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HIGH STAKES TESTING LAW AND LITIGATION[1]

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The exams are coming – exams with consequences for takers and givers alike. The new high stakes exam in Massachusetts and Texas kick in as of spring 2003;[2] those in California and Virginia take effect in 2004.[3] New York is phasing in its new testing program now, one new subject a year, until students must pass all five to graduate.[4] Many states are already at least as far along; by current count, eighteen states are in some stage of requiring students to pass a uniform, large-scale assessment in order to receive a high school diploma (often called an "exit exam"), and another six plan to do so in the near future.[5] That figure has consistently risen over the last decade[6] and the numbers are likely to continue to climb. Other high stakes exams focus on promotion from grade to grade and/or ability tracking, either together with, or independent of, a diploma requirement.[7] Many people refer to these sorts of tests as "high stakes" because of the consequences they carry and the doors they can open or close for the children who take them.

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2. Chudowsky et al., *State High School Exit Exams: A Baseline Report* 112-13 (Ctr. on Educ. Policy Aug. 2002).

3. *Id.* at 100-01.

4. *Id.* at 124-25.

5. *Id.* at 32.

6. Barbara Guy et al., *National Center On Educational Outcomes Technical Report No. 24: State Graduation Requirements for Students With and Without Disabilities* 8 (Apr. 1999) (available at <http://www.education.umn.edu/NCEO/OnlinePubs/Technical24.html>).

7. Natl. Research Council, *High Stakes: Testing for Tracking, Promotion and Graduation* 1-8 (J.P. Heubert & R.M. Hauser eds., 1998) (hereinafter "NRC Report").

The stakes can be very high. Retention in any grade has been shown to be closely linked to high dropout rates,[8] while a high school diploma is a threshold requirement for acceptance into college, the military, and many high-paying careers. Students who leave high school without a diploma begin their adult lives at an enormous disadvantage in terms of career options, potential for achievement, and self esteem. Research has shown that individuals who lack a high school diploma or GED earn approximately nineteen percent less per hour than do those who have one.[9] The situation is markedly worse for students who already face challenges in demonstrating what they know such as those with disabilities and English Language Learners. Indeed, it should be no surprise that much of the litigation surrounding high stakes tests involves plaintiffs receiving special education services.[10]

And yet, many people believe, as a *New York Times* article recently stated, that "the strong medicine of standards-based reform can act as a powerful tonic, at least when intelligently administered,"[11] and that high stakes exams can be an excellent way to bring about such reform. Many states have invested heavily in this belief, spending many millions on their testing programs to date. Their hope is that by holding high expectations and standards for all children, they will raise academic achievement to levels of competency or even mastery. This laudable goal is proving trickier to implement than it is to endorse.

In any event, high stakes are not only, or always, applied to individual students. High stakes tests can also have a huge impact on teachers, schools, and districts. Teacher bonuses, state funds for schools, and even the control of a particular school or school district can all be affected by the results of standardized tests. A test that does not affect individual students but does affect how much money a school receives is not a high stakes test for the students (often referred to as individual accountability); rather, these tests carry high stakes

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8. William Owings & Susan Magliaro, *Grade Retention: A History of Failure*, 6 Of Primary Interest 2 (Spring 1999) (available at <http://www.ldonline.org/ld_indepth/legal_legislative/grade_retention.html>).

9. Gary Orfield, *Going to Work: Weak Preparation, Little Help*, in *Advances in Education* (Kenneth K. Wong ed., 1997).

10. *Id.* at 9-12, 28-32.

11. James Traub, *The Test Mess*, N.Y. Times Sun. Mag. 50 (Apr., 7 2002).

for the school and are often referred to as instruments of systemic accountability. The recently enacted federal No Child Left Behind Act (NCLB),[12] for example, does not focus on individual accountability, but holds schools and districts accountable for the academic progress of their students.

This paper will describe the general features of these high stakes tests, provide a grounding in the federal laws that foster and sculpt them, offer an analysis of case law precedents, provide an account of current and recent litigation, and attempt to identify significant patterns and factors that will shape future testing. It should be noted that this is an area in flux; at the moment states are making modifications to their testing programs or plans with such frequency that the national picture seems to change from week to week. The following analysis will be most useful, then, as a guide to current trends and the issues that underlie them as well as a basis from which to assess changes to come.

I. THE ABC'S OF HIGH STAKES TESTING

In most states, students advance in grade and earn high school diplomas by accumulating "Carnegie" units which reflect the number of hours children have spent in classrooms, and that also by achieving passing grades in certain courses.[13] Because this system does not allow for a detailed measurement of what knowledge a student has actually mastered, many states have chosen to impose a competency exam as well.

As early as the 1970s, some states had made adequate performance on exit exams one of the requirements for grade promotion or high school graduation.[14] A single, multiple-choice test is usually used with the intent to accurately measure whether students have mastered the required basic skills.[15] As indicated above, the recent emphasis on "standards-based reform" for defining common standards that can serve as the basis for what should be taught and what children should be expected to know has led almost half of the states to implement high school exit exams.[16] While in

12. 20 U.S.C. § 6301 *et seq.* (2002).
13. NRC Report, *supra* n. 7, at 164.
14. *Id.* at 163-64.
15. *Id.* at 163.
16. *See* Chudowsky, *supra* n. 2, at 93.

previous years, state standards focused largely on assuring minimum competence, more and more of the states implementing the recent spate of high stakes exams set their sights higher, toward establishing world-class standards.[17] Such elevated standards come at a price; while many students will undoubtedly rise to the challenge, experience shows that many others slip through the cracks, either failing or dropping out of school once failure seems assured.

A. Basic Format

Despite the broad consensus that all children should be included in large-scale exam programs, there is substantial variation in the way those exams are designed and implemented state to state.

Certain core features establish a basic format. For example, each of the state that imposes an exit exam strives to provide a uniform method for ensuring that children who graduate from high school have mastered at least the fundamental elements of reading and math.[18] Many states test for competency in other areas as well. These include social studies, science, history, geography, and global studies.[19] All states that impose such exams utilize multiple-choice tests, in many cases together with a writing sample.[20] There is some contentiousness, however, over the appropriateness of using a single criterion – such as performance on a multiple-choice standardized test – to determine whether a student has mastered a particular set of information. Many educators believe that it is more appropriate and more accurate to look to "multiple measures" of performance – such as classroom grades, teacher assessments, student portfolios, and performance on other standardized tests – in assessing a student's capacities. Nevertheless, whether due to pedagogy or expediency, most states who have adopted high stakes tests do not utilize multiple measures.

Another common thread in state testing programs is the presence of a phase-in period. Large-scale assessments that

17. Jay Heubert, *High Stakes Testing in a Changing Environment: Disparate Impact, Opportunity to Learn and Current Legal Protections*, forthcoming in *Redesigning Accountability Systems* (Teachers College Press 2003).

18. NRC Report, *supra* n. 7, at 165.

19. *See* Chudowsky, *supra* n. 2, at 49-50.

20. *Id.*

impose high stakes are introduced incrementally over a period of several years, partly to comply with federal law.[21] In the initial years, a test usually serves only as a trial,[22] and adjustments are made to the test in response to any problems encountered. During this period, the number of subjects tested is often restricted and scores have no effect. The high stakes kick in when a failing grade on the exam results in a retention in grade or the denial of a diploma.

B. Exit Options

The ways of obtaining a graduation credential – exit options – vary state to state. At a minimum, each state has at least one high school exit option: meeting the state's regular requirements for a standard local or state-level diploma. However, many states have multiple exit options. In some states, different options apply to children with or without disabilities, respectively.[23] Most commonly, exit option requirements are based on accumulation of a certain number of Carnegie Units or credits. Additional requirements vary; many states also impose an attendance requirement, and an increasing number require a passing score on an exit exam.[24]

Some states offer other options such as a vocational diploma for vocational track students or an advanced studies diploma for students who exceed the ordinary graduation requirements.[25] For students who cannot meet the standard diploma requirements, many states offer some sort of lesser exit credential. Some states call this a "certificate of attendance," others a "certificate of achievement" or of "completion."[26]

C. Exit Exams and Students with Disabilities

The lesser credential certificates of one name or another are often utilized by special education students who cannot meet a

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21. *See infra* Part II.

22. Preliminary rounds of testing also provide valuable performance data.

23. *See generally*, Guy, *supra* n. 6.

24. *See* Chudowsky, *supra* n. 2, at 93-141.

25. Sandra Thompson & Martha Thurlow, *2001 State Special Education Outcomes: A Report on State Activities at the Beginning of a New Decade* table 10 (Natl. Ctr. on Educational Outcomes 2001) (available at <http://education.umn.edu/NCEO/OnlinePubs/2001StateReport.html>).

26. *See id.*

state's standard diploma requirements even with appropriate accommodations.[27] At least eight states also offer a special education diploma of one kind or another, usually tied to the successful completion of individual education plan (IEP) goals.[28] In about half of the states, standard diplomas are available to special education students not able to sit for the standard exit exam but who can demonstrate mastery on an alternate assessment.[29] The Individuals with Disabilities Education Act (IDEA) requires that, as of July 2000, all states offer alternate assessments to standardized tests, but it does not dictate how such testing must impact graduation options.[30]

Regardless of the types of specialized exit options they may offer, states that choose to require exit exams must contend with a handful of core variables relating to the participation of students with disabilities.

