

# TESTING HUMAN RIGHTS: THE IMPACT OF HIGH-STAKES TESTS ON ENGLISH LANGUAGE LEARNERS' RIGHT TO EDUCATION IN NEW YORK CITY

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## I. INTRODUCTION

The rising stakes of standards-based education in the United States increasingly dictate the educational decisions that immediately impact a child's progress in school, threatening to compromise students' fundamental right to education. Most dramatically, high-stakes tests predicate important scholastic benchmarks, such as progressing to the next grade or graduating from high school, on a student's standardized test performance. The increased popularity of high-stakes testing in recent years is part of a general movement toward standardized testing in American schools.<sup>1</sup> Since the enactment of the No Child Left Behind Act (NCLB) in 2001,<sup>2</sup> all fifty U.S. states have developed standardized testing systems to measure students' achievement and improvement in math, reading, and language arts in grades three through eight.<sup>3</sup> Many states

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1. For an overview of the use of high-stakes testing in the United States prior to the enactment of the No Child Left Behind Act, see COMMITTEE ON APPROPRIATE TEST USE, HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION (Jay P. Heubert & Robert M. Hauser eds., 1999) [hereinafter TESTING FOR TRACKING].

2. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.). One of NCLB's major components is its requirement that states receiving federal education grants adopt "challenging academic content standards and challenging student academic achievement standards" that apply equally to all students. 20 U.S.C. § 6311(b). States must implement "accountability system[s]" (i.e., tests) to ensure that all schools make "adequate yearly progress," defined as meeting or exceeding the objectives set by the state. 20 U.S.C. § 6311(b)(2). The state must measure the achievement of various subgroups of students, including economically disadvantaged students, students from major racial or ethnic groups, students with disabilities, and students with limited English proficiency. 20 U.S.C. § 6311(b)(2)(C)(v). If any such group does not meet state objectives in a particular year, a school may nonetheless be found to have made adequate yearly progress if certain other requirements are met: the percentage of students in the group who did not meet or exceed the state's proficiency standards for that year decreased by ten percent from the preceding school year; the group made progress on at least one academic indicator set out in the Act; and not less than ninety-five percent of the school's students in each subgroup described above are required to take the tests. 20 U.S.C. § 6311(b)(2)(I).

3. Press Release, U.S. Dep't of Educ., Paige Announces That All States Are on Track by

go further, requiring that students pass standardized exams in order to graduate from high school. In 2005, nineteen states, including New York, only awarded high school diplomas to students who passed statewide exit exams, and seven states plan to phase in such exams before 2012.<sup>4</sup> Proponents of standardized and high-stakes tests argue that only with elevated standards and accountability can the United States ensure that all students are receiving a quality education. However, teachers, students, parents, and advocates have objected to standardized tests, alleging that they force schools to divert resources from teaching content to teaching students how to pass the tests. High-stakes tests in particular have met with criticism that they unfairly punish students for the failures of the education system. Missing from the debate so far has been a legal analysis of how high-stakes testing affects students' right to education under international law. Focusing on New York City as a case study, this article uses an international human rights perspective to examine the implications of high-stakes testing for the rights of English language learners (ELLs), whose first language is not English, and who are working towards English proficiency.

A number of factors raise concerns about the impact of high-stakes testing on ELLs. Most obviously, ELLs may score lower on tests, with the result that they are disproportionately subject to high-stakes consequences, because of limited English language proficiency or lack of familiarity with the cultural assumptions upon which the tests are based. Additionally, however, such tests put adverse pressures and penalties on schools, particularly schools with high numbers of disadvantaged and/or minority students that in turn decrease educational opportunities for ELL students. This article will evaluate these concerns using the structure promoted by the first United Nations special rapporteur on the right to education, Katarina Tomaševski.<sup>5</sup> Under this analysis, the four elements of the right to education are accessibility, acceptability, adaptability, and availability (the "4-A framework").<sup>6</sup> The article concludes that

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Submitting No Child Left Behind Accountability Plans on Time (Feb. 3, 2003), available at <http://www.ed.gov/news/pressreleases/2003/02/02032003b.html>. As of the 2005–06 school year, NCLB also requires states to develop academic standards in science. 20 U.S.C. § 6311(b)(1)(C).

4. CENTER ON EDUC. POL'Y, STATE HIGH SCHOOL EXIT EXAMS: STATES TRY HARDER BUT GAPS PERSIST 11 (2005). Twenty states, including New York, currently use their exit exams to meet NCLB's high school accountability requirements. *Id.* at 23–24. Increasingly, these tests are not merely minimum-competency tests, which focus on basic skills, but instead are based on state achievement standards or on the content of specific courses. The latter are referred to as end-of-course exams. *Id.* at 19.

5. The United Nations appointed a special rapporteur on the right to education to "report on the status, throughout the world, of the progressive realization of the right to education . . . and the difficulties encountered in the implementation of this right." Commission on Human Rights Res. 1998/33, ¶ 6, in U.N. Econ. & Soc. Council [ECOSOC], Official Records 1998, Supp. No. 3, Commission on Human Rights, *Report on the 54th Session*, ch. II(A), at 124–26, U.N. Doc. E/CN.4/1998/177 (April 24, 1998). Katarina Tomaševski was appointed the first rapporteur in 1998. In 2004, Vernor Munoz Villalobos was appointed the special rapporteur. Press Release, Vernor Munoz Villalobos Appointed UN Special Rapporteur on Right to Education, U.N. Doc. HR/CN/1102 (Aug. 30, 2004).

6. Katarina Tomaševski, *Preliminary Report of the Special Rapporteur on the Right to*

while high-stakes tests need not necessarily conflict with established principles of international law with respect to the right to education, the manner in which high-stakes tests are currently being implemented in New York City has serious implications for ELLs' right to education.

#### A. *Why International Human Rights?*

A detailed explanation of the rationale for and utility of a human rights analysis of education policy is beyond the scope of this article.<sup>7</sup> However, because the use of international human rights law to analyze or prescribe domestic policies in the United States is neither a common nor a widely accepted approach, especially outside the fields of civil and political rights,<sup>8</sup> it is important to briefly highlight why such an analysis is useful. The Universal Declaration of Human Rights, adopted by the United Nations in 1948, explains in its preamble that, ". . . recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."<sup>9</sup> Human rights are often described as natural rights, meaning rights that a human being possesses "simply by virtue of being a person;"<sup>10</sup> as such, human rights undoubtedly bear on domestic law. Since one of these rights is the right to education, as recognized in Article 26 of the Universal Declaration,<sup>11</sup> it is important to consider how educational policy choices, such as high-stakes testing, impact that inherent right.

With this strong normative underpinning, a rights-based analysis can be a strong advocacy tool for those seeking to improve education in the United States. The fundamental nature of a human right should raise it above discretionary consideration. Education's status as a basic human right gives advocates an opportunity to argue that policy and funding decisions regarding education should not be subject to partisan shifts and political whims. A human rights

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*Education*, ¶ 50, delivered to the U.N. Econ. & Soc. Council, U.N. Doc. E/CN.4/1999/49 (Jan. 13, 1999) [hereinafter Tomaševski, *Preliminary Report*]. Although the former special rapporteur's analysis was developed to review the human rights obligations of states with respect to primary education, her analysis is also highly relevant to secondary education.

7. For a more in-depth look at the use of international law in an education context, see James A. Gross, *A Human Rights Perspective on U.S. Education: Only Some Children Matter*, 50 CATH. U. L. REV. 919, 929e-37 (2001), for a description of the fundamental nature of human rights and why education is a human right; and C. Raj Kumar, *International Human Rights Perspectives on the Fundamental Right to Education—Integration of Human Rights and Human Development in the Indian Constitution*, 12 TUL. J. INT'L & COMP. L. 237, 247-62 (2004), for a discussion of the relevance of an economic and social rights analysis and an outline of the sources of the right to education under international law.

8. For an example of the growing use of international human rights law to interpret civil and political rights in the United States, see *Roper v. Simmons*, 543 U.S. 551, 575-8 (2005).

9. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, art. 1, U.N. Doc A/810 (Dec. 10, 1948).

10. See, e.g., Jack Donnelly, *Human Rights as Natural Rights*, 4 HUM. RTS. Q. 391, 391 (1982).

11. Universal Declaration of Human Rights, *supra* note 9, at 76.

understanding can help activists change both social and legal norms as they lobby legislatures, challenge policies in court, and empower local communities and schools.

The treaties and agreements that establish the international right to education remain only weak legal authority in the United States,<sup>12</sup> but may be persuasive in shaping thoughts and actions. State legislatures, governors, and courts frequently struggle to interpret vague provisions in state constitutions that protect the right to education.<sup>13</sup> Just as courts look to other states for authoritative guidance in interpreting constitutional provisions, so too should states look outside domestic sources of law to international human rights law.<sup>14</sup> Human rights law provides a universal framework for balancing the rights and responsibilities of all actors, including governments, schools, teachers, and children. International law establishing the right to education represents a holistic approach aimed at promoting human rights in a broad sense, without prescribing specific policies for any given locale. These attributes make it a particularly useful tool for assessing existing policies and crafting new guidelines.

To promote human rights in the United States, it is vitally important to consider the right to education because it is central to the exercise of so many other basic rights.<sup>15</sup> Education is valuable, if not necessary, to the meaningful exercise of civil and political human rights such as the right to vote and the right to free speech. Increasingly, education is also a prerequisite for meeting other economic and social rights, including the right to work. Furthermore, education can help create a human rights culture aimed at preventing future abuses by the government. To the extent that a student's right to education is jeopardized,

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12. See *infra* notes 48–59 and accompanying text for an explanation of the United States' participation in international human rights law related to the right to education.

13. See, e.g., *Rose v. Council for Better Education*, 790 S.W.2d 186, 205–06 (Ky. 1989); *Hoke County Board of Educ. v. State of North Carolina*, 358 N.C. 605, 623–27 (2004); Molly Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J. OF L. & EDUC. 485 (1999) (describing the state-wide debate on education reform in Kentucky, including the role of business, the legislature, and the courts); Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 208 HARVARD J. ON LEGIS. 307, 308–09 (1991) (categorizing the types of state constitutional language on education).

14. See generally Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359 (2006).

15. See, e.g., Manfred Nowak, *The Right to Education*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS 245 (Asbjørn Eide, Catarina Krause & Allan Rosas eds., 2d ed. 2001) (“The enjoyment of many civil and political rights, such as freedom of information, expression, assembly and association, the right to vote and to be elected or the right of equal access to public service depends on at least a minimum level of education . . . .”); Gross, *supra* note 7, at 934 (“Education is a basic right necessary to realize and exercise other rights.”). As Justice Cardozo wrote:

We are free only if we know, and so in proportion to our knowledge. There is no freedom without choice, and there is no choice without knowledge,—or none that is not illusory. Implicit, therefore, in the very notion of liberty is the liberty of the mind to absorb and to beget.

BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 104 (1928).

other rights are also at risk. As policymakers and advocates consider high-stakes testing, it is therefore important for them to understand international human rights standards and to apply such standards whenever possible.

### *B. High-Stakes Testing*

The No Child Left Behind Act has had a tremendous impact on educational policy in the United States. While NCLB includes a number of important provisions, its requirements for standards-based accountability through testing<sup>16</sup> are of the greatest significance for the purposes of this article. To continue receiving federal education funding, all states must now rate schools based on whether their students are making “adequate yearly progress,” as measured by the students’ performance on standardized tests.<sup>17</sup> While NCLB represents a major change in federal law, the standards-based accountability movement was already well-established at the time the Act was implemented in 2001. Standardized testing of U.S. students had reached such heights that in 2000, *Education Week* published a piece declaring, “Our children are tested to an extent that is unprecedented in our history and unparalleled anywhere else in the world.”<sup>18</sup> As a result of NCLB, American students are tested even more now than in 2000.<sup>19</sup>

New York State currently requires students to take and pass five Regents exams in order to graduate. In the past, New York administered end-of-course Regents examinations only to students who wished to receive a Regents-endorsed diploma.<sup>20</sup> Other students could opt for a local, non-Regents diploma or graduate from an alternative school that used portfolio assessments as a

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16. See No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, 1454–56 (codified at 20 U.S.C. § 6311(c)).

17. *Id.*

18. Alfie Kohn, *Standardized Testing and Its Victims*, EDUC. WK., Sept. 27, 2000, at 46.

19. Jonathan Kozol, *Still Separate, Still Unequal*, HARPER’S, Sept. 2005, at 53. (“Since the enactment of this bill, the number of standardized exams children must take has more than doubled.”).

Whereas the Improving America’s Schools Act, passed in 1994, “required testing in math and reading at three points during a student’s school career, NCLB requires annual testing in reading and math in grades three through eight. At least one more test in reading and math must be given in grades ten through twelve. Beginning in the 2007–08 school year, students must also be tested in science at least three times between grades three and twelve.”

James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 940 (2004).

