2013

High stakes testing policy issues in education: An analysis of litigation involving high stakes testing and the denial of diplomas

Lisa M. Winfield
William & Mary - School of Education

High Stakes Testing Policy Issues in Education:

An Analysis of Litigation Involving High Stakes Testing and the Denial of Diplomas

Lisa M. Winfield

The College of William and Mary

February 18, 2013

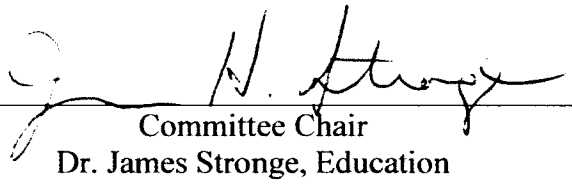
APPROVAL PAGE

This Dissertation is submitted in partial fulfillment of
the requirements for the degree of

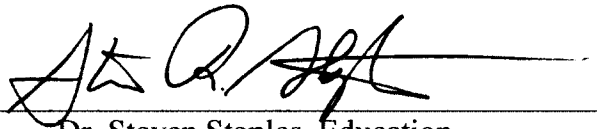
Doctor of Philosophy

Lisa M. Winfield

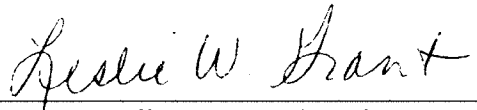
Approved by the Committee, February 18, 2013



Committee Chair
Dr. James Stronge, Education
The College of Willam and Mary



Dr. Steven Staples, Education
The College of William and Mary



Dr. Leslie Grant, Education
The College of William and Mary

Dedication

I am truly grateful to all those who supported me on this journey of my doctoral program. I dedicate this dissertation to my husband, Mark Winfield who continually encouraged me throughout my coursework and especially through the dissertation process. I also thank my children who sacrificed many opportunities for me to write. Also, I thank my mother and father who taught me persistence and endurance as well as tenacity. I am profoundly grateful to my committee, Dr. James Stronge, Dr. Steven Staples and Dr. Leslie Grant for their optimism that I would indeed finish. Lastly, thank you to my friends, colleagues and family who always believed in me.

TABLE OF CONTENTS

LIST OF TABLES

Abstract

This study analyzed the legal documents of cases involving the denial of a high school diploma as the result of not passing a high stakes exam in public education. The qualitative extrapolation of consistent themes in the court documents revealed information regarding the court's interpretation of the intersection of state authority to establish diploma requirements, and the rights of the students who were denied their diploma. The results of the study were influenced greatly by the case law evolution, and therefore presented a historical a caption of analysis as well as the intended content analysis. The independent issues presented to the courts were examined and discussed, as well as the differences between rulings involving students with disabilities and regular education students, and differences by judicial regions. The results of the analysis inform the reader of the history of high stakes testing and the constitutionality of the policy during different decades and under federal legislation regarding subgroups of students

High Stakes Testing Policy Issues in Education:

An Analysis of Litigation Involving High Stakes Testing

CHAPTER 1

Statement of Problem

Public education has served society by providing its young citizens with the knowledge, skills, and dispositions needed to become productive members of democratic communities. "Schools are to help build the civic capacities and a wider sense of common good among diverse students and families" (Abowitz, 2008, p. 360). The judicial ruling in the landmark case *Brown v. Board of Education* (1954) indicated the value of education in our society and the immense responsibility of providing education for all citizens:

> Education is perhaps the most important function of the state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment (p. 692).

Our society has valued education for all citizens to maintain our democracy and to transmit our society's ideals and culture to the next generation.

Educational philosophies and practices have promoted the need for quantitative evidence to determine whether these goals were being achieved. Measuring student

progress through standardized testing was one method for providing quantitative data. These data have helped contribute to the understanding of the effectiveness of academic programs, instruction, and interventions as components of public education. However, general accountability measures seemed to focus on individual student test scores as a means of evaluating educational progress. Similar to the No Child Left Behind (NCLB) Act (2001), which imposed sanctions on states and schools based upon academic performance, some states imposed sanctions on students. Individual student accountability meant holding each student accountable for achieving the established outcomes (Mueller, 2001). These sanctions resulted in denying student promotion to the next grade or refusing to award a diploma to a pending graduate (Mueller, 2001). In order to "induce students to assume personal responsibility for their learning..." some state and local school boards have imposed a requirement of successful completion of exit exams before issuing a diploma (DeFur, 2002, p. 203). A variety of issues have arisen due to the implementation of state, school, and student accountability measures, but perhaps the most disputed was the denial of a diploma to seniors who were unsuccessful on the exit exams. High stakes testing practices were a controversial method to hold students accountable for meeting the intended goals of education. As a result, "many high stakes tests implemented across the nation in recent decades have attracted litigation" (Heise, 2009, p. 146).