Modifications: In some states that impose exit exams, modifications of the standard testing procedure are available for students with disabilities. One such modification is simply that students with disabilities could be exempted from the exam and still receive a standard diploma. In other states, students with disabilities are required to participate in an alternate assessment.[31]

Retesting: All states imposing state-wide exit exams allow students who fail to have multiple opportunities to pass the exams by either retaking the same exam or by taking another form of the test.[32] In some states, students with disabilities are provided with more such opportunities than are other students.

Scoring: In about half of the states that impose exit exams, all students, with or without a disability, are required to pass the same graduation exam with the same passing score.[33] However, in a few states, children with severe disabilities are allowed to take different tests and pass those tests with different scores than children without disabilities and children with mild or moderate disabilities.[34]

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27. *See id.* at Table 10.
28. *See id.*
29. *See id.* at Table 10.
30. 20 U.S.C. § 1400 *et seq.* (2003) (currently, the 1997 IDEA Amendments).
31. *See generally* Thompson & Thurlow, *supra* n. 25.
32. *Id.*
33. *Id.*
34. *Id.*

Reporting: As of 1999, about half of the states with exit exams kept records of the participation of children with disabilities; about half did not.[35] Similarly, about half of the states that imposed exit exams kept records of the performance of children with disabilities on their tests, while the other half did not.[36] Thanks to NCLB, this situation is likely to change.

NCLB requires that, as of the 2005-2006 school year, all states must keep records of the participation and performance of students with disabilities (and several other subgroups) on certain large-scale assessments; states must disaggregate that data from the overall student data they collect and assess whether or not students with disabilities in a particular school are making adequate yearly progress (AYP) towards state-established educational goals.[37] States must report this data to the federal Department of Education and will be held accountable by the Department to ensure that all students, including those with disabilities, achieve proficiency in reading and math within twelve years after the 2001-2002 school year.[38] Schools that fail to demonstrate AYP for students with disabilities (or certain other student groups) are subject, over a period of several years, to an increasingly severe series of corrective measures.[39]

Accommodations: For children with disabilities, perhaps the most significant factor in implementing high stakes exams is allowing for proper accommodations. Federal law requires any state that imposes a standardized exam to provide the appropriate accommodations for children with identified disabilities. All states provide such accommodations to one extent or another. States take varying positions on the accommodations they will and will not allow. Nonetheless, generalizations can be made; in the National Research Council's (NRC) recent report on high stakes testing, the NRC cites the following four basic categories of accommodations currently in use:

35. *Id.*
36. *Id.*
37. 20 U.S.C. § 6301 *et seq.* (2002).
38. *Id.*
39. *Id.*

1. Changes in *presentation*: i.e., Braille forms for visually-impaired students; books on tape for children with auditory or reading disabilities;

2. Changes in *response mode*: i.e., computer assistance on tests not otherwise administered by computer; use of a scribe to write answers for the examinee;

3. Changes in *timing*: i.e., extra time within a given test session and/or reallocation of time blocks within a session;

4. Changes in *setting*: i.e., administration of the tests in small groups or alone, in a separate room.[40]

Although alternative testing can be necessary for children with severe impairments, many students with special needs suffer from relatively minor impairments, which can be addressed through the use of these sorts of accommodations.

In 1997, the NRC's Committee on Goals 2000 and the Inclusion of Students with Disabilities issued a report entitled *Educating One and All: Students with Disabilities and Standards-Based Reform*,[41] assessing systems of accountability assessment and how they affect children with disabilities. The authors of *Educating One and All* make it clear that accommodations are intended to correct distortions in a child's actual competence that are caused by a disability unrelated to the skill or knowledge being measured.[42] Appropriate accommodations, then, essentially level the playing field. For example, providing a visually-impaired child with a Braille version of a history test simply circumvents a deficit which is unrelated to the child's knowledge of history. The danger is that a particular accommodation may either provide too weak a correction or excessive, which may unintentionally diminish or enhance the child's performance and, therefore, invalidate the test. For example, allowing a child with poor motor skills to dictate his answers during a handwriting skills test would compromise the test's objective. As the following section will make clear, this sort of intrusive accommodation is not allowable under federal law.

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40. *See* NRC Report, *supra* n. 7, at 195.

41. Committee on Goals 2000 & the Inclusion of Students with Disabilities, Natl. Research Council, *Educating One and All: Students with Disabilities and Standards-Based Reform*, (Lorraine M. McDonnell, Margaret J. McLaughlin & Patricia Morison eds., Natl. Academies Press 1998) (hereinafter *Educating One & All*).

42. *Id.*

II. STATUTORY UNDERPINNINGS

Federal and state laws mandate the inclusion of all children in large-scale testing programs. The Equal Protection and Due Process clauses of the Fourteenth Amendment to the United State Constitution provide for the equal and fair administration of activities, such as high stakes testing, which affect a constitutionally protected interest. Congress has enacted several federal laws that specifically require states to include all students in their assessments.

The Goals 2000: Educate America Act (Goals 2000)[43] is a recent major piece of legislation, championed by the Clinton Administration and enacted by Congress in 1994. As a grant program, it is only binding upon those states that seek the funding it offers, but nearly all states currently receive such funds. Goals 2000 seeks to foster eight national education goals, including encouraging states to develop both content standards and performance standards. It provides modest federal grant money to states on the condition that they outline strategies for enhancing teaching and learning and ensure that students are mastering basic and advanced skills in core content areas.[44] Goals 2000, however, does not impose specific restrictions as to how its requirements are to be carried out.

A number of federal laws significantly affect the ways in which children with disabilities participate in large-scale testing regimens such as state exit exams. The statute with the greatest effect on the participation of children with disabilities on large-scale assessments is the **Individuals with Disabilities Education Act (IDEA).**[45] IDEA is the primary federal law addressing the education of students with disabilities. It is primarily a grant program that applies to all states receiving funding under the Act (currently, all states do). Under IDEA's 1997 amendments, states must establish policies and procedures that allow students with disabilities to take part in state and district-wide testing programs and provide any necessary adaptations and accommodations to meet identified student needs. It requires that a student's Individual Education Plan (IEP) describe any necessary testing

43. 20 U.S.C. § 5801 *et seq.* (2000).

44. *Goals 2000*, Pub. L. No. 103-227, § 306(b)(9), 108 Stat. 125 (1994); *see also Educating One & All*, *supra* n. 41, at 23.

45. 20 U.S.C. § 1400 *et seq.*

modifications. IDEA requires that only in very limited instances – and only when called for in an IEP – are children to be excluded from testing. It required states to develop guidelines by July 2000 for participation of children with disabilities in alternative assessments where appropriate (some states have yet to comply with this requirement[46]). Two other special education laws that come into play are anti-discrimination laws – **Section 504 of the Rehabilitation Act of 1973 (Section 504)**[47] and the **Americans with Disabilities Act (ADA)**.[48] Collectively, these laws assure a level playing field for students with disabilities in a wide range of settings, including testing, and like IDEA provide for reasonable testing accommodations to be given to students as needed.

The Elementary and Secondary Education Act (ESEA),[49] the most substantial federal law impacting public education, is becoming an increasingly important source of authority requiring and shaping testing. Until recently, this was mainly accomplished through somewhat modest requirements contained in Title I of the ESEA (Title I), the largest federal school aid program, which serves poor, underachieving students. For years it has imposed the sorts of challenging content standards that Goals 2000 does not provide. Title I contains an explicit set of requirements that states and local districts must meet as a condition for obtaining funds under it. In order to be eligible to receive Title I funds, states have been required to submit plans that provide for challenging content and performance standards, as well as conduct statewide assessments designed to assess students' mastery of the requirements. States have been required to submit annual progress reports detailing the success of their efforts.[50] Unlike Goals 2000, the funds available under Title I are very substantial, totaling billions of dollars a year.[51]

With the passage of the **No Child Left Behind Act (NCLB)** – the 2002 reauthorization of the ESEA – came testing requirements that go far beyond those formerly contained in

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46. *See infra* Part III(C)(1).
47. 20 U.S.C. § 794 *et seq.*
48. 42 U.S.C. § 12101 *et seq.*
49. 20 U.S.C. § 6301 *et seq.*
50. Pub. L. No. 103-382, § 1001(d), 108 Stat. 3518 (1994).
51. *Educating One & All*, supra n. 41, at 26.