20. Before 1996, students could take minimum competency examinations for a regular diploma, or Regents exams in order to receive a Regents-endorsed diploma. In 2000, the state began administering new Regents Comprehensive Examinations for graduation, but required that students pass only the English subject tests. The current requirement of five passing Regents scores was implemented in 2003. CENTER ON EDUC. POL’Y, *supra* note 4, at 194; PUB. ADVOCATE FOR THE CITY OF N.Y. & ADVOCATES FOR CHILDREN, *PUSHING OUT AT-RISK STUDENTS: AN ANALYSIS OF HIGH SCHOOL DISCHARGE FIGURES 23 (2002)* [hereinafter *PUSHING OUT AT-RISK STUDENTS*].

measure of progress.<sup>21</sup> Now, however, if a student is unable to pass the standardized exams in English, mathematics, global history and geography, U.S. history and government, and one of several science courses,<sup>22</sup> her only other option is a General Equivalency Diploma (GED), even if she has completed and received passing grades on all required coursework.<sup>23</sup> Although the new high-stakes Regents Comprehensive Examinations are required throughout the state, this article focuses on their impact in New York City, where large portions of the student body are ELLs.<sup>24</sup>

NCLB does not mandate high-stakes testing policies like New York's Regents Comprehensive Examination scheme. However, federal law and New York law both require students and schools to show improvement and ability through standardized tests. The New York approach also reflects national efforts to expand NCLB at the high school level,<sup>25</sup> and a state trend toward requiring high-stakes tests for graduation. As noted above, in 2005, nineteen states required students to pass exit exams in order to receive a high school diploma, and seven are phasing in such requirements.<sup>26</sup> By 2012, seventy-two percent of all U.S. public school students, and eighty-seven percent of all ELL students, will be educated in states that require graduation tests.<sup>27</sup> An analysis of New York's policy therefore will provide a useful guide for other states considering similar courses of action. Given that approximately "one in five [U.S.] children under the age of [eighteen] is the child of an immigrant,"<sup>28</sup> many of the issues

21. PUSHING OUT AT-RISK STUDENTS, *supra* note 20, at 23.

22. CENTER ON EDUC. POL'Y, *supra* note 4, at 194; PUSHING OUT AT-RISK STUDENTS, *supra* note 20 at 23.

23. PUSHING OUT AT-RISK STUDENTS, *supra* note 20, at 3.

24. Over half of all children in New York City are the children of immigrants. Jorge Ruiz de Velasco & Michael Fix, *Limited English Proficient Students and High-Stakes Accountability Systems*, in CITIZENS' COMM'N ON CIVIL RIGHTS, RIGHTS AT RISK: EQUALITY IN AN AGE OF TERRORISM 245, 247 (Dianne M. Piché, William L. Taylor, & Robin A. Reed eds., 2002) [hereinafter RIGHTS AT RISK].

25. Margaret Spellings, U.S. Sec'y of Educ., Ahead of the Curve, Prepared Remarks for Secretary Spellings at the National Governors Association's National Education Summit on High Schools (February 27, 2005), <http://www.ed.gov/news/speeches/2005/02/02272005.html> (describing the President's proposed High School Initiative, which will test students in reading and math over two additional high school years).

26. CENTER ON EDUC. POL'Y, *supra* note 4, at 11. The states that currently require exit exams are Alabama, Arkansas, Florida, Georgia, Indiana, Louisiana, Massachusetts, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, South Carolina, Tennessee, Texas, and Virginia. The states that are currently phasing in exit exams are Arizona (2006), California (2006), Idaho (2006), Maryland (2009), Oklahoma (2012), Utah (2006), and Washington (2008). *Id.* at 13 fig.1.

27. *Id.* at 14, 15 tbl.1.

28. RIGHTS AT RISK, *supra* note 24, at 247. Moreover, "[r]apid growth has led to population dispersal in the nation as the communities with large shares of immigrant children are no longer confined to a few gateway cities or states." *Id.* The U.S. Department of Education's National Clearinghouse for Bilingual Education estimated that LEP enrollment in U.S. schools increased from two million during the 1989-1990 school year to four million in the 1999-2000 school year. JEFFREY J. KUENZI, CRS REPORT FOR CONGRESS, EDUCATION OF LIMITED ENGLISH PROFICIENT AND

raised in this article will become increasingly relevant as more states move toward high-stakes tests to judge both students and schools.<sup>29</sup>

While this article focuses on the special difficulties facing ELL students in New York City as a result of the Regents exit exam requirements, high-stakes testing has a broad impact and has sparked significant debate. Advocates argue that such testing allows monitoring of school improvement efforts, provides public accountability for student performance, motivates students to learn and teachers to teach the required material, helps identify schools that are failing their students, and provides accurate comparisons for colleges and employers.<sup>30</sup> Critics, on the other hand, point to a loss of learning due to teaching to the test,<sup>31</sup> cheating and mistakes,<sup>32</sup> and a disparate impact on minority students.<sup>33</sup> In addition to these general implications of high-stakes testing, the tests pose further concerns specific to ELL students.

RECENT IMMIGRANT STUDENTS: PROVISIONS IN THE NO CHILD LEFT BEHIND ACT OF 2001, at 2 (2004), available at [http://digital.library.unt.edu/govdocs/crs//data/2004/upl-meta-crs-7368/RL31315\\_2004Apr26.pdf?PHPSESSID=7f20120200577636198d49111d40c1a5](http://digital.library.unt.edu/govdocs/crs//data/2004/upl-meta-crs-7368/RL31315_2004Apr26.pdf?PHPSESSID=7f20120200577636198d49111d40c1a5).

29. Under NCLB, ELLs must take standardized tests and make yearly progress as soon as they come to the U.S., although they may be permitted to take exams in their native language and are given three years before having to take the English test. Schools have the option to offer tests in an ELL student's native language if it is determined that "academic assessments in another language or form would likely yield more accurate and reliable information on what such student knows and can do," but they are not obligated to do so. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, 1451 (codified as amended at 20 U.S.C. § 6311(b)(3)(C)(ix)(III)-(x)).

30. See COMMONWEALTH EDUC. POL'Y INST., HIGH STAKES TESTING (James McMillan ed.) (2000), [http://www.cepionline.org/policy\\_issues/saa/high\\_stakes.html](http://www.cepionline.org/policy_issues/saa/high_stakes.html) (summarizing the claims made by supporters and critics of high-stakes testing) [hereinafter HIGH STAKES TESTING].

31. See, e.g., Katy Anthes, Educ. Comm'n of the States, Competency Testing for High School Graduation—Notes on the Texas Lawsuit G.I. Forum v. Tex. Educ. Agency, (May 2, 2000), <http://www.ecs.org/clearinghouse/13/88/1388.htm> (noting concern among teachers and parents that "the curriculum in high poverty schools will be reduced to little more than test preparation"); Brian Friel, *Don't Know Much About History*, NAT'L J., Aug. 2, 2003, at 2500 (describing how NCLB's high standards in math, science, and English have led schools to emphasize those subjects to the detriment of other subjects, such as history and social studies); Sam Dillon, *Schools Cut Back Subjects to Push Reading and Math*, N.Y. TIMES, Mar. 26, 2006, at A1 (reporting that to achieve better results on math and science tests related to NCLB, schools are neglecting other subjects, such as English); Diana Jean Schemo & Ford Fessenden, *Gains in Houston Schools: How Real Are They?*, N.Y. TIMES, Dec. 3, 2003, at A1 (describing how Houston students had improved scores on the Texas Assessment of Academic Skills (TAAS), which is required for graduation, without any corresponding improvement of scores on the Standardized Achievement Test (SAT)).

32. See, e.g., Anthes, *supra* note 31 ("Security breaches have occurred in Ohio, Texas, and Rhode Island. Tests have been scored incorrectly in Indiana, North Carolina, South Carolina, Wisconsin, and New York. In New York 52 New York City teachers and administrators were named in a report that charged that they helped students improve their test scores by illegal means."); HIGH STAKES TESTING, *supra* note 30 ("In 1999, thousands of New York City students were mistakenly required to attend summer school based on incorrect scores. In Washington, 500,000 student writing samples had to be rescored, and Kentucky, Minnesota, and California have experienced mis-scoring or loss of students' tests. In the past three years, at least 19 states have reported problems with test materials or mistakes in scoring.").

33. See, e.g., Anthes, *supra* note 31 (discussing the concern that high-stakes testing places further burdens on students who have already experienced an "unequal educational system" by attending struggling urban and rural schools).

### C. English Language Learners in New York City

In New York City, students who score 20% or lower on the Language Assessment Battery (LAB) qualify for bilingual or English as a Second Language (ESL) services.<sup>34</sup> According to the New York City Department of Education, there were 143,575 ELL students in New York City as of June 30, 2005, out of a total of 1,029,540 enrolled students,<sup>35</sup> making ELLs approximately 13% of the student body. In the 2000–01 school year, 64% of ELLs were Spanish-dominant, 10.8% were Chinese, 3.3% were Haitian, and 3.2% were Russian,<sup>36</sup> with over 150 languages represented overall.<sup>37</sup> Of course, “there is no such thing as a ‘typical’ English language learner,” and immigrant ELLs enter schools in the United States with widely varying levels of education in their primary language.<sup>38</sup>

Advocates are concerned that ELLs tend to do worse on the high-stakes Regents exit exams,<sup>39</sup> and that the adverse consequences of poor performance on these exams create counterproductive pressures for students and schools. It is important to note that a great deal of research is still needed with regard to the ways in which a variety of factors, including high-stakes tests, impact the complex educational experiences of ELLs. This article applies the tests to New York City based on general research about ELLs and high-stakes testing, anecdotal evidence, and empirical evidence where available.

## II.

### THE RIGHT TO EDUCATION UNDER INTERNATIONAL LAW

The right to education is recognized around the world,<sup>40</sup> and international law provides standards and guidelines to ensure that governments develop

34. See, e.g., SHELLEY RAPPAPORT, *BEYOND BILINGUAL EDUCATION: MEETING THE NEEDS OF ENGLISH LANGUAGE LEARNERS IN THE NEW YORK CITY PUBLIC SCHOOLS 2* (2002).

35. New York City Department of Education, Statistical Summaries, <http://www.nycenet.edu/Offices/Stats/default.htm> (last visited Apr. 22, 2006).

36. RAPPAPORT, *supra* note 34, at 2.

37. Sandra del Valle, *Presentation to Special Rapporteur on the Right to Education Concerning Linguistic and Cultural Issues Confronted By English Language Learners in New York City Public Schools*, in *THE STATUS OF THE RIGHT TO EDUCATION IN NEW YORK CITY: A MEETING WITH UNITED NATIONS SPECIAL RAPPORTEUR ON EDUCATION, KATARINA TOMAŠEVSKI*, ¶ 1 (2001) (on file with the author).

38. CENTER ON EDUC. POLICY, *supra* note 4, at 88.

39. *Id.* at 87 (finding that “in many states the percentage of ELLs who pass mathematics exit exams on their first try is at least thirty to forty percentage points lower than the overall first-try pass rates. . . ; [i]n reading, the gap is often greater”).

40. According to the former special rapporteur on the right to education, the constitutions of seventy-six countries guarantee free and compulsory education, twenty-nine countries ensure progressive realization or partial guarantees, and thirty-seven countries have educational guarantees that are restricted to citizens or residents. Only forty-four countries fail to guarantee the right to education in their constitutions. KATARINA TOMAŠEVSKI, *RIGHT TO EDUCATION PRIMER NO. 2, FREE AND COMPULSORY EDUCATION FOR ALL CHILDREN: THE GAP BETWEEN PROMISE AND PERFORMANCE 18* (2001) [hereinafter TOMAŠEVSKI, PRIMER 2].



policies aimed at the right's maximal realization. The international right to education gained express recognition in the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948.<sup>41</sup> A number of subsequent international treaties and declarations outline the right to education, including the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>42</sup> the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention Against Discrimination in Education,<sup>43</sup> and the Convention on the Rights of the Child (CRC).<sup>44</sup> These treaties require that primary and secondary education should be free and compulsory, that post-secondary education should be generally available, and that all education should promote the full development of the human personality. The right to education is also widely recognized in regional human rights law.<sup>45</sup>

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41. Universal Declaration of Human Rights, *supra* note 9, art. 26, at 76.

42. International Covenant on Economic, Social and Cultural Rights art. 13, *opened for signature* Dec. 16, 1966, S. EXEC. DOC. D, 95-2 (1978), 993 U.N.T.S. 3, (entered into force Jan. 3, 1976) [hereinafter ICESCR]. The ICESCR requires States Parties to recognize the right to an education "directed to the full development of the human personality and the sense of its dignity." *Id.* Primary education should "be compulsory and made available free to all," and secondary education should "be made generally available and accessible." *Id.* The ICESCR also recognizes the right to establish educational institutions and the right of parents to direct their children's education. *Id.* The ICESCR requires each State Party to "take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized" in the Covenant. *Id.* art. 2.

