

DOCUMENT RESUME

ED 469 049

EC 309 191

AUTHOR Karger, Joanne; Pullin, Diana
TITLE Exit Documents and Students with Disabilities: Legal Issues. EPRRI Issue Brief Two.
INSTITUTION Educational Policy Reform Research Inst., College Park, MD.
SPONS AGENCY Special Education Programs (ED/OSERS), Washington, DC.
PUB DATE 2002-06-00
NOTE 21p.
CONTRACT H324P000004
AVAILABLE FROM Educational Policy Reform Research Institute, University of Maryland, 1308 Benjamin Building, College Park, MD 20742-1161. For full text: <http://www.eprri.org/products.html>.
PUB TYPE Guides - Non-Classroom (055) -- Information Analyses (070)
EDRS PRICE EDRS Price MF01/PC01 Plus Postage.
DESCRIPTORS *Court Litigation; *Disabilities; Due Process; Educational Assessment; Educational Testing; *Graduation Requirements; High Schools; *High Stakes Tests; Minimum Competency Testing; Standardized Tests; Student Rights; Test Format; *Testing Accommodations

ABSTRACT

This report describes court challenges to high school exit exams for students with disabilities, explores the legal and public policy issues, and discusses implications for educators. Legal challenges include claims brought under the Due Process and Equal Protection clauses of the Fourteenth Amendment, and under disability statutes, including the mandate for a free appropriate public education, the requirement that a sole criterion not determine an appropriate education program, the need to provide reasonable accommodations and/or alternate assessments, and the decision to provide alternate exit documents. Analysis of case law indicates policymakers should consider: (1) the denial of a diploma to students with disabilities has a negative effect on future educational and occupational attainment; (2) decisions about assessment participation should be made by the Individualized Education Program (IEP) team; (3) students with disabilities must receive adequate notification of the testing requirement and date to enable IEPs to include material being tested; (4) students with disabilities must be afforded the opportunity to learn the material on all exit exams; (5) students with disabilities must receive appropriate accommodations on exit exams; and (6) if an exit exam is not appropriate, with reasonable accommodations, the student must receive an alternate assessment. (Contains 31 references.) (CR)

ED 469 049

EPRRI Issue Brief Two

Exit Documents and Students with Disabilities: Legal Issues

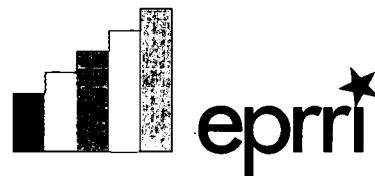


*By: Joanne Karger, Larsen Fellow
and Doctoral Student in
Administration Planning and
Social Policy, Harvard Graduate
School of Education
and
Diana Pullin, J.D.,
Professor, Lynch School of
Education at Boston College*

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)

- This document has been reproduced as received from the person or organization originating it.
- Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.



Educational Policy Reform Research Institute

The Institute for the Study of
Exceptional Children and Youth
University of Maryland
1308 Benjamin Building
College Park, Maryland 20742-1161

BEST COPY AVAILABLE

EC 309191

Table of Contents

Issue Brief Highlights	2
Introduction	4
Major Court Challenges to High School Exit Exams	5
Legal and Public Policy Issues	7
Implications for the Implementation of Assessments	14
Conclusion	17
References	18

Exit Documents and Students with Disabilities: Legal Issues

Issue Brief Highlights

This EPRRI study looks at the complex legal and public policy issues related to exit exams, exit documents (which include regular diplomas, special education diplomas, certificates of completion, and others), and students with disabilities. As states increasingly use exit exams as prerequisites for granting a high school diploma, lawsuits are challenging both the process and the results for students with disabilities. The legal challenges include:

- Constitutional claims brought under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.
- Claims under disability statutes, including the mandate for a free appropriate public education; the requirement that a sole criterion not determine an appropriate educational program; the need to provide reasonable accommodations and/or alternate assessments; and the decision to provide alternate exit documents in place of a regular diploma.

Our analysis of case law and administrative opinions indicates that policymakers should consider the following:

- The denial of a diploma to students with disabilities has a negative effect on their future educational and occupational attainment and can thwart the goals of the IDEA and the ADA.
- Decisions about the participation of an individual student with disabilities in a state or local assessment program should be made by the student's IEP team.
- Students with disabilities must receive adequate notification of the testing requirement and date to enable the students' IEPs to be adjusted to include the material being tested.
- Students with disabilities must be afforded the opportunity to learn the material covered on exit exams.
- Students with disabilities must receive appropriate accommodations on exit exams.

- If an exit exam is not appropriate for a student with a disability, with reasonable accommodations, the student must receive an alternate assessment.

Clear legal standards address some of the complex issues raised by exit exams and exit documents. For additional guidance, policymakers can look to the goals of the laws governing the education of students with disabilities.