Title I. As mentioned previously, the law establishes a state-based annual testing requirement for students in grades three through eight and at least once in grades ten through twelve to gauge student proficiency in reading and math starting in the 2005-2006 school year.[52] It requires testing in science at least once in elementary, middle and high school as well. States must show academic proficiency, as defined by each state, within twelve years. NCLB allows states to utilize at least some of the assessments they already have in place – there are no federally required tests under the Act – as part of a statewide plan to ensure students are learning. Whatever measures a state utilizes, NCLB requires that its tests align with state standards so that it will be apparent whether children are truly learning and making real improvement where performance has been inadequate. If not, schools will be held accountable. NCLB does not require that high stakes be imposed on students (nor does it forbid this), but it does hold the system's feet to the fire where students fail to show adequate yearly progress (AYP). Each school must disaggregate data for students with disabilities, as well as other groups such as economically disadvantaged students, English Language Learners, and those from major ethnic and racial groups. In order for a school to show AYP, all of these subgroups must make adequate progress each year, subject to some complicated exceptions.[53] Where such progress is lacking, a school will be deemed to be "in need of improvement" and subject to a schedule of intervention measures that get increasingly aggressive each year. In schools serving Title I students, after two years of failure to make AYP, parents gain the right to transfer their child to a better performing school. After three years, parents gain the right to supplemental educational services for their child. After four years, the district must take corrective measures such as replacing staff or implementing a new curriculum. Finally, after five years of failure to make AYP, the school can be reorganized by the state, which could entail a state-takeover, conversion to a charter school, or other aggressive remedial steps.[54]

52. 20 U.S.C. § 6301 *et seq.*

53. *Id.*

54. *Id.*

It should be noted that NCLB does not require states to administer a high school exit exam, but it does require testing in reading and math and the reporting of the resultant scores at least once between grades ten and twelve. It seems very unlikely that states already offering or planning to offer an exit exam will create a separate high school exam to meet this requirement.[55] Given that NCLB also requires annual testing in grades three through eight in reading and math, it also seems likely that most state promotion exams will be linked into the NCLB framework and subject to its reporting and accountability requirements as well.[56]

III. TESTING IN THE COURTS

While the recent proliferation of state-mandated high stakes exams is unusual, states have imposed such tests for decades and courts have had numerous occasions to pass on the validity of testing tied to promotion and high school graduation. Suits challenging high stakes testing programs have focused on a variety of factors, but the common denominator is fairness. Are these tests a fair measure of student achievement? Is it fair to allow a failing score on a single exam to trump years of good grades? Does the test discriminate against African-Americans or English Language Learners or students with disabilities? These issues are all likely targets for litigation. Such suits have most often been grounded on the Due Process Clause and the Equal Protection Clauses of the Fourteenth Amendment. Suits involving special education issues have also relied on Section 504 and IDEA. What follows is an account of significant case law drawing on each of these areas, which should provide precedent for and insight into the ways that courts will approach such claims in the future.

A. Due Process Claims

The Due Process Clause of the Fourteenth Amendment makes it unconstitutional for a state to "deprive any person of life, liberty or property without due process of law."[57] In

55. *Id.*

56. *Id.*

57. U.S. Const. amend. XIV.

determining what process is due, courts look to the nature of the interest at stake to assess whether the interest is protected and whether the government abused its power in acting to restrict it. In making this determination, courts consider the interests and the value of the procedures available.[58] The Due Process Clause offers procedural safeguards to protected interests and provides protection for substantive aspects of liberty against impermissible governmental restrictions.[59] Procedural due process guarantees that a state proceeding that results in the deprivation of property or liberty must be fair, while substantive due process insures that such state action is not arbitrary and capricious.[60] Each of these aspects of due process will be dealt with, in turn, below. While they represent separate analyses, these aspects tend to blend in application.

Courts have often been reluctant to second-guess the discretion of public school officials with regard to evaluation of the academic performance of their students,[61] "but judicial intervention in school affairs regularly occurs when a governmental education institution acts to deprive an individual of a significant interest in either liberty or property."[62] Indeed, the Supreme Court has consistently upheld the rights of students in the face of improper actions by schools, holding that young people "do not shed their constitutional rights at the schoolhouse door."[63]

1. Procedural Due Process Claims

Under the Due Process Clause, individuals are entitled to adequate notice and an opportunity to be heard before governmental deprivation of their constitutionally recognized interest in property or liberty.[64] High stakes tests can implicate both interests.

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58. 16B Am. Jur. 2d *Constitutional Law §890* (2002).

59. *Id.* (*see* cases cited therein).

60. *Id.*

61. *See San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1972); *Epperson v. Ark.*, 393 U.S. 97, 104 (1968); *Erik V. v. Causby*, 977 F. Supp. 384, 390 (E.D.N.C. 1997); *Williams v. Austin*, 796 F. Supp. 251, 253 (W.D. Tex. 1992).

62. *Bd. of Educ. v. Ambach*, 436 N.Y.S.2d 564, 571-72 (1981). *See also Goss v. Lopez*, 419 U.S. 565, 574 (1975); *Greenhill v. Bailey*, 519 F.2d 5, 7 (8th Cir. 1975).

63. *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506 (1969).

64. *Bd. of Regents v. Roth*, 408 U.S. 564, 569-70 (1972). The protected interest need not itself be a constitutional right, but only a state recognized expectation that cannot be removed without Due Process.

a. Property (entitlement)

Denial by the government of a benefit to which a person has a legitimate claim of entitlement encroaches on a property interest and therefore requires procedural due process.[65] This right is just as applicable in a school setting as elsewhere: "Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause . . .."[66]

One of the seminal cases laying the groundwork for the ways in which courts might assess high stakes exams, *Debra P. v. Turlington*,[67] was predicated in large part on a finding that a testing program was implemented in such a way as to deprive a student of her property interests without Due Process. There, the Fifth Circuit Court of Appeals found unconstitutional a Florida law requiring students to pass a statewide minimum competency test in order to receive a diploma. The court found that the state's compulsory education law and student education program gave children a constitutionally-protected expectation that they would receive a high school diploma if they successfully completed high school.[68] This property interest, it said, effectively prevented the state from imposing new criteria without adequate notice and sufficient educational opportunities to prepare for such tests. Notice allows children to prepare for the test, allows school districts time to develop and implement the test, and allows schools the chance to correct any deficiencies in the test and to set a passing score. The court in *Debra P.* was persuaded by expert evidence indicating that at least four to six years of preparation time is required in order for children to adequately prepare for a high stakes exam.[69]

Debra P. has been widely followed and stands as persuasive precedent. Among the most notable of its progeny is *Board of*

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65. *Roth*, 408 U.S. at 577.

66. *Goss v. Lopez*, 419 U.S. at 574.

67. 644 F.2d 397 (5th Cir. 1981), *later proceeding at* 730 F.2d 1405 (5th Cir. 1984).

68. *Debra P.* involved significant racial issues; plaintiffs asserted that the failure rate on the exit exam was ten times greater for black students than for other students. *Debra P.*, 730 F.2d at 1406.

69. *Debra P.*, 730 F.2d at 1407; 644 F.2d at 407.

Education v. Ambach,[70] a New York state court opinion. Relying in part on *Debra P.*, the court held that special education students suffered a violation of protected property interests when they were denied high school diplomas without having received adequate notice and preparation. In *Ambach*, the parents of two students, one with a neurological math disability and the other with mild mental retardation, challenged a ruling by the local education commissioner invalidating the diplomas the children had been awarded for successfully completing their IEPs. Under a recently-enacted state law, New York required all students seeking a local diploma to pass a basic competency test of math and reading skills, and both students failed to pass that test. The court found that the students "had a legitimate expectation of the receipt of a diploma therefore the diploma represents a property interest for the purposes of the due process protection."[71] It based this finding on testimony produced by the plaintiffs indicating that denial of their diplomas would have grave consequences for their "future life chances"[72] and future employment opportunities, which the court found to represent a substantial deprivation of significant and protected property interests.[73]

The *Debra P.* property rights analysis has not, however, been universally adopted by the courts. For example, in *Bester v. Tuscaloosa*,[74] the Eleventh Circuit Court of Appeals held that a class of plaintiffs challenging a new reading standard designed to prevent social promotion from grade to grade had no protected property rights in their expectation that the former, lower standard would continue to be accepted as the threshold for academic promotion.[75] *Bester*, it should be noted, did not involve a diploma requirement.

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70. 436 N.Y.S.2d 564.

71. *Id.* at 572.

72. *Id.*

73. *Id.*

74. 722 F.2d 1514 (11th Cir. 1984).

75. *Id.* at 1516. *See also Erik V.*, 977 F. Supp. 384 (no property right in promotion; case did not involve diploma requirement); *Williams*, 796 F. Supp. 251 (plaintiffs not found to have constitutional right to receive diploma at a particular graduation ceremony).

b. Liberty (notice)

Courts have also found that students have a protected liberty interest in school settings[76] and, in particular, a protected liberty interest in avoiding the sorts of damaging stigma and curtailed career opportunities that can result from the improper implementation of high stakes exams.

In *Brookhart v. Board of Education*,[77] the court found that student's liberty interest had been violated by inadequate notice provisions within a state testing regime. The Seventh Circuit Court of Appeals assessed the effect of a minimum competency exit exam imposed by an Illinois school district on children with disabilities and found that children with disabilities can be held to the same standards as other children, but that they might require more advance notice and more opportunities to prepare for such testing than may otherwise be necessary. The court reasoned that, unlike children without disabilities, children with individualized education plans do not focus their academic efforts on school or district goals; they concentrate instead on meeting the personalized educational goals established for them. They must, then, have substantial notice and be sufficiently exposed to most of the contents of the test, so that the test objectives can be adequately incorporated into their IEPs. The court in *Brookhart* found that the eighteen month lead time called for by the school district was insufficient for this purpose.

Similarly, in *Ambach*, the court found that there was a protected liberty interest at stake where diplomas were invalidated. "By stigmatizing an individual or imposing an obstacle which forecloses his freedom in pursuing employment opportunities, the State deprives a person of a liberty interest."[78] The court noted that such stigma can have devastating effects, asking rhetorically, "Will [these children] be labeled as incompetent because of their failure to pass basic competency tests and thus considered unable to function in society?"[79]

Having identified such a deprivation, the court then addressed the question of what process was due, stating that

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76. *Goss*, 419 U.S. at 574-75.

