Ever since schools existed, students have been grouped using various criteria. During recent decades, there have been significant court cases challenging the constitutionality of classifying students based on race, gender, native language, age, and disability. Discrimination against teachers using these criteria has also been challenged in courts.
Classification by Race

Historically, our public schools have been segregated by race. In our southern states, segregation was mandated by state constitutions or statutes, while in the north it resulted from residential segregation. Residential segregation was brought about by economic discrimination, real estate ‘redlining,’ the policies of banks and mortgage companies, and deed restrictions. Residential segregation coupled with neighborhood schools, particularly when local school boards drew attendance lines, substantially ensured segregated schooling in our northern communities as well.

Did the Equal Protection Clause of the Fourteenth Amendment Eliminate Segregated Schooling?

Initially it did not. Since the broad language of the Constitution needs to be interpreted, the Supreme Court was called on to determine the meaning of the equal protection clause, as applied to schooling. In the famous case of Plessy v. Ferguson\(^1\) in 1896, the Court announced the doctrine of ‘separate but equal.’ Although Plessy involved segregation in public transportation required by Louisiana law, three years later the Court applied the same principle to the education of public school children.

Despite a variety of challenges to the Plessy doctrine over a half a century, it was not overturned until 1954, when, in Brown v. Board of Education,\(^2\) the Supreme Court declared that segregated public schools were ‘inherently unequal.’ The following year, in Brown II,\(^3\) the Court ordered schools to desegregate ‘with all deliberate speed.’

How Speedily Did School Districts Carry Out the Court’s Mandate?

Very slowly. Massive foot-dragging, subterfuge, and occasional violence delayed desegregation nationwide, and it took almost another half a century for public schools to desegregate in the North and South as well as the East and West. And vestiges of segregated schooling may still be found in some communities.

The Green\(^4\) case from Virginia specified six factors for judges to consider in determining whether a school system has eliminated segregation. These became known as the Green Criteria and are still used today. The six factors are the composition of the student body, the faculty, staff, facilities, transportation, and extracurricular activities. The Supreme Court has also pronounced that the days of
“deliberate speed” are over, all schools must get rid of racial segregation, and the only desegregation plan that is constitutional is one that works.

What about Communities Where Resegregation Occurs?
The Fourteenth Amendment only outlaws segregation that results from the law, school board policy, or actions of institutions licensed by the state. Such segregation is *de jure*, as contrasted with *de facto* (as a matter of fact) segregation where no official acts were involved. Thus, if a school district has no history of *de jure* segregation or if it achieves a unitary status (a desegregated status), and afterward, with no official action but as a result of population mobility, it becomes segregated or resegregated, that is *de facto* segregation and does not violate the Constitution.5

Who Supervises the Process of Desegregation?
The federal district court closest to the school district involved in the litigation has continuous jurisdiction until desegregation is complete and a unitary district is achieved. This might take a short time, but it could take more than 20 or 30 years, as it did in Boston and Los Angeles. Once such unitary status is achieved, the federal district court can terminate its supervision if it is satisfied that the district will not return to its former discriminating ways and has complied with all court orders in good faith to the extent practicable.6 It is also possible to relinquish court supervision over those portions of the district’s operation that satisfied the court’s orders while the district continues its efforts to satisfy the rest under continued court supervision.7

Are Teachers Protected against Racial Discrimination?
Yes, they are protected by the Fourteenth Amendment and by Title VII of the Civil Rights Act of 1964. The Fourteenth Amendment mandates that no state shall deny to any person within its jurisdiction equal protection of the laws. And Title VII prohibits employers, both public and private, with 15 or more employees from discriminating on the basis of race, color, religion, gender, or national origin. Title VII covers hiring, promotion, and compensation practices and other terms and conditions of employment.

Both disparate treatment and disparate impact are prohibited by the statute. *Disparate treatment* occurs when an individual is the victim of discrimination, whereas *disparate impact* occurs when an individual’s class has been discriminated against because of the discriminating impact of a neutral policy or practice.8
An applicant for a teaching position who claims discrimination based on disparate treatment has to show that he or she is a member of a protected class, is qualified for the job, was denied the position, and that the employer continued to look for applicants with the same qualifications. To claim discrimination based on disparate impact, one must show that the employer’s apparently neutral policy or practice had a disproportionate impact on one’s protected class. If a teacher succeeds in showing this, the school district must show that the policy or practice is job related and justified by a business necessity. Title VII also protects employees against retaliation for having filed complaints or suits for discrimination.

