New York Civil Liberties Union Policy on High Stakes Testing

Education is essential to the functioning of our democracy, to full participation in civil society and to economic independence. The New York Civil Liberties Union ("NYCLU") has defended and advanced the right of every student to equal and adequate educational opportunities, including high educational standards, and opposed policies and practices that are arbitrary, unfair or discriminatory or that otherwise undermine educational opportunity. The NYCLU understands that standardized tests can perform a useful role as a tool to diagnose educational problems at both the individual and school level as part of achieving the goal of an adequate education for all students.

However the NYCLU opposes high stakes tests -- tests that are used as the sole determining factor for making important, "high stakes," educational decisions, including promoting a student or conferring a high school diploma.

These increasingly popular high stakes tests violate civil liberties in the following ways:

(1) Educational decisions such as retention and graduation made on an un-validated single high-stakes test violates students' constitutional rights to due process and equal protection. These concerns are particularly acute where, as here, the tests have not been validated as an accurate measure of academic competence, and where, as here, alternative and more accurate vehicles exist for measuring student performance that rely on student performance on a variety of measures, including tests, throughout the course of the school year.

(2) High stakes tests discriminate on the basis of race, national origin, and disability. They have been shown to have a racially disparate impact on racial and ethnic minorities, English language learners and students with disabilities, yet they have not been validated as an accurate measure of academic achievement.

(3) High stakes tests deny New York State's school students their constitutional guarantee of a sound, basic education by discouraging promotion and graduation of students, with a disproportionate impact on students who are members of racial and language minorities.

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MEMORANDUM

To: New York Civil Liberties Board of Directors

From: Education Committee

Re: Proposed NYCLU Policy on High-Stakes Testing

Date: January 20, 2010

I. Introduction

In 2008-2009, the Education Committee was charged with exploring the issue of high-stakes testing in New York State and proposing, if necessary, a policy on the matter. High-stakes tests are standardized tests that are used as the sole factor in making critical, "high-stakes" decisions regarding a child's education, including promotion and graduation. Though the issue of high-stakes testing has been discussed by the NYCLU Board in the past, the conversation was largely academic because New York did not employ a high-stakes testing regime at the time. Students could earn a high school diploma without passing the Regents exams and teachers had the discretion to promote students regardless of performance on standardized tests.

That changed in 2003, when all New York State public high school seniors had to pass five Regents exams in order to obtain a diploma. As a result, the NYCLU Board passed a resolution authorizing the staff to oppose the use of the Regents as a high-stakes test for graduation. Recent policy changes in New York State and the increasing push for student, teacher and school accountability through standardized tests have put the civil liberties issues raised by high-stakes testing front and center. Having always recognized the importance of educational opportunity, the Education Committee believes that NYCLU must now identify and oppose the harmful effects of high-stakes testing.

II. Background on the Use of High-Stakes Tests in New York

Standardized tests have been administered to students in one form or another since 1865. For many years New York public school students had the option of pursuing either a "Regents diploma" by passing the requisite Regents exams or a "local diploma" in order to graduate from high school. Not all schools offered Regents diplomas but students could choose whether they wanted to attend a school where obtaining a Regents diploma was a possibility. Either route (the "Regents diploma" or the "local diploma") produced the same result: a New York State high school diploma.

In 2003 all students (excepting those with disabilities) were now required to pass Regents exams in order to graduate. Students who scored 65 or better received Regents diplomas and students who received 55 or better received local diplomas. In 2008, New York State announced the elimination of the local diploma effective in 2012. Accordingly, starting with the 2008 freshman class, all students must pass five Regents exams with a score of 65 or better in order to

graduate and receive the only diploma available – the Regents diploma.[1] Thus, students who fail any one of the five required Regents examinations will be prohibited from receiving a New York State high school diploma, regardless of their performance on other tests or class work. As a result, public school students in New York State, who have demonstrated through course work and class performance that they have the skills and knowledge to qualify them as a high school graduate, may still be denied a diploma if they fail one of the Regents examinations by a mere, single point. Regardless of the students' coursework, class participation and the teachers' assessment, they must select from two unacceptable options: retake the exam (postponing graduation until the exam is offered again) or pursue a GED. However, private schools in New York are not required to follow the Regents-only graduation requirements.

These recent policy changes precipitated New York City subjecting its elementary and middle school students to high-stakes standardized tests. For example, students who fail to perform adequately on standardized third grade tests were made ineligible for promotion to fourth grade regardless of their performance on classroom assignments, tests and other activities throughout the school year.

This new approach to educational assessment and accountability was New York State's response to the increased emphasis on outcomes and accountability fueled by the mandates of the No Child Left Behind Act of 2001 ("NCLB"). NCLB requires testing annually from third through eighth grades as well as in one year of high school, although a high school exit exam is not required.

