

## **RAISING THE BAR** EVIDENCE-BASED THINKING ABOUT THE BAR EXAM

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## FROM THE DIRECTOR

As we welcome the inevitable transition from winter to spring, this issue of *Raising the Bar* reflects approaches to confronting the other inevitable: change. Change invites us to take stock of the tools we have and know, consider potential impacts for the better and worse, and map out the process for adapting. As a professional community, we continue to consider our approaches to the changing bar exam.

As we take stock of the tools we have and know, Professor Joan Howarth provides an insightful call for preserving and elevating performance tests as a means of assessing minimum professional competence for the practice of law. As we consider the potential impact of change, Professor Jeffrey A. Parness provides a commentary on the ramifications of change on curriculum and law schools. Finally, to map out the process and direction guiding the NextGen Bar Exam, Marilyn J. Wellington of the National Conference of Bar Examiners updates us on the process and benchmarks of designing the NextGen Bar Exam.

AccessLex Institute® is excited to partner with our member law schools in navigating the demands and opportunities of a changing bar exam. To this end, we are proud of the scholarship of our peers within the Association for Academic Success Educators (AASE) as we launch the third year of the ASP Faculty Scholars Program.

Finally, as we approach a season of gathering at conferences and annual meetings, I look forward to meeting many of you. I am eager to learn about your work and to actively consider how AccessLex can support you in your programs and research to empower the next generation of lawyers.

Joel Che

Joel Chanvisanuruk, M.P.A., J.D.

Director, Programs for Academic and Bar Success AccessLex Center for Legal Education Excellence® Visit the Director's **SSRN author page** Visit the AccessLex **SSRN page** 

## DISTINGUISHED COMMENTARIES

### The Robust Future for Performance Tests

Joan W. Howarth is a Distinguished Visiting Professor at University of Nevada, Las Vegas Boyd School of Law, and Dean Emerita at Michigan State University College of Law. This article draws heavily on her book, Shaping the Bar: The Future of Attorney Licensing.<sup>1</sup>

Perhaps swimming against the tide, or tsunami, of the NCBE's impending NextGen exam, I want to keep our collective attention focused on Performance Tests. The NextGen should be better than the Uniform Bar Exam (UBE), but the advent of NextGen should not erase the usefulness and advantages of Performance Tests in legal education and licensing. At first, the NCBE described the NextGen as more like Performance Tests, the part of bar exams for which NCBE research found support.<sup>2</sup> But the NextGen may continue to test excessive memorization of legal doctrine and significant content and scoring questions remain.

Jurisdictions with questions about NextGen should consider using Performance Tests instead.<sup>3</sup> Jurisdictions that adopt the NextGen and accept the NCBE invitation to add a half-day, statespecific component<sup>4</sup> should consider using Performance Tests for any such component. Jurisdictions developing supervised practice assessment without a traditional bar exam<sup>5</sup> that want to include some standardized component could use Performance Tests. And no matter the licensing mechanisms their students will face, law teachers can use Performance Tests throughout the curriculum to enhance student learning and readiness to practice.<sup>6</sup>



<sup>1</sup> JOAN W. HOWARTH, SHAPING THE BAR: THE FUTURE OF ATTORNEY LICENSING (Stanford University Press 2023).

5 See Shaping the Bar, *supra*, at 123–25.

<sup>2</sup> SHAPING THE BAR, *supra*, at 139.

<sup>3</sup> SHAPING THE BAR, supra, at 138–42 ("THE BEST EXAMS: PERFORMANCE TESTS").

<sup>4</sup> But why do that? Jurisdictions concerned with knowledge of state-specific law can require newly licensed lawyers to complete CLE-type trainings on usual aspects of the state's laws that are more comprehensive than whatever could be tested.

<sup>6</sup> See Sara Berman, <u>Integrating Performance Tests into Doctrinal Courses, Skills Courses, and</u> <u>Institutional Benchmark Testing: A Simple Way to Enhance Student Engagement While Furthering</u> <u>Assessment, Bar Passage, and Other ABA Accreditation Objectives</u>, 42 J. LEGAL PROF. 147 (2018).