High stakes exams were not new features of education. In 1864, the New York Board of Regents installed requirements for entrance examinations for admittance to high schools and academies. In 1877, the New York State Legislature passed a state statute authorizing exit exams for students completing high school (The State Education

Department of New York, 1987). These exams were implemented to determine whether students had the necessary knowledge and skills needed in order to contribute to society as productive and capable citizens. In subsequent years, high stakes testing became part of a larger reform movement intended to improve public education. The foundational assumption of the new education reform measures was that all children should receive a quality education regardless of equitable resources and funding, and that best instructional practices should inform decision-making (Rhoten, Carnoy, Chabran, & Elmore, 2003).

The results of the National Commission on Excellence in Education's (NCEE) report, *A Nation at Risk* (1983), caused concern for the future progress of our nation. This report began by stating, "Our nation is at risk. Our once unchallenged preeminence in commerce, industry, science and technological innovation is being overtaken by competitors throughout the world" (NCEE, p. 5). In an effort to improve education, leaders borrowed from economic and business models and proposed the implementation of accountability measures (Amrein & Berliner, 2002; Moran, 2000; Wagner, 1989). In another effort to improve educational outcomes, President Clinton proposed the Educational Accountability Act during his 1999 State of the Union Address calling for the end of social promotion in public schools to reduce the number of high school graduates who lacked basic reading and math skills (Elul, 1999).

The most recent and powerful legislation, PL107-110, more commonly known as the NCLB Act of 2001, required states to develop statewide educational standards in order to address the crisis in education. This legislation was the first to hold states accountable for student outcomes and accelerated the standards-based reform movement.

The assumptions of this legislation supposed that the key to improving education was to raise expectations. Moreover, NCLB intended to hold the states, which were responsible for delivering public education, accountable for the educational outcomes. The use of high stakes assessments was intended to lead to data-based decisions to improve teaching, enhance educational opportunities, and increase academic success (DeFur, 2002; Rhoten, Carnoy, Chabran, & Elmore, 2003).

High stakes tests were a legitimate way to "get tough" on public schools (Moran, 2000, p. 109). Originally intended to provide data to evaluate educational programs, critics argued that these tests were not valid for the purpose of making high stakes decisions for individual students since they were not designed for this application (Mueller, 2001). "High stakes testing is the practice of hinging a significant educational decision on the results of a single assessment tool" (Mueller, p. 203). Opponents challenged the use of high stakes decision-making on a single test as it would be difficult to assess the depth and breadth of student knowledge on the basis of one data point or test score (sole criteria). Moreover, the scope of the use of high stakes testing decreased the likelihood that the scores would be used for the intended application of determining the level of student achievement by identifying individual strengths and deficits (Amrein and Berliner, 2002; Mueller, 2001). Researchers Amrein and Berliner contended that large-scale testing programs rarely resulted in the test scores being used for diagnostic purposes to improve student success. The broader focus of school and individual accountability was the direct application of high stakes tests, which translated into increased high stakes testing policies at the state and local level (Amrein & Berliner).

State legislatures were granted the authority to regulate public education under

Article X of the United States Constitution. In addition, some states allowed local boards, and in some cases individual schools, latitude in implementing additional requirements resulting in a multitude of differing graduation policies and possible additional sanctions (Laird, Cataldi, KewalRamani, & Chapman, 2008). However, the states needed to exercise these accountability measures within the constitutional framework, as well as within subsequent legislation and case law. Traditionally, legislation, such as NCLB, was not been successful at mandating the actions of individual schools, principals, teachers or students, reiterating the focus on external control for accountability policies and not in improving schools (Fernandez, 2001; Lemons, Luschei & Siskin, 2003). An indication of the estranged alignment was exemplified in the argument that, while NCLB required testing procedures to ensure accountability, it did not mandate the use of these tests as the sole criterion for promotion or graduation for students who did not successfully complete the requirements. However, in 2002, 18 states required students to pass an exit exam and in 2004, 20 states required mandatory exit exams (Amrein & Berliner, 2002; Katsiyannis, Zhang, Ryan, & Jones, 2007). As of 2012, 16 states required exit exams for graduation in an effort to hold schools and students accountable for meeting minimum expectations (standards) of learning (State of Alaska, 2011). According to a publication titled *State High School Exit Exams* (2011), the following states required an exit exam as criteria for graduation: Alabama, Arizona, California, Georgia, Idaho, Indiana, Louisiana, Minnesota, Nevada, New Jersey, New Mexico, New York, Ohio, South Carolina, Texas and Washington.