You may download these and other documents from the EPRRI website: the link to the Topical Review documents is http://www.eprri.org/products_topical.html – the link to download this Issue Brief is http://www.eprri.org/products_research.html

i n t r o d u c t i o n



During the 1970s in an effort to increase education achievement, states began to implement minimum competency examinations as a prerequisite for receipt of a high school diploma. This resulted in various lawsuits challenging the denial of a diploma based on both constitutional and statutory grounds.¹ Education reform efforts of the 1990s have again emphasized the use of high school exit exams to ensure accountability.² Although the elevation of standards for receipt of a high school diploma has implications for all students, exit exams raise complex public policy and legal issues for students with disabilities: the economic and educational consequences of credentials that students are awarded, the stigmatizing effect of the denial of a diploma, the need for adequate notification and appropriate instruction, and the provision of reasonable accommodations and alternate assessments.

The impact of exit exams on students with disabilities is especially great in light of recent federal statutory provisions mandating the inclusion of students with disabilities in state assessments. Both the Goals 2000 Educate America Act³ and Title I of the Improving America's Schools Act of 1994⁴ called for state accountability measures and included specific provisions for the inclusion of students with disabilities. To ensure that students were attaining performance standards, Goals 2000 required that states must have a process for developing and implementing nondiscriminatory and reliable state assessments. Such assessments were to be aligned with state content standards, involve multiple measures of student

The impact of exit exams on students with disabilities is especially great in light of recent federal statutory provisions mandating the inclusion of students with disabilities in state assessments.

1 See, e.g., *Brookhart v. Illinois State Board of Education*, 697 F.2d 179 (7th Cir. 1983); *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981); *Board of Education v. Ambach*, 458 N.Y.S.2d 680 (N.Y.A.D. 1982).

2 See Coleman, A.L. (1998, Fall).

3 20 U.S.C. § 5801 *et seq.* (1994).

4 *Id.* § 6301 *et seq.*

performance and provide for participation of students with disabilities and diverse learning needs with “the adaptations and accommodations necessary to permit such participation.”⁵

The 1997 amendments to the Individuals with Disabilities Education Act (IDEA) and their implementing regulations similarly require states to take significant steps to allow for the participation of students with disabilities in state and district-wide assessments, providing for appropriate accommodations where necessary.⁶ In addition to this recent legislation, Section 504 of the Rehabilitation Act of 1973⁷ (Section 504) and the Americans with Disabilities Act of 1990⁸ (ADA) bar discrimination on the basis of disability and require the provision of reasonable accommodations as part of testing programs for students with disabilities.

This paper will briefly describe major court challenges to high school exit exams, explore the legal and public policy issues raised by the cases, and discuss implications for educators who must implement assessment systems.

Major Court Challenges to High School Exit Exams

Debra P. v. Turlington (1981)

The leading case concerning high school exit examinations is *Debra P. v. Turlington*.⁹ Although this Florida case in part involved racial issues and did not address claims specific to students with disabilities, it established a model for future student challenges to exit exams, including those made by students with disabilities. In this case, the U.S. Court of Appeals for the Fifth Circuit held that the state could not deprive students of a high school diploma based on a competency exam unless the state could prove that the students received adequate notice about the test, that the test was fundamentally fair, and that it covered material actually taught in the classroom.¹⁰

..., the U.S. Court of Appeals for the Fifth Circuit held that the state could not deprive students of a high school diploma based on a competency exam unless the state could prove that the students received adequate notice about the test, ...

5 20 U.S.C. § 5886(c)(1)(B)(i)(I)-(III). Title I and the Elementary and Secondary Education Act were reauthorized by the No Child Left Behind Act of 2001, P. L. 107-110 (2002)

6 20 U.S.C. § 1412(a)(17)(A); 34 C.F.R. § 300.138(a).

7 29 U.S.C. § 794(a); 28 C.F.R. § 41.53.

8 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(7).

9 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, rev'd in part*, 644 F.2d 397 (5th Cir. 1981), *on remand*, 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (11th Cir. 1984).

10 644 F.2d at 404, 408.

Board of Education v. Ambach (1981, 1982)

The first court case pertaining to students with disabilities and exit exams was *Board of Education v. Ambach*.¹¹ In *Ambach I*, the New York state trial court held that in general, the state had the power to require the passing of a competency exam for receipt of a diploma and that the denial of diplomas to students with disabilities was not a violation per se of the Education for All Handicapped Children Act (EHA) (the forerunner of the IDEA) or Section 504.¹²

The following year in *Ambach II* (1982), however, the state appellate court determined that students are entitled to sufficient advanced notification of a graduation testing requirement to allow appropriate IEPs to be prepared. But that court modified the earlier court decision, holding that the students' due process rights had not been violated because a notice period of three years was sufficient.¹³

Brookhart v. Illinois State Department of Education (1983)