Performance Tests like the Multistate Performance Test or those from California or Nevada offer a feasible, flexible, relatively inexpensive, even elegant licensing test of minimum competence. Performance Tests can cover as broad a range of knowledge, skills, and tasks as the NextGen,<sup>7</sup> while leaving room for the possibility of staged licensing.<sup>8</sup> Performance tests can fairly simulate the ambiguity and uncertainty in law and facts.<sup>9</sup> Using Performance Tests can reduce the money and time wasted in bar prep after graduation.<sup>10</sup> Because Performance Tests are truer measures of attorney competence, scoring and standard setting are sounder.<sup>11</sup> And Performance Tests may be easier to adapt to changes in practice than the NextGen, which is taking a decade to implement.<sup>12</sup>

But what about reliability? The NCBE has perfected MBE-centric scoring that uses repeat multiple-choice questions for equating and scaling the entire score, achieving excellent reliability.<sup>13</sup> Indications are that the NextGen will use similar reliability methodology, embedding multiple choice or short answer questions into the problem sets.

The NCBE approach to reliability is not the only way; psychometricians understand that reliability can be achieved without multiple-choice questions. Starting in July 2020, Nevada administered a series of bar exams consisting of essays and Performance Tests without the MBE. Working with psychometricians, we added new mechanisms to achieve reliability. Without scaling to the MBE, bar examiners had to ascertain minimum competence for each essay and Performance Test. Multiple graders, careful rubrics, calibration training, and real time alerts about scoring deviations are possible.<sup>14</sup> Accepting the challenge to develop reliable scoring of performance Tests are better assessments of minimum competence.

As a member of the Nevada Board of Bar Examiners, I have written and graded Performance Tests based on actual Nevada statutes and cases. When I score a candidate's Performance Test as not minimally competent, I am disappointed but confident in the assessment. A candidate who cannot glean the issues from the file and use the library to answer the problem presented does not have the skills of critical reading, legal writing, and legal analysis required of every minimally competent lawyer. With reasonable time, a performance test gives a candidate a clean shot to demonstrate the requisite skills and fundamental knowledge to solve a legal problem.

Every jurisdiction and law professor should ask, why *not* use Performance Tests?

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<sup>7</sup> Shaping the Bar, *supra*, at 139–40.

<sup>8</sup> SHAPING THE BAR, *supra*, at 139.

<sup>9</sup> SHAPING THE BAR, *supra*, at 140.

<sup>10</sup> SHAPING THE BAR, *supra*, at 141. "Three years of post-graduate law school should be sufficient to prepare for any bar exam based on the actual competencies of entry-level law practice."

<sup>11</sup> See Shaping the Bar, supra, at 142.

<sup>12</sup> SHAPING THE BAR, *supra*, at 141.

<sup>13</sup> SHAPING THE BAR, *supra*, at 33–35. "This impressive advance [using the MBE for reliable exam results] may be the NCBE's greatest achievement." *Id.* at 35.

<sup>14</sup> See, e.g., Nevada Supreme Court order regarding February 2023 bar exam.



### **UBE 2.0**

Jeffrey A. Parness is a Professor Emeritus at Northern Illinois University College of Law. His thoughts on the NextGen Bar Exam and its coverage of Civil Procedure can be found in his recent article <u>Civil</u> <u>Procedure and the New Bar Exam</u>.

A new approach to the Uniform Bar Exam (UBE), propounded by the National Conference of Bar Examiners (NCBE), is expected in 2026. All indications are that it will reflect a seismic shift in how applicants are assessed. It will likely also prompt a dramatic change in how and what many students are taught in law schools. The stated goal of the NCBE is for the "next generation of the bar exam" to focus on "topics and tasks... that are most essential for newly licensed lawyers."<sup>15</sup>

The new approach is now scheduled to include assessments of eight "foundational concepts and principles" (FCP) (civil procedure, contracts, evidence, torts, business associations, constitutional law, criminal law, and real property). As well, it encompasses assessments of seven foundational skills (FS) (legal research, legal writing, issue spotting and analysis, investigation and evaluation, client counseling and advising, negotiation and dispute resolution, and client relationship and management).<sup>16</sup>

In undertaking assessments, the new exam will not have, as it has now, separate essay, performance, and multiple-choice components. It will run a day and a half, not two days, allowing states to more easily test local subjects for a half day. And the new exam will likely contain, unlike now, "integrated" exam questions that use "scenarios that are representative of real-world types of legal problems" that newly-licensed lawyers encounter.<sup>17</sup> Such questions differ from current UBE queries containing "discrete components comprised of stand-alone terms."<sup>18</sup>

17 NAT'L CONF. OF BAR EXAM'RS, FINAL REPORT OF THE TESTING TASK FORCE 20 (2021).

<sup>15</sup> NAT'L CONF. OF BAR EXAM'RS, **CONTENT SCOPE OUTLINES FOR PUBLIC COMMENT** 1 (2022).