The diverse application of high stakes testing policies had resulted in a plethora of litigation particularly regarding the denial of diplomas to students. The denial of a high

school diploma has directly impacted the future income, status, and social mobility of young citizens (Baker, 2005; Mueller, 2001; Thurlow & Johnson, 2000). Consequences of high stakes testing policies on students have included retention, denial of diplomas, and an increased likelihood of dropping out of school resulting in self-esteem issues (O'Neill, 2003). "Students who leave high school without a diploma begin their adult lives at an enormous disadvantage in terms of career options, potential for achievement, and self-esteem" (O'Neill, 2003, p. 623). The court documents in the *Debra P. v. Turlington* (1979) case predicted that the denial of a diploma could have had serious consequences both economically and academically for the student. The court's expert witness testified that in the State of Florida, 80% of the state-level jobs required a high school diploma. The court also heard testimony that the jobs obtained by persons not earning a high-school diploma were often low paying and lacked the opportunity for advancement (*Debra P. v. Turlington, 1979*). The unintended consequences of high stakes testing practices included future employment promotion options, income disparity between those who had attained a diploma and those who had not, and admittance into college or military service (O'Neill, 2003).

High-school dropout rates have been a significant issue for our nation's schools. In the year 2005-2006, over 600,000 students dropped out of high school (Stillwell, 2009). The scope of denial of diplomas added to this dilemma in high school completion for our students. Florida was a state that required the successful completion of the Florida Comprehensive Assessment Test state assessment. During the year 2002, over one-half of the 5,206 students in one county were expected to fail the state assessment test and receive a certificate of completion instead of a high school diploma (Borg, Plumlee, &

Stranahan, 2007). These data represented one policy in a single county in one testing state. The issue was large and the stakes were high for our students and our country.

The impact of these policies on students with disabilities increased due to their challenges in learning and difficulty demonstrating their capabilities (O'Neill, 2003). Students who were more than one year behind in achieving state standards would have had to demonstrate an academic gain 150% higher than the average student (Allensworth, 2004). "Students who tend[ed] to have the lowest achievement [were] most at risk of being adversely affected by high stakes testing" (Allensworth, p. 160). Minority students, students of lower socio-economic status, and students with disabilities may have been further challenged by high stakes testing practices (Allensworth; DeFur, 2002; Hancock, 2007; Jacob, 2001; Moran, 2000; Mueller, 2001). More specifically, one critic of the tests contended that low-income children of color were unlikely to have the "cultural capital" needed to pass the tests (Moran, 2000, p. 110).

Unfortunately, many of minority and disadvantaged students were identified as 'at risk' meaning they were more likely to drop out of school. Attorney and special education advocate Peter Wright (2004) predicted special education was the area where future litigation would occur. As the complaint in the case of *Noon et al. v. Alaska State Board of Education and the Anchorage School District* (2004), indicated, the *fail first* policy embedded in high stakes tests was unfair and unconstitutional for students with disabilities. The plaintiffs in this case charged that the students must have failed the test prior to receiving reasonable accommodations to meet their individual needs, resulting in an increased risk of hardship for these students.

As the litigation of plaintiff complaints were costly, educational policy makers,

leaders, and practitioners need to be informed as to the implications and ramifications of broadly implemented policies in order to develop an understanding of the impacts on the stakeholders within educational organizations. An investigation of the legal history of cases involving high stakes testing could serve as an important framework for future policy implementation. Armed with this framework, interpretation of resulting data, and improvements in decision-making could occur perhaps avoiding the violation of students' rights and resulting litigation.

Statement of the Problem

Analysis of an implemented policy has been a critical step in evaluating policy effectiveness. Too often, educational programs and policies were implemented without subsequent evaluation. The determination of whether a program or policy was meeting its intended objectives should serve as the basis for continuing, eliminating, or making modifications to said policy. "Unanticipated consequences invariably flow from court decisions that venture too deeply into legislative and executive policy terrain" (Heise, 2009, p. 327). Informed educational policy evaluations begin with analyzing the policy's objectives and outcomes, formulating a judgment as to whether the policy has been effective in meeting the intended goals, and determining the impact on the organization's stakeholders.

The "stakes" in high stakes testing practices were the consequences of the policy imposed on students. In order to develop a broad perspective regarding these practices, a comprehensive examination of the legal and educational literature was needed. This researcher aspired to inform educational policy makers, leaders, and practitioners as to the implications of the use of the tests as a requirement for a diploma, as well as the

courts' interpretations regarding the constitutionality of high stakes testing policies. In order to analyze and understand the impacts and implications of high stakes testing policies and practices, the historical context and the current legal status of the case law was examined. The historical context illuminated the political, social, economic, and cultural influences that under-girded the policy. The legal foundation explored the constitutional framework under which the policy existed. The evolution of the courts' policy interpretation was extrapolated from the case law established since the inception of the policy implementation.

