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High-Stakes Tests and Students with Disabilities

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HIGH-STAKES TESTS AND STUDENTS WITH DISABILITIES

Abstract: Federal statutes require states to establish high educational standards and to create and administer standards-based assessments for all students, including those with disabilities. Although states can include most students with disabilities in these tests by providing them with accommodations, including students for whom these adaptations are insufficient to allow for meaningful participation in the tests has been more difficult. When designing and administering these tests, policy-makers must guard against unfairly denying educational opportunities to any student in an effort to set higher standards for the general population. Alternate assessments must be based on the individualized goals and objectives of each student who requires such an assessment in order to comply with constitutional requirements and non-discrimination policies.

INTRODUCTION

In 1983, the controversial report *A Nation at Risk*[1] sounded as a warning cry to educators, parents and legislators about the state of education in the United States.[2] The report, which purported to demonstrate conclusively that children in the United States were far behind their peers in other countries, sparked a firestorm of education reform that continues today.[3] A major offshoot of that reform was the reauthorization of the Elementary and Secondary Education Act as the Improving American Schools Act ("IASA").[4] IASA included requirements for states to establish high standards and to create and administer standards-based assessments for "all students," including

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[1] NATIONAL COMMISSION ON EXCELLENCE AND EDUCATION, A NATION AT RISK: IMPERATIVE FOR EDUCATIONAL REFORM (1983).

[2] *See* Martha Minow, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 257 n.2 (1999).

[3] *See* Michael Dannenberg, Note, *A Derivative Right to Education: How Standards-Based Education Reform Redefines the Individuals with Disabilities Education Act*, 15 YALE L. & POL'Y REV. 628, 642 (1997).

[4] The Elementary and Secondary Education Act was signed into law by President Lyndon B. Johnson on April 11, 1965. President Johnson had made federal aid for education an important component of his Great Society agenda. John F. Jennings, the director of the Center on Education Policy, argues that the 1965 law was "'the landmark . . . that paved the way' for an increasingly large federal presence in education policy". *See* Erik Robelen, *The Evolving Federal Role*, EDUC. WK., Nov. 17, 1999, at 34 (1999).

those with disabilities.[5] These assessments often are called "high-stakes" assessments, in part, because many states require a passing score in order to graduate from high school.[6] Although IASA provides rough guidelines for developing assessments to meet the needs of bilingual and limited English proficient students, it provides no such framework for students with disabilities.[7] The Federal Department of Education defines a child with a disability as:

> [A] child evaluated . . . as having mental retardation, a hearing impairment including deafness, a visual impairment including blindness, serious emotional disturbance . . . , an orthopedic impairment, autism, traumatic brain injury, an other [sic] health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.[8]

Notwithstanding the fact that states have been able to include most students with disabilities by providing them with accommodations or modified tests,[9] states continue to struggle to include students

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[5] *See* 20 U.S.C. § 6311(b)(1)(A), (b)(3)(F)(i) (1994); 20 U.S.C. § 5802(a)(1) (1994).

[6] "High-stakes tests" are generally standardized tests that are used as a gate-keeper for the attainment of some goal. This Note focuses primarily on graduation and diploma decisions as they are impacted by high-stakes tests. Examples of some other goals include "student placement in gifted and talented programs or in programs serving students with limited-English proficiency; determinations of disability and eligibility to receive special education services; student promotion from one grade to another; . . . and admission decisions and scholarship awards." U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., THE USE OF HIGH STAKES TESTS WHEN MAKING HIGH-STAKES DECISIONS FOR STUDENTS: *A RESOURCE GUIDE FOR EDUCATORS AND POLICYMAKERS* 2 (Jul. 6, 2000) (unpublished manuscript, on file with the Boston College Law Review).

The U.S. Department of Education Office for Civil Rights ("OCR") is in the midst of developing a resource guide for educators and policymakers concerning the use of high-stakes tests. The July 2000 draft identifies the guide as "an effort to assemble the best information regarding psychometric standards, legal principles, and resources to help educators and policymakers frame strategies and programs that promote learning to high standards in ways consistent with federal non-discrimination law." *See id.*, Introductory Letter, at 2. The guide is explicit that it is intended to reflect existing legal principals and does not establish new federal regulations or requirements. *See id.* at 3, 5 & n.99.

[7] *See generally* 20 U.S.C. 6311 (1994 & Supp. II 1996).

[8] 34 C.F.R. § 300.7 (1999).

[9] *See* U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., *supra* note 6, at 35, 82. States typically provide accommodations to students with disabilities, including allowing students to have an unlimited amount of time to complete the test, allowing adults to read portions of the test to the student and allowing manipulatives and other assistive devices. Each one of these accommodations must be included in the student's IEP, *see* 20 U.S.C. § 1414(d)(1)(A)(v)(I) (Supp. III 1997), and, depending on the state, may result in a student's scores being "flagged." *See* STUDENTS WITH DISABILITIES AND STANDARDS-BASED

for whom these adaptations are insufficient to allow for meaningful participation in the tests. Researchers estimate that about 85% of students who are eligible for special education services can participate in large-scale high-stakes assessments with or without accommodations.[10] Although the remainder—those students who can not participate in these assessments even with accommodations—represents only one-half to two percent of the total student population,[11] the Individuals with Disabilities Education Act ("IDEA") requires that these students be included in state-wide assessment initiatives using alternate assessments by July 1, 2000.[12] This Note examines the various federal statutes relating to high-stakes assessments and explores how states might include students who require alternate assessments in those statewide assessment initiatives. In 1995, seventeen states required students to pass an exit exam to receive a diploma.[13] By 1999, (according to one estimate) twenty-six states projected to use tests as conditions for graduation by 2003 and six states already use tests as conditions for grade promotion.[14] Some states have even adopted a two-tiered system, giving one type of diploma to students who pass state-wide tests and another type to those who do not.[15] Since nearly every state cur-

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REFORM 184 (Lorraine M. McDonnell et al. eds., 1997) [hereinafter EDUCATING ONE AND ALL]; MARTHA THURLOW ET AL., TESTING STUDENTS WITH DISABILITIES: PRACTICAL STRATEGIES FOR COMPLYING WITH DISTRICT AND STATE REQUIREMENTS 27–66, 87–94 (1998) [hereinafter TESTING STUDENTS WITH DISABILITIES].

[10] U.S. DEPT. OF EDUC., *State-Wide Assessment Programs: Including Students with Disabilities*, *in* RESEARCH CONNECTIONS 3 (1998) [hereinafter *State-wide Assessment Programs*].

[11] Martha Thurlow et al., *Alternate Assessments for Students with Disabilities*, POLICY DIRECTIONS, Oct. 1996, at 2 [hereinafter *Alternate Assessments for Students with Disabilities*]. Because of the individualized nature of accommodation/alternate assessment decisions, commentators may arrive at different estimates of the number of students who should participate in alternate assessments. *See, e.g.*, TESTING STUDENTS WITH DISABILITIES, *supra* note 9, at 68 (1998) (estimating that only about 10% of students with disabilities would participate in alternate assessments).

[12] *See* 20 U.S.C. § 1412(a)(17)(A)(ii) (Supp. III 1997).

[13] JUDY ELLIOTT ET AL., ASSESSMENT GUIDELINES THAT MAXIMIZE THE PARTICIPATION OF STUDENTS WITH DISABILITIES IN LARGE-SCALE ASSESSMENTS: CHARACTERISTICS AND CONSIDERATIONS 6 (1996) [hereinafter CHARACTERISTICS AND CONSIDERATIONS].

[14] U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., *supra* note 6, Introductory Letter, at 2.

[15] When states offer this kind of differentiated diploma, the test may provide increased incentives for teachers and students. At the same time, students who pass their courses may still graduate or receive a certificate of completion. This type of system could also decrease the motivation for some students to pass the test. Some commentators "argue that differentiated diplomas stigmatize students; others feel that giving a standard diploma to [students with disabilities] devalues the credential and corrupts the educational process." *See* NATIONAL RESEARCH COUNCIL, HIGH STAKES: TESTING FOR TRACKING PROMOTION, AND GRADUATION 180–81, 194 (Jay P. Heubert & Robert M. Hauser eds., 1999) [hereinafter HIGH STAKES]; *see also* EDUCATING ONE AND ALL, *supra* note 9, at 205. Differentiated di-

rently is grappling with this issue, this Note focuses on Massachusetts, and uses its efforts as a case study. While other states may take different approaches to high-stakes tests than Massachusetts, the issues surrounding the inclusion of students with disabilities are substantially the same.

Part I of this Note examines the federal statutes that underlie the development of high-stakes tests.[16] Part II then explains the issues that states must contend with when developing such tests—including due process and non-discrimination concerns.[17] Part III describes Massachusetts's high-stakes testing initiative: the Massachusetts Comprehensive Assessment System ("MCAS").[18] Part IV applies the examination of due process and non-discrimination concerns to the MCAS and makes recommendations concerning how states should deal with students who require alternate assessments.[19] Finally, Part V proposes recommendations for states in constructing and administering alternate assessments.[20]

I. Federal Statutes' Impact on High-Stakes Tests

Although the administration of education traditionally is considered a state role,[21] the federal government maintains tremendous influence over state and local education agencies through its spending power[22] and its efforts to protect the general welfare.[23] Congress

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ploma systems also raise questions about narrowing the curriculum and may result in high standards only for a small subset of students for whom the test does not pose a significant challenge. As the National Research Council points out: "Research evidence on these questions is generally lacking," and they are therefore beyond the scope of this Note. *See* High Stakes at 194.

[16] *See infra* notes 21–64 and accompanying text.

[17] *See infra* notes 65–162 and accompanying text.

[18] *See infra* notes 163–190 and accompanying text.

[19] *See infra* notes 191–236 and accompanying text.

[20] *See infra* notes 237–246 and accompanying text.

[21] *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments."); Cummings v. Board of Educ., 175 U.S. 528, 545 (1899) ("[T]he education of people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of the Federal authority with the management of such schools can not be justified except in the case of a clear and unmistakable disregard of the rights secured by the supreme law of the land.").

[22] *See* U.S. Const., art. I, § 8. *See generally* Steward Machine v. Davis, 301 U.S. 548 (1937) (upholding spending power act designed to encourage states to develop unemployment compensation systems).