Can School Districts Hire on the Basis of Race or Ethnicity?
Only under special circumstances. It is not sufficient that a school district may want to hire minority teachers or administrators to provide role models for its students. They may engage in such hiring if there has been a proven history of discrimination in the district. Without past discrimination, race or ethnicity cannot be a major consideration in personnel decisions. However, if there has been a proven history of discrimination, the court will determine the appropriate remedy that will overcome the vestiges of prior unconstitutional actions. Similarly, negative personnel decisions must not be tainted by unconstitutional considerations of race or ethnicity but must be based on the employee’s job performance.

Can School Districts Use Affirmative Action to Hire Teachers or in the Placement of Students?
Only in rare circumstances. Affirmative action is defined by the U.S. Commission on Civil Rights as “steps to be taken to remedy the grossly disparate staffing and recruitment patterns that are the present consequences of past discrimination and to prevent the occurrence of employment discrimination in the future.”

In sum, constitutional and statutory protections are now available to overcome the vestiges of past racial discrimination in education. Whether public schools can use affirmative action to achieve racial balance among students is a controversy now before the Supreme Court.

Gender Discrimination against Teachers
Although the overwhelming majority of teachers are women, they are the subjects of most cases of gender discrimination. Today, most forms of such discrimination
are prohibited by law. The Fourteenth Amendment and Title VII are the key legal resources with which to fight gender discrimination.

Can Gender Be Used in Hiring Teachers?
In general no, unless there is a legitimate occupational qualification for a male or female, for example, the supervising of girls’ or boys’ locker rooms. To advertise for a male art teacher or a female kindergarten teacher is obvious gender discrimination. On the other hand, a seemingly neutral recruiting process might result in the exclusion of female applicants; for example, an advertisement for head counselor for boys. In such a situation, business necessity might be a justification.

An employer may always justify a hiring decision by showing that the successful candidate was better qualified than the others. Some gender-based distinctions are also allowed by Title VII as bona fide occupational qualification (BFOQ) exceptions.

Can Pay Differentials Be Based on Gender?
Not if male and female teachers are equally qualified in terms of degrees held and years of experience. Some school districts also give credit for years of military service or civil service classification.

In the past, males often received higher pay for being a “head of household”; now, however, such a pay differential must also be available to women if they are heads of households. The Equal Pay Act of 1963 also applies to gender-based wage discrimination claims of unequal pay for equal work. To determine whether the jobs in question are equal, courts look at the nature of the required tasks as well as the efforts, responsibilities, skills, and working conditions associated with the jobs.

Gender may not be a factor in other personnel decisions, such as reappointment, promotion, or tenure. An employee claiming discrimination must prove intent to discriminate by the employer. This is often very difficult to do unless the administrator or some member of the board made some careless remarks.

Is Discrimination Based on Pregnancy or Childbirth Allowable?
No. It is forbidden by the Pregnancy Discrimination Act, which makes it illegal to refuse to hire an otherwise qualified applicant because of pregnancy. Employers may not even inquire about applicants’ intentions to have children, or how the children will be cared for if applicants are hired.
If the employer requires a physician’s statement about the medical condition of an applicant or an employee, it may also require one for pregnancy prior to granting a leave or paying medical benefits. If a pregnant employee is unable to perform her job due to pregnancy, she must be treated as any other temporarily disabled person. If she decides to take a leave, her position must be held open in the same manner as if she were sick or otherwise disabled. Furthermore, the historic practice of requiring pregnant teachers to take a leave of absence prior to the birth of a child and specifying a date when they may return was struck down by the Supreme Court as a violation of the due process clause because it creates an *irrebuttable presumption* that all pregnant teachers are physically unable to work as of a specified date.

**Gender Discrimination against Students**

Our earliest schools were for males only. Schools merely reflected the widespread discrimination against women in the culture at large. When girls were finally allowed to enroll in schools, their schooling was usually segregated and inferior. It took many years and much controversy to achieve substantial equality in schooling free of gender discrimination. Major breakthroughs occurred only in the latter part of the twentieth century, with the aid of the Fourteenth Amendment and Title IX of the Education Amendments of 1972.