The implementation of high stakes testing practices created controversy in the denial of diplomas to individual students (Laird, Cataldi, KewalRamani & Chapman, 2008; Lay & Stokes-Brown, 2008; Swanson & Chaplin, 2003). The legal issues presented to the courts helped to determine the constitutionality of high states testing as a requirement for graduation. The legal interpretation of the courts affected the perceptions of, and helped define the issues embedded in, the implementation of high stakes testing as a requirement for graduation. Furthermore, an analysis of individual cases regarding high stakes testing practices revealed current legal information pertinent to educational leaders and policy makers regarding the use of this policy.

The legal issues that were inherent in diploma sanctions-based practices were an important factor in [the courts' ruling on?] the plaintiff complaints. Numerous substantial cases, primarily due process and equal protection claims, were presented to the courts for judicial review. The resulting rulings captured valuable information for educators (Katsiyannis, Zhang, Ryan & Jones, 2007; Quigley, 2001). An analysis of the most influential case law was addressed by O'Neill (2001) in which he examined the issues

presented to the courts regarding the use of high stakes testing for a graduation requirement; the cases O'Neill reviewed were often well-publicized and did not include smaller, lesser-known cases. The cases not considered in O'Neill's prior published analyses may have contained important information necessary to fully inform decision-makers. Case-law consistencies can inform professionals in the field as to the fair use of educational practices and could provide caveats for constitutionally sound implementation (Hancock, 2007; Moran, 2000; Mueller, 2001; Quigley, 2001; Superfine, 2008). Due to the amount of litigation that resulted from the implementation of testing practices, a current analysis of the embedded issues would be helpful to leaders to avoid future litigation as well as to refine procedures for future policy implementation.

Purpose of the Study

The purpose of this study was to examine relevant federal and state case law involving the use of high stakes testing policies and practices as a requirement for graduation. The issues extrapolated from the case law were used to formulate a framework for educational leaders and policy makers to inform future decision-makers. Moreover, bringing to light the legal impacts of the implementation of high stakes testing as a requirement for graduation provided guidance to other policy makers on the best course of action in order to avoid costly litigation when implementing new educational reform measures.

This study reviewed the relevant case law regarding the denial of diplomas to pending graduates. The intent of this study was to reveal the issues presented to the courts regarding high stakes testing practices, and judicial holdings for the courts' interpretation of the relationship of the practices to the law. Each case presented in the state or federal

courts was coded for emerging themes to illustrate the issues presented in the case law. These themes were then synthesized and summarized in the findings of this study.

Research Questions

The following research questions were used to guide this study:

1. What issues related to high stakes testing and the denial of diplomas were revealed in state and federal case law within the 1979-2012 timeframe?
2. Were the issues distinctive based upon regular education or special education students?
3. What differences were revealed within the case law rulings regarding those in favor of the students and those in favor of the educational agencies?
4. What differences existed between the case law according the geographical regions as defined by regions in published court reporters and listed as follows: Northeastern, Northwestern, Southeastern, Southern, Southwestern, Pacific, and Atlantic regions?

Significance of the Study

The goal of educators and policymakers has been to offer the best quality education to our children. However, when a policy has been implemented based upon economic and public sector pressures, the policy model recruited to meet the needs of the pressure agents may not have been the most suitable model to meet the needs of all students, particularly students in vulnerable populations. The overlay of the business accountability model on a public institution involving human subjects could potentially create a tension between the stakeholders. Unfortunately, this was what occurred in the implementation of high stakes testing policies. The business model of *zero-defect*

collided with the educational concept of *zero-reject*. As our society tried to come to grips with the most prevalent issues in educational reform, the analysis of the implementation of this policy could provide a framework for which to conduct future analyses and implementations. "Epistemological development within the human sciences, like education, functions politically and is intimately imbricated in the practical management of social and political problems" (Ball, 2007, p. 263). Insight into the practical management of this social and political problem would be critical to the future reform of educational policies. The overarching goal of this study was to provide a framework for educational leaders and policy makers regarding the legal issues as a result of high stakes testing policies and practices for use in future educational decisions.

Definition of Terms

A legal discussion and analysis contains specific language that is not usually incorporated into educational dialogue. An understanding of these terms was essential to the understanding of the legal discussion included in this study and may be helpful for understanding the statutory analysis. These definitions were acquired from Black's Law Dictionary (Garner, 2004):

Appellant: The party who appeals a lower court decision usually seeking reversal of that decision (p. 107).

Appellate: Of or relating to an appeal or appeals generally (p. 107).

Arbitrary: Depending on individual discretion specifically determined by a judge rather than by fixed rules, procedures, or law (p. 112).

Capricious: Characterized by or guided by unpredictable or impulsive behavior. Contrary to established rules of law (p. 224).