The first federal court case pertaining to students with disabilities and exit documents was *Brookhart v. Illinois State Department of Education*.¹⁴ Like the New York court in *Ambach II*, the U.S. Court of Appeals for the Seventh Circuit found that requiring students with disabilities to pass a minimal competency exam as a prerequisite for receipt of a diploma was not a violation per se of the EHA or Section 504.¹⁵ Similar to the court's holding in *Debra P.*, however, the *Brookhart* court also found that the students' due process rights were violated because they received only a year and a half period of notice before imposition of the test requirement.¹⁶

Chapman v. California Department of Education (2002)

A federal district court judge entered a preliminary injunction concerning the California High School Exit Exam (CAHSEE). According to the terms of the court's order, students with learning disabilities should be permitted to take the test, if they wish, with any accommoda-

..., the Brookhart court also found that the students' due process rights were violated because they received only a year and a half period of notice before imposition of the test requirement.

¹¹ 436 N.Y.S.2d 564 (N.Y. Sup. 1981), *modified*, 458 N.Y.S.2d 680 (N.Y.A.D. 1982), *aff'd*, 457 N.E.2d 775 (N.Y. 1983), *cert. denied*, 465 U.S. 1101 (1984).

¹² 436 N.Y.S.2d at 569-570.

¹³ 458 N.Y.S.2d at 687-88.

¹⁴ 534 F. Supp. 725 (C.D. Ill. 1982), *rev'd*, 697 F.2d 179 (7th Cir. 1983).

¹⁵ 697 F.2d at 182-184.

¹⁶ *Id.* at 184-186.

tions, modifications or alternate assessments specified in their IEP or Section 504 plan for either the CHSEE, any standardized test, or any classroom testing. Students with learning disabilities were also entitled to a valid assessment of their capabilities and the state was ordered to develop an alternate assessment system.¹⁷

Legal and Public Policy Issues

Legal challenges brought against states implementing exit exams as a prerequisite for receipt of a diploma have included: (1) constitutional claims brought under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and (2) statutory claims brought under various anti-discrimination laws. This section will describe these challenges and suggest some additional areas in which future legal challenges might arise.

Constitutional Challenges

Procedural Due Process. The Due Process Clause of the Fourteenth Amendment states, “No person shall ... be deprived of life, liberty, or property, without due process of law ...”¹⁸ Although courts often defer to the educational and curricular decisions of local school districts, courts will intervene when an individual has been deprived of a life, liberty or property interest.¹⁹

Governmental action that deprives an individual of a benefit to which that person has a legitimate claim of entitlement creates a constitutionally-recognized property interest, which is protected by the Due Process Clause. Courts have found that in states with compulsory attendance, students have a “legitimate entitlement to a public education” (i.e., a constitutionally protected property right).²⁰

Courts have also found that denial of a diploma implicates a constitutionally protected

Legal challenges brought against states implementing exit exams as a prerequisite for receipt of a diploma have included: (1) constitutional claims brought under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and (2) statutory claims brought under various anti-discrimination laws.

¹⁷ *Chapman v. California Department of Education*, Order for Preliminary Injunction (No. C 01-01780 CRB, N.D. Calif., February 21, 2002) available at <http://www.dralegal.org>.

¹⁸ U.S. Const. amend. XIV.

¹⁹ See e.g., *Brookhart*, 697 F.2d at 182; *Debra P.*, 644 F.2d at 403; *Ambach II*, 458 N.Y.S.2d at 686.

²⁰ See *Debra P.*, 644 F.2d at 403 (quoting *Goss v. Lopez*, 419 U.S. 565, 574 (1975)).

liberty interest. For example, in *Debra P.*, the courts recognized a liberty interest in being free of the stigmatization associated with receipt of a certificate of completion by students who failed the graduation test Florida had named the Functional Literacy Test.²¹ In *Brookhart*, the court expressed grave concern over the impact of denying students with disabilities a high school diploma and also acknowledged the public policy goal, reflected in such legislation as the IDEA, Section 504 and the ADA, of preparing students with disabilities for future employment and educational opportunities in the community.²²

Once a constitutionally protected interest - whether property or liberty - is found, the next question is: What process is due? Usually due process involves an opportunity to be heard on the denial of a right or benefit; however, in the context of exit exams, courts have tended to look to whether the parents and students received adequate notice about the test.²³ The issue is whether the students have sufficient opportunity to prepare for the test. Notice periods tend to vary and courts have been reluctant to determine what specific time period constitutes adequate notification. However, courts have determined that some students with disabilities may require a greater period of notice than students without disabilities.²⁴ Courts have been more likely to find a sufficient period of notice when there are opportunities for retesting and remediation.²⁵

Substantive Due Process. The substantive due process provision of the Fourteenth Amendment requires that government entities avoid action that would deprive individuals of property or liberty interests in a way that is “arbitrary and capricious, does not achieve or even frustrates a legitimate state interest, or is fundamentally unfair.”²⁶ The National Research Council’s Committee on Appropriate Test Use (NRC, 1999) has explained that there are a number of interpretations of the concept of fairness that affect testing. These include the

The National Research Council’s Committee on Appropriate Test Use (NRC, 1999) has explained that there are a number of interpretations of the concept of fairness that affect testing.

