

# Including Students with Dyslexia in the State Accountability System: The Basic Legal Framework

by Joanne Karger and Kathleen B. Boundy

A cohesion created by two federal statutes has raised expectations and opportunities for students with disabilities, including students with dyslexia, to learn to the same standards set for all students. Title I of the Elementary and Secondary Education Act (ESEA), reauthorized and amended as the No Child Left Behind Act of 2001 (NCLB), created a framework for enhanced State, district, and school-level accountability for improved educational outcomes for all students. Title I/NCLB, in turn, provided a critical backdrop for the 2004 reauthorization and amendment of the Individuals with Disabilities Education Act (IDEA). These two statutes together have lifted expectations for learning and have underscored the legally enforceable rights of students with disabilities to be effectively taught by highly qualified teachers, to be provided an opportunity to learn to the same high standards as their peers without disabilities, and to be included in all State and district-wide assessments. Protections provided under Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act (ADA) and grounded in the Fourteenth Amendment of the U.S. Constitution also ensure that students

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with disabilities are not subject to discriminatory policies and practices. Rather, these students must be provided meaningful opportunities to learn the knowledge and skills necessary to attain proficiency on their respective State standards; full and fair opportunities to demonstrate their level of mastery of State standards through participation in appropriate assessments used to improve their instruction and learning; and equal opportunities to be counted in the publicly reported data system that is used to hold schools, districts, and States accountable for the academic performance of all students.

This article will address the panoply of legal rights and protections associated with the inclusion of students with dyslexia in the State accountability system. Participation in this system is critical to ensure that students with dyslexia are effectively taught a rigorous curriculum and learn to proficient and advanced standards. This article lays the foundation for the other articles in this issue, including “Special Issues Affecting Inclusion of Students with Dyslexia in Statewide Assessments and Their Implications,” which discusses the legal implications for students with dyslexia who are assessed, and thus taught, based on

modified achievement standards, who are assessed using limited assessment instruments or without appropriate accommodations, and who do not graduate “on time” with their peers.

## **Overview of the Legal Framework for Enhanced Accountability Under NCLB and IDEA**

When NCLB was enacted in January 2002 to reauthorize and amend Title I of the ESEA (as originally enacted in 1965), it expanded the assessment and accountability requirements that accompanied the sweeping 1994 amendments to Title I. The 1994 amendments, adopted under the Improving America's Schools Act (IASA) of 1994,<sup>1</sup> had opened the door to the inclusion of all students in standards-based reform. NCLB went even further by requiring States that receive funds under Title I, Part A to improve the quality of education for disadvantaged children. Moreover, the statute holds *all* public elementary and secondary schools and school districts (regardless of whether they receive Title I, Part A monies) accountable for making sufficient, continuous improvement toward the goal of ensuring that *all* students reach “proficiency,” as defined by the State, by 2013-14.<sup>2</sup> Today, all States receive federal funds under Title I/NCLB, and the system for assessing and reporting on school achievement levels and for determining whether schools are making adequate yearly progress (AYP) must include all public schools within each State. As Congress expressly declared, the Act's purpose is “to ensure that *all* children have a fair, equal and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”<sup>3</sup>

Accordingly, students with disabilities enrolled in publicly funded education programs, including students with dyslexia, must, as all other public school students, be included in their respective State accountability systems. Each State recipient of funds under NCLB is required to establish a single statewide system of accountability designed to reduce the achievement gap between higher and lower achieving students, including students with disabilities in need of special education under IDEA. The mandated State accountability system is comprised of a) State adopted academic content standards and academic achievement standards in, at a minimum, mathematics, reading/English language arts, and science; b) a system of assessments using multiple measures and aligned with the State academic standards; and c) publicly reported data of progress by students in meeting annual measurable outcomes (AMOs) for each State, local school district, and school. The latter is to be disaggregated by certain groups—race/ethnicity, limited English proficiency, migrant status, economic disadvantage, and disability as defined by IDEA.<sup>4</sup> Disaggregating the data makes it possible to identify what portion of each subgroup of students assessed is proficient and where more attention is needed.

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Moreover, disaggregation helps ensure that all students attain AYP or enough continuous improved progress to attain their respective State's defined goal of "proficiency" by 2013-14.

