WEBINAR MATERIALS

“Including Students with Disabilities in Accountability Systems: Legal Framework & Ongoing Concerns

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About the Presenter: Kathleen Boundy, Esq., is Co-Director of the Center for Law and Education (CLE) and has an extensive background in education law. An attorney with CLE for more than 30 years, Ms. Boundy has played a significant role through legislation, policy development and litigation in implementing and enforcing the rights of students with disabilities, including improved educational outcomes under the Individuals with Disabilities Education Act, as amended, and Section 504 of the Rehabilitation Act of 1973 and No Child Left Behind.

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Including Students with Disabilities in Accountability Systems:  
*Legal Framework & Ongoing Concerns*

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Legal framework for State, School District and School Accountability to *ALL Students*  
- Title I of the Elementary and Secondary Education Act/No Child Left Behind Act  
- Individuals with Disabilities Education Act  
- Section 504 of the Rehabilitation Act  
- Americans with Disabilities Act  
- Title VI of the Civil Rights Act of 1964 (race, color, national origin)  
- Equal Protection and Due Process Clauses of the Fourteenth Amendment, U.S. Constitution

No Child Left Behind Act  
- NCLB enacted January 8, 2002, reauthorized and amended Title I of the Elementary and Secondary Education Act (ESEA) of 1965  
- Largest federal education program providing aid to LEAs for education of disadvantaged children - $14 billion annually to improve schools’ academic programs  
- Serves 12 million + children in approx. 48000 schools (58% of all), including 96% of schools with low-income enrollments of 75% or more  
- Creates framework at state, district, school levels for ensuring all students, including SWD, become proficient as defined by each state in knowledge and skills identified in each state’s standards by 2013-14
Basic Premise of Title I – Purpose & Intent

- Purpose is “to ensure that all children have a fair, equal and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”

- Achievement gaps between rich and poor; white and children and of color; children with and without disabilities are not acceptable.

Legally Mandated State Accountability System under Title I/NCLB

- Each State must establish single statewide system of accountability to reduce the gap between higher & lower achieving students
  - Adopt challenging academic content and achievement standards for all students to learn.
  - Use multiple measures of assessment to see if children are learning
  - Publicly report results of assessments by subgroups (race, LEP/ELL, SPED, low-income) in meeting annual measurable outcomes by school districts and schools.
  - Use interventions/options when schools do not make adequate improvement (AYP): school choice, SES, corrective action.

- This system (assessments, reporting, determining if meeting AYP) except sanctions applies to all public elementary & secondary schools and districts regardless of receipt of Title I Part A funds

Individuals with Disabilities Education Improvement Act of 2004 (IDEA)

- Signed into law on December 3, 2004, went into effect on July 1, 2005 (with some exceptions) and reauthorized IDEA through 2011

- Congress specifically aligned IDEA with NCLB through new findings; provided more flexibility for greater accountability

- Increased funds & increased requirements for statewide activities

- Placed new emphasis on student achievement and participation in the general education curriculum rather than compliance with procedures
**IDEA 2004 in the Context of Standards-Based Education**

- Reaffirms change from *low* to *high* expectations
- Requires that all SWDs have access to the general curriculum aligned to state standards reflecting what all students are expected to know and be able to do
- Uses IEP as a tool individually tailored to help a SWD
  - address disability related educational needs that impede learning what all other students are expected to learn;
  - ensure that each SWD is able to receive meaningful benefit;
  - make progress toward closing the achievement gap
- Requires SWDs to *participate in assessments* to improve teaching and learning
- Increases State, district and school *accountability* to parents and SWDs

**Key Components of the Legal Framework for Accountability under Title I/NCLB & IDEA: Academic Standards**

- NCLB requires adoption and use of the same academic content standards for all students in the State without exception – in mathematics, reading or language arts, and science – include same knowledge and skills, and levels of achievement expected of all students.
- IDEA requires provision of FAPE “consistent with State educational agency standards”
  - Special education = specially designed instruction to ensure access to the general curriculum so that each child can meet the educational standards that apply to all children
  - State performance goals for SWDs must be the same as the State’s definition of adequate yearly progress under NCLB, including State’s objectives for progress by SWDs; also indicators for measuring progress must include “measurable annual objectives for progress by SWDs under NCLB”