²¹ 474 F. Supp. 244, 266 (M.D. Fla. 1979).

²² 697 F.2d at 184-185; see also Pullin, D. (1984), at 813.

²³ See, e.g., *Brookhart*, 697 F.2d at 185-186; *Debra P.*, 644 F.2d at 403-404; *Ambach I*, 436 N.Y.S.2d at 573-574.

²⁴ See *Brookhart*, 697 F.2d at 186-187; *Ambach I*, 436 N.Y.S.2d at 574.

²⁵ See *Rene ex rel. Rene v. Reed*, 751 N.E.2d 736, 742-43 (Ind. Ct. App. 2001); *Ambach II*, 458 N.Y.S.2d at 688.

²⁶ *Debra P.*, 644 F.2d at 404.

absence of bias in the test, the equitable treatment of individuals taking the test, and an opportunity for those being tested to learn the material covered by the test.²⁷

Courts have made reference to the third of these interpretations when examining substantive due process challenges to high school exit exams. In *Debra P.*, the Fifth Circuit found that the state had made no effort to determine whether the material being tested on the competency exam was actually being taught in the schools.²⁸ On remand, the trial court determined that the students were now being provided with the opportunity to learn the material covered on the exam and that the testing program had been made fundamentally fair.²⁹

Equal Protection. The Equal Protection Clause of the Fourteenth Amendment guarantees all persons equal protection under the law.³⁰ In essence, equal protection prevents the government from discriminating against particular groups of individuals based on arbitrary classifications. Certain types of classifications, such as race, are considered inherently suspect and, therefore, require a strict level of scrutiny by the courts. Most classifications, however, including disability, need only be rationally or loosely related to a legitimate governmental interest. Equal protection challenges to state exit exams based on disability have tended to be unsuccessful. For example, in *Ambach II*, the New York appellate court said, “The immutable mysteries of genetics, accident, disease and illness are the creators of handicapped children, not the State.”³¹ The court then proceeded to find that “the integrity of a high school diploma” constituted a legitimate state interest and that the state’s use of a competency exam was reasonably related to such an interest.³² Thus, the court held that the students’ equal protection rights had not been violated by the state’s denial of their diplomas.³³

27 National Research Council, Committee on Appropriate Test Use (1999), at 78-79.

28 644 F.2d at 405.

29 See 564 F. Supp. 177, 185-186 (M.D. Fla. 1983).

30 U.S. Const. amend XIV.

31 458 N.Y.S.2d at 689.

32 *Id.*

33 *Id.* at 688.

Claims Under Disability Statutes

Denial of “FAPE” under the IDEA. The IDEA and its forerunner the EHA mandate that students with disabilities receive a “free appropriate public education” (FAPE).³⁴ In 1982, in *Board of Education v. Rowley*, the U.S. Supreme Court explained that the statute was intended to be more of an attempt “to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.”³⁵ To date, challenges to state exit exams by students with disabilities based on the denial of FAPE have tended to be unsuccessful. It remains to be seen whether the interpretation of FAPE by the courts will change now that the 1997 IDEA Amendments require that a student’s IEP include a statement concerning how the student will be involved and progress in the general curriculum.³⁶ Also as yet unaddressed by the courts are any disputes concerning the question of whether the particular content or performance standards established by a state are “appropriate” for a particular student with a disability.

Sole Criterion Requirement under the IDEA. The IDEA also mandates that “no single procedure shall be the sole criterion for determining an appropriate educational program for a child.”³⁷ Challenges to state exit exam requirements based on this provision of the IDEA have tended to be unsuccessful. For example, the court in *Brookhart* found that because the school district had three requirements for graduation - namely, obtaining a sufficient number of credits, taking required courses and passing a minimal competency test, the latter did not violate the “sole criterion” provision of the statute.³⁸

To date, challenges to state exit exams by students with disabilities based on the denial of FAPE have tended to be unsuccessful.

³⁴ 20 U.S.C. § 1412(a)(1).

³⁵ 458 U.S. 176, 192 (1982).

³⁶ 20 U.S.C. § 1414(d)(1)(A)(i)-(iv); 34 C.F.R. § 300.347(a)(1)-(4).

³⁷ 20 U.S.C. § 1412(a)(6)(B).

³⁸ 697 F.2d at 183.

