DUE PROCESS RIGHTS OF GRADE SCHOOL STUDENTS SUBJECTED TO HIGH-STAKES TESTING

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Today in education there is a threat afoot to which I do not need to call your attention: the threat of high-stakes testing being grossly abused in the name of greater accountability, and almost always to the serious detriment of our children. Allowing the continued misuse of high-stakes tests is, in itself, a gross failure of moral imagination, a failure both of educators and of policymakers, who persistently refuse to provide the educational resources necessary to guarantee an equal opportunity to learn for all our children.

U.S. Senator Paul D. Wellstone, March 31, 2000[1]

"A test that covers matters not taught in the schools is fundamentally unfair."[2]

I. INTRODUCTION

High-stakes standardized testing is taking the public grade school systems of the country by storm. Already well established in the area of high school exit exams, standardized tests are now becoming increasingly popular methods of determining issues of promotion and retention for public grade school children. And like the forces of a strong storm, high-stakes testing is leaving serious damage in its wake. This article examines the law of high-stakes testing for grade school children in light of the fairness requirements of the due process clause. Government test givers are usually not subject to legal accountability because lower courts have so often misapplied Supreme court due process decisions. However, the fairness of state educational action against grade school children is still a viable due process

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[1] Senator Paul D. Wellstone, High-Stakes Tests: A Harsh Agenda for America's Children, Remarks at Teacher's College, Columbia University (Mar. 31, 2000).

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

challenge. While this article will briefly address other considerations in high-stakes testing in order to put this matter in context, it is primarily restricted to analyzing the due process issues in grade school promotion and retention.[3] High-stakes testing, despite whatever value it has in pushing forward much-needed educational reform, cannot be allowed to become the means for sacrificing the constitutional value of fundamental fairness for our children inherent in the due process guarantee. Though it is somewhat more challenging for courts to review the due process claims of children subjected to high-stakes testing than the claims of children complaining of unfair disciplinary procedures, all three branches of government have provided guidance on how the fundamental fairness of these testing schemes should be evaluated. The guidelines are critically important new developments for the children of this nation, whose due process concerns should not be mistakenly brushed aside.

As this article will show, students have judicially recognized property rights and liberty interests in academic matters that trigger due process protections in high-stakes testing. Due process in high-stakes testing situations guarantees students four core rights: students have the right to expect that the test is an accurate and appropriately utilized evaluation tool; students have the right to only be tested on material that they have been taught; students have the right to expect that the test and their level of preparation for the test meet professionally acceptable standards; and finally, the state must prove that the students have been fairly adequately prepared to take the test and have a fair chance to pass it.

While many may quarrel with the whole concept of high-stakes testing, the students who are forced to take these tests must at least have their rights acknowledged and protected. This article sketches how that should be done.

II HIGH-STAKES TESTING

If tests [can] predict that a person is going to be a poor employee, the employer can legitimately deny the person [a] job, but if tests suggest that a young child is

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[3] For additional information see: The Use of Tests When Making High-Stakes Decisions for Students: A Resource Guide for Educators and Policy Makers, U.S. Dept. of Educ., Office of Civil Rights, Draft December 8, 1999; HIGH-STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION (Jay P. Heubert and Robert M. Hauser eds., Nat'l Academy Press 1999)[*hereinafter* TESTING FOR TRACKING]; Arthur L. Coleman, *Excellence and Equity in Education: High Standards for High-Stakes Tests*, 6 VA. J. SOC. POL. & L. 81 (1998); Jay P. Heubert, *Nondiscriminatory Use of High-Stakes Tests: Combining Professional Test-Use Standards with Federal Civil Rights Enforcement*, 133 W.E.L.R. 17 (May 1999)[*hereinafter* Heubert]; Donald Marion Lewis, *Certifying Functional Literacy: Competency Testing and Implications for Due Process and Equal Educational Opportunity*, 8 J. L. & EDUC. 145, 145-53 (1979); Thomas A. Schweitzer, *"Academic Challenge" Cases: Should Judicial Review Extend to Academic Evaluation of Students?* 41 AM. U. L. REV. 267 (1992); James Durling, Note, *Testing the Tests: Due Process Implications of Minimum Competency Testing*, 59 N.Y.U.L. REV. 577 (1984).

probably going to be a poor student, a school cannot on that basis alone deny that child the opportunity to improve and develop the academic skills necessary to success in our society.[4]

High-stakes testing is the practice of using standardized tests for critical issues such as promotion, tracking, and graduation in public education.[5] Public education "is perhaps the most important function of state and local government." [6] High-stakes testing may be used to *diagnose* capabilities and deficiencies, to *allocate* services or resources, and to *exclude* persons or institutions from eligibility for services.[7] Both proponents and opponents of high-stakes testing couch their arguments in terms of support for education. The educational value of high-stakes testing is a source of considerable educational controversy but increasingly turned to by elected officials as the public clamors for improvements in the quality of public education.[8] This article assumes that neither the proponents nor opponents

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[4] Larry P. v. Riles, 793 F.2d 969, 980 (9th Cir. 1984).

[5] *See* TESTING FOR TRACKING, *supra* note 3, at 14; Coleman, *supra* note 3; Hagit Elul, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 195, 495-96 (1999). For a good overview of civil rights issues in tracking, see Daniel J. Losen, *Silent Segregation in Our Nation's Schools*, 34 HARV. C.R.-C.L. L. REV. 517 (1999).

[6] San Antonio Independent School District v Rodriguez, 411 U.S. 1, 29 (1973) (quoting Brown v. Board of Education, 347 U.S. 483, 493 (1954)). *See also* Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) (stating providing public schools "ranks at the very apex of the function of a State"); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (stating public education has always been regarded by the public as a matter of "supreme importance").

[7] James Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 376 n.102 (1990).

[8] "[H]igh-stakes tests have been a part of the American educational experience for more than a century." Coleman, *supra* note 3, at 82. *See also* Elul, *supra* note 6, at 498-500; Dan Seligman, *Accountability: the Backlash*, FORBES, Nov. 13, 2000, at 53 (notes liberal complaints of the effect on poor and minority students and conservative complaints that schools are "dumbing down" by now "teaching the test"); Edward Cohn, *Selling Higher Test Scores*, THE AMERICAN PROSPECT, Oct. 23, 2000, at 24; Mary Lord, *High-stakes Testing: It's Backlash Time*, U.S. NEWS & WORLD REPORT, Apr. 3, 2000, at 17. For the different sides of the controversy, see Donald Marion Lewis, *Certifying Functional Literacy: Competency Testing and Implications for Due Process and Equal Educational Opportunity*, 8 J.L. & EDUC. 145, 145-53 (1979); Antonette Logar, *Minimum Competency Testing in Schools: Legislative Action and Judicial Review*, 13 J.L. & EDUC. 35, 35-38 (1984).

For another approach to educational reform that is not driven by high-stakes testing but uses testing as a diagnostic tool and incentive see Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485 (1999). Hunter details the official and community actions associated with the Kentucky Supreme Court decision in Rose v. Council for a Better Education, 790 S.W.2d 186 (Ky. 1989) (declaring education a fundamental right and finding the entire state system of education to be in violation of the Kentucky constitution.)

of high-stakes testing have a monopoly on educational expertise. It will take considerable time for comprehensive data, much less convincing data, to emerge from the current educational experiments with high-stakes testing. In fact, convincing data may never emerge as the political dimensions of high-stakes testing overshadow the agendas of those who seek to interpret the information. Despite this, public grade school children are increasingly being subjected to high-stakes tests and when children and public authorities are involved, the courts will be involved, and the fairness considerations of due process will be raised. This article will examine those due process considerations.

The focus of this article is on the use of high-stakes standardized tests in the promotion and retention of grade school students. Students who could formerly be promoted as a result of passing their required subjects and complying with the attendance policies of their school are now being subjected to an additional standardized test, which in some cases trumps the evaluation decisions made by the individual student's teachers. This article reviews the due process claims not involving racial discrimination of all grade school children regarding high-stakes testing.[9]

Almost all states have for some time employed some form of standardized tests for assessing students. However, these tests have historically not been used to determine important educational decisions like promotion or retention of individual students. By the mid-1990s, eighteen states had some test-based requirements for high school graduation.[10] By the year 2000, at least fourteen states have laws on their books which already use or will use standardized tests in the decision of whether to promote or retain public school children.[11] Students who score below a certain level are required to attend summer school and take an alternative form of the test at the end of the summer. Failure to achieve a certain score requires retention in grade.[12]

Proponents of high-stakes testing suggest that the use of standardized tests in

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[9] For more on the issues of racial discrimination and high-stakes testing, see Heubert, *supra* note 3. *See also* GI Forum Image de Tejas v. Texas Education Agency, 87 F.Supp. 2d 667 (W.D.Tex. 2000).

[10] *See* TESTING FOR TRACKING, *supra* note 3, at 15.

[11] *See* Making Standards Matter, Table 4 Promotion Policies (1999). This table lists Arkansas, California, Delaware, District of Columbia, Florida, Illinois, Louisiana, North Carolina, Ohio, South Carolina, Ohio, South Carolina, Texas, Virginia, and Wisconsin. *See also* TESTING FOR TRACKING, *supra* note 3, at 116. The most visible plan for using standardized tests for promotion and retention in grade school is the one advanced by Governor Bush of Texas. *See also* Joseph F. Johnson, Jr., *The Influence of a State Accountability System on Student Achievement in Texas*, 6 VA. J. SOC. POL'Y & L. 155 (1998). This plan proposes holding back third and fifth graders who fail to score above a certain level on the Texas Assessment of Academic Skills (TAAS).

[12] *See* TESTING FOR TRACKING, *supra* note 3, at 116. At the end of the 1996-1997 school year, 32% of third graders, 31% of sixth graders, and 21% of eighth graders failed the test on first taking. After summer school and re-test, 15% of third graders, 13% of sixth graders and 8% of eighth graders were retained.

determining whether individual students should be promoted or retained is a good development for several reasons. First, the use of standardized tests stop social promotion and the evils that occur when academically struggling children are merely passed on to the next grade without actually mastering necessary skills in reading and math. Second, standardized tests can hold teachers and school administrators accountable to the public in order to see what kind of job they are doing. Third, the use of these tests boosts public confidence in the schools.

Opponents of high-stakes testing raise three concerns. First, that many of the recent uses of standardized tests for promotion appear to ignore existing scientific standards for appropriate test use. Second, there is little research to support the proposition that retention is in fact better than social promotion. Third, contrary to public perception, there is already quite a bit of retention going on based on individual choices by individual teachers, but the effects of current retention practices are often ignored.[13] Retention is fraught with educational peril for children because students who are required to repeat a year are significantly more likely to eventually drop out of school altogether.[14]

One author characterizes the tension inherent when standardized tests are used for student decisions, as opposed to individual and institutional diagnosis and evaluation, as a problem of balance between individual (student) accountability and institutional (school) accountability. From a teacher's perspective, one might assume that students are more likely to do well on tests when there are real consequences for the student based on the student's performance. In contrast, from the perspective of parents of students who have not passed the test after multiple tries, one might believe that children are being held responsible for learning when they have not been given adequate opportunities to learn.[15]

Despite these concerns, high-stakes testing for grade school children remains a political option in the ongoing concern about how to bring about school reform. This article now examines when students can invoke a judicial due process review of the fairness of a public high-stakes testing scheme.