III. The Trouble with High-Stakes Testing – A Policy Perspective

Standardized tests undoubtedly perform a useful role as a tool to diagnose educational problems at both the individual and school level. However, they become "high-stakes" tests when they are used as the sole criterion for making major educational decisions, regardless of other measures of academic performance. The correlation between a high school diploma and social and economic independence is universally acknowledged. Less dramatic, perhaps, but also profound is the impact of being "held back" on a child's likelihood of graduation and, consequently, success and independence as an adult[2].

The use of high-stakes tests to determine school promotion and graduation has a disproportionate impact that disadvantages children who are members of racial and language minorities. Their failure rates on high-stakes tests are disproportionately high; a disproportionately small percentage of minority students take the Regents; and as a result they constitute a disproportionately high percentage of those students who are not promoted and who are precluded from graduating.

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[1] These exams cover: integrated algebra, global history and geography, U.S. history and government, comprehensive English, and one of four science exams.

[2] Shepard, L. A. (ed.) & Smith, M. L. (ed.) (1989). *Flunking grades: Research and policies on retention*. Philadelphia: Falmer. Notably, the test companies themselves caution against using standardized tests to make high-stakes decisions about a child's future.

Some children who fail or who are perceived to be at high risk of failing the high-stakes tests for high school graduation are vulnerable to being pushed out of school by administrators who could themselves be susceptible to negative consequences as a result of their students' failure. Others simply leave school because they have little hope of ever passing the Regents. As a result large numbers of students – predominantly racial and ethnic minorities and children with disablities – never graduate from high school and face a future limited by their lack of education. These children are at increased risk of incarceration and economic dependence. Indeed, though being "held back" in third grade appears far less serious than being pushed out of school altogether, children who are held back are at greater risk of educational failure, economic dependence and incarceration as an adult than their peers.[3]

This disparate racial impact of the high-stakes testing regime would be problematic under any conditions. But it is especially problematic because the tests have not been validated as an accurate measure of academic competence. Indeed, on numerous occasions over the past several years, tests have been renormed because too few students passed; sharp improvements in student performance on state exams have been called into question by flat or declining results on national tests; and students who fail to achieve a passing grade are allowed to "pass" the test by re-taking the sections they got wrong.

A. Racially Disparate Impact

The starkly disproportionate impact of the high-stakes testing regime on racial and language minorities highlights many of the inequalities present in our system of education. High-stakes testing in New York exacerbates the profound inequalities in New York's educational system and is fundamentally unfair for students who have not been adequately prepared. Moreover, it results in pushing minority children out of school. New York's schools are highly segregated and those with the highest percentages of minority children, who are often low-income, have the least experienced teachers, the most teachers teaching out of certification, the lowest salaried teachers, and the highest rates of teacher turnover. On the most recently reported 4th grade English Language Arts test, for example, 74% of students in low-minority enrollment schools met or exceeded state standards as compared to 38% of students in high-minority enrollment schools. Also, according to the most recent State Education Department report, while 82% of eligible students in low-minority enrollment schools took and passed the English Regents exam, only 35% of students in high-minority enrollment schools did so. We suspect these statistics do not fully convey the disparate impact as they do not include the thousands of students who drop out of school in anticipation of having to take tests for which they are wholly unprepared.

Not surprisingly, these widespread disparities result in drastically different educational outcomes, with students of color faring far worse on high-stakes tests than their white counterparts. For example, in New York City, 28 % of African Americans and 26 % of Latino students in the class of 2007 received a Regents diploma, compared to 57 % of white students.

[3] See Shepard and Smith, *Flunking grades*.

Less than 23 % of African American and Latino male students received a Regents diploma in 2007.[4]

B. Education Policy

The NYCLU believes that the State of New York, its schools and educators should be held accountable for providing New York's students with a quality education. Moreover, while testing students can be helpful in diagnosing both individual educational needs and broader school –wide or systemic failures, the use of standardized tests as the exclusive measure of academic success raises serious concerns. This one-size-fits-all approach to education assumes that every child learns in the same way and at the same time. High-stakes testing can also negatively impact curriculum, instruction and student achievement by replacing challenging curricula and inquiry based instructional methods that foster critical thinking. The emphasis on high-stakes tests also encourages schools to focus on "teaching to the test" and squeezes out other "untested" but critically important areas of learning – e.g. music, art, physical education, class trips.

Various forms of alternative assessments exist that are equally meaningful and that also evaluate creative and critical thinking skills. Progressive educators have found that students who did well on alternative assessments entered college and performed well academically. The NYCLU has repeatedly supported the New York Performance Standards Consortium, which is comprised of 32 public schools that received waivers from the Regents' exam requirements and use performance assessment systems to determine graduation eligibility. These schools have much lower dropout rates and higher college-acceptance rates than schools that require the Regents examinations, even though they serve a greater percentage of low-income, minority and English language learner ("ELL") students.