Reasonable Accommodations under IDEA, Section 504 and the ADA. One of the most important issues affecting students with disabilities concerning high school exit exams is the provision of appropriate or reasonable accommodations. In reviewing the administration of high school exit exams, lower federal and state courts have found that states are required to provide students with disabilities with reasonable accommodations, but are not required to provide “substantial modifications” that would have an impact on the meaning or interpretation of the exam score.³⁹ A number of administrative opinions by the Office of Civil Rights (OCR) of the U.S. Department of Education, the federal agency charged with investigating education complaints under Section 504 and the ADA, have paralleled the line of reasoning used by the courts. OCR has concluded that accommodations are not required when they interfere with the skill being measured and compromise the validity of a test or program.

For example, in 1990 in *Hawaii State Department of Education*,⁴⁰ a parent brought a claim before OCR that the local school district had discriminated against her son by refusing to allow him to have a reader assist him in taking the Hawaii State Test of Essential Competency (HSTEC). OCR found that because a particular section of the exam was designed to test the student’s reading ability, allowing a reader for this section would defeat the purpose.⁴¹ Denial of the accommodation for this section of the exam, therefore, was not discriminatory under Section 504.⁴²

Alternate assessments. A small percentage of students with disabilities require an alternative or different assessment because their curriculum does not completely match the content and performance standards being assessed by the state test.⁴³ The provisions of the IDEA 1997 place responsibility for determining which students should receive alternate assessments with

In reviewing the administration of high school exit exams, lower federal and state courts have found that states are required to provide students with disabilities with reasonable accommodations, but are not required to provide “substantial modifications” that would have an impact on the meaning or interpretation of the exam score.

39 See, e.g., *Brookhart*, 697 F.2d at 184; *Rene*, 751 N.E.2d at 746.

40 17 EHLR 360 (OCR 1990).

41 *Id.*

42 *Id.* See also *Florida Department of Education*, 28 IDELR 1002 (OCR 1998); *Alabama Department of Education*, 29 IDELR 249 (OCR 1998); *Nevada Department of Education*, 25 IDELR 752 (OCR 1996).

43 See Thompson, S.J., R. F. Quenemoen, M. L. Thurlow & J. E. Ysseldyke (2001).

the IEP team.⁴⁴ The one case addressing alternate assessments resulted in an order requiring the State of California to develop an alternate assessment system for students with learning disabilities for use in the State's high school exit testing program.⁴⁵

Alternative credentials. Another issue affecting students with disabilities is the nature of the exit document. A decision on the type of exit document to be given to students is governed by local policy and state law and is not mentioned in the IDEA or its accompanying regulations. In many instances, students with disabilities receive the same diploma as all other students, even if they complete an alternate program or an alternate assessment. Whenever an accommodated or alternate assessment is provided to a student with a disability, however, there is the possibility that the student may receive an alternate exit document in lieu of a regular high school diploma; this may be a regular diploma with different wording, a special education diploma, a certificate of completion, a certificate of attainment, or other document.⁴⁶

The awarding of alternate exit documents raises a number of due process and equal protection concerns. With respect to procedural due process, courts have held that students with disabilities have a liberty interest in receipt of a diploma, based on the stigma that results from denial of a diploma and the impact on future educational and occupational attainment.⁴⁷ Therefore, the provision of an exit document other than a diploma triggers procedural due process protections - that is, parents are entitled to notice and the opportunity to be heard if their child will not receive a regular diploma. In addition, although a state's use of differentiated diplomas may not be a violation per se of substantive due process, it is clear that a state's method of provision of alternate certificates in lieu of regular diplomas must not be arbitrary and capricious and must be fundamentally fair. In the future, parents may also bring challenges under equal protection, claiming that the denial of equal access to post-secondary

... although a state's use of differentiated diplomas may not be a violation per se of substantive due process, it is clear that a state's method of provision of alternate certificates in lieu of regular diplomas must not be arbitrary and capricious and must be fundamentally fair.

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

⁴⁵ *Chapman v. California Department of Education*, Order for Preliminary Injunction (No. C 01-01780 CRB, N.D. Calif., February 21, 2002), at 13.

⁴⁶ See Thompson, *et al.* (2001).