<sup>16</sup> *Id*.

<sup>18</sup> *Id*.

The UBE 2.0 drafters clearly envision newly-licensed lawyers as more than advisors on existing legal norms, document drafters, and advocates of client interests in adversarial settings. New lawyers are seen as multitaskers who are called upon to integrate varying legal subjects in order to serve client interests, upon skillfully determining the nature of those interests and client wishes, as well as to educate clients about existing legal parameters.

Since it seems likely most states will employ UBE 2.0, what ramifications arise for state lawmakers and for law schools? For state lawmakers, there will be an easy avenue to introduce a half-day exam geared to local topics. Good candidates are family law and trusts and estates, subjects likely missing from UBE 2.0, though frequently encountered by new lawyers. In addition, state-specific testing might be directed to basic principles of state civil and criminal practices that differ from federal practices, as well as to state constitutional government structures and individual rights.

For law schools, dramatic changes in curricular offerings and teaching methodology may be warranted. While law school personnel generally were once loathe to admit to teaching to the bar exam, increasingly upper-level classes are specifically designed to foster such preparation. But too often they are offered not by regular faculty but by others with less pay and stature, as are some FS courses. More importantly, the "integrated" approach to problem solving should start in the first-year curriculum, where the FCP usually are taught by regular faculty whose approaches often focus on "discrete components of stand-alone terms." The curriculum revolt should occur less in Harvard, Chicago, and other highly ranked schools where bar passage rates are high. But especially with the American Bar Association accreditors focusing more these days on bar pass rates rather than on faculty salaries or library books, a revolution is needed in historically lower ranked schools with low bar passage rates. Difficulties for these schools likely await, not only due to anticipated tenured faculty resistance, but also due to the fact that law school coursebooks overwhelmingly are written by educators at traditionally highly ranked schools.



## FUTURE OF THE BAR EXAM

### Pilot Testing and Beyond: Gathering Data to Ensure Fairness on the Next Generation of the Bar Exam

Marilyn J. Wellington is the Chief Strategy and Operations Officer for the National Conference of Bar Examiners.

As the National Conference of Bar Examiners (NCBE) progresses in its work to develop the next generation of the bar exam, one of our most important tasks is to ensure that the new exam gives all examinees an opportunity to demonstrate that they are ready to begin practicing law and that factors that are not relevant to practice, such as race, ethnicity, gender, or disability, do not artificially hold examinees back. Avoiding bias in test questions and ensuring fairness for all examinees are two of the central aims of the extensive research testing being performed as part of the exam development process. This testing, in which law school students and recent graduates who are currently preparing to take the bar exam are asked to respond to, and provide feedback on, draft questions for the new exam, allows us to gather detailed data on the new exam questions, and the exam as a whole, before administering it as a live exam.

This column takes a closer look at the first phase of this research, pilot testing, which is currently underway. By the end of February 2023, 22 law schools will have participated in pilot testing for the NextGen exam, with more anticipated to participate in subsequent research phases. Pilot testing participants are recent graduates and law students who are close to graduation, drawn from law schools across the country. One of the ways we gather data relevant to issues of fairness is by ensuring diversity among the research testing participants. To ensure a diverse group of pilot test participants, NCBE has sought out law schools with diverse student bodies and is sampling for racial/ethnic, gender, geographic, and school tier diversity among participants. Data collected also include whether participants are first-generation law students and whether English is their first language.