Certiorari: An extraordinary writ issued by an appellate court, as it discretion, directing a lower court to deliver the record in the case for review (p. 241).

Claimant: One who asserts a right or demand, especially formally: especially one who asserts a property interest in land, chattels, or tangible things (p. 265).

Complainant: The party who brings legal complaint against another: especially the plaintiff in a court of equity or, more modernly, a civil suit (p. 302).

Defendant: A person sued in a civil proceeding or accused in a criminal proceeding (p. 450).

Disparate Impact: The adverse effect of a facially neural practice (especially an employment practice) that nonetheless discriminates against persons because of their race, sex, national origin, age or disability and that is not justified by business necessity (p. 504).

Due Process Rights: The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case (p. 538).

Equal Protection Clause: The 14th Amendment provision requiring the states to give similarly situated persons or classes similar treatment under the law (p. 577).

First Amendment: The Constitutional amendment ratified with the Bill of Rights in 1791, guaranteeing the freedoms of speech, religion, press, assembly and petition (p. 666).

Fourteenth Amendment: The constitutional amendment, ratified in 1868, whose primary provisions effectively apply the Bill of Rights to the states by prohibiting states form denying due process and equal protection and from abridging the privileges and immunities of US citizens (p. 682).

Motion: A written or oral application requesting a court to make a specified ruling or order (p. 1036).

Nexus: A connection or link, often a causal one (p. 1070).

Plaintiff: The party who brings a civil suit in a court of law (p. 1188).

Prima Facie: At first sight: on first appearance but subject to further evidence or information (p. 1288).

Procedural Due Process: The minimal requirements of notice and a hearing guaranteed by the due process Clauses of the 1st and 14th Amendments, especially if the deprivation of a significant life, liberty or property interest may occur (p. 539).

Rational Basis Test: The criterion of judicial analysis of a statute that does not implicate a fundamental right or a suspect or quasi-suspect classification under the due process or equal protection Clause, whereby the court will uphold a law if it bears a reasonable relationship to the attainment of a legitimate governmental objective (p. 1290).

Remand: The act or an instance of sending something (such as a case, claim, or person) back for further action (p. 1319).

Stare Decisis: The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation (p. 1443).

Strict Scrutiny Analysis: The standard applied to suspect classification (such as race) in equal-protection analysis and to fundamental rights (such as voting rights) in due-process analysis (p. 1462).

Substantive Due Process: The doctrine that the due process Clauses of the 1st and 14th Amendments require legislation to be fair and reasonable in content and to further the legitimate governmental objective (p. 539).

Limitations of the Study

A limitation of this study included the limiting conditions or restrictive weakness inherent in qualitative and quantitative research (Locke, Spirduso & Silverman, 2007). The literature revealed other legal issues regarding the use of high stakes tests in public schools, such as cases involving promotion for students in elementary and middle school. Although similar in context, these cases did not contribute to the specific use of high stakes tests for a diploma requirement and were not included in this study. The examination of cases did not include cases from municipal courts, state administrative hearings, and court guided mediation since information from these decisions were not accessible through database searches, court reporters, or state and federal level court documents. Therefore, the case law analysis consisted only of those cases that were presented in state and federal courts relative to diploma requirements or the denial of diplomas to students as the result of a high stakes testing policy. This limitation affected the study in the respect that the unpublished cases may have contributed to the deeper understanding of the legal implications of high stakes testing policies.

Delimitations of the Study

Locke, Sprirduso, and Silverman (2007) described delimitations as "defining the limits inherent in the use of a particular construct or population" (p. 16). Although the case law reflected other issues regarding high stakes testing practices, only cases with a direct nexus to high stakes testing and diploma requirements, and the denial of diplomas were included in this analysis. The cases examined were limited to the cases brought before the state and federal courts.

Inherent in any implementation of policy was the unique impact on each

individual student. This analysis of case law did not represent the impact on all students under an infinite variety of circumstances. Therefore, what was represented in the case law reflected only those cases that were brought before the courts at the state and federal level.

CHAPTER 2

Review of Related Literature

"Be patient, then, and sympathetic with the type of mind that cuts a poor figure in examinations. It may, in the long examination which life sets us, come out in the end in better shape than the glib and ready reproducer, its passions being deeper, its purpose more worthy, its combining power less commonplace, and its total mental output consequently more important"

(James, 1958, p. 142-143)

High stakes testing policies and practices have incited a conflict between current national and state reform measures, and the protection of students' rights. The impact of these policies and practices on student graduation and diploma sanctions fueled the conflict. This literature review examined the aspects of the conflict presented in the professional literature, as well as the seminal case law serving as the foundation for subsequent litigation resulting from high stakes testing practices. Specifically, the review included the following key areas of study: historical perspective, judicial intervention, and case law regarding student rights. A cohesive synthesis of relevant educational and legal literature was presented in this literature review. Furthermore, the empirical studies reflecting high stakes testing policies on the awarding of student diplomas were included, pointing the final discussion to the need for a high stakes testing policy analysis to provide a framework for future reform practices and policy implementation.