[23] *See, e.g.*, *Brown*, 347 U.S. at 493; U.S. Dept. of Educ. Off. for Civ. Rts., *supra* note 6.

influences education primarily by passing appropriations—laws requiring specific state action in exchange for federal funding—that bind only the states that choose to accept federal funds.[24] All fifty states and the District of Columbia currently receive federal funds under IASA and the Individuals with Disabilities Education Act.[25]

A. *Goals 2000 and the Improving American Schools Act*

The Goals 2000 Educate America Act ("Goals 2000") and IASA were among Congress' major responses to *A Nation at Risk*.[26] Together, the acts stand for the principle that *all* children can learn and achieve high standards and are entitled to participate in a broad and challenging curriculum.[27] The acts also establish requirements for states accepting their funds. Namely, states must create and implement education improvement plans that include processes for developing and adopting curriculum standards for "all students."[28] The requirement that these plans apply to "all students" explicitly includes those with disabilities.[29]

To help measure progress, Goals 2000 requires that state improvement plans include a process for developing and implementing reliable state educational assessments.[30] These assessments must be aligned with state curriculum standards, involve multiple measures of student performance and "provide for participation of students with diverse learning needs."[31] Goals 2000 also establishes National Educa-

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[24] *See* 20 U.S.C. §§ 1412(a) (Supp. III 1997); 5886(a) (1994); 6311(a) (1994).

[25] National Center for Educ. Statistics, *Digest of Education Statistics, 1998: Chapter 4. Federal Programs for Education and Related Activities* (visited Feb. 12, 2000) <http://nces.ed.gov/pubs99/digest98/d98t367.html>; U.S. Dep't. of Educ., *Office of Special Education Programs Congressional Notification of Grant Awards* (visited Feb. 12, 2000) <http://www.ed.gov/offices/OSERS/OSEP/PartBAllCombined.html>. Recently, the Court of Appeals for the Eighth Circuit questioned whether states subject themselves to suit by accepting federal funds under IDEA. *See* Jim C. v. Arkansas Dep't. of Educ., 197 F.3d 958 (8th Cir. 1999) (vacating without opinion the portions of *Bradley v. Arkansas Dep't. of Educ.*, 189 F.3d 745 (8th Cir. 1999), that addressed spending power).

[26] *See* Martin Gerry, *Service Integration and Beyond: Implications for Lawyers and Their Training*, *in* LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 244, 247 (1999).

[27] Diana Pullin, *Law and Practice: The Testing and Assessment of Students with Disabilities*, *in* LEGAL RIGHTS IN EDUCATION: PENDULUM SWINGS, CONFERENCE PAPERS OF THE 44TH ANNUAL CONFERENCE OF THE EDUCATION LAW ASSOCIATION 37, 40 (1998); *see also* CHARACTERISTICS AND CONSIDERATIONS, *supra* note 13, at 1.

[28] *See* 20 U.S.C. § 5886(c)(1)(A) (1994).

[29] *See id.* § 5802(a)(1).

[30] *See id.* § 5886(c)(1)(B); Pullin, *supra* note 27, at 40.

[31] *See* 20 U.S.C., § 5886(c)(1)(B)(i)(III); Pullin, *supra* note 27, at 40.

tion Goals, which help guide states in creating their own educational goals and standards.[32] Once states establish educational standards, IASA requires the participation of all students in state assessments "with reasonable accommodations" necessary to measure the achievement of students with "diverse learning needs" relative to the state's standards.[33] These assessments, the statute provides, "shall be the same assessments used to measure the performance of all children," shall provide "coherent information about student attainment of the standards" and shall be used in a way that ensures that they are "valid, reliable, and . . . consistent with relevant, nationally recognized professional and technical standards."[34] Moreover, the results of these assessments must provide interpretive and descriptive information and must be disaggregated within each state, local school district and school, including a comparison of scores for students with disabilities as compared to nondisabled students.[35] Congress intended this disaggregation to "help schools ensure that *all* types of students are making progress towards meeting the state standards."[36]

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[32] *See* 20 U.S.C. §§ 5811, 5812. The goals are stated broadly with some objectives attached to clarify each goal. For example, the section on Mathematics and Science provides:

> (A) By the year 2000, United States students will be first in the world in mathematics and science achievement.
> (B) The objectives for this goal are that—
> (i) mathematics and science education, including the metric system of measurement, will be strengthened throughout the system, especially in the early grades;
> (ii) the number of teachers with a substantive background in mathematics and science, including the metric system of measurement, will increase by 50 percent; and
> (iii) the number of United States undergraduate and graduate students, especially women and minorities who complete degrees in mathematics, science, and engineering will increase significantly.

Id. § 5812(5).

[33] *See id.* § 6311(b)(3)(F)(i)–(ii); Pullin, *supra* note 27, at 40–41.

[34] *See* 20 U.S.C. § 6311(b)(3)(C).

[35] *See id.* § 6311(b)(3)(H)–(I).

[36] H.R. REP. No. 103–425, at 5 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2807, 2811 (emphasis added).

B. *Individuals with Disabilities Education Act*

In 1997, two years after Congress reauthorized IASA, it also reauthorized IDEA.[37] Under IDEA, Congress defines "special education" as "specially designed instruction . . . to meet the unique needs of a child with a disability."[38] Thus, Congress identifies the purpose of IDEA as ensuring that all children with disabilities receive educational services that are "designed to meet their unique needs."[39] The primary tool for accomplishing this goal is the Individualized Education Plan ("IEP"). An IEP is a written document that includes a statement of the child's present levels of educational performance and a description of the ways in which the child's disability impacts his or her educational progress.[40] The IEP also must contain a "statement of measurable goals, including benchmarks or short-term objectives," related to meeting the child's needs as well as a statement of the special education programs and services to be provided.[41]

The IEP is developed by a team that must include at least the parents of the child; at least one of the child's regular education teachers (if the child is or may be participating in the regular education environment); at least one special education teacher; a representative of the local education agency who is qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general curriculum, and is knowledgeable about the availability of resources of the local educational agency; and an individual who can interpret the instructional implications of evaluation results if one of the other individuals can not do so.[42]

In developing an IEP, the IEP team must consider "the strengths of the child and the concerns of the parents for enhancing the education of their child" along with the results of the most recent evaluations of the child.[43] Moreover, the team must review the child's IEP at least annually to determine whether the annual goals for the child are

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[37] IDEA was originally promulgated as the Education for All Handicapped Children Act of 1975, Pub. L. No. 94–142, 89 Stat. 773 (codified as amended at 20 U.S.C. § 1400 (Supp. III 1997)).

[38] 20 U.S.C § 1401(a)(25) (Supp. III 1997).

[39] *Id.* § 1400(d)(1)(A).

[40] *See id.* § 1414(d)(1)(A).

[41] *Id.*

[42] *Id.* § 1414(d)(1)(B).

[43] 20 U.S.C. § 1414(d)(3)(A) (Supp. III 1997).

being achieved and must revise the IEP to address any lack of expected progress and the results of any reevaluation.[44]

In addition, IDEA, like IASA and Goals 2000, reaffirms that state education reform initiatives must fully include students with disabilities.[45] A student's IEP, developed by a team of educators and the student's parents, must describe both the nature and extent of a student's participation in the state reforms.[46] The IEP also must specify the modifications and accommodations that the student requires in order to participate in state or district-wide assessments.[47] Moreover, IDEA requires states to include students with disabilities in performance goals, assessments and the reporting of test or assessment results.[48]

C. *Section 504 and the Americans with Disabilities Act*

Even absent statutes like Goals 2000, IASA and IDEA, which specifically target education, Section 504 of the Rehabilitation Act of 1973 ("Section 504") and the Americans with Disabilities Act ("ADA") have significant implications in student participation in educational programs and activities and in the creation and administration of standardized assessments for students with disabilities.[49] Because Section 504 and the ADA both were promulgated under Congress' 14th Amendment powers, states, districts and schools are bound by their requirements even if they do not accept federal funds.[50] Section 504 requires states to include students with disabilities in any program that receives federal financial assistance, including any public education program or state-wide assessment initiative.[51] The regulations promulgated under Section 504 and the ADA explicitly prohibit the

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[44] *Id.* § 1414(d)(4).

[45] *See id.* § 1412(a)(17).

[46] *See id.* § 1414(d).

[47] *See id.* § 1414(d)(1)(A)(v).

[48] *See* 20 U.S.C. § 1412(a)(17) (Supp. III 1997).

[49] *See* HIGH STAKES, *supra* note 15, at 198; Pullin, *supra* note 27, at 37–38.

[50] *See, e.g.*, Kilcullen v. New York State Dep't. of Labor, 205 F.3d 77, 81–82 (2d Cir. 2000) (holding that "Congress has validly abrogated the States' immunity from suit under both the ADA and Section 504 of the Rehabilitation Act); Dare v. California, 191 F.3d 1167, 1175 (9th Cir. 1999) ("[t]he ADA was a congruent and proportional exercise of Congress' enforcement powers under § 5 of the Fourteenth Amendment that abrogated Eleventh Amendment immunity"). *But see* Alsbrook v. Maumelle, 184 F.3d 999, 1002 (8th Cir. 1999) ("[w]e find that . . . the ADA . . . exceeds Congress' authority under Section 5 of the Fourteenth Amendment").

