

Fall 3-2-2002

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Recommended Citation

Ryan R. West, *The Fallacy behind Increased Accountability: How Disabled Students' Constitutional Rights Have Been Disregarded in a Rush to Implement High-Stakes Exams*, 2002 BYU Educ. & L.J. 351 (2002).
Available at: <https://digitalcommons.law.byu.edu/elj/vol2002/iss2/9>

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THE FALLACY BEHIND INCREASED ACCOUNTABILITY: HOW DISABLED STUDENTS' CONSTITUTIONAL RIGHTS HAVE BEEN DISREGARDED IN A RUSH TO IMPLEMENT HIGH-STAKES EXAMS

I. INTRODUCTION

Accountability has become one of the major focuses in recent efforts to reform education, and high-stakes exams have become one of the most commonly used tools to increase accountability.¹ At least twenty-four states have, or will have by 2003, mandatory exit exams that must be passed before a student may receive a diploma.² There is serious debate about the role high-stakes exams ought to play in the education of disabled students. The current trend requires disabled students to take the exams without any special accommodations or modifications and to pass those exams before graduating.³ However, this approach does not account for the special needs of disabled students. In fact, because the right to a high school diploma is a constitutionally protected interest, schools violate the due process and equal protection requirements when they fail to account for disabled students' special needs regarding high-stakes exams. To stay within constitutional requirements, schools should use the Individual Education Plan (IEP) to assess individual student needs and make accommodations and modifications necessary for each student's success.

Part II of this note explains why all students have a constitutional right to a high school diploma. Part III describes the

1. "High-stakes" exams are required tests taken at various grade levels. If a student fails a high-stakes exam then he or she will not be allowed to advance. This comment focuses on high-stakes exams that must be passed before a student can graduate with a high school diploma.

2. Paul T. O'Neill, *Special Education and High Stakes Testing for High School Graduation: An Analysis of Current Law and Policy*, 30 J.L. & Educ. 185, 186 (2001).

3. Accommodations are special helps a student receives during an exam such as the assistance of a reader or the use of a dictionary. Modifications are changes in the test itself such as an extension of time or a different testing format.

underlying rationale of high-stakes exams and examines how they affect disabled students. Part IV takes an in-depth look at the disparate impact high-stakes tests have on the disabled student's right to a high school diploma by analyzing the disabled student's equal protection and due process rights under the Constitution; this part will focus on the application of accommodations and modifications during high-stakes tests as a way to protect the disabled student's constitutional rights. Finally, Part V presents some recommendations for states and schools that develop and administer high-stakes exams and offers a brief conclusion.

II. THE CONSTITUTIONAL RIGHT TO A HIGH SCHOOL DIPLOMA

The Constitution protects both a student's property interest and liberty interest in a high school diploma. Courts have determined that because of the rigors associated with earning a high school diploma and because education is compulsory, students have a constitutional property interest in a high school diploma.⁴ Furthermore, students retain a liberty interest in a diploma because serious consequences, namely, a stigma and a lack of opportunity, result when a student fails to graduate.⁵ More importantly, for purposes of this note, disabled students are entitled to the same constitutional protections of their right to receive a high school diploma.⁶

III. THE CREATION, IMPLEMENTATION, AND EFFECTS OF HIGH-STAKES TESTS

High-stakes exams are not new; several states have used them for years to make decisions about student placement.⁷ However, many people now believe that the traditional graduation measurement of Carnegie units for credit is inadequate to measure whether students have mastered the subject material.⁸ States are responding by implementing mandatory tests

4. See e.g. *Debra P. v. Turlington*, 644 F.2d 397, 404 (5th Cir. 1981).

5. See e.g. *id.*

6. See *Bd. of Educ. v. Ambach*, 436 N.Y.S.2d 564, 569 (1981).

7. See Natl. Research Council, *High Stakes: Testing for Tracking, Promotion, and Graduation* 163 (Jay P. Huebert & Robert M. Hauser eds., Natl. Acad. Press 1999).

8. Many policymakers and educators are fond of high-stakes tests because they provide a low-cost way to measure students' knowledge and to hold schools and teach-

for graduation called “exit exams” or “high-stakes exams.”⁹ In early 2000, eighteen states required students to pass exit exams before graduating, and at least six other states planned to make exit exams mandatory by 2003.¹⁰ Most schools’ blind application of these tests as a graduation requirement for students results in a violation of constitutional rights and unfair treatment for disabled students.