Athletic activities and competition were important parts of the education of boys going back to ancient Greece. Girls were merely spectators and, in more recent times, cheerleaders. This began to change with compulsory schooling when physical education was required of all children attending school.

**Is Gender Discrimination in Sport Competition Permissible?**

Title IX allows public schools to have separate teams for each sex. However, where schools have a team for one sex but not for the other, members of the excluded sex must be able to try out for the team offered unless it is a contact sport such as football or basketball.

A highly controversial issue related to high school athletics is the participation of boys and girls together in a contact sport. Title IX does not require gender segregation in contact sports, though it permits it. Each school may determine for itself whether it can meet the goal of equal athletic opportunity through separate or coeducational teams. Regional athletic associations often have rules forbidding
coeducational competition; however, it is still up to each school to decide whether to field coeducational teams.

A New York case ruled on the basis of the Fourteenth Amendment that a female junior high student had a right to try out for the junior varsity football squad. The school failed to show that its policy against mixed competition served an important governmental objective. When the school claimed that the policy was to protect the health and safety of female students, the court indicated that female students were not given an opportunity to show that they were as strong and fit as the weakest male member of the team. A Wisconsin case ruled similarly. States with state Equal Rights Amendments have also allowed mixed gender athletic competition.

Are Single-Sex Public Schools Legal?

The federal Education Department announced on October 25, 2006, that public schools may create single-sex schools and classes as long as enrollment in them is voluntary. School districts that create such single-sex schools must make available coeducational schools and classes of “substantially equal” quality available for students of the excluded sex.

In 1977, a federal appeals court upheld a gender-segregated high school in Philadelphia. The court found that the education was substantially equal in the two schools and attendance was voluntary. The court accepted the argument that adolescents might study more effectively in gender-separated institutions, and the female plaintiff had the option of attending a coeducational school within her attendance zone.

Philadelphia has had such single-sex schools available for years and plans to open more of them. Nationwide, the number of single-sex public schools for girls or boys has risen from 3 in 1995 to 241 in 2006, according to the National Association for Single-Sex Schools. New York City has nine such schools.

Although research related to the effectiveness of single-sex schools is equivocal, Secretary of Education Margaret Spellings claims that such schools expand educational options in public schooling. Some women’s groups and some civil rights groups are considering challenging the 2006 change as reinstituting official discrimination in schools around the country in violation of Title IX.

A proposal to open and operate all-male schools for African American students in Detroit, with a unique Afrocentric curriculum, was disallowed by a federal district court. There was no equivalent school for girls except as a promise in the future. The court held that the proposal violated the equal protection clause, Title IX, and the state law.
Can School Districts Compel Pregnant Students to Transfer to a Separate School?

No. Under regulations promulgated by the U.S. Department of Education under Title IX, schools may not discriminate against an enrolled student in academic or nonacademic activities because of pregnancy, birth of a child, false pregnancy, miscarriage, or termination of pregnancy unless the student opts to participate in a comparable alternative activity. Requiring a pregnant student to attend a school exclusively for pregnant women would constitute a form of segregation and discrimination.

**Sexual Harassment of Teachers**

Sexual harassment refers to repeated unwelcome sexual advances, sexually suggestive speech, or sexually offensive gestures or acts. Both men and women can be victims of sexual harassment from persons of the opposite or same sex. Under Title VII, two types of sexual harassment have been identified: quid pro quo and hostile environment.

Quid pro quo means giving something for something. To establish such a claim, a plaintiff must show that she or he was subjected to unwelcome sexual advances and requests for sexual favors; the harassment was based on gender; and submission was an express or implied condition for a favorable action, such as promotion, or avoidance of some adverse action by the employer or supervisor.

In a suit based on the theory of hostile environment, a plaintiff must show that the workplace environment is severely or pervasively hostile so as to unreasonably interfere with the person’s work performance. The plaintiff also must show that the sexually offensive conduct was unwelcome and the harasser was informed of that fact.

School districts should have sexual harassment policies that are disseminated to all employees. Supervisory personnel should be trained to understand and follow these policies. Grievance procedures should be available for reporting harassment. Timely corrective action must be taken.