# FUTURE OF THE BAR EXAM

The pilot testing phase is designed to evaluate the form, organization, and structure of exam items. Pilot testers have approximately two hours to answer a series of draft exam items and provide feedback. Pilot testing allows us to gather data about how the new question formats perform among their intended users, providing valuable information and insight as we work to finalize crucial details regarding what the NextGen exam will look like, including:

- 1. The types of questions that will be used on the new exam. The NextGen exam will include new item types alongside those used on the current exam, such as essay and multiple-choice questions. New item types may include, for example, short answer questions or multiple-choice questions in a format that allows for more than one correct response. Pilot testing is an opportunity to collect both qualitative and quantitative data on how these new question types will perform on the exam and adjust them as necessary based on item performance and participant feedback.
- 2. The best way to combine and sequence different types of questions. The NextGen bar exam will be an integrated exam, using mixed item sets in addition to a limited number of standalone questions. The integrated format allows us to provide item sets that more closely reflect situations that a newly licensed lawyer may see in practice. Whereas each of NCBE's current bar exam components contains a single type of question (multiple choice, essay, or performance test), NextGen examinees will encounter a mixture of several different question types. For example, examinees might be presented with a scenario followed by a handful of short-answer questions, a prompt to draft a memo, and several multiple-choice questions. Pilot testing allows us to determine the best order in which to present those questions: for example, should an item set begin with constructed responses, move to short-answer questions, and finish with multiple choice? Or is another order better?
- **3. The best way to provide examinees with supplemental materials.** Another change underway for the new exam is the plan to provide examinees with supplemental materials where appropriate, such as relevant portions of the Federal Rules of Evidence, so that they need to rely less on specific recall of legal doctrine details. During pilot testing, we can study the impact of providing such materials and determine how best to provide them in a way that is fair and equally accessible to all.
- 4. How long we should expect it to take for examinees to complete new types of questions and question sets. The bar exam is not a test of speed that is, its purpose is not to test how quickly examinees can answer as many questions as possible. Rather, the intent is for examinees to exhibit their ability to work at a speed that is reasonable for legal work while fully demonstrating their skills and knowledge. A key factor in pilot testing is determining the amount of time examinees need to respond to the exam's new item sets in a test setting, and what factors may impact the time required. Ultimately, this information will help determine how much time should be allotted for the entire exam.



An analysis of the data received from pilot testing will provide the NCBE NextGen research team with the data needed to build multiple simulated exams for the next phases of research, field, and prototype testing, which are scheduled to begin following the completion of pilot testing. Field and prototype testing will provide valuable information that will, among other things, help each jurisdiction considering adoption of the NextGen exam determine the passing score that will be required for admission to the bar in that jurisdiction.

Each of these research phases will play a vital role in transitioning from plan to reality for the next generation of the bar exam. Each round of testing will give us the data, information, and insight to ensure that the new exam provides a fair and meaningful assessment to support jurisdictions in determining whether their examinees are ready to begin practicing law.

A longer version of this column was first published in the Winter 2022–23 issue (Vol. 91, No. 4) of the Bar Examiner and is **available online**.





## **PROGRAM PROFILE**

### Advanced Legal Writing at Santa Clara Law

Devin Kinyon is an Associate Clinical Professor and Director of the Office of Academic and Bar Success at Santa Clara University School of Law.

Santa Clara's core bar exam preparation program is a course called Advanced Legal Writing: The Bar Exam (ALW). We have offered this course for many years in different forms, targeted at our weakest students, entirely driven by individual instructors' preferences, with inconsistent impacts. In the mid-2010s, we began a critical faculty conversation about how we could better support our students in their bar exam preparation. Among the changes we adopted was a wholesale redesign of ALW.

#### REDESIGN

I credit my predecessor bar director, Professor Mike Flynn, with setting the goals for the new ALW. All students would have a uniform experience, regardless of their instructor. The course would emphasize skills and practice. And we would add MBE preparation, a specific challenge area for our bar takers. Around that time, we participated in the **AccessLex Bar Exam Success Analyses program** which evaluated our students' bar needs and suggested that we should be targeting interventions at the middle quartiles of our graduating classes. With this insight, we also committed to offering ALW to any graduating student.



#### **NEW STRUCTURE**

The biggest challenge for us was incorporating MBE coverage. We recognized that effective MBE instruction, particularly at the scale we envisioned, required outside expertise. We sought proposals from the major bar preparation companies and ultimately contracted with one provider. The contract provided us with access to questions, doctrinal outlines, and an engaging and effective lecturer who offered meaningful instruction for our students on navigating fact patterns, common question types, and tricks and strategies. They also provided our students with a baseline MBE exam.