**Key Components of the Legal Framework for Accountability under NCLB & IDEA: Valid, Multiple Measures for Assessing All Students**

- All students participate in state assessments as primary means of determining yearly progress of the State, district and school in helping students meet the state academic content and achievement standards
- State assessments use valid reliable, multiple measures for determining whether all students are meeting proficient and advanced levels of mastery of the state’s standards
- State assessments provide reasonable adaptations and accommodations for SwDs
Key Components of the Legal Framework for Accountability under NCLB & IDEA:
Valid, Multiple Measures for Assessing All Students

- One or more alternate assessments for SWDs who are unable to participate in the regular assessment even with appropriate accommodations
- Except for students with the most significant cognitive disabilities, for whom State may develop an alternate assessment based on alternate standards, all other alternate assessments must yield results for the grade in which the SWD is enrolled.

Key Components of the Legal Framework for Accountability under Title I/NCLB & IDEA:
Public Reporting

NCLB requires
- States to collect and “produce individual student interpretive, descriptive, and diagnostic reports...that allow parents, teachers, principals to understand and address the specific academic needs of students” and to receive accurate data about the degree to which the school is enabling students to meet the State standards.
- Schools and school districts must provide report cards and other public reporting of data (including data disaggregated by racial subgroup, ethnicity, disability, LEP, low-income status), reflecting attendance (K-8), participation in assessments, assessment outcomes with progress toward proficiency by 2013-2014 or AYP also disaggregated by subgroup, high school graduation rate.

Key Components of the Legal Framework for Accountability under Title I/NCLB & IDEA
Public Reporting of Outcomes

IDEA requires
Public reporting of number and percentage of SwDs participating in:
- regular state and district assessments with and without accommodations
- alternate assessments based on grade level standards
- alternate assessments based on modified standards
- alternate assessments based on alternate achievement standards
**Key Components of the Legal Framework for Accountability under Title I/NCLB & IDEA**

**Public Reporting of Outcomes**

IDEA requires:
- Federal monitoring & State oversight of LEAs using quantifiable indicators in each of the following priority areas:
  - Provision of FAPE in least restrictive environment.
  - State exercise of general supervisory authority (child find, effective monitoring, resolution sessions, mediation, voluntary binding arbitration, and system of transition services...)
  - Disproportionate representation of racial and ethnic groups based on inappropriate identification
- Annual State performance plan (SPP) and state determination of whether LEAs are meeting requirements “including the targets in the State’s performance plan...” e.g., grad. rate, drop-out rate, improved achievement

**Key Components of the Legal Framework for Accountability: Options for Intervention**

**NCLB:**
- System of interventions begins when schools, school districts, or the state fail to make “adequate yearly progress” (AYP)
  - AYP = degree of improvement required to enable all students in each key subgroup— each racial/ethnic group, low-income students, SwD, LEP — as well as entire student body to reach a proficient or advanced level by 2014
- “In improvement” status
- Supplemental education services (SES)/ transfer
- Corrective action
- Restructuring

**Title I/NCLB as Implemented: Unintended Consequences**
- Title I in its present NCLB incarnation has become recognized as being about “Accountability for results” — i.e.,
  - Using State achievement tests to determine whether students are proficient in skills that the State has determined all children should learn, and
  - If not enough students (overall and for each subgroup) are proficient to meet the targets for AYP, then the school is subjected to increasing levels of interventions to improve performance.
  - Identification of a school in need of improvement perceived as stigmatizing and interventions as punitive.
  - Avoidance of stigma and punishment = force for improvement
On-going Issues & Concerns about Narrowly Defining Accountability

- Tendency to define accountability narrowly based on meeting targets measured by single test outcomes and desire of schools to avoid sanctions raises serious concerns that many schools may be engaging in practices that do not promote learning and high achievement, e.g.,
  - narrowing curriculum and instruction (teaching to the test);
  - cutting back on subject areas not falling under narrow definition of accountability;
  - pushing/counseling students out of school;
  - providing accommodations that invalidate the assessments;
  - using statistical loopholes allowed by federal regulations so as not to count certain subgroups of students.

So what does the research say about the education of SWDs?

And how can reforms result in SWDs receiving a high quality education?