III STUDENTS HAVE PROPERTY RIGHTS AND LIBERTY INTERESTS SUFFICIENT TO INVOKE THE PROTECTIONS OF DUE PROCESS IN ACADEMIC DECISION MAKING

The conventional understanding of due process in the educational context is that procedural due process is required in the area of disciplinary proceedings, but the courts will not find a due process cause of action, procedural or substantive, in the area of academic decisions. That understanding is wrong.

While the Supreme Court and lower courts have definitively found that students do have the protection of substantive and procedural due process in areas more likely to be described as academic than disciplinary, these same courts have also found that due process protection for students *are* triggered in disciplinary

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[13] *See id.* at 116-17.

[14] *Id.*

[15] Johnson, *supra* note 12, at 175.

decisions. Unfortunately, the understanding of the law in this area is muddied by the continual misinterpretation and misapplication of Supreme Court and Court of Appeal decisions by district courts.[16] This section of this article will address the two most recent Supreme Court decisions on point and sketch the numerous decisions of the federal appeals and district courts which recognize due process rights in the academic context.

Opponents of judicial review of high-stakes testing in grade schools often raise the argument that students have no liberty or property interest in academic matters sufficient to trigger the protections of the due process clause, except in the situation where a diploma is being withheld. This argument often goes on to cite selective language indicating that the Supreme Court has directed the lower courts not to get involved in substantive academic decisions. Those who argue the federal courts should not get involved in academic decisions can point to some language in some decisions to support their position. However, this language is not nearly enough for judges who carefully read the law to refuse to allow children to have the opportunity to have their day in court to present their due process complaints.

In the two most recent decisions by the Supreme Court where students complained of unfair academic decisions, *Board of Curators of the University of Missouri v. Horowitz*,[17] and *Regents of the University of Michigan v. Ewing*,[18] the court specifically assumed that the student petitioners had liberty and property interests sufficient to trigger due process protection and analysis.[19] That is, students do indeed have due process rights in the academic arena and the courts need to and have recognized those rights. Since these decisions have been occasionally misconstrued and misapplied by the lower courts to stand for the proposition that there are no circumstances where courts should conduct due process reviews of state educational decisions, these cases will be briefly discussed.

Before looking at these due process cases, it is wise to remember that all due process analysis starts with Section 1 of the Fourteenth Amendment which states "nor shall any State deprive any person of life, liberty, or property without due process of law."[20]

Prior to 1970, due process was used in a generalized manner to protect

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[16] *See, e.g.*, Hartfield v. East Grand Rapids Pub. Sch., 960 F.Supp. 1259 (W.D. Mich. 1997). The Hartfield parents filed a pro se complaint in federal court alleging due process violations arising from mistreatment of their children by the local public school system. They alleged that: 1) one of their children was wrongfully suspended, 2) they were refused review of public documents, truancy, vague claims of racial discrimination, and 3) disagreements over whether other children should be tested for placement in special education classes. Faced with a pro se complaint, the *Hartfield* court disposed of their claims on several grounds, including a two paragraph dismissal of their due process claims. Those paragraphs inaccurately summarized *Roth* and *Horowitz*, in one sentence each, and went on to misstate the law of due process. No thoughtful court should rely on this decision.

[17] 435 U.S. 78 (1978).

[18] 474 U.S. 214 (1985).

[19] *See infra* notes 28-41 and accompanying text.

[20] U.S. Const. amend. XIV, §1.

"fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" and to guarantee those procedures which are required for the "protection of ultimate decency in a civilized society."[21]This due process analysis, generally analogized by the Supreme Court to the Magna Carta's "guaranties against the oppressions and usurpations" of the royal prerogative, was a restraint on legislative, executive and judicial power which, at a minimum, required notice and opportunity to be heard when any governmental action was involved and did not try to screen out certain types of governmental action from review.[22]

However, contemporary due process interpretation has been narrowed, a narrowing which is and reflected in the caution articulated by the Supreme Court in their 1972 decision of *Board of Regents of State Colleges v. Roth*.[23] *Roth* stands for the general proposition that due process is not a generalized constitutional right to be treated fairly by the government. Rather, as a starting point for any due process analysis, the court must first "look to see if the interest of the plaintiff is within the Fourteenth Amendment's protection of liberty and property."[24] According to *Roth*,

> property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlements to those benefits.[25]

The Court wisely declined to narrowly define what property and liberty interests were:

> Liberty and property are broad and majestic terms. They are among the great constitutional concepts purposely left to gather meaning from experience. They relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.[26]

As a result of this post-1970s way of looking at due process, people who seek to challenge governmental action under the due process clause must first demonstrate to the court they have a constitutionally protected liberty or property interest. If they do, and only if they do, then the court takes the next step and determines what process is due to them. If there is no constitutionally protected liberty or property interest, the due process analysis ends. Thus children who complain of lack of due

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[21] *See* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 678 (2d ed. 1988) (citing Adamson v. California, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring) and Hurtado v. California, 110 U.S. 516, 535 (1884)).

[22] *See id.* at 664 (citing *Hurtado*, 110 U.S. at 531). The pre-1970 due process doctrine is reviewed in some depth by Tribe at 678-85.

[23] 408 U.S. 564 (1972).

[24] *Id.* at 571.

[25] *Id.*

[26] *Id.*

process must show that the state interfered with either a liberty or property interest or both in order to litigate their claims. Fortunately for the children, there is ample precedent for raising both liberty and property interests to contest the due process fairness of high-stakes testing.

For educational cases, subsequent decisions have reviewed under what circumstances liberty and property rights are involved in the educational context and when the protections of procedural and substantive due process are triggered.[27] The major cases are the *Horowitz* and *Ewing* cases.

A. *Missouri v. Horowitz* .

In 1978, the Supreme Court heard *Horowitz*, reviewing the procedural and substantive due process claims raised by a medical student who was dismissed from school for non-disciplinary academic reasons.[28]

Ms. Horowitz, a student, was found deficient by several faculty members in her clinical work and placed on academic probation. The student was evaluated again mid-year, and advised she would not graduate absent radical improvement. She was given an appeal to seven practicing physicians, five of whom voted that she not be allowed to continue in her studies as scheduled. The faculty re-affirmed their earlier decision and advised her if there was no radical improvement she would not be allowed to re-enroll. When no improvement was forthcoming, the faculty recommended dismissal. That decision was affirmed by another faculty committee and the Dean. Ms. Horowitz then appealed to the Provost of the university, who turned her down.[29]

In deciding *Horowitz*, the Court explicitly assumed the existence of a liberty or property interest in Ms. Horowitz's claim for due process in challenging her dismissal from medical school, while not deciding whether Ms. Horowitz stated such a claim.[30] This is of critical importance because it allows students to pass through the threshold and trigger the protections of the due process clause.

The Court then undertook a review of Ms. Horowitz's claims for procedural due process and decided not to require a formal due process disciplinary-like hearing but to defer to the judgment of the academic faculty members and administrators

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[27] *See* TRIBE, *supra* note 21, at 686 (noting that the Supreme Court has recognized due process protections can be triggered by interests founded on justifiable expectations based on state law *Roth*, 408 U.S. at 577; or mutually explicit understandings Perry v. Sindermann, 408 U.S. 593, 601 (1972)). In *Perry*, the Supreme Court found that when there are potential constitutional violations judicial intervention into the academic sphere was appropriate. The court specifically held that even a non-tenured teacher could have a property interest in his continued employment where its termination may violate the First and Fourteenth Amendments. *Perry*, 408 U.S. at 599. For more discussion see TRIBE, *supra* note 21, at 678-06.

[28] *See Horowitz*, 435 U.S. 78 (1978).

[29] *See id.* at 80-82.

[30] *Id.* at 85-86

involved.[31] As in the earlier decision in *Ewing*, this conclusion may give pause to those seeking to challenge the decision of a teacher to retain a child, but does not in any way diminish the claim of opponents of high-stakes testing who, in most cases, want to protect the right of individual teachers to make the pass or fail decision for the children in their classes.

It would be a mistake to suggest that, because Ms. Horowitz ultimately lost her case, this decision stands for the proposition that no due process hearing is required in a dismissal for academic reasons. That is not what a careful reading of the four opinions in the case show. Justice Rehnquist, writing for the majority, indicated his own opinion that far less stringent procedural requirements were required in the case of an academic dismissal and does say that the due process clause of the Fourteenth Amendment does not require a hearing for academic evaluations.[32] However, as at least one court has perceptively pointed out, Justice Rehnquist's position on this point was only one of four opinions published in this case and that particular declaration was not followed by the majority of the court and can be considered dicta.[33]

The Court also reviewed Ms. Horowitz's claims for substantive due process and found that "no showing of arbitrariness or capriciousness has been made in *this case*."[34] There was no sweeping dictate that due process never applies in the academic context. In fact, in the high-stakes testing context, most plaintiffs would be happy to receive the due process that was provided to Ms. Horowitz.

Read carefully, *Horowitz* supports the right of children to have their day in court

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[31] *See id.* at 89-90. The Court observed that

> The decision to dismiss respondent. . .rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. *Like the decision of an individual professor as to the proper grade for a student in his course*, the determination of whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making.

Id. (emphasis added).

[32] *Id.* at 86 n.3.

[33] *See* Stoller v. College of Medicine, 562 F.Supp. 403, 413-14 (M.D. Pa. 1983) *aff'd*, 727 F.2d. 1101 (3rd Cir. 1984). In that decision, Judge Muir noted that two Justices, Marshall and White, explicitly stated that students expelled for academic reasons had a right to pre-deprivation due process hearings; two other Justices, Blackman and Brennan, concluded that because the student was in fact given due process there was no reason to decide the issue; and no where in Justice Powell's concurrence, in which he joined the majority as saying that the student was afforded due process, does he indicate he agrees with Justice Rehnquist's view that a student dismissed for academic reasons is not entitled to a hearing.

[34] *Horowitz*, 435 U.S. at 92 (emphasis added).

to challenge high-stakes testing. First, the court assumed a liberty and property interest in the academic setting. Secondly, the court chose to defer to the judgment of those faculty members who had made a careful and systematic review of the student's progress, exactly what most children are asking the court. Like the court, children challenging high-stakes testing are also saying that state authorities should leave the academic decisions to the teachers and allow the teachers to consider the standardized tests as one indicator among many. It is usually elected officials who are taking the authority to determine the academic future of their students away from classroom teachers and giving it to standardized high-stakes testing schemes. Thus, a reading of *Horowitz* that tries to support judicial refusal to review the fairness of high-stakes testing is inappropriate.