77. 697 F.2d 179 (5th Cir. 1983).

78. *Ambach*, 436 N.Y.S.2d at 572.

79. *Id.* at 573.

"[i]n determining the applicable requirements the court balances the private interests of the petitioners, the risk of an improper deprivation of such interest, and the governmental interest involved."[80] After balancing these interests, the court determined that potential harm to the petitioners outweighed all other concerns, especially since the school system had failed to provide timely notice of the new diploma requirement.[81] In the court's estimation, students with handicaps were provided less than two years' notice that they would be required to pass the exit exam in order to receive a diploma. Since the educational program followed by these students focused on their IEP requirements and not on mastering the subjects covered by the test, and because the court was persuaded by expert testimony indicating that early notice of exam requirements is essential for children who need special help in developing their academic skills,[82] it found that the notice period was insufficient and that the diplomas should be validated. The court declined to "set a specific time period which would be adequate."[83]

A number of other courts have addressed the question of how much notice is due in order for the denial of a diploma to be considered legitimate. The notice period is the amount of time between the date on which students are first given notice that they must pass the test in order to receive a diploma, and the date on which that requirement actually goes into effect. In *Debra P.*, a notice period of thirteen months was found to be inadequate.[84] In contrast, in *Williams v. Austin*,[85] the court found that the students had seven years notice that they must pass a comprehensive examination before receiving their diplomas, a period that the court considered adequate. [86] The court made this determination despite the fact that the actual testing regime in question had been implemented only a year prior to the suit, and it replaced a substantially less rigorous

80. *Id.* at 573 (citing *Matthews v. Eldridge*, 424 U.S. 319 (1976)).

81. *Ambach*, 436 N.Y.S.2d at 573.

82. *Id.* at 574.

83. *Id.* at 575.

84. "At the eleventh hour and with virtually no warning, these students were told that the requirements for graduation had been changed." *Debra P.*, 644 F.2d at 404.

85. 796 F. Supp. 251.

86. *Id.* at 254.

one that had been given in the previous six years.[87] In *Mahavongsanan v. Hall*,[88] a master's degree student was found to have received ample notice that successful completion of a comprehensive examination was a requirement for graduation, even though the notice period lasted less than a year. In making its decision, the court pointed out that the student had received both an opportunity to retake the test and to complete additional coursework in lieu of passing the test. Similarly, in *Anderson v. Banks*,[89] a notice period of slightly more than two years was found to be adequate for the imposition of a high stakes exam where there was ample opportunity for students to re-take the test and where remedial courses were also available.[90]

Finally, in *Brookhart* and in *Ambach*, notice periods of just less than two years were found to be insufficient. As noted earlier, in *Ambach,* the court limited its analysis of appropriate notice given to children with disabilities. The *Brookhart* court also appeared to base its decision at least in part on evidence presented there that "special education students learn at a slower rate than regular division students," and that, for children with disabilities, a year and a half of lead time in which to prepare for high stakes test was not enough.[91]

Clearly, evaluations of proper notice are fact-bound and subject to varying judicial rationales. There is substantial precedent, however, supporting the proposition that the availability of remedial programs and factors such as the opportunity for re-testing may be given serious weight by courts engaging in a Due Process analysis of high-stakes testing. The case law also seems to support the proposition that students with disabilities are entitled to more notice than are other students given their unique capacities and academic goals.

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87. *Id.*

88. 529 F.2d 448 (5th Cir. 1976). Despite this being a higher education case, the due process analysis is the same.

89. 520 F. Supp. 472 (S.D. Ga. 1981).

90. The *Anderson* court commented that it believed such notice considerations to be more property viewed as substantive due process concerns.

91. *Brookhart*, 697 F.2d at 187.

2. Substantive Due Process Claims (curricular validity)

In addition to its procedural safeguards, the Due Process Clause protects "the substantive aspects of liberty against impermissible government restrictions."[92] Courts have determined that the Due Process Clause requires that the government avoid taking action that is arbitrary, capricious, does not achieve a legitimate state interest, or is fundamentally unfair.[93] A substantive due process violation is deemed to occur where such state action "encroaches upon concepts of justice lying at the basis of our civil and political institutions."[94]

A substantive due process analysis involves two steps. First, the state action at issue must implicate a fundamental right, such as the right to privacy,[95] the right to a jury trial[96] or the right to marry,[97] not just a protected interest. Second, the government must show that any infringement is justified by a compelling state interest and that its action is narrowly tailored to further that interest.[98]

Plaintiffs have successfully challenged high school exit exams on substantive due process grounds. In the testing context, the relevant concern is over what is called "curricular validity." Curricular validity essentially refers to whether a test administered to a particular student, or students, measures what it purports to measure. Curricular validity has two parts. First, the test questions must correspond to the required curriculum – to what the student or students were *supposed* to be taught – and second, the test must correspond to the material that was *actually* taught to the student or students.

In *Debra P.*, the exit exam was designed to match the minimum performance standards established by the Florida Department of Education, but "[n]o effort was made by the Florida Department of Education to ascertain whether or not all the minimum student performance standards were in fact

92. 16B Am. Jur. 2d *Constitutional Law* § 901 (2002).

93. *Debra P.*, 644 F.2d at 404; *see also Mahavongsanan*, 529 F.2d at 449.

94. *Debra P.*, 644 F.2d at 404.

95. *See Roe v. Wade*, 410 U.S. 113 (1973).

96. *See Duncan v. La.*, 391 U.S. 145, 149-50 n. 14 (1968).

97. *See Zablocki v. Rehail*, 410 U.S. 113 (1978).

98. *Roe*, 410 U.S. at 155.

being taught in the public schools of the State of Florida."[99] As a result, the Fifth Circuit Court of Appeals held that the test could be fundamentally unfair and remanded that issue to the district court, requiring the state to prove that the test covered only material actually taught.[100]

A similar result was reached in *Anderson,* where the court explicitly, if a bit reluctantly,[101] indicated that it was bound by the precedent set in *Debra P.* and, therefore, found that the school district had not sustained its burden to show the test followed the actual curriculum. The court stated that "where the award of a diploma depends on the outcome of a test, the burden is on the school authorities to show that the test covered only material actually taught."[102] The *Williams* court applied the same analysis but found, under its facts, that the plaintiffs were unlikely to prevail on their challenge to the exit exam's curricular validity. In *Williams*, the state had not "merely assumed" that the subject matter tested on the exam was taught in the relevant high school; rather, the state had "presented substantial evidence"[103] regarding the standards themselves, the ways in which the testing regime related to them as well as which specific courses were taken by the particular student at issue, and how they corresponded to the standards.

A similar substantive due process analysis has been applied in a related circumstance – that of participation in graduation ceremonies. In *Crump v. Gilmer Independent School District,*[104] a federal district court in Texas granted a motion for a temporary restraining order sought by two high school seniors who had failed the state's exit exam. The *Crump* opinion did not address the issue of whether or not the court should have awarded them their diplomas despite their

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99. *Debra P.*, 644 F.2d at 405.

100. *Id.* at 408. On remand, the district court found that the tested material did correspond to the curriculum and upheld the validity of the graduation requirement. *Debra P.*, 730 F.2d at 1416-17.

101. After stating that it was bound by the Fifth Circuit's ruling in *Debra P.* with regard to proving that test material was actually taught, the *Anderson* court noted that "[t]he Court is curious as to whether the ruling in *Debra P.* will mean that in the future any diploma determinative test, perhaps a final exam in senior English, will require this justification by school authorities." *Anderson*, 520 F. Supp. at 509 n. 11.

102. *Id.* at 509.

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

104. 797 F. Supp. 522, 556 (E.D. Tex. 1992).

inability to pass the test – the court pointed out that the students would have to re-take the test until they pass it in order to receive their diplomas.[105] Instead, the court focused only on their request that they be allowed to participate in the graduation ceremony with their class. Both students had taken the test four times without passing, but had completed all other requirements for graduation. The court found that they had met the standard for obtaining a temporary restraining order preventing the state from barring their participation in the ceremony. In doing so, it emphasized the irreparable harm that would otherwise result,[106] as well as the untested nature of the new exit exams requirements and the possibility that it might not withstand legal challenge because the state had yet to demonstrate the test's curricular validity.[107] The court held that "the school district must eventually make a substantial showing to demonstrate the validity of the [exit exam] and there is little assurance that the district will be able to make this showing."[108] The court also gave substantial weight to two assurances made by the students—that they had met all other degree requirements, and that they would, if necessary, retake the test until they passed it.[109] Indeed, the court refused to award a temporary restraining order to a third student who failed to pass the exam and was seeking to participate in the ceremonies, because he had not met all of the other prerequisites.[110]

B. Equal Protection Claims

The Equal Protection Clause of the Fourteenth Amendment requires that no state shall "deny to any person within its

105. Plaintiffs did allege that they were being unconstitutionally denied a high school diploma, but the *Crump* court did not address that issue directly, and appeared to disagree with their position.