[51] *See* HIGH STAKES, *supra* note 15, at 198; Pullin, *supra* note 27, at 37–38; *see also*, U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., *supra* note 6, at 60.

use of "criteria or methods of administration which have the effect of subjecting individuals to discrimination" on the basis of a disability in all educational institutions that receive federal funds.[52] These regulations also require that programs and services for students with disabilities be equally as effective as those provided to their nondisabled peers in terms of affording an opportunity to obtain the same result, gain the same benefit or reach the same level of achievement.[53]

Notwithstanding Section 504's requirement that schools include students with disabilities in high-stakes assessments, in 1981, in *Jackson County Schools*, the U.S. Department of Education Office for Civil Rights ("OCR") held that exempting students with disabilities from participating in West Virginia's Statewide Achievement Test did not violate Section 504.[54] On April 7, 1981, OCR received a letter of complaint alleging that the Jackson County Schools were preventing students with disabilities from participating in the test.[55] The complaint claimed that this action deprived the students of their "right to be viewed as normal," prevented students from being ranked among their peers, and prevented students in segregated programs from demonstrating academic success.[56] The Office for Civil Rights found that Jackson County Schools was not in violation because "1. the majority (79.4%) of eligible handicapped students participate[d] in the test; and 2. those eligible students who [did] not participate [were] excluded on the basis of individual, not categorical, decisions. . . ."[57] This holding, however, may not reflect the agency's current interpretation. The July 2000 draft of a resource guide concerning the use of high-stakes tests notes that state and district-wide "assessments provide valuable information which benefits students, either directly, such as in the measurement of individual progress against standards, or indirectly, such as in evaluating programs. Given these benefits, exclusion from assessment programs based on disability generally would violate Section 504 and [the ADA]."[58]

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[52] *See* 34 C.F.R. § 100.3(b)(2) (1998); 34 C.F.R. pt. 104 (1999); U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., *supra* note 6, at 60.

[53] *See* Pullin, *supra* note 27, at 38 (citing 34 C.F.R. § 104.4(b)(2) (1998)); *see also* HIGH STAKES, *supra* note 15, at 198; *cf.* Brookhart v. Illinois Bd. of Educ., 697 F.2d 179, 184 (7th Cir. 1983).

[54] Jackson County (WV) Schools, Educ. Handicapped L. Rptr. 257:324 (1981).

[55] *Id.*

[56] *Id.*

[57] *Id.* at 257:326.

[58] U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., *supra* note 6, at 61.

Like Section 504, the ADA also has significant implications in the design and administration of high-stakes tests for students with disabilities.[59] Title II of the ADA prohibits states, school districts, schools and all other public entities from excluding from participation, denying benefits, aids or services to, or discriminating against a qualified individual with a disability.[60] The ADA provision on testing requires that schools and states offer assessment in a "place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals."[61] In addition, Title III of the ADA provides that these prohibitions apply to public accommodations, privately-operated services and private testing companies that write tests; they do not apply, however, to religious entities operated by religious organizations.[62] The Department of Justice, which is responsible for enforcing Title III, issued regulations specifically covering assessments by private secondary schools.[63] These regulations require the private entity to ensure that the examination is selected and administered "so as to best ensure that, when the examination is administered to a person with a disability . . . the examination results accurately reflect the individual's aptitude or achievement level . . . rather than reflecting the individual's impaired sensory, manual, or speaking skills."[64]

II. State Considerations in Developing High-Stakes Tests

Although Congress provides guidance and financial incentives, states retain primary responsibility for setting educational policy. Indeed, IASA charges states with establishing standards and state-wide assessment systems,[65] and IDEA makes it a state's responsibility to provide all students with disabilities a free and appropriate public education.[66] Thus, state governments, not Congress, ultimately decide *how* to implement IASA and IDEA and ultimately design and administer

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[59] *See* High Stakes, *supra* note 15, at 58, 188–203; U.S. Dept. of Educ. Off. for Civ. Rts., *supra* note 6, at 51.

[60] *See* 42 U.S.C. § 12132 (1994); Pullin, *supra* note 27, at 39.

[61] *See* 42 U.S.C. § 12189 (1994).

[62] *See id.* §§ 12181–12189; U.S. Dept. of Educ. Off. for Civ. Rts., *supra* note 6, at 51 & n.151.

[63] *See* 28 C.F.R. § 36.309 (1999). The regulation specifically applies to "[a]ny private entity that offers examinations or courses related to . . . credentialing for secondary or postsecondary education." 28 C.F.R. § 36.309(a) (1999).

[64] 28 C.F.R. § 36.309(b)(1) (1999).

[65] *See* 20 U.S.C. § 6311(b) (1994 & Supp. II 1996).

[66] *See* 20 U.S.C. § 1412(a)(1) (Supp. III 1997).

high-stakes assessments.[67] Because each state is, in many ways, free to design its own state-wide assessment system, each system is somewhat unique.[68] In light of the broad authority retained by states to administer education policy, it is instructive to examine several important considerations for states—including constitutional and statutory concerns as well as the standards and guidelines set forth by scholars and education associations—as they design and implement state-wide high-stakes assessment systems.

A. *Constitutional and Non-Discrimination Policy Issues in Developing High-Stakes Tests*

According to Arthur Coleman, former Deputy Assistant Secretary for Civil Rights at the United States Department of Education, the "job of the educator is to help students achieve their full potential. This educational mandate is no less present during classroom instruction than it is when educators administer tests and evaluate."[69] Coleman also adds that tests, when properly used, "help students achieve their full potential."[70] In addition, the National Research Council ("NRC")[71] has recognized the value of testing programs, stating that "[b]lanket criticisms of tests are not justified."[72] The NRC believes that when tests are used in ways that meet the relevant professional

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[67] *See id.* §§ 1412, 6311.

[68] *See* 20 U.S.C. § 6311 (1994 & Supp. II 1996). *Compare* MASS. GEN. LAWS ch. 69, §§ 1D, 1E, 1I (1996), *with* CAL. EDUC. CODE § 60600–60614 (Supp. 2000), KY. REV. STAT. ANN. §§ 158.645–.6458 (Michie 1996 & Supp. 1999), and MICH. COMP. LAWS §§ 15.41278–.41283 (1996 & Supp. 1999).

[69] Arthur Coleman, *Excellence and Equity in Education: High Standards for High Stakes Tests*, 6 VA. J. SOC. POL'Y & L. 81, 84–85 (1998).

[70] *Id.* at 85.

[71] The National Research Council is made up of members of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine. Congress commissioned the Council to:

> [C]onduct a study and make written recommendations on appropriate methods, practices, and safeguards to ensure that—
> (1) existing and new tests that are used to assess student performance are not used in a discriminatory manner or inappropriately for student promotion, tracking or graduation; and
> (2) existing and new tests adequately assess student reading and mathematics comprehension in the form most likely to yield accurate information regarding student achievement of reading and mathematics skills.

Pub. L. No. 105–78, § 309, 111 Stat. 1467, 1506 (1997). The Council was required to report to Congress by September 1, 1998. Pub. L. No. 105–78, § 309, 111 Stat. 1467, 1506–07 (1997).

[72] *See* HIGH STAKES, *supra* note 15, at 4.

standards "student scores provide important information that, combined with other sources, can lead to decisions that promote students learning and equality of [educational] opportunity."[73] Thus, when designing and administering high-stakes tests, policy-makers and the educational community must guard against unfairly denying educational opportunities to any student in an effort to set higher standards for the general population.[74] Because of this tension between civil rights concerns and the practice of setting high standards, disagreements over the participation in and use of high-stakes tests often implicate due process considerations that require judicial intervention.[75]

When considering a due process claim in the context of a school's denial of a diploma due to a student's failure on a high-stakes test, courts generally have held that in states where attendance is compulsory, students have a cognizable property right at stake: namely, a legitimate entitlement to public education.[76] In addition, most courts have held that the opportunity to receive a high school diploma is also a constitutionally protected interest.[77]

Once a constitutionally protected interest is identified, federal courts first consider whether the purpose of the testing program is "legitimate and reasonable."[78] Courts consistently have deferred to educational judgments made at the state level provided that these judgements are "reasonable, rational, or not arbitrary."[79] Next, courts examine whether students and parents received adequate notice of the test and its consequences.[80] This requirement of adequate notice is intended to provide a reasonable transition period so that curricula and classroom instruction can be aligned to the standards being

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[73] *Id.*

[74] *See* Coleman, *supra* note 69, at 85.

[75] *See* Coleman, *supra* note 69, at 93; S.E. Phillips, *High-Stakes Testing Accommodations: Validity Versus Disabled Rights*, 7 J. OF APPLIED MEASUREMENT IN EDUC. 93, 108 (1994); *see also Brookhart*, 697 F.2d 179; Debra P. v. Turlington, 644 F.2d 397 (5th Cir. Unit B 1981).

[76] *See* Goss v. Lopez, 419 U.S. 565, 579 (1975); *Debra P.*, 644 F.2d at 404.

[77] *See Brookhart*, 697 F.2d at 184; *Debra P.*, 644 F.2d at 404; GI Forum v. Texas Educ. Auth., 87 F. Supp. 2d 667, 682 (W.D. Tex. 2000). *But see* Coleman, *supra* note 69, at 94 ("the more widely accepted view appears to be that the denial of promotion opportunities or of the opportunity to graduate at a particular time . . . is not a constitutionally protected property interest").

[78] *See* U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., *supra* note 6, at 17; *see also* HIGH STAKES, *supra* note 15 at 64–65; *Debra P.*, 644 F.2d at 404–06.

[79] *See* Coleman, *supra* note 69, at 95; *see also* U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., *supra* note 6, at 18 (asserting that the standard is "arbitrary and capricious").

[80] *See Brookhart*, 697 F.2d at 185; *Debra P.*, 644 F.2d at 404; *see also* U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., *supra* note 6, at 18; HIGH STAKES, *supra* note 15, at 63–64.

tested and students can prepare adequately for the test itself.[81] The actual time period that is required for adequate notice depends on a variety of factors, including "the alignment of curriculum and instruction with material tested, the number of test taking opportunities provided to students, tutorial or remedial opportunities provided to students, and whether factors in addition to test scores can affect high-stakes decisions."[82]

In conjunction with the question of adequate notice, courts consider whether the test is "fundamentally unfair."[83] Ultimately, the question of fairness is a matter of whether students have actually been taught the material covered by the test.[84] As Coleman describes this analysis, "courts question whether [the tests] are administered appropriately, and are aligned with the instruction students have received so that they provide meaningful conclusions about the students."[85] Thus, the courts' consideration of fundamental fairness is closely related to an examination of the validity of the test.[86] Tests are considered valid when they actually measure what they say they measure and lead to legitimate inferences that are appropriate and meaningful.[87]

In addition to due process concerns, states must guard against establishing systems that discriminate under Title VI of the Civil Rights Act of 1964 ("Title VI"),[88] Title IX of the Education Amendments of 1972 ("Title IX"),[89] Section 504 and the ADA.[90] Those who

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[81] *See* U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., *supra* note 6, at 18; HIGH STAKES, *supra* note 15, at 63–64.