Historical Perspective

Policy Rationale

The implementation of mass public educational testing arose from the political and social landscape during the latter 20th century and early 21st century. During the 20th century, schools were influenced by turbulent and rapid urbanization, industrialization, and immigration trends (Moran, 2000). Prior to this time of growth, relatively few children attended school and only a small minority earned a high school diploma (Dorn, 2003); public schools were not designed to educate the masses and provide the nation with an adequate workforce. However, changes and challenges to our society increased the need for educated citizens. States enacted compulsory attendance laws to require students to participate in educational programs to ensure a fundamental set of skills in order to participate productively in society (Moran, 2000) thus expanding the nation's public school systems. The Russian launch of Sputnik in 1957 inspired an explosive and critical analysis of the American educational system (Amrein & Berliner, 2002). During the 1960s, a link was revealed between the established beliefs about the value of schools and increased effort to formulate a new expectation for more students to become high school graduates (Dorn, 2003). The implementation of exit exams was a means of measuring whether high school graduates had acquired the skills necessary to enter the work force and, thus, become productive and contributing members of our society and economy.

National Concerns and Accountability

The Civil Rights Movement influenced the next decade as the nation's schools advanced toward minimum competency standards as a means to measure student

preparation. These standards were met with public resistance amid concerns about fairness to students and concerns that the tests would punish students who were victims of past discrimination (Moran, 2000). As a result of increased pressure to address the minimum standards movement, the increased expectation of the public, and the growing criticism of the public schools, the NCEE released a report investigating the status of public education. This report, entitled *A Nation at Risk* (1983), detailed huge deficits in the adequate preparation of students and advocated an intense scrutiny of the public education system and student achievement. A massive movement toward school accountability was brought forth in the use of standardized tests, which served as the primary and most cost effective mechanism for measuring school effectiveness (Lipman, 2004; Smith & Fey, 2000). As schools struggled to achieve progress toward political and social expectations, student accountability emerged as a way of measuring individual student progress and reporting educational program effectiveness. States began to implement student accountability standards with the assumption that when consequences were wedded to the implementation of student test performance criteria, the curriculum content would be reflected in the instruction in the classrooms (Airasian, 1988). In short, the intended purpose of state accountability systems was to raise student achievement and improve the quality of schooling (Carnoy & Loeb, 2002).

Educational Reform Movement

Although *A Nation at Risk* (1983) indicated the need for a reexamination of the nation's schools, the intention was to present the challenge of reforming public education through systemic organizational change. However, in the period following the release of *A Nation at Risk,* student achievement was lower than when Sputnik was launched,

indicating that the wave of concern over student achievement had yielded few results. Educational leaders saw a need for building capacity by empowering teachers and administrators to deliver a better education (Carnoy & Loeb, 2002). The business world saw the economic aim of education to prepare students for the work force and to compete in global economies (Siegel, 2004). The political perspective wanted to hold schools accountable for student achievement. The conflict between these three philosophies refocused the subject of educational reform from a political stance to a national debate (Dorn, 2003).

A Nation at Risk (1983) fuelled the debate as the report illuminated the need for stronger and more comprehensive reform measures including the recommendation for statewide-standardized testing (Amrein & Berliner, 2002). The report stated that tests should be administered at each major transition point, such as from one level of schooling to another and particularly from high school to college or entering the workforce (NCEE, 1983). However, the report also stipulated that nationwide tests should be delivered at the state and local level, and be used in conjunction with other mechanisms for evaluating student achievement (NCEE, 1983). The purpose of these tests was to certify the students' credentials, to identify the need for remedial interventions, and to determine the opportunity for advanced and accelerated work (NCEE, 1983).

After the publication of *A Nation at Risk*, a series of Gallup polls documented public opinion regarding what was happening in schools. Echoing *A Nation at Risk,* the 1983, 1984, and 1986 Gallup Polls results indicated that the majority of participants were concerned about public school effectiveness, therefore, establishing a perceived need for reform to focus on academic excellence in schools (Airasian, 1988). The American public

believed that schools should be accountable for outcomes and these outcomes should be measured by tests and enforced by sanctions (Heubert & Hauser, 1999, as cited by Smith & Fey, 2000). The public's concern regarding school accountability legitimized the use of standardized tests. Airasian documented that their wide acceptance was due to "the perceptions that they evoke[d] and the extent to which those perceptions mesh[ed] with prevalent social norms and values" or how they served as symbols of the broader societal goals (p. 302). Conversely, the empirical evidence was important to the legitimacy for the implementation of new programs and initiatives. In the case of standardized testing, empirical data was not used as the determinant to push forward the use of tests to measure school effectiveness (Airasian). "The tests appeared virtually out of nowhere...and have enjoyed an acceptance and status that not only was rarely seen in an educational innovation, but also far outstripped available evidence of their effectiveness" (Airasian, p. 304).

