

Special Issues Affecting Inclusion of Students with Dyslexia in Statewide Assessments and Their Implications

by Kathleen B. Boundy and Joanne Karger

The importance of including all eligible students receiving special education under the Individuals with Disabilities Education Act (IDEA) in the State's assessment system cannot be overstated. Assessing performance based on subgroup population allows for heightened accountability to the students within the particular subgroups as well as to their parents. Information garnered from the data reflecting adequate yearly progress (AYP) generally encourages access to early identification and intervention; access to research-based reading instruction prior to student referral for special education programming and services; increased efforts to teach reading and math to grade level through additional and more effective specialized instruction and related services; and recognition of the need to utilize other methods and strategies for providing specialized instruction, for example, in English language arts, the use of assistive technology services and devices that focus on aural and visual instruction, such as voice synthesizers, books on tape, Kurzweil readers, images, photographs, documentary, and theatrical presentations.

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As discussed earlier in this issue, in the article entitled "Including Students with Dyslexia in the State Accountability System: The Basic Legal Framework," students with dyslexia, as all other students, have a right to participate effectively in the State accountability system, to be provided the opportunity to learn to meet the same standards established for all students, and to be provided the opportunity to participate in statewide assessments to demonstrate not only what they have learned and are able to do but what they need to learn to attain the State's high standards. Yet, despite their legal rights, students with dyslexia are vulnerable to being inappropriately assessed, and thus, inappropriately educated, based on invalid State assessments.

Overview of Selected Issues Related to Assessing Students with Dyslexia

State assessments may, in fact, be measuring for students with dyslexia,¹ their disability related needs (i.e., their limited ability to decode and their limited reading fluency) because States have elected to assess "reading," rather than the broader range of knowledge and rigorous and challenging skills sub-

sumed within English language arts. Under the No Child Left Behind Act of 2001 (NCLB), students must be assessed in subjects determined by the State, "including at least mathematics, reading or language arts, and (beginning in the 2005–06 school year) science..."² "Reading" is defined by statute as "a complex system of deriving meaning from print that requires all of the following:

- The skills and knowledge to understand how phonemes, or speech sounds, are connected to print.
- The ability to decode unfamiliar words.
- The ability to read fluently.
- Sufficient background information and vocabulary to foster reading comprehension.
- The development of appropriate active strategies to construct meaning from print.
- The development and maintenance of a motivation to read.³

As a matter of law and policy, the question must be asked, why students, in general, and students with reading or print disabilities, in particular, are being assessed solely on "reading" skills and not the broader academic content-based knowledge and skills within English language arts aligned with a State's academic content standards? Regulations promulgated by the U.S. Department of Education merely reiterate "reading or English language arts" without addressing the broader legal issues of exclusion and discrimination that are raised by States and local school districts assessing students based on a limited skill that is tied to a specific learning disability.

While some States have assessments that differentiate the construct being measured (e.g., reading for grades 3–5 and English language arts for grades 6–12), many States assess all students, regardless of grade, only based on reading and reading comprehension. To the degree that States limit their assessments to "reading" instead of assessing students based on the broader academic content standards subsumed by English language arts, those assessments deny students with dyslexia from fully and fairly participating in their State assessment and their State's accountability system. This exclusion can be harmful to the extent that information based on State assessments measuring only the construct of reading and comprehension of decoded text is being used to make school/district-based decisions about curricula choices, teaching, and instruction for all students.

Moreover, inaccurate inferences may also be being drawn from individual test scores attained by students with dyslexia on such assessments. Of particular concern is that members of individualized education program (IEP) teams, on the basis of invalid test results based heavily on reading outcomes for students with dyslexia, select disproportionate numbers of these students to be assessed (and all too likely taught) based on

modified achievement standards. While students assessed based on modified achievement standards are not precluded from graduating, their exposure to classes teaching higher order thinking skills and providing authentic learning opportunities is limited. Similarly, IEP teams may be using student performance on reading assessments to identify students for assignment in non-diploma tracks.