43. UNESCO Convention Against Discrimination in Education art. 4, Dec. 14, 1960, 429 U.N.T.S. 93. The Convention calls on States Parties to make education available and compulsory. *Id.*

44. Convention on the Rights of the Child art. 28-29, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]. The CRC states that education should be directed to development of a child's fullest potential, as well as development of a respect for human rights and cultural values and "preparation of the child for a responsible life in a free society." *Id.* art. 29. The CRC also puts an overall emphasis on the best interests of the child, and further obliges States Parties to take responsibility for students' attendance at school by adopting measures to encourage regular attendance and reduce dropout rates. Similarly, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) requires States Parties to work toward the "reduction of female student drop-out rates and the organization of programs for girls and women who have left school prematurely." Convention on the Elimination of All Forms of Discrimination Against Women art. 10, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Dec. 22, 2000) [hereinafter CEDAW].

45. Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") art. 13, Nov. 17, 1988, O.A.S. T.S. No. 69, 28 I.L.M. 161 (1989) (reiterating a broad right to education); African [Banjul] Charter on Human and Peoples' Rights art. 17, Jun. 27, 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982) (stating that each individual shall have the right to an education); Organization of American States, American Convention on Human Rights arts. 12, 19, Nov. 22, 1969, S. EXEC. DOC. F, 95-2 (1978), 1144 U.N.T.S. 143 (providing for the right to freedom of thought and expression and the rights of the child including "the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state"); Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, May 18, 1954, Europ. T.S. No. 9, 213 U.N.T.S. 262 [hereinafter First Protocol to the European Convention] (ensuring that no person shall be denied the right to education); Org. of Am. States, American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, ch. 1, art. XII, (1948),

The International Covenant on Civil and Political Rights (ICCPR) does not explicitly recognize the right to education, but does guarantee “the right to freedom of expression,” including the “freedom to seek, receive and impart information and ideas of all kinds.”<sup>46</sup> International law further establishes that states must not discriminate in the provision of education on the basis of race, color, gender, religion, or other protected group status.<sup>47</sup>

The United States has not ratified most of the international treaties that specifically call for a right to education, such as the ICESCR and the CRC.<sup>48</sup> However, the United States did ratify the Charter of the Organization of American States (OAS), as amended by the Protocol of Buenos Aires, which mandates that participants ensure effective exercise of the right to education.<sup>49</sup> Additionally, while the United States has not ratified the American Convention on Human Rights, all OAS members who have not ratified the Convention are considered to be bound by the American Declaration on the Rights and Duties of Man, and are subject to the jurisdiction of the Inter-American Human Rights Commission and Inter-American Human Rights Court.<sup>50</sup> The United States *has*

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*reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OAS/Ser.L/V/I.4 Rev.9, at 19 (2003), *also reprinted in* 43 AM. J. INT’L L. (Supp.) 133 (1949) (“[E]very person has the right to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society.”)

46. International Covenant on Civil and Political Rights art. 19, *opened for signature* Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 993 U.N.T.S. 3 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

47. For example, CEDAW urges states to ensure equal rights for women in the field of education by guaranteeing equal access to diplomas and career guidance, curricula, staff, scholarships, sports, and continuing education. CEDAW, *supra* note 44, art. 10. CEDAW further calls for the elimination of stereotyped curricula and the reduction of female dropout rates. *Id.* The UNESCO Convention Against Discrimination in Education defines the term “discrimination” to include “any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education [.]” UNESCO Convention against Discrimination in Education, *supra* note 43, art. 1.

48. See University of Minnesota Human Rights Library, *Ratification of International Human Rights Treaties—USA* (Ilhan Isik ed.) (2004), <http://www1.umn.edu/humanrts/research/ratification-USA.html>.

49. Protocol Amendment to the Charter of the Organization of American States (“Protocol of Buenos Aires”) *opened for signature* Feb. 27, 1967, T.I.A.S. no. 6847, 721 U.N.T.S. 324, (entered into force Feb. 27, 1970). The Protocol states:

Member States will exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right to education, on the following bases: a) Elementary education, compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the State it shall be without charge; b) Middle-level education shall be extended progressively to as much of the population as possible, with a view to social improvement. It shall be diversified in such a way that it meets the development needs of each country without prejudice to providing a general education; and c) Higher education shall be available to all, provided that, in order to maintain high level, the corresponding regulatory or academic standards are met.

*Id.* art. 47.

50. The United States denies that it is bound by the American Declaration. See I/A Court of

ratified and is therefore bound by the ICCPR and the Convention on the Elimination of All Forms of Racial Discrimination (CERD),<sup>51</sup> both of which prohibit discrimination.<sup>52</sup> The United States has also signed, although it has not ratified, the ICESCR and CRC, which explicitly provide for the right to education. As a signatory, the United States is obligated to “refrain from acts which would defeat the object and purpose of a treaty.”<sup>53</sup> Finally, U.S. courts consider themselves bound by customary international law.<sup>54</sup> Although there is considerable debate about whether the right to education is protected by customary international law, the overwhelming global acceptance of the right in international treaties<sup>55</sup> and national constitutions and laws,<sup>56</sup> the Supreme Court’s reference to the CRC,<sup>57</sup> and the fact that forty-eight U.S. states constitutionally guarantee the right to education in some form<sup>58</sup> make plausible the

H.R., *Interpretation of American Declaration of the Rights and Duties of Man Within the Framework of Art. 64 of the American Convention on Human Rights*, Advisory Opinion, OC-10/89, July 14, 1989, Inter-Am Ct. H.R. Series A, No. 10 ¶ 17. Nonetheless, the Inter-American Court on Human Rights and the OAS General Assembly have recognized the Declaration as a source of binding obligation on all member states. *Id.* ¶¶ 37–48.

51. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. EXEC. DOC. C, 95-2 (1978), 660 U.N.T.S. 195 [hereinafter CERD]. The United States ratified the ICCPR in 1992 and the CERD in 1994. *See* University of Minnesota Human Rights Library, *supra* note 48.

52. ICCPR, *supra* note 46, arts. 24, 26, 27; CERD, *supra* note 51 arts. 2, 5, 7.

53. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

54. *See, e.g.*, *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”). For a definition of customary international law, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) cmt. c (1987), stating that “[f]or a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation. . . ; a practice that is generally followed but which states feel legally free to disregard does not contribute to customary international law.”

55. *See supra* notes 41–47 and accompanying text.

56. *See supra* note 40.

57. *Roper v. Simmons*, 543 U.S. 551, 576 (2005) (citing the CRC’s “express prohibition on capital punishment for crimes committed by juveniles under 18”). The CRC has also been cited by lower U.S. courts. *See, e.g.*, *Mansour v. Ashcroft*, 390 F.3d 667, 681 (9th Cir, 2004) (Pregerson, J., concurring in part and dissenting in part).

58. *See* Roger J.R. Levesque, *Educating American Youth: Lessons from Children’s Human Rights Law*, 27 J.L. & EDUC. 173, 202 & n.170 (1998) (noting that Mississippi is a possible exception since the state constitution “emphasizes the importance of education while making state responsibility discretionary”). The New York State constitution, for example, states that “[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” N.Y. CONST. art. XI, § 1. The only two state constitutions that do not guarantee education, Alabama and Mississippi (both constitutions were amended after *Brown v. Board of Education*, 347 U.S. 483 (1954)), nonetheless explicitly address the duties of the state with respect to education. The Alabama Constitution provides that:

[N]othing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature, in furthering or providing for education, to require or impose conditions or procedures deemed necessary to the preservation of peace and order.

ALA. CONST. art. XIV, § 256. The Mississippi constitution states that “[t]he Legislature shall, by general law, provide for the establishment, maintenance, and support of free public schools upon

contention that education is a fundamental right under international customary law.<sup>59</sup>

Perhaps of more importance than the formal authority of international law is the normative strength of engaging in a human rights dialogue. In the United States, “rights” have strong resonance. International human rights law is based on an understanding of what each human being is owed by the society in which he or she lives. While “human rights” rhetoric in the United States has traditionally been used primarily in discussions about foreign affairs, “civil rights” and “constitutional rights” are common and powerful concepts. Thus, understanding the right to education under international law can empower communities. These principles can also guide legislatures, governors, and state judiciaries as they interpret their state’s constitutional requirements and attempt to craft policies that enhance children’s educational opportunities.

As fundamental and important as the right to education may be, treaty language supporting its implementation tends to be rather vague.<sup>60</sup> Furthermore, most of the treaties that specifically include the right to education were written in such a way as to preclude international or domestic litigation of violations,<sup>61</sup> so that there is little case law to clarify the potential content of the right. Nonetheless, authoritative guidance with regard to the substance of the right to education may be found in reports by official U.N. experts such as the special rapporteur on the right to education<sup>62</sup> and the Committee on Economic, Social and Cultural Rights (CESCR).<sup>63</sup> Domestic litigation from various countries, based on constitutional provisions protecting the right to education, provides an additional interpretive source of the right.

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*such conditions and limitations as the Legislature may prescribe.”* MISS. CONST. art. 8, § 201 (emphasis added).

59. See Stephen Knight, *Proposition 187 and International Human Rights Law: Illegal Discrimination in the Right to Education*, 19 HASTINGS INT’L & COMP. L. REV. 183, 188–92 (1995) (surveying international law regarding the right to education to conclude right to education is international customary law).

60. See, e.g., ICESCR, *supra* note 42, art. 13.

61. KATARINA TOMAŠEVSKI, RIGHT TO EDUCATION PRIMER NO. 3, HUMAN RIGHTS OBLIGATIONS: MAKING EDUCATION AVAILABLE, ACCESSIBLE, ACCEPTABLE AND ADAPTABLE 11 (2001) [hereinafter TOMAŠEVSKI, PRIMER 3].

62. See *supra* note 5.

63. The U.N. Committee on Economic, Social and Cultural Rights (CESCR) was established in 1985 to oversee the implementation of the ICESCR. The primary function of the Committee is to monitor the implementation of the Covenant by States Parties. It also issues “General Comments” that provide persuasive authority as to the content of the rights in the ICESCR. See Office of the U.N. High Commissioner for Human Rights, Fact Sheet No.16 (Rev.1), *The Committee on Economic, Social and Cultural Rights*, ch. 6, (1991), available at <http://www.unhcr.ch/html/menu6/2/fs16.htm#6>.

### III. THE 4-A FRAMEWORK

The CESCR uses the first special rapporteur's 4-A framework of accessibility, acceptability, adaptability, and availability<sup>64</sup> to evaluate states' fulfillment of the right to education.<sup>65</sup> In each of these categories, states should respect, protect, and fulfill the right.<sup>66</sup> These elements are not completely discrete; many aspects of the right to education do not fit neatly into one category. The framework nonetheless provides a useful way to analyze the impact of New York's high-stakes testing policy on ELLs in New York City.

#### *A. Accessibility*

International law on the right to education generally requires states to ensure that all children have equal access to available schooling. To do so, governments must work toward the elimination of all barriers to education, including unnecessary legal and administrative hurdles, financial obstacles, and discriminatory denials. Primary and secondary schooling must be accessible to all, while access to postsecondary education may be based on the student's capacity.<sup>67</sup> Mandatory high-stakes testing in New York City, as currently designed, has serious implications for ELL students' access to education.

#### *1. Inadequate Preparation*

ELL students are less likely than non-ELL students to be prepared for the high-stakes Regents exams.<sup>68</sup> On top of other challenges, many ELL students

64. *Supra* note 6 and accompanying text.

65. CESCR, *Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 13: The Right to Education*, ¶ 6, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) [hereinafter *General Comment 13*]. This framework is consistent with CESCR's approaches in other areas. See, e.g., CESCR, *General Comment No. 4: The Right to Adequate Housing*, ¶ 8, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, pt. II, U.N. Doc. HR/GEN/1/Rev.1 (July 29, 1994) (identifying availability, affordability, accessibility, and cultural adequacy as factors to be considered with respect to the right to adequate housing); CESCR, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 12: The Right to Adequate Food* ¶¶ 7–13, U.N. Doc. E/C.12/1999/5 (May 12, 1999) (identifying availability, acceptability, and accessibility as elements of the right to adequate food).

66. *General Comment 13, supra* note 65, ¶ 46. To respect the right, a State Party must "avoid measures that hinder or prevent the enjoyment of the right"; to protect the right, a State Party must take measures to "prevent third parties from interfering with the enjoyment of the right to education"; to fulfill the right, a State Party must "take positive measures that enable and assist individuals and communities to enjoy the right to education." *Id.* ¶ 47.

67. *Id.* ¶ 19.