The public acceptance of these tests was evident through the determination of public appeal. Airasian also elaborated on three distinct types of symbolic public appeal. First, the tests conveyed the order and control the public perceived was needed to improve public schools through external verification with objective fairness. Second, the tests measured important educational outcomes validating progress in improving the system. Finally, standardized tests mirrored a distinct and moral outlook that society desired to be reflected in public institutions (Airasian). Combined, these three types of symbolic appeal provided the structure and accountability needed to fuel the reform. This public approval toward student testing translated into public policy with the assumption that over time "the demands of public policy will be stronger than the existence of local

factors, such as culture, tradition, and expectations..." (DeBray, Parson, & Avila, 2003, p. 57). Public policy regarding high stakes testing had evolved to political debates on how to improve the nation's educational system.

The Bias of External Control

The implementation of state standardized testing seemed to alleviate the concern over the lack of external control; however, the process of implementation was not standardized, and in some cases compromised fairness. States with the lowest performing populations implemented the strongest accountability systems (Carnoy & Loeb, 2002). Many of the lowest performing schools had high minority and economically disadvantaged populations. In 1987, William Bennett serving as US Secretary of Education, publicly condemned Chicago's inner city schools as the worst schools in the nation (Lipman, 2004). Minority students and children of poverty dominated the attendance at these schools. A year later, Chicago implemented its school reform movement; addressed as the 1988 School Reform Law. In addition, Chicago added high stakes testing as a means of standards accountability as well as "centralized regulation of teacher and schools" (Lipman, p. 2). In his 1999, State of the Union Address, President Clinton urged states to adopt the same type of educational standards implemented in Chicago (Elul, 1999).

Supporting this trend, Moran (2000) posted, "High stakes testing [was] popular because it offer[ed] a way to identify and blame individuals without acknowledging a collective unwillingness to invest in public schools, particularly those low-income, often minority areas" (p. 26). Even though the states with the strongest accountability systems had higher increases in student achievement on national tests, the pressure created by the

enforcement of sanctions led to litigation as parents sought the courts' assistance to make the tests fair to all students (Borg, Plumlee, & Stranahan, 2007; Carnoy & Loeb, 2002).

National Policy Regarding Accountability and Reform

In 2001, the Elementary and Secondary Education Act of 1965 was reauthorized as the NCLB Act (Kim & Sunderman, 2003). This new federal legislation mandated student testing with demonstrated improvement in terms of *Adequate Yearly Progress* (AYP) for students, particularly for students in minority populations, economically disadvantaged students, students with limited English proficiency, and students with disabilities (Kim & Sunderman). This legislation also mandated the testing of 95% of all students and set specific and absolute requirements for proficiency (Kim & Sunderman). This marked the government's increasing pressure to address criticism for our nation's public school performance. As a result, concerns regarding the achievement gap between minority students and white students, success of students with disabilities, and limited English proficiency, as well as socio-economically challenged students increased in momentum.

The NCLB Legislation (2001) required states to use student achievement as the "principal indicator of performance" but, states were also required to use high school graduation rates as another academic indicator of student performance (Swanson, 2003, p. 1). The graduation indicator was used as a component in the calculation of AYP to hold schools accountable for student learning. Student achievement on statewide tests and graduation data were then used to implement sanctions against those schools that did not meet the requirement under the law (Swanson, 2003). "The original intent of the legislation was that a district or school's failure to achieve adequate graduation rates

would also result in failing to make AYP (Orfield, et al., 2004, p. 11) thus requiring the installation of sanctions. However, the "lack of proper funding and support encourage[d] schools to look for any loopholes that they [could] in order to showcase themselves in a more positive light" (Price &Peterson, 2008, p. 56). The empirical evidence discovered by research studies regarding high stakes testing and improvement in student outcomes provided an insight into the effectiveness of establishing this policy.

Empirical Data Regarding High Stakes Testing Outcomes

Jacob (2001) sought to determine the effects of high stakes tests used for the awarding of a diploma. By analyzing the National Education Longitudinal Study (NELS) data for eighth through 12th grade students across individual schools, school divisions and states, his findings indicated that students in states that required testing were more likely to drop out before completing high school. The author noted that states with larger populations of African Americans, Latino, and disadvantaged students were more likely to implement a high stakes testing policy. Investigated by region, southern states that required testing reported higher student achievement scores in math but also reported higher dropout rates in high school (Jacob).