106. At least two other federal opinions have determined that denial of an opportunity to participate in high school graduation ceremonies can constitute irreparable harm. *See Dubey v. Niles Township High Schools*, 1991 U.S. Dist. LEXIS 7739 (N.D. Ill. 1991) (injunction granted to allow student to graduate despite ban stemming from placing controversial article in school paper); *Albright v. Bd. of Educ.*, 765 F. Supp. 682 (D. Utah 1991) (in considering injunction, court states that participation in high school graduation ceremonies is unique and rule which causes students to miss them can result in irreparable harm, though not the case there).

107. *Crump*, 797 F. Supp. at 555-56.

108. *Id.* at 556.

109. *Id.* at 557.

110. *Id.*

jurisdiction the equal protection of the laws."[111] The Equal Protection Clause is regularly invoked to guard against arbitrary classifications that discriminate against a particular group. In order to be in compliance with the clause, all laws that classify citizens must bear at least some rational relationship to a legitimate state interest.[112] In order to remedy past patterns of discrimination, classifications which impact certain classes of individuals must meet even more stringent standards. Courts have found that distinctions based on classifications such as race, alienage or national origin, for example, will be subjected to strict scrutiny and upheld only if they are narrowly tailored to serve a compelling state interest.[113] Certain other classifications, such as those based on gender, are entitled to an intermediate level of scrutiny, under which laws must be found to be substantially related to an important governmental interest.[114]

There have been several instances in which plaintiffs invoked the Equal Protection Clause to challenge high stakes exams. In *Debra P.*, the court held that the challenged testing regime was impermissible, in part, because it had a disproportionately negative effect on black students, who were failing the test in larger numbers than others, partly because of past deficiencies in the educational quality of programs provided to them.[115] Similarly, in *Rankins v. Board of Education*,[116] a state court in Louisiana faced an Equal Protection challenge to a testing statute that only required public school students, and not those attending private schools or receiving home schooling, to take and pass a high school exit exam in order to receive a diploma. There, the court determined that there was no inequity, since all similarly situated students – those receiving public schooling – were treated alike.[117] The court also found that the state had a legitimate interest in ensuring the minimum competence of

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111. U.S. Const. amend. XIV, § 1.

112. *See e.g. Cleburne v. City of Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 463 (1988).

113. *Cleburne*, 473 U.S. at 440.

114. *Id.* at 440-41.

115. *Debra P.*, 644 F.2d at 407.

116. 637 So.2d 548 (La. App. 1994).

117. Under the Louisiana Constitution the State Board of Education is not permitted to determine the contents of the curriculum of non-public schools and home schooling programs. *Id.* at 552-53.

students receiving a state diploma, and that the testing regime bore a rational relationship to that objective. Finally, *Erik V. v. Causby*,[118] rejected due process and equal protection challenges to a grammar school promotion exam. The court held that, absent factors requiring a heightened level of scrutiny, "[a] 'classification' based on students' scores on standardized test [sic] is surely the paradigmatic situation for application of rational basis review."[119]

While this has not proven to be a fruitful basis for challenging a high stakes exam, it is worth noting that at least one court has stated, in dicta, that an exit exam that lacked curricular validity must fail a rational basis test and is, therefore, a violation of the Equal Protection Clause.[120]

C. Claims Made Under Federal Special Education Laws

1. Section 504

Section 504 provides that "no otherwise qualified individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[121] To show that one is an "otherwise qualified individual with a disability" within the meaning of the statute, a litigant must demonstrate that he or she has an impairment that substantially limits a major life activity.[122] Additionally, someone who is "otherwise qualified" must be capable of meeting all of the requirements of a particular publicly-funded program[123] despite the impairment.

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118. 977 F. Supp. 384.

119. *Id.* at 389. *See also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. at 35-40 ("Nor is public education right which would trigger strict scrutiny of claims of denial of equal protection").

120. *Debra P.*, 644 F.2d at 406.

121. 29 U.S.C. § 794 (West 1999 & Supp. 2000).

122. *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 278-79 (1987).

123. As addressed more fully above, Section 504 and IDEA apply only to recipients of federal financial assistance, whereas the protections of the Fourteenth Amendment, and other constitutionally-guaranteed rights are broader — they extend to actions by governmental entities that are "state actors" and are not dependent on their receipt of federal financial assistance. *See* U.S. Dept. of Educ., Off. of Civil Rights, *The Use of Tests When Making High-Stakes Decisions for Students: A Resource Guide for Educators and Policymakers* 16 n. 46 (July 6, 2000 (draft)).

The Supreme Court has held that Section 504 does not require "an educational institution to lower or effect substantial modifications of standards to accommodate a handicapped person."[124] In fact, as is the case with the Equal Protection Clause, suits under Section 504 challenging the applicability of exit exams to students with disabilities have not met with much success.

In *Anderson*, the plaintiffs, who suffered from neurological disabilities, challenged the applicability of an exit exam regime to students similarly situated. The court found against plaintiffs on their Section 504 argument (although it found in their favor on substantive due process grounds). Plaintiffs argued that school authorities had discriminated against students with disabilities by choosing to define a diploma as evidence of an acceptable level of academic achievement and then denying disabled students a diploma when they were unable to meet this criterion.[125] The court found that school authorities were free to award a diploma to whomever they chose, and that Section 504 did not require them to lower or modify academic standards for the receipt of a diploma.[126] The court stated that "if the handicap itself prevents the individual from participation in an activity or program, the individual is not 'otherwise qualified' within the meaning of the statute."[127] Similarly, in *Ellis v. Morehouse School of Medicine*,[128] the court held that a medical student suffering from dyslexia was not entitled to relief from a rule dismissing him for failing grades because he was not able to show that he was "otherwise qualified" to perform the essential functions of a medical student. Dyslexia, the court stated, interferes with a major life activity, the ability to read, but since the life activity of reading is central to performance of a medical student's tasks, the student's dismissal did not violate of Section 504.

Other courts have rejected Section 504 challenges to testing programs by reasoning that the denial of a diploma was not done "solely by reason of a handicap."[129] In denying a section 504 claim, the court in *Ambach*, offered the following

124. *S.W. Community College v. Davis*, 442 U.S. 397, 412-13 (1979).

125. *Anderson*, 520 F. Supp. at 509.

126. *Id.* at 511.

127. *Id.*

128. 925 F. Supp. 1529 (N.D. Ga. 1996).

129. *Ambach*, 436 N.Y.S.2d at 569.

explanation:

> An analogy can be drawn to the handicapped person who is wheelchair bound. Section 504 may require the construction of a ramp to afford him access to a building but it does not assure that once inside he will successfully accomplish his objective. Likewise, Section 504 requires that a handicapped student be provided with an appropriate education but does not guarantee that he will successfully achieve the academic level necessary for the award of a diploma.[130]

The *Brookhart* court took a similar stance. Plaintiffs there argued that a high school exit exam was discriminatory because students with learning disabilities were unable to pass it. The court held that a student who is unable to learn is "surely not" a person who is qualified in spite of his or her handicap, and, therefore, the denial of a diploma on those grounds was not a violation of Section 504.[131]

Either by holding that denial of a diploma was not done "solely by reason" of a student's disability or because a student denied a diploma was not "otherwise qualified" to receive one, courts have so far declined to hold that Section 504 is a viable source of law in overturning decisions by school districts refusing to grant diplomas to special education students who fail exit exams. It should be noted that suits under Section 504 (as well as under IDEA and the ADA) may have a much greater rate of success when focused on procedural concerns, such as challenging improper accommodations or ensuring that alternative means to show competency are made available.

2. IDEA

IDEA is a strong weapon for children with disabilities seeking an educational plan tailored to their needs or seeking appropriate testing accommodations. But to date, it has been of limited benefit to students with disabilities who challenge the negative consequences of high stakes testing. IDEA protects the rights of all children who suffer from a disability covered under that law to receive "a free and appropriate public education" (FAPE).[132] To date, few courts have addressed the

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130. *Id.*

131. *Brookhart*, 697 F.2d at 184.

132. 20 U.S.C. § 1400 *et seq.* (West 1999 & Supp. 2000).

issue of what would constitute a denial of FAPE in an exit or promotion exam context.

In *Board of Education v. Rowley*,[133] the Supreme Court stated that the intent of the statute was to make public education accessible to handicapped children, not to guarantee any particular level of education.[134] In *Ambach*, the court echoed this sentiment with regard to exit exams. It declined to rely on the Education for All Handicapped Children Act (EHA),[135] (predecessor to IDEA) in holding that the diplomas of two high school students remained valid despite their failure to pass an exit exam. The court stated that FAPE does not entitle a student to the receipt of a diploma. It held that "[t]he EHA does not require specific results . . . but rather the availability of a 'free and appropriate public education.' The award of a diploma has not been shown to be a necessary part of an 'appropriate public education' therefore denial of same on the basis of failure to meet [a test's] requirements does not amount to a violation of the EHA."[136]

The court in *Brookhart*, in which special education students denied diplomas for failure to pass an exit exam challenged the validity of the exam, took essentially the same approach. It held that "denial of diplomas to handicapped children who have been receiving the special education and related services required by the Act, but are unable to achieve the educational level necessary to pass the Minimal Competency Test, is not a denial of a 'free and appropriate public education.'"[137] However, the court did indicate that, because the material covered on the exam was not part of the students' IEPs, those programs were not designed to meet the goal of passing the test. That being the case, it found that those students were entitled to an extended period of time in which to prepare for the test.[138]

In several recent instances, IDEA-based arguments about the adequacy of accommodations and access to an alternate

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133. 458 U.S. 176, 194 (1982).