68. ADVOCATES FOR CHILDREN OF N.Y. & THE N.Y. IMMIGRATION COALITION, CREATING A FORMULA FOR SUCCESS: WHY ENGLISH LANGUAGE LEARNER STUDENTS ARE DROPPING OUT OF SCHOOL, AND HOW TO INCREASE GRADUATION RATES 31–32 (2002) (arguing that ELLs are "disproportionately behind academically at entry to high school") [hereinafter CREATING A FORMULA]

have not had continuous formal education.<sup>69</sup> Moreover, ELLs attend inadequately funded, overcrowded, and segregated schools in disproportionate numbers.<sup>70</sup> Frequently, this means that ELLs struggle in schools that cannot afford to hire adequately sufficiently trained bilingual or ESL teachers.<sup>71</sup> ELLs in low-income schools face additional obstacles. Studies have found that students who attend schools with high numbers of low-income students tend to perform significantly worse than students in schools with high numbers of wealthier students, even after statistically accounting for their own socio-economic status and family background.<sup>72</sup> In New York City, the students who most need extra services receive the least amount of the necessary resources, yet are tested against other students who have fewer needs and more services available to them. Accountability programs are intended to highlight areas where students do not receive an adequate education, so that policymakers can more effectively craft targeted solutions. A high-stakes regime, however, punishes students for the failures of the school system, with ELL students likely constituting a disproportionate number of those who are held back a grade or denied a high school diploma.<sup>73</sup>

Some advocates for equal education for minority and low-income students have called for accountability through testing, arguing that such standardized evaluation allows states to measure students' achievement.<sup>74</sup> They argue that testing can highlight inequalities in the system and provide incentives for schools and states to eliminate the disparities.<sup>75</sup> Some advocates have cited low test scores in litigation to establish that education systems are inadequate or

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69. It is difficult to locate data, but some estimates put the number of limited English proficient high school students who have missed two or more years of schooling since age six at 20 percent. RIGHTS AT RISK, *supra* note 24, at 245. See also del Valle, *supra* note 37, ¶ 1.

70. See del Valle, *supra* note 37, ¶ 2.

71. *Id.* ¶ 3 (“[T]wenty-seven percent of the bilingual education teachers are uncertified and fourteen percent of the [English as a Second Language (ESL)] teachers who teach ELLs English are uncertified. For ELLs who are not enrolled in bilingual programs but are attending ESL-only classes, the content areas are taught by mainstream educators who have not been trained nor are required to receive instruction in how to teach content to ELLs.”).

72. See, e.g., John Charles Boger, *Education's "Perfect Storm"? Racial Resegregation, High Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375, 1413–14 (2003) (describing studies linking low achievement among minority students to the overall socioeconomic composition of the schools they attend).

73. See CREATING A FORMULA, *supra* note 68, at 31–34 (noting that ELL students in New York City are unlikely to meet the higher standards now required for graduation unless appropriate support services are implemented, and that ELL students are disproportionately over-age for their grade).

74. See, e.g., Julius Chambers, *Adequate Education for All: A Right, An Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55, 60–61 (1987) (noting that the standards-based education reform movement presents “an affirmative opportunity to define a right to a *minimally adequate education*”).

75. See e.g., *id.*, at 61–63 (highlighting both legislative and judicial pressures imposed by transparent records of student achievement).

inequitable.<sup>76</sup> Some would even argue that standards should be stricter, since judging schools on improvement rather than absolute scores allows states to continue to undereducate certain populations. For example, a recent Texas case highlighted the prospect of improving minority access to adequate education, to uphold a high-stakes test found to have a disparate impact on minority students in the short-term.<sup>77</sup>

These arguments are based on the assumption that poor-performing schools will gain access to resources and teachers in order to remedy inequalities, but this result does not often obtain in an era of ever-shrinking education budgets. Furthermore, while tests with high-stakes consequences may create incentives for teachers and schools to improve student scores, there are other, unintended consequences: low-scoring students are driven out of schools, and students close to passing are taught test-taking techniques instead of substantive material. Even if the tests are acceptable as an assessment tool, it is unacceptable policy to punish students who are already victims of an inadequate education.

## 2. *Pushing Out Low-Performing Students*

There is significant anecdotal evidence that schools in New York City and around the country are responding to testing pressures by pushing out low-performing students.<sup>78</sup> A push-out occurs whenever school personnel encourage a student who is “at-risk, or who will need extra years to graduate, . . . to leave regular high school.”<sup>79</sup> These students can either end up in alternative programs

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76. See, e.g., *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 382 (N.C. 2004) (“[P]laintiffs sought to demonstrate that the measure of test score constitutional compliance was whether an ample number of Hoke County students were attaining a ‘Level III’ proficiency in the subjects tested.”); CENTER ON EDUC. POL’Y, FROM THE CAPITAL TO THE CLASSROOM: YEAR 2 OF THE NO CHILD LEFT BEHIND ACT 11 (2004) (summarizing legal actions involving NCLB in 2003, including four Nebraska cases using NCLB standards to support a constitutional claim of inadequate state funding for education; Michael Dobbs, *Poor Schools Sue for Funding: Higher Standards Are Basis for Seeking “Educational Adequacy”*, WASH. POST, June 7, 2004, at A13 (describing how data from standardized tests have been used in lawsuits seeking equity between wealthy and poor school districts in South Carolina and other states); Siobhan Gorman, *Can’t Beat ‘em? Sue ‘em! What Liberal Lawyers Love About Bush’s Education Plan*, WASH. MONTHLY, Dec. 2001, at 36 (describing lawyers’ use of low test scores as a basis for lawsuits seeking educational equity); David J. Hoff, *Federal Law Bolsters Case for Aid Suits*, EDUC. WK., October 1, 2003, at 1 (stating that lawyers can use NCLB-mandated statistics on “how many students aren’t reaching state academic goals . . . as evidence that the state is short-changing its schools”).

77. *G.I. Forum v. Tex. Educ. Agency*, 87 F. Supp. 2d 667, 675 (W.D. Tex. 2000) (“The Court finds as an inescapable conclusion that in every administration of the TAAS test since October 1990, Hispanic and African American students have performed significantly worse on all three sections of the exit exam than majority students. However, the Court also finds that it is highly significant that minority students have continued to narrow the passing rate gap at a rapid rate.”).

78. See, e.g., Boger, *supra* note 72, at 1449 (noting pressure on school officials to expel, transfer to alternative schools, or avoid enrolling those students who are least likely to score well on the tests mandated by NCLB).

79. See PUSHING OUT AT-RISK STUDENTS, *supra* note 20, at 5.

or drop out altogether. Since ELLs tend to score lower on standardized tests,<sup>80</sup> they are particularly susceptible to pressure to quit.<sup>81</sup>

A 2002 report by Advocates for Children (AFC) revealed that New York City statistics for dropouts included an undefined number of push-outs.<sup>82</sup> AFC found numerous cases indicating that as testing requirements have increased, in addition to an increase in expulsions, at-risk students and those who needed extra years to graduate were being encouraged, or even told, to leave regular high schools.<sup>83</sup> These students tended to be above the standard age for their grade level or behind in credits, have disciplinary or attendance problems, and/or have failed one or more of the Regents exams.<sup>84</sup> AFC identified budget cuts, high-stakes exams, and merit pay for principals based on students' test performance as some of the possible factors leading schools to push out low-performing students.<sup>85</sup> One retired principal told the *New York Times*, "Ten years ago, you could focus on the kids. The pressures were not the same, and you could take some risks. Now you're supposed to focus on the numbers."<sup>86</sup> These trends indicate that high-stakes tests may contribute to a serious denial of access to education for some students, and disproportionately for ELLs.<sup>87</sup>

New York City's statistics on the number of "discharged" students include students who have "enrolled in a local private or parochial school, enrolled in a school outside of New York City, or entered a non-Department of Education GED preparation program."<sup>88</sup> Of particular significance are students in the third category, who have dropped out of a standard high school and given up their chance for a high school diploma.<sup>89</sup> In 2002, as the New York State graduation requirements became stricter, community-based organizations in New York City reported a surge in youth ages sixteen and seventeen applying for adult education

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80. CENTER ON EDUC. POL'Y, *supra* note 4, at 87.

81. New York law mandates full-time instruction for students until the age of sixteen, but New York City has extended compulsory schooling to age seventeen. PUSHING OUT AT-RISK STUDENTS, *supra* note 20, at 21.

82. *Id.* at 5.

83. *See id.* at 18–20 (listing numerous accounts of such conduct on the part of schools); Jennifer Medina & Tamar Lewin, *High School Under Scrutiny for Giving Up on Its Students*, N.Y. TIMES, Aug. 1, 2003, at A1; Jennifer Medina & Tamar Lewin, *To Cut Failure Rate, Schools Shed Students*, N.Y. TIMES, July 31, 2003, at A1.

84. *See* PUSHING OUT AT-RISK STUDENTS, *supra* note 20, at 18–20.

85. *Id.* at 5.

86. Medina & Lewin, *High School Under Scrutiny*, *supra* note 83, at A1.

87. PUSHING OUT AT-RISK STUDENTS, *supra* note 20, at 20 ("Many immigrant students are denied access to high school, told they are too old, or told their English is not proficient enough to pass the Regents.").

88. *Id.* at 5 (citing NEW YORK CITY DEPARTMENT OF EDUCATION, CLASS OF 2001 FOUR YEAR LONGITUDINAL REPORT AND 2000–2001 EVENT DROPOUT RATES (2002)).

89. Teenagers who complete a GED program are counted as having graduated from high school; these students constitute an estimated fifteen percent of the total number of students who graduate from New York City high schools. *Id.* at 31.



programs that prepare students for the GED test.<sup>90</sup> A 2001 study of schools outside New York City found that principals across the state were encouraging at-risk or low-performing students to transfer into GED programs.<sup>91</sup>

ELLs in New York City drop out of school at a much greater rate than non-ELL students.<sup>92</sup> Many are above the standard age for their grade, and accordingly tend to wind up in GED programs.<sup>93</sup> Therefore, it is not surprising that ELL students have reported pressure from counselors and teachers to leave high school because their English skills were weak.<sup>94</sup> Because the parents of ELL students may be less likely to know their rights under New York State law, ELLs may be even more vulnerable to being pushed out than non-ELL students.<sup>95</sup>

### 3. Increase in Dropouts

The precise relationship between high-stakes testing and the ELL dropout rate cannot be determined without further research. However, it is clear that the ELL dropout rate is increasing, and is doing so more quickly than dropout rates for other students.<sup>96</sup> Even in cases where the school does not pressure a student to leave in order to increase the school's graduation rate, the tests themselves may promote dropouts.<sup>97</sup> In 2001, the New York City Department of Education's Division of Assessment & Accountability released a study reporting that dropout rates had increased since the introduction of higher graduation standards.<sup>98</sup> While the study did not establish that the Regents tests were the

90. At Discipleship Education Center in Brooklyn, thirteen of thirty-two students in the spring 2001 class and ten of thirty-six in the fall class were sixteen years old, compared with six of thirty-six the previous winter and six of thirty-two in the fall of 2000. The proportion of sixteen- and seventeen-year-olds at Flatbush Development Corporation's GED program doubled in eighteen months, from twenty to forty percent. Linden Learning Center in East New York had more sixteen- and seventeen-year-olds than all other ages combined. At Opportunities for a Better Tomorrow in Manhattan, seventeen-year-olds comprised thirty-five to thirty-eight students in a typical fifty-person class. Mark Greer, *Learning Disabled*, CITY LIMITS, Feb. 2002, at 14.

91. DAVID H. MONK, JOHN W. SIPPLE & KIERAN KILLEEN, ADOPTION AND ADAPTATION: NEW YORK STATE SCHOOL DISTRICTS' RESPONSES TO STATE IMPOSED HIGH SCHOOL GRADUATION REQUIREMENTS: AN EIGHT-YEAR RETROSPECTIVE 33 (2001).

92. CREATING A FORMULA, *supra* note 68, at 12 (finding that 31.7% of ELL students in New York City had dropped out of school prior to their scheduled graduation, as opposed to a dropout rate of 20.4% overall for the class of 2001).

93. CREATING A FORMULA, *supra* note 68, at 32–34.

94. *Id.* at 32.

95. For a description of the rights afforded to students and parents under New York law, see PUSHING OUT AT-RISK STUDENTS, *supra* note 20, at 21–26.

96. CREATING A FORMULA, *supra* note 68, at 14–18.

97. Gary Orfield, Daniel Losen, Johanna Wald, & Christopher B. Swanson., *Executive Summary* to THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, THE URBAN INSTITUTE, ADVOCATES FOR CHILDREN OF NEW YORK, & THE CIVIL SOCIETY INST., LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS 1, 9 (2004) [hereinafter LOSING OUR FUTURE].