Researchers Carnoy, et al. (2001) focused on the Texas Assessment of Academic Skills (TAAS) test. This high stakes testing program was initiated by the Perot Commission and served as the model for the NCLB legislation. Passing the TAAS was required for diplomas in 1991, this created controversy as the denial of diplomas met with legal resistance in litigation filed by parents of students who were not permitted to graduate (*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education,* 2000). Although students increased performance on the test in each

grade beginning in 1994 and those gains correlated to increased scores on the National Assessment of Educational Progress (NAEP) test, controversy still remained as accusations arose regarding teaching to the test, students retention as a result of predicted failure of state testing, students disappearing from the rosters, or skipping the accountability grade and showing up in later grade levels (Carnoy et al., 2001). These researchers studied approximately 1,000 schools in rural, urban and suburban settings. Analysis of the data revealed that student achievement positively impacted dropout rates: a ten percent increase in TAAS scores yielded a 0.24% decrease in dropout rates mostly in these urban schools. However, the analysis also identified a gap between white students and minority student achievement, with 78% of white students graduating on time, and 65% of African American and Latino students graduating on time or at all. Furthermore, the data indicated that there was a rapid increase in retention and escalating dropout rates for low socio-economic and minority students but causality could not be determined nor linked directly to the administration of the TAAS test. These researchers concluded that the TAAS test did not meet the objectives of improving the overall education in Texas for minority students or for students from low socio-economic families despite the small reductions in dropout rates as TAAS scores increased (Carnoy et al., 2001).

Researchers Madaus and Clark (2001) utilized national testing data to report on high stakes testing policies. They analyzed trend data for the NAEP, NELS, and the Scholastic Assessment Test (SAT) for 30 consecutive years. They concluded that although high standards along with high stakes tests did have "a markedly positive effect on teaching and learning in the classroom...high stakes testing programs [had] shown to

increase high school dropout rates-particularly among minority students populations" (Madaus & Clark, p. 2). Although the authors presented evidence indicating that states requiring high stakes tests had a higher dropout rate than those that did not, they admitted causation could not be established linking the dropout rate to high stakes testing policies (Madaus & Clark).

Arizona State University researchers Amrein and Berliner (2002) conducted one of the most cited and influential studies on high stakes testing policies (2002). Their research sought to determine whether high stakes testing programs promoted the transfer of learning on nationally norm-reference tests. In addition, the researchers also sought to determine any negative effects generated by these high stakes testing policies on minority and low-income students. The authors of this study examined whether students who successfully completed the high stakes tests were demonstrating improved performance on the American College Testing (ACT) program, the SAT, the NAEP, and the Advanced Placement Exams in Advanced Placement classes. They examined ACT, SAT, NAEP and Advanced Placement data across 18 states to determine if the high stakes testing policies affected student learning. The states selected were the states with the most severe consequences; leading the nation in school closures, interventions, state takeovers, and teacher and/or administrator dismissals. These states also had very strict promotion and retention policies. The researchers analyzed data from the ACT, which indicated that there were short-term gains after implementing high stakes testing requirements. However, longer-term negative effects were evident twice as often as the positive effects. Of the states that implemented the high stakes testing policies, 67% showed decreases in ACT scores over time (Amrein and Berliner, 2002).

The SAT data reflected similar results. The majority of high stakes testing states posted losses in SAT scores after implementation while eight posted positive gains. The NAEP testing data had congruent findings but due to exclusionary practices of Limited English Proficient and students with disabilities, these test analyses did not represent generalizable results and were advised to be only used for limited consideration. The Advanced Placement results were also limited do to fluctuations in participation. In 2002, Amrein and Berliner concluded that the data indicated an increase in retention and dropout rates particularly for minority and low SES groups. In addition, the data resulted in no significant improvement in the correlation between high stakes testing policies and an increase in participation in higher educational opportunities. Their general conclusion was that the implementation of the TAAS test had little impact on the educational outcomes for Texas students. They contended that the increases in student performance of high stakes tests did not transfer to increased performance on any of the nationally norm-referenced tests indicated in the study. The authors reported that the data generated by high stakes tests were invalid due to distortions and corruptions (Amrein & Berliner). The authors' final notes indicated that "there [was] no compelling evidence from a set of states with high stakes testing policies, that those policies result[ed] in transfer to the broader domains of knowledge and skills for which high stakes test scores *must* be indicators" (Amrein & Berliner, 2002, Final Thoughts, ¶ 1). This study also concluded that the adverse effects of the testing policy on minority and economically disadvantaged students were disproportionate and were a "benign error in political judgment" (Amrein & Berliner, 2002, Final Thoughts, ¶ 1).

Another researcher was skeptical of Amrein and Berliner results