We shifted the writing portion of the course to provide greater consistency across all sections which enroll approximately 15 students each. All students write the same set of California Bar Exam essays following the same doctrine reviewed in the MBE sections and get feedback from their writing section professor. The professors use their class time to coach on appropriate writing style and formatting, introduce self-assessment techniques, and sometimes simply dedicate class periods to timed writing so that students can focus without distractions. While retaining some of our prior writing faculty with strong bar exam expertise, we also recruited many new instructors with diverse experiences to which our students can relate. All faculty are provided a guide with a sample lesson plan, proven in-class activities, answers to frequently asked student questions, and the nuts-and-bolts of our expectations for commenting on student writing. The goal is to make instruction and feedback as consistent as possible for all students.

Finally, we formalized an end-of-semester mock exam where students spend a full day running through a morning of MBE questions and an afternoon of writing essays. Many students describe the Mock Bar as painful, but also the most valuable part of their ALW experience.

#### IMPACT

We used recent funding from an AccessLex Barriers and Interventions Grant to analyze various bar performance questions, including how the new ALW is working, and we're pleased with our findings. Overall, the course appears to be helping our first-time bar pass rate. In our targeted mid-class populations, the course is increasing likelihood of first-time passage for our second-quartile students by 0.5% and for our third-quartile students by 4%. Outside of California, these numbers may not mean much, but in terms of California Bar Exam pass rates, even these small improvements matter greatly. And the course is also helping our bottom-quartile students, improving their likelihood of first-time passage by 14%. We're excited by the increase in enrollment. In spring 2023, 204 students enrolled out of a graduating class of 218. We still have a lot of work to do, but we're happy that this program seems to be meeting our goals.

## ACCESSLEX BAR SUCCESS GRANTS

### Letters of Inquiry Due April 19, 2023

**The Bar Success Intervention Grant Program** provides funding to programs and interventions aimed at helping increase bar exam passage rates among populations most at-risk of not passing on the first or subsequent attempts. The central goal of the Bar Success Intervention Grant Program is to increase the knowledge base about effective bar exam success programming that is scalable and replicable.

Fundable programs must:

- Have a duration of 12-24 months and seek funding in the amount of \$150,000-\$300,000.
- Focus on law students and graduates most at risk of not passing the bar exam and/ or institutions with ultimate bar examination passage rates that fall below 70%.
- Include clear statements of program goals and tangible and measurable objectives.
- Include an evaluation plan.

Letters of Inquiry are being accepted until April 19, 2023. Full information on this program, including application instructions, is available on the **AccessLex website**.

**The Bar Success Research Grant Program** funds well-designed studies of the bar examination. Examples of focus include predictors of bar exam performance; bar exam test design and/or efficacy; and successful study or preparation methodologies. Proposals focusing on other relevant aspects of the bar exam are also welcomed.

Fundable projects must:

- Have a duration of 12-24 months.
- Seek funding in the amount of \$150,000-\$300,000.
- Have a clear research design, using appropriate methodologies.

Letters of Inquiry are being accepted until April 19, 2023. Full information on this program, including application instructions, is available on the **AccessLex website**.

## ACCESSLEX | AASE ASP FACULTY SCHOLARSHIP GRANT: UP TO \$5,000

### Call for Proposals: Due April 24, 2023





#### **GRANTS:**

AASE and AccessLex are dedicated to the academic and bar success of law students across the nation. An important point of this collaboration is to support the scholarship of academic support educators, especially those who are newer to the discipline and face various challenges in getting such support. Launched in 2021, this grant supports scholarship by ASP faculty in any area, with academic support-related articles preferred.

#### **SELECTION OF SCHOLARS:**

Scholars will be selected through an application process where applicants must describe their writing topic and explain how the writing relates to their career advancement (directed toward getting tenure, seeking tenure track positions, contributing to ASP scholarship, or other considerations). Applicants need not have a track record of publications; this grant may be used to jump-start an applicant's scholarship. Applicants must be members of the AASE organization.

The grant subcommittee will use a blind review policy. At all stages of the process, voting committee members will not know the identity and institutional affiliation of grant applicants. Only a designated non-voting person will know the identity of the applicant and will handle applicant communications. Applicants will be asked three questions related to their identity (name, email, and institution) which only the designated person will know. For all other questions, please do not disclose any identifying information.