134. *Id.*; *accord see Battle v. Commw. of Pa.*, 629 F.2d 269, 277 (3d Cir. 1980); *Mrs. A.J. v. Special Sch. Dist. No. 1*, 478 F. Supp. 418, 431 (D. Minn. 1979); *Kelly K. v. Town of Framingham*, 633 N.E.2d 414, 415 (Mass. 1994).

135. The Education for All Handicapped Children Act was passed in 1975.

136. *Ambach*, 436 N.Y.S.2d at 570.

137. *Brookhart*, 697 F.2d at 183.

138. *See* discussion of Due Process, *supra*.

examination have been successful either before a court or between the parties in reaching a settlement. The next section will address these and other current trends.

IV. RECENT CASE LAW

There are a number of significant high stakes testing cases that have either been recently decided or are currently working their way through the courts that could have a substantial impact on the ways in which courts respond to challenges by students to the requirements of high stakes tests.

A. Texas: G.I. Forum v. Texas Educational Agency, *87 F. Supp. 2d 667 (W.D. Tex. 2000)*

Texas has one of the newest exit and promotion exams in the nation and one of the longest records of high stakes testing. This year the new test, the Texas Assessment of Knowledge and Skills (TAKS), is taking its place as the latest in a string of standardized assessments,[139] replacing the twelve-year-old Texas Assessment of Academic Skills (TAAS), which in turn replaced the Texas Educational Assessment of Minimum Skills in 1985, which followed the Texas Assessment of Basic Skills in 1980.[140] The TAKS will be administered in grades three through eleven and next year's eleventh-graders will be the first to be required to pass the test in order to graduate.[141] Like the TAAS program it is replacing, under the TAKS, schools are rated and high school diplomas are either issued or withheld from students based on their performance on the test.

While the TAAS was rigorous – tens of thousands of children were denied diplomas for failure to pass it[142] – the TAKS is substantially more so. It is more comprehensive in scope with lengthier reading passages and more analytical math problems.[143] Unlike previous Texas exams, students

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139. Texas Assessment/Testing Information <http://www.tea.state.tx.us/assessment.html>.

140. TAKS Standards Plan <http://www.tea.state.tx.us/student.assessment/taks/standards/plan.pdf>.

141. *See* Texas Assessment/Testing Information, *supra* n. 139.

142. For example, in 1991 more than two thirds of all black students and nearly sixty percent of Hispanic students failed the test. Rob Hotakiainen, *High Stakes Tests Under Fire in Texas: Scores Rising But Some Students are Left Behind*, Minneapolis Star-Tribune 1A (Feb. 6, 2000). These numbers have recently shown improvement.

143. *See generally*, TAKS Standards Plan, *supra* n. 140; *see also* Melanie Markley,

must supply their own answers to some questions – not all questions are multiple choice.[144] At the high school level, students now face questions in such content areas as algebra, geometry, biology, chemistry, physics, history, and geography, in addition to the core areas of reading, math, and writing that were the focus of previous exams.[145]

Many worry about the consequences of such a challenging test. Critics claim that even the less rigorous TAAS led to widespread cheating. Not long ago, teachers in a Houston school district were found to be actually erasing marks on student answer sheets and penciling in the right answers. Similarly, the Austin school district was indicted for allegedly manipulating test data, and some schools in Fort Worth have been accused of "hiding" underachieving students in special education classes so that their scores will not be attributed to the schools and lower their rating.[146] The rigor of the TAKS promises higher failure rates and perhaps greater incentives for such cheating and manipulation of scores. It should be noted, however, that the TAKS is not a timed test – students can take as long as they need to complete it.[147] This may have the effect of lessening the pressure on test-takers and even raising performance for some children. By taking time out of the equation, Texas has also made it easier for many students with disabilities to take part in the regular testing program without resorting to the most prevalent accommodation – extra time. This attempt to level the playing field bears watching.

Texas has been the source of important legal precedent in the area of high stakes testing. A recent court decision explicitly upheld use of the TAAS as a high school exit exam. In that case, *G.I. Forum*,[148] a federal district court heard a challenge to the TAAS by the Mexican American Legal Defense Fund (MALDEF) and other plaintiffs claiming that the TAAS violates the Equal Protection Clause because it has been shown

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New Test is More TAKS-ing, Stresses Far More Than 3 R's, Houston Chronicle 1 (Mar. 9, 2003).

144. *Id.*

145. *Id.*

146. Carlos Illescas, *TAAS Mania Strides to Earn Texas Gold Star*, Denver Post A-01 (Mar. 2, 2000).

147. *See* Kristine Hughes, *Some Parents Fear Exam's Toll on Kids*, Dallas Morning News METRO 29A (Mar. 28, 2003).

148. 87 F. Supp. 2d 667.

to have a disproportionately negative effect on blacks and Hispanics. The judge acknowledged that children from minority backgrounds did not perform as well as other children on the TAAS, but pointed out that their performance has been steadily improving; they are closing the gap. In February, MALDEF, concerned about the possibility of negative appellate precedent, decided not to appeal to the Fifth Circuit. It is worth noting that there is recent research indicating that much or all of the apparent progress shown by minority groups on the TAAS maybe attributable instead to greatly increased dropout rates among those groups over the same period of time. In other words, it may be that low scoring black and Latino students may simply be dropping out rather than improving their scores on the test, thereby raising the average scores of these groups.[149]

B. Louisiana: Parents Against Testing Before Teaching v. Orleans Parish School Board, *273 F.3d 1107 (5th Cir. 2001),* cert. denied, *122 S.Ct. 1174 (2002)*

In March, the United States Supreme Court refused to hear an appeal in a case in which the plaintiffs attempted to throw out Louisiana's promotion exam, the Louisiana Educational Assessment Program for the 21st Century (LEAP). The plaintiffs, a group of parents, challenged the overall fairness of the test and sought to bar the state and school districts from denying promotion to fourth and eighth grade students who fail it.[150] According to plaintiffs, forty-two percent of the New Orleans district's fourth graders and fifty-three percent of its eighth graders scored "unsatisfactory" on the 1999 tests.[151] The denial of certiorari lets stand the district court's 1999 ruling, which was affirmed by the Fifth Circuit, holding that, while courts have recognized a property interest in receiving a diploma, "no court has ever recognized a property interest in promotion."[152]

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149. Walter Haney, *The Myth of the Texas Miracle* (Ctr. for the Study of Testing Evaluation & Educ. Policy, B.C. 2000); Susan Finch, *Education Experts, Parents Blast Use of Single Test for Promotion,* Time-Picayune A02 (Apr. 26, 2000).

150. A.P. St. & Local Wire, *High Court Approves State's LEAP Test* (Mar. 26, 2002).

151. Mark Walsh, *Court Declines Case Challenging Promotion-Assessment Ties,* Educ. Week 30 (Mar. 6, 2002).

152. *Id.*

C. Minnesota: Belcourt v. National Computer Systems, Inc., *2001 Minn. LEXIS 642 (Minn. 2001)*

Plaintiffs in a recent Minnesota case complained of a problem that seems likely to repeat itself as exit exams start to show their teeth in states across America: they were denied diplomas in error. National Computer Systems, Inc., the testing company that graded the test, erroneously informed almost 8,000 Minnesota students in July 2000 that they failed the test and therefore could not graduate.[153] This resulted in 48 students actually being denied diplomas in error, some of whom were not allowed to take part in their graduation ceremonies.[154] A handful of students filed suit in Hennepin County District Court, and within a few months the company had admitted liability. That admission came too late, however, for those students to participate in the graduation ceremonies.[155]

D. Special Education Trio

Some of the most interesting and influential recent high stakes testing cases come from the special education context. A trio of recent decisions arose from challenges to exit exam programs by students with learning disabilities. Their impact promises to be widespread.

1. California: Chapman v. California Department of Education, *36 IDELR 91 (N.D. Cal. 2002)*

A real battle is being fought in the federal courts in California. A group of California parents, through a disability rights advocacy group, earned what appeared to be a landmark victory in March of 2002 by persuading a federal district court judge to order California to make accommodations for students with disabilities on a high stakes, state-wide exam.[156] The court's ruling applied to at least 45,000 tenth-graders with learning disabilities. It also found that the state's waiver policy was unlikely to satisfy IDEA requirements for alternate

153. Kavita Kumar, *Preliminary Settlement Reached in Test-Score Suit*, Star-Tribune (Minneapolis, Minn.) 1B (Oct. 4, 2002).

154. *Id.*

155. *Id.*

156. Lisa Fine, *Spec. Ed. Advocates Hail Graduation-Test Ruling*, Educ. Week (Mar. 6, 2002).

assessment and ordered the state to quickly develop an alternative assessment for those students whose disabilities, make it impossible for them to take the conventional test (recall, the IDEA required the state to have an alternative test in place as of July 2000).[157]

In September 2002, the Ninth Circuit Court of Appeals reversed much of the district court's ruling. It found that, while the right to participate in statewide testing must be meaningful, this fact does not require a prohibition on the state from exercising its traditional authority to set diploma requirements.[158] The Ninth Circuit held that the questions of whether the state is remiss in not yet having established an alternate assessment was not ripe for adjudication. The court did uphold the district court's determination that students with disabilities must be able to take the California exam with those accommodations and modifications provided in their IEP or Section 504 plans.[159]

The fight will continue, and in fact, the Ninth Circuit's ruling may mainly serve to extend its timetable. Any issues of ripeness will be mooted once California begins withholding diplomas from students with disabilities who fail to pass the exam.