A. Effect of High-Stakes Tests on Students with Disabilities

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 speech or language impairment, a visual impairment including blindness, serious emotional disturbance, . . . an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.¹¹

An estimated five million students, or ten percent of the school-aged population, qualify for special education services as disabled students under the Individuals with Disabilities Education Act (IDEA).¹² With varying degrees of modification and

ers accountable. See Rachel F. Moran, *Sorting and Reforming: High-Stakes Testing in the Public Schools*, 34 Akron L. Rev. 107, 111 (2000). A related argument is that high stakes tests are an effective motivation for public schools to reform and improve their instruction. See *Educating One and All: Students With Disabilities and Standards-Based Reform* 151-55 (Lorraine M. McDonnell, Margaret J. McLaughlin & Patricia Morrison eds., Natl. Acad. Press 1997). Others argue that schools will be able to give specialized attention to students who need it most because of information learned from the exams. See Natl. Research Council, *supra* n. 7, at 14. Many other people dislike standardized tests because they appear to be arbitrary and may not adequately measure a student’s knowledge. Likewise, many people argue that high-stakes tests encourage teachers to “teach to the test” instead of covering a broad curriculum. See Nancy Buell & Charolette Crawford, *Does Prepping for High-Stakes Tests Interfere with Teaching?*, 19 NEA Today 11 (2001); Karen Langenfeld, Martha Thurlow & Dorene Scott, *High Stakes Testing for Students: Unanswered Questions and Implications for Students with Disabilities* <<http://education.umn.edu/NCEO/OnlinePubs/Synthesis26.htm>> (accessed Oct. 23, 2002). A final plausible argument against high-stakes tests is that they do not take into account the unique needs and talents of individual students as well as differences in learning speed.

9. See O’Neill, *supra* n. 2, at 186.

10. *Id.*

11. 34 C.F.R. § 300.7(a)(1) (2001).

12. Natl. Research Council, *supra* n. 7, at 190 (IDEA is codified at 20 U.S.C. §

accommodation, nearly eighty-five percent of all disabled students can participate in high-stakes exams without significant changes to the test.¹³ The remaining fifteen percent of disabled students must receive some type of alternate assessment.

Students with disabilities were generally exempted from high-stakes exams for a variety of reasons including an effort to keep average scores up, a desire not to subject disabled students to the rigors of high-stakes tests, or a general confusion among educators about the possibility of accommodations and modifications available to students with disabilities.¹⁴ Generally, students who did not take the exams would receive a "special" diploma or maybe no diploma at all.¹⁵ Leaving school without a diploma or with a "special" diploma can have devastating effects on a student's future marketability and employability.¹⁶ Studies also have shown that disabled students who fail high-stakes tests drop out of school at a much higher rate than other students who fail the tests.¹⁷ Clearly, high-stakes tests have a significant effect on disabled students; therefore, appropriate measures must be taken to safeguard these students by affording them their constitutional rights.

B. Role of Accommodation and Modifications in High-Stakes Tests

The meaning of appropriate has been a major sticking point in determining the validity of accommodations and modifications. There has been little agreement about what accommodations should be allowed and whether modifications should even be allowed at all. Clearly, because of the special needs of disabled students and the effects of high-stakes tests, accommodations and modifications should not be viewed as *per se* invalid.¹⁸ Disabled students are more likely to participate in high-stakes tests when they are provided with appropriate accommodations

1400 *et. seq.* (West 2001)).

13. Christopher M. Morrison, *High-Stakes Tests and Students with Disabilities*, 41 B.C. L. Rev. 1139, 1141 (2000).

14. Natl. Research Council, *supra* n. 7, at 189, 193.

15. *Id.* at 194

16. Langenfeld, Thurlow & Scott, *supra* n. 8.

17. *Id.*

18. Natl. Ctr. for Learning Disabilities, *High Stakes Assessments and Students with Learning Disabilities* <http://www.ld.org/advocacy/high_stakes.cfm> (accessed Jan. 23, 2002).

and modifications; therefore, accommodations and modifications should be allowed unless research has shown that the particular accommodation or modification alters the validity of the test.¹⁹ In every case, however, students with disabilities ought to be allowed the same accommodations and modifications for the high-stakes tests as they are provided in their Individualized Education Plans (IEP).

C. Role of IEPs in the Education of Students With Disabilities

Congress created IDEA to “ensure that children with disabilities receive an education that is both appropriate and free.”²⁰ A free, appropriate public education (FAPE) is defined as special education and related services that (1) provide public supervision at public expense—without any cost to parents, (2) meet the standards of the state education agency, (3) include an appropriate preschool, elementary, or secondary school education, and (4) provide the IEP required by § 1414(a)(5) of the Act.²¹ Therefore, a FAPE education is designed to meet the unique needs of each disabled child; however, those unique needs have generally not been considered for high-stakes tests.