[82] *See* U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., *supra* note 6, at 18. *Compare Brookhart*, 697 F.2d at 182 (holding that two years was insufficient notice and that parents of students affected may not have received actual notice), *with Debra P.*, 644 F.2d at 407 & n.16 (holding that less than four years constituted insufficient notice).

[83] *See Debra P.*, 644 F.2d at 404; *see also Brookhart*, 697 F.2d at 186. Although the notion of fundamental fairness bears some resemblance to substantive due process, courts have generally included it as part of a procedural due process analysis in this context. *See id.*

[84] *See Brookhart*, 697 F.2d at 187; *Debra P.*, 644 F.2d at 404; U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., *supra* note 6, at 18–19.

[85] *See* Coleman, *supra* note 69, at 95–96. *But see GI Forum*, 87 F. Supp. 2d at 671 (upholding Texas Assessment of Academic Skills test as having been properly administered even when "the policies [were] not perfect").

[86] *See Debra P.*, 644 F.2d at 405. Validity is a construct of the professional standards with regard to testing and is discussed *infra* notes 136–152 and accompanying text.

[87] *See* U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., *supra* note 6, at 21–22.

[88] *See* 42 U.S.C. § 2000d (1994). Title VI prohibits discrimination on the basis of race, color or national origin.

[89] 20 U.S.C. § 1681 (1994). Title IX prohibits discrimination on the basis of gender.

[90] *See, e.g.*, Larry P. v. Riles, 793 F.2d 969, 980 (9th Cir. 1984) (holding that use of intelligence tests for Special Education classification could be challenged under, *inter alia*, Section 504); *GI Forum*, 87 F. Supp. 2d at 676–77 (holding that suit challenging Texas Assess-

wish to challenge statewide assessment systems under these statutes and their accompanying regulations need not even allege that the state intended to discriminate against them; rather, they need only show that the tests yield results that have the *effect* of discriminating.[91] When addressing these kinds of discrimination claims in the context of high-stakes assessments, the courts look first to determine whether an assessment leads to a disparate adverse impact on any particular group.[92] Thus, even if intentional discrimination is lacking, "a violation of [the discrimination statutes] may occur if . . . a test that is used to deny a student educational benefits or opportunities has a statistically significant adverse impact upon a group of students based on race, national origin, sex, or disability."[93] This means that an individual who claims that a test is discriminatory must show by statistical analysis that the success rate for members of a protected class is "significantly lower (or the failure rate is significantly higher) than would be expected from a random distribution."[94]

Even if the test has a disparate impact, the state or school district administering the test has the opportunity to show that the testing practice is educationally necessary and therefore justified.[95] A test is more likely to be considered educationally necessary if it meets the professional standards that apply in the context of the intended use.[96] If the test is found to be educationally necessary, it still may be challenged if "there is a less discriminatory and practicable alternative that as effectively would serve the educational objectives that support the use of the test in the first instance."[97] Costs and administrative burdens may be considered when assessing whether the alternative practice is feasible and equally as effective in fulfilling the institution's

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ment of Academic Skills was appropriately challenged under Title VI); Sharif v. New York State Educ. Dep't, 709 F. Supp. 345, 361 (S.D.N.Y. 1989) (holding that Title IX could be used to challenge New York's use of the Scholastic Achievement Test as a measure of high school achievement).

[91] *See Larry P.*, 793 F.2d at 982; 34 C.F.R. §§ 100.3(b)(2), 106.21(b)(2), 104.4(b)(4) (1999); 28 C.F.R. § 35.130(b)(3) (1999); U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., *supra* note 6, at 12.

[92] *See* Coleman, *supra* note 69, at 100; *see also* HIGH STAKES, *supra* note 15, at 58–59.

[93] Coleman, *supra* note 69, at 99.

[94] HIGH STAKES, *supra* note 15, at 59.

[95] *See id.*; Coleman, *supra* note 69, at 100; *see also* Board of Educ. v. Harris, 444 U.S. 130, 155 (1979) (upholding legal standard of educational necessity).

[96] *See* HIGH STAKES, *supra* note 15, at 59. For a discussion of the professional standards in the context of high-stakes tests, see *infra* notes 140–163.

[97] Coleman, *supra* note 69, at 99; *see also* HIGH STAKES, *supra* note 15, at 62.

goals.[98] In sum, if a test is valid, used appropriately and is the most effective and practicable tool to achieve a legitimate educational purpose, it can survive a discrimination claim even if some subset of students is disproportionately denied opportunities as a result of the test's use.[99]

Two cases in particular illustrate the way courts deal with challenges to testing systems under the Constitution and nondiscrimination statutes. In 1981, in *Debra P. v. Turlington*, the Court of Appeals for the Fifth Circuit held that Florida could not impose a requirement that students achieve a passing score on a state-wide assessment before they could receive a diploma unless the State could show that it had afforded the students an opportunity to learn the information required by the test.[100] The court noted that absent such a showing the test was unlikely to be a valid instrument for measuring mastery of the state standards.[101] Moreover, the court found that if the test covered "matters outside the curriculum, its continued use would violate the Equal Protection Clause."[102] In analyzing the test under the Equal Protection Clause, the court said that "[i]f the test by dividing students into two categories, passers and failers, did so without a rational relation to the purpose for which it was designed, then the Court would be compelled to find the test unconstitutional."[103] Similarly, analyzing the plaintiffs' due process challenge, the court found that "the state administered a test that was, at least on the record before us, fundamentally unfair in that it may have covered matters not taught in the schools of the state."[104]

Likewise, in 1983, in *Brookhart v. Illinois State Board of Education*, the Court of Appeals for the Seventh Circuit held that a local school district violated the due process rights of eleven students with disabilities when it notified students of a high-stakes test only a year and a half before requiring them to pass the examination in order to receive a high school diploma.[105] Although the court determined that

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[98] *See Sharif*, 709 F. Supp. at 363–64 (finding that the state's claim that alternative was not feasible and was excessively burdensome was not persuasive where other states used the proposed alternative); *see also* U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., *supra* note 6, at 56–57.

[99] *See* Coleman, *supra* note 69, at 101.

[100] *Debra P.*, 644 F.2d at 408.

[101] *See id.* at 405.

[102] *Id.* at 406.

[103] *Id.* (quoting Debra P. v. Turlington, 474 F. Supp. 244, 260 (M.D. Fla. 1979)).

[104] *Id.* at 404.

[105] *See* 697 F.2d 179 (7th Cir. 1983).

the students had a liberty interest in receiving a diploma, it rejected the students' claims that the high-stakes testing requirement violated the Education for all Handicapped Children Act ("EAHCA") (now IDEA) and Section 504.[106] With regard to EAHCA, the court held that the test requirement did not deny the students a free and appropriate education because a diploma was an educational outcome that did not reflect the student's access to educational services.[107] Moreover, the district did not violate EACHA's regulation mandating that no single procedure be used as the sole criterion for determining an appropriate educational program because the district also required students to earn seventeen credits and complete state requirements in order to graduate.[108]

In its examination of Section 504, the court found that "[a]ltering the content of [the test] to accommodate an individual's inability to learn the tested material because of his handicap would be a 'substantial modification'" that was not required under the statute.[109] Thus, although Section 504 required the school district to modify the test so that students with disabilities could "disclose the degree of learning [they] actually [possess]," that statute did not preclude denying a diploma to students who did not pass the modified test.[110]

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[106] *See id.* at 182–85.

[107] *See id.* at 183; *see also* Board of Educ. v. Rowley, 458 U.S. 176, 192 (1982) ("[T]he intent of the Act was more to open the door of public education to handicapped children than to guarantee any particular level of education once inside.").

[108] *See Brookhart*, 697 F.2d at 183.

[109] *See id.* at 184.

[110] *See id.* Arthur Coleman, former Deputy Assistant Secretary for Civil Rights at the U.S. Department of Education, summarizes the foregoing analysis into a four-part examination to determine whether high-stakes tests meet the goals of educational excellence and legal soundness. *See* Coleman, *supra* note 69, at 107–08. The first part of Coleman's examination is to "establish in clear terms the objectives of high-stakes tests" in order to ensure the test is a valid measure of what it claims to assess. *Id.* at 108–09. Once a test is determined to be based on clearly-articulated objectives, Coleman considers the methodology of administration and interpretation of the test to "help eliminate the risk of inappropriately denying (or conferring) educational opportunities to students based [solely] on their scores." *Id.* at 109. The third step to Coleman's examination is aimed at ensuring that the test was developed in a way that provided students and parents with sufficient notice that standards were being implemented and that assessments based on those standards would ultimately have high-stakes consequences. *See id.* at 111–12. The fourth and final part of Coleman's examination of tests requires that "educators should periodically monitor test results to determine if there are significant disparities among student groups based on race, national origin, gender or disability." *See id.* at 112.

B. *The National Research Council's Response to State Exclusion of Students with Disabilities*

States continue to struggle to include students with disabilities in their assessment initiatives. Although a few states, notably Kentucky (where 99% of students participate in the state's assessment system)[111] and Maryland, have made strides in including students with disabilities, many, including North Carolina and Florida, continue to exclude them altogether.[112] When students with disabilities are included in the assessments, there is often a public outcry over dramatic drops in scores.[113]

Given these considerations, in 1999, the NRC published a report on high-stakes tests.[114] In the chapter on disabilities, the NRC begins by sketching the relevant federal statutes, focusing on the 1997 amendments to IDEA, which provide that states must "have policies and procedures to ensure that students with disabilities are included in . . . assessment programs, with appropriate accommodations when necessary."[115]

Despite IDEA's mandate that students with disabilities be included in large-scale assessment programs, the NRC states that "many students with disabilities have traditionally been exempted from large-scale achievement tests."[116] According to the NRC, exclusion persists because educators and parents are confused about the availability of modifications or accommodations or are concerned about subjecting these children to the stress of testing.[117] Additionally, officials sometimes have "excused" children with disabilities from a testing requirement in an effort to raise their schools' average scores.[118] Parents and educators also remain concerned about the potential mismatch between test content and student curricula as well as difficulties in administering certain tests to students with severe disabilities.[119]

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[111] *See* Andrea Tortora, *Ky. Leads Special-ed Test Efforts*, CIN. ENQUIRER, Aug. 31, 1999, at B1.