Congress, in reauthorizing and amending IDEA in 2004 (IDEA 2004), added new findings and amended the purpose of the Act to connect implicitly and expressly with Title I/NCLB.<sup>5</sup> For example, new findings acknowledge that the education of students with disabilities is more effective by having "high expectations" for these students and by

ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible in order to... meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and ... [by] coordinating this title with other local, educational service agency, State and Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965, in order to ensure that such children benefit from such efforts and that special education can become a service...rather than a place...<sup>6</sup>

Other statutory changes that were introduced (discussed below) further aligned IDEA with NCLB by ensuring that students with disabilities fully participate in the State accountability system through access to the general curriculum aligned to State standards adopted consistent with NCLB, through mandatory inclusion in all aspects of State and district-wide assessments, with accommodations as necessary, and through public reporting of disaggregated results.

### Specific Components of the Legal Framework for Enhanced Accountability

As described above, the framework for enhanced accountability under Title I/NCLB, which was later reinforced by the 2004 reauthorization and amendment of IDEA, consists of three components: a) State adopted academic content standards and academic achievement standards; b) a statewide system of assessments using multiple measures and aligned with the State academic standards; and c) publicly reported data of academic progress by students in attaining AYP for each State, local school district, and school. This section describes each of these three components in more detail.

#### Academic Standards

Under NCLB, each State is required to adopt challenging academic content and achievement standards to be used by the State, its local educational agencies, and its schools.<sup>7</sup> The academic content standards specify *what* students are expected to know and be able to do; the academic achievement standards determine *how well* students have mastered the content standards and describe at least three levels of achievement (basic, proficient, and advanced).<sup>8</sup> Dispelling any doubt about the inclusion of students with disabilities, the language of NCLB clearly requires the adoption and use of the *same* academic standards for *all* students in the State, without exception.<sup>9</sup> By

law, States are required to adopt academic standards for all public elementary and secondary school children in at least mathematics, reading or language arts, and science, which must include the same knowledge, skills, and levels of achievement expected of all children.<sup>10</sup> For other subject areas for which standards are not statutorily required and have not been developed, the State must have a strategy for ensuring that students with disabilities, including students with dyslexia, "are taught the same knowledge and skills in such subjects and held to the same expectations as are all children."<sup>11</sup> This latter provision, as Section 504, which ensures that "otherwise qualified persons" receive comparable aids, benefits, and services,<sup>12</sup> protects students with disabilities from being denied learning opportunities by being channeled into different courses and curricula based solely on disability.

IDEA was enacted under the Fourteenth Amendment to protect from discrimination children with disabilities who were subjected to a history of mistreatment, abuse, and exclusion. The statute was also passed pursuant to the Spending Clause of the Tenth Amendment, which means that States accepting federal monies under IDEA must comply with the substantive and procedural requirements of the statute. These requirements include providing all eligible children with disabilities with a free appropriate public education (FAPE), defined by the statute as special education and related services without cost to the parent that meet the standards of the State educational agency and are consistent with the student's individualized education program (IEP).<sup>13</sup> The U.S. Department of Education's implementing regulations define "special education" as "specially designed instruction," which involves "adapting, as appropriate to the needs of an eligible child... the content, methodology, or delivery of instruction... to ensure access of the child to the general curriculum, so that the child can *meet the educational standards within the jurisdiction of the public agency that apply to all children.*"<sup>14</sup> Thus, for an eligible child with a disability to receive FAPE today, the child must be provided specialized instruction that is aligned with the academic content and achievement standards adopted by the State, as required by NCLB.

Moreover, IDEA 2004, as amended, expressly requires that State performance goals for children with disabilities be "the same as the State's definition of adequate yearly progress [under NCLB] including the State's objectives for progress by children with disabilities."<sup>15</sup> A State's indicators for measuring progress must include "measurable annual objectives for progress by children with disabilities" under NCLB that are designed to enable them through access to the general curriculum to make AYP so as to attain the State defined standard of proficiency and goal for all students by 2013-14.<sup>16</sup>

#### Valid Multiple Measures for Assessing All Students

Under Title I/NCLB, each State must also include as a key component of its accountability system "a set of high-quality, yearly student academic assessments" that are aligned with the academic content and academic achievement standards estab-

lished for all students.<sup>17</sup> These assessments, which are intended to make schools more accountable to families, are the primary means for determining the yearly progress of the State and of each district and school in enabling all children to meet the State's academic content and achievement standards. The assessments must use valid, reliable, multiple methods for measuring whether all students are reaching proficient and advanced levels of mastery of the State's academic standards.<sup>18</sup> Moreover, the assessments serve as a means of reviewing the performance of a school overall, the performance of particular subgroups of students (based on race/ethnicity, limited English proficiency, migrant status, economic disadvantage, and disability status), and the performance and proficiencies of each individual student.<sup>19</sup> The State must provide evidence to the U.S. Department of Education from relevant sources (e.g., test publishers or other analysis) that the assessments are of "adequate technical quality for each purpose required" by NCLB and meet nationally recognized, professional and technical standards.<sup>20</sup>

