Retention in Grade

What happens when students opt out of assessments required to demonstrate proficiency for promotion?

By Perry A. Zirkel

The policy of having students repeat their grade placement based on insufficient academic or social development has a history of fluctuation in the public schools. The empirical research is inconclusive, and the cost-benefit analysis is dependent on various other factors. This column's original coverage of this topic in 1982 found that courts generally sided with school authorities, deferring to their educational discretion. Nevertheless, the re-emphasis on student achievement test scores that is reflected in federal legislation, including value-added teacher evaluation and student-competency laws, have contributed to the return of this practice in some jurisdictions. A parental countermovement against standardized testing has contributed to renewed litigation. The following case and question-and-answer discussion illustrates the current trend among court decisions where grade retention is at issue.

The Case

In 2004, Florida passed a law expressly aimed at eliminating the practice of social promotion. As amended, the law required, among various other provisions, retention in grade 3 with intensive interventions for students who did not exhibit the requisite level of reading proficiency. The primary measure was a mandatory standardized reading test known as the English Language Arts (ELA) assessment. However, the law included narrow "good cause" exceptions, including students with IEPs and, in limited circumstances, student portfolios.

A group of parents encouraged their children to opt out of the ELA assessment at the end of grade 3 in spring 2016; their children broke the seals of their test booklets, entered their names on their answer sheets, and did not otherwise participate. When their children were not promoted to grade 4, the parents filed a class action suit in state court, alleging violations of the children's due process and equal protection rights under the state and federal constitutions. They also filed an emergency motion for a preliminary injunction, seeking to enjoin the defendant school districts from "refusing to accept a student portfolio or report card based on classroom work throughout the course of the school year when there is no reading deficiency."

The state education department's resulting rules and guidance did not foreclose school districts from requiring an alternate standardized reading test before offering the portfolio option. One of the defendant districts, Hernando County School Board (HCSB), had adopted this prerequisite, which the affected parents refused.

After a four-day hearing, the trial court denied the injunction for parents in the other districts because they had disenrolled their children, refused alternative promotion options, or failed to exhaust their administrative remedies regarding the portfolio option. However, the court granted the motion for temporary injunctive relief against HCSB and the state education department. These two agencies filed an appeal, arguing that the plaintiff parents had not met the requisite elements for injunctive relief, including (a) likelihood of success on the merits, (b) unavailability of an adequate remedy at law, and (c) being in the public interest.

What do you think was the appellate court's ruling for the defendants' motion with regard to each of the following prerequisite criteria for injunctive relief:

a) Likelihood of success on the merits? In *School Board of Hernando County v. Rhea* (2017), Florida's intermediate court of appeals ruled that the parents did not meet this criterion. More specifically, in reasoning that was the obverse to what might be otherwise expected, the appellate court summarily concluded: "Students who refuse to answer any questions on the ELA have not 'exhibited a substantial deficiency in reading,' which is the statutory trigger for the required notice of the availability of alternative assessments and student portfolios."

b) Nonavailability of alternative remedies? The appellate court again rather summarily concluded that the

parents had not met this criterion, observing that the parents had the right to challenge the state education department's nonrule policy regarding the prerequisites for the portfolio option via the impartial hearing mechanism of the state's Administrative Procedures Act.

c) Favorable balance of interests?
Here, the appellate court provided a more emphatic and detailed rejection of the parents' claim. First, the court concluded that the state has a compelling interest in (a) not socially promoting third-graders who do not exhibit the requisite reading proficiency and (b) receiving federal education funding, which requires 95 percent participation in specified statewide achievement testing. Moreover, again resorting to the obverse side of the parents' claim of no reading deficiency, the court identified a third public interest: "It would make no sense—and would be a waste of the schools' finite resources—to provide [the required intensive] services to students who do not need them and would not have been provided them had they simply taken the ELA and demonstrated their reading proficiency."

As a result of the application of these criteria, did the appeals court affirm the preliminary injunction?
No, the result was that the appeals court reversed the denial of the defendants' motion for dismissal and vacated the injunction. Subsequently, the plaintiffs sought, but the state's highest court denied, review.

If the judicial proceedings in this case end up reaching the underlying constitutional issues, do the outcome odds favor the plaintiff parents?
No. For example, in *Parents Against Testing Before Teaching v. Orleans Parish School Board* (2001), the Fifth Circuit Court of Appeals summarily affirmed a decision against the plaintiff parents. They alleged that 42 percent of New Orleans district's fourth-graders and 53 percent of its eighth-graders scored "unsatisfactory" on Louisiana's statewide promotion exam in 1999. They sought to bar retention of these fourth- and eighth-graders, but the court rejected their due process claim, concluding that students do not have a reasonable expectation of promotion and thus property right under this constitutional provision. Similarly, in *Eric V. v. Causby* (1997), a federal district court in North Carolina rejected a preliminary injunction in a class action challenge based on both federal constitutional and statutory grounds.

Would the outcome have been different if the lawsuit, instead of a class action, had been on behalf of a racial or ethnic minority child?
Likely not. For example, in *Kajoshaj v. New York City Department of Education* (2013), the Second Circuit Court of Appeals upheld the dismissal of a civil rights suit of a Muslim student of Albanian descent who was retained for a second year in the fifth grade based on deficient performance on the statewide language arts test. The claims based on the Fourteenth Amendment equal protection clause and Title VI of the Civil Rights Act failed for insufficient evidence of discriminatory intent. The substantive and procedural due process claims failed for lack of the requisite property interest. Their corresponding state constitutional and statutory claims, which included freedom of religion, similarly lacked an evidentiary foundation.

Are students with IEPs under the IDEA entitled to exemptions from such statewide testing standards and district retention decisions?
Not in any sort of automatic or absolute way. The IDEA not only provides IEP teams with the authority to determine whether the child is entitled to alternate academic achievement standards based on severe cognitive disabilities, but also, aligned with the Every Student Succeeds Act (ESSA), specifies counterbalancing limits on the number of such children in the state who will not count in the assessment indicator for district and school accountability. Similarly, while providing for individualized determinations, the IDEA does not contain any absolute bar to retaining students with IEPs from grade retention. For example, in *K.P. v. District of Columbia* (2013), a federal district court rejected the parents' claim that the child's retention in grade based on truancy and academic failure proved that her IEP was not appropriate.

Conclusion

Grade retention remains a pedagogical and policy issue for which courts accord due deference to school authorities within the bounds of federal legislation, such as the ESSA and IDEA, and state laws, such as those providing for high-stakes testing that include grade retention consequences. To the extent that state and local education authorities adopt grade retention policies, well-crafted formulation and prudent implementation are keys to both legal defensibility and community acceptance. As a concluding consideration, here is an excerpt from the recent white paper of the National Association of School Psychologists:

> *Although retaining students who fail to meet grade level standards has limited empirical support, promoting students to the next grade when they have not mastered the curriculum of their current grade, a practice termed social promotion, is not an educationally sound alternative. For these reasons, the debate over the dichotomy between grade retention and social promotion must be replaced with efforts to identify and disseminate evidence-based practices that promote academic success for students whose academic skills are below grade level standards.*

In any event, whether the issue is retention in grade or the use of standardized testing for such purposes, the key consideration for school principals is educational efficacy and equity, not fear of litigation.

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