Performance, Value, and Accountability:
Public Policy Goals and Legal Implications of the Use of Performance Assessments in the Preparation and Licensing of Educators

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ABSTRACT

This paper addresses legal issues in the use of educator performance assessments as evidence for initial state licensure and for program approval and accountability in educator preparation programs. It describes individual, institutional, and governmental interests in the use of performance assessments and discusses associated legal issues. It considers traditional types of legal claims and also anticipates new types of potential legal challenges. Throughout the paper, practitioners are offered checklists of considerations for creating and implementing policies arising from the legal issues discussed.
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INTRODUCTION

Educator quality has become the predominant focus of recent education reform initiatives. Many different efforts are underway to improve the teaching force. One approach is the use of systematic, calibrated educator performance or portfolio assessments to assess candidates for the education professions and determining educator licensure. And, given increasing interest in the use of outcomes metrics, student outcomes results for both graduates and the P-12 students they teach will be used to judge the quality of educator preparation programs, as will be required by the Council for the Accreditation of Education Preparation (CAEP). These approaches are part of contemporary reform initiatives that value common standards for educators and for students, outcomes measures, and the use of metrics to promote accountability for institutions and individuals.

While strong arguments exist for increased attention to improving educator preparation and educator performance, there are also controversies over the approaches. Given the high stakes impacts of these approaches and increasing scrutiny by both policymakers and consumers, one can anticipate there will be increased legal consequences associated with the uses of these assessments. In the past, the most likely claims associated with large-scale assessments focused on issues of race and ethnic discrimination. In the future, claims of disability discrimination can be anticipated to increase, along with the use of novel claims drawn from areas such as the field of business law. Two phenomena are behind the anticipated increase in new types of legal challenges: More Americans have come to see education as a consumer product and more governmental functions have been privatized to corporate entities and are subject to quantitative metrics that change the transparency of public functions.

This paper addresses legal issues in the use of educator performance assessments as evidence for state licensure and for individual or institutional accountability in educator preparation programs. It identifies individual, institutional, and governmental interests in the use of performance assessments and discusses associated legal issues, considering traditional types of legal claims and also anticipating new types of potential legal challenges. It is designed as a set of considerations for policymakers and practitioners considering the use and implementation of educator performance assessments and includes checklists for reviewing performance assessment programs.

The value of setting clear goals and a well-grounded theory of action to enhance legal defensibility.

An important initial issue to address in assessing a state’s efforts to reform the education professions is “what is the goal of the government?” Ideally, public policy goals for a program have been clearly defined and are linked to the government’s responsibility to meet the educational needs of the state. Judgments of the legal defensibility of a test or assessment program depend upon a review of the goals of the program. Such goals create the foundation for establishing the governmental interests, the goals or rationale, sometimes called

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1 This paper uses the term “performance assessment” throughout as a generic term, broadly applicable to any form of high stakes individual educator portfolio or performance assessment through a collection of artifacts representing the work of an educator, including edTPA, the new portfolio assessment being developed by ETS or other systematic assessments of educator work such as the use of computer simulations. It addresses the types of assessment programs that use submissions of work samples by educators as indicators of performance to meet proficiency standards and can include such artifacts as lesson plans, examinations of student work of a candidate’s students, video recordings of teaching practice, and reflections on practice. It focuses primarily on approaches in which calibrated systems for scoring the assessment by trained experts is used, but other, less formal approaches can also be associated with many of the issues discussed here. The paper does not address the full range of legal issues concerning on-the-job performance of employees.
the “business necessity” for the requirements for a teaching credential or the “job-relatedness” of a test or assessment to measure teaching success.

The definition of goals and the theory of action for attaining the goals will play a key role in how courts scrutinize many types of legal claims that could arise under federal or state constitutions or statutes. While courts tend to extend great deference to education officials, a persuasively stated goal and an appropriate means for attaining that goal can substantially influence how courts will assess a government program like an educator performance assessment.

Many different potential interests are at stake in a program designed to improve the quality of the education workforce. Many governmental entities share the same interests in such programs, but sometimes the interests of different levels of government will vary. The federal government has recently used its financial support to promote its desired approaches to education reform. States may adopt the same goals and approaches, or not. And local interests, either for school districts or schools, or for educator preparation programs may vary. As a result, it is important to have a clearly articulated set of goals and theory of action at each level within the system. The more these align, the greater the possibilities for defensibility. Clarity on these issues is important at each level. For example, in 2014, civil rights groups successfully prevailed in federal appellate court in federal civil rights claims brought against the New York City Public Schools on grounds that the district was utilizing an invalid licensure test, even though that test was state-mandated and created by the state.

At the same time that governmental entities have different goals and approaches to reform of the education professions, other institutions may have different interests. For example, a variety of providers of educator preparation exist today. Institutions of higher education (both for profit and nonprofit, state funded and private) and alternative types of educator preparation providers all have interests in the operation and implementation of these systems. Local schools have interests as well, seeking both a system that can assure local school leaders opportunities to hire well-qualified educators and a system that operates with minimal problems for the provision of education to the wide range of P-12 students, including those with special needs, and their parents. Local educators who mentor future educators seek improvements to the profession as a whole, but also seek a system that functions for them. Vendors selling products in both the P-12 and higher education sectors have interests at stake in expanding the market for all of their products. Finally, individuals participating in the system, either future educators or their students, have interests at stake, seeking a system that is fair for them. In short, many potential stakeholders exist in an education reform. In many legal disputes, as this paper will describe, weighing the interests of government in designing and implementing a program against the interests of an individual or entity concerned about the program will be the key to the outcome of a legal dispute.

The goals of a program and the means implemented to attain those goals will also be instrumental in determining the technical quality of the assessment. The goals of a program and the approach to attaining those goals are important considerations in establishing the validity and reliability of the performance assessment, as will be discussed later in this paper.

**CONSTITUTIONAL ISSUES**

**Constitutional issues – fair treatment and defensible decision-making.**

Challenges to governmental programs such as efforts to ensure the competence of educators
can be based upon claims arising under United States or state constitutions or federal or state statutes. When courts assess such claims, the inquiry will focus upon the goals or purposes of the governmental program being scrutinized. For example, for most challenges arising under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, courts will most often ask whether the government is attempting to further a *legitimate governmental interest* and whether it is using a *rational means* to do so. Qualifications for licensure imposed by the state must have a rational connection with the applicant’s fitness or capacity for the occupation.

Courts generally recognize the importance of state regulation of certain occupations, particularly those serving the public good like the teaching profession. Courts have consistently recognized the importance of states’ efforts to ensure the quality of the teaching force and have concluded that states can redefine the standards for assessing minimum educator competence and that the use of educator tests and assessment to do this is acceptable.

Judges regularly declare that determinations about the provision of education programs should for the most part be left in the hands of professionals and elected officials. This doesn’t mean that education officials always win these court cases. And, it is in the interest of all of us to have assurance that, when government sets out to improve schools, the approach it takes will lead us there through fair and evidence-based approaches to the attainment of meaningful increases in learning outcomes.

**Constitutional issues - substantive protections against unfair or arbitrary and capricious government action.**

Courts are generally reluctant to second guess educators’ judgments of educational performance based on subjective evaluations. However, they will review decisions involving objective requirements, such as a passing score on a standardized multiple choice test or requirements for a diploma, licensure, or continued participation in a program of professional education. They engage in more rigorous review in high stakes contexts in which a license is already held and might be taken away or when a teacher has an ongoing contract or tenure. In situations in which the individual stakes are not as high, such as during an educator preparation program or during a probationary year of employment, fewer protections are required. Moreover, if the decision-making seems to be based upon the purely evaluative judgments of qualified professionals, courts may be very reluctant to intervene.

If a case can be made, however, that government is operating in a manner that seems fundamentally unfair, arbitrary or capricious, then courts might take a closer look at governmental action. These types of claims are now being asserted in some of the litigation concerning the evaluation of current teachers, when they are assessed on the basis of student test scores for students they do not actually teach, as is happening for teachers who teach untested grades or subjects.