[112] Andrea Tortora & Richard Whitmire, *Schools Can Raise Scores by Exclusion: Special-ed Students Left Out*, CIN. ENQUIRER, August 31, 1999, at B1.

[113] Andrea Tortora & Richard Whitmire, *Successful School's Scores Plummet: Dramatic Change Linked to Dropping Exemption of Special Ed Students*, DET. NEWS, Sept. 3, 1999, at 1.

[114] *See* HIGH STAKES, *supra* note 15.

[115] *See id.* at 189.

[116] *See id.* at 193.

[117] *See id.*

[118] *See id.*

[119] *See* HIGH STAKES, *supra* note 15, at 193.

The report points out that "[b]ecause about 50 percent of students with disabilities have been excluded from state and district-wide assessments . . . there has been a shortage of key indicators of success for these students."[120] This exclusion, according to the NRC, leads to school systems that have not "established meaningful educational goals for children who, it is now clear, can achieve at higher levels than society has historically assumed."[121]

To provide for the increased inclusion of students with disabilities in high-stakes tests, the NRC points out that since July 1, 1998, all IEP's must include either a statement of the modifications that a student will require to participate in state-wide assessments or a statement of why the assessment is inappropriate for the student if he or she will not participate.[122] For students who are excluded from state-wide assessments, the state must ensure "development of guidelines for their participation in alternate assessments."[123] These alternate assessments must be developed and conducted by July 1, 2000, and states must have a mechanism for reporting the resulting scores.[124] In addition, the considerations with respect to non-discrimination, due process and validity that apply to large-scale high-stakes assessments in general apply with equal force to these alternate assessments.[125]

Although standards for identifying disabilities vary greatly across the nation, the NRC asserts that, overall, students with disabilities make up ten percent of the school-age population.[126] In addition to this population, Section 504 and the ADA entitle an unknown number of students who may not qualify for specialized education services under IDEA to reasonable accommodations on high-stakes tests. Therefore, the legal rights afforded students with disabilities have a significant effect on state high-stakes assessment systems.[127]

Although the NRC identifies some accommodations that commonly are used in schools today, it does not make any suggestions about how to increase the number of students with disabilities participating in these assessments.[128] Rather, the NRC merely points out that

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[120] *See id.* at 189.

[121] *See id.*

[122] *See id.*

[123] *See id.*

[124] *See* HIGH STAKES, *supra* note 15, at 189; 20 U.S.C. § 1412(a)(17) (Supp. III 1997).

[125] *See* U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., *supra* note 6, at 48.

[126] *See* HIGH STAKES, *supra* note 15, at 190.

[127] *See id.* at 193.

[128] *See id.* at 195.

a significant question exists and that research on the issue is scarce.[129] Drawing on an earlier report,[130] the NRC identifies four conclusions concerning students with disabilities and high-stakes tests.[131] First, disabilities can lead to unpredictable distortions in test scores.[132] Second, some accommodations may inflate artificially and inappropriately the scores of some students.[133] Third, the most common accommodation—providing additional time—is not appropriate in every case; moreover, the effectiveness of this accommodation merits more research.[134] Finally, "although individuals with disabilities are entitled to reasonable accommodations that do not alter the content being tested, *current knowledge and testing technology are not sufficient to allow the design of such accommodations.*"[135] Thus, two of the NRC's recommendations are particularly relevant here.[136] The first is that "[m]ore 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."[137] The second important recommendation is that "[b]ecause 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

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[129] *See id.* at 199.

[130] *See* EDUCATING ONE AND ALL, *supra* note 9.

[131] *See* HIGH STAKES, *supra* note 15, at 199; EDUCATING ONE AND ALL, *supra* note 9, at 177–93.

[132] *See* HIGH STAKES, *supra* note 15, at 199; EDUCATING ONE AND ALL, *supra* note 9, at 177–78.

[133] *See* HIGH STAKES, *supra* note 15, at 199; EDUCATING ONE AND ALL, *supra* note 9, at 179–82. One method for dealing with the problem of artificially inflated scores is to "flag" non-standard administrations of the test. However, since flagged scores rarely are accompanied by descriptions of the individual or the nature of the accommodations offered, flagging does not really help users interpret scores more appropriately. Moreover, "in the case of scores reported for individual students, flagging identifies the individual as having a disability, raising concerns about confidentiality and stigma." EDUCATING ONE AND ALL, *supra* note 9, at 184.

[134] *See* HIGH STAKES, *supra* note 15, at 199; EDUCATING ONE AND ALL, *supra* note 9, at 180–81.

[135] *See* HIGH STAKES, *supra* note 15, at 199; EDUCATING ONE AND ALL, *supra* note 9, at 193 (emphasis added).

[136] *See* HIGH STAKES, *supra* note 15, at 294–95. Congress explicitly requested that the NRC submit "written recommendations on appropriate methods, practices and safeguards to ensure that . . . existing and new tests that are used to assess student performance are not used in a discriminatory manner or inappropriately for student promotion, tracking or graduation. . . ." Pub. L. No. 105–78, 111 Stat. 1467, 1506.

[137] HIGH STAKES, *supra* note 15, at 294.

evidence such as grades, teacher recommendations, and other examples of student work."[138]

C. *Professional Standards Regarding Assessments for Individuals with Disabilities*

Since 1954, the American Educational Research Association, the American Psychological Association and the National Council on Measurement in Education have been responsible for publishing professional standards for educational and psychological testing.[139] The APA Standards seek to "promote the sound and ethical use of tests and to provide a basis for evaluating the quality of testing practices."[140] One of the essential tenets of the APA Standards with regard to high-stakes tests is that no single test should be used to make a high-stakes decision about a student.[141]

A key question posited by the APA Standards, and underlying both due process and non-discrimination claims, as described above, is whether the test is valid for the purposes for which it is being used for *all* students taking the test.[142] According to the APA Standards, validity is the "most fundamental consideration in developing and evaluating tests."[143] The process by which tests are designed and administered must ensure that the inferences that are meant to be drawn from the test are based on sound scientific principles.[144] In the context of high-stakes tests, a test and the inferences drawn from it are considered invalid if students have not been taught the material on the test.[145] Said another way, if the content of instruction and

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[138] *Id.* at 295.

[139] AMERICAN EDUCATIONAL RESEARCH ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, AND THE NATIONAL COUNCIL ON MEASUREMENT IN EDUCATION, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING at v (1999). [hereinafter APA STANDARDS]. The American Psychological Association ("APA") published the original version of the standards in 1954. In 1955, the American Educational Research Association ("AERA") joined with the National Council on Measurement in Education ("NCME") to publish a second version of the standards. In 1966, the AERA, APA and NCME joined together to publish a new set of standards, and have continued to revise them as a Joint Committee since then. APA STANDARDS, *supra*, at v.

[140] *Id.* at 1.

[141] *Id.* at 146.

[142] *See id.* at 16–17 (emphasis added); *see also Debra P.*, 644 F.2d at 405.

[143] APA STANDARDS, *supra* note 139, at 9.

[144] *See id.*

[145] *See, e.g., Debra P.*, 644 F.2d at 405–06, 408 (finding that a test to determine high school graduation would be invalid if the state could not show that students were taught the material being tested).

teaching methodology provide students with a chance to learn the material on the test, the test is more likely to be considered valid, reliable and fair.[146] This means that tests may be valid for one group of students—or one kind of inference—and invalid for another.[147] Thus, Standard 13.1 states that "[w]hen educational testing programs are mandated by school, district, state, or other authorities, the ways in which test results are intended to be used should be clearly defined."[148] Such a clear definition helps identify both intended and unintended consequences of high-stakes decisions based on test results. Once the test is in use, evidence gathered about these consequences provides important feedback about the validity of the test results "or it can raise concerns about an inappropriate use of a valid test."[149] For example, significant differences in placement scores based on race or gender should trigger further inquiry about the test and how it is being used to make placement decisions.[150] In this situation, the validity of the test could be compromised if scores are "substantially affected" by irrelevant factors that the test is not intended to measure.[151]

In addition to validity concerns, which apply in all testing situations, the APA Standards also recognize that high-stakes tests involve additional, unique considerations.[152] When all students of a particular age or in a given grade are required to participate in an assessment, Standard 11.23 recommends that "users [of the test] should identify individuals whose disabilities . . . [indicate] the need for special accommodations in test administration and ensure that these accommodations are employed."[153] The Comment that accompanies this standard notes that "[a]ppropriate accommodations depend on the nature of the test and the specific needs of the test taker."[154] In addition, Standard 10.8 urges that those responsible for decisions about test use with potential test takers who may need modifications should

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[146] *See* Coleman, *supra* note 69, at 106.

[147] *See id.* at 103.

[148] *See* APA STANDARDS, *supra* note 139, at 145.

[149] *See* U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., *supra* note 6, at 26. Because students with disabilities represent a small subset of all students, validity evidence for these students may need to accumulate over time in order to have a sufficiently large sample size. *See id.* at n.133.

[150] *See id.* at 19–20.

[151] *See id.* at 20.

[152] *See* APA STANDARDS, *supra* note 139, at 21, 23, 118.

[153] *Id.* at 118.

[154] *Id.*

"(a) possess the information necessary to make an appropriate selection of measures, (b) have current information regarding the availability of modified forms of the test in question, (c) inform individuals, when appropriate, about the existence of modified forms, and (d) make these forms available to test takers when appropriate and feasible."[155]

Moreover, Standard 10.10 urges that "any test modifications adopted should be appropriate for the individual test taker" and that a "test professional needs to consider reasonably available information about each test taker's experiences, characteristics, and capabilities" that may affect test performance.[156] Like the NRC, the authors of the APA Standards recognize that although "more valid results may be obtained through the use of a test specifically designed for use with individuals with disabilities"[157] it may be difficult to find a substitute test "for which scores can be placed on the same scale as the original test."[158]

The National Center on Educational Outcomes ("NCEO"), an organization which studies testing practices, addressed this difficulty in its recommendations on alternate assessments for students who are unable to participate in high-stakes tests with accommodations.[159] The NCEO advocates alternate assessments that are "designed to assess achievement toward pre-determined standards."[160] The NCEO clearly states that such assessments can and should maintain high standards for achievement by students with disabilities.[161] To account for the individualized needs of students who are likely to require alternate assessments, the NCEO recommends that "[b]roadly defined goals, such as appropriate communication skills and independence in a number of areas (transportation, self-care, etc.) which are important for all students" should be the focus of the assessments.[162]

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[155] *Id.* at 107.