In an effort to meet these requirements, IDEA requires federally-funded state and local agencies to provide each child with an IEP.²² An IEP is a written statement that is developed by an IEP team, consisting of representatives from a local agency, the child’s teacher, the child’s parent or guardian, and when appropriate, the child.²³ Six elements must be included in the IEP: (1) a statement of the student’s present educational performance level, (2) a statement of the student’s annual goals, (3) a statement of the specific educational services to be provided to the child and the extent to which the child will participate in regular educational programs, (4) a statement of the student’s transition services, (5) the date and duration of educational services, and (6) objective criteria and evaluation procedures to determine if these objective criteria are being met.²⁴ Although IDEA does not require the best possible education for

19. Natl. Research Council, *supra* n. 7, at 193.

20. 20 U.S.C. § 1400(d)(1)(A) (LEXIS L. Publg. 2001).

21. *L.I.H. ex. rel. L.H. v. Bd. of Educ.*, 103 F. Supp. 2d 658, 665 (E.D.N.Y. 2000).

22. *Murphy v. Timberlane Regl. Sch. Dist.*, 22 F.3d 1186, 1188 (1st Cir. 1994).

23. *L.I.H.*, 103 F. Supp. 2d at 666.

24. *Id.*

the disabled student, it does require that students receive the support necessary to benefit from classroom instruction.²⁵

IV. CONSTITUTIONAL IMPLICATIONS: EQUAL PROTECTION AND DUE PROCESS

Congress mandates IEP's to address the unique needs of each student.²⁶ IEP's outline certain accommodations and modifications to the general curriculum that help disabled students to be more successful.²⁷ Because students' disabilities vary in both nature and severity, there are no across-the-board accommodations or modifications that will be effective for all students. Instead, the IEP team determines the best accommodations and modifications for each child.²⁸

Disappointingly, the same individual attention given disabled students when learning the general curriculum is not given them when it comes high-stakes testing. Instead, in an effort to ensure the validity of high-stakes exams, states prescribe specific recommendations as to which accommodations and modifications may be used.²⁹ This comment explores the due process and equal protection ramifications of these limiting recommendations.

A. *Equal Protection Analysis*

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws."³⁰ Although some scholars have rejected application of the equal protection clause to disabled students, their arguments fail to consider both the existing case law and the importance of high-stakes exams. In *Debra P. v. Turlington*, the Fifth Circuit held that "fundamental fairness requires that the state be put to test on the issue of whether the students were tested on material they

25. *M.T. ex. rel. D.T. v. Bd. of Educ.*, 2000 U.S. Dist. LEXIS 12468 (N.D. Ill. Aug. 18, 2000).

26. *Bd. of Educ. v. Rowley ex. rel. Rowley*, 458 U.S. 176, 181 (1982).

27. Natl. Research Council, *supra* n. 7, at 192.

28. *L.I.H.*, 103 F. Supp. 2d at 666.

29. See e.g. Cal. Dept. of Educ., Spec. Educ. Div., *STAR Testing with Non-Standard Accommodations* <<http://www.cde.ca.gov/spbranch/sed/nonstnac.htm>> (last updated May 4, 2001).

30. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

were or were not taught.”³¹ Further, the court reasoned, “If the test is found to be invalid for the reason that it tests matters outside the curriculum, its continued use would violate the equal protection clause.”³²

Disabled students’ equal protection rights are violated when states deny them proper accommodations and modifications for high-stakes exams or when states only expose them to the general curriculum. Education research clearly shows that exposure alone does not guarantee access and meaningful interaction with the general curriculum for disabled students.³³ States mistakenly believe that they are teaching disabled students by merely exposing them to the material that will be on high-stakes exams. In fact, if states do not provide proper accommodations and modifications to help disabled students interact with and learn the material, the students have not been taught.³⁴ Similarly, if states permit disabled students to use accommodations and modifications in the classroom to learn the material but then bar the students from using those same accommodations and modifications on the exit exam, they are not testing the material taught.³⁵

An education system that denies disabled students use of accommodations and modifications during high-stakes tests—even though the accommodations and modifications were used during coursework—will not survive an equal protection challenge because such a system is not a rational means to serve a legitimate end.³⁶ The United States Supreme Court held that “to withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose.”³⁷ The Court adopted this “rationally related” view in *City of Cleburne v. Cleburne Living Center*—a case not involving students with disabilities and high-stakes exams—because of the likelihood that “mental retardation is a characteristic that the government may legitimately take into account in a wide range of de-

31. 644 F.2d at 406.