Fairness issues also can arise under state or federal equal protection and due process clauses if government decision-making fails to draw rational distinctions between those who pass a performance requirement and those who fail to pass (an issue that will be discussed below in consideration of standard-setting and scoring). One federal civil rights case was brought not only against the state, but also against local school districts that relied upon results from the state teacher test to make local employment decisions. A settlement between the parties occurred after a federal district court judge found that the private company that developed the test for the state engaged in unprofessional practices violating the minimum
professional requirements for test development. Among the problems the judge found were test development decisions that resulted in scores that were arbitrary and capricious and bore no rational relationship to teacher competence.

Claims of the denial of fairness in educator assessment systems could arise from a variety of implementation practices, such as issues of technical quality. In addition, issues concerning the appropriate methods for collecting and verifying data about an individual educator’s performance, the potential misattribution of a teacher’s scores from other teachers, and the fairness of the scoring system used to judge candidate submissions can all be potentially subject to claims of denials of fair treatment in violation of the federal or state equal protection or due process clauses.

**CHECKLIST:**

- Once the state’s goals have been identified and clarified, check how clearly, consistently, and persuasively the state’s goals or interests are articulated throughout the program. This includes reviewing the assessment and its technical characteristics, the standard-setting and cut scores, scorer guidelines and training, score reporting, and the inferences made on the basis of scores.

- Review all materials, including relevant statutes, regulations, guidelines, policy documents, assessments or tests, and samples of candidate performance. All of these sources should be assessed to determine what they specify about what educators need to know and be able to do, the consistency of the approach, and the technical quality of the approach. While most of this focuses on evidence for the overall program as developed nationally, there should also be state and local level reviews of these factors, as well as state and local level decisions.

- Review the standards being imposed and the mechanisms for attaining those standards, as well as success rates on the assessment to ensure the existence of a clear, fair, and technically sound system that is consistently implemented in the same way for all educator candidates from all preparation programs.

**Constitutional issues - procedural protections for candidates.**

The procedural protections under the federal and state constitutions’ due process clauses that are available to persons or groups impacted by new credential requirements should be carefully considered. Some state statutes and regulations may have applicable procedural requirements as well. And, to the extent that an educator may be a member of a collective bargaining unit because they are a paraprofessional or a licensed educator seeking an additional license, the local collective bargaining agreement may contain applicable procedural protections. Courts have traditionally recognized that individuals have a general interest in a reasonable level of accuracy in governmental decisions that affect them - an interest that entitles them to an appropriate level of procedural due process, most often in the form of an opportunity to be heard in person when important interests are at stake.

To determine procedural protections that might be necessary under the federal constitution, courts might look at the nature of the private interests at stake in a program, the risks to the affected individual(s) resulting from errors in determinations that might be made, the nature of the government’s interest, and the administrative and other burdens that procedural protections might cause.
The easiest time to change the credentialing of educators is during the early phases of careers, before individuals have entered the field and before they have an enhanced interest in maintaining their professional reputations or employment. Thus, preparation and pre-certification or pre-licensure time periods may present the best opportunity to make changes without bringing to bear the full protections of due process requirements.

**CHECKLIST:**

- Ensure that a fair system exists for resolving complaints from candidates who assert that they were mistreated in the implementation of the program.

### Constitutional issues – bars to race/ethnic-based decision-making.

If a government program like a licensure decision has a negative impact on racial/ethnic minorities, the questions raised under the U.S. Constitution’s Equal Protection Clause may be more demanding. When a history of unlawful discrimination against these groups exists or when standing court orders exist requiring the dismantlement of discriminatory programs (still in place in some school districts and state higher education systems), a court’s review of a program will be the most rigorous. Here, a court may require compelling persuasion from government that its program is defensible in the face of a race/ethnic discrimination claim. Here, government needs a compelling reason for its program and an appropriate means to achieve its goals.

The more powerful race/ethnic discrimination issues arise under statutes rather than constitutional provisions and these will be addressed later in this paper, along with recommendations to address these issues.

### Constitutional issues - religious and expressive rights for future teachers.

Some of the most powerful legal challenges to public education practices in recent years have been initiated by social or religious groups based on claims of violations of the speech and religious freedom provisions of federal and state constitutions. In this context, claims could be made that the definitions of teaching competence and the standards for assessing educators intrude upon the rights of individual educators to freedom of speech and religious practice. Examples would include individuals whose bona fide religious beliefs bar video or photographic images or members of groups who, on grounds of religious belief, do not engage in what some evaluators might consider fair treatment of a homosexual or transgender student in their classroom. Government can intrude on religious-based practice, but must have appropriate grounds for doing so, which means the governmental interest being pursued by the program and the means for achieving that goal will be important, as will the extent of the intrusion on individual religious belief and practice.

**CHECKLIST:**

- Regularly review the definitions and measures of teaching competence to assess whether any elements might present an opportunity for claims of discrimination based upon a religion or viewpoint and, if so, decide whether it is important to retain these elements.

- Also, train scorers on bias and review scoring criteria and scorer judgments that might relate to religious beliefs and practices of candidates or biases of scorers or scoring criteria.
Constitutional issues - opportunity to learn for future teachers.

In addition to implementing or overseeing the award of teaching credentials, each state also controls the process of educator preparation through the state's mechanisms for approval of educator preparation programs. This control imposes on states another set of requirements to ensure that a relationship exists between educator credentialing and educator preparation. This would be true regardless of whether the state directly performs these functions or delegates them to some quasi-public or other agency or to an accrediting body.

If a performance assessment is used for formative purposes during an educator preparation program, the obligations to provide a meaningful opportunity to learn are particularly evident. This would obligate the state to ensure that its standards for program approval are consistent with what would be required to prepare future educators to meet licensure requirements, including the performance assessment requirements. This obligation would include the provision of sufficient feedback on the performance to allow a candidate a meaningful opportunity to improve future performance, particularly when the performance is being judged in a formative evaluation.

The state may have a constitutional obligation to assess whether teacher candidates are offered instruction in the state's approved or accredited educator preparation programs, including programs within higher education institutions as well as programs by other types of providers. In addition, the state may be obligated to assess whether educator preparation programs are offering the curriculum and instruction that will prepare students in those programs to meet the testing or assessment requirements for certification or licensure. In a similar situation that required successful performance on a minimum competency test in order to receive a high school diploma, courts have held that, when compulsory attendance in school is required and students expected that they would receive a diploma as a result of having met high school requirements, the state must show that schools provided students a fair opportunity to be taught what is covered on the test.

**CHECKLIST:**

- Review program approval standards and processes to ensure that the obligations imposed on educator preparation programs reasonably relate to the knowledge and capabilities measured on the teacher assessment.
- If the state requires certain competencies, skills, or knowledge in order to obtain a credential as a professional educator, ensure, as part of the state's mechanisms to evaluate educator preparation programs, that the programs are teaching and assessing the same competencies, skills, and knowledge that the state will require in its own assessments of candidates for teaching credentials. The evaluation of educator preparation programs would, and ordinarily does, review course content, fieldwork requirements, and student assessments; ensure that these reviews are aligned with licensure requirements so that future educators receive the requisite preparation in their state-approved preparation programs. In addition, if one of the reasons for the state's requirements for educators or educator preparation is based upon the standards for achievement of elementary and secondary students, ensure that a link also exists between those standards and what is required for educators.
Constitutional issues – opportunity to learn for P-12 students.

Since the 1980’s, students in low property wealth school districts have brought litigation under state constitutional provisions concerning the operation and funding of public schools. Most recently, these cases have focused on whether appropriate or adequate education is being provided by a state. These often long-running and complicated cases seek to define the nature of a state’s obligation to educate, determine how to assess whether adequate funding is being provided, and then measure whether the system is achieving the level of educational access the state constitution contemplated.

Many state constitutions contain requirements that the state must create and fund a system of public education that provides students access to adequate, appropriate, or meaningful educational opportunity. If parents feel that any of these legal provisions for access to educational opportunity are being denied, litigation can be mounted challenging the education provided by the state or local schools. Some of these cases have scrutinized the quality of the educator workforce. An educator performance assessment system could be scrutinized as part of such litigation.