California's exit exam program has been pulled together quickly at the urging of Governor Gray Davis; Davis wants the state to adopt the toughest standards in the nation, but wants to impose a high stakes test to measure this in a very short period of time.[160] Such a short timeline can be problematic for all students, especially for children with special education needs who may require plenty of lead time in order to demonstrate their competency. The California exam, which is supposed to become a graduation requirement for the class of 2004, covers math and language arts. In the spring of 2001, it was given for the first time, on a voluntary basis, and ninety-one percent of the students with disabilities who took it failed the math portion; eighty-two percent failed the language arts

157. *Id.*

158. *9th Cicuit Turns Back on Lower Court's High Stakes Test Revisions*, Sch. L. Bull. (LRP Publications Jan. 24, 2003).

159. *Id.*

160. Regina Apigo, *Sparks Fly Over Plan for Exit Examination: Critics Say Governor is Moving too Fast*, The Press Enterprise (Riverside, Cal.) A01 (Jan. 10, 2000).

portion.[161] The district court's ruling seemed to indicate that it intends to actively ensure a level playing field for students with disabilities; if so, and if the Ninth Circuit does not stand in the way, it will continue to pave new ground.

2. Oregon: A.S.K. v. Oregon State Board of Education, *settled, 1999*

An Oregon class action suit much like *Chapman* has recently been settled by the parties. The *A.S.K.* case in Oregon involved a suit by concerned parents, through a disabilities rights advocacy group, on behalf of a class of students with disabilities who were challenging the validity of a new statewide exit exam. As of last year, tenth grade students in Oregon must achieve a passing grade on a standardized test, which is part of the Certificate of Initial Mastery (CIM) testing system,[162] in order to earn a mastery certificate. According to the plaintiffs, a student who fails any of the tests may be required to repeat tenth grade, may be required to attend summer school, may be shut out of the school's honors program, may not graduate from high school, may be denied admission to Oregon's state colleges, and may be disadvantaged in seeking employment.[163]

Plaintiffs claimed that the testing program discriminates against students with learning disabilities because it did not take the needs of such children into account, and the test failed to allow children with disabilities an opportunity to demonstrate their competency. The testing program included a required handwritten essay, a format with which many students with learning disabilities such as dyslexia could not comply. The suit alleged that the Oregon school boards had refused to allow appropriate and easy accommodations such as spell-check programs in violation of federal and state law. Just as in California, Oregon Department of Education officials took the position that only students who took and passed the test

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161. Fine, *supra* n. 156.

162. The CIM testing program emanates from the controversial Oregon Educational Act for the 21st Century, a 1991 state law that seeks to bring standards-based reform to Oregon's public school system. A.P. St. & Local Wire, *Parents Plan to File Lawsuit Claiming Reform Law Discriminates* (Feb. 22, 1999).

163. P.R. Newswire, *ASK Advocates Class Action Lawsuit Charges that School Assessment Tests Discriminate Against Learning Disabled Students in Oregon Schools* (Feb. 22, 1999).

under "standard administration procedures" were eligible to obtain a diploma.

The parties reached a settlement through mediation in February 2001.[164] The process was unusual. As part of the settlement, a panel of experts studied the state's assessment program and the ways in which it relates to students with disabilities. The panel found that Oregon's list of acceptable accommodations for students with learning disabilities was too limited. In response, the Oregon Department of Education agreed to broaden that list. It promised to allow the same accommodations students use in their classrooms unless the state can prove that those accommodations invalidate test results.[165] The state also agreed to provide an alternative assessment for those students whose accommodations would invalidate test results (again, IDEA required this several years ago).

3. Indiana: Rene v. Reed, *751 N.E.2d 736 (Ind. Ct. App. 2001)*

In the spring of 2000, an Indiana Superior Court judge refused to grant an injunction that would have kept the state from withholding a high school diploma from diploma-track seniors with identified disabilities who failed to pass the state's new Graduation Qualifying Examination.[166] Although the GQE was first implemented in 1997, the Class of 2000 was the first to feel its sting. Eighty six percent of seniors passed both the English and Math portions of the test; they had five opportunities to do so.[167] Twenty-one percent of special education students in the diploma track – more than 1,000 children – did not pass the exam and were not eligible for a waiver that would have allowed them to receive a diploma despite their failure to pass the test.[168]

The judge found that, despite the fact that these students had met all other degree requirements, and despite the serious negative consequences likely to flow to the students from the

164. Steven Carter, *State Agrees to Rethink Testing Rules for Students* The Oregonian (Feb. 2, 2001).

165. *Id.*

166. Michele Solida, *Special Ed. Seniors Not Exempt: Judge Denies Injunction to Allow Diplomas to Those Who Failed Exit Exams; Lawsuit Still Pending,* Indianapolis Star B01 (May 31, 2000).

167. *Id.*

168. *Id.*

denial of their high school diplomas, the law is fair and likely to be upheld.[169] In defense of her ruling, the judge pointed out that the state has a public interest in "ensuring that an Indiana high school diploma is worth more than the paper it is written on."[170] The Indiana Civil Liberties Union, which brought the case on behalf of the students, saw it differently. They maintained that the state had moved too quickly in implementing the diploma testing, particularly where children with disabilities were concerned. "This is not about the state setting standards or changing things," they have said, "[i]t is about fairness."[171] The Indiana Supreme Court recently refused to hear the case on appeal[172] ending the issue and leaving the graduation exam requirement in place.

The results in these three cases are varied – students with disabilities lost the suit in Indiana, settled the suit in Oregon, and have had mixed results so far in California, all on relatively similar facts and all citing the same core cases. This complicates predicting which direction courts will go from here, but these cases will help define the possibilities.

E. Massachusetts: Student 1 v. Driscoll, *C.A. No. 02-30152-MAP (D. Mass. Sept. 19, 2002), refiled, C.A. No. 03-0071 (Mass. Super. 2003)*

Most recently, several unidentified students in Massachusetts filed the first legal challenge to that state's new high stakes exit exam, the Massachusetts Comprehensive Assessment System (MCAS) claiming that the state has not adequately prepared students for the assessments, and that the MCAS discriminates against minority students in violation of the Equal Protection clause.[173] Plaintiffs, who are members of the Class of 2003, the first class of students that will be subject to denial of a diploma for failure to pass the math and English portions of the test, insist that the MCAS is an inappropriate and illegal graduation requirement and that

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169. *Id.*

170. *Id.*

171. Michele Solida, *Lawyers Battle Over Test Waivers for Special Education Students: Judge Will Decide if 1,000 Marion County Seniors Can Get Diplomas Without Passing State-Mandated Examination*, Indianapolis Star A02 (May 26, 2000).

172. 2002 Ind. LEXIS 101 (Ind. 2002).

173. John Gehring, *Massachusetts Sued Over Graduation Tests*, 22 Educ. Week 17 (Oct. 2, 2002).

education officials exceeded their authority under state law in imposing it. They also claim that it violates the Due Process clause and Section 504.[174] The suit was originally brought in September 2002, in federal district court, but that court refused to hear it, saying that federal courts had limited jurisdiction over claims centered on alleged violations of state law. In January 2003, the suit was re-filed in state court.[175]

Approximately 12,000 students in the 64,000 member Class of 2003 have been unable to pass the test so far. Of that group, roughly forty-four percent of African-Americans in the current senior class and fifty percent of Hispanic students still have not passed the test after several years of trying. They had additional opportunities in December 2002, May 2003, and again in the summer of 2003, if they participate in a summertime remedial program.

As with other challenges to exit exams, it is unclear what the appropriate remedy would be for victorious plaintiffs, and at this stage in the school year, while students still have chances to pass the test, it is not clear that the challenge is ripe for judicial review. Parent opposition to the MCAS has been substantial, and the case promises to be argued in the media as well as in the courts.

V. BACKLASH

Even where they are imposed in complete accordance with the law, one factor predominates the administration high stakes exams – children fail them, often in massive numbers. Initial failure rates of thirty or forty percent for the general student population are not unusual for exit exams.[176] Research shows that a common pattern presents itself in most states – in the earliest phases, large numbers of those tested fail, scores then steadily improve, level-off, and after several years, fall-off somewhat.[177] Even after the phase-in period, children fail state exit exams by the thousands; since 1994 in Texas alone, nearly

174. *Id.*; *see also* Anand Vaishnav et. al., *Lawsuit to Allege MCAS is Widely Discriminatory*, Boston Globe A1 (Sept. 19, 2002).

175. *See* Anand Vaishnav, *Fight Against MCAS Renewed in State Suit*, Boston Globe B3 (Jan. 8, 2003).

176. David Hoff, *Testing's Ups and Downs Predictable*, Educ. Week 1 (Jan. 26, 2000).

177. *Id.* at 12.