[156] APA STANDARDS, *supra* note 139, at 107–08.

[157] *Id.* at 104.

[158] *Id.*

[159] *See State-Wide Assessment Programs*, *supra* note 10, at 4.

[160] *Alternate Assessments for Students with Disabilities*, *supra* note 11, at 2.

[161] *See id.*

[162] *Id.* at 3–4.

III. The Massachusetts Comprehensive Assessment System: A Case Study

Following the Massachusetts Supreme Judicial Court's decision in 1993, in *McDuffy v. Secretary of Executive Office of Education,* which held that the Commonwealth's education financing system failed to satisfy the state constitutional duty to cherish the public schools,[163] the Commonwealth responded with the Massachusetts Education Reform Act of 1993 ("MERA").[164] MERA requires that "the [state education] system shall employ a variety of assessment instruments"[165] that are "criterion referenced, assessing whether students are meeting" the standards set by the state Board of Education.[166] These assessments developed into what is now known as the Massachusetts Comprehensive Assessment System ("MCAS").[167] MCAS and the Massachusetts Curriculum Frameworks, the Commonwealth's name for its learning standards,[168] are the Commonwealth's answer to IASA and Goals 2000, which require the development and adoption of curriculum standards for *all* students.[169] The Curriculum Frameworks themselves have been the subject of recent controversy as revisions continue to

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[163] *See* 615 N.E.2d 516, 548, 555 (Mass. 1993).

[164] *See generally* Mass. Gen. Laws ch. 69 (1996). The MERA is a $5 billion plan that will have doubled the state's spending on education by 2000. *See Quality Counts '99,* 18 Educ. Wk., Special Rep., at 151 (1999).

[165] *See* Mass. Gen. Laws ch. 69, § 1I (1996). Educators have begun to level criticism at the state for relying on a single test in assessing education in Massachusetts. Jacob Ludes III, Executive Director of the New England Association of Schools and Colleges, the agency that sets accreditation standards for most Massachusetts high schools, recently railed against the MCAS in a statement to educators and state legislators. Ludes stated: "The notion that a single high-stakes test can be used to set policy, and reward or punish schools and the children in them, is indeed appalling. . . . The idiosyncrasies of the day, the validity of the items, the bias of the test maker, the conditions of the test site, and a score of other variables can compromise assessment based on a single instrument." *See* Marissa Katz, *Top Educator Attacks Emphasis on MCAS Scores,* Providence J., Feb. 2, 2000, at C1.

[166] Mass. Gen. Laws ch. 69, § 1I (1996).

[167] *See id.*; Mass. Regs. Code tit. 603, § 30.00 (2000).

[168] *See* Mass. Gen. Laws ch. 69, §§ 1D, 1E (1996). The Curriculum Frameworks are "academic standards for the core subjects of mathematics, science and technology, history and social science, English, foreign languages and the arts." *Id.* They cover grades kindergarten through twelve and "set forth the skills, competencies and knowledge expected to be possessed by all students at the conclusion of individual grades or clusters of grades." *Id.* They are designed "to set high expectations of student performance and to provide clear and specific examples that embody and reflect these high expectations." *Id.*

[169] 20 U.S.C. §§ 5812(1)(A), 6311(b)(a)(A) (1994); *see also* 20 U.S.C. § 1412(a)(17) (Supp. III 1997) (IDEA); *supra* notes 22–37.

meet with resistance from teachers, parents and policymakers.[170] This is particularly significant when considering whether the Commonwealth has provided adequate notice of what will be assessed by MCAS. Courts require adequate notice in order to provide a reasonable transition period so that curricula and classroom instruction can be aligned to the standards and students can prepare for the test itself.[171] Although the actual time period required for adequate notice depends on a variety of factors, changing standards are obviously more difficult to align with instruction. [172]

MERA does not specifically address the participation of students for whom modifications and accommodations would be insufficient to allow participation in the assessment, but does provide that:

> As much as is practicable, especially in the case of students whose performance is difficult to assess using conventional methods, such instruments shall include consideration of work samples, projects and portfolios, and shall facilitate authentic and direct gauges of student performance. . . . The assessment instruments . . . shall recognize sensitivity to different learning styles and impediments to learning. The system shall take account on a nondiscriminatory basis the . . . particular circumstances of students with special needs.[173]

Because Massachusetts receives federal funds under IDEA to help fund its programs for students with disabilities, the IEP requirements, which require schools to specify the modifications and accommodations that a student will need to participate in state or district-wide assessments, apply in Massachusetts.[174] The Massachusetts analog to the federal IDEA is commonly referred to as Chapter 766, after the chapter of the original act under which it was passed.[175] Massachusetts regulations also require an IEP team to consider the general curriculum, the learning standards of the Massachusetts Curriculum Frame-

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[170] *See, e.g.*, Andrea Downs, *Protest Multiplies Over Changes to Math Standards*, BOSTON GLOBE, Feb. 23, 2000, at B2 (referring to "the math war"); Dina Gerdeman, *New Math Curriculum Protested/Teachers Persuade State to Slow Down*, PATRIOT LEDGER, Feb. 24, 2000, at 15; Doug Hanchett, *Board OKs Math Guide in Face of Furious Criticisms*, BOSTON HERALD, Feb. 24, 2000, at 10.

[171] *See* U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., *supra* note 6, at 18; HIGH STAKES, *supra* note 15, at 63–64.

[172] *See supra* note 82 and accompanying text.

[173] *See* MASS. GEN. LAWS ch. 69, § 1A (1996).

[174] *See* 20 U.S.C. § 1412 (Supp. III 1997).

[175] *See* 1972 Mass. Acts ch. 766, § 11.

works, and the district curriculum and to spell out in the IEP the specially designed instruction that will enable the student to progress effectively in the content areas of the general curriculum.[176]

In the spring of 1999, the Massachusetts Department of Education ("DOE") published a guide to aid teachers and parents in administering the MCAS to students with disabilities.[177] The DOE guide defines students with disabilities as "students who have Individualized Education Plans (IEPs) or a plan of instructional accommodations provided under Section 504 of the Rehabilitation Act of 1973."[178] The Guide states that the purpose of the MERA is "to ensure that *all* students are provided an opportunity to learn the material covered by the Massachusetts *Curriculum Framework* [sic] standards."[179] The Guide also provides a list of accommodations that might be appropriate when administering MCAS and notes that some students could be allowed to take an alternate assessment.[180] With regard to alternate assessments, however, the Guide states that "[t]he Department [of Education] anticipates that few students with disabilities will participate in MCAS through alternate assessments,[181] and intends to closely examine schools that report significant increases in the number of students who participate in alternate assessments from one year to the next."[182] In order to facilitate reporting of scores, a critical aspect of the federal mandate and the MCAS system, the Guide promises that the Department of Education will collect data from individual student participation in alternate assessments in 1999 through *MCAS Alternate Assessment Student Report* forms completed by schools during MCAS administration.[183]

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[176] MASS. REGS. CODE tit. 603, § 28.05(4)(b) (2000).

[177] MASSACHUSETTS DEP'T. OF EDUC., THE MASSACHUSETTS COMPREHENSIVE ASSESSMENT SYSTEM: REQUIREMENTS FOR THE PARTICIPATION OF STUDENTS WITH DISABILITIES (A GUIDE FOR EDUCATORS AND PARENTS) (1999) [hereinafter DOE GUIDE].

[178] *Id.* at 6.

[179] *Id.*

[180] *See id.* at 9–11 app. A.

[181] *Id.* at 13. Two weeks before the 1999 MCAS administration, the Department of Education announced that the use of a scribe would not be considered an appropriate accommodation as it had been in 1998. *See* Jordana Hart, *Special Education Faces MCAS Trial*, BOSTON GLOBE, Apr. 21, 1999, at B5. Although it was difficult to tell how many students were effected by this change, many schools whose students previously participated in the test with this accommodation were forced to create new alternate assessments for those students. *See id.*

[182] DOE GUIDE, *supra* note 177, at 13.

[183] *Id.*

The Massachusetts Department of Education is currently working to develop an alternate assessment for students for whom an on-demand paper-and-pencil test like the MCAS is inappropriate and has set aside $2,550,000 over the next three years for the project.[184] Until now, IEP teams have been free to design alternate assessments for these students.[185] Beginning with the 2000–2001 school year, however, "schools and school districts will begin using a new statewide format: the MCAS Alternate Assessment."[186] Although the AERA Standards and NRC's report on high-stakes tests both suggest that current technology does not allow scores from such alternate assessments to be normed along with scores from regular administrations, the DOE plans to include results of the MCAS Alternate Assessment "in school and school district MCAS reports *beginning with their first administration.*"[187] The DOE is unequivocal in its intent to require students who participate in this assessment to achieve a specific score in order to graduate, stating that "[s]tudents with disabilities who demonstrate the required level of performance through the MCAS Alternate Assessment will have the same opportunity to meet the state's graduation requirements as students who demonstrate the required level of performance on the standard MCAS tests."[188] While this intention is laudable in that it maintains the focus on high expectations for students who take the Alternate Assessment, the Participation Guidelines provide no information about how the Alternative Assessment will be validated or normed.[189] Moreover, the DOE clearly wants to discourage the use of the Alternate Assessment, noting that "[t]he Department intends to examine closely those schools and districts where the number of students taking alternate assessments is unusually high and/or fluctuates from one year to the next."[190]

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[184] *See* Memorandum from David P. Driscoll, Commissioner of Mass. Dep't. of Educ., Request for Response: *MCAS Alternate Assessment Implementation Program* (June 8, 2000), *available in* Mass. Dep't. of Educ., *MCAS Alternate Assessment RFR* (last modified June 12, 2000) <http://www.doe.mass.edu/mcas/2000docs/pdf/alt_rfr.pdf>; MASSACHUSETTS DEP'T. OF EDUC., PARTICIPATION GUIDELINES FOR STUDENTS WITH DISABILITIES: A FOCUS ON MCAS ALTERNATE ASSESSMENT (1999) [hereinafter PARTICIPATION GUIDELINES]. The PARTICIPATION GUIDELINES, *supra*, at 3–4, also provide examples of situations in which a student may be eligible for an alternate assessment.