98. DIV. OF ASSESSMENT & ACCOUNTABILITY, N.Y. BD. OF EDUC., FLASH RESEARCH REPORT #5: AN EXAMINATION OF THE RELATIONSHIP BETWEEN HIGHER STANDARDS AND STUDENTS DROPPING OUT 4 (2001), available at [http://www.nycenet.edu/daa/reports/flash\\_report\\_5.pdf](http://www.nycenet.edu/daa/reports/flash_report_5.pdf)

cause of the higher dropout rates, it did find that New York City's recent experience was consistent with previous research, noting that "[w]henver standards are raised without the necessary academic and social supports, graduation rates tend to decline and dropout rates increase."<sup>99</sup> The study cited evidence from a New York program, implemented in the late 1980s, which tested fourth and seventh grade students in reading and math. Schools held back students who did not pass the test and placed them in one-year remedial education programs, resulting in some short-term gains. However, these initial outcomes were not sustained, with a markedly higher dropout rate among students who were held back.<sup>100</sup> Similarly, education policy researchers at Arizona State University found that while high-stakes testing did not significantly enhance students' achievements, "increases in testing pressure are related to larger numbers of students being held back or dropping out of school."<sup>101</sup> Looking at rational choices that students make, the Citizens' Commission on Civil Rights concluded that "raising graduation standards (without first ensuring that students have the time and support they need to meet those standards) significantly changes short-term calculations of the relative payoffs between schooling and early entry to the labor market."<sup>102</sup>

In response to advocates' concerns, the New York City school system changed its system of recording discharge statistics and promised to readmit students who were forced out without diplomas, although by some accounts, push-outs continue to be a problem.<sup>103</sup> Even if New York City changes its accounting methods so that push-outs are properly labeled as dropouts, however, and even if it were possible to keep individual teachers and administrators from pushing students out, high-stakes tests would continue to impede students' access to education by raising dropout rates. New York City itself reports that dropout rates have increased since institution of the mandatory high-stakes policy and admits that "this trend is consistent with previous research showing a relationship between higher standards and lower school completion rates."<sup>104</sup>

The international right to education does not specify that education must be guaranteed for students over the age of seventeen and, therefore, arguably, push-outs and dropouts do not violate the letter of international law. However, international law mandates that secondary education be generally available and

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[hereinafter FLASH REPORT #5].

99. *Id.* at 1.

100. *Id.* at 3 (emphasizing the lack of support services after the first year remediation).

101. SHARON L. NICHOLS, GENE V. GLASS & DAVID C. BERLINER, *HIGH-STAKES TESTING AND STUDENT ACHIEVEMENT: PROBLEMS FOR THE NO CHILD LEFT BEHIND ACT*, at ii (2005).

102. *RIGHTS AT RISK*, *supra* note 24, at 255.

103. *See, e.g.*, David M. Herszenhorn, *Brooklyn High School Is Accused Anew of Forcing Students Out*, N.Y. TIMES, Oct. 12, 2005, at B1 (discussing a suit against New York City on grounds that city's new policies of adopting updated discharge codes and readmitting students previously forced out were not working or were not being enforced).

104. FLASH REPORT #5, *supra* note 98, at 1.

accessible<sup>105</sup> and discourages policies that take away existing rights.<sup>106</sup> Since New York City guarantees high school education for students until age 21,<sup>107</sup> a policy that systematically withdraws that promise for some students violates international legal mandates. If such a policy has a disparate impact on ELL students, it also violates international nondiscrimination principles. Moreover, the CRC requires States Parties to reduce dropout rates actively;<sup>108</sup> a policy that increases dropout rates clearly violates the spirit of the treaty. Finally, while the right to education is not measured by the amount of money a student can make upon graduation, the lack of a high school diploma can drastically decrease earning power,<sup>109</sup> which has a palpable impact on the exercise of economic and social rights to employment, housing, and food.

#### 4. Test Discrimination

Nondiscrimination is one of the overriding principles of international human rights law. Treaties that include a right to education specify that the right is subject to nondiscrimination standards.<sup>110</sup> The Convention on the Rights of the Child provides one of the more comprehensive statements of the principle of nondiscrimination, stating that rights must be granted “irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”<sup>111</sup> International law does not restrict principles of nondiscrimination to intentional discrimination; policies or practices that have a disparate impact on a protected group are also considered discriminatory.<sup>112</sup>

105. ICESCR, *supra* note 42, art. 13.

106. See *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 691, 696–97 (1998).

107. N.Y. Educ. Law § 3202(1) (McKinney Consolidated 2001 & Supp. 2006). See also PUSHING OUT AT-RISK STUDENTS, *supra* note 20, at 21 (“Any person over five and under [twenty-one] years of age, who lives in New York City and has not received a regular high school diploma, is entitled to attend a public school.”).

108. CRC, *supra* note 44, art. 28 ¶ 1(e).

109. In 2001, the unemployment rate for dropouts 25 years old and over was almost 75 percent higher than for high school graduates. LOSING OUR FUTURE, *supra* note 97, at 6. High school dropouts will earn on average 270,000 dollars less than high school graduates over their working lives, and the mean earnings of young adult Latinos who finish high school are forty-three percent higher than those who drop out. *Id.* Some recent studies show GED recipients also have significantly lower earning power than high school graduates. *Id.* See also CREATING A FORMULA, *supra* note 68, at 18 (“Students with a GED generally earn considerably less salary, are more likely to be unemployed, and are more likely to be on public assistance.”); RAPPAPORT, *supra* note 34, at 3 (“[I]n 1999, average annual earnings were \$18,900 for high school dropouts, compared to \$25,900 for high school graduates, \$45,400 for college graduates, and \$99,300 for holders of professional degrees.”)

110. See, e.g., CERD, *supra* note 51, art. 2; UNESCO Convention Against Discrimination in Education, *supra* note 43, art. 3; Universal Declaration of Human Rights, *supra* note 9, art. 2.

111. CRC, *supra* note 44, art. 2.

112. See Rosemary C. Hunter & Elaine W. Shoben, *Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?*, 19 BERKELEY J. EMP. & LAB. L. 108, 123

As a result of their disproportional harm on certain racial, income and language groups, New York City testing policies may violate the principle of nondiscrimination. ELLs are one of the groups that disproportionately perform poorly on the tests and suffer the adverse consequences that follow. In part, this reflects inadequate preparation, since lack of funding means that ELLs often receive instruction from teachers ill-equipped to deal with their needs.<sup>113</sup> However, ELLs are also likely to encounter problems as a result of taking exams in a second language,<sup>114</sup> or, when they are permitted to take tests in their primary language, as a result of the practical challenges involved in creating translations that test equivalent skills.<sup>115</sup>

*a. Distortion Caused by Second-Language Testing*

Taking a test in a second language causes distortion in the test results. After all, “every assessment is an assessment of language.”<sup>116</sup> The authors of a National Research Council report, upon examining the testing problems faced by non-native English speakers, concluded that tests used to place students by grade level are best conducted in the student’s first language.<sup>117</sup> The study highlighted

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(1998) (“[I]n international law . . . discrimination may be found in the disparate impact of policies or practices on a protected group.”).

113. See del Valle, *supra* note 37, ¶ 3; RIGHTS AT RISK, *supra* note 24, at 252.

114. See TESTING FOR TRACKING, *supra* note 1, at 225 (“[I]f a student is not proficient in the language of the test . . . her test score is likely to underestimate her knowledge of the subject being tested.”); JAMAL ABEDI, MARY COURTNEY & SETH LEON, NATIONAL CENTER FOR RESEARCH ON EVALUATION, STANDARDS, AND STUDENT TESTING (CRESST)/UNIVERSITY OF CALIFORNIA, LOS ANGELES, EFFECTIVENESS AND VALIDITY OF ACCOMMODATIONS FOR ENGLISH LANGUAGE LEARNERS IN LARGE-SCALE ASSESSMENTS 77 (2003) (finding that language accommodation strategies helped narrow the gap between ELL students and non-ELL students in eighth-grade science tests and recommending that “modifying test questions to reduce unnecessary language complexity should be a priority in the development and improvement of all large-scale assessment programs”).

115. See TESTING FOR TRACKING, *supra* note 1, at 227 (noting “problems of regional and dialect difference, nonequivalence of vocabulary difficulty between the two languages, problems of incomplete language development and lack of literacy development in students’ primary languages, and the extreme difficulty of defining a ‘bilingual’ equating sample . . .” (citation omitted)).

116. *Id.* at 226 (citation omitted). See also CENTER ON EDUC. POLICY, *supra* note 4, at 92 (“For ELLs, subject matter tests (such as a mathematics test) measure both academic achievement and language proficiency, which makes scores difficult to interpret.”); Kurt F. Geisinger, *Testing Limited English Proficient Students for Minimum Competency and High School Graduation*, in PROCEEDINGS OF THE SECOND NATIONAL RESEARCH SYMPOSIUM ON LIMITED ENGLISH PROFICIENT STUDENT ISSUES: FOCUS ON EVALUATION AND MEASUREMENT 33, 47 (1992) (“[W]hen Spanish-speaking tenth grade students write responses on an essay final examination in History, the quality of their responses may be limited by their ability to write the answer in English. A source of test score variance becomes English writing ability and inferences which assume that the scores are solely due to knowledge of History are incorrect.”).

117. TESTING FOR TRACKING, *supra* note 1, at 225 (“If promotion and tracking decisions are meant to determine which available placement or treatment is most likely to benefit individual students, then it seems clear, given the relation between first-language accomplishments and likely performance in second-language settings, that first-language testing must play a role in these

potential problems for ELLs as a result of the “mainstream bias” of formal testing. Among these problems were a normalizing bias,<sup>118</sup> a content bias,<sup>119</sup> and linguistic and cultural biases.<sup>120</sup> Other studies have found that standardized tests are often less valid and/or reliable for ELL students.<sup>121</sup>

Furthermore, studies have found discrepancies in the results between translated exams and the originals.<sup>122</sup> The most likely explanation is that the translated tests are not equivalent to the original English versions. Unconscious cognitive biases of the test graders may also skew the results to the disadvantage of ELL students where the tests are in English. Even on math exams, “ELL’s responses [to open-ended questions] can easily be misread by scorers in large-volume testing situations, such as state exit exams.”<sup>123</sup> Furthermore, in tests where students must show their work for partial credit, a student from another country may complete the work in a different format than that which American students learn to use, and may not receive credit as a result.<sup>124</sup> For these reasons, it is likely that ELL students are disadvantaged by standardized tests whether in English or their native language; yet despite these inequalities, ELL students are held to the same high-stakes standards. As there is no reason to believe that

decisions for English-language learners.”).

118. Minority group samples are often underrepresented in probability samples. TESTING FOR TRACKING, *supra* note 1, at 225.

119. Test content and procedures reflect the dominant culture’s standards of language function and shared knowledge. TESTING FOR TRACKING, *supra* note 1, at 225.

120. Factors such as timed testing, difficulty with English vocabulary, and the difficulty determining what bilingual students know in each of their two languages can adversely affect the test performance of students from diverse linguistic and cultural backgrounds. TESTING FOR TRACKING, *supra* note 1, at 225. See also Geisinger, *supra* note 116, at 48–52 (examining the test bias against LEP students by looking at language differences and cultural differences); Walter Secada, *Evaluating Mathematics Education of LEP Students in a Time of Educational Change*, in PROCEEDINGS OF THE SECOND NATIONAL RESEARCH SYMPOSIUM ON LIMITED ENGLISH PROFICIENT STUDENT ISSUES: FOCUS ON EVALUATION AND MEASUREMENT 209, 228 (1992) (offering potential solutions to overcome cultural bias).

121. See, e.g., Geisinger, *supra* note 116, at 39–42 (noting, e.g., that “[a] competency test might be differentially valid in terms of *instructional validity* if the material covered on the examination is not equivalently presented to the majority students and LEP students” (emphasis in original)).

122. See TESTING FOR TRACKING, *supra* note 1, at 227; CENTER ON EDUC. POLICY, *supra* note 4, at 98 (“[D]iscrepancies in student performance on the same [National Assessment of Educational Progress] test questions across the two languages indicated that for many items, the Spanish and English versions may not have been measuring the same underlying math knowledge.”).

123. CENTER ON EDUC. POL’Y, *supra* note 4, at 100–01 (describing a “Guide to Scoring LEP Student Responses to Open-Ended Mathematics Questions” developed to train scorers in ways that more accurately evaluate the nonstandard oral and written responses of ELLs).

124. See, e.g., Secada, *supra* note 120, at 234 (“[I]t is not clear how students will know exactly what is expected of them. Are they to produce a final, polished product? Should they omit a large amount of detail? Should they include their scratch work? . . . More generally, how does one communicate to a student that . . . she is being scored on the use of conceptual knowledge, procedural knowledge, communication skills, or any of the other criteria that have been created? . . . [T]hese questions . . . would seem increasingly important, especially for students from diverse backgrounds.”).

these conclusions would not also apply to the Regents exams, ELL students are consequently being denied the opportunity to graduate if they do not perform well on the Regents exams.

*b. Racial Distortions*

Beyond language, there are racial disparities in test performance and educational outcomes that are a particular concern for the many Latino ELLs in New York City.<sup>125</sup> This discrepancy may be attributed to disparities in educational opportunities, including fewer resources in high-minority schools, placement of minority students in less rigorous courses, fewer highly qualified or experienced teachers in high-minority schools, society's and schools' lower expectations of minority students, performance anxiety, and lack of access to high-quality preschool.<sup>126</sup> Other factors may include the effects of poverty on learning, a legacy of discrimination, limited learning supports in homes and communities, and biases in the tests or their scoring.