**Sexual Harassment of Students**

The Fourteenth Amendment and Title IX both apply to claims of sexual harassment of students. The Supreme Court ruled that, for a student to collect money damages from the district for harassment by a teacher, a school official with
authority to address the alleged discrimination must have had actual knowledge of the inappropriate conduct and failed to address the problem. Furthermore, the school official had to act with “deliberate indifference” in responding or not responding to such discrimination.18

Can Students Sue Schools for Harassment by Other Students?
Yes, they can if the harassment is severe, pervasive, and objectively offensive so as to prevent the victim from having access to educational opportunity. The school officials would have to have knowledge of the harassment and acted with deliberate indifference. The Supreme Court so ruled in 1999 in Davis v. Monroe County Board of Education where a school failed to take any action to stop lewd comments and unwelcome touching despite repeated complaints for more than three months.19

Discrimination Based on Age

How Does Age Discrimination Affect School Employees?
Employees receive protection against age discrimination under the Fourteenth Amendment and under the Age Discrimination in Employment Act (ADEA).20 The ADEA applies to employees aged 40 or older who work in a place with 20 or more employees. The act applies to failure to hire or to discharge persons, or otherwise discriminate in compensation or terms and conditions of their employment because of their age. An ADEA violation might result in the employer being compelled to hire, reinstate, or promote the plaintiff with compensation for back pay, damages, and attorney fees.

Age discrimination in hiring is difficult to prove, because an employer has discretion to select a better-qualified person. Plaintiffs who challenge an adverse employment action must show they were 40 or older; applied for and were qualified for the position; were subject to a negative decision; and a younger person took their place. An involuntary transfer to a lesser position because of age would have to be challenged in the same way.

How Does Age Discrimination Affect Students?
State laws generally require students to attend school between the ages of 6 and 16. In many states, they may attend between the ages of 3 and 21.
There have been a variety of cases involving students with disabilities who were overaged and wanted to participate in interscholastic sports in violation of the rules specified by regional scholastic athletic associations. Often, sport participation is included in the disabled student’s IEP. Courts have arrived at conflicting decisions in these cases, so there is no uniform law on this subject.

**English Language Learners**

**May Schools Discriminate against Students of Limited English Proficiency?**

No, they may not. Their rights are protected by the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and the Equal Educational Opportunity Act of 1974 (EEOA). The No Child Left Behind Act also addresses the rights of limited English-speaking students.

The best-known case, and only Supreme Court case, addressing this issue arose in San Francisco, where instruction in English was provided for non-English-speaking students who were recent immigrants from China. The Court ruled that such education, in the absence of adequate remedial instruction in English, violated Title VI. The Court wrote that “basic English skills are the very core of what these public schools teach . . . students who do not understand English are effectively foreclosed from any meaningful education.”

Because there are scholarly disagreements about the best way to educate students with limited English proficiency (LEP), the courts do not require any one method to be used. In fact, the federal law no longer uses the term bilingual education, but speaks of limited English proficiency students. In different states, school districts have used a variety of programs and, if they do so in good faith, with reasonable results, courts will approve their programs. This was the case in Berkeley, California, where a Spanish bilingual program and three forms of English as a Second Language programs were approved by the court. California also passed Proposition 227, which requires that “nearly all” instruction be in English using “Sheltered English immersion” (SEI) methods and procedures. The law exempts children who already possess good English skills. When challenged by the California Teachers’ Association as too vague, the circuit court upheld the law.

In sum, federal laws protect limited English proficiency students against discrimination and allow schools to use various methods that in good faith try to overcome language disabilities of students.
Special Education

Can Schools Discriminate against Students with Disabilities?
No, they cannot, although historically there was widespread exclusion of disabled children from schools as well as substantial educational neglect when they were enrolled. In recent years, a number of lawsuits inspired some important legislation that has significantly changed this area of schooling.

How Has the Brown Case Helped Disabled Children?
Although the Brown v. Board of Education case was about racial segregation, the language of the Supreme Court emphasized that education is perhaps the most important function of the state and that it “must be made available to all on equal terms.” Ultimately, this helped the admission of disabled students to public schools. Legislation in several states as well as court cases eventually led to federal legislation originally known as the Education of Handicapped Children Act (94-142). Today, the major federal laws used to achieve equality of education for the disabled are the Individuals with Disabilities Education Act (IDEA), the Americans with Disabilities Act (ADA), and the Rehabilitation Act (Section 504).