[185] *See id.* at 2.

[186] *Id.*

[187] *Id.* (emphasis added); *see also* HIGH STAKES, *supra* note 15, at 199; EDUCATING ONE AND ALL, *supra* note 9, at 193–94.

[188] PARTICIPATION GUIDELINES, *supra* note 184, at 2.

[189] *See id.*

[190] *Id.* at 2.

IV. Analysis

Tests, when properly used, can improve the overall quality of education by informing decisions that promote learning.[191] When states use tests which are intended to set higher standards for education overall as gatekeepers for promotion or high school graduation, however, they run the risk of unfairly denying educational opportunities to individual students.[192] Students with disabilities have unique qualities that augment this risk of unfair denial of educational opportunities when high-stakes tests are misused.[193]

Because of the nature of their disabilities, it may take students with disabilities longer to learn the material than is typically allotted in general education.[194] This slower pace must be considered when implementing large-scale high-stakes testing.[195] Moreover, classroom instructional techniques affect high-stakes testing; while special educators are skilled at accommodating instruction to fit students' strengths, these instructional practices are not always appropriate in the context of large-scale testing and may hamper students with disabilities when they are faced with high-stakes tests.[196] Finally, some students are not exposed in any meaningful way to the types of accommodations that are in high-stakes testing.[197] Because of their effects on students with disabilities, high-stakes tests are subject to due process and non-discrimination challenges.[198] While these problems are inherent to *all* high-stakes tests, Massachusetts' efforts with MCAS and the MCAS Alternate Assessment are instructive in examining these and deriving a more effective approach by which to include students with disabilities in high-stakes testing programs.

Courts often have held that the opportunity to receive a diploma is a constitutionally protected interest.[199] In considering whether Massachusetts' use of the MCAS to determine eligibility for a diploma unconstitutionally denies students that right, a court would first try to identify the objectives of the MCAS "in clear terms."[200] The two most

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[191] *See* High Stakes, *supra* note 15, at 4.

[192] *See* Coleman, *supra* note 69, at 85.

[193] *See* U.S. Dept. of Educ. Off. for Civ. Rts., *supra* note 6, at 47.

[194] *See id.*

[195] *See id.*

[196] *See id.*

[197] U.S. Dept. of Educ. Off. for Civ. Rts., *supra* note 6, at 47.

[198] *See supra* notes 70–111.

[199] *See, e.g., Brookhart*, 697 F.2d at 184–85; *Debra P.*, 644 F.2d at 404; GI Forum v. Texas Educ. Auth., 87 F. Supp. 2d 667, 682 (W.D. Tex. 2000).

[200] *See* Coleman, *supra* note 69, at 108.

common objectives are (1) to monitor student performance over time and inform educators about appropriate interventions and/or courses of action for improved learning; and (2) to act as a gatekeeper "so that failure has particular and real consequences for the students taking the test"—most often denial of promotion or of a high school diploma.[201] Massachusetts seems to offer a third possibility: to monitor the effectiveness of individual schools and school districts.[202] Even though MCAS appears to be intended for all three of these objectives, the most controversial is its role as gatekeeper for receipt of a high school diploma.[203] Nonetheless, courts generally defer to the judgement of a state legislature in these types of policy decisions.[204] Thus, a court would probably have to acknowledge that the Commonwealth's objectives are legitimate and reasonable.[205]

Second, a court would consider whether students, parents and educators received adequate notice of the test and its consequences.[206] Given the current controversy over the Curriculum Frameworks, the standards upon which the MCAS is based, and the on-going revisions to them, it is difficult to imagine how any student could receive adequate notice of what the test will cover.[207] Although the high-stakes consequences for students do not take effect until 2003,[208] some teachers and administrators are already feeling reper-

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[201] *See id.* at 109.

[202] *See* MASS. GEN. LAWS ch. 69, § 1I (1999).

[203] *See id.*; MASS. REGS. CODE tit. 603, § 30.00 (2000); Clive McFarlane, *MCAS Standard set at 220,* WORCESTER TELEGRAM & GAZETTE, Jan. 26, 2000, at A1.

[204] *See, e.g., Debra P.*, 644 F.2d at 402–03 ("[W]e wish to stress that [we are not] in a position to determine educational policy [for the state]. . . . As long as it does so in a manner consistent with the mandates of the United States Constitution, a state may determine the length, manner, and content of any education it provides.").

[205] *See* U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., *supra* note 6, at 17; *see also Debra P.*, 644 F.2d at 406; HIGH STAKES, *supra* note 15, at 64–65.

[206] *See Brookhart*, 697 F.2d at 179; *Debra P.*, 644 F.2d at 404; *see also* U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., *supra* note 6, at 17; HIGH STAKES, *supra* note 15, at 63–64. Note that Massachusetts does not plan to condition the receipt of a diploma on a passing score on the MCAS until 2003. *See* MASS. REGS. CODE tit. 603, § 30.03 (2000).

[207] *See supra* note 162 and accompanying text.

[208] *See* MASS. REGS. CODE tit. 603, § 30.03. Exactly how states set the bar for passing and failing is an important ancillary issue in itself. As a general rule, states must have some acceptable basis for establishing a particular standard. *See, e.g.*, Association of Mexican-American Educators v. California, 937 F. Supp. 1397, 1410 (N.D. Cal. 1996), *rev'd in part*, 183 F.3d. 1055 (9th Cir. 1999) (citing professional principles and expert studies as justification for establishing a passing score); Groves v. Alabama State Bd. of Educ., 776 F. Supp. 1518, 1530–31 (M.D. Ala. 1991) (holding that a passing score was not set on a professionally acceptable basis).

cussions from the first two administrations of the MCAS.[209] Moreover, the state has failed to explain how alternate assessments will factor into the aggregate scores for the school and the district and whether students who take alternate assessments are eligible for a high school diploma.[210]

Third, the court also would have to determine whether the MCAS is "fundamentally unfair" to the student or students who are challenging it.[211] This inquiry would focus on whether students have had the opportunity to learn the material being tested.[212] In the case of students with disabilities who, like the plaintiffs in *Brookhart* and *Debra P.*, could be denied a high school diploma even though they have achieved their IEP goals and objectives, this denial certainly would rise to the level of fundamental unfairness.[213] This unfairness would arise, in part, because there is an inherent conflict between the IDEA/Chapter 766 requirement of an individualized plan[214] based on the achievement of personal developmental and educational goals and the IASA requirement that states develop standards applicable to "all children."[215] The IASA requirement presumes that these standards will be appropriate for all children, while the special education statutes recognize that all children are unique.[216] Although it is certainly true that all students can learn,[217] the same standards and curriculum might not be equally appropriate for *all* students. This is not to say that educators should not have high expectations for all students, including those with disabilities. Indeed, the United States Congress explicitly found that educational programs for students with disabilities are made more effective by "having high expectations for such children and ensuring their access in the general curriculum to

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[209] *See, e.g.*, Karen Hayes, *Schools, Pupils Cram for Second Shot at MCAS Tests*, BOSTON GLOBE, Mar. 13, 1999, at South Weekly 1.

[210] *See generally* DOE GUIDE, *supra* note 177.

[211] *See Debra P.*, 644 F.2d at 404; *see also Brookhart*, 697 F.2d at 186.

[212] *See supra* notes 84–88 and 143–163 and accompanying text.

[213] *See Brookhart*, 697 F.2d at 185; *Debra P.*, 644 F.2d at 404.

[214] *See supra* notes 39–49 and accompanying text.

[215] 20 U.S.C. § 6311 (1994 & Supp. II 1996); *see also supra* notes 27–37 and accompanying text.

[216] *Compare* 20 U.S.C. § 6311 (b)(1)(B) (1994) ("set of assessments for all students"), *with* 20 U.S.C. § 1414(d) (Supp. III 1997) ("'individualized education program' or 'IEP' means a written statement for each child with a disability").

[217] Although this may seem like an obvious contention, courts have been called upon to decide whether a student's capacity to learn can negate a state's obligation to educate the student under IDEA. *See, e.g.*, Timothy W. v. Rochester, NH School Dist., 875 F.2d 954 (1st Cir. 1989); Pennsylvania Assoc. for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 296 (E.D. Pa. 1972).

the maximum extent possible."[218] When referring to the IASA standards, however, Congress noted that students with disabilities first must "meet developmental goals" set out in the student's IEP—thereby recognizing the significant differences in students' ability to learn.[219] While an effective teacher can include students with disabilities in regular education lessons that concentrate on state learning standards, the focus of instruction for these students often remains these personal developmental goals.[220]

Students with disabilities, then, might need to concentrate on more basic skills throughout their prolonged school careers (students with disabilities are entitled to continue to attend public schools until they graduate or turn twenty-two).[221] If these skills are the focus of their education, as determined by the IEP Team and implemented by school professionals, these students cannot be said to have been afforded an opportunity to master state learning standards; requiring them to meet the state standards would thus be fundamentally unfair.[222]

To some extent, the MCAS Alternate Assessment is an effort at resolving these tensions.[223] The *Participation Guidelines*, which are intended to guide IEP teams in determining how a student will participate in MCAS, however, focus on the method of administration—whether students should have access to a particular accommodation when taking the test—rather than on the particular subject-matter on which the student actually should be assessed.[224] Insofar as this is the case, the MCAS Alternate Assessment fails to resolve either the tension between IASA/MERA and IDEA/Chapter 766 or the due process concerns about fairness.

These same tensions give rise to some concerns about the validity of the MCAS as a gatekeeper for receipt of a high school diploma. In *Debra P.*, the Court of Appeals for the Fifth Circuit recognized that the validity of a high-stakes assessment turned on whether the test measured "things that are currently taught" to the students who are being

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[218] 20 U.S.C. § 1400(c)(5) (Supp. III 1997).

[219] *See id.* § 1400(c)(5)(E)(i).