Effect of NCLB on Academic Success of SWDs: What Does the Research Show?

- CEP, State Test Score Trends Through 2007-08: Has Progress Been Made in Raising Achievement for SWDs? (Nov. 2009) – More states showed gains in proficiency than declines; progress in grade 4 basic, proficient & advanced levels; problems with “fuzzy” data; gaps with nondisabled students. ([http://www.cep-dc.org](http://www.cep-dc.org))
- NCLD & Advocacy Institute, How Schools & Districts Are Improving the Performance of Special Education Students (Mar. 2009) – NCLB requirements have led some schools & districts to use educational practices that result in improved academic success for SWDs.
- NCLD & Advocacy Institute, Rewards & Roadblocks: How Special Education Students Are Faring under NCLB (June 2007) – Greater participation by SWDs in general assessments; challenges persist. ([http://ncld.org](http://ncld.org))

The Other Accountability Framework under NCLB: Using a Rights-Based Focus to Reform

Title I as a critical lens for school reform by focusing on every child’s right to a high quality education:

- Focusing on each school’s core academic program
  - What does the school need to do to bring about desired student outcomes?
- What the state and district need to do
  - resources and support, technical assistance?
- Focusing on the goal that all students learn to proficiency, not as a requirement for which a school is sanctioned when not met, but as a trigger for action when students are not on track to master what all students should learn.
The Other Accountability Framework under NCLB: Using a Rights-Based Focus to Reform (cont)

- Using Title I as a framework for providing federal assistance to improve core academic program of school; and as condition of funding, states establish a system of public education capable of teaching what the state has decided all students shall learn; of providing the basic elements of a quality education.
- Implementing key parent participation provisions under Title I (section 1118) to enhance school and district accountability to parents and students (not just to the state) for providing all students high quality education.

Using Parent Involvement Provisions under Title I to Ensure All Students Receive a High-Quality Education

- Parent Involvement Policy (PIP) req’d by Title I/NCLB describes how parents will be involved in the school decision-making process; specifically, in the planning, creation, and review of the School Improvement Plan (SIP).
- PIP must specifically detail how parents, teachers, and administrators will share responsibility in the joint development and implementation of the SIP.
- The PIP addresses the training and information needs of parents and educators.
- It must be jointly developed and agreed upon.
- SIP must be jointly developed & agreed upon together with parents.
- The SIP must describe how the entire school community will provide a high-quality education for every child.

Elements of a Right to Quality Education within the Framework of Title I of the ESEA

- As a condition of funding, every state identifies challenging knowledge and skills that all students in that state must attain.
- A high-quality education is one that enables all students to learn to the high standards that a state adopted for all students.
- Law does not simply require a system for measuring whether students have made adequate progress toward proficiency but has a set of core program requirements to ensure all students a quality education.
  - An accelerated enriched curriculum aligned w/ state standards of what all students should learn;
  - Effective instructional methods used by qualified teachers to teach students what they are expected to learn;
  - Effective and timely individual assistance for students struggling to master knowledge & skills in the state standards.
Civil Rights Laws Complement Key Title I Program Requirements

- Title VI of the Civil Rights Act of 1964 (race, color, national origin) & Section 504 (disability) bar practices that absent some overriding educational necessity, disproportionately exclude students based on race, color, national origin, or disability from the high quality curricula and instruction that schools must provide under Title I.

- Such students must be provided and are protected from being denied opportunities to learn to high standards; participation in meaningful assessments so as to ensure that they are learning and being taught effectively what they need to know; effective instruction by qualified teachers; and individualized assistance through timely effective interventions.

Legal Implications of Denying SwDs Meaningful Participation in State Assessments: § 504

- Setting lower standards for certain students and depriving them the skills and body of knowledge expected to be learned by all other students without irrefutable proof that giving SwDs and/or racial, ethnic, linguistic minority students access to the same level of knowledge and skills is pointless – violates §504 (disability) and/or Title VI (race, color, national origin)

- If a State adopts lower standards (i.e., less challenging, modified standards at reduced levels of difficulty) for SwDs on basis of their disabilities, it creates an intentional classification based on disability and one that has the effect of subjecting them to lower standards in violation of §504 and the 14th Amendment.