*B. Acceptability*

Education must not only be accessible, but also acceptable. The U.N. Committee on Economic, Social and Cultural Rights has glossed this standard to mean that "the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate, and of good quality) to students and, where appropriate, parents."<sup>127</sup> This involves not only a minimum standard of quality, safety, and environmental health, but also respect for parental choice, freedom from censorship, and the recognition of children as subjects of rights.<sup>128</sup> States have the duty to both establish and ensure compliance with these acceptable minimum standards.<sup>129</sup>

125. RAPPAPORT, *supra* note 34, at 2. In 2002 in New York City, Hispanic students had the highest dropout rate (26%) and the lowest four-year graduation rate (41.1%). NEW YORK CITY DEP'T OF EDUC., THE CLASS OF 2002: FOUR-YEAR LONGITUDINAL REPORT AND 2001–2002 EVENT DROPOUT RATES 11–12 (2003). Another report puts the graduation rate of Hispanic students in New York State at 31.9 percent, black students at 35.1 percent and white students at 75.3 percent. LOSING OUR FUTURE, *supra* note 97, at 55.

126. See, e.g., DONNA Y. FORD & ANTOINETTE THOMAS, COUNCIL FOR EXCEPTIONAL CHILDREN, ERIC EC DIGEST #E544: UNDERACHIEVEMENT AMONG GIFTED MINORITY STUDENTS: PROBLEMS AND PROMISES (1997), available at <http://ericec.org/digests/e544.html> (finding that lower expectations of African-American gifted students account in part for those students' underachievement); NANCY KOBER, CENTER ON EDUC. POL'Y, IT TAKES MORE THAN TESTING: CLOSING THE ACHIEVEMENT GAP 21 (2001); Harold Berlak, *Race and the Achievement Gap*, RETHINKING SCHOOLS ONLINE, Summer 2001, available at [http://www.rethinkingschools.org/archive/15\\_04/Race154.shtml](http://www.rethinkingschools.org/archive/15_04/Race154.shtml) (citing a study by Prof. Samuel Meyers, Jr. finding that scores on a Minnesota standardized high school test correlated with how the student had been tracked in school, and a study by Prof. Claude Steele of Stanford University students finding evidence of "stereotype vulnerability").

127. *General Comment 13*, *supra* note 65, ¶ 6(c).

128. TOMAŠEVSKI, PRIMER 3, *supra* note 61, at 12.

129. See ICESCR, *supra* note 42, art.13; *General Comment 13*, *supra* note 65, ¶ 54.

### 1. *Failing to Provide a Minimum Level of Education*

International law does not dictate the standards that make education “acceptable,” but rather offers general guidelines, within which States have considerable leeway to fulfill their humanitarian obligation. The European Court of Human Rights has stated that the right to education, “by its very nature, calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals.”<sup>130</sup> International treaties agree on a strong set of general principles:

[E]ducation shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms . . . . [E]ducation shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.<sup>131</sup>

The international human rights community has more recently emphasized a fundamental or basic education, which was the focus of 1990’s World Declaration on Education for All.<sup>132</sup>

ELL students may not receive even a minimal level of education, particularly if they enter school without a prior formal education and are not given proper remedial instruction. Arguably, any child who leaves the school system without learning to read, write, and do basic math has been denied her right to education, a position supported by the World Declaration. Furthermore, one can reasonably conclude that New York has defined a minimum level of education as that which is needed to pass the state standardized tests.<sup>133</sup> While standardized tests are not necessarily conclusive of ability, ELLs’ higher failure rate may be indicative that ELLs are not achieving proficiency and its attendant benefits in basic subject areas. According to the New York’s own metric, many students do not receive a minimum level of education, and these students are disproportionately ELLs.

Further, a consensus on the required minimal level of state-offered education suggests that at the very least, secondary education should prepare

130. “Belgian Linguistic Case,” 6 Eur. Ct. H.R. (ser. A) at 32 (1968).

131. ICESCR, *supra* note 42, art. 13(1).

132. World Conference on Education for All, Mar. 5–9, 1990, World Declaration on Education for All art. 1, [http://www.unesco.org/education/efa/ed\\_for\\_all/background/jomtien\\_declaration.shtml](http://www.unesco.org/education/efa/ed_for_all/background/jomtien_declaration.shtml) (“Every person . . . shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings.”).

133. As a recent decision by the Supreme Court of North Carolina demonstrates, the minimum level of education required by state constitutions may be linked to test scores. *See Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 374 (N.C. 2004).

students for higher education or vocational training. The New York Court of Appeals has held that the New York Constitution requires the state to provide a “sound basic education,” consisting “of the basic literacy, calculating, and verbal skills to enable children to eventually function productively as civic participants capable of voting and serving on a jury.”<sup>134</sup> Similarly, in countries bound by the ICESCR, students are, at a minimum, entitled to education that allows them to “participate effectively in a free society.”<sup>135</sup> Examining ELL’s minimal right to education suggests that standardized tests could bring light to failures of the city to provide students’ right to education. Nonetheless, in practice, the externalities created by the test seem to be having a different result.

## 2. *Teaching to the Test*

The right to education calls for instruction that enriches children’s potential. Yet some schools react to state and federal testing mandates by concentrating classroom time on test-taking techniques, and by teaching only the subject areas tested.<sup>136</sup> This raises the potential that curricula may be restricted in inappropriate ways in reaction to standardized tests instead of being tailored to students’ needs and that students will be learning how to take tests instead of the subject matter. Instead of deciding on the most appropriate curricula for their classes, many teachers must focus on material that is expected to be on the tests and on the skills needed in order to take the tests.<sup>137</sup> In response to standardized testing requirements, some schools forgo individualized instruction in favor of a one-size-fits-all curriculum.<sup>138</sup> In addition, subjects such as physical education are increasingly excluded by schools that are under pressure to improve test scores in curriculum areas subject to state-mandated testing.<sup>139</sup> Whether these pressures lead to better or worse teaching depends greatly on the quality and relevancy of the tests.<sup>140</sup>

Moreover, teachers have criticized high-stakes tests for forcing them to teach test-taking skills as opposed to the substantive content the tests are

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134. *Campaign for Fiscal Equity v. State*, 655 N.E.2d 661, 666 (N.Y. 1995).

135. ICESCR, *supra* note 42, art. 13(1).

136. *See, e.g.*, Jennifer Mueller, *Facing the Unhappy Day: Three Aspects of the High-Stakes Testing Movement*, 11 KAN. J.L. & PUB. POL’Y 201, 235 (2001–2002) (describing how high-stakes tests lead to teaching to the test).

137. *See* Kozol, *supra* note 19, at 47, 54.

138. *See id.* at 47–51 (describing New York City’s experiment with the “Success for All” teaching methodology).

139. *See, e.g.*, Norman Draper, *Physical Education Sent to the Sidelines: As Schools Devote More Resources to Improving Test Scores, Some Are Cutting Back on Gym Classes*, MINNEAPOLIS-ST. PAUL STAR-TRIB., March 15, 2004, at A1.

140. *See* Robert Rothman, Jean B. Slatery, Jennifer L. Vranek, & Lauren B. Resnick, CRESST/UNIVERSITY OF CALIFORNIA, LOS ANGELES, BENCHMARKING AND ALIGNMENT OF STANDARDS AND TESTING 4 (2002) [hereinafter BENCHMARKING]; Geisinger, *supra* note 116, at 57 (“To be effective. . . [tests] need to have high instructional and curricular validity.”); Secada, *supra* note 120, at 226–27.



supposed to measure.<sup>141</sup> A Center on Education Policy report notes that, “any form of teaching to the test is inappropriate if it raises test scores without also increasing students’ knowledge and skills in the broader subject being tested.”<sup>142</sup>

The pressure to teach to the test is much more intense in schools where students are currently underperforming on the tests or where resources are scarce.<sup>143</sup> When teachers have less than one school year to show measurable gains, they may opt for the quick score improvements achieved by emphasizing test-taking strategies. Consequently, increases in standardized test score often are attributable in significant part to test preparation, narrowing of the curriculum, and time spent learning test-taking strategies.<sup>144</sup> A further problem arises through the fact that the skills tested are often not the same skills needed for employment or higher education.<sup>145</sup> For example, standardized tests often prioritize short essay answers over more significant research and writing, or multiple-choice strategies over higher-level analysis.

141. In a 2001 survey by *Education Week*, nearly seven in ten teachers reported that instruction stresses state tests “far” or “somewhat” too much; sixty-six percent said state tests forced them to concentrate too much on tested subjects to the detriment of other important topics, and nearly half reported spending “a great deal” of time preparing their students in test-taking skills. Lynn Olson, *Finding the Right Mix*, EDUC. WK., Jan. 11, 2001, at 15.

142. Nancy Kober, *Teaching to the Test: The Good, The Bad, and Who’s Responsible*, TEST TALK FOR LEADERS (Center on Educ. Pol’y, Wash., D.C.), June 2002, at 1, available at <http://www.cep-dc.org/testing/testtalkjune2002.pdf>.

143. See COMMONWEALTH EDUC. POL’Y INST., TESTING CONSEQUENCES (James McMillan, ed.), [http://www.cepi.vcu.edu/policy\\_issues/saa/test\\_consequences.html](http://www.cepi.vcu.edu/policy_issues/saa/test_consequences.html) [hereinafter TESTING CONSEQUENCES] (citing a 2000 study of schools in Maryland which found that “low performing schools” are likely “to focus more on aligning classroom assessments with the formats used in the [high-stakes] tests than on instructional methods”).

144. See, e.g., William J. Mathis, *No Child Left Behind: Costs and Benefits*, 84 PHI DELTA KAPPAN 679, 684 (2003) (citing study by Audrey Amrein and David Berliner).

[I]f these upticks were not merely temporary “testing gains” achieved by test-prep regimens and were instead authentic education gains, they would carry over into middle school and high school. . . . Yet hundreds of thousands of the inner-city children who have made what many districts claim to be dramatic gains in elementary school, and whose principals and teachers have adjusted almost every aspect of their school days and school calendars, forfeiting recess, canceling or cutting back on all the so called frills (art, music, even social sciences) in order to comply with state demands—those students, now in secondary school, are sitting in subject-matter classes where they cannot comprehend the texts and cannot set down their ideas in the kind of sentences expected of most fourth and fifth-grade students in the suburbs.

Kozol, *supra* note 19, at 54.

145. See, e.g., CENTER FOR EDUC. POL’Y, STATE HIGH SCHOOL EXIT EXAMS: A MATURING REFORM 12 (2004), available at <http://www.cep-dc.org/highschoolexit/ExitExamAug2004/ExitExam2004.pdf> (finding that of the twenty-five states that have or plan graduation exams, only one, Georgia, says its test ensures that students are prepared for higher education or work); TESTING CONSEQUENCES., *supra* note 143 (reporting that in Fairfax County, Va., ninety-one percent of students continued on to postsecondary education in 1998, while only fifty-four percent passed the statewide test); Mueller, *supra* note 136, at 236 (describing the problems facing students in vocational schools in Massachusetts, who must take and pass both general standardized tests and occupational tests to receive professional certification).

### 3. *Teaching to the Middle*

The high-stakes testing regime pressures schools to increase the number of children who pass the standardized tests. Such a policy creates an incentive to focus educational efforts and resources on the children who are on the border between failing and passing the exams. Teachers might be told, for example, to concentrate their teaching efforts on one or two students, instead of on the entire class. Low-performing students, a disproportionate number of whom will be ELLs, are at risk to receive significantly less focus and instruction if teachers use their energies to maximize test outcomes.<sup>146</sup>

The right to education does not mandate that all children be educated at an advanced level. Nonetheless, principles of nondiscrimination require that schools offer the same level and type of education to different ethnic and language groups. It is likely that ELL students, despite their higher needs, receive less substantive education as a direct result of high-stakes tests. This educational policy disproportionately encourages teachers with low-scoring students, including teachers of ELL students, to teach to the test. If teachers will be forced to focus on raising the test scores of students closer to passing, it follows that the children with the lowest scores will receive a lower quality education. Entire classes stand to receive less instruction on substantive content, if teachers worried about whether their lower-scoring students will pass spend more time on test-taking strategies than those teachers who are confident in their students' performance.

### 4. *Testing versus Learning*

The first U.N. special rapporteur on the right to education distinguished testing and learning as two separate processes. She found that testing mathematics and science is relatively easy, but that it is significantly harder to test "subjects where the children learn the official curriculum at school, while a different version of the same events, phenomena or values might be learned at home, and yet a third one in the street or from television."<sup>147</sup> Following that logic, high-stakes tests that test material open to cultural interpretations, will likely have a disproportionately negative impact on ELL students, who are primarily from nondominant cultural backgrounds. Some research suggests that all subjects, including mathematics and science, are influenced by culture and therefore acculturation must be considered when writing or interpreting scores for tests that language minority students will take.<sup>148</sup>

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146. Similarly, high-performing students will likely not be pushed to perform to their capacity, since teachers know that these students will pass the test even without targeted instruction.