40,000 children have been denied diplomas for failure to pass that state's high stakes exam.[178]

In addition to the soaring numbers of children who are denied promotion or diplomas because they fail high stakes exams, large numbers of children are believed to be dropping out of school in anticipation of failure.[179] Cheating is also believed to be proliferating in the wake of high stakes tests, not only by anxious students, but by teachers and school districts who also face severe repercussions for poor student test performance.[180] Add in widespread fears that preparing children to take such exams forces teachers to narrow the curriculum and "teach to the test," concerns about damage to students' self esteem, and the effects of unrelenting pressure in the classroom, and it is not surprising that many people, especially parents, are coming to believe that these testing programs should be abandoned. Nationwide there appears to be a growing retrenchment from, and general backlash against, the imposition of high stakes exams in general, especially those tied to the issuance of high school diplomas.

To date, the response of policymakers has generally been to try to put out the fire without abandoning the tests; many have agreed to lowering the passing score, at least in the early years of testing, extending the phase-in period, and other concessions. Concessions have, in turn, infuriated advocates for rigorous testing who see the concessions as an abandonment of reform.

Some states have taken moderate steps to address these concerns. In Nevada, for example, parent protests prompted education officials to give students more chances to pass its new, rigorous exit exam.[181] Like many states, Tennessee relies

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178. Hotakiainen, *supra* n. 142.

179. Scott Greenberger, *Hispanic Drop-out Rate Up Sharply; State Survey Finds Levels Up for Other Minorities*, Boston Globe B1 (Aug. 15, 2000).

180. Educators and administrators face high stakes as well, and have, in a number of instances, been found to inflate scores. In Maryland, where schools that improve scores on certain tests split several million dollars each year, the principal of an affluent suburban school recently resigned after fifth graders revealed that he and a teacher gave them answers to a standardized test. Carolyn Kleiner, *Test Case: Now the Principal's Cheating*," U.S. News & World Rep. (June 12, 2000). There have been similar incidents in New York, Texas and Ohio. Adrienne Mand et. al., *Polls: High Stakes Tests Don't Test the Whole Student* (June 19, 2000) (available at <www.FoxNews.com>).

181. Peter Schmidt, *Colleges Prepare for the Fallout from State Testing Policies*, The Chron. of Higher Educ. A26 (Jan. 21, 2000).

exclusively on exit exam performance in awarding diplomas, but in response to widespread concerns about fairness, the State is considering a shift to multiple measures of proficiency.[182]

In other states, the backlash against exit exams has been so strong that their testing programs were simply cancelled. This was the case in Arkansas where children are no longer required to pass tests, which were found to be too difficult. Arizona recently decided to put off its high stakes test until 2006 partly in response to widespread misgivings and concerns about legal challenges.[183] Wisconsin went even further and, in response to complaints of parents, recently backed away from plans to impose an exit exam at all.[184]

In addition to localized backlash efforts, something approaching a national boycotting movement seems to be developing as well. Many students are simply refusing to take high stakes exams over concerns about fairness and the watering down of the curriculum. In 2001 sixty percent of Scarsdale New York eighth-graders stayed home during the state tests.[185] Last year in California, approximately 50,000 students boycotted the state's high stakes exam.[186] Massachusetts has recently seen similar boycotts, and they are being considered in Virginia and Maryland, among other states.[187] Such boycotts are often led by concerned parents and involve the participation of many of the strongest students within a school.[188] This may have the effect of lowering a school's aggregate scores and possibly expose the school to adverse consequences. In the face of No Child Left Behind and its mandatory federal testing requirements, boycotters may have to either give up the fight or redouble their efforts.

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182. Claudette Riley, *State Exploring Non-exam Routes to Diploma*, The Tennessean 1B (Mar. 14, 2003).

183. Darcia Harris Bowman, *Delayed Again: Arizona Moves its High School Exit Exam to 2006*, Educ. Week (Sept. 5, 2001).

184. Debra Nussbaum, *Does School Testing Make the Grade?* N.Y. Times 14 (Dec. 12, 1999).

185. Marc Fisher, *Taking a Stand on Testing*, Wash. Post B01 (Mar. 25, 2003).

186. *Id.*

187. *Id.*

188. *Id.*

VI. LOOKING AHEAD

Taking a step back from recent cases and developments, it is possible to see several significant, emerging patterns.

A. Identifying Patterns

First, taken together, the relevant federal legislation and seminal case law can be read to yield a four-pronged test against which to measure any exit exam regime and, to a lesser extent, any high stakes test:

- Adequate notice and opportunity to prepare must be allowed; this notice must make it clear that passing the test is a prerequisite for obtaining a diploma and must allow for sufficient opportunity for children to prepare for the test.[189] Children with disabilities may require longer lead time than others.[190]

- The test must fairly test the material that was supposed to be, and actually was, taught.[191]

- Children with disabilities must be included in the testing.[192]

- Reasonable accommodations and/or alternate testing must be provided.[193]

Furthermore, an analysis of the case law also suggests a number of potentially significant factors:

- Suits challenging promotion exams are unlikely to succeed on due process grounds on the basis of a property interest.[194]

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189. U.S. Const. amend. XIV; *Debra P.*, 644 F.2d 397; *Debra P.*, 730 F.2d 1405; *Brookhart*, 697 F. 2d 179; *Ambach*, 436 N.Y.S. 2d 564.

190. *Brookhart*, 697 F. 2d 179; *Ambach*, 436 N.Y.S. 2d 564, *but see Rene*, 751 N.E.2d 736.

191. U.S. Const. amend. XIV; *Debra P.*, 644 F.2d 397; *Debra P.*, 730 F.2d 1405; *Anderson*, 520 F. Supp. 472; *Williams*, 796 F. Supp. 251; *Crump*, 797 F. Supp. 522.

192. *Goals 2000*, 20 U.S.C. § 5801 *et seq.*; *Title I*; *IDEA*, 20 U.S.C. § 1400 *et seq.*

193. *Goals 2000*, 20 U.S.C. § 5801 *et seq.*; *Title I*; *Americans with Disabilities Act*, *IDEA*, 20 U.S.C. §1400 *et seq.*; *Chapman*, 36 IDELR 91.

194. *Erik V.*, 977 F. Supp. 384; *Parents Against Testing Before Teaching*, 273 F.3d 1107.

- Suits seeking injunctions and/or other relief have been more successful where the students challenging the testing have met all other degree requirements.

- Suits have been most successful under Due Process (both procedural and substantive) claims. Conversely, claims under the Equal Protection Clause and Section 504 have generally been denied. IDEA suits have also had limited success to date, but issues pertaining to accommodations and the newly-enacted provision[195] requiring states to provide for alternate assessment mechanisms may make this a fruitful legal approach for plaintiffs.

The presence of factors such as the opportunity for re-testing and remedial programs[196] and the availability of alternate methods to obtain a diploma[197] may make courts more likely to uphold an exit exam program.

B. Broader Considerations

It seems important to take note of several sizable factors transforming high stakes testing. First, NCLB is just beginning to focus federal attention, power, and funding on holding schools to high expectations and stakes. NCLB effectively puts standards-based reform into every school, and we will see soon enough whether this produces positive results for schools. It is worth noting, however, that certain aspects of NCLB may actually serve as a disincentive for states to impose high stakes exit exams. Under NCLB, states must demonstrate adequate yearly progress toward their student achievement goals, and graduation rates are one of the factors that states must look to in determining which schools are underperforming. Graduation tests could, then, result in more schools labeled in need of remediation. In this new climate, some states may want to avoid or discontinue such tests.

Second, exit exams and other forms of high stakes tests are blooming all over America and it is likely that many states that have yet to adopt similar testing programs will soon place on

195. As of July 1, 2000.

196. *Mahavongsanan*, 529 F.2d 448; *Anderson*, 520 F. Supp. 472.

197. *Rene*, 751 N.E.2d 736.

the students' shoulders the consequences for student achievement. NCLB emphasizes systemic accountability (for schools, districts, and states), whereas promotion and exit exams are premised on individual accountability (for the students themselves). While these two concepts are not necessarily incompatible, they are not the same thing. Given the increased testing that will come with NCLB, it is even more important to determine what we wish to accomplish by testing students.

Third, as with NCLB, widespread commitment to raising standards should put the concept of individual accountability to the test. Simply put, if it works, student scores should rise significantly. If it fails, the losses will be significant. Regardless of whether most students benefit from the imposition of high stakes, many students will most likely not receive any benefit, and, consequently, the numbers of students dropping out of school or simply leaving with no diploma in hand will continue to rise. Concern for such casualties appears to be one of the main factors fueling the backlash against testing, and the tension continues to escalate as the tests have proliferated.

Fourth, where there is a backlash, there is litigation. Substantial litigation challenging high stakes exams is all but assured, and is likely to follow the precedents set in the relevant cases to date and culled in the section above.

Fifth, increased pressure to perform does not necessarily translate into improved performance. Indeed, it could be argued that making additional threats for failure to schools that already seem to have demonstrated that they do not know how to adequately stimulate student achievement can be counter-intuitive and may lead to increases in cheating on all levels. Reliance on higher stakes alone, without offers of guidance and other assistance, may serve to widen the gap between schools that work and schools that don't.

Tremendous amounts of money have been invested, sweeping legislation has been passed and, in numerous instances, courts have cleared the way for imposition of high stakes tests and the accountability they carry. It seems likely that the next few years in particular will bring a steep learning curve as well as rapid adjustments to state testing programs as experience tempers enthusiasm.