As one commentator long ago noted, while rejecting full judicial adjudication of the individual academic decisions of teachers "*Horowitz* does not foreclose a judicial role in circumscribing the use of system wide standardized proficiency testing. . . ."[35]

When a claimant seeks to subject an individual student's grades to adjudication, *Horowitz* stands in the way because grades rest on subjective factors. But challenges to state-mandated standardized high-stakes tests are quite different from asking a court to second guess the academic decision of a teacher. According to once scholar:

> [T]he nature of the [judicial] inquiry differs when the state imposes a standardized test instrument to identify the functionally illiterate. In grading the pupil's history paper, the judgment of the instructor may be a fundamental ingredient in the definition of 'failure,' and as such it does not lend itself to factual inquiry. But when the state decides to quantify academic competence by promulgating standards of proficiency, the barrier of subjectivity is removed. Competency in basic skills, unlike a student's knowledge of American history, looks more like an ascertainable fact. Finally, judicial scrutiny of the administration of competency testing programs poses no threat to the student-teacher relationship. Competency programs do not hinge on classroom dynamics; the test is externally imposed, externally developed, and externally evaluated, *Horowitz*, in sum, presents no obstacle to a judicial remedy which affords students fairness and accuracy in academic evaluation most effectively, and least intrusively, through restrictions in the employment of standardized test instruments.[36]

B. *Michigan v. Ewing.*

Michigan v. Ewing[37] is a 1985 Supreme Court case that involved a due process constitutional challenge by a medical student who was dismissed from school for

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[35] Lewis, *supra* note 9, at 164-65. It is true that the Supreme Court in *Horowitz* refused to "inject the adjudicatory mode into the schoolhouse." *Id.*

[36] *Id.*

[37] 474 U.S. 214 (1985).

academic problems. *Ewing* had extensive academic and personal difficulties over the course of a four-year academic program which culminated in his failure of a two-day National Board of Medical Examiners test, with the lowest grade ever recorded by a student. Because of his academic problems, nine members of an academic promotion and achievement board reviewed his overall academic record and who unanimously voted to drop him from the rest of the medical school program. The student Ewing was then given a chance to appeal once again to the board, which he did. The nine faculty members then voted again unanimously to drop him from the program. The Board gave Ewing the opportunity to appeal to the Executive Committee of the Medical School. Ewing appealed, but the Executive Committee denied the appeal, as well as two subsequent appeals. Ewing then filed suit alleging violation of his substantive due process rights under the Fourteenth Amendment.[38]

If the due process clause did not offer any protection to students in academic settings, this again was a case for the Supreme Court to so state.

On the contrary, Justice Stevens, writing for the court, explicitly assumed "that federal courts can review an academic decision of a public educational institution under a substantive due process standard."[39] While acknowledging that this is a "narrow avenue for judicial review," the Court did go on to make a substantive due process review:

> Where judges are asked to review the substance of a genuinely academic decision. . . they should show great respect for the *faculty's professional judgment.* Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.[40]

While the court ultimately ruled against Ewing's claim of denial of due process, they did say that courts should look to and must accept academic decisions "when viewed against the background of [the student's] entire career at the University."[41]

So *Ewing* stands for several propositions applicable to challenges by grade school children to high-stakes testing. First, students can indeed bring their substantive due process challenges to "academic" decisions to federal court. Second, while there is a narrow avenue for judicial review, there is an avenue that can be traveled. Third, part of the reason that the *Ewing* court suggests a narrow avenue of review is out of concern over a substitution of the court's judgment for that of the reasoned, nuanced, multi-factored decision made by individual faculty members. And fourth, academic decisions are evaluated, as are many other decisions that careful courts make, against the norms of the community in which the decisions are made.

For children seeking substantive due process review of this new scheme of high-

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[38] *See id.* at 222.
[39] *Id.* at 215-17.
[40] *Id.* at 225.
[41] *Id.* at 228.

stakes testing, *Ewing* offers not a closed door but an open one. Substantive due process reviews are allowed of academic decisions. An additional support found in *Ewing* is that in most challenges to high-stakes testing in the grade school context, unlike the challenger in *Ewing*, the children are seeking to *uphold* the decision of their individual teachers or faculty. So the deference suggested to be given to the judgment of individual teachers by the *Ewing* court helps students complaining of the role of high-stakes testing, because they are usually challenging the taking away of the decision to promote or retain from the person who knows the most about the student, her teacher. Students usually ask that each of the children whose teacher said they can be promoted be allowed to do so, and that the standardized high-stakes tests be used as only one factor in the determination of promotion or retention. The children are thus seeking what the court in *Ewing* sought, a look at the student's overall academic performance, based on the judgement of the teacher in the classroom.

The two times the Supreme Court was presented with due process challenges to academic decisions, the court engaged in constitutional inquiry. Property and liberty interests were assumed. Evaluations of the fairness of the academic decisions were made. Though the two claimants lost, their claims were heard. It is absolutely erroneous to suggest that the *Horowitz* and *Ewing* cases can be cited for the proposition that there is no liberty or property interest in an academic decision and thus due process is not triggered. They stand for the opposite.

C. *Other courts have also found protected a property interest.*

Numerous circuit and district courts have followed the Supreme Court in *Ewing* and *Horowitz* and have assumed that students do possess a constitutionally protected property interest in academic matters They go on to evaluate the facts, determine what sort of process is due, and see if the student was given due process. While most of these cases have found students have a property interest, some have found a liberty interest in academic matters.

D. *Property interest.*

Appellate courts in the First, Second, Third, Fifth, Sixth, Eighth and Tenth Circuits, along with other district courts, have all proceeded under the assumption that students possess protected due process property rights in academic issues. These courts have found property interests in academic matters based in interpretations of state law or based on implied mutual understandings on behalf of the educational institution and the student

The key decision in the due process analysis of standardized testing is the 1981 Fifth Circuit decision in *Debra P. v. Turlington*.[42] In the *Debra P.* case public school students in Florida challenged a change in state law that conditioned the award of a high school diploma upon scoring a certain number on a high-stakes

[42] 644 F.2d 397 (5th Cir. 1981).

standardized examination.[43] The court acknowledged that the judiciary was not the place to determine educational policy for the state, but that the court is required to make sure that the state exercises its power over education "in a manner consistent with the mandates of the United States Constitution."[44] After reviewing the test and the circumstances under which it was given, the court affirmed the lower court injunction prohibiting Florida from using it until the state proved that the test was fairly constructed, nondiscriminatory, and the students were given adequate preparation time in order to have a fair chance to pass the test.[45]

Florida claimed that the students had insufficient property rights or liberty interests to invoke due process protection.[46] The Fifth Circuit disagreed, finding that the students who complained of the unfairness of the new scheme of standardized testing had a property interest sufficient to trigger due process protection. Quoting *Roth,* the Court found that the students had a "state-created understanding" based on mandatory attendance laws that created a mutual expectation between students and the state. The state could not interfere with the students' academic expectations if such interference was at odds with the fairness required by due process.[47]

Debra P. is *the* high-stakes standardized testing case.[48] It recognizes the property right of students in high-stakes testing. It obligates the state to create a fair test. Further, it places on the state the burden of showing that students have actually been taught the material on the test.[49]

Supporters of unfettered high-stakes testing for grade school children have predictably attempted to limit the due process rights outlined by *Debra P.* to circumstances involving only the conferring of a high school diploma. However, it is not just the result but the analysis which is important for due process considerations. The *Debra P.* analysis applies quite easily to grade school students who have passed all their subjects, and who have complied with attendance requirements, and who thus have the "expectation" or "understanding" promotion. The words of the *D*ebra P. opinion speak of diploma because that was what was before the court, but the analysis is not so limited:

> It is clear that in establishing a system of free public education and in making school attendance mandatory, the state has created an expectation in the students. From the student's point of view, the expectation is that if a student attends school during those required years, and indeed more, if he takes and passes the required courses, he will receive a diploma. This is a property

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[43] *See id.* at 400-02.

[44] *Id.* at 402-03.

[45] *See id.* at 408.

[46] *See id.* at 402.

[47] *See id.* at 403-04.

[48] *Id. See, e.g.,* Lee D. Gunn, Note: *Debra P. v Turlington: Due Process Enters the Courtroom, But How Far?* 11 J. L. & EDUC. 573 (1982) (providing a brief contemporary review of *Debra P.*).

[49] *Debra P.*, 644 F.2d at, 400.

> interest as that term is used constitutionally. Although the state of Florida constitutionally may not be obligated to establish and maintain a school system, it has done so, required attendance and created a mutual expectation that the student who is successful will graduate with a diploma. This expectation can be viewed as a state created 'understanding' that secures certain benefits and that supports claims of entitlement to those benefits.[50]

Limiting the analysis to diploma issues alone misses the point. In academic circumstances, whenever 1) the student has a legitimate expectation 2) grounded in state law or state practices that 3) a certain course of conduct will result in a predictable outcome, due process is triggered. That is not to say that the state cannot change their rules or conduct. However, when it does, it must make changes in a manner consistent with the students' due process rights. As one commentator has noted: "States may create constitutionally protected property interests either by enacting positive laws that mandate benefits or by otherwise fostering a mutual understanding between themselves and their citizens." [51] These property rights are not created out of thin air, but out of the laws and practices and mutual understandings between the state and the student. Other circuit courts have also found that students have property interests in the academic context that entitle the students to due process protections. While many of these decisions ultimately found that the students had received all the process to which they were due, they did find, as a threshold matter, that the students had property interests sufficient to engage in a due process review.

In 1999, the First Circuit assumed a property right protected by due process in a

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[50] *Id.* at 403-04 (citations omitted). The court also said "Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which may be protected by the Due Process Clause." Goss v. Lopez, 419 U.S. 565, 574 (1975)

[51] Liebman, *supra* note 7, at 406. Liebman then concludes that there is a basis for a property interest sufficient to trigger due process protections in the situation of public school children who can and should expect that their state and local government will provide instruction and remedial services enabling students who expend reasonable effort to pass the high-stakes tests necessary to achieve diplomas. *See id.*

James Durling criticizes the property right analysis as inadequate. *See* Durling, *supra* note 3, at 589-93. Durling suggests several errors in *Debra P.*: first, since students who fail high-stakes tests are not prohibited from attending class they are not deprived of the right to an education and it is the right to the education rather than the right to a diploma which is important; second, reliance on mandatory attendance laws is misplaced because they have no rational connection to the high-stakes testing requirement of demonstrating competency in subjects; third, since the state changed its rules on awarding diplomas there can be no mutual understanding that students can get a diploma merely by fulfilling the prior rules; and fourth, there is a "catch 22" that undercuts all attempts to characterize high-stakes testing as a deprivation of a property right in that no one can challenge the new state law or practice at the time it is enacted because no one has yet been harmed by the law and once people have been harmed there is no longer any expectation that the old rules will apply. *See id.*

college student's continued enrollment in a teacher's certification program.[52] Also in 1999, the Fifth Circuit assumed that a doctoral student who challenged his dismissal from a graduate program had both property and liberty interests sufficient for the court to engage in a procedural and substantive due process review.[53]

Other Fifth Circuit decisions have been the source of a number of misinterpretations in the area of student rights to due process in academic matters. One example is the oft misquoted 1976 decision, *Mahavongsanan v. Hall.*[54] *Mahavongasanan,* which concerned a student who challenged her failure of a comprehensive examination required for her masters degree, is often cited for the proposition that due process does not attach to academic decisions. However, *Mahavongasanan* affirmed that a hearing *was* required in disciplinary matters even though "a hearing *may* be useless or harmful in finding out the truth concerning scholarship."[55] The court then proceeded to conduct a due process review of the record and found the student received timely notice, a second chance to take the test, ample time to prepare, a reasonable opportunity to complete alternative course work in lieu of a comprehensive examination, and a decision by the student not to take advantage of the administrative opportunities to pursue her grievance. The Fifth Circuit then decided that the student was not denied either procedural or substantive due process.[56] Another example finds numerous decisions incorrectly citing the case of *Dixon v. Alabama State Board of Education*[57] for the proposition that academic dismissal does not require a hearing.[58]

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[52] *See* Hennessy v. City of Melrose, 194 F.3d 237, 249-50 (1st Cir. 1999). The court reviewed the student's claims and decided that even if he was entitled to due process, his due process rights were not denied given the facts of his challenge. *See id.*

[53] *See* Wheeler v. Miller, 168 F.3d 241, 247-51 (5th Cir. 1999). In *Wheeler*, a doctoral student in psychology, challenged his dismissal from the graduate program. The Fifth Circuit assumed that the student had a property or liberty interest which would invoke both the protections of procedural and substantive due process. The court found that the student received notice, an opportunity for an individually tailored remedial program, and a careful and deliberate review which satisfied the requirement of procedural due process. Under its substantive due process analysis, the court found that the plaintiff failed to show that the decision of the academic institution was in violation of the *Ewing* standard or "beyond the pale of reasoned academic decision-making when viewed against the background of [the student's] entire career. . ." *Id.* at 250.