For public education, the most important of these laws is the IDEA. This law requires that qualified children receive free appropriate public education (FAPE) in the least restrictive environment. Who are qualified for FAPE? Children who are hard of hearing, deaf, mentally impaired, speech or language impaired, blind, visually impaired, seriously emotionally disturbed, orthopedically impaired, autistic, other health-impaired, learning disabled, or suffer from traumatic brain injury, and, as a result, are in need of special education and related services.24

What Constitutes a Free Appropriate Public Education?
All children with disabilities, from ages 3 to 21 (except in states that do not serve ages 3 to 4 and 18 to 21), are entitled to FAPE at public expense and under public supervision. The schooling must meet the standards of the state educational agency; be in conformity with the student’s individualized educational program (IEP); and include preschool, elementary, and secondary school education. The students must be provided supplementary aids and services; transition services to enable them to progress from school to postschool activities; and assistive technology devices and services to improve functional capabilities.
Must FAPE Provide Education That Will Maximize a Student’s Learning Potential?

No, ruled the Supreme Court in the *Rowley* case. The intent of the law was to guarantee a “basic floor of opportunity”, and the evidence showed that the student was making better-than-average progress academically as well as socially. The Court indicated that lower courts should simply ask two questions: First, did the state comply with the procedures identified in the IDEA? Second, is the IEP reasonably calculated to enable the child to receive educational benefit?

What Constitutes an Individualized Educational Program?

The IDEA has a “child find” provision, pursuant to which school districts must find and evaluate all resident children with disabilities whether they attend public or private schools. Its “zero reject” provision requires that no child with a disability be denied an appropriate program.

Before a child with disabilities is placed in a program, there must be thorough evaluation by qualified personnel, using standardized tests. The evaluation must be in the child’s native language and be free of racial or cultural bias. Informed consent of the parents or guardians must be secured prior to the evaluation of the child. If the parents refuse consent, the school district may secure such consent through due process procedures. If the parents disagree with the district’s evaluation and placement, they have a right to request an independent evaluation.

School districts have IEP teams responsible for deciding whether a child is qualified under the IDEA for services and for designing appropriate least restrictive placement. An IEP team should include the parents of the child with the disability; at least one regular education teacher; at least one special education teacher; a district representative qualified to provide or supervise specially designed instruction to meet the unique needs of the child; other individuals who have special knowledge or expertise relevant to the child’s needs; and possibly the child.

The IEP team creates a program for the child specifying annual goals and objectives; special education–related services; the extent to which the student will be included in general education activities; the date to initiate the services, together with their frequency and duration; and how the parents will be informed of the child’s progress. The program must be reviewed at least annually, and a reevaluation must take place every three years if requested by the parents, the IEP team, or any of the child’s teachers.
What Is the Least Restrictive Environment (LRE)?

The IDEA requires that children with disabilities be educated in the least restrictive environment; to the maximum extent appropriate, with children who are not disabled. The regulations list a continuum from a regular classroom with support services all the way to home schooling or instruction in hospitals or residential institutions.26

The most important consideration is the provision of an appropriate program and secondarily the placement that is the least restrictive. Such placement may be in public or private schools or institutions. If an appropriate program is available in a public school and the parent chooses a private school or facility for noneducational reasons, the parents will most likely have to bear the costs.

Must Schools Provide Year-Round Instruction for Disabled Children?

Yes, for children who regress significantly during the summer vacation and when the IEP team considers it essential for them to recoup what they would lose. The nature of the summer program is determined by the IEP team.

What Are the “Related Services” Required by the IDEA?