Because many states assess students in “reading” and not the more encompassing subject area of language arts, students with dyslexia routinely participate in State assessments without appropriate or reasonable accommodations authorized by IDEA or Section 504 of the Rehabilitation Act of 1973 (Section 504), respectively, because a “read aloud” accommodation, presumably, would invalidate the results of an assessment of “reading” and “reading comprehension.”⁴

The dilemma of students with dyslexia is exacerbated by the lack of any statutory or regulatory definition of “multiple measures.” NCLB explicitly requires that a State must establish a system of assessments that uses valid, reliable, multiple methods for measuring whether all students are reaching proficient and advanced levels of mastery of the State’s academic standards.⁵ Instead of helping to address some of the above described issues and concerns by ensuring that this statutory requirement is given meaning consistent with the purpose of NCLB and professionally recognized technical principles of testing and assessment,⁶ the U.S. Department of Education through its recently published Notice of Proposed Rulemaking,⁷ further obfuscated the meaning of “multiple measures.” The Department made no reference to the Senate Report describing the use and purpose of “multiple measures” to “encourage States to move toward using new forms of assessments, such as performance based measures, for the purpose of determining AYP and for assessing the performance of children served under Title I Part A.”⁸ Contrary to providing direction that might include a performance or project assessment that would more accurately reflect what a student with dyslexia knows and can do, the U.S. Department of Education said nothing more than that multiple measures “[m]ay include– (i) [s]ingle or multiple question formats that range in cognitive complexity within a single assessment; and (ii) [m]ultiple assessments within a subject area.”⁹ Indeed, by reiterating what is already recognized under NCLB and its regulations, the Department does greater harm to the extent that its failure to identify additional tools and strategies is perceived as a rejection of such alternatives.¹⁰

Legal Implications of Not Meaningfully Including Students with Dyslexia in State Assessments

Use of Inappropriate Assessment [and Teaching] Based on Modified Standards

The strong presumption against applying lower standards to the education of students with disabilities under IDEA and NCLB is heightened by the mandates of Section 504 and the Americans with Disabilities Act (ADA). First, Section 504 and its long-standing regulations require that students with disabilities not be discriminated against or denied comparable aids, benefits, or services.¹¹ Setting lower standards for certain students with disabilities will inevitably mean that most of the selected students will not be taught the skills and bodies of

knowledge expected for all students, at the levels expected for all students, to the extent that level of knowledge and skills are not included in the same form, depth, and rigor in the modified standards. Rather, the lower standards will set the ceiling of their education as the standards are incorporated into their IEPs and their overall instruction. Such a result violates Section 504, at least in those cases where there is not irrefutable proof that giving any such student the same access to the same level is utterly pointless.

In permitting the adoption of lower standards (i.e., less challenging, modified standards at reduced levels of difficulty) for these students on the basis of their disabilities, the NCLB regulations¹² authorize an intentional classification on the basis of the students’ disabilities, as well as one that has the effect of subjecting them to lower standards—both in violation of the Equal Protection Clause of the Fourteenth Amendment. Again, even if one were to concede that there are some instances where, on the basis of a student’s disability, the student may be denied full access to the same level of public education as other students, this scrutiny would require the most careful tailoring to avoid overinclusion in such a category and ensure that students are not unnecessarily denied such access.

Such a case may likely be posed by students with dyslexia who may be capable of demonstrating mastery of the knowledge and skills required for all other students being assessed based on the State’s regular content and achievement standards if the students with dyslexia: 1) were assessed based on broader constructs for language arts, and not merely reading and decoding skills that define their disability;¹³ 2) were assessed using multiple measures that are designed to help ensure the accuracy of the inferences being made about the student’s knowledge, skills, and levels of learning; and 3) were provided appropriate accommodations, e.g., “read aloud” services for those items that do not specifically measure decoding and comprehension based solely on decoding.

Regulations under Section 504 state that to be “equally effective,” an aid, benefit, or service “must...afford [disabled] persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement...”¹⁴ Such is not the case when a student with dyslexia who cannot decode with fluency continues to be assessed based on the narrow subset of “reading” skills and not the fuller set of skills intended to be assessed in language arts, for example, through a performance assessment that would enable the student to demonstrate his or her knowledge and skills in comprehension, inference, tone, voice, grammar, etc. To the extent that incorrect inferences are being drawn from such an inappropriate assessment and relied upon to limit a student’s opportunities to learn, the student’s rights under Section 504 are violated. The evidence may show, for example, that schools are relying upon such an assessment that a student with serious dyslexia cannot decode at a sufficient level of fluency to restrict instruction by focusing on lower level standards of achievement. It may also show that incorrect inferences are relied upon to limit student access to programs, courses, and curriculum providing opportunities to learn higher levels of knowledge and critical thinking skills.

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Failure to Adopt and Implement Multiple Measures

As noted above, the use of multiple measures of assessment is particularly important for students with dyslexia because these students would be able to demonstrate an understanding of the subject matter beyond their ability to decode particular text. Indeed, the “multiple measures” requirement of NCLB¹⁵ arguably mandates, as Section 504, that States develop an alternate assessment aligned to grade-level standards so as to enable these and other students, in particular those who because of their disability are unable to participate meaningfully in the State assessment and accountability system, to do so effectively.