147. KATARINA TOMAŠEVSKI, RIGHT TO EDUCATION PRIMER NO. 4, HUMAN RIGHTS IN EDUCATION AS PREREQUISITE FOR HUMAN RIGHTS EDUCATION 23 (2001) [hereinafter TOMAŠEVSKI, PRIMER 4].

148. See Geisinger, *supra* note 116, 220–222.

High-stakes testing as it has been implemented in the United States also triggers concerns about knowledge building as opposed to rote learning. Even when states attempt to align high-stakes tests with their own standards and material, a 2002 study conducted by the National Center for Research on Evaluation, Standards and Student Testing (CRESST) indicated that “states are ‘tilting’ their tests toward the least challenging of their own objectives” that the tests are meant to assess.<sup>149</sup> The study concluded that “[s]tandards and objectives that call for high-level reasoning are often omitted in favor of much simpler cognitive processes—low- or non-inference questions in reading, and routine calculations in math, for example.”<sup>150</sup> As the former special rapporteur noted, “[f]orcing children to memorize information that may or may not be useful . . . is reinforced by testing.”<sup>151</sup> Her analysis suggests that students receive inadequate education when states place more emphasis on outcomes than on the learning process.

### 5. First Language Learning

International law recognizes the right of linguistic minorities to establish private schools in their primary language.<sup>152</sup> However, there is no consensus regarding whether states must provide or fund education in minority languages.<sup>153</sup> The European Court of Human Rights has affirmed that states may determine their own official language and therefore the language of instruction in public schools, but has denied that linguistic minorities have a right to education in other languages.<sup>154</sup> However, the U.S. Supreme Court held in *Lau v. Nichols* that publicly funded schools must provide English-language instruction for non-English speakers: “[T]here is no equality of treatment merely by providing [non-English-speaking] students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.”<sup>155</sup>

In the push to ensure that ELL students become proficient enough to take

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149. BENCHMARKING, *supra* note 140, at 26.

150. *Id.* at 29.

151. TOMAŠEVSKI, PRIMER 4, *supra* note 147, at 22.

152. Tomaševski, *Preliminary Report*, *supra* note 6, ¶¶ 65–66 (noting that this right has existed since the time of the League of Nations). *Cf.*, *Minority Schools in Albania*, 1935 P.C.I.J. (ser. A/B) No. 64 (Apr. 6) (finding that the Albanian government’s abolition of all private schools did not violate a Resolution of the Council of the League of Nations that racial, linguistic or religious minorities in Albania must have an equal right to maintain and control educational institutions at their own expense).

153. *See* TOMAŠEVSKI, PRIMER 3, *supra* note 61, at 29–30 (“Demands that minority schools be made ‘free’ (that is, state-financed) are often made but seldom granted. The right to be educated in one’s mother tongue has been on the international human rights agenda since the 1950s and controversies intensified in the 1990s.”).

154. “Belgian Linguistic Case,” 6 Eur. Ct. H.R. (ser. A) at 31 (1968).

155. *Lau v. Nichols*, 414 U.S. 563, 566 (1974) (finding that the Civil Rights Act of 1964 requires public schools to provide instruction in English).

the English-language tests mandated by NCLB in English within three years of entering the United States, some school districts choose immersion over bilingual education as a quicker method of developing English proficiency.<sup>156</sup> Immersion programs disserve ELLs in a number of ways. One significant problem is that ELLs in English-only immersion programs may lose highly useful academic proficiency in their native language.<sup>157</sup> The availability of bilingual education can determine whether ELLs have the opportunity to remain fluent in their first language. Bilingualism improves children's performance in other subjects<sup>158</sup> and is a skill desirable for higher education and many professions. Furthermore, students pushed to learn English may quickly fall behind in other subject areas.<sup>159</sup> Both immersion and bilingual education can help ELLs develop English language proficiency, but ELLs may learn most effectively when they receive instruction in their first and second languages.<sup>160</sup> Moreover, the evidence suggests that three years may not be long enough for some children to learn English, particularly as they attempt to advance in other subjects.<sup>161</sup> Thus, if high-stakes tests push schools to replace bilingual instruction with immersion, children risk losing skills in their primary language without measurable long-term gains in other subjects.

Proponents of testing argue that tests are necessary to ensure that all students receive an adequate education. Many students did not receive an adequate

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156. Robert Dodge, *Classes Merging as Clock Ticks on English Testing*, DALLAS MORNING NEWS, Aug. 3, 2003, at 16A (describing one school's efforts to comply with the NCLB mandate by eliminating bilingual education for Spanish-speaking students).

157. See DIANE AUGUST, MARGARITA CALDERÓN & MARÍA CARLO, TRANSFER OF SKILLS FROM SPANISH TO ENGLISH: STUDY OF YOUNG LEARNERS 3 (2002), <http://www.cal.org/pubs/articles/skills-transfer.pdf> ("By strengthening these students' Spanish literacy, [the practice of providing literacy instruction in Spanish to Spanish-speaking ELLs] . . . enables them to use their native language well, enhancing their bilingual capability.").

158. See NADINE DUTCHER, THE USE OF FIRST AND SECOND LANGUAGE IN EDUCATION: A REVIEW OF INTERNATIONAL EXPERIENCE 36–37 (World Bank Pacific Islands Discussion Series No. 1, 1997) (1997). See also RIGHTS AT RISK, *supra* note 24, at 251 (noting that immigrant children who arrive as teenagers must learn language and content simultaneously, rather than sequentially).

159. See RAPPAPORT, *supra* note 34, at 2 ("In effect, placing non-English speaking students in a class geared toward native English speakers puts them in a 'sink or swim' situation. These students must find a way to comprehend what is being said in a language that is foreign to them and then use that to learn the material being taught. Failure to understand what is being said inevitably means they fail to master the material.").

160. See, e.g., AUGUST, CALDERÓN & CARLO, *supra* note 157, at 21–22. (advocating, based on initial research data, "the practice of providing literacy instruction in Spanish to Spanish-speaking English-language learners as a means of helping them acquire literacy skills in English"); DUTCHER, *supra* note 158, at viii ("In the United States, Spanish-speaking students in late-exit programs where they were learning through their first language, Spanish, as well as through English, were catching up to English-speaking students in academic work and in acquisition of English, whereas their Spanish-speaking peers in submersion or early-exit programs appear to be falling behind. . . . Development of the mother tongue is critical for cognitive development and as a basis for learning the second language.").

161. DUTCHER, *supra* note 158, at 4 (noting that mastering academic level language skills, as opposed to social communication skills, in a second language requires five to seven years of instruction).

education prior to the introduction of high-stakes tests and the enactment of NCLB, and since international law requires states to establish minimum standards and to ensure that all students meet them, it is possible to view high-stakes testing as upholding, rather than violating, international law. However, to the extent that high-stakes tests result in ELL students learning less substantive material, rushing to learn English without adequate time and instruction, losing the opportunity to continue learning in their native language, and being denied access to secondary and tertiary education, these tests diminish the adequacy of their education.

### C. Availability

The International Convention on Economic, Social and Cultural Rights requires states to make education available to each child at the primary and secondary school levels.<sup>162</sup> Accordingly, states should ensure that there are sufficient numbers of schools and teachers, and must ensure that teachers are adequately trained and compensated.<sup>163</sup> These obligations will usually require fiscal allocations for infrastructure, maintenance, salaries, supplies, and technology. Where there is a shortage of schools and resources for education, children are deprived of their right to education.

The ICESCR requires compulsory and free primary education, generally available and accessible secondary education, and higher education that is accessible on the basis of capacity.<sup>164</sup> Secondary and tertiary education is to be made free over time.<sup>165</sup> The first special rapporteur found that in order for education to be available, fiscal allocations should meet “states’ human rights obligations.”<sup>166</sup> That is, governmental licensing, supervision and funding of educational institutions should correspond to human rights law. This concept should not be particularly controversial in the United States, where almost every state recognizes some economic, social, or cultural right to education.<sup>167</sup>

Law from countries around the world provides additional authority for American advocates seeking to establish the meaning of “available education.” The right to education, in one form or another, is constitutionally protected in most countries.<sup>168</sup> As a result, the right to available education has been litigated in a number of courts using domestic law. Although such cases do not provide direct jurisprudence related to the international right to education, they do

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162. See ICESCR, *supra* note 42, art. 13(2)(e).

163. See TOMAŠEVSKI, PRIMER 3, *supra* note 61, at 12, 23–25; *General Comment 13*, *supra* note 65, ¶ 27.

164. ICESCR, *supra* note 42, art. 13.

165. *Id.* art. 13.

166. TOMAŠEVSKI, PRIMER 3, *supra* note 61, at 12.

167. See Levesque, *supra* note 58.

168. TOMAŠEVSKI, PRIMER 2, *supra* note 40, at 18 (although most countries do not have an unconditional guarantee to the right to education, most countries do have some type of guarantee in their constitution).

provide persuasive authority as to the substance of the right.

For example, the Constitutional Court of the Czech Republic found that the state's obligation to provide free education was met by the provision and maintenance of school infrastructure and tuition-free schools, and that the state was not obliged to provide textbooks and teaching materials free of charge.<sup>169</sup> A court in the United Kingdom found that the obligation to make education available required all reasonable efforts by the state; the court denied an application for judicial review when a shortage of teachers led to several hundred children being deprived of the right to attend school for a year or more, because the authorities had done everything within their power to hire teachers.<sup>170</sup> Similarly, the Supreme Court of the Philippines approved the state's budgetary allocation of 86.8 billion pesos for debt service and 27 billion pesos for education, despite the constitutional requirement that education should receive the highest budgetary priority.<sup>171</sup> Noting that "the very survival of our economy is at stake," the Court found that the legislature could permissibly appropriate "an amount for debt service bigger than the share allocated to education."<sup>172</sup>

Unfortunately, these precedents do not create clear guidelines for decision-makers in the United States. Such cases establish that states are not responsible for providing education at the expense of other necessities. While education advocates may interpret human rights obligations broadly, it is important to recognize that courts have historically been reluctant to intrude upon the fiscal decisions of elected politicians. Nonetheless, these cases do show that international law provides governments with few excuses for not fulfilling education-related responsibilities.

ELL students are disproportionately located in resource-poor school districts.<sup>173</sup> These districts have fewer experienced teachers,<sup>174</sup> less funds, and higher costs for space, security,<sup>175</sup> and after-school programs.<sup>176</sup> Parents of

169. Constitutional Court of the Czech Republic, Judgment US 25/94 of June 13, 1995, [http://test.concourt.cz/angl\\_verze/doc/p-25-94.html](http://test.concourt.cz/angl_verze/doc/p-25-94.html).

170. *R. v. Inner London Educ. Auth., ex parte Ali* (1990) *The Independent*, Feb. 15, 1990; *The Times* Feb. 21, 1990, CO/1499/89 (Transcript: Marten Walsh Cherer) (Q.B.) (LEXIS, England and Wales Reported and Unreported Cases).

171. *Guingona, Jr. v. Carague*, G.R. No. 94571, 196 S.C.R.A. 221, 227 (S.C., April 22, 1991). (Phil.)

172. *Id.*

173. See U.S. COMM'N ON CIVIL RIGHTS, *REDEFINING RIGHTS IN AMERICA: THE CIVIL RIGHTS RECORD OF THE GEORGE W. BUSH ADMINISTRATION, 2001–2004*, at 47 (Sept. 2004) (draft report for Commissioner's review) (noting that limited English proficient students "more frequently attend poor schools that do not have the resources to provide necessary learning tools").

174. See Lynn Olson, *The Great Divide*, *EDUC. WK.*, Jan. 9, 2003, at 13 (noting that students in high-poverty schools are more likely to be taught by inexperienced or unqualified teachers); Boger, *supra* note 72, at 1446–47 (citing studies from Texas and North Carolina which found that schools with high numbers of disadvantaged children have less qualified teachers).

175. See Emerald A. Crosby, *Urban Schools: Forced to Fail*, 81 *PHI DELTA KAPPAN* 298, 299, 301 (1999).

176. See, e.g., WILLIAM O. BROWN, STEVEN B. FRATES, IAN S. RUGE & RICHARD L.

ELLs, and low-income parents generally, may be less able to help their children with schoolwork or to provide tutoring or other extracurricular support.<sup>177</sup> Children of immigrants are more likely to live below poverty in families with housing hardship and difficulties affording food.<sup>178</sup> These children are significantly less likely to have health insurance and more likely to be in fair or poor health.<sup>179</sup> Students who come to school without adequate housing, health care or nutrition may experience difficulty concentrating on the material.<sup>180</sup> Furthermore, since such districts are likely to have lower test scores in the first place,<sup>181</sup> combined with the above factors, schools with fewer resources must work exceptionally hard to prepare students for testing.