Statutory Protections for Opportunity to Learn for P-12 Students

In a manner similar to the constitutional issues concerning opportunity to learn for P-12 students, the Equal Educational Opportunities Act (EEOA) (20 U.S.C. § 1703) obligates P-12 schools receiving federal assistance to prohibit discrimination on the basis of race, color or national origin in public schools. The EEOA creates an obligation for states and localities to take appropriate action to provide and improve educational opportunities for these educationally disadvantaged populations. Instituting a performance assessment might well be considered such an action. Courts applying the EEOA have described a three-part standard defining state and local obligations requiring evidence on the soundness of the educational theory behind a program, the adequacy of the implementation of the program, and evidence that the program improves educational achievement. Evidence concerning educator quality, including quality as represented in educator licensure and performance accomplishments, could be considered under this three-part standard.

Civil Rights Statutes Barring Discrimination in Licensure and Employment

Federal civil rights laws (and, often, analogous state laws) have been used to challenge successfully both objective criteria for employment and scored tests used to make decisions concerning employment, training programs, and licensure. If an employment test, selection process, or evaluation has disparate results for protected groups or individuals, such as racial or ethnic minorities or older workers, or creates barriers to participation for individuals with
disabilities or is based on gender role stereotypes, the nondiscrimination requirements of federal employment statutes will apply.

**Statutes barring discrimination on the basis of race/ethnicity.**

Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) bars discrimination in education programs receiving federal financial support. The more widely used basis for challenging discrimination in employment testing, selection, and evaluation is Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e), which bars discrimination on the basis of race, color, religion, sex, or national origin. It is in the application of Title VII that courts have in the past been most heavily involved in issues of the validity and reliability of inferences based on tests and evaluations. Even if a state agency may not be covered by Title VII because it is not an employer of an educator or educator candidate, local school systems who use an assessment would themselves be subject to Title VII requirements, even if they only use the assessment because the state requires them to do so. And, both state and local educational agencies would be subject to the requirements of Title VI.

When courts assess challenges to educational or employment practices under Title VI or Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000d and § 2000e), the Age Discrimination in Employment Act (29 U.S.C. §§ 621-634), Section 504 of the Rehabilitation Act (29 U.S.C. § 794), or the Americans with Disabilities Act (ADA) (42 U.S.C. §§ 12101-12213), they will review whether an educational or business necessity exists for a particular practice (see, for example, 42 U.S.C. § 12113(a) requiring evidence of educational or business necessity for claims arising under ADA; 42 U.S.C. § 2000e-2(k)(1)(A)(i) requiring evidence of “business necessity” for requirements with disproportionate impact on basis of race, ethnicity, sex, religion for claims under Title VII). This is the same or similar to the review of the government’s goal discussed in the early part of this paper.

Title VII bars discrimination in employment, but permits the use of professionally-developed ability tests for employment decisions, provided that they are not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin. The provisions of other federal civil rights statutes also allow tests and objective criteria, but only if they do not cause unlawful discrimination on the basis of gender (regulated under Title IX, 20 U.S.C. § 1681 et. seq., which bars gender-based discrimination in federal programs or activities receiving federal financial assistance), age (29 U.S.C. § 621-634), or disability (Section 504 and the Americans with Disabilities Act).

Traditionally, an objective test that has a disparate impact on protected groups requires a demonstration by the employer that the test is job-related with regard to the position in question and consistent with business necessity (42 U.S.C. § 2000e-2(k)(1)(A)(i)(2010); EEOC, 29 C.F.R. § 1607.5). This requires evidence that the test actually measures skills, knowledge, or ability required. Broad coverage also exists under Title VII and the Equal Employment Opportunity Commission’s (EEOC) Uniform Guidelines for Title VII enforcement (29 C.F.R. § 1607.2(B); 29 C.F.R. § 1607.2(C)) concerning not only use of standardized objective tests, but also all employee selection devices, including performance evaluations (29 C.F.R. § 1607.2(C)). A long history of court cases exists concerning allegations of discrimination in employment testing, focused on paper and pencil standardized selection tests or hands-on performance tests. However, in recent years, the conditions for use of class action lawsuits to challenge programs have sometimes become more restricted by the federal courts and the proof required to establish discrimination in employment is sometimes more difficult than in the past. The
issues related to employment discrimination laws remain important to consider, however, because the laws are still applicable and cases continue to be decided against education officials.

**CHECKLIST:**

- Ensure adequate consideration of potential unlawful bias throughout the performance appraisal development and implementation process, including fair representation of all groups during the development and field test process.

- Continuously monitor the passing rates of race, ethnic and language minorities, individuals with disabilities, older candidates, as well as gender groups. Are there disproportionate rates of success on the assessment? Are minority candidates failing disproportionately compared to nonminority candidates? Are the failing students clustering near the passing standard? Is there compliance with professional and technical standards? If your state, higher education systems, or any local districts have past or pending court orders or state statutory civil rights requirements concerning these populations, impose a particularly rigorous monitoring.

- One assessment of demographic statistical data for the overall assessment should include a calculation of whether or not the assessment has a “disparate impact” on members of racial/ethnic minority groups. Initiate a formal and consistent effort to gather and assess data on the impact of the program on particular groups of educators or potential educators. Where quantitative or qualitative, or even anecdotal, data indicate a problem may exist regarding one or more protected groups, gather and assess further evidence.

- When subjective criteria are used, even if there is calibration of scoring, the defensibility of the system is enhanced if states ensure: (1) clear procedures and guidelines exist for ensuring the uniformity and fairness of the system, including an opportunity for bias review, due process review and specific written instructions for persons conducting appraisals or scoring; (2) the appraisal system is based on a job analysis; (3) the appraisal system is behavior-oriented rather than trait-oriented; (4) members of protected groups participated in the development process for the assessment; and (5) the system is free of discriminatory language and stereotypes about the abilities of certain types of people to perform particular jobs.

- Ensure thorough training of scorers and monitoring of their performance to review for and eliminate sources of unlawful bias in scoring.

**Statutes barring discrimination on the basis of disability.**

While in the past, the most powerful legal claims concerning discrimination in assessment were brought on the basis of race or ethnic status, some of the more powerful current legal claims concerning discrimination are being brought on behalf of people with disabilities. This section will focus on federal civil rights requirements concerning disability-based discrimination; many states have similar or even more powerful state laws.

Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) is a broad nondiscrimination law that applies to programs run by any organization participating in federally-funded activities and programs. This covers all public elementary and secondary education programs and the vast majority of higher education programs in all...
of their educational and employment activities, and all state departments of education. Section 504 can also apply to an independent licensing board if it receives federal funds, either directly or indirectly. The provisions of Section 504 and its implementing regulations are designed to ensure nondiscrimination and to promote equal opportunities for persons with disabilities to benefit from educational programs and activities and to participate in employment and other life activities without discrimination.

The second disability-related federal civil rights law, the Americans with Disabilities Act (ADA) (42 U.S.C. §§ 12101-12213), is an even broader nondiscrimination law than Section 504. It requires the same types of efforts as those called for under Section 504 to avoid discrimination on the basis of disability, but it has many more detailed requirements and some provisions specific to assessment. It covers almost every educational employer and institution in the nation. It applies to most educational and employment testing or assessment programs, both public and private.

Both Section 504 and the ADA bar discrimination on the basis of disability when employers use job criteria that intentionally or unintentionally screen out individuals with disabilities who are capable of performing a specific job. An assessment should not be utilized for a job requirement if it bars individuals with disabilities from employment unless the test can be shown to be job-related and necessary to meet legitimate business needs for a particular position. Therefore, if an assessment is used as a requirement for qualifying for a teaching credential or job, evidence must exist that the assessment measures an essential function of the job and no reasonable accommodation in the assessment could be provided given the specific disability a candidate presents.