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#### FELLOWSHIP PROGRAM FOR SCHOLARS:

Upon selection, all scholars will participate in an approximately one-year fellowship program. The fellowship will include two mentors for each Scholar to assist the Scholar in completing a draft of an article. Scholars will be publicly announced at the annual AASE meeting in May 2023. The culmination of the Fellowship will be a "Works-In-Progress" presentation at the May 2024 AASE Annual Conference, with a final draft for publication by December 31, 2024.

#### **IMPORTANT DATES:**

Applications are now open to all AASE members, who can apply **here.** Applications will be due on April 24, 2023. Recipients will have a publishable law review draft on or before December 31, 2024. Grant funds will be awarded to recipients as follows: \$2,000 on or near July 1; \$1,000 after presenting the work-in-progress at the 2024 AASE Annual Conference, and \$2,000 upon submission of a completed article draft in publishable form. (Grant recipients who receive an award but do not complete their project may be required to return the funds to AccessLex and AASE.) Grant recipients will be paired with mentors to meet with throughout the process.

For more information, please contact Cassie Christopher at **<u>catherine.christopher@ttu.edu</u>**, Ashley London at **<u>londona@duq.edu</u>**, or Joel Chanvisanuruk at **<u>JChanvisanuruk@accesslex.org</u>**. Apply today!

## **CONFERENCE CORNER**

- American Educational Research Association Annual Meeting (April 13–16)
- Association of American Law Schools Conference on Clinical Legal Education (April 27–30)
- Association of Academic Support Educators Conference (May 22–26)
- Association of American Law Schools Workshop for New Law School Teachers (June 7–10)
- National Association of Law Student Affairs Professionals Conference (June 13–15)
- American Association of Law Libraries Annual Meeting (July 15–18)
- Southeastern Association of Law Schools Conference (July 23–29)

Please email **<u>RTB@accesslex.org</u>** about upcoming bar-related conferences.

## **PUBLICATIONS AND POSTS**

- Jessica R. Blaemire, <u>Well-Being in Law School—Law Students Aren't OK</u>, BLOOMBERG L. (FEB. 3, 2023).
- Michael J. Bommarito II & Daniel Martin Katz, GPT Takes the Bar Exam (2022).
- Heather M. Buzick et al., <u>The Association of Participating in a Summer Prelaw</u> <u>Training Program and First-Year Law School Students' Grades</u> (Ariz. Legal Studies Discussion Paper No. 23-01) (2023).
- Karen Sloan, Old Bar Exam or New One? States Will Have a Choice in 2026, REUTERS (JAN. 19, 2023).
- Xerxes Wilson, *Delaware Is Changing the Bar Exam. Here's What That Means* for Current, Future Lawyers, Del. Online (Feb. 21, 2023).

Please email **<u>RTB@accesslex.org</u>** with recent and forthcoming bar-related publications, posts, and podcasts to be included in future issues of *Raising the Bar*.

## **RESOURCES FOR LEGAL EDUCATORS AND** LAW STUDENTS

### Information About the Research Grants **Bar Exam**

- AccessLex Resource **Collections: Bar Success**
- ABA Bar Information for **Applicants with Disabilities**
- ABA Bar Passage Outcomes
- ABA Statistics
- Bar Exam Results by Jurisdiction
- Bar Admission Guide
- NCBE Bar Exam Fundamentals for Legal Educators
- NCBE NextGen: Bar Exam of the Future

### **Student Resources**

- AccessLex<sup>®</sup> Law School **Scholarship Databank**
- AccessLex<sup>®</sup> Student Loan Calculator
- MAX by AccessLex<sup>®</sup>
- ABA Scholarships and **Financial Aid**

- AccessLex Bar Success **Intervention Grant Program**
- AccessLex Bar Success **Research Grant Program**
- American Association of Law Libraries (AALL)

### **ASP and Bar Success Resources**

- The Bar Examiner
- **The Learning Curve**
- **CALI Lessons**

Please email **<u>RTB@accesslex.org</u>** with information about resources for faculty and students in your jurisdiction.

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### **Raising the Bar** Spring 2023 Volume 6, Issue 2 Joel Chanvisanuruk, Senior Editor Fletcher Hiigel, Managing Editor Rob Hunter, Staff Editor



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