Under NCLB, all students who have attended schools in the school district for at least a year must participate in State academic assessments in at least mathematics, reading/English language arts, and as of 2007–2008, science, in every grade from 3 through 8, plus at least once in grades 10–12.<sup>21</sup> States must enable all students to participate fully in their assessments

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by providing reasonable adaptations and accommodations for students with disabilities and, to the extent practicable, for students with limited English proficiency.<sup>22</sup> To help ensure full participation, each State's assessment system must include one or more alternate assessments for students with disabilities whose IEP team determines that they are unable to participate fully in the regular State assessments "even with appropriate accommodations."<sup>23</sup> Except for students with the most significant cognitive disabilities, for whom the State may choose to develop an alternate assessment aligned with alternate academic standards,<sup>24</sup> all other alternate assessments must yield results for the grade in which the student is enrolled.<sup>25</sup> Although few states provide such an option, an argument can be made based on Section 504 that each State must, at a minimum, provide an alternate assessment (e.g., a portfolio assessment) based on the same grade-level standards set for all.<sup>26</sup> Failure to do so may be discriminatory if students with disabilities who are unable to participate in the regular State assessment, even with accommodations, are constructively excluded from the State accountability and assessment system in violation of their rights to comparable benefits and services.<sup>27</sup> These students would be denied the opportunity to demonstrate what they know and can do, and to participate in appropriate assessments used to improve their instruction and learning.<sup>28</sup>

IDEA 2004 also requires all students with disabilities to participate in State and district-wide assessments, including those

prescribed by Title I/NCLB, with appropriate accommodations and alternate assessments where necessary and as indicated in their respective individualized education programs (IEPs).<sup>29</sup> Most students with disabilities are expected to participate in their State's regular assessment aligned with grade-level content and achievement standards, with or without appropriate accommodations. IEP teams determine which students cannot be validly or reliably assessed based on the regular assessment, even with accommodations, and therefore need to participate through an alternate assessment.<sup>30</sup> States must implement guidelines for alternate assessments and ensure that, to the extent they are used by a State, they are aligned with the State's challenging academic content and achievement standards under NCLB.<sup>31</sup> Even when the State elects to adopt an alternate assessment that measures achievement against alternate academic achievement standards, as permitted under the NCLB regulations only for students with the most significant cognitive disabilities,<sup>32</sup> the alternate achievement standards must be aligned with the State's academic content standards.<sup>33</sup> To the extent feasible, assessments must incorporate "universal design principles."<sup>34</sup> The term "universal design" refers to "a concept or philosophy for designing and delivering products and services that are usable by people with the widest possible range of functional capabilities, which include products and services that are directly accessible (without requiring assistive technologies) and products and services that are interoperable with assistive technologies."<sup>35</sup>

Subsequently promulgated NCLB regulations, published in April 2007, authorize States to develop modified achievement standards for "a small group of students whose disability has precluded them from achieving grade-level proficiency and whose progress is such that they will not reach grade-level achievement standards in the same time frame as other students."<sup>36</sup> Modified achievement standards that are challenging but less difficult than grade-level achievement standards<sup>37</sup> must still be aligned with grade-level academic content standards.<sup>38</sup> Modified achievement standards may not be defined for grade clusters (e.g., for grades 3–5 or 6–9).<sup>39</sup> Moreover, modified achievement standards are to be used only for a student whose IEP team has determined that, even with appropriate instruction and support services, the student will not meet grade-level proficiency over the course of the year.<sup>40</sup> Under the regulations, there is no limit on the number of students with disabilities who can be assessed based on modified achievement standards. However, no more than an additional 2% of all students assessed may be assessed on an alternate assessment based on modified standards *and counted as proficient on these standards*.<sup>41</sup>

To assess students with disabilities based on modified academic achievement standards, a State may choose to develop a new alternate assessment or to adapt an assessment based on grade-level academic achievement standards.<sup>42</sup> Each student's IEP team makes the decision whether or not the student needs to participate in an alternate assessment as part of the State or district-wide assessment. The IEP must include a statement explaining why the student cannot participate in the regular