[54] 529 F.2d 448 (5th Cir. 1976).

[55] *Id.* at 450 (emphasis added).

[56] *See id.* As some courts have correctly observed, to say that this case stands for the naked statement that due process is not required in academic matters misconstrues the purpose. *See, e.g.*, Anderson v. Banks, 520 F. Supp. 472, 477 (S.D. Ga. 1981).

[57] 294 F.2d 150, 158-59 (5th Cir. 1961).

[58] *See, e.g., Hennessy*, 194 F.3d 237 (citing *Dixon* erroneously, contrasting dismissal for misconduct, which requires a hearing, with academic dismissal, which does not). *Dixon* does not say any more so than *Horowitz* or *Ewing* that students have no liberty or property interest in the continuation of their education. What *Dixon* does say, in deciding that a notice and due process hearing is required when students are expelled from a state school, in

In 1996, the Eighth Circuit found that a nursing student had a property right based on published grievance procedures sufficient to invoke a substantive due process review.[59] Another Eighth Circuit decision in 1985 assumed a student in a state pharmacy college had a protected property interest that entitled the student to due process review.[60] The Second Circuit followed the reasoning of the Eighth Circuit in conducting a due process review of the dismissal of a nursing student from a clinical program.[61] Similarly, the Third Circuit assumed property and liberty interests in a challenge by a student to her academic dismissal from dental school.[62]

The Tenth Circuit found a college student had a protected property interest in his education because state law opened all public colleges to those willing to pay tuition. The judges reasoned that this entitled him to raise procedural and substantive due process issues.[63]Another Tenth Circuit decision found that a

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a sixteen page decision, is: "By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of facts concerning the charged misconduct, easily colored by the point of view of the witnesses." *Dixon,* 294 F.2d. at 158-59. While Dixon certainly does squarely stand for the proposition that notice and a due process hearing is called for in misconduct discharges, it is not accurate to say that the one sentence noted above makes the court of appeals stand for the principle that due process is not triggered by scholastic issues.

[59] *See* Disea v. St. Louis Community College, 79 F.3d 92, 94-96 (8th Cir. 1996). In *Disea,* a nursing student who failed a course and thus had her graduation postponed sued claiming violations of her procedural and substantive due process rights. The court determined that the school provided sufficient procedural due process by repeated notices of her deficient performance and several reviews of her grades by administrators. The court further found that a student handbook setting forth a grievance procedure was sufficient to create a protected property right but because there was no evidence of arbitrary or capricious decisions or bad faith by defendants that her substantive due process rights had not been violated. *See id.*

[60] *See* Ikpeazu v. University of Nebraska, 775 F. 2d 250, 253 (8th Cir. 1985) (involving an academic dismissal of a student from the state pharmacy college.) The *Ikpeazu* Court assumed the student had a property interest in the grades he received but decided that there was no bad faith and that there was a rational basis for the grades, thus no due process violation: "Although for present purposes, we may tend to agree with plaintiff that he may assert a protected property interest in the grades he received from the instructor defendants, we cannot agree that he was deprived of that interest when he received failing grades and was subsequently dismissed." *Id.* at 253.

[61] *See* Clements v. Nassau County, 835 F.2d 1000, 1004-06 (2nd Cir. 1987) (upholding summary judgment against a nurse who sought review of her dismissal from a public clinical program on due process issues because the college's four-step grievance process "comports with minimal standards of due process.") *Id.*

[62] *See* Mauriello v. University of Medicine & Dentistry of New Jersey, 781 F.2d 46, 49-50 (3rd Cir. 1986) (assuming a protected interest, then deciding that the student received procedural due process pursuant to *Ewing* and *Horwowitz,*).

[63] *See* Harris v. Blake, 798 F.2d 419, 422 (10th Cir. 1986) (recognizing that a college student holding a protected property interest in public education was entitled to procedural

nursing student had a property interest in her continued enrollment in school.[64] The Sixth Circuit found a medical student had a property interest in continued study under Tennessee state law.[65]

There is, however, a 1984 Eleventh Circuit decision that seems to stand against the *Debra P.* proposition that students facing new high-stakes promotion testing schemes possess protected property rights in their education. On close review, however, *Bester v. Tuscaloosa* does not contradict *Debra P.*.[66] In *Bester*, black parents complained about a new minimum reading standard set by the local school system that resulted in dramatically increased failure rates among grade school children. The school system determined each child's reading level by evaluating progress in the reading program, and, as the court was careful to note, the school system used no other system of evaluation.[67] The parents challenged the change of policy claiming, as did the students in *Debra P.*, that the school system had failed to provide sufficient notice and opportunity to prepare the students for the new standard. The court found that these public school parents had no property right in their expectation that substandard scholastic achievement would continue to be accepted as a basis for promotion. Additionally, the court determined that grade school standards had been raised and that all parties admitted that such standards needed to be raised. However, the *Bester* court specifically distinguishes itself from *Debra P.* case, holding that the educational change involved evaluation of classroom work and rather than an external test for which the students were not prepared.

While *Bester* does not involve standardized high-stakes testing, it is important because it applies to property interests in grade school promotion issues. Despite the fact that it was decided in 1984, *Bester* does not even discuss the 1978 Supreme Court *Horowitz* decision (*Ewing* was not yet decided). *Bester* specifically accepted that *Debra P* stands for the proposition that a student who performs satisfactorily in the classroom may still be subjected to a "a new and external test was required as a prerequisite to a diploma and . . . unrelated to academic work required in the school."[68] Thus, *Bester* must be read very narrowly because it did not acknowledge the main Supreme Court case on point and limited itself to challenges to

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and substantive due process in Colorado because a state statute opened public colleges to all who paid reasonable tuition). The *Harris* Court discussed whether the student also had a liberty interest but decided it was not important to reach that issue since they ultimately decided that the student did receive both procedural and substantive due process. *Id.* at 422 n.2.

[64] *See* Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975) (holding that a nursing student has property interest in continued enrollment in state vocational school.)

[65] *See* Stevens v. Hunt, 646 F.2d 1168, 1169 (6th Cir. 1981) (holding that under Tennessee state law, a medical student has a qualified property interest in studying and practicing medicine.)

[66] 722 F.2d 1514 (11th Cir. 1984).

[67] *See id.* at 1515.

[68] *Id.*

"objectively substandard classroom work."[69]

Many district courts have also found that students have property interests triggering due process review in academic matters from law school grades to ceramics classes.[70] A 1997 district court decision, *Erik V. v. Causby*,[71] that held that children who sought a due process challenge to a new standardized testing scheme did not have a property right in promotion. The value of this decision is minimal, however, because the court failed to discuss either of the Supreme Court cases on point.[72] *Erik V.* was apparently settled while appeal was pending.[73]

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[69] *Id.*

[70] *See* Sylvester v. Texas Southern Univ., 957 F.Supp. 944 (S.D.Tex. 1997). In *Sylvester,* a law student complained that she incorrectly received a D and dropped from first to third in class rank. The court did not discuss whether the student had either a protected property or liberty interest but was certain that she was entitled to both substantive and procedural due process, and had received neither. In a decision no doubt enjoyed by law students everywhere, the court flayed the faculty and administration for their failure to adequately follow their own regulations: "Between active manipulation and sullen intransigence, the faculty, embodying arbitrary government, have mistreated a student confided to their charge." *See id.* at 947. The Court ultimately adjusted the student grade to a "pass," on its own. *See id.*

The court in *Stoller,* 562 F.Supp. at 412 found, pursuant to *Horowitz*, that a graduate student had a property interest in continuing his studies that afforded him the right to a review to see if his substantive and procedural due process rights were violated.

See also Ross v. Pennsylvania State University, 445 F.Supp. 147, 152-53 (M.D. Pa.1978) (concluding that a graduate student had a property interest in the continuation of his education as a graduate student in ceramics and was entitled to due process).

[71] 977 F.Supp. 384 (E.D.N.C. 1997).

[72] Those opposing due process protections for children often cite *Erik V.* Parents in a North Carolina county school district challenged the decision of the county board of education to retain grade school children unless they attained a certain score on a state-developed standardized test. The school board adopted a new policy in 1996 which went into effect for the 1996-1997 school year. Children were given three chances to pass the standardized test. If they did not pass the test, but earned A, B, or C grades in the subject tested during the school year, the child and parents could *seek* a waiver of the retention policy. At risk children were required to be so notified by the end of the first semester and were offered remediation. During the summer after the first year of the new testing regime, parents filed suit asking for an injunction. The parents alleged the test violated their due process rights and had a racially disparate impact that violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000(d). The district court denied the request for an injunction on all grounds. On the due process claim the court, citing *Bester* and *Roth*, said in a one-paragraph analysis "plaintiffs have failed to establish at this stage that there is any property right in promotion that triggers the requirements of due process." *Id.* at 390. As noted above, neither *Bester* nor *Roth* actually stands for the position posed by the court. Also, the court failed to discuss either of the Supreme Court cases on point, *Horowitz* or *Ewing.*

[73] Those who *seek* to rely on *Erik V.* should know that the case was ultimately settled with increased educational opportunities presented to the students *and* a new retention waiver policy that has resulted in a substantial reduction in the number of students retained. *See* Elul, *supra* note 6, at 500-03, 501 n.49.