32. *Id.*

33. Richard P. West, *Look But Don't Touch: Accessing the General Curriculum*, 21 Utah Spec. Educator 11 (2001).

34. *Id.*

35. *Id.* at 12.

36. 16B Am. Jur. 2d *Constitutional Law* § 813 (1998).

37. *Cleburne*, 473 U.S. at 446.

cisions.”³⁸ As a result, some people argue that students with disabilities do not qualify for a heightened level of scrutiny, so all the state must show is that the law is rationally related to a legitimate purpose.³⁹ Even if this were the proper analysis, and I contend it is not, denying disabled students their right to accommodations and modifications does not serve a legitimate state interest. Because there is no legitimate state interest, disabled students have a right to accommodations and modifications for high-stakes exams under the equal protection clause.

Those people that believe a “rationally related” analysis should apply to disabled students and high-stakes exams miss the mark. The Supreme Court stated in *Attorney General of New York v. Soto-Lopez* that when a state law infringes upon a constitutionally protected interest, a strict scrutiny test must be employed to survive an equal protection challenge.⁴⁰ Since courts have held that high school diplomas are fundamental interests protected by the Constitution,⁴¹ states must then show both that they have a compelling interest for the infringement, and that less restrictive alternative means are not available to achieve the same result.⁴² Under either a “rationally related” or “strict scrutiny” analysis, states cannot show legitimate or compelling interests that justify the denial of proper accommodations and modifications for students with disabilities.

B. Two-Step Due Process Analysis

The due process guarantees found in the Fifth and Fourteenth Amendments provide that no individual shall be deprived of “life, liberty, or property without due process of law.”⁴³ The deprivation of constitutionally protected interests is not necessarily guaranteed here; rather, it is the “deprivation of such an interest without the due process of law” that is pro-

38. *Id.*

39. O'Neill, *supra* n. 2, at 204.

40. 476 U.S. 898 (1986).

41. *Debra. P.*, 644 F.2d at 404-05. There is some debate, however, whether education has been accorded the status of a constitutionally guaranteed right for the protection of strict scrutiny under the equal protection clause. For one court that found education is a fundamental interest for this purpose see *Serrano v. Priest*, 18 Cal.3d 728 (1976).

42. 16B Am. Jur. 2d *Constitutional Law* § 815.

43. *Id.* at § 890.

tected.⁴⁴ The due process clauses offer a higher protection for fundamental rights and liberty interests. Rights that are implicit in the concept of liberty—such as the choice of marriage, lifestyle, or children—are considered fundamental.⁴⁵

Due process requires fundamental fairness.⁴⁶ A due process analysis entails the consideration of both procedural due process and substantive due process. “Procedural due process guarantees that a state proceeding which results in a deprivation of property is fair, while substantive due process insures[sic] that state action is not arbitrary and capricious.”⁴⁷ As explained above, disabled students’ liberty and property interests in a high school diploma are protected by the full guarantees of the due process clauses.⁴⁸

1. Procedural Due Process Analysis

Procedural due process requires that when an individual is deprived of her life, liberty, or property, she must be given a hearing, and the deprivation must be resolved consistent with fundamental fairness.⁴⁹ Because deprivation of a high school diploma results in a stigma and other devastating consequences, a student’s liberty interest in a high school diploma is protected by procedural due process.⁵⁰ Many courts have held that high-stakes exams violate procedural due process because they are implemented without first giving disabled students adequate or timely notice to prepare for the exams.⁵¹ Special consideration can be made in the IEP to solve the problem of inadequate exposure or untimely notice.

Constitutional law provides that a liberty interest—such as a high school diploma—may be subject to deprivation if adequate and timely notice is given, and the student has an opportunity to be heard in response.⁵² The seminal case, *Brookhart v. Illinois*, provides some guidance in determining what qualifies

44. *Id.*

45. *Id.* at § 892.

46. *See id.* at § 896.

47. *Id.* at §901.

48. *Debra P.*, 644 F.2d at 402.

49. *Brookhart v. Bd. of Educ.*, 697 F.2d 179, 185 (5th Cir. 1983); *see also Ambach*, 436 N.Y.S.2d at 573-75.

50. *Brookhart*, 697 F.2d at 185.

51. *See id.* at 184-85 for a discussion of cases.