It is apparent that the prime reason for having multiple measures has been largely ignored by the U.S. Department of Education,¹⁶ that is to ensure validity and reliability of the judgments about proficiency, as required by the statute and nationally recognized professional and technical standards,¹⁷ by providing *multiple ways* for students to demonstrate proficiency in the *same* skills and knowledge. As discussed above, the failure to implement and enforce this requirement properly has seriously adverse consequences for students with disabilities, for example, those with dyslexia, who are especially prone to being wrongly identified based on incorrect inferences drawn from invalid assessments that they are, in fact, unable to learn at the same level of difficulty and within the same timeframe as their peers without disabilities. To the extent that these individual students can demonstrate that their education and future livelihood have been harmed as a result of these practices, they have a basis for exploring the viability of claims of discrimination.¹⁸

Failure to Provide Appropriate Accommodations

IDEA 2004 requires that the IEP include a statement of any individual appropriate accommodations that are necessary to measure the academic and functional performance of the child on State and districtwide assessments.¹⁹ While this provision suggests using accommodations necessary for students to participate in the assessment even if the accommodations invalidate the test score, the U.S. Department of Education’s most recently promulgated regulations pertaining to assessments state to the contrary. The final regulation requires States to develop accommodation guidelines for providing appropriate accommodations; to identify only those appropriate accommodations for each assessment that do not invalidate the score; and to instruct IEP teams to select for each assessment only those accommodations that do not invalidate the score.²⁰ It is obvious that providing a student (e.g., a student with dyslexia, who, as a result of that disability, cannot read or decode text) a “read aloud” accommodation on a “reading” assessment will change the construct being measured and, thus, allow inferences that are not accurate to be drawn from the assessment results. Providing a “read aloud” accommodation to a student with dyslexia on those particular items designed to assess “reading” (i.e., decoding, phonemic awareness/knowledge, and word recognition) may not be an appropriate accommodation for these particular students.

Even if the test items were left blank or not scored, this would confirm for educators and parents the level of student performance on the state standards.

However, if a student with dyslexia were administered a broader “language arts” assessment and provided a “read aloud” accommodation for all items other than reading/decoding, the use of the accommodation would enable the student to access information on the test as well as the test questions, and to demonstrate his or her broader knowledge of literacy and comprehension of information alternatively presented (i.e., aural, oral, through technology, or other modalities). Except when the construct being assessed by the test item(s) is the ability to “read,” “decode text,” or “comprehend decoded text,” an oral accommodation such as “reading aloud” test items to assess a student’s comprehension of information and knowledge of literary information should be considered an appropriate accommodation and not construed as a non-standard accommodation with restrictive conditions placed upon its use.

Many students with specific learning/reading disabilities struggle greatly with decoding text, yet have strong comprehension skills when access to information is provided through alternative modes that include: auditory, tactile, visual, and a combination of auditory and visual modalities. Similarly, individuals who are visually impaired may not be able to decode text and participate in the State assessment without an accommodation that allows them access to the information and questions in the text on which their comprehension is being assessed. The failure to differentiate between decoding skills and the broader comprehension of information and range of literary knowledge that are within the scope of the academic content standards embedded in a language arts curriculum denies the meaningful and effective participation of students with specific learning disabilities, who are otherwise unable to participate. Moreover, the failure to distinguish between decoding and broader comprehension is inconsistent with the requirements of NCLB and State law, and constitutes discrimination under IDEA, Section 504, and the ADA. Furthermore, this failure to provide appropriate accommodations for those items, e.g., those on the “language arts” assessment, may likely lead the IEP team to use invalid test results to make decisions to limit student participation to alternate assessments aligned with different and reduced standards of learning.

Failure to Develop Alternate Assessments Based on Grade-Level Standards

It is problematic and arguably in violation of Section 504 that so few States have developed an alternate assessment that is aligned with grade-level content and grade-level achievement standards, which students are expected to learn within the same timeframe established for all other students. An alternate assessment based on regular grade-level achievement standards (i.e., not less challenging or rigorous standards) would most likely be a performance assessment such as a portfolio or project that incorporates the high-level knowledge and

skills being assessed to demonstrate proficiency and advanced knowledge and skills. It would in all likelihood be particularly beneficial for students with dyslexia or other specific learning disabilities that impede drawing accurate inferences of their actual knowledge and skills. The student with dyslexia should not be precluded from being assessed based on actual grade-level achievement standards and thus being taught to the highest standards expected for non-disabled students because the student's disability may impede his or her ability to decode and read with fluency. The failure to provide the student with dyslexia or any student with a disability an opportunity to demonstrate proficiency on grade-level standards violates the student's rights to participate in the State accountability system through State assessments under Section 504 and the ADA. Students with disabilities who are unable to take the regular assessment with accommodations are being constructively denied the opportunity to demonstrate what they know and can do based on regular grade-level standards. These students do not fall within the definition of those covered by the 1% rule (i.e., those students with the most significant cognitive disabilities²¹); nor is there a basis for assuming that they are unable to learn to grade-level standards within the same school year timeframe, and must, therefore, be assessed based on modified achievement standards.