E. *Liberty interest.*

Other courts have found that students have a liberty interest in academic matters sufficient to invoke due process protections.[74]

In a 1982 decision, *Brookhart v. Illinois State Board of Education*,[75] the Seventh Circuit found students had a liberty interest sufficient to trigger due process when Illinois instituted high-stakes testing and removed a prior right to a high school diploma despite the fact that the student passed all classes and met all attendance requirements. As the court stated, "Denial of [a] diploma clearly affects a student's

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[74] *See* Durling, *supra* note 3, at 577-11. Durling makes the liberty interest the core of his argument for due process protections. He points out that the traditional approach to a liberty analysis is based on harm to reputation, which combines stigmatizing governmental action, publicity, and some action that falls into reputation-plus requirements demanded by the Supreme Court. An alternative approach is looking at the impact on future employment opportunity. He concludes that denial of a high school diploma, which is almost always subject to public stigma from actual listing to required remediation, satisfies the loss of liberty requirements promulgated by the Supreme Court in Paul v. Davis, 424 U.S. 693 (1976). *Paul* not only required that a person seeking to invoke liberty interests had to prove damage to reputation but also additional consequences like changed status under state law or loss of a tangible interest such as employment. 424 U.S. at 708-10. *Paul* found that an action for damage to reputation requires proof of government-imposed stigma based on a label that is false, has been publicized, and has either changed plaintiff's status under state law or resulted in a tangible loss. *Paul*, 424 U.S. at 708-09. Durling concludes that students who are denied diplomas obviously suffer damage to reputation and employment opportunities, thus liberty interests are clearly invoked. Durling, *supra* note 3, at 611.
See Tim Searchinger, Note, *The Procedural Due Process Approach to Administrative Discretion: The Courts' Inverted Analysis*, 95 YALE L.J. 1017, 1020 n.14 (1986). *See also* Charles M. Masner, Note, *Educational Malpractice and a Right to Education: Should Compulsory Education Laws Require a Quid Pro Quo?* 21 WASHBURN L.J. 555, 568 (1982) (arguing that there is a protected liberty interest in receiving a diploma as a quid pro quo for the state's deprivation of the student's liberty through mandatory school attendance).
By 1918 all states had compulsory public education that is usually enforced through criminal remedies, a situation which clearly implicates liberty interests. *See* Gershon M. Ratner, *A New Legal Duty for Urban Public Schools*, 63 TEX. L. REV. 777, 823-24 (1985).

[75] 697 F.2d 179 (7th Cir. 1983). In *Brookhart*, the court ordered, on constitutional due process grounds, that diplomas be given to students who had a new standardized test imposed upon them without sufficient notice and an opportunity to prepare. Like *Debra P.*, *Brookhart* talks about deprivation of a right previously held under state law. *Brookhart*, following the Supreme Court in *Paul*, held that it was the removal of a right or interest "from the recognition and protection previously provided by the state, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment." *Id.* at 185. *Brookhart* went on to say that "[i]n changing the diploma requirement, the governmental action by the School District deprived the individual of a right or interest previously held under state law. Plaintiffs thus have a liberty interest sufficient to invoke the procedural protections of the due process clause." *Id.* 185. *Brookhart* went on to find that 1 to 2 years was inadequate notice for reasonable preparation for the test. *See id.*

reputation. It attaches a 'stigma' that will have potentially disastrous effects for future employment or educational opportunities."[76]

Seven years earlier, the Eighth Circuit had found that a student dismissed from medical school for academic reasons had a liberty interest significant enough to warrant due process protections.[77] However, a later Eighth Circuit decision showed that due process protections do not apply in all academic matters. In Killion v. Burl, the Court found that a first grader had no liberty or property interest in promotion to second grade in a dispute over a mistake on his report card.[78]

A number of district courts have also found that students have a protected liberty interest sufficient to trigger due process protections.[79]

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[76] *Id.* at 184-85. (citation omitted).

[77] *See* Greenhill v. Bailey, 519 F.2d 5, 8 (8th Cir. 1975) (concluding that a student dismissed from medical school had a liberty interest sufficient to invoke due process protections when the school's actions had the effect of suggesting that the student was intellectually unfit). The *Greenhill* Court acknowledged that they would ordinarily defer to the broad discretion vested in public school officials in academic as opposed to disciplinary cases but "that the dictates of due process, long recognized as applicable to disciplinary expulsions (and suspensions of significant length) may apply in other cases as well, where the particular circumstances meet the criteria articulated by the Supreme Court in *Roth* and *Perry*. *Id.* at 8-9 (citations omitted). The court concluded: "We hold that the action by the school in denigrating Greenhill's intellectual ability, as distinguished from his performance, deprived him of a significant interest in liberty, for it admittedly 'imposed on him a stigma or other disability that forecloses his freedom to take advantage of other. . . opportunities.'" *Id.* at 8.

[78] *See* Killion v. Burl, 860 F.2d 306 (8th Cir. 1988) (holding that there is no liberty or property interest in promotion to second grade.) This decision is a one page per curium opinion regarding a mistake on a first grader's report card. Little Killion was doing poorly in first grade classes in math and reading and was not promoted. His end of year progress report inaccurately indicated he would be promoted when he should not have been and was not. The court said he failed to establish a liberty or property interest in being promoted to the second grade and, without discussion and likely in error, noted the citations for *Roth* and *Ewing*. *See id.*

[79] The district court in *Debra P.* found both a property right and a liberty interest. The trial court held that students had a liberty interest to be free from the stigma of an inferior graduation credential. *Debra P.*, 644 F.2d at 398. *See also* Grove v. Ohio State University, College of Veterinary Med., 424 F.Supp. 377, 382-83 (S.D. Ohio 1976) (finding a protected liberty interest, but not a protected property interest, in admission to graduate veterinary school because it plays a crucial role in entry into a profession); Warren v. Nat'l Ass'n of Secondary Sch. Principals, 375 F.Supp 1043, 1048 (N.D. Tex. 1974) citing Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 573 (1972) (finding that a student had a protected liberty interest in continued participation in high school honor society in a public high school because his exclusion could well cause injury to his good name, reputation, honor, or integrity)); Ector County Indep. Sch. Dist. v. Hopkins, 518 S.W.2d 576 (Tex. Civ. App. 1974) (finding that a student had due process rights in her exclusion from the National Honor Society for drinking wine). *But see* Price v. Young, 580 F.Supp. 1 (E.D. Ark. 1983); Karnstein v. Pewaukee School Board, 557 F.Supp. 565 (E.D. Wis. 1983).

One other point about these decisions deserves brief mention. Most of the courts that have reviewed academic decisions have been confronted with individual claims. One can reasonably argue that non-promotion of one student is an individualized academic judgment of a teacher or faculty that should not be subjected to adjudicative review. However, a new public testing scheme that results in the retention of hundreds or even thousands of students is not reasonable. This sort of public action is an institutional change in policy and rule. Courts have never shied away from determining the constitutionality of institutional changes in rules and policies, particularly when the changes negatively impact large numbers of people.

Based on these decisions, the threshold question for a due process analysis for evaluating high-stakes testing for grade school children should be: "Did these students previously have a right or interest in being promoted to the next grade if they met the attendance requirements and passed their subjects?" The usual answer would be "yes" since these high-stakes tests are usually a change from previous state practice. If the answer is "yes," then the children then have an interest sufficient to invoke the procedural protections of the due process clause.

Thus, in light of decisions by the Supreme Court and many circuit and district courts, students who raise procedural and substantive due process challenges to academic decisions should not be turned away at the threshold for any concern about the existence of adequate property rights or liberty interests.

IV WHAT PROCESS IS DUE STUDENTS FACING HIGH-STAKES TESTS?

"Once it is determined that due process applies, the question remains what process is due."[80]

Once it has been established that public school children facing high-stakes tests have sufficient property and liberty interests to invoke due process protections, the

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Opponents of judicial review of high-stakes testing often cite at some length two paragraphs in the decision in Hartfield v. East Grand Rapids Public Schools, 960 F.Supp. 1259 (W.D. Mich. 1997). In *Hartfield*, parents in one family filed a pro se complaint in federal court alleging due process violations as a result of mistreatment of their children by the local public school system. They alleged that one of their children was wrongfully suspended, that the parents were refused review of public documents, and truancy records, claims of racial discrimination lodged against the school, and disagreements over whether other children should be tested for placement in special education classes. The trial court disposed of plaintiffs claims on several grounds, including a two paragraph dismissal of their due process claims. *Hartfield* stated that there was no property right or liberty interest in promotion to ninth grade, citing *Killion*. Those paragraphs managed to inaccurately summarize *Roth*, *Horowitz*, and *Ewing*, in one sentence each, and then proceeded to misstate the law of due process. While one might be sympathetic with the court's reluctance to spend an inordinate amount of judicial time with the extensive pro se claims of the plaintiffs, the resulting decision should not be relied on by any thoughtful court.

[80] Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

next question is: "What process are they due?" The legal analysis is still evolving, providing students with both procedural due process and substantive due process often in some combination. Fortunately, there are some direct answers and, some principles to guide this analysis. Evaluating the fairness of high-stakes testing is not as easy as deciding if a child received procedural due process in a disciplinary context. However, three branches of government have already begun formulating criteria for evaluating high-stakes testing and each offers guidance on how to proceed. The following discussion starts with the Supreme Court; looks then to the lower courts; reviews the result of a critically important Congressionally-mandated study; and ends with guidance provided by the Office of Civil Rights of the Department of Education. Students facing high-stakes testing have four core due process rights: (1) the right to a fair test; (2) the right to have their teachers adequately prepare them in the material on the test; (3) the right to expect that the test itself, the way the test is being used, and the adequacy of their preparation will meet professional and academic standards; and (4) the right to require the state to prove that the students are prepared to have a fair chance to pass the high-stakes tests.

As the Supreme Court has noted, the due process clause has two aspects-procedural and substantive.[81] On the procedural side, the law demands that the state provide, at a minimum, notice and opportunity to be heard before it deprives citizens of certain state-created protected interests.[82] Procedural due process challenges seek to evaluate the fairness of the method by which the state action was taken.

On the substantive side, the law holds that some rights are so profoundly inherent in the American system of justice that they cannot be limited or deprived arbitrarily, even if the procedures afforded the individual are fair.[83] Substantive due process challenges strike at the fairness of the state action itself, not the method by which it was achieved.

While the Supreme Court has never presumed to give the definitive version of what due process is or what protections it offers, there is guidance available for those who seek to apply due process to high-stakes testing. While this article is not intended to be a comprehensive overview of the professional and technical issues involved in high-stakes testing, it will consider some of the starting points for judicial review and evaluation.[84]

Unfortunately, the Supreme Court has been unclear in setting the guidelines for both procedural and substantive due process analysis in academic decision-making. As noted above, the Court in *Horowitz* and *Ewing* has assumed without deciding

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[81] *See* Michigan v. Ewing, 474 U.S. 214, 229 (1985) (Powell, J., concurring).

[82] *See id.;* Frazier v. Garrison Indepdent School District 980 F.2d 1514, 1529 (5th Cir. 1993).

[83] *See Ewing*, 474 U.S. at 229. For discussion of substantive due process in high-stakes testing, see Durling, *supra* note 3, at 626-29.

[84] Readers who want to begin a detailed world-wide legal tour of testing should start with Coleman, *supra* note 3, and Heubert, *supra* note 4, at 1.

that there are property and liberty rights sufficient to trigger due process rights in major academic decisions.[85] The Court was not clear in those opinions as to exactly what procedural and substantive due process require. Those decisions, however, do offer the starting points for any determination about what process is due.