⁴⁷ See *Brookhart*, 697 F.2d at 184-185; *Debra P.*, 474 F. Supp. at 266.

educational and occupational opportunities is discriminatory because it is based on disability status. Such claims, however, will likely be unsuccessful because, as noted, classifications based on disability need only be rationally related to a legitimate state interest. Consequently, a state will likely prevail in arguing that it has a legitimate governmental interest in maintaining the integrity of the diploma.⁴⁸

There have been a number of challenges and inquiries brought before OCR and the Office of Special Education Programs (OSEP) regarding a school district's use of differentiated diplomas based on violation of federal disability statutes. OSEP has explained that students with disabilities do not have a guaranteed right to receive a regular high school diploma.⁴⁹ OCR has found that school districts are not obligated to award diplomas to students with disabilities who have not met the graduation requirements even when those students have completed the goals and requirements of their IEPs.⁵⁰

The IDEA regulations make reference to exit documents in the statement that receipt of a "regular high school diploma" ends the entitlement to special education.⁵¹ The regulations also note that graduation constitutes a change in placement for a student on an IEP.⁵² OSEP has explained that school districts should re-evaluate the student's IEP prior to graduation in order to assess whether the student has met all of the requirements necessary for receipt of a diploma.⁵³ With respect to a decision concerning graduation, particularly when students have successfully completed their IEPs but will not receive a diploma, parents are entitled to the due process protections afforded under IDEA - namely, the right to prior written notice and the right to an impartial due process hearing.⁵⁴

⁴⁸ See, e.g., *Ambach II*, 458 N.Y.S.2d at 688-89.

⁴⁹ Letter to Anonymous, 22 IDELR 456 (OSEP, Response to Inquiry, 1994). See also *Salem-Keizer School District*, 30 IDELR 1024 (SEA Or. 1999).

⁵⁰ *Special School District of St. Louis County* (MO), 16 EHLR 307 (OCR 1989).

⁵¹ 34 CFR § 300.122(a)(3)(i).

⁵² *Id.* at § 300.122(a)(3)(iii).

⁵³ 22 IDELR 456; *Letter to Richards*, 17 EHLR 288 (OSEP, Response to Inquiry, 1990).

⁵⁴ 34 CFR § 300.503-300.514; 22 IDELR 456; 16 EHLR 307.

OCR has further concluded that diplomas awarded to all students must be the same in “significant respects.”⁵⁵ Some modifications in the wording of diplomas are permissible and are not a violation per se of Section 504 or Title II of the ADA; however, the changes cannot be based on “disability as a category of students.”⁵⁶ In Salem-Keizer School District, the hearing officer approved of the school district’s use of three types of exit documents: a “standard diploma,” an “alternate diploma” and a “certificate of attainment.”⁵⁷ Moreover, the hearing officer found that the school district was not required to use the term “diploma” in reference to a particular exit document.⁵⁸

Implications for the Implementation of Assessments

An analysis of the legal and public policy issues pertaining to exit exams and students with disabilities raises a number of important considerations:

1. The denial of a diploma to students with disabilities has a negative effect on future educational and occupational attainment and can thwart the underlying goals of the IDEA and the ADA. Although a public policy goal relates to the value of the diploma itself and the state’s right to define state education standards, it is important for judges and policy-makers to remember that the denial of a diploma may directly contradict the public policy goals expressed in the IDEA and the ADA of helping students with disabilities lead active lives as adults in the community.⁵⁹
2. Decisions about the participation of an individual student with disabilities in a state or local assessment program should be made by the student’s IEP team. The IDEA requires an appropriate education for each student with a disability in need of special education,

⁵⁵ *Letter to Runkel*, 25 IDELR 387 (OCR, Response to Inquiry, 1996).

⁵⁶ *Id.*

⁵⁷ 30 IDELR at 1032.

⁵⁸ *Id.*

⁵⁹ See Pullin (1984), at 813.

with decisions about appropriateness to be individualized and determined by a student's IEP team. According to the Section 504 regulations, students with disabilities who do not need special education are also entitled to appropriate education as spelled out in each student's 504 plan. Here also, an individualized determination by the student's planning team is necessary.⁶⁰

3. Students with disabilities must receive adequate notification of the testing requirement and the date of the test to enable the students' IEPs to be adjusted to include the material being tested. Procedural due process requires states to provide students with adequate notice of the testing requirement that is a prerequisite for receipt of a diploma. A review of the case law reveals the following: (1) courts have not set specific time periods that would constitute adequate notice; (2) the sufficiency of notice for a testing requirement will depend upon the curriculum and instructional opportunities provided to prepare students for the test; (3) in assessing adequacy of notice, courts will consider whether there were opportunities for retesting and remediation; (4) students with disabilities may require a longer notice period than students without disabilities in order for there to be adequate time to incorporate the content of the test into the students' IEP goals. In the future, when faced with a challenge to exit exams, states will be required to show that they provided adequate notice, with opportunities for remediation.
4. Students with disabilities must be afforded the opportunity to learn the material covered on exit exams or alternate assessments. An important measure of the fairness of an exit exam is whether curriculum and instruction are aligned with what the test measures.⁶¹ As challenges to exit exams continue, states will have the burden of presenting substantial evidence that the students have actually had the opportunity to learn the material on which an exam is based.

An important measure of the fairness of an exit exam is whether curriculum and instruction are aligned with what the test measures.

⁶⁰ See Freedman, M.K. (2000).

⁶¹ See National Research Council, Committee on Appropriate Test Use (1999), at 178.