Exclusion from the Four-Year Graduation Rate

The practice of denying, on the basis of disability, a qualified student with a disability the opportunity to be included and to benefit from the use and effect of the four-year graduation rate set for all other students also violates Section 504 and the ADA.²² Failure to include students with disabilities in the "on time" graduation rate would, for example, deprive them of the effect of the incentive imposed by the requirement on schools and school districts to identify struggling students, provide them with the necessary interventions, and provide them with effective instruction by highly qualified teachers so as to ensure that they meet the same standard set for all.

Under Section 504, a recipient of federal funds may not utilize criteria or methods of administration that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability.²³ Similarly, according to regulations implementing the ADA, a public entity may not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.²⁴ Public school students with disabilities who require special education and/or related services receive such services either through implementation of an IEP developed in accordance with IDEA or a plan developed under Section 504.²⁵

It is unlawful to deny a student on the basis of disability inclusion in an indicator of program effectiveness (in this case, the expected four-year graduation rate) that is certainly perceived as a benefit for making schools and school districts more accountable to the affected students, solely because of that student's need for special education or related aids and services or because that student has an IEP or a plan under Section

504. The practice of excluding from or conditioning inclusion in assessments, public data reports, programs, or an indicator of effectiveness such as a graduation rate by an otherwise qualified student with a disability on the forfeiture of special education or of related aids and services to which the student is legally entitled, also violates Section 504 and the ADA.

Moreover, the requirement for individualized determinations under IDEA is violated when schools ignore the student's individual needs and automatically deny a qualified student with a disability needed programming and/or related aids and services in the four-year program that defines the general education curriculum for all students without disabilities. When an IEP team proposes that a student will take an alternate assessment on a particular State or districtwide assessment, the student's IEP must include a statement explaining why he or she cannot participate in the regular assessment and, perhaps more significantly, why the particular alternate assessment selected is appropriate.²⁶ The same protection should be applied when an IEP team determines that a student with a disability cannot be expected to participate successfully in the regular four-year track.

Once the door is open to exempt school districts from meeting State accountability standards, the premise of NCLB becomes nonoperative.

The legality of any exclusion from the State's accountability system established for all students, including being provided a curriculum and instruction necessary to attain the expected graduation with a regular high school diploma within four years, can arguably only be justified if explicit criteria are met through a decision-making process that ensures that students who are exempted from inclusion in the indicator will be taught the knowledge and skills in the general education curriculum to the maximum extent appropriate.

Once the door is open to exempt school districts from meeting State accountability standards, the premise of NCLB becomes nonoperative. It is inconsistent with the premise of NCLB to exclude from the "on-time" graduation requirement students with disabilities (e.g., dyslexia), who are *not* incapable on the basis of their disability of participating in the general education curriculum aligned to State standards, and who, through their right to free appropriate education (FAPE), receive specialized instruction tailored to their unique needs and designed to enable them to meet the same State education standards expected to be attained by all. The core structure of NCLB creates a presumption that, for all students not achieving proficient or advanced performance standards in relation to the full range of State standards, the quality of their instruction needs to be improved. Similarly, failure of students with dyslexia to meet the on-time graduation requirement suggests that the State ought to be reviewing the school or district's

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efforts to provide effective and appropriate education to *these students*, including through extended school day and school year services to the extent the students require (as a result of their disabilities) additional time and support to attain the standards set for all.

As evidenced by actual data, there is no reason why the vast majority of students with disabilities who have the cognitive ability, but whose learning may be impeded by their disabling conditions, cannot attain the standards set for all and be graduated “on-time” with a regular high school diploma with their age and grade-level peers. Just as some students without disabilities (who cannot be identified in advance) will not meet the State standards, so too certain students with disabilities (whom we again cannot identify in advance) will not attain the State standards necessary to be graduated with a regular high school diploma on-time. As in the case of students without disabilities, this is why NCLB requires attention to these students when they do not. The inability of these students to graduate with the four-year cohort does not compromise their rights under Section 504 or the IDEA.