In *Horowitz*, the Supreme Court found that the student was entitled to due process, but did not squarely answer the question of what process was due.[86] The court noted that the student had received a substantial notice, multiple opportunities to be heard, and several reviews evaluating the accuracy of the academic action complained of.[87] The court did recognize that due process evaluations of academic issues differ from due process in the disciplinary context, and noted the need for courts to exercise flexibility in procedural due process reviews of academic decisions:

> [T]he need for flexibility is well illustrated by the significant differences between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural due process requirements in the case of an academic dismissal.[88]

The court then went on to agree with the lower courts that "no showing of arbitrariness or capriciousness has been made in this case."[89]

Thus, from *Horowitz*, there are at least three themes that should characterize due process review in the context of high-stakes testing. First, as the court did in *Horowitz*, a court should evaluate the factual record to see what notice was provided, what opportunities to be heard were provided, and what evaluation of the decision complained of occurred. Second, in order to protect the subjective judgment inherent in most academic decision-making, flexibility must be a characteristic of a procedural due process review of high-stakes testing. Third, in light of the above, the state action at issue must not be arbitrary or capricious.

In *Ewing*, the Court added both another note of caution and some guidance in evaluating whether the state action was arbitrary or capricious. In due process reviews of genuinely academic matters, courts are to intervene in a less intrusive manner than in disciplinary due process reviews:

> When judges are asked to review the substance of a genuinely academic decision. . .they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.[90]

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[85] *See* discussion *infra* Part III.

[86] *See* Board of Education v. Horowitz, 435 U.S. 78 (1978).

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Ewing*, 474 U.S. at 225.

Thus, a state's educational determinations may be invalid under a substantive due process analysis only where they reflect a "substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[91]

The court also provided some additional direction when it chose to review the fairness of the challenged academic decision in light of the student's entire academic career. Like *Horowitz*, the *Ewing* Court observed that the student had repeated notice, several opportunities to be heard, and the academic decision was substantively evaluated in an open and apparently fair manner. When the Court weighed the fairness of the academic action, it found that the state decision to dismiss *Ewing* was not "beyond the pale of reasoned academic decision making when viewed against the background of [Ewing's] entire career."[92]

Ewing thus both continues two themes of *Horowitz* and adds new points to academic due process review. First, like the flexibility demanded by *Horowitz*, the *Ewing* court starts with a direction that the courts give professional judgments of academics great respect. Second, again as in *Horowitz*, one way of reviewing the reasonableness of the state action as it impacts the student is to look at it in light of the student's entire academic career and the facts which show notice, opportunities to be heard and fair evaluations. Third, as part of the substantive due process evaluation to decide whether the state action was arbitrary or capricious, the court should evaluate the action in question to see if it is a substantial departure from academic norms. Fourth, the inquiry must determine whether the actions of the teacher or academic committee demonstrate that they actually exercised professional judgment.

In sum, *Horowitz* and *Ewing* give lower courts some general guidance in how to determine what process is due when evaluating genuinely academic decisions. Courts must be respectful and flexible when evaluating the judgment of teachers and academics. Courts must also test the validity of the academic action to see if it is arbitrary or capricious by determining if it is a substantial departure from academic norms. Further, courts must keep the overall career of the student involved in context and evaluate the notice given, opportunity to be heard, and the chance for others to evaluate the fairness of the decision. Finally, courts must ensure the teachers or academics actually exercised professional judgment.

Horowitz and *Ewing* point the way that courts should evaluate high-stakes testing due process issues. Examination of high-stakes testing in light of academic and professional norms is not as easy as deciding if a child received procedural due process in a disciplinary context, but it is important work that can and ought to be done. Judges should no more turn away the due process claims of these children merely because they are complex any more than they would turn away other parties seeking resolution of complex matters. Fortunately for the courts there is more specific guidance in these matters.

All three branches of government have begun formulating criteria for evaluating

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[91] *Id.*

[92] *Id.* at 228.

high-stakes testing and each offers guidance on how to proceed. Lower courts in the judicial branch have evaluated high-stakes testing and articulated principles of review in *Debra P.* and subsequent cases. Congress asked the National Academy of Sciences and the National Research Council to determine norms for appropriate testing and methods for determining compliance with those norms. Finally, the executive branch, through the U. S. Department of Education, Office of Civil Rights have formulated guidelines for evaluating high-stakes testing.

A. *Judicial evaluation of high-stakes testing*

> Establishing a right to a meaningful educational process. . .squarely presents to the courts the central question of fairness that stigmatizing minimum-standards laws raise: Whether a state fairly may harm children it compels to attend school by imposing expectations-frustrating consequences on those children when they fail state-mandated tests that they demonstrably are without the instructional means to pass.[93]

More than two dozen courts have already engaged in some evaluation of high-stakes testing.[94] Determining how high-stakes tests are to be fairly used in schools can be a complex endeavor involving evaluations of the tests themselves as well as academic norms and professional judgment.[95] This section will highlight the most important principles that courts should use in conducting due process evaluations of high-stakes testing schemes.

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[93] Liebman, *supra* note 7, at 411.

[94] Perry A. Zirkel, *Tabular Analysis of the Case Law Concerning High-stakes Testing*, 143 W.E.L.R. 697 (2000) (briefly reviewing over thirty reported testing cases).

[95] The courts have for years been involved in reviewing determinations of test validations. *See, e.g.*, Association of Mexican-American Educators v. California, 195 F.3d 465, 485-92 (9th Cir. 1999) (reviewing test validation, in terms of disparate impact, content validation, job relatedness, expert overviews, actual measurement of skills, the determination of cut off scores, and job specific validation). *See also* Cureton v. NCAA, 37 F.Supp. 2d 687,706-14 (E.D. Pa. 1999). *Cureton* reviewed the discriminatory impact under Title VI of a standardized score cutoff under the Scholastic Aptitude Test which the NCAA required for first year athletes to participate in intercollegiate competition. The court reviewed the validity of the SAT as a predictor of student-athlete graduation rates, the decision to use a specific cutoff score, the predictive ability of the questioned test, and the racial impact of the policy chosen. *Id.* at 107. *See also* Sharif v. N.Y. Education Dept., 709 F.Supp 345, 350-56, 360-65 (S.D.N.Y. 1989) (rejecting the use of SAT scores for awarding scholarships finding that the state reliance on the SAT alone discriminated against women). The court required the state to show both an "educational necessity" and that the testing practices bear "a manifest demonstrable relationship to classroom education." *Id* at 350. After comparing the disparities between using standardized test scores alone and using standardized tests in conjunction with grades, the court found the state policy of using standardized tests alone untenable. *Id.* at 360-65. *See also* Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984) (use of IQ tests to place students in educable mentally retarded classes violated civil rights and educational law.)

Once again the starting point is *Debra P. v. Turlington*,[96] where the Fifth Circuit Court of Appeal found four important principles that should guide the judicial due process reviews of high-stakes testing. Recall that *Debra P.* involved a challenge to a new requirement that students pass a standardized test before they could be certified for graduation. While the focus of this article is on grade school children, the due process principles of *Debra P.* can and should be adapted by courts reviewing high-stakes testing in all contexts.

First, the *Debra P.* court said what would appear obvious, the high-stakes test that is the subject of a due process challenge must itself be a fair test.[97] Second, in order to comply with the notice requirements of due process, any high-stakes test must examine students on matters actually covered in the classroom.[98] Third, the court can look to professional testing standards for guidance to decide if requirements one and two are met.[99] And fourth, the burden of proving that students were actually taught the material on the test lies with the state.[100]

The first requirement is that the test be fair. The Fifth Circuit sought to determine the professional validity of the test in question. In all due process cases, one of the starting points has been to make sure that the government is not making a mistake in its efforts, that it is at least accurate in the action taken.[101] Accuracy is an ongoing and obvious problem with standardized tests.[102]

Second, the students must be tested on matters actually covered in the classroom. As framed by *Debra P.* court, the Florida testing scheme failed to pass muster under these standards of validity because there was insufficient evidence that the skills measured on the test were taught to the students who were required to take the test. The court termed this curricular validity. As the court said, not every question must be taught to every student in the form that it appeared on the test: "We think, however, that fundamental fairness requires that the state be put to test on the issue of whether the students were tested on material they were or were not

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[96] 644 F.2d 397 (5th Cir. 1981).

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *See* Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976):

> [P]rior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35. *See also* Carey v. Piphus, 435 U.S. 247, 262 (1978) ("a purpose of procedural due process is to convey to the individual that the government has dealt with him fairly").

[102] *See* Durling, *supra* note 3, at 616-17 (discussing scoring errors, coding errors, computer errors, and other inherent limitations on such test).

taught."[103]

The requirement that students, who are compelled by law to attend school six hours a day, five days a week, thirty-six weeks a year, for ten to twelve years, are entitled in return to be taught the materials that they will be tested upon is not a revolutionary concept.[104]

Third, the courts should look to professional standards to help in the determination of these issues. For their guidance in determining the validity of the test, the Fifth Circuit court looked to the then current standards for educational and psychological tests as formulated by the American Psychological Association.[105]

Fourth, and very importantly, the Fifth Circuit places the burden of proving that the material on the test was actually taught, actually "covered in class," on the state.[106] We do not question the right of the state to condition the receipt of a diploma upon the passing of a test so long as it is a fair test of that which was taught. Just as a teacher in a particular class gives the final exam on what he or she has taught, so should the state give its final exam on what has been taught in its classrooms.[107]

Subsequent judicial evaluations of the substance of high-stakes testing have followed this four part due process analysis.[108] While the Eleventh Circuit, in a

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[103] *See Debra P.*, 644 F.2d at 406.

[104] *See, e.g.*, Ratner, *supra* note 74, at 823-28 (arguing that educational institutions owe students a right to be educated in return for the loss of their liberty under substantive due process).

[105] *Debra P*, 644 F.2d at 405 n.10. One of the significant contributions of the *Debra P.* court is its reliance on expert testimony to conclude that curricular validity means that the test must measure what was actually taught. The court cited Merle McClung, *Competency Testing Programs: Legal and Educational Issues*, 47 FORDHAM L. REV. 651, 683 (1974) (discussing the standards for testing promulgated by the American Psychological Association). However, McClung does not actually agree with the terminology employed by the *Debra P.* Court which cited him, calling "instructional validity" what the court termed "curricular validity." *See also* Gunn, *supra* note 48, at 574 n.9.

[106] *Debra P.*, 644 F.2d at 406.

[107] *Id.*

[108] *See, e.g.*, Anderson v. Banks, 520 F.Supp 472, 487 (S.D. Ga. 1981) (analyzing the bias and statistical validity of the standardized test under a multiple regression analysis). A multiple regression analysis evaluates information to see what variables are important to the outcome of the concluding data.