[220] *See, e.g., Brookhart*, 697 F.2d at 186 (noting that "as much as 90% of the material on the [test] did not appear on the IEP's").

[221] *See* MASS. REGS. CODE tit. 603, § 28.103.0 (1999).

[222] *See Brookhart*, 697 F.2d at 186; Debra P. v. Turlington, 644 F.2d 397, 404 (5th Cir. Unit B 1981).

[223] *See* PARTICIPATION GUIDELINES, *supra* note 184.

[224] *See id.*

assessed.[225] Similarly, the APA Standards note that "[i]n addition to modifying tests and test administration procedures for people who have disabilities, evidence of the validity for inferences drawn from these tests is needed. Validation is the only way to amass knowledge about the usefulness of modified tests for people with disabilities."[226] Instruction for students with disabilities generally focuses on their IEP goals and objectives.[227] In effect, the IEP is a kind of curriculum guide for these students. To the extent that IEP goals and objectives diverge from state standards, students with disabilities are not afforded an opportunity to learn the material on the MCAS.[228] Since the IEP Team must consider the student's unique capabilities and needs there are bound to be a significant number of students for whom instruction focusing on state learning standards remains a distant hope. This is not to suggest that IEP Teams ought to have lower expectations for these students, but rather that the concept of high expectations is shifted somewhat because of the uniqueness of the student.[229] Students with unique needs should be held to high expectations that consider both those needs and the specific educational program that the student receives pursuant the IEP.[230] When students have not been taught the material on a test, the test is generally considered invalid for use with those students.[231]

Under the regulations that interpret Title VI, Title IX, Section 504 and the ADA, a test may be challenged if it has the effect of discriminating against a particular group of students.[232] Even in the absence of intentional discrimination, a test that is used to deny an educational benefit—like a diploma—may violate these statutes if the success rate for members of a protected class is "significantly lower (or the failure rate is significantly higher) than would be expected from a random distribution."[233] Educators and legislators are obligated to monitor the results of the assessments to determine whether there are

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[225] *Debra P.*, 644 F.2d at 405.

[226] APA STANDARDS, supra note 139, at 107.

[227] EDUCATING ONE AND ALL, *supra* note 9, at 141.

[228] *See id.* at 148.

[229] *See id.*

[230] *See supra* notes 39–49.

[231] *See, e.g., Debra P.*, 644 F.2d at 405–06, 408 (finding that a test would be invalid if the state could not show that students were taught the material being tested).

[232] *See* Larry P. v. Riles, 793 F.2d 969, 982 (9th Cir. 1984); 34 C.F.R. §§ 100.3(b)(2), 106.21(b)(2), 104.4(b)(4) (1999); 28 C.F.R. § 35.130(b)(3) (1999); U.S. DEPT. OF EDUC. OFF. FOR CIV. RTS., *supra* note 6, at 12, 14, 53.

[233] *See* HIGH STAKES, *supra* note 15, at 59; *see also* Coleman, *supra* note 69, at 99.

significant disparities among student groups.[234] Although "[t]here is no rigid mathematical threshold regarding the degree of disproportionality required" the statistical disparity must be sufficiently substantial to raise an inference that the challenged practice caused the disparate results.[235] Responsible educators admit that two administrations of MCAS is insufficient evidence upon which to base any conclusions, but data collected thus far indicates that students with disabilities fail the MCAS at a much higher rate than other students.[236] Thus, MCAS is most likely discriminatory in violation of the ADA and Section 504.

V. Recommendations

Clearly, states must improve their abilities to provide meaningful assessments and reports for students with disabilities. For students who typically are excluded from state-wide assessments, however, the need for improvement is even more dramatic because these students will not be considered when decisions are made about how to improve programs, which may lead to the denial of educational oppor-

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[234] *See* Coleman, *supra* note 69, at 106.

[235] *See* U.S. Dept. of Educ. Off. for Civ. Rts., *supra* note 6, at 54.

[236] For example, in 1998 (the first MCAS administration) 43% of fourth graders with disabilities failed the English Language Arts test, as compared to a failure rate of only 8% among regular education students and 15% of all students who took the test. Massachusetts Dep't. of Educ., Report of 1998 Statewide Results: The Massachusetts Comprehensive Assessment System (MCAS) 19 (1998) [hereinafter 1998 MCAS Results]. Similarly, in eighth grade, 60% of regular education students scored in the "Proficient" range on the English Language Arts test, while 85% of students with disabilities scored either in the "Needs Improvement" or "Failing" range. *Id.* at 20. In tenth grade, 94% of students with disabilities scored as Failing (or failed to take the test altogether) or Needs Improvement, and only 7% scored Proficient. *Id.* at 21. For the same test, 44% of regular education students were either Proficient or Advanced. *Id.* In math, while 88% of tenth graders with disabilities failed or did not take the test, only 46% of regular education students faired as poorly. *Id.*

In 1999, the results were no better. While 70% of students with disabilities failed or were found to need improvement on the fourth grade science test, only 38% of regular education students scored in the same range. Regular education students scored in the Proficient range at almost twice as high a rate as students with disabilities on that test. Massachusetts Dep't. of Educ., *Massachusetts Comprehensive Assessment System: Report of 1999 State Results* (last modified Nov. 10, 1999) <http://www.doe.mass.edu/mcas/99mcas/iipart.html> [hereinafter 1999 *MCAS Results*]. In eight grade, 82% of students with disabilities failed the history and social science test, as compared with 42% of regular education students. *Id.* In tenth grade, 87% of students with disabilities failed the math test, while only 47% of regular education students fared as poorly. *Id.*

tunities that other students enjoy.[237] States must develop valid alternate assessments. These assessments must be individualized to focus on the student's unique IEP goals and objectives rather than on goals that are supposed to be applicable to all students.

By 1997, only twelve states were reporting test-based outcome data on students with disabilities.[238] In Massachusetts, students who take an alternate assessment currently receive a "zero" or "failing" grade on the state report.[239] If alternate assessments continue to yield an automatic "zero" score, school principals, whose salaries may be tied to improving scores, may prefer to force students to take MCAS with some accommodations even if the alternate assessment is more appropriate for that student.[240]

The NCEO disagrees, pointing out that "[t]here are problems with assuming that the alternate assessment should be completely individualized. . . . The primary problem with this approach is that attainment of IEP goals cannot easily be aggregated for accountability purposes and IEP goals do not serve as a total curriculum for a student."[241] This argument is unconvincing. Learning standards do not serve as a total curriculum for nondisabled students any more than IEP goals and objectives do for students with disabilities. Admittedly the NRC says that current knowledge and testing technology are insufficient to allow the design of accommodations or alternate assessments whose scores are easily compared to and aggregated with standard scores.[242] The mere fact that states find it difficult to aggregate scores, however, does not relieve them of the responsibility to explore new and better avenues for reporting. As Justice Brandeis once

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[237] *See Alternate Assessments for Students with Disabilities*, *supra* note 11, at 1; *see also*, HIGH STAKES, *supra* note 15, at 189; TESTING STUDENTS WITH DISABILITIES, *supra* note 9, at 4–7 (1998).

[238] J. RUTH NELSON ET AL., DESIRED CHARACTERISTICS FOR STATE AND SCHOOL DISTRICT EDUCATIONAL ACCOUNTABILITY REPORTS 2 (1998).

[239] *See, e.g.*, 1998 MCAS RESULTS, *supra* note 236.

[240] *See, e.g.*, Beth Daley, *Lynn Ties Principal Pay to Testing: Raises to Depend on Pupils' Scores*, BOSTON GLOBE, Sept. 29, 1999, at B1. Notably, the trend toward tying salaries to test scores has already begun, long before an alternate assessment has been implemented and before the state imposes high-stakes consequences for students. *See id.*

Principals are not the only ones who are dependent on improved scores for salary increases. Pay for commissioners of education in Massachusetts and Illinois are now tied to improvements on state-wide assessments. Beth Daley, *Official's Pay Tied to MCAS Scores: Commissioner Agrees to Chairman's Idea*, BOSTON GLOBE, Dec. 22, 1999, at B1; *see also* Karen Bushweller, *Eyes on the Prize*, AM. SCH. BD. J., Aug. 1999, at 18; Bess Keller, *In Age of Accountability Principals Feel the Heat*, 17 EDUC. WK., May 20, 1998, at 1.

[241] *Alternate Assessments for Students with Disabilities*, *supra* note 11, at 4.

[242] *See* HIGH STAKES, *supra* note 15, at 199.

pointed out, "[t]o stay experimentation in things social and economic is a grave responsibility."[243] In an arena as important as education, certainly states can be expected to develop innovative reporting methods if encouraged to do so. The NRC suggests as much in its call for more research into the development of valid assessment methods for students with disabilities.[244]

Eliminating high-stakes tests or embracing them "to the exclusion of all other educational criteria that should guide the educational program" are equally poor choices.[245] Rather, tests should be only one of many valuable tools that can ensure "(1) students and their parents know what the students are expected to learn; (2) teachers and other educators know what needs to be taught; and (3) administrators know the kind of professional development opportunities that should be pursued so that teachers can help their students reach the [established standards]."[246] The establishment of high standards may yet lead to improved educational outcomes for all students. For students with disabilities who cannot participate in high-stakes tests with accommodations, this outcome is significantly more likely if alternate assessments are as individualized as these students' educational programs.

Conclusion

IASA provides no significant guidance for developing assessments to meet the needs of students with disabilities. In particular, states have found it difficult to include those students with disabilities who can not participate in high-stakes tests with accommodations. IDEA requires that these students be included in state-wide assessment initiatives by July 1, 2000. This Note examined the import of the various federal statutes relating to high-stakes assessments and explored how states might include students who require alternate assessments in statewide assessment initiatives. Using Massachusetts as a case study, important considerations—including due process and nondiscrimination challenges—in high-stakes assessments for students who may be denied diplomas as a result of their failure on high-stakes tests like MCAS can be reviewed. Finally, states must develop alternate

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[243] New State Ice Co. v. Leibmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[244] *See* High Stakes, *supra* note 15, at 294.

[245] *See* Coleman, *supra* note 69, at 112.

[246] *See id.* at 113.

assessments that are based on the IEP goals and objectives of each student who requires such an assessment.

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