Legal Implications of Denying SwDs Meaningful Participation in State Assessments: § 504

- To be equally effective, an aid, benefit or services “must...afford [disabled] persons equal opportunity to obtain the same result, gain the same benefit, or to reach the same level of achievement...”

- If use of an inappropriate assessment results in inaccurate inferences that are relied upon to deny an SwD access to a program or benefit, §504 may be violated.

- Same argument for students of color and/or English language learners based on Title VI.
Considerations for ESEA Reauthorization: Alternate Assessments Based on Modified Academic Achievement Standards (AA-MAS, 2% rule)

- Amount of proficient and advanced scores on this assessment may count towards AYP for up to 2% of all students assessed at the LEA and State level.

- Based on limited research indicating that approximately 2% of the school-aged population can make progress but may not reach grade-level achievement standards “in the same timeframe as other students.”

- Announced in May 2005. Provided both short term policy and long term policy that has now expired.

AA-MAS

- Any disability category
- Progress to date (with appropriate instruction) shows student unlikely to achieve grade-level proficiency within year covered by IEP
- Decision made annually, by subject, by IEP team
- IEP must have annual goals based on grade-level academic content standards for assigned grade in subject of AA-MAS
- IEP teams must have clear guidelines to use when deciding if AA-MAS is justified

Issues and Concerns about Validity

- Is the AA-MAS assessment appropriate for the students for whom it was intended?
- Is the process for identifying SwDs who will be taught and assessed based on the AA-MAS valid?
- Will the correct inferences be made from the results of SwDs who participate in the AA-MAS – i.e., that they are not able to learn higher order knowledge and skills expected of those students participating in the regular assessment with and without accommodations?
- Are these SwDs given the full range of accommodations they need to demonstrate what they have learned?
Legal Implications of Denying SwDs Meaningful Participation in State Assessments

- Failure to adopt and implement multiple measures may violate rights of SwDs under NCLB based on regulatory mandate to provide “multiple measures”, under IDEA (failure to ensure full, meaningful participation in state/district assessments);
- May violate §504 if the effect is to deny these SwDs the opportunity to participate in the State assessment and accountability system, and to do so effectively.
- May also violate §504 if the failure to develop multiple measures for assessing SwDs results in wrong inferences being drawn causing harm to the SwD’s education.
- SwDs who are also students of color or ELLs may have additional claims under the Title VI regulations.

Considerations for ESEA Reauthorization: Relevance of Multiple Measures

- Primary purpose of multiple measures is to enhance validity of inferences drawn from assessments being used as part of State assessment system by providing multiple ways for all students to demonstrate proficiency in same skills and knowledge.
- Implementation of multiple measures is critical to help ensure that inferences based on evidence gathered from State assessment system are fair, accurate & reliable.
- Implementation of multiple measures can help to improve the quality and use of data from State assessments, improve teaching and instruction, and mitigate unintended consequences.
Legal Implications of Denying SwDs Meaningful Participation in State Assessments

- Failure to provide appropriate accommodations necessary to measure the academic and functional performance of a SWD on a statewide assessment may violate NCLB, IDEA, §504, and the ADA.
  - Issues of validity
  - Issues of discrimination
- Failure to develop alternate assessments based on grade-level standards may, in addition to violating IDEA, violate §504 and the ADA if the effect is to deny SwDs from participation in the State’s/district’s accountability and assessment systems.

Considerations for ESEA Reauthorization: Skills Assessed & Use of Accommodations

- Limiting assessments, e.g., to “reading” skills instead of assessing broader knowledge and skills subsumed by language arts for all grade levels may violate IDEA, §504, the ADA, and the Fourteenth Amendment if
  - Such limited assessment excludes student with significant reading disability or dyslexia from effective participation in the State/district assessment and accountability systems
  - Test results are used to make high stakes decisions (e.g., participation in modified assessments, assignment to low track classes, non-diploma track)
- Raises issues of test fairness and validity
- Raises issues of accommodation vs. modification

Additional Considerations for ESEA Reauthorization

- National Education Standards – Common Core State Standards and implications for SwDs.
- Graduation Rates – Calculation methods and need to include a focus on proficiency rates of students who have been retained in grade or dropped out.
- Reconsideration of 1% Rule
- Minimum Group Size & Inclusion of Students in Accountability