For students with disabilities, the issue is more complex. One of the major premises underlying the IDEA is that instruction should be tailored to meet the individual needs of each student. Educators are left to grapple with how an individual's IEP goals fit into the overall scheme of uniform state standards used to determine curricular and instructional validity for a state exit exam. Ensuring the provision of the opportunity to learn the material being tested has become more significant in light of the new requirement under the IDEA that a student's IEP include a statement of how the student will be involved in and progress in the general education curriculum.⁶²

5. Students with disabilities must receive appropriate accommodations on exit exams. The IDEA requires the participation of students with disabilities in state and district-wide assessments, with appropriate accommodations where necessary.⁶³ Similarly, Title II of the ADA and Section 504 require states and school districts to provide students with disabilities with reasonable accommodations.⁶⁴

Courts and OCR hearing officers have tended to find that accommodations that have an impact on the integrity of the test by altering the construct being measured, thereby affecting the validity of the test, are not required by law and have not been upheld as appropriate accommodations.⁶⁵

From a legal and public policy standpoint, there is a need for more discussion concerning which accommodations are appropriate, understanding that there should not be a one-size-fits all model and remembering the individualized determinations on appropriate education required by the IDEA. At present, accommodations vary from state to state.⁶⁶ There is a real need for training and outreach to help states, local school districts, and parents better understand the concept of accommodations.

Courts and OCR hearing officers have tended to find that accommodations that have an impact on the integrity of the test by altering the construct being measured, thereby affecting the validity of the test, are not required by law and have not been upheld as appropriate accommodations.

62 20 U.S.C. § 1414(d)(1)(A)(i)-(iv); 34 C.F.R. § 300.347(a)(1)-(4).

63 20 U.S.C. § 1412(a)(17)(A); 34 C.F.R. § 300.138(a).

64 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(7); 29 U.S.C. § 794(a); 28 C.F.R. § 41.53.

65 See, e.g., *Brookhart*, 697 F.2d at 184; *Rene*, 751 N.E.2d at 746; *Florida Department of Education*, 28 IDELR 1002 (OCR 1998); *Nevada Department of Education*, 25 IDELR 752 (OCR 1996).

66 National Research Council, Committee on Appropriate Test Use (1999), at 195

6. If an exit exam is not appropriate for a student with a disability, with reasonable accommodations, the student must receive an alternate assessment. The IDEA mandates the provision of alternate assessments for students who are unable to take the exam with appropriate accommodations.⁶⁷ Moreover, the IDEA specifies that states must have developed such alternate assessment measures by July 1, 2000 and must include procedures for the reporting of scores.⁶⁸ As with accommodations, there are difficult public policy questions here. For example, how should the scores of students taking alternate assessments be aggregated, if at all, with the scores of other students? The use of alternate assessment measures will most likely play a pivotal role in future challenges to exit exams by students with disabilities.

Conclusion

The participation of students with disabilities in state and local assessment programs presents a complex set of legal and public policy issues, and many have not yet been addressed by either the courts or administrative hearing officers. There are some clear legal standards set forth here to guide practitioners; the unresolved legal, public policy, and educational issues that remain will present considerable challenges for both IEP teams as well as state and local policy-makers. These decision-makers can be guided, however, by the goals set forth in the laws governing the education of these students.

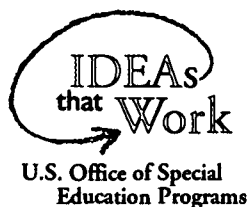
The participation of students with disabilities in state and local assessment programs presents a complex set of legal and public policy issues, and many have not yet been addressed by either the courts or administrative hearing officers.

⁶⁷ 20 U.S.C. § 1412(a)(17)(A)(i); 34 C.F.R. § 300.138(b)(1).

⁶⁸ 20 U.S.C. § 1412(a)(17)(A)(ii); 34 C.F.R. § 300.138(b)(3).