The act defines related services as:

Transportation, and such developmental, corrective, and other support services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluative purposes only) as may be required to assist the handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.27

The question of what are related services was a key issue in the Tatro case.28 Amber Tatro, born with spina bifida, suffered from orthopedic and speech impairments and a condition that prevented her from emptying her bladder voluntarily. She had to be catheterized every 3 or 4 hours to avoid injury to her kidneys. Is such periodic catheterization during school hours a related service or an excluded medical service? “Clean intermittent catheterization” (CIC) was not included in her IEP, though it is a simple procedure that can be learned in about an hour and requires 5 minutes to administer. The Supreme Court ruled that CIC was a related service because it made it possible for the child to remain in school during the day, without which she could not be educated.
Other highly controversial cases went to courts trying to distinguish between related services and medical services not covered by IDEA. In Pennsylvania, 7-year-old Bevin had fetal face syndrome, was profoundly mentally handicapped, suffered from plastic quadriplegia and a seizure disorder, and was legally blind. She was fed and given medicine through a gastrostomy tube and breathed through a tracheostomy tube. Without a doubt, the services of a trained nurse were necessary to keep her in school. In 1984–1985, nursing services cost $1,850 a month, excluding close to $1,000 additional expenses a month for Bevin outside of school. The court concluded that neither IDEA, its regulations, nor case law include such extensive and expensive nursing care under related services.

**Must Schools Administer Prescription Drugs to Disabled Students?**

Yes, if the medications are prescribed by the student’s physician. The school nurse usually administers such medications. In one case, the physician prescribed a dosage of Ritalin larger than the recommended daily dose listed in the *Physicians’ Desk Reference*. When the school refused to administer the larger dose, the parents sued. The court held that the school provided reasonable accommodation under a facially neutral policy, for it was willing to have the parents give the larger dose at school or modify the student’s schedule so that the Ritalin could be given to her at home.

**Can Schools Discipline Children with Disabilities?**

Yes, they can if their misbehavior is not a manifestation of their disabling condition and if due process is followed. Long-term suspension or expulsion, however, are considered changes in educational placement and are allowed only after procedures specified by law are followed. Under the law, appropriate alternative educational placement must be found for such students.

Before a suspension of 10 or more days, or an expulsion, there must be a “manifestation determination” review. At a meeting conducted by representatives of the local educational agency, the parents and certain members of the IEP team determine whether the offending behavior was a manifestation of the disability. If it was, standard disciplinary procedures will not be applied to the student, and the IEP team must develop a plan to address the behavior or alter the existing plan. These changes went into effect in 2005 and must be consistent with the No Child Left Behind Act. At a subsequent meeting, a *behavior intervention plan* must be developed by the IEP team, together with the student’s regular teacher and any other qualified personnel. The team may recommend a change of placement (COP), which the parents may accept or challenge.
A 1997 amendment to the IDEA provides legal protection for students not yet eligible for special education who are facing possible expulsion. The amendment allows the parents of such children to request protection under the IDEA by alleging that school personnel knew or should have known that the student had a disability before the misconduct occurred that triggered the disciplinary process. When such a request is made and there are some reasonable grounds for it, the “stay-put” provision of IDEA mandates that the student not be expelled, but an IEP team should determine the student’s eligibility for special education and all its procedural safeguards.

**Can Students Whose Behavior Is Dangerous Be Given Long-Term Suspension?**

Not according to the Supreme Court’s 1988 ruling in *Honig Doe*. Doe, a 17-year-old special education student whose IEP explicitly recognized his propensity for aggressive acts, acted explosively when taunted by a fellow student. He “choked the student with sufficient force to leave abrasions” on the neck and “kicked out a school window” while being escorted to the principal’s office afterward. When the school proceeded with a summary long-term suspension, suit was filed on behalf of Doe. The school district claimed that the IDEA implicitly contained a “dangerousness exception” to the “stay-put” provision. However, the Supreme Court disagreed and said that “the stay-put provision was intended to remove the unilateral authority school officials traditionally exercised to exclude disabled children, particularly emotionally disabled children, from school.” School officials, however, may temporarily suspend dangerous students for up to 10 days, can initiate a review of their IEP, and work with the parents to agree on an interim placement. If the parents refuse to permit any change in placement, the 10-day period gives school officials an opportunity to ask the courts to approve a new placement.

A 1997 amendment to the IDEA enables school officials to place a student with dangerous drugs or weapons in an “interim alternative setting” for 45 days. The student must be allowed to continue to receive IEP services to reduce the risk of future dangerous behavior.