The concept that schools should be required to teach what they intend to test is not a revolutionary idea. *See Brookhart*, 697 F.2d at 186, 187 (basing its opinion on substantive rather than procedural due process, court held that requiring earlier notice and the attendant opportunity to earn the material will greatly decrease the risk of erroneous deprivation). *Id.* The court relied on expert testimony that compared the curriculum of what the students were taught with the material covered on the standardized test. *Id.* The court, after reviewing other testing notice cases, concluded that a year and a half notice of the new high-stakes requirement was insufficient. *Id.* (*considering* Board of Education v. Ambach, 436 N.Y.S.2d 564 (Sup. Ct. 1981) (less than two years is inadequate notice); Anderson v. Banks, 520 F. Supp. 472 (S.D. Ga. 1981) (twenty-four months is adequate notice); Wells v. Banks, 266

case concerned with grade school promotion issues, declined to enter into this analysis, it carefully noted that *Debra P.* was inapplicable to those facts because the case did not involve a high-stakes standardized test.[109] Thus the four parts of the

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S.E. 2d 270 (Ga. App. 1980) (adequate notice existed though no specific time mentioned)). Courts should look to professional standards as an indication of due process. *See Brookhart*, 697 F.2d at 179. *Brookhart* used expert testimony to compare the curriculum taught to the students with the material on the new high-stakes tests. *Id.* at 186. Likewise, *Anderson*, 520 F.Supp at 487, analyzed the bias and statistical validity of the standardized test under a multiple regression analysis. A multiple regression analysis evaluates information to see what variables are important to the outcome of the concluding data. *Id.*

The state has a burden of proving materials were taught to the students *Id. Anderson* followed *Debra P.* and found that a local school board did not meet its due process burden of proof when it showed only that it was "probable" that the material on a new high-stakes test was actually taught to the students. *Id.* at 509. Two 1992 Texas district court decisions focused on this prong of the *Debra P.* analysis but came to opposite results. *Compare* Crump v. Gilmer Indep. Sch. District, 797 F.Supp. 552, 555 (Tex. 1992) (ordering Texas to allow student plaintiffs, who passed all their required course work but failed a standardized high school exit exam, to participate in graduation ceremonies, and interpreting *Debra P.* to stand for the proposition that the state is prohibited from imposing new criteria absent adequate notice and a sufficient nexus between the test and the school curriculum: "[f]undamental fairness requires that the state be put to the test on the issue of whether the students tested were tested on material they were or were not taught.") *with* Williams v. Austin Sch. Dist., 796 F.Supp. 251, 254 (Tex. 1992) (finding that because the student had seven years of notice of the exam and the school met its burden of showing curriculum was matched to the test, *Debra P.* did not apply: "Students should be given a fair opportunity to pass the test, not a guarantee that they will pass the test").

[109] *Debra P.* was inapplicable in an Eleventh Circuit grade school promotion/retention case, Bester v. Tuscaloosa, 722 F.2d 1514 (11th Cir. 1984), because there was no external high-stakes test. *See* nn.66-69 and accompanying text.

However, for those concerned about a lack of adequate preparation for high-stakes testing in grade school children, it is very important to note that the *Bester* plaintiffs did not allege that the remedial efforts of the school system were deficient nor was there any complaint about an external high-stakes standardized test being used to replace teacher evaluations. The *Bester* court specifically accepted that *Debra P.* stands for the proposition that a student who performs satisfactorily in the classroom but who is subjected to a "a new and external test was required as a prerequisite to a diploma and the test was unrelated to academic work required in the school." *Id.* at 1516. The court found that the plaintiffs were not entitled to a preliminary injunction to prevent a new policy from going into effect. Importantly, as the court noted, this was classroom evaluation of individual students reading ability and a change of the district policy on promotion and, unlike *Debra P.*, "no separate test would be used." *Id.* at 1515.

Also, merely having a cause of action under the due process clause does not always lead to a *Debra P.* like suspension of standardized tests. See for example the January 2000 decision of a federal district court in Texas, which, after an extensive trial, affirmed that the Texas standardized test required for high school graduation did not violate the due process rights of students despite having a clearly disproportionate negative impact on African American and Hispanic students. *See* GI Forum Image de Tejas v. Texas Education Agency, 87 F.Supp. 2d

Debra P. due process analysis should guide all judicial evaluations of high-stakes testing. The test must be fair. The students should already be taught the material they are to be tested upon. Professional standards should be met. And the state must shoulder the burden of proving that the students have been provided with a fair educational opportunity to learn the material on the test. While commentators have suggested various important refinements of these principles, these four still remain the core of the due process analysis.[110]

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667 (W.D.Tex. 2000).

[110] *See* Durling, *supra* note 4 (making several helpful suggestions that, if adopted, would increase confidence in the fairness of high-stakes testing. Part of the determination of the fairness of the test is found when the state is called upon to provide a copy of the test and the answers to the student who is reported to have failed. Likewise, there should be an opportunity to check on scoring and undetected substantive errors). *Id.* at 618-20. An opportunity to re-take the test in a timely fashion is a usual response to the use of high-stakes tests. *Id.* at 622-25. That will reduce the risks of scoring errors on a test, but it will not address the issue of children not being adequately taught the material on the test.

Due process challenges to high-stakes testing of grade school children are based on several grounds: inadequate notice of the implementation of new requirements; inadequate opportunity to learn the tested materials; and the validity of the tests themselves in light of what they are supposed to accomplish. Coleman, *supra* note 3, at 93-98. And, while federal courts have a traditional deference to reasonable, rational and non-arbitrary decisions by local school authorities of whether to have high-stakes tests, courts have used a "more probing inquiry. . . into the design and use of particular tests. Specifically, courts question whether high-stakes achievement tests are administered appropriately and are aligned with the instruction the students have received such that they provide meaningful conclusions about the students." *Id.*, at 95-96.

As Coleman further noted:

> Educators can ensure that they meet the goals of educational excellence and legal soundness through standards-based reforms as long as those reforms that may include high-stakes tests involve appropriate attention and action in four areas: (1) establishing in clear terms the objectives of high-stakes tests; (2) implementing a methodology for test development and administration that provides a sufficient foundation for ensuring accuracy in educational decision making; (3) designing the substance of the high-stakes tests so that the achievement that is measured is fully aligned with the school's standards, curriculum and instruction for all students taking the test; and (4) assessing results of test administrations over time to monitor trends and performance.

Id. at 108-12.

Other commentators on the issue of due process in high-stakes testing have identified three areas where courts should inquire as to the fairness of the testing process: test reliability; test validity, and instructional match. Test reliability means that the test ought to meet professional standards to make sure that it will yield consistent results and result in minimal errors.

Test validity means that the test must in fact measure what it intends to. This is different from reliability in that a test can be predictable and consistent but still not accurately measure competency, i.e., is the test a good indicator of student ability? The validity of tests have been regularly reviewed by courts in the employment context. *See, e.g.*, Note, *The Use*

These criteria can be posed as a series of questions that the parties, their experts, and the court must address. Is the high-stakes testing scheme at issue at its core composed of valid and accurate tests? That is, does the state's new testing regime meet professional standards? If the test is valid and accurate, have the students had sufficient notice of the high-stakes test? That means not just whether or not were they given advance warning but whether the students were given a fair educational opportunity and adequate preparation in order to be given a real chance to pass the test? For example, does the curriculum taught to the students align with the questions asked on the test? Has the preparation of the students and the curriculum used been validated by proof sufficient to meet professional standards? And, finally, has the state provided sufficient proof to meet its burden of showing that the students were actually taught what is on these high-stakes tests?

As *Debra P.* and its progeny suggest, as one important part of the review of the fairness of high-stakes tests, courts should evaluate the validity, accuracy, and appropriate use of the tests in light of the most recent professional standards. Fortunately, three professional organizations have recently issued such standards. The American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education published Standards for Educational and Psychological Testing.[111] The purpose of publishing these standards was "to provide criteria for the evaluation of tests, testing practices, and the effects of test use."[112] The standards specifically address issues of test fairness in the construction, evaluation, application and documentation of tests and provide professional standards and commentary to guide judicial determinations of high-stakes testing.[113] While most of the standards apply to high-stakes educational

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of Competency Testing in the Evaluation of Public School Teachers, 39 U. KAN. L. REV. 845, 846-54 (1991) (discussing criterion-related validation, content validation, and construct validation of tests).

Instructional match is the answer to the question, does the test measure what the student has been taught or has the student had a reasonable opportunity to learn what they are being tested on? *See, e.g.*, Lewis, *supra* note 8, at 159-65. *See also* Coleman, *supra* note 3, at 102-06. Coleman suggests that tests must be properly designed, properly used, and properly interpreted, while the students must be properly prepared by the educational system.

For evaluation of tests in academic admissions, see William C. Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and its Relationship to Racial Diversity in Legal Education*, 12 YALE J.L. & FEMINISM 1, 19-22 (2000).

[111] STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING, AMERICAN EDUCATIONAL RESEARCH ASSOCIATION (1999) [hereinafter STANDARDS].

[112] *Id.* at 2.

[113] The STANDARDS are indexed as follows: Validity, Standards 1.1-1.24; Reliability and Errors of Measurement, Standards 2.1-2.20; Test Development and Revision, Standards 3.1-3.27; Scales, Norms, and Score Comparability, Standards 4.1-4.21; Test Administration, Scoring and Reporting, Standards 5.1-5.16; Supporting Documentation for Tests, Standards 6.1-6.15; Fairness in Testing and Test Use, Standards 7.1-7.12; Rights and Responsibilities of Test Takers, Standards 8.1-8.13; Testing Individuals of Diverse Linguistic Backgrounds, Standards 9.1-9.11; Testing Individuals with Disabilities, Standards 10.1-10.12;

testing, of particular concern to those evaluating high-stakes testing of grade school children are: Standard 6.1 which indicates test materials should be made available to the public at the time the tests are given;[114] Standard 13.5 which points out that students should only be tested after it is certain that tested material has been taught in the classroom;[115] and Standard 13.7 which cautions that educational decisions should not be made based on a single test.[116]

While some state authorities may not enthusiastically accept these responsibilities to make sure that mandatory high-stakes testing are fair, it is certainly fair to make the state rise to the challenge of explaining the validity and fairness of their testing scheme, for, as a federal court observed in reviewing a challenge to the validity of a state teacher competency test, just "as the state expects it teachers to measure up to the more exacting professional demands of today's educational system, it itself must do likewise."[117]

Following these due process requirements will cost the state some funds to make sure the tests are fairly constructed and applied but should not be unduly burdensome, considering the important interests of the children at stake and the overall cost of implementing and sustaining the high-stakes standardized testing regime.[118]

Responsibilities of Test Users, Standards 11.1-11.24; Psychological Testing and Assessment, Standards 12.1-12.20; Educational Testing and Assessment, Standards 13.1-13.19; Testing in Employment and Credentialing, Standards 14.1-14.17; and testing in Program Evaluation and Public Policy, Standards 15.1-15.13. *See id.* at iii and iv.

[114] Standard 6.1: "Test documents (e.g., test manuals, technical manuals, user's guides, and supplemental material) should be made available to prospective test users and other qualified persons at the time a test is published or released for use." *Id.* at 68.

[115] *Id.* "When test results substantially contribute to making decisions about student promotion or graduation, there should be evidence that the test adequately covers only the generalized content and skills that students have had an opportunity to learn." STANDARDS, *supra* note 111, at 146.

[116] *Id.* "In educational settings, a decision or characterization that will have a major impact on a student should not 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." *Id.* at 146-47.

[117] Groves v. Ala. State Bd. of Educ., 776 F.Supp. 1518, 1532 (M.D. Ala. 1991).