52. *See* 16B Am. Jur. 2d *Constitutional Law* § 902.

as adequate notice.⁵³ While the court stated it could not provide a bright-line rule, the court did provide two factors to determine if adequate notice is met. First, a school district must “ensure that handicapped students are sufficiently exposed to most of the material that appears on the [test].”⁵⁴ Second, a school must produce evidence that parents and teachers have reasonably concluded that a particular student will be better served by focusing on other educational subjects not on the test.⁵⁵ In both factors, the timeframe is left to each court’s discretion based upon the circumstances. In *Brookhart*, the court held that one and one-half years to prepare for the exam was insufficient and thus violated the notice protection of the due process clause.⁵⁶

Although “adequate notice” is the standard, notice alone will not defeat a procedural due process challenge. Just as in an equal protection analysis, exposure to the material to be tested, or notice that the material will be on the test, is not enough. In order for meaningful interaction to take place, disabled students must be given proper accommodations and modifications to help them learn the material on high-stakes exams, and, to ensure meaningful exposure, disabled students must be given adequate notice to allow a revision in their IEPs. In *Brookhart*, the court stated that even though the students had one and one-half years to master the skills necessary to pass the exit exam, the students were never exposed to as much as ninety percent of the material tested.⁵⁷

2. Substantive Due Process Analysis

Substantive due process is concerned with securing citizens against arbitrary deprivations of their rights relating to life, liberty, or property. Disabled students often prevail on substantive due process grounds because a state’s denial of certain accommodations and modifications is considered arbitrary and capricious, and denial is not the least restrictive method to achieve legitimate government purposes.⁵⁸ Although—in the

53. 697 F.2d at 185-87.

54. *Id.* at 187.

55. *Id.* at 187-88.

56. *Id.* at 186.

57. *Id.*

58. See 16B Am. Jur. 2d *Constitutional Law* § 913.

context of disabled students and high-stakes exams—both the procedural due process and substantive due process guarantees are somewhat muddled, it is clear that when a government statute does not serve a legitimate purpose or is not the least restrictive method the government statute must fail.⁵⁹

Substantive due process challenges of exit exams have been successful because a high school diploma is considered a fundamental right to property. In this context, the courts focus on what the exams measure.⁶⁰ In other words, the exam must correspond to the required curriculum and must test what was actually taught.⁶¹ These requirements provide a fair opportunity for disabled students to pass exams by ensuring proper exposure to the material and by providing adequate accommodations and modifications in the IEP.

Given the foregoing due process and equal protection jurisprudence and the uniqueness of each student's IEP, a disabled student's rights must be determined on a case-by-case basis. To reiterate, simply testing students on material that should be covered in class is not enough. Likewise, testing disabled students without providing adequate accommodations and modifications is not enough. The students must be given an opportunity to learn the material and then be tested with the aid of accommodations and modifications on the material actually taught. When states deny disabled students the proper use of accommodations and modifications, they choose a too restrictive means of ensuring that schools and teachers are held more accountable.

V. RECOMMENDATIONS AND CONCLUSION

Students with disabilities, like other students, have a fundamental, constitutionally protected interest in a high school diploma. In light of America's haste to improve public education, states must be careful not to trample over the constitutional rights of students with disabilities. The following recommendations should accompany the implementation and creation of high-stake exams to ensure state compliance with due process and equal protection requirements.

59. See *Brookhart*, 697 F.2d at 186-87.

60. O'Neill, *supra* n. 2, at 201.

61. Natl. Research Council, *supra* n. 7, at 64.

First, accommodations should never be considered *per se* invalid.⁶² Instead, schools and courts should adopt a rebuttable presumption of validity so that schools can make student specific accommodations and modifications.⁶³ Most scholars agree that more research is needed to determine which accommodations are “valid”, but until such time, students should not be penalized for using accommodations that allow them to interact meaningfully with the general curriculum and account for their unique needs. Second, the same accommodations used to help students learn the course material—as outlined in the student’s IEP—must be allowed for use on high-stakes exams.⁶⁴ Due process and equal protection require that the same accommodations used to learn the materials should be allowed when students take exams on those materials.

Disabled students’ constitutional rights of equal protection and due process must be protected by examining disabled students on an individual basis, by developing proper accommodations and modifications that foster meaningful interaction with the general curriculum, and by allowing disabled students to use those accommodations and modifications on high-stakes exams.

Ryan R. West

62. Natl. Ctr. for Learning Disabilities, *supra* n. 18.

63. Disability Rights Advoc., *Do No Harm – High Stakes Testing and Student with Learning Disabilities* 28 (unpublished report 2001) (copy on file with author).

64. Natl. Research Council, *supra* n. 7, at 64-65.