IV. The Civil Liberties and Civil Rights Impact of High-Stakes Testing

The use of standardized tests as the sole criterion for significant educational decisions like promotion and graduation raises serious concerns about due process, equal access to education and compliance with various state and federal anti-discrimination laws. These tests have not been shown to be valid reflectors of academic success, and clearly result in a disparate disadvantage to children of color, non-native English speakers[5] and children with disabilities. [6]

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[4] New York City Coalition for Educational Justice, *Looming crisis of Historic Opportunity: Meeting the Challenge of the Regents Graduation Standards*, February 2009.

[5] Using data supplied by the New York City department of Education, the New York Immigration Coalition reports in its publication, IMPROVE EDUCATIONAL OUTCOMES FOR IMMIGRANT, REFUGEE AND ENGLISH LANGUAGE LEARNER STUDENTS IN NEW YORK CITY, that promotion and graduation standards have been implemented without adequate preparation being provided to students from immigrant families and ELLs in particular. The result has been an unprecedented increase in dropout rates for ELLs, and many more ELLs being pushed out of high schools illegally as schools attempt to suppress their dropout rates. According to [New York] City Department of Education statistics, ELLs have the highest dropout rate, 30.5%, of any group of students in the school system. They are followed by Black and Latino students at 25.8% and 22.1% respectively. Over the course of seven years, over half (50.5%) of all ELLs drop out of high school.

[6] Many students with disabilities learn at a different pace, level and manner than their non-disabled peers. Federal and state laws demand that schools address these different learning abilities and styles. Both the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act expressly prohibit state and local educational agencies from

As a matter of policy, they are also counterproductive -- they drive children out of school and into the "school-to-prison pipeline," resulting in lifelong disadvantages.

V. Contribution to the School-to-Prison Pipeline

The NYCLU is committed to challenging the school-to-prison pipeline, the collection of local, state and federal education and school discipline policies that push students out of the classroom and lead them on a path to the juvenile and criminal justice systems. This system disproportionately impacts at-risk children, especially children of color and children with disabilities. The rise in high-stakes testing in New York contributes to the school-to-prison pipeline. New York's test-based accountability regime gives schools an incentive to push low-performing students - often perceived as too difficult to educate and likely to fail the standardized tests - out of school in order to boost overall test scores. Indeed, during the academic year 2000-2001, approximately 55,000 New York City high school students were "pushed out" of school rather than face likely failure on the Regents exams. More disturbingly, some students drop out of school in anticipation of having to take a test for which they are not prepared.[7]

According to a 2003 study by the University of Florida and the National Bureau of Economic Research examining quantitative data from numerous Florida school districts found that "schools respond to high-stakes testing by selectively disciplining their students." Moreover, the study noted, "Schools have an incentive to keep high-performing students in schools and low-performing students out of school during the testing window in order to maximize aggregate test scores." [8] Thus, high-stakes testing correlates with the disproportionate punishment of low-achieving students. Notably, in New York City, there is statistical evidence of a sharp rise in student suspensions around the time when standardized tests are administered.

Few would debate the importance of a high school diploma in improving life outcomes and providing the tools necessary for success both socially and economically. Those without a high school diploma are severely handicapped in their ability to successfully engage as full members of civil society. The majority of high school drop outs find themselves unable to earn enough money to avoid poverty. And, "[a]s our economy continues to grow into the service and information age, the economic implications of failing to earn a high school diploma are greater than ever." [9] Even those who are employed, compared to those who are better educated, will be most affected by future economic slowdowns, the constant change in the structure of the

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discriminating against students on the basis of disability and mandate the provision of a free, appropriate, public education. English Language Learners also have unique rights under the Equal Educational Opportunities Act ("EEOA") which imposes an affirmative duty for state and local educational agencies to take "appropriate action to overcome language barriers" that may impede the academic progress and outcomes of ELLs. 20 U.S.C. §1703(f).

7 Daniel Losen, *Graduation Rate Accountability under No Child Left Behind Act and the Disparate Impact on Students of Color, in Dropouts In America: Confronting The Graduation Rate Crisis*, Gary Orfield, ed., Harvard Education Press (2004)

8 David N. Figlio, *Testing, Crime and Punishment*. University of Florida and NBER, November 2003.Daniel Losen, *Graduation Rate Accountability under the No Child Left Behind Act and the Disparate Impact on Students of Color*, in DROPOUTS IN AMERICA 41 (2004).

economy, and ever-advancing technology. A steadily expanding young prison population will be drawing disproportionately from this population and will be returning similarly undereducated young people back to society, where they will face the additional employment handicap of having been in prison.

High-stakes tests are touted as the vehicle to ensure high standards and accountability in education, but they have proven inaccurate as a measure of student achievement and have had a disparate harmful impact on vulnerable children especially children of color, ethnic and language minorities and children with disabilities. For these reasons the NYCLU should adopt the attached policy opposing the regime of high-stakes tests.

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[9] See Losen, *Graduation Rate Accountability under No Child Left Behind Act*.