Conclusion

Both the reauthorization of Title I/NCLB and the IDEA are pending before the 110th Congress. It can be anticipated that there will be significant changes to NCLB, including, perhaps, dramatically changing the meaning and consequences of gaps in AYP to a more constructive and less punitive approach, consistent with an effective continuous improvement model for all schools that seek to improve in some area. It is especially in the interest of all students who struggle to learn that the core provisions of the Act remain intact, that is, those governing implementation of key elements of a high-quality academic program that will enable children to achieve in the first place (e.g., enriched and accelerated curriculum, effective instruction, timely and effective individual attention). What can also be expected is that through the reauthorization of IDEA, there will be a push backwards away from alignment with NCLB under the guise of individualization. In the effort to ensure that students with disabilities are included in State accountability and assessment systems most, if not all of the above described issues, will also need to be addressed.

References

1. Dyslexia is defined as: ...a specific learning disability that is neurological in origin. It is characterized by difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities. These difficulties typically result from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction. Secondary consequences may include problems in reading comprehension and reduced reading experience that can impede growth of vocabulary and background knowledge. This definition was adopted by the International Dyslexia Association (IDA) Board of Directors (Nov. 12, 2002) and is used by the National Institute of Child Health and Human Development (NICHD). See <http://www.dyslexia-ca.org/dyslexiadefinition.html>
2. 20 U.S.C. §6311(b)(1)(C)(emphasis added).
3. 20 U.S.C. § 6368(5).
4. This would be inconsistent with 34 C.F.R. § 300.160(b)(2)(ii).
5. 20 U.S.C. § 6311(b)(3)(C)(iii).

6. See *infra* note 16 (discussing the notion of multiple measures in the context of the *Joint Standards for Educational and Psychological Testing*).
7. 73 Fed. Reg. 22,020, 22,040 (April 23, 2008).
8. 103rd Congress, 2nd Session, S. Rep. No. 103-292 (Part I of 5) (June 24, 1994).
9. 73 Fed. Reg. 22,020, 22,040 (April 23, 2008) (proposal to be codified at 34 C.F.R. § 200.2(b)(7)).
10. See Center for Law and Education, *Comments on Proposed Rule for Title I: 34 CFR Part 200, 73 Federal Register 22020* (April 23, 2008).
11. 34 C.F.R. § 104.4(b).
12. 72 Fed. Reg. 17,748, 17,778, 17,779 (Apr. 9, 2007) (codified at 34 C.F.R. §§ 200.1(e), 200.6(a)(3)).
13. Dyslexia is characterized by difficulties with learning how to decode at the word level, to spell, and to read accurately and fluently. See *supra* note 1.
14. 34 C.F.R. § 104.4(b)(2).
15. 20 U.S.C. § 6311(b)(3)(C)(vi).
16. This is evident in the U.S. Department of Education’s recent Notice of Proposed Rulemaking for Title I/NCLB. 73 Fed. Reg. 22,020 22,040 (Apr. 23, 2008) (proposed regulation at § 200.2(b)(7)).
17. According to Standard 13.7 of the *Standards for Educational and Psychological Testing*, “...in elementary or secondary education, a decision or characterization that will have a major impact on a test taker should not automatically be made on the basis of a single test score. Other relevant information... should be taken into account if it will enhance the overall validity of the decision.” American Educational Research Association, American Psychological Association, and National Council on Measurement in Education (1999). *Standards for Educational and Psychological Testing* (p. 146). Washington, DC: American Psychological Association.
18. It is also possible that subgroup students other than those with disabilities would have similar legal claims for challenging their exclusion on the basis of inaccurate inferences being made based on the assessment.
19. 20 U.S.C. § 1414(d)(1)(A)(i)(VI)(aa).
20. 34 C.F.R. § 300.160(b).
21. In late 2003, the U.S. Department of Education amended the NCLB regulations to recognize that States may develop an alternate assessment based on alternate achievement standards for a very limited set of students with the most significant cognitive disabilities. Under these regulations, States may include in AYP calculations test scores of up to 1% of all students assessed (or approximately 9% of students with disabilities receiving special education) who score proficient or advanced based on their performance on an alternate assessment based on alternate achievement standards. 68 Fed. Reg. 68,698, 68,702-68,703 (Dec. 9, 2003) (codified at 34 C.F.R. §§ 200.6(a)(2)(ii)(B), 200.13(c)(2)(i)).
22. 34 C.F.R. §§ 104.4(a), (b); 28 C.F.R. §§ 35.130(a), (b).
23. 34 C.F.R. § 104.4(b)(4).
24. 28 C.F.R. § 35.130(b)(8).
25. 34 C.F.R. § 104.33.
26. 20 U.S.C. § 1414(d)(1)(A)(i)(VI)(bb).

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