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assessment and why the particular alternate assessment selected is appropriate.<sup>43</sup> This provision is a safeguard for students, in particular those with dyslexia or other specific learning disabilities, who, by definition, do not qualify for the alternate assessment based on alternate achievement standards, yet who may be at-risk of being disproportionately represented among students identified to participate in the assessment based on modified standards. Recently promulgated regulations require States to provide IEP teams with a clear explanation of the differences between assessments based on grade-level academic achievement standards and those based on modified achievement standards.<sup>44</sup> The explanation must address the effects of students' participation in one versus another assessment based on State or local school district policies, for example, whether a student must pass the regular assessment based on regular academic achievement standards, with accommodations as necessary, to attain a regular high school diploma.<sup>45</sup> Parents of students who are "selected to be assessed" based on modified academic achievement standards must be informed that their child's achievement will be measured based on the modified academic achievement standards.<sup>46</sup>

### Accountability—Public Reporting and AYP

Through required public reporting of data, schools and school districts are held accountable to parents and members of the school community for providing improved teaching and instruction for students with disabilities and for all struggling students. States must collect and "produce individual student interpretive, descriptive, and diagnostic reports...that allow parents, teachers, and principals to understand and address the specific academic needs of students" and to receive accurate data about the degree to which the school is enabling students to reach the school's learning goals and State standards.<sup>47</sup> The reported data include the number of students who did not participate in the assessment; however, currently the data do not include those who have dropped out or have been retained in a different grade.<sup>48</sup> Through report cards and other public reporting of data (including data disaggregated by race, ethnicity, LEP, disability, and low income status), schools and school districts are held accountable for failing to make AYP based, in large part, on the State assessment outcomes that trigger consequences over time for those schools and school districts receiving Title I/NCLB funding.

AYP is a measure of continued improvement necessary to meet by 2014 "proficiency" as defined by each State.<sup>49</sup> In addition to indicators such as school attendance at the elementary and middle school levels (95% required), participation in assessments (95% required), and high school graduation rate, AYP is based on academic assessments showing enough annual progress to bring all students in each district and school and students within each subgroup to a proficient level in English language arts and math by 2014.<sup>50</sup> If a school does not make AYP overall or for any subgroup over a specific period of time, students may exercise a right to transfer to a school making AYP, and the school must provide students with supplemental

educational services. In addition, States may impose professional development, restructuring, or other corrective action.<sup>51</sup>

Both NCLB and IDEA require States to report publicly and to the federal government the number and percentage of students with disabilities participating in regular assessments with and without accommodations, alternate assessments based on grade-level academic achievement standards, alternate assessments based on modified academic achievement standards, and alternate assessments based on alternate academic achievement standards.<sup>52</sup> Achievement results disaggregated by subgroup, including students with disabilities, must be posted unless the number of students assessed (i.e., the "n" size) is so small as to lack statistical reliability or to enable students to be personally identifiable.<sup>53</sup> For AYP decisions based on assessments in the 2007-08 school year, States were not allowed to establish a different minimum number or "n" size for purposes of publicly reporting achievement results for separate subgroups or for the school as a whole.<sup>54</sup>

### Conclusion

Title I/NCLB and IDEA have created a cohesion that has led to increased expectations for learning for students with disabilities and greater accountability for States, local school districts, and individual schools. Section 504 and the ADA, which are grounded in the Fourteenth Amendment and prohibit discrimination on the basis of disability, further serve to protect the rights of students with disabilities to learn to high standards and participate in State accountability systems. This article has described three components that comprise the framework for enhanced accountability under Title I/NCLB and IDEA: 1) the rights of students with disabilities to have meaningful opportunities to attain proficiency on their State's academic standards; 2) the rights of students with disabilities to participate effectively and appropriately in their State's assessments; and 3) the rights of students with disabilities to be included accurately in their State's accountability system. This framework for enhanced accountability has the potential to lead to improved educational outcomes for all students, including students with dyslexia and students with other disabilities.

### References

1. Pub. L. No. 103-382, 108 Stat. 3518 (1994).
2. 20 U.S.C. §§ 6311(b)(2)(A), (F).
3. *Id.* § 6301 (emphasis added).
4. *Id.* § 6311(b)(2)(G).
5. See 20 U.S.C. § 1400(c)-(d).
6. *Id.* § 1400(c)(5)(A), (C).
7. 20 U.S.C. § 6311(b)(1)(A).
8. *Id.* §§ 6311(b)(1)(D)(i)-(ii).
9. *Id.* § 6311(b)(1)(B).
10. *Id.* § 6311(b)(1)(C).
11. *Id.* § 6311(b)(1)(E).
12. 29 U.S.C. § 794(a), 34 C.F.R. § 104.4(b)(1).
13. 20 U.S.C. § 1401(9).
14. 34 C.F.R. § 300.39(b)(3) (emphasis added).
15. 20 U.S.C. § 1412(a)(15)(A)(ii). Prior law only required performance goals and indicators for children with disabilities to be "consistent, to the maximum extent appropriate, with other goals and standards for children established by the State" *id.* § 1412(a)(16)(a)(1997).