[118] Zirkel, *supra* note 94, at 697. Zirkel briefly reviews over thirty reported testing cases and concludes with the following practical recommendations for government authorities developing or implementing high-stakes testing: 1. Courts tend to afford latitude to school authorities in testing cases; 2. Invest resources in the validation of the test and cutoff scores, for students include "instructional validity;" 3. Provide ample notice, at least three years before implementation of consequences of high-stakes; 4. Allow administrative accommodations for students with disabilities; 5. Make sure tests meet criteria of educational necessity and cost/benefit effectiveness where the results are disproportionate for a protected group (e.g. racial minority test takers); 6. Allow re-testing and where possible remediation; 7. Stick to the basics; avoid psychologically sensitive content, particularly for students (unless you have informed parental consent). *Id.* at 699.

B. *Response to legislative call for norms in high-stakes testing*

"Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.[119]

Responding to concerns over the use and misuse of high-stakes testing, in late 1997, Congress asked the National Academy of Sciences to conduct a study and make written recommendations on appropriate methods, practices, and safeguards to ensure that-(1) existing and new tests that are used to assess student performance are not used in a discriminatory manner or inappropriately for student promotion, tracking or graduation; and (2) existing and new tests adequately assess student reading and mathematics comprehension in the form most likely to yield accurate information regarding student achievement of reading and mathematics skills.[120]

As a result of the congressional call, the National Academy of Sciences, through its National Research Council, conducted a comprehensive study and issued a report in 1999 entitled High-stakes: Testing for Tracking, Promotion and Graduation.[121]

This NRC study sets out a general definition of appropriate test use and makes findings and recommendations regarding the use of high-stakes testing.[122] This is of substantial importance in determining whether or not the high-stakes testing in question meets professional standards.

The NRC study adopts a three part framework for determining whether a particular high-stakes test is appropriate: measurement validity; attribution of cause; and effectiveness of treatment.[123] Translated, the three NRC criteria pose three questions that go to the heart of the fairness of the high-stakes testing scheme:

(1) Is the test valid for the purpose it is being used and does it accurately measure student knowledge in the area being tested?

(2) If a student does poorly is that an accurate reflection of their lack of knowledge despite appropriate teaching or is the poor performance based on

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[119] Griggs v Duke Power Co., 401 U.S. 424, 433 (1971).

[120] Public Law 105-78, Section 309(a), 111 Stat. 1506, November 13, 1997.

[121] *See* TESTING FOR TRACKING, *supra* note 3. On the state level, there have been efforts, largely unsuccessful so far, to create "truth-in-testing" laws which would give minimum due process rights to students subjected to standardized tests. *Id. See* Michael Burns, *Truth in Testing Arguments Examined*, 31 J. LEGAL EDUC. 256 (1981); Robert A. Kreiss, *Copyright Fair Use of Standardized Tests*, 48 RUTGERS L. REV. 1043 (1996); A. STRENIO, THE TESTING TRAP 279 (1981); Note, *Truth in Testing Laws: Copyright and Constitutional Claims*, 81 COLUM. L. REV 179 (1981). *But see* Chicago Sch. Reform Bd. of Trustees v. Substance, 79 F.Supp.2d 919 (N.D.Ill. 2000) (First Amendment does not permit newspaper to publish copies of copyrighted standardized high-stakes test); College Entrance Examination Bd. v Pataki, 893 F.Supp. 152 (N.D.N.Y. 1995) (where court limited scope of the New York Standardized Testing Act).

[122] Heubert, *supra* note 3, at 1.

[123] *Id.* at 2.

factors like language barriers or disabilities unrelated to the skills being tested?

(3) Do the uses of the student scores on the test lead to educationally beneficial consequences for the student being tested? [124]

But what are evaluators to look at when high-stakes testing is used as an instrument to push change in public education demonstrating a gap between an "old" educational system and the "new"? The high-stakes report follows the *Debra P.* demand that "tests should be used for high-stakes decisions about individual mastery only after implementing changes in teaching and curriculum ensure that students have been taught the knowledge and skills on which they will be tested."[125] As the report notes, for tests intended to measure mastery, such as. . .some promotion tests, there should be a close fit between what the test measures and what students have already been taught in the schools of the state or district that administers the test.[126]

These criteria can be used by experts to evaluate high-stakes tests to see if they meet the norms and requirements of the NRC. If they do, then the test meets the test of fundamental fairness. If the test does not, then the fundamental fairness of the policy and its application is in question.

Like the Supreme Court suggested approvingly in *Ewing*, supra, it is important to view the entire academic career of a student before making a significant decision.[127] Thus, "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."[128]

In fact, the High-stakes report concludes that the use of high-stakes testing to decide whether students should be retained in grade is an inappropriate use of high-stakes testing. Retention based on standardized tests alone is an ineffective intervention as the negative consequences outweigh the positive.[129]

This report, commissioned by Congress, provides very pointed and useful guidance in evaluating the fairness of a state mandated high-stakes testing scheme. The report also provides a very useful caution to those considering high-stakes testing for grade school children as a way to lead educational reform. "Accountability for educational outcomes should be a shared responsibility of states, school districts, public officials, educators, parents, and students. High standards cannot be established and maintained merely by imposing them on

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[124] *Id.*

[125] "Tests should be used for high-stakes mastery only after implementing changes in teaching and curriculum that ensure that students have been taught the knowledge and skills on which they will be tested." TESTING FOR TRACKING, *supra* note 3, at 6.

[126] Heubert, *supra* note 3, at 2.

[127] Michigan v. Ewing, 474 U.S. 214, 229 (1985)

[128] TESTING FOR TRACKING, *supra* note 3, at 8.12.

[129] *See id.* at 283.

students."[130]

C. *Executive branch norms used to evaluate high-stakes testing*

The U.S. Department of Education, Office of Civil Rights has provided educational institutions with a December 1999 guide for the use of tests when making high-stakes decisions for students.[131] Their brief overview of what due process requires is extracted from court decisions analyzing these in educational contexts. They define the issue as "notice of and an opportunity to learn the required content" and in that find three core issues:

(1) Is the purpose of the testing program legitimate?

(2) Have students received adequate notice of the test and its consequences?

(3) Are students actually taught the knowledge and skills measured by the test?[132]

In evaluating purpose, DOE suggests that institutions look to *Debra P.* and *Anderson v. Banks* and query, under a substantive due process analysis, whether the policy judgments of the educators in deciding to implement high-stakes testing were arbitrary or capricious? The guidelines recognize that under both *Debra P.* and *Ewing*, the courts usually give wide latitude to educational institutions in the determination of educational purpose.

DOE recognizes that the requirement of notice is not restricted to the provision of a warning that an entirely new testing and promotion scheme is on the way, but rather that there is real and sufficient notice so that elementary and secondary students may be adequately prepared for the new policy and given a reasonable chance to pass.[133] Part of notice is clearly the time involved in transition from the previous policy to the new tougher high-stakes policy. DOE suggests looking at several factors:

> In looking at the length of the transition period needed between announcement of a new requirement and its full implementation, the kind of test and the context in which it is administered are central factors to be considered. Specific circumstances taken into account include the nature of instructional supports, including remediation, that accompany the test; whether re-testing is permitted; and the whether the decision to promote or graduate the student

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[130] *See id.* at 5.

[131] *The Use of Tests When Making High-Stakes Decisions for Students: A Resource Guide for Educators and Policy Makers*, U.S. Department of Education, Office of Civil Rights, Draft December 8, 1999.

[132] *Id.* at 47-49.

[133] *Id.* at 48. A particularly important concern related to the adequacy of notice for racial minorities and students with disabilities is where such students were less likely than other students to have received a program of instruction that prepared them to pass the test. *Id.*

considers other information about the student's performance.[134]

Finally there is the ultimate *Debra P.* question, have students actually been taught the knowledge and skills measured by the test? Looking to *Debra P.*, *Brookhart* and *Anderson*, the DOE points out:

> Several courts have found that "fundamental fairness" requires that students be taught the material covered by the test where passing the test is a condition for receipt of a high school diploma. For the test to meaningfully measure student achievement, the test, the curriculum, and classroom instruction should be aligned. Although courts require that the content covered by the test is actually taught, courts will not expect proof that every student has received the relevant instruction.[135]

The guidance of the courts, the professional standards of the testing community, the congressionally-mandated study, and the Department of Education all underscore that students facing high-stakes tests have four core due process rights. They have the right to a determination that the test itself is a fair and accurate instrument which will be used in an appropriate manner. Students have the right to expect to be adequately prepared and taught the material on the test which will have a high-stakes impact on their education. Students have the right to expect that the test, the way the test is being used, and the adequacy of their preparation will meet professional and academic standards. And, finally, the students do not have to prove that they are unprepared, but the state has to prove that the children are ready and able to have a fair chance to pass the high-stakes tests.

V CONCLUSION

While the denial of the diploma has a certain deterrent value, its application in the instant case would be analogous to asserting that the immediate and indefinite incarceration without trial of an individual upon suspicion of the commission of a crime would have a deterrent effect on other potential offenders. No doubt it would. But in our country, the Constitution, including the due process clause stands between the arbitrary government action and the innocent individual. The implementation schedule in effect relative to the functional literacy testing program is fundamentally unfair.[136]

The *Debra P.* court concluded by quoting from *Brown v. Board of Education*[137] on the importance of education and went on to say:

> Because of this seminal role, it is critical to provide and administer education in a manner which comports with our historical and constitutional notions of fairness and equality. Any deviation from this course would seriously affect

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[134] *Id.* at 49.

[135] *Id.*

[136] Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981).

[137] Brown v. Board of Education in Topeka, 347 U.S. 483 (1954).

not only the individual student but our society as a whole. [138]

As noted at the beginning, high-stakes testing for grade school children is sweeping the country. This storm should not be a contest between our national values of fairness and our national hopes to raise educational expectations and performance, but rather it should be about finding a way to reconcile issues of high standards and fairness so that the rising tides of increased education lift our children up rather than wash them aside. In public systems that adopt high-stakes testing, which links student promotion and graduation to test performance, students can be asked to pay the price directly for failures by teachers and parents.[139]

No matter how helpful high-stakes testing is in prodding, pushing and pulling needed educational reform, it cannot be allowed to proceed at the price of giving up the constitutional due process rights of children. It does this nation no good at all to make progress in educational reform at the expense of the constitutional rights of children.

Students have property rights and liberty interests in academic matters that trigger due process protections in high-stakes testing. Due process guarantees students four core rights. Students have the right to expect that the test is an accurate evaluation tool. Students have the right to only be tested on material that they have been taught. Students have the right to expect that the test and their level of preparation for the test meet professional standards. And finally, the state must prove that the students have been fairly adequately prepared to take the test and have a fair chance to pass it.

In the educational system, the only valid use of tests is to help students improve their learning. If faulty tests are used, or valid tests are used in an incorrect manner, tests can result in a denial or frustration of a child's educational opportunity. Turning a blind eye to tests which frustrate the educational advancement of children is an abandonment of children to a perverse predicament where their educational environment actually retards their educational opportunity. Courts which allow that to happen are not courts of justice at all.

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[138] *Id.* at 495.

[139] Martha Minow, *Reforming School Reform*, 68 FORDHAM L. REV. 257, 268 (1999).