**Can High-Stakes Tests Be Used with Students with Disabilities?**

This question was raised by many students under a variety of laws. The 1997 amendment to the IDEA requires state and local education agencies to develop guidelines to enable children with disabilities to participate in state or district
assessments. The student’s IEP must describe the modifications to be made to enable the student to participate in the assessment. If, on the other hand, the IEP team decides that a student should not participate, it should state its reasons and how the student will be assessed.

As the law now stands, “high-stakes testing,” when following the provisions of IDEA, giving sufficient notice, and adequately presenting the relevant curriculum, does not violate the law even if some students with disabilities are thereby prevented from receiving a diploma. Disabled students in California challenged the requirement that they pass the California High School Exit Exam to receive a high school diploma.\textsuperscript{33} The federal district court ruled that such requirement, without accommodations, would be injurious to the “individual dignity” of the disabled student. The court noted that the IEPs must address individual modifications for statewide assessments and guide the accommodations acceptable for taking such tests. For students unable to master the high school curriculum, alternative assessment must be provided under the IDEA.

Guidelines

Race Discrimination and Equal Protection

- The equal protection clause of the Fourteenth Amendment forbids racial segregation in schooling by law or policy, and both teachers and students are protected against racial and ethnic discrimination.
- Racial resegregation that occurs as a result of population mobility, without official action, is \textit{de facto} segregation and does not violate the Constitution.
- School districts may hire on the basis of race only to overcome a proven history of discrimination.

Gender Discrimination and Equal Protection

- The Fourteenth Amendment, Title VII, Title IX, and state Equal Rights Amendments are the key legal resources with which to challenge gender discrimination.
- Gender may be considered in a hiring decision only if it is a legitimate occupational qualification.
- Gender cannot be used to justify a pay differential, or any personnel decision, and there can be no discrimination based on pregnancy or childbirth.
Title IX is the principal federal law controlling the sports participation of boys and girls in public schools.

If a school has a team in a sport for members of one sex but not for the other, and athletic opportunities for that sex have historically been limited, members of the excluded sex must be allowed to try out for the team unless the sport is a contact sport. But, in some states, those with state ERAs, they can try out for contact sports also.

As a general rule, schools cannot have gender-separate academic programs. New regulations allow school districts to offer gender-segregated classes and schools if they are genuinely equal, and there are coed alternatives.

Sexual harassment of teachers or students violates Title VII, independently of gender.

Schools can be held responsible for student-on-student harassment if it was severe and pervasive, and if school officials knew about it and acted with deliberate indifference.

**Discrimination Based on Age**

- A federal law protects employees over 40 years of age from age discrimination in hiring, discharge, and other personnel actions.

**Students with Limited English Proficiency**

- Students with limited English proficiency are protected by the Fourteenth Amendment, Title VI, the Equal Protection Act of 1974, and the No Child Left Behind Act.
- The courts respect a variety of approaches to teaching students with limited English proficiency as long as it is done in good faith and produces reasonable results.

**Students with Disabilities**

- Federal and state laws ensure equal educational rights for disabled students; the best known of these are the IDEA, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act (ADA).
- The IDEA requires that disabled students receive free, appropriate, public education in the least restrictive environment.
An IEP team creates an educational program for each child with disabilities, subject to the parents’ approval.

Schools must provide related services and administer medications prescribed by the student’s physician and provided by the parents.

Disabled students may be disciplined in the same manner as other students if there is no causal connection between their misbehavior and their disability. If there is, long-term suspension or expulsion is a change in placement, which can be done only with the involvement of the IEP team and the parents.

Disabled students who are dangerous to themselves or others can be suspended for up to 10 days, (or up to 45 days in cases of weapons or drugs) during which period a different placement can be negotiated with the parents or guardians, or, if they resist, with the help of a court.

Disabled students can also be required to take standardized tests or “high-stakes” tests, as long as they have been given adequate notice, the appropriate curriculum, and appropriate accommodations for taking such tests.

Notes

1. 163 U.S. 537 (1896).
11. 34 C.F.R. §106.41 (a), (b).
14. There have also been numerous cases challenging policies denying gender integration of noncontact sports where schools had teams for only one gender. Title IX explicitly favors girls who want to participate on integrated teams in noncontact sports, since athletic competition for girls has historically been more limited than for boys.
26. 34 C.F.R. § 300.551(b) (2003).