16. 20 U.S.C. § 1412(a)(15)(B).
17. *Id.* §§ 6311(b)(3)(A), (C)(i)-(ii).
18. *Id.* § 6311(b)(3)(C)(iii).
19. The requirement that State assessments serve as a way to review the performance and proficiencies of each student is compromised by the U.S. Department of Education's regulation authorizing State assessments to include norm referenced tests as well as criterion-referenced tests, the latter which measure how well students have, in fact, mastered specific content-based knowledge based on a fixed performance or achievement standard.
20. 20 U.S.C. §§ 6311(b)(3)(C)(iii), (iv).
21. *Id.* §§ 6311(b)(3)(A), (C)(v), (C)(vii).
22. *Id.* § 6311(b)(3)(C)(ix).
23. 34 C.F.R. § 200.6(a)(2)(i).
24. Through amendments to the NCLB regulations promulgated in late 2003, the U.S. Department of Education recognized that for a very limited set of students with the most significant cognitive disabilities, States may assess them with an alternate assessment based on alternate achievement standards. Under these regulations, States are authorized to 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)).
25. *Id.* § 200.6(a)(2)(ii)(A).
26. 29 U.S.C. § 794(a); 34 C.F.R. §§ 104.4(a), (b).
27. 29 U.S.C. § 794(a); 34 C.F.R. §§ 104.4(a), (b).
28. 29 U.S.C. § 794(a); 34 C.F.R. §§ 104.4(a), (b).
29. 20 U.S.C. § 1412(a)(16)(A).
30. *Id.*
31. *Id.* § 1412(a)(16)(C)(ii).
32. See *supra* notes 24-25 and accompanying text.
33. 20 U.S.C. § 1412(a)(16)(C)(ii).
34. *Id.* § 1412(a)(16)(E), 34 C.F.R. § 300.160(g).
35. 29 U.S.C. § 3002(19).
36. 72 Fed. Reg. 17,748 (April 9, 2007) (codified at 34 C.F.R. § 200.1(e)).
37. 34 C.F.R. §§ 200.1(e), 200.13(c)(2)(ii).
38. *Id.* § 200.6(a)(3)(ii)(A).
39. U.S. Department of Education (April 2007). *Modified Academic Achievement Standards: Non-Regulatory Guidance Draft* (p. 16). Washington, D.C.: Author.
40. 34 C.F.R. § 200.1(e).
41. *Id.* §§ 200.1(e), 200.13(c)(2)(ii).
42. *Id.* § 200.6(a)(3)(i).
43. 20 U.S.C. § 1414(d)(1)(A)(i)(VI)(bb).
44. 34 C.F.R. § 300.160(d).
45. *Id.*
46. *Id.* § 300.160(e).
47. 20 U.S.C. §§ 6311(b)(3)(C)(xii), (xv).
48. 34 C.F.R. § 200.2(b)(9); see also *id.* §§ 200.13, 200.20.
49. 20 U.S.C. § 6311(b)(2)(B).
50. *Id.* §§ 6311(b)(2)(C), (I).
51. *Id.* §§ 6316(b)(5), (7), (8).
52. 34 C.F.R. §§ 200.6(a)(4), 300.160(f).
53. *Id.* § 300.160(f)(5).
54. *Id.* § 200.7(a)(2)(ii).

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## The International Dyslexia Association Grant Award Program for Research on Developmental Dyslexia

This Grant Award is designed to provide funding for new or ongoing educational, medical, and cognitive science research projects. Studies on humans or experimental models (computer, etc.) are eligible. The main criteria for the awards are the excellence of the proposals and their potential enhancement of theories, research, and applications related to dyslexia.

For further information, visit the IDA website, Research section, or contact Diane Nies, Research Grants, (410) 296-0232, ext. 408

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*IDA wishes to congratulate the recipient of this year's Research Grant Award for the project:*

**“Intracellular Electrophysiology and Cellular Morphology of Auditory Thalamus Neurons in a Rat Model of Dyslexia”**

Edward Bartlett, Ph.D., Assistant Professor, Department of Biological Sciences and Biomedical Engineering, Purdue University, West Lafayette, IN



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