References

- *Alabama Department of Education*, 29 IDELR 249 (OCR 1998).
- Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*
- *Board of Education v. Ambach*, 436 N.Y.S.2d 564 (N.Y.Sup. 1981), *modified*, 458 N.Y.S.2d 680 (N.Y.A.D. 3 Dept. 1982), *aff'd*, 457 N.E.2d 775 (N.Y. 1983), *cert. den'd*, 465 U.S. 1101 (1984).
- *Brookhart v. Illinois State Board of Education*, 534 F. Supp. 725 (C.D. Ill. 1982), *rev'd*, 697 F.2d 179 (7th Cir. 1983).
- *Chapman v. California Department of Education*, Order for Preliminary Injunction (No. C 01-01780 CRB, N.D. Calif., February 21, 2002) available at <http://www.dralegal.org>.
- Coleman, A.L. (1998, Fall). Excellence and equity in education: High standards for high stakes tests. *Virginia Journal of Social Policy and the Law*, 6, 81-113.
- *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, rev'd in part*, 644 F.2d 397 (5th Cir. 1981), *on remand*, 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (11th Cir. 1984).
- *Florida State Department of Education*, 28 IDELR 1002 (OCR 1998).
- Freedman, M.K. (2000). *Testing, grading and granting diplomas to special education students*. Horsham, PA: LRP Publications.
- Goals 2000 Educate America Act, 20 U.S.C. § 5801 *et seq.*
- *Hawaii State Department of Education*, 17 EHLR 360 (OCR 1990).
- Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.*
- *Letter to Anonymous*, 22 IDELR 456 (OSEP, Response to Inquiry, 1994).
- *Letter to Richards*, 17 EHLR 288 (OSEP, Response to Inquiry, 1990).
- *Letter to Runkel*, 25 IDELR 387 (OCR, Response to Inquiry, 1996).
- *Mobile County Board of Education*, 26 IDELR 695 (OCR 1997).
- Morrison, C.M. (2000). High-stakes tests and students with disabilities. *Boston College Law Review*, 41, 1139-1173.
- National Research Council, Committee on Appropriate Test Use (1999). *High stakes: Testing for tracking, promotion, and graduation*. J.P. Heubert & R.M. Hauser (Eds). Washington, D.C.: National Academy Press.
- National Research Council, Committee on Goals 2000 and the Inclusion of Students with Disabilities (1997). *Accountability and assessment*. In L.M. McDonnell, M.J. McLaughlin, and P. Morison (Eds.), *Educating one and all: Students with disabilities and standards-based reform* (pp. 151-210). Washington, D.C.: National Academy Press.
- *Nevada Department of Education*, 25 IDELR 752 (OCR 1998).
- O'Neill, P.T. (2001). Special education and high stakes testing for high school graduation: An analysis of current law and policy. *Journal of Law and Education*, 30, 185-222.
- Pullin, D. (1984). Minimum competency testing and special education: Evolving judicial standards. *West's Education Law Reporter*, 20, 811-819.
- *Rene ex rel. Rene v. Reed*, 751 N.E.2d 736 (Ind. App. June 20, 2001).
- *Salem-Keizer School District*, 30 IDELR 1024 (SEA Or. 1999).
- Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.*
- *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).
- *Special School District of St. Louis County (MO)*, 16 EHLR 307 (OCR 1989).
- Thompson, S.J., Quenemoen, R.F., Thurlow, M.L., & Ysseldyke, J.E. (2001). *Alternate assessment for students with disabilities*. Thousand Oaks, CA: Corwin Press.
- Title I, Improving America's Schools Act of 1994, 20 U.S.C. § 6301 *et seq.*
- U.S. Const. amend. XIV.
- U.S. Department of Education (2000, August 24). *Questions and answers about provisions in the Individuals with Disabilities Education Amendments of 1997 related to students with disabilities and state and district-wide assessments*. Washington, D.C.: Office of Special Education and Rehabilitative Services, Office of Special Education Programs. Available at 34 IDELR 119.



The U.S. Department of Education's
Office of Special Education Programs (OSEP)
is committed to positive results
for children with disabilities.
The Institute is an IDEAs that Work project.



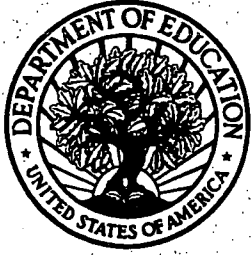
Educational Policy Reform Research Institute

1308 Benjamin Building
College Park, Maryland 20742-1161
tel: 301.405.6509 • fax: 301.314.9158 • www.epri.org

Any or all portions of this document may be reproduced and distributed without prior permission, provided the source is cited as:

Educational Policy Research Reform Institute (EPRI), (December 2001).
Issue Brief Two. College Park: University of Maryland,
Educational Policy Research Reform Institute, The Institute for the Study of Exceptional Children and Youth.
Retrieved [today's date], from the World Wide Web:www.epri.org

Funding for this research work was provided by the U.S. Department of Education, Office of Special Education Programs (Grant # H324P000004). Opinions expressed in this paper are those of the authors, and do not necessarily reflect the views of the U.S. Department of Education or the Office of Special Education Programs.



*U.S. Department of Education
Office of Educational Research and Improvement (OERI)
National Library of Education (NLE)
Educational Resources Information Center (ERIC)*



NOTICE

Reproduction Basis

- This document is covered by a signed "Reproduction Release (Blanket)" form (on file within the ERIC system), encompassing all or classes of documents from its source organization and, therefore, does not require a "Specific Document" Release form.
- This document is Federally-funded, or carries its own permission to reproduce, or is otherwise in the public domain and, therefore, may be reproduced by ERIC without a signed Reproduction Release form (either "Specific Document" or "Blanket").