NCLB and other standards-based accountability programs often provide incentives (financial and otherwise) for schools to improve students' education.<sup>182</sup> As a consequence, schools that perform poorly due to a lack of resources are likely to lose more resources. Furthermore, these programs give teachers and administrators incentives to move to well-resourced schools where teachers' efforts are more likely to result in passing scores, which in turn generates high praise, financial rewards, and more teacher control over classrooms.<sup>183</sup> In a failing school, the same teachers may face condemnation, financial penalties, and job insecurity, and the teachers will have to spend much of their classroom time on test-taking skills, and focus their efforts on a few students. As teachers are drawn from high-poverty schools to schools with more

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TRADEWELL, THE COSTS AND BENEFITS OF AFTER SCHOOL PROGRAMS 22 (2002), [http://rose.claremontmckenna.edu/publications/pdf/after\\_school.pdf](http://rose.claremontmckenna.edu/publications/pdf/after_school.pdf) (noting that after-school programs have the potential to increase graduation rates in urban school districts).

177. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 173, at 47 (concluding that "minority, limited English proficient, and low income students . . . rely more heavily on school for learning than children in high socioeconomic classifications.").

178. Randy Capps, *Hardship among Children of Immigrants: Findings from the 1999 National Survey of America's Families*, in THE URBAN INSTITUTE, *NEW FEDERALISM: NATIONAL SURVEY OF AMERICA'S FAMILIES* No. B-29, at 6 (2001). Capps's study for the Urban Institute found that in New York State 27 percent of children of immigrants lived in families below the poverty level, compared with 19 percent of children of native-born parents. *Id.* at 5. Fifty-four percent of children of immigrants lived in families below 200 percent of the poverty line, compared with 39 percent in nonimmigrant families. *Id.* More than twice as many children of immigrants were in families paying at least of income for rent or mortgage, and more than three times as many children of immigrants lived in crowded housing. *Id.*

179. *Id.* at 5.

180. See Mathis, *supra* note 144, at 685 ("The system does not recognize that a hungry child with a poor, single parent and a violent home may not be focused on phonics each morning.").

181. See, e.g., Mueller, *supra* note 136, at 232 (citing a study of test scores in Massachusetts that found that "demographic differences among the state's 200 largest school districts explain eighty-six percent of the variation in test scores" (internal quotation marks omitted)).

182. See, e.g., TESTING CONSEQUENCES, *supra* note 143 (noting that New York City gives principals up to \$15,000 to raise test scores); Boger, *supra* note 72, at 1430 ("[1995 legislation in North Carolina] placed principals and/or teachers in low-performing schools at risk of forfeiting their jobs if improvements were not forthcoming [.]").

183. See, e.g., Boger, *supra* note 72, at 1448 (describing concerns in North Carolina about teacher flight from poorly performing schools).

resources, low-resourced districts face shortages of experienced, qualified teachers.<sup>184</sup> High-stakes testing threatens to exacerbate this phenomenon.<sup>185</sup>

A policy that punishes schools for low scores on high-stakes tests, and rewards schools for high scores, threatens the availability of education that meets the state's minimum standards because more often than not, schools with fewer resources receive even fewer and schools with more receive even more. According to the New York State Court of Appeals, schools' infrastructure constitutes an integral component of education to which children have a right:

Children are entitled to minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas.<sup>186</sup>

Many schools in New York City do not currently meet these standards, and to the extent that high-stakes tests punish poor-performing schools, even fewer schools will meet such standards in the future. ELL students will disproportionately suffer the effects of schools' failures to meet these standards.

#### *D. Adaptability*

Education must be adaptable to the changing needs of children, and to the needs of children with different abilities. As the former U.N. special rapporteur explained, "[T]he system of education is required to adapt to each individual child, against the historical heritage of excluding all the children who were deemed not to be able to adapt to the system of education as it was."<sup>187</sup> International precedents regarding the integration of disabled children into mainstream education provide guidance to advocates for ELL students. In order to integrate learners with disabilities into mainstream schools, governments must do more than ensure access to education; they must ensure that the education provided is adapted to the needs of the children. For example, the Supreme Court of Canada has ruled that failure to make reasonable accommodations for people with disabilities constitutes discrimination in violation of Canada's Charter of Rights and Freedoms,<sup>188</sup> and further noted that "a presumption in favour of

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184. Olson, *supra* note 174, at 14 (noting high teacher turnover in schools serving high-poverty, high-minority and low-achieving students).

185. See, e.g., TESTING CONSEQUENCES, *supra* note 143 (citing one dramatic example, in which a North Carolina elementary school lost three-quarters of its teachers the summer following a designation of the school as "low performing.").

186. Campaign for Fiscal Equity v. State, 655 N.E.2d 661, 666 (N.Y. 1995).

187. TOMAŠEVSKI, PRIMER 3, *supra* note 61, at 31.

188. Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241, 272.



integrated schooling would work to the disadvantage of pupils who require special education in order to achieve equality.”<sup>189</sup> The Federal Court of Australia also found that the accommodation of special needs sometimes requires positive action to be taken.<sup>190</sup> In 1997, The United States Congress reauthorized the Individuals with Disabilities Education Act (IDEA), and granted every disabled child the right to a free appropriate public education,<sup>191</sup> having found that pervasive educational disadvantages frustrated “equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”<sup>192</sup>

In stark contrast to this attitude toward students with disabilities, New York City, in its one-size-fits-all approach to testing, requires ELL students to adapt to the education offered, rather than the other way around. Internationally, precedent dealing with adaptability has largely focused on disabled students. However, the same principles arguably should apply to any child with special or different needs, including ELLs. Indeed, both the New York State Board of Regents and the New York City Board of Education (BOE) have recommended that ELLs receive additional support in order to meet the higher Regents requirements for graduation.<sup>193</sup> Nonetheless, in a 2002 report, Advocates for Children and the New York Immigration Coalition detailed a number of concerns about the implementation of additional support services for ELL students. The report described a failure to increase the number of certified ESL or bilingual teachers and a failure to provide after-school or summer classes for ELLs.<sup>194</sup> In the 2001–02 school year the BOE found that 4380 ELL students did not receive mandated services,<sup>195</sup> and most students did not have access to remedial dual-language instruction.<sup>196</sup> To the extent that high-stakes tests force teachers and schools to offer a one-size-fits-all curriculum, such policies exacerbate the problem that special needs of ELL students are not being met.

Tests of any kind cannot measure the entire range of human knowledge in order to assess what each child knows; they must instead test a certain range of knowledge. One of the criticisms of standardized tests is that they take away teachers’ creative control, and prevent them from designing a curriculum that meets the needs of the local community or particular students. NCLB allows each state to set its own standards. However, neither NCLB nor New York’s

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189. *Id.* at 274.

190. *A School v. Human Rights & Equal Opportunity Comm’n* (No. 2) (1998) 55 A.L.D. 93 (S. Austl.), <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/1998/1455.html>.

191. *See* Individuals with Disabilities Education Act (IDEA), Pub. L. No. 105-117 § 601(d), 11 Stat. 37, 42 (1997) (codified as amended at 20 U.S.C. § 1400(d)(1) (2000)).

192. *Id.* § 601(c), 11 Stat. 37, 38–42 (codified as amended at 20 U.S.C. § 1400(c)).

193. *CREATING A FORMULA*, *supra* note 68, at 37–38.

194. *Id.* at 38–40. *See also* RIGHTS AT RISK, *supra* note 24, at 248.

195. RAPPAPORT, *supra* note 34, at 15 (noting that in 1985, the Educational Priorities Panel found that only 60% of ELL students “received all legally-required language instruction,” compared to 96.6% of general education ELLs in the 2001–02 school year).

196. RAPPAPORT, *supra* note 34, at 15–16.

high-stakes graduation exams provide for flexibility on a school-by-school, class-by-class, or child-by-child basis. If tests are to be used, they should be sufficiently flexible to meet the special needs of ELL students.

#### IV.

#### CONCLUSION AND PROPOSALS FOR REFORM

High-stakes graduation tests in New York City currently deprive ELLs of their international right to education in numerous ways. While high-stakes tests are not inherently incompatible with international human rights standards for education, numerous reforms are necessary to ensure that such tests do not stand in the way of students' right to education.

Proponents of standardized testing will find certain arguments in international human rights law to support high-stakes tests. International law gives states leeway to define minimum standards and to ensure that these standards are met. While international law prohibits discrimination in the provision of public education, proponents of high-stakes tests argue that standardized testing policies are nondiscriminatory and further equality by helping to ensure that every American child receives an adequate education. Without the accountability provided by standardized tests, proponents argue, ELL students linger in low-quality programs, and teachers' low expectations create a self-fulfilling prophecy.

It is clear, however, that in New York City, the high-stakes graduation exams jeopardize all four components of the international right to education. ELL students' right to accessible education is limited both by the practice of pushing out students who score lower on tests, and by the tests' disparate impact on ELL students. The focus on test scores hampers the right to acceptable education by providing incentives for schools to teach test strategies or teach only to a few failing students who seem capable of moving above the passing score. Current punitive measures tied to high-stakes tests threaten the availability of schooling for ELL students. Finally, high-stakes tests hinder the adaptability of education in NY since schools are not meeting the special needs of ELL students, many of whom will be unable to graduate without extra resources and services.

Standardized tests may be helpful as one of several measures of student performance, but the high stakes attached to New York State's graduation exams make them problematic for ELL students. New York City must take action to ensure that ELL students are not adversely affected by the new graduation requirements, and more research is needed to determine which reforms would be most effective, particularly as other states implement similar high-school exit exams.

First, New York City must prevent push-outs through institutional reforms that prioritize student learning above test scores at every level of the educational system. Low test scores could be used to identify schools that need more

resources and support rather than as a reason to punish teachers and principals. As long as teachers and principals are celebrated for high test scores and punished for low test scores, there is an incentive for schools to avoid testing the lowest scoring students. Furthermore, with less emphasis on testing, teachers will be less likely to replace content with test-taking strategies or concentrate on only the borderline students in their classes. Research shows that high-stakes outcomes for tests do not encourage students to study or learn more.<sup>197</sup> Furthermore, the punishment of denying graduation is inappropriate for ELL students who have only recently begun to learn English. Education should be aimed at the “full development of the human personality”<sup>198</sup> and post-secondary education should be available based on students’ capacity. New York City is failing ELL students in this regard; high-stakes tests punish them for their greater needs, and for the education system’s own failure to address them.

Second, New York City would benefit from an international human rights perspective to nondiscrimination, recognizing that equal resources are not commensurate if students’ needs are different. Schools with higher costs and schools where parents cannot afford private services to supplement their children’s education need substantially greater resources just to even the playing field. For example, imagine a child in a wealthy suburban school district who enters school each day with sufficient nutrition to learn, receives after-school supervision and homework help from a regular caretaker, feels safe at home and school, and is in a school with the latest pedagogical methods and technology, colorful and plentiful supplies, and experienced teachers. An ELL student in a low-income urban neighborhood may need to be provided with food, before- and after-school care, mentoring, tutoring, and school security if she is to receive truly equal educational opportunities. The availability of quality education in New York is correlated to race and class, and ELL students are often among those short-changed with only low quality schools available to them. Standardized tests, when combined with financial “incentives” for good performance, encourage teachers and parents to abandon the neediest schools, and punish those who remain. New York City could address this problem by putting more resources into the neediest schools. Experienced teachers must be recruited to and supported in schools with ELL students who may be less likely to pass the tests.

Finally, tests must be valid and reliable to have any chance of creating positive incentives. While creating such tests would be expensive, a low-cost alternative (or addition) is to reduce the significance of standardized testing. New York City should consider more than test scores in awarding diplomas. One possibility would be to bring back non-Regents diplomas, which show the graduate has successfully completed the required coursework, without requiring

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197. See NICHOLS, GLASS & BERLINER, *supra* note 101, at i (noting the study’s finding that “pressure created by high-stakes testing has had almost no important influence on student academic performance”).

198. ICESCR, *supra* note 42, art. 13(1).

students to pass all five Regents tests. New York could also consider other measurements, such as teacher recommendations or a portfolio submission, for students who have trouble succeeding at standardized tests.

If New York continues to use standardized testing to judge whether students should receive a high school diploma, the state must make some reforms in order to comply with the spirit of international human rights law. ELL students need additional help from the school system, including remediation, tutoring, and mentoring. They may need classes or testing in their own language, or additional time to complete the tests. While human rights standards do not dictate specific policies, it is clear that the current policy is not sufficiently adaptable to ELL students' educational needs. Schools with low test scores should be given sufficient resources to provide students with the education they need and deserve, even if that includes substantial supplemental services. It may also be necessary to offer alternatives to standardized tests for some students. Only with such reforms can New York make its high-stakes tests compatible with international human rights standards.