Both the ADA and Section 504 provisions require that test scores provide an accurate indication of what an individual can do, rather than merely reflecting a disability. The ADA includes a specific provision requiring nondiscrimination in the administration of examinations (42 U.S.C. § 12189; see also 28 C.F.R. § 36.309). These provisions include ADA requirements that testing sites be physically accessible and that test formats be the most effective manner for persons to demonstrate that they can perform necessary job-related skills and knowledge:

> Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals. (42 U.S.C. § 12189; see also 28 C.F.R. § 36.309)

The ADA also includes a “job-relatedness” requirement limiting the use of assessments that “screen out or tends to screen out ... individuals with disabilities unless ...[it] is shown to be job-related for the position in question and is consistent with business necessity.” 42 U.S.C. § 12112(b)(6).

Under the ADA, a person with a disability should be considered qualified to perform a job or participate in an educational program if he or she can meet the essential requirements of the job or program “with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers or the provision of auxiliary aids and services” (42 U.S.C. § 12131).
The most typical types of reasonable accommodations or modifications are alterations in the format of a test (such as the provision of large-print, audio recording, reader, or Braille formats) and/or extended time to take a test. Both the ADA and Section 504 allow an opportunity to refuse to provide an accommodation that would cause undue hardship, which has been defined as an action requiring significant difficulty or expense considered in light of the nature and cost of the accommodation, the overall size, nature, and financial resources of the entity being asked for an accommodation, and the type of program involved.

One of the key issues in using performance assessments for educator licensure for individuals with visual and other physical disabilities will be the extent to which they can access the online platforms for the assessment. A growing number of concerns have been addressed about the accessibility for individuals with visual impairments to online learning platforms in higher education and other websites. And, a new issue that is now being asserted is a claim that individuals with disabilities ought to be included in field tests conducted during assessment development when accommodations can be tried out to ensure they provide a fair opportunity to participate. In this way, individuals with disabilities will have their needs considered during the development process rather than being forced to face accommodations or refusals to provide accommodations later when the assessments have high stakes consequences.

**CHECKLIST:**

- Include a range of types of individuals with disabilities in field-testing of the program to ensure full participation when the program goes operational.
- Continuously provide and monitor accessibility and accommodations in all programs of assessment.
- Each time a need to accommodate on a test is considered, know clearly the essential requirements of the job, as measured by the assessment and its scoring system, and the impact of a particular accommodation on the assessment of the capabilities to perform essential job tasks.

**LEGAL ISSUES CONCERNING THE QUALITY OF THE ASSESSMENT**

*The evidence about a program required under federal and state laws.*

How does a state define and measure what a beginning educator needs to know and be able to do? The federal civil rights laws set out requirements for the quality of evidence used in an employment or licensure program. Requirements also exist on the quality of the evidence to support a program embedded in the provisions of the No Child Left Behind Act (20 U.S.C. §§ 6301 et seq.). These requirements call for evidence-based approaches and implementation of programs based on scientific or technical standards. These are analogous in many ways to the standards required under the federal civil rights laws discussed above.

The requirements that states have adopted for evidence used in the implementation of educator evaluation are also important to consider. Some state statutes incorporate standards on the scientific quality of evidence to support the evaluation tool being used. Among the state...
requirements are obligations to ensure evidence-based, meaningful, valid, and reliable approaches based on clear standards of performance. Most of these requirements are designed to apply to the evaluation of current practicing educators who are already licensed, but some state requirements may be more broadly formulated or be vague. Or, it could be the case that the evaluation is of a practicing educator not yet licensed, an educator seeking an additional license, or a local evaluation that takes performance on a licensure assessment into account in its decision-making. In any of these instances, the state requirements concerning the quality of evidence about an educator could apply to any performance assessment.

**CHECKLIST:**

- Review state statutes and regulations, as well as subsequent case law, to determine whether specific requirements exist about the scientific quality of the performance assessment and then regularly monitor for compliance with those requirements.

*Validity and reliability evidence.*

In general, the two primary considerations for the technical quality of an assessment are the validity of the inferences made as a result of the assessment and the reliability of the determinations made by the assessment. Both issues of technical quality are based upon consideration of professional standards of the American Educational Research Association, American Psychological Association, and the National Council on Measurement in Education, as well as the professional guidelines of the Society of Industrial Psychologists. Also useful are the professional standards of the Joint Committee for Evaluation Standards.

Test validity is always of primary importance in assessing an employment test. This obligation arises out of the federal statutes, the Uniform Guidelines of the Equal Employment Opportunities Commission (29 C.F.R. §§ 1607.14 and .15), and also the relevant standards of practice for the testing profession applied often through expert testimony in legal disputes. Sufficient evidence should exist to support the inferences made from a test. The test should be appropriate in teacher performance assessment.

The validity consideration requires evidence on the relationship between the assessment and the use of assessment data to draw an inference that an individual has met the required standards for proficiency. Validity is therefore directly linked to measure what it purports to measure and “generally, validity is defined as the degree to which a certain inference from a test is appropriate and meaningful” (see, for example, Richardson v. Lamar County Board of Education, 1989, p. 806).

The second over-riding technical issue in the quality of assessments is the reliability of the assessment. Evidence of reliability requires assurances that the data generated by the assessment are consistent and accurate.

How a state defines and measures what an educator needs to know centers around our diverse cultural perceptions of effective teaching practice. Wide variation can exist between cultural or ideological groups in expectations for successful teaching. The cultural judgments embedded in teaching standards and in test items can introduce a source of bias in the system of educator testing; some of this bias may manifest itself in the content or instructions for assessment submissions or in training or instructions for scorers or in scoring choices. These issues are related to the validity and reliability of the assessment and can also impact the composition of the teaching force.

One set of possible challenges to the assessment system relates to the use of student test score data.
to make determinations of teacher effectiveness. These student growth approaches, or value-added models (VAM), have been adopted widely by states for the evaluation of current educators. Interest is increasing in the use of these data to evaluate individuals seeking licensure as well as the preparation programs they completed, as is now required by the Council for the Accreditation of Educator Preparation (CAEP), and as has been proposed by the federal government. While widespread political support exists for the initiatives and a strong cadre of social scientists support the approach, many social scientists, particularly those with expertise in educational testing and assessment, have issued cautions that insufficient validity and reliability evidence exists to substantiate the use of student test scores to make determinations of educator competence. These social scientists point to the wide variety of factors that can impact student performance in addition to the role of the teacher. They also point out considerable technical concerns about the lack of validity and reliability of VAM measures to determine individual teacher performance and the inconsistency of scores from year to year.

Another issue of technical quality may arise when states have multiple tracks for performance-based licensure. As different types of performance assessment become available, these will need to be compared. Further, if data are collected about on-the-job performance during employment and these relate to a new license area, then those data will need to be compared to those generated by the performance assessment system. If different assessment systems are utilized in a state or local district, technical evidence of the equivalence of those systems should be considered.

Another possible challenge could focus on whether cut-scores were set properly. One of the qualities of an assessment that may be reviewed by a court under any of the civil rights or the due process or equal protection claims is the manner in which the cut-score for passing the test is set. Even if an assessment is an appropriate measure of the skills and knowledge required of educators, an assessment may not be educationally justified if the cut-score used is not itself a valid indicator of educator competence. Appropriate professional technical procedures should be followed in setting a cut-score. Evidence should be available that the cut-score for an assessment does not eliminate good educators from eligibility for teaching jobs. Some recent decisions about cut-score setting and standard-setting for educator licensure have become public and this transparency can highlight standard-setting approaches that may not withstand scrutiny.

☑️ Checklist:

- Review state laws on the requirements concerning the quality of evidence required to make licensure or individual or institutional effectiveness decisions.
- Conduct a review to determine if the state’s definitions of competence and its standards and scoring criteria and decisions are sensitive to issues of ethnic and cultural diversity and to differences of gender, age, and disability status. Similarly, conduct a review of differing gender-based perceptions of effective educational practice for similar reasons.
- Carefully review all written materials in which the state defines teaching competence, including all relevant statutes, regulations, guidelines, policy documents, and assessments or tests. Assess all of these sources to determine the statements they make about what educators must know and be able to do. Are the standards for educator competence clear and understandable? Is there agreement that these definitions
embody what individuals must know and do in order to be at least minimally adequate educators? Do individuals really need to know these things to be minimally qualified to teach in the state? Do the standards reflect the current knowledge base (best practices)? How do they directly relate to student performance standards and achievement measures in your state?

Review the distinctions drawn between what entry level and more advanced level educators should know and be able to do and determine whether these are rational. Review also the differences between common competencies for all educators and specialized competencies for specific credentials such as those for special education teachers or bilingual educators. Ensure that the performance standards are clearly correlated with the knowledge and disposition statements. Ensure that the performances described represent behavior that can be accurately assessed. Ensure that the standards are realistic and attainable.

Ensure that validation and reliability data for assessment uses exist in the state and local districts.

When student growth or VAM measures are included in assessment data, ensure the specific validity and reliability of those data, the underlying student tests, and the relationship between the student scores and the educator candidate scores. Research and monitor these over time as student tests and the educational context change.

When more than one assessment approach is available to candidates in one area of licensure, monitor the equivalence of the difference assessments.

**PRIVACY LAW ISSUES**

Increasing attention to individual privacy rights in the implementation of education reform initiatives can be expected, as the issues arise for both P-12 students and future teachers. State and federal laws set out individual privacy rights for educators and both P-12 students and students in educator preparation programs. These individual interests must be weighed against the public right to know about educators and educational institutions, both P-12 schools and programs preparing future educators. And individual privacy interests must be balanced against the state’s right to have access to assessment information that is needed to meet statutory requirements.

Privacy interests are potentially impacted by classroom observation, by video or audio recording, and by use of P-12 student work in the teacher assessment submitted for licensure. A second set of privacy issues arise when the assessment information might be used for purposes other than the licensure of the individual candidate who submitted the assessment materials. Concerns have been raised about how the content of an assessment might be used once it is in the hands of the entity receiving the materials. What will happen to the candidate’s submission once it is scored and what will be done with the information included about the P-12 students and their parents or incidental information collected about the cooperating classroom teacher or school administrators? Will privacy of all these people be protected? Will other products be created from information in the submission? Several different potential sets of privacy considerations are implicated, each with their own sets of interests at stake: privacy of all the P-12 students (and their parents) in the classes used for the candidate’s performance assessment; privacy of the individual students whose work is examined in the assessment; privacy of the individual classroom
teacher (teacher of record); and privacy of the candidate or future educator. These individual interests need to be balanced against the potential interests of: the P-12 school/district in which the performance occurs; the state regulating the P-12 and higher education systems; and the public in the performance and accountability of educational institutions and individual educators.

Increasingly, as interest in the use of “big data” sets to enhance performance and accountability continues to grow, more attention needs to be paid to identifying and understanding the interests not only of individual students and educators, but others impacted by these systems: the educator preparation institutions; the state agency implementing the licensure system; the state agency overseeing P-12 school accountability; the state agency overseeing educator preparation institutions; the educator preparation programs themselves; and independent accrediting bodies, such as the Council for the Accreditation of Educator Preparation (CAEP), which are now more focused on outcomes measures of program and student quality. The new standards for institutional review adopted by CAEP, for instance, call for the use of performance data for program graduates based on the performance of the P-12 students those graduates teach. In addition to these interests, the public at large, sometimes represented by the press seeking access to information on the performance of P-12 schools or educator preparation institutions, or by an outside entity that conducts rankings like the National Council on Teacher Quality (NCTQ) or the U.S. News and World Report, may have an interest in data on educational performance.

As a result, a wide range of privacy issues are associated with educator assessment materials, particularly when the materials contain the work of P-12 students or video or audio recordings of actual classrooms or other school experiences. Privacy concerns arise for the P-12 students (both those who are focused upon in the materials the candidate submitted and also for non-focus students who may be incidentally captured in records, work products, or recordings), the families of the P-12 students, and their classroom teachers of record. Potentially, the educator candidate may have his or her own privacy interests at stake as well if the assessment materials are used for purposes other than licensure, as will be discussed below.

While specific statutes and regulations related to privacy may come into play, it is also worth noting that our cultural notion of the meaning of “privacy” is currently in great flux. Younger generations are apparently more comfortable sharing, often through social media, what older generations might have considered strictly private information. At the same time, recent current events make clear that government and commercial collection of massive amounts of information about us is common and extremely widespread with the potential use and misuse of this information frightening to many.

To the extent that legal issues concerning claims of privacy turn in part on considerations of what are reasonable expectations of privacy in our society, it is worth considering what constitutes a “reasonable” privacy expectation today. However much society may be changing in terms of information-sharing, the fundamental issues concerning the protection of personally identifiable information (PII), the privacy of children, and the expectations around the intimacy of relationships between parents and their children suggest that great care is warranted in adopting an approach to protections for PII.

Perhaps inspired in part by prominent media accounts of national security and credit/debit card hacking, as well as a flurry of social media-targeted marketing initiatives based upon information in databases, a new digital privacy rights movement has quickly developed. This follows efforts on the part of social conservative advocacy groups
to protect parental rights to influence or control what happens to their children in schools and to amend state laws to do so. As a result, more attention to privacy issues is warranted. The issue is complicated by the fact that the existence of big databases on educational performance, available in an era of increasing focus on accountability, have resulted in calls for access to the data on the part of journalists and activists. The fact that many of these databases are in the hands of private vendors only complicates the matter further.

In this portion of the paper, a range of privacy issues will be addressed. Primary attention in this discussion will be paid to federal law, but those implementing assessment systems should consider state laws (student records laws, freedom of information laws, and general privacy standards or common law provisions). State laws concerning student records must be carefully considered in each state as they may offer different and more comprehensive protections to individuals than federal law.

**Common law privacy law protections.**

State court case law and some state statutes set broad parameters for protecting privacy in situations in which individuals would ordinarily expect privacy. In settings in which privacy is expected, unreasonable or serious interference with privacy that causes harm to private individuals can result in significant monetary damage awards from the private parties or the institutions or entities violating privacy.

**CHECKLIST:**

- Two cornerstones to protecting privacy interests exist. First, ensure that careful policies and procedures are in place on what information is collected about individuals, why it is collected, and how it is managed. Determine when private information is necessary in an assessment or when other information might be used without intruding on privacy. And, for both the parents of P-12 students and for prospective teachers who are themselves students in educator preparation programs, informed consent to disclose personal information outside the educational program collecting it is the first requirement for protecting privacy interests. Active and informed consent is the safest means to ensure privacy protection. Sometimes in research contexts, passive consent or assent can be applied; it is not the preferred approach and it is difficult to contemplate a scenario when it might promote the governmental interests discussed in the first part of this paper. Second, pay careful attention to the mechanisms and places for the use and disclosure of personal information, which is the other cornerstone requirement for protecting privacy.

- Review consent forms for educator candidates to ensure they request full, informed consent for all uses of the assessment materials submitted.

**State laws related to video recording or audio recording of students and classrooms.**

A particular set of legal issues associated with educator assessment arises from the inclusion of any audio or video recordings of classroom or individual student(s) performance as part of the materials submitted. State privacy laws and wiretapping laws are relevant to these recordings and videotapes; those state laws can vary considerably.

The use of video or audio recording requires consideration of where the recording occurs and the expectations of privacy that exist in that context or are specifically defined by state law. The general
principle is that recording of a private place or of a private interaction requires prior and specific consent from the parents of P-12 students, while audio or video recording in a public place does not require consent. The language and interpretation of state laws vary from state to state on whether a school or a classroom should be regarded as private places and the ways schools operate can impact this consideration as well. For example, if security cameras are widely deployed in schools and everybody knows that, little reasonable expectation of privacy may exist. In most instances, the more publicly accessible parts of schools are probably not regarded as private. What is less clear is whether the individual classroom is private or whether the more intimate interactions between educator and student or among students themselves are private. This is likely a matter of state law or may not be clearly resolved yet under state law.

In addition, many states have wiretapping laws that can apply broadly, including at school. Under these laws, whenever one person records another (unless a court order is in place), that recording cannot be secret and requires the prior consent of anyone whose utterances or actions might be picked up by the recording. In the case of P-12 students, the permission required here would be from the parents or legal guardians of students. Under some state laws, both parental and school administrator permission are required prior to classroom recording.

The use of permission based upon informed consent is required in some states and is clearly the most cautious approach in other states. What constitutes informed consent may also vary from state to state, but the general principles are that consent must be freely given, given by the appropriate person (in most cases the parent or legal guardian), and the consent has to be based upon both an understanding of how the recording will occur and all the uses that will be made of the recording. Less clear are the standards for when it is appropriate to proceed when this consent has not been given. The most cautious approach would be to never proceed without consent.

**CHECKLIST:**

- Review state law with local legal counsel to determine the provisions applicable to privacy interests and procedures in schools.
- Prepare educator candidates so they have an understanding of privacy requirements and their legal and ethical obligations to protect the privacy of students and others. Provide legally appropriate consent forms vetted by legal counsel and create processes to ensure that these have been procured in advance of the recording of P-12 students and cooperating teachers.

**Federal statutes protecting student and family privacy.**

The primary federal statute concerning student privacy is the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g and implementing regulations at 34 C.F.R. Part 99), which will be discussed in detail below. In addition to FERPA, several other federal statutes and regulations protect family and individual privacy. In addition, a broad federal Privacy Act (5 U.S.C. § 552a) exists to regulate federal records and researchers’ use of personally identifiable information (PII).

Among the federal laws, the most noteworthy here are the Children’s Online Privacy Protection Act (COPPA) (15 U.S.C. §§ 6501-6506), and the Protection of Pupil Rights Amendment (PPRA) (20 U.S.C. §1232h). Also potentially applicable are the provisions of the Health Insurance Portability and Accountability Act (HIPAA) (42 U.S.C. § 300gg), which protects medical information about individuals, and the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1401 et seq.), which focuses on addressing the education of individuals with disabilities who need special education.
Children’s Online Privacy Protection Act (COPPA). The Children’s Online Privacy Protection Act of 1998 (15 U.S.C. §§ 6501-6506) regulates the online collection of personal information from children under the age of 13 to promote children’s privacy and provide security of personal information about them. It requires parental notification and consent to data gathering, along with a provision that allows a parent to limit the use of information already collected about a child. The Federal Trade Commission (FTC) is responsible for administering this law (16 C.F.R. § 312).

In response to an effort to exclude school-based data gathering from the coverage of COPPA and to allow schools to be deemed consent providers on behalf of parents when online data is gathered at school, the FTC determined that COPPA can apply in schools, but that if information is obtained directly from school districts, and not from a child under 13, then COPPA does not apply. This leaves a clear ambiguity about whether and how COPPA would apply to information gathered at school by future teachers. To the extent COPPA might apply, parental consent for data gathering from students under age 13 will be important, particularly when schools or educators allow or require students to participate in online activities or e-learning that teacher candidates might incorporate into their assessment materials.

Protection of Pupil Rights Amendment (PPRA). Some of the information that educator candidates collect about P-12 students represented in their assessment materials could involve very sensitive information. This information might be presented, for example, in an effort for the future educator to explain student performance or might be elicited from the student herself in the course of class participation or in the completion of class assignments.

The Protection of Pupil Rights Amendment (PPRA) provides parents of P-12 children the opportunity to opt a student out of school surveys involving protected personal information and the data collection, disclosure, or use of personal information obtained from students for marketing, sale, or for other distribution of the information to third parties (20 U.S.C. § 1232h(c)(2)(A)(ii)). It addresses marketing to students or sale of information about students.

The law covers eight protected categories of information: political affiliations or beliefs of the student or his or her parents; mental or psychological problems of the student or the student’s family; sexual behavior or attitudes; illegal, anti-social, self-incriminating, or demeaning behavior; critical appraisals of other individuals with whom respondents have close familial relationships; legally recognized privileged or analogous relationships; religious practices or beliefs; and information about family income other than when required by law to determine eligibility for programs or financial support (20 U.S.C. § 1232h(b)). PPRA relies primarily on an approach in which parents can exempt their children from activities when they don’t want PII addressed by PPRA to be disclosed about their child.

✔️ CHECKLIST:

✔️ Provide educator candidates with an understanding of parental rights concerning sensitive information about children and children’s online activities.

✔️ Create processes to ensure privacy and online rights.

✔️ Implement processes for parental consent and opt-out provisions so these can be clearly and consistently addressed by candidates, schools, and educator preparation programs.
Family Educational Rights and Privacy Act (FERPA).

The federal Family Educational Rights and Privacy Act (FERPA) creates a statutory privacy right for parents and age-eligible students to inspect and review student records, to exercise prior consent over the disclosure of many education records, to know school records policies (including a requirement that logs be maintained of disclosures to outside parties), and to have due process protections in records disputes, including the right to seek corrections or deletions of inaccurate, misleading, or otherwise inappropriate data (20 U.S.C. § 1232g). FERPA applies to both P-12 and higher education programs that receive federal financial assistance. The cornerstone for FERPA is the requirement for prior written parental consent (or student consent for higher education students) prior to the disclosure of PII.

FERPA exceptions can apply to this requirement and are potentially relevant to educator assessment materials submissions. An exception to the prior consent requirement for personally identifiable information exists for directory information (basic information such as student name, level, athletic participation, etc). Prior consent is also not required when information is provided to those with a legitimate educational need to know information, such as school officials (20 U.S.C. §1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1)), those conducting studies on behalf of an educational agency (20 U.S.C. § 1232g(b)(1)(F); 34 C.F.R. § 99.31(a)(6)), and those conducting evaluations of programs funded with federal money (20 U.S.C. § 1232g(b)(1)-(5)). Recently, the exceptions to the general prior consent to disclosure of PII requirement have been considerably expanded by the U.S. Department of Education, as will be discussed below.

It is important to note that FERPA doesn’t provide an individual right to go to court to enforce its provisions, despite the word “rights” in the title of the law. The ultimate remedies for FERPA violations are federal monetary sanctions, such as the withdrawal of federal funding, or sanctions on researchers and vendors barring them from activities supported by the U.S. Department of Education. These are rarely imposed sanctions, but when imposed, they can be stiff; the ultimate result for educational agencies could be denial of or required payback of federal funding for educational programs. For vendors or others outside education programs who use PII from schools, the remedy is limited to the withdrawal of federal funds to the sponsoring entity or a not less than five year ban on accessing PII from education records (20 U.S.C. § 1232g(b)(4)(B); 34 C.F.R. § 99.67(c)).

Note, if someone successfully subpoenas student records in a state or federal court or administrative proceeding, then all FERPA protections for PII fall to the side unless either one of the parties to the case or the judge realizes that special protections for those records need to be put in place to ensure individual privacy.

Data warehouses, outside vendors, security, and digital privacy rights.

There has been recognition that the current FERPA provisions are not really sufficient to address all of the new innovations in information collection and use. Race to the Top funding called for longitudinal data systems to support instruction (U.S. Department of Education, 2009), as did the America COMPETES Act (20 U.S.C. § 9871(e)(2) (2013)). Every state created a P-12 Statewide Longitudinal Education Data System (SLED) as a result of these requirements if they didn’t already have such systems. Many of these systems were turned over to private for-profit vendors to manage and they often do so using cloud-based computing.
A new opportunity that might be offered by these private vendors is the collection and analysis of data across classrooms, schools, districts and states, as well as the collection and use of data across platforms, including data from educator assessment materials. These vendors collect data, with identifying information, at the individual student and teacher level. They often have more control, or ownership, over data than do public education authorities, so the use of the data they collect, including any metadata they may capture, may create new opportunities for them commercially, which raises potential new privacy issues.

A growing number of parent, civil rights, and advocacy groups have mounted a campaign to promote greater individual privacy and control over data, particularly digital data related to education. Strong concerns have been raised about: the security of the cloud storage of personal data; insufficient public control in the contractual relationships with vendors providing information services; insufficient parental privacy protections and provisions for parental control over student data; lack of consent to data collection and dissemination; and commercialization of school and student data, with particular concerns that private information companies can track students online for marketing or other purposes.

Many new types of legal issues concerning privacy arise from the current focus on “big data” approaches to education reform and accountability and the widespread increase in the privatization of many information functions as a result of efforts to maximize access to technical expertise and offset the dwindling workforce of many government agencies. The complexity of these issues is significant, due to the increasingly widespread role of big companies, large for-profit businesses and well-funded start-ups who seek to play a role in many different aspects of the education process. Increasing concern exists that student privacy laws are completely antiquated because they don’t address recent technology innovations. And, one of the challenges of determining how to proceed in this context is that it is simply impossible to forecast the ways those handling big data sets and generating metadata associated with them will innovate to create new uses of data not yet imagined by most people.

In 2008 and again in 2011, the U.S. Department of Education amended its FERPA regulations to make clear its interpretation that FERPA should permit easy handoff of student data from schools to private vendors for statewide longitudinal education data systems (SLEDS) or other data management activities. Taking a very broad interpretation of the law, the Department amended the definition in its FERPA regulations to broaden who can have use of PII without prior parental consent. The new regulation allows disclosure without consent to entities and programs not administered by educational agencies or institutions themselves. This change was coupled with broad flexibility to entities regulated by FERPA in terms of how they implement FERPA requirements and how they designate authorized representatives with legitimate interests to handle data on their behalf as part of audit, evaluation, enforcement, or compliance activities (see 34 C.F.R. § 99.31(a)). Further, it broadened the definition of the “school officials” covered by FERPA to include “contractors, consultants, volunteers, and other parties to whom an educational agency or institution has outsourced institutional services or functions it would otherwise use employees to perform” (34 C.F.R. § 99.31(a)(1)(i)(B)). The same revision of the regulations was also designed to broaden access to student PII “to organizations conducting studies for, or on
behalf of, educational agencies or institutions to: (a) develop, validate, or administer predictive tests; (b) administer student aid programs; or (c) improve instruction (34 C.F.R. § 99.31(a)(6)(i)).

The expansion of FERPA regulations to broaden access to outside vendors and researchers has been challenged in court already by privacy advocates, although the case was dismissed on grounds that the plaintiffs didn’t have standing to bring the case to court. Given the extent of concern about these changes among privacy rights advocates, more legal challenges to the new approaches can be expected.

The most recent FERPA regulations require educational institutions or agencies providing student records to vendors to have a written agreement specifying terms of use. The entity providing the PII to a vendor is assumed to retain control over the data. The obligations imposed on a vendor include parental access provisions and recording of re-disclosures of PII.

The U.S. Department of Education recognizes that a vendor receiving student records can be involved in the development of educational products for the schools from which PII student records information is received. The Department seems to envision a role for the use of student records data to create or improve educational products so long as the product was intended for use in the district that disclosed the PII to a vendor, but would not allow the provision of student records data to a vendor solely for the purpose of creating a product. Of course, the lines here can be quite blurry. The recent regulations on digital data privacy rights do not directly address the potential privacy intrusions that may arise in the implementation of a performance assessment, either in terms of what might occur relative to a candidate or to the students that the candidate teaches.

**CHECKLIST:**

- Work with producers and users of student data to increase the use of “data minimization” - scrutinize the use of PII and only use it when needed and when de-identified or anonymized data can’t be used.
- Set and monitor clear limits on how PII can be used and for what purposes by vendors and outside data managers.
- Work with state and local authorities responsible for testing, candidate submissions, and data warehouses, as well as other organizations involved in data generation, warehousing, and use to ensure that privacy obligations are fully met.
- Ensure that there are enforceable written agreements with all entities handling PII. Review the written agreements with vendors and researchers to ensure contracts are in place for compliance with FERPA and other privacy protection statutes. Make sure that reasonable methods are in place to ensure that any entity or individual with access to PII provides appropriate privacy protections and security.

**State privacy laws.**

Federal privacy laws may allow data disclosures that state laws might prohibit. A state court case was filed in New York on behalf of parents seeking to prohibit the New York Department of Education from moving data collected by local schools to a cloud-based service. The data at issue involved data warehouses with millions of students’ individual grades and test performance, socioeconomic status, race, language proficiency, attendance, suspensions, and eligibility for special education. The data were intended to serve as the basis for data dashboards maintained by third-party vendors.
for local schools and districts under the Race to the Top funding received from the federal government. One New York advocacy group asserted that the cloud storage vendor stated that it couldn’t guarantee the security of the information stored or that the information would not be intercepted when it was being transmitted. The court case presented legal claims arising from an assertion that the state failed to meet its obligations to protect student privacy when a private company data sharing program subjects students’ PII to commercial use and potential identity theft, when grave risk exists of data hacking by the private vendors who provide cloud services, and when a probable “grave risk of injury to students’ future educational and career opportunities” exists (Davids complaint, p. 2). It asserted that state privacy laws are violated by the data arrangements when government entities give up control of PII to private vendors without sufficient assurances that data privacy and confidentiality requirements would be met by the vendors. The case was dismissed by the trial court; later, the state ended the arrangement and the vendor announced it was disbanding.

The public’s right to know about public education versus the privacy of individuals.

As more and more data are collected on current and future educators, and more and more metrics are calculated, and as the demands for educational accountability increase, another new type of legal issue has arisen concerning performance data. These issues are rooted in tensions between the provisions of state freedom of information laws designed to protect the public’s interest in government transparency and the privacy protections for individuals embedded in most state laws. The federal government and many states have freedom of information statutes and regulations designed to allow access to certain government information. At the same time, state and federal laws and regulations protect the privacy of individuals for certain information held by the government. These two types of provisions, one set allowing for transparency in government and the other protecting individual and family privacy, are increasingly coming into conflict.

One issue recently brought to the attention of a few state courts is efforts of journalists to obtain access to individual educator performance information that is based on their students’ test performance (evaluation ratings). This student growth, or value-added modeling (VAM), information was sought for current practitioners either because a local district had calculated the information or because a newspaper wanted to hire an expert to calculate its own teacher performance metrics.

State statutes generally have privacy laws protecting individual private information and other statutory provisions allowing access to government information to which the public should have access given the goal of promoting government transparency and accountability. These two sets of goals can stand in stark contrast in the context of providing access to individual student or teacher performance data. In the context of a dispute between teacher privacy rights and the public interest in knowing more about teacher performance, some state statutes are unclear.

State courts in Florida, New York City, and Los Angeles have been asked to review efforts by the media to obtain public release of data on individual teacher performance, student test scores, or VAM results. These disputes brought into direct conflict educators’ privacy interests in protecting their professional reputations and the media’s interest in reporting on government programs (and similar issues might arise when public interest or advocacy research entities like the National Council on Teacher Quality seek information about individuals or educator preparation programs). Since public
school teachers serve in the public interest, the media asserted it was in the public’s interest to know individual teacher scores so that citizens could assess the quality of their schools and parents could know more about their children’s current or future teachers.

In all three cases, the courts sided with the media over the objections of state or local education agencies or teacher unions. In New York, a state court interpreting New York laws allowed release of individual teacher performance data because release of public sector job-performance information did not, in the court’s view, constitute an unwarranted invasion of privacy. Subsequently, the state, in response to concerns of the teacher unions, revised state law to limit access to a teacher’s evaluation data to the parents or guardians of students in that teacher’s class. In the other states, individual teacher performance data were published and posted on the Internet.

**CHECKLIST:**

- Check with local legal counsel on the provisions of state laws concerning privacy rights associated with educator evaluations, public access to information, and protections for student and family privacy. Consider, in advance of potential litigation, how to balance these interests.

**NEW TYPES OF LEGAL ISSUES FROM THE BUSINESS CONTEXT**

While many types of civil rights claims are becoming more complicated for those filing lawsuits, as discussed previously, the new contexts for assessment in education suggest that many types of legal claims that previously were either not used, or infrequently used, will be possible, as was highlighted above in the consideration of privacy issues. These new types of legal challenges require some new ways of thinking about issues of legal defensibility and public policy goals in education. Some of these new types of challenges arise from changing perspectives on the role of education in our society and from the changing economic, cultural, and political contexts in which education occurs. Considerable evidence exists that education, particularly post-secondary education, is increasingly seen as a commodity purchased for individual credentialing and economic gain. At the same time, many educational activities are no longer primarily in the hands of governmental entities and are instead privatized in the hands of nonprofit or for-profit vendors. This means that the types of legal issues that come up in a commercial or business context may be used rather than the more traditional constitutional or civil rights challenges to government programs. This section of the paper will discuss issues of intellectual property and commercial interests as well as highlighting new types of criminal and fraud concerns that are starting to arise in contemporary educational assessment programs.

**Intellectual property interests of teachers who create lessons and approaches.**

While court cases are not happening in any number yet, one new potential business law issue associated with performance assessment of educators seeking licensure arise from questions that have already been presented in public policy disputes over performance assessments for licensure. The issue focuses on ownership of the teaching materials created for the assessments. In addition to commercially available products, a small industry has already developed online where practicing teachers sell teaching materials to other teachers or provide them for free.

When educator assessment materials are submitted to a scoring or review body, does the educator candidate “own” the materials? Can the scoring entity use the materials a candidate submits for benchmarking scores or as samples for training future
scorers or for training future educator candidates or to create other education programs or services? This has been a particular concern when the scoring entity might generate a profit from the use of candidate materials in its other lines of business.

The resolution of the legal issues concerning ownership or copyright of a teacher’s curricular and instructional materials is not clear in many states. Most of the relevant cases have arisen in the context of professors, not P-12 educators. However, while emphasizing that the legal standards are not definitive, some contextual issues might be determinative in the outcome of a dispute over who “owns” a candidate’s submission.

The general rule of copyright is that the individual (or group of individuals) creating an intellectual product has copyright ownership of that product, can control use and obtain resulting profits. Exceptions to this broad rule can exist if the creator contracts away his or her ownership or if the context in which the work was created takes the presumption of ownership away from the creator. An employee who creates materials as part of meeting their job responsibilities often doesn’t own a “work,” the employer does under the “work for hire” exception to the general rule of copyright law. Under this rule, it is up to the employer to determine what will be done with creative materials and to obtain whatever financial gains might result. However, many (but not all) courts have recognized the unique creative nature of professors’ work and the need to promote their creativity, both in their scholarly work and in the creation of course materials. These cases created an exception to the concept of work for hire, giving copyright to the professor due to the unique nature of professors’ creative work and the context in which it is performed. It is unclear whether the same approach would apply to P-12 teachers.

One basis for determining ownership of P-12 teaching materials by employees of a school could be based on local factors, such as the contract between a school and an employee, a collective bargaining agreement with a union, or a stated policy of an institution about ownership of teaching materials. Another might be a specific provision of state law or regulations concerning ownership of teaching materials. But in many instances, these issues have not been spelled out.

The creation of teaching materials by future teachers is another matter, however, since the considerations above apply to “employees.” While some teacher candidates may be employees of a school district, most are not. Most teacher candidates serve in schools solely as unpaid participants in an educator preparation program while others are in a preparation program while also working as an employee at that school (as part of a educator residency program, for example, or because they are seeking a second license). This might suggest that the broad “work for hire” exception has no role at all concerning the creative work of student teachers and that they own full copyright for the teaching materials they create. This, however, creates a strange anomaly in which employed teachers, if they have not been afforded copyright protections for their work, may have fewer rights than student teachers who work in a school but are not employed there.

**CHECKLIST:**

- Seek legal counsel to provide guidance on copyright law and the procedures for implementing these requirements to guide local districts and educator preparation programs.
- Set standards on ownership of teacher-created materials for curriculum and instruction.
Because these new types of claims are no doubt associated with a growing socio-cultural and economic phenomenon in which education credentials are seen as a consumer good as well as an educational benefit, the potential exists for business law types of claims. These claims are most often filed by attorneys with little familiarity with education or civil rights issues, but with a great familiarity with business law approaches, some of which can be lucrative. Another variation in this approach is described next.

**Whistleblower claims and criminal charges - fraud, breach of contract, and making false claims to the government.**

When P-12 student performance data is used in an assessment system, two new types of legal controversies over the use of the student test scores are now arising: criminal prosecutions for systemic test cheating on student tests used for high-stakes educator accountability, and whistleblower claims that VAM initiatives have resulted in fraudulent use of federal funds.

As the stakes grow higher, incentives for cheating increase. Given the increasing use of P-12 student test performance data to determine educator or institutional quality, it is perhaps not surprising that these initiatives have led to some inappropriate teacher and administrator behavior. States have acted accordingly, suspending or revoking licenses and, in one case successfully incarcerating a superintendent in a criminal case. Courts tend to support education officials in these types of actions to address cheating. So, for example, a Georgia appellate court found that it was appropriate for the state to temporarily suspend the license of a kindergarten teacher who changed some of her student’s incorrect answers on the Iowa Tests of Basic Skills. As cheating allegations in education perhaps become an increasing problem, consideration of the legal ramifications of cheating allegations are needed.
**Whistleblower lawsuits.**

In Washington, D.C., P-12 student test scores were used as part of individual value-added measures used for teacher terminations and bonuses. The U.S. Department of Education Inspector General, along with the District of Columbia Inspector General became involved when a former D.C. principal filed a whistleblower case (Qui Tam Action) alleging fraudulent use of federal funds from the Race to the Top initiative in the implementation of the program. A successful whistleblower case can result in fines or criminal penalties for those committing fraud, coupled with substantial monetary awards for the individuals who successfully blew the whistle, so the stakes are high on both sides. The Inspector General found evidence of cheating and admissions of cheating but concluded the evidence was insufficient to substantiate criminal or whistleblower claims. This was one of the first uses of whistleblower claims in public P-12 education, but it foreshadows a new set of legal possibilities.

**Criminal law cases concerning irregularities in assessments.**

In Atlanta, Georgia, the former superintendent and 34 high level education leaders faced criminal charges carrying the possibility of substantial prison time for engaging in a criminal conspiracy in violation of state laws by either perpetrating, covering up or turning a blind eye to cheating on P-12 student tests used in high stakes accountability programs. The allegations focused on teachers and principals altering answer sheets or committing other violations of appropriate test security or use including teaching to the test. The student tests were used for school accountability calculations and substantial salary bonuses for school leaders resulted. The Atlanta cheating charges followed an extensive statistical investigation by the local newspaper. A substantial forensic investigation followed, conducted by a large team of experienced criminal investigators working under the purview of the state governor’s office. The criminal charges resulted in one educator being acquitted, several pleading guilty, and with trials pending for the others, including the former school superintendent.

**CHECKLIST:**

- Prior to full implementation of a program, ensure clear procedures and policies are established for systematic review of all aspects of the program to check for possible score abnormalities that might be attributable to cheating and for investigation of reports of observed cheating. In addition, procedures should be in place for appropriate due process review of individual cases in which scores might be invalidated due to inappropriate conduct on the part of a candidate or others.

**CONCLUSION**

Recent efforts to address the quality of the education professions have received attention, garnering considerable political support from many different constituencies. However, as these activities proceeded, little attention was paid to the potential legal complications associated with these programs. And, these programs were being implemented at the same time that major changes in other education approaches were occurring and as society was evolving in its responses both to education reform and to other changes, like big data collection and use in our economy.

This paper provides a survey of potential legal issues and implications for those who design and implement these programs. It addresses traditional
types of claims that may be mounted in challenge to educator performance assessment and the evaluation of educator preparation programs. It also attempts to highlight a new series of legal issues associated with educator assessment that may be important for the future.

☑️ **CHECKLIST:**

☑️ This paper provides a general overview of the legal issues associated with educator performance assessment; it does not provide specific legal advice. Readers are urged to seek legal counsel in their state for further information, specific guidance, and to conduct a review of the potential issues that can arise for their programs for educator assessment and accountability for educator preparation programs.
SOURCES

(References to a source for specific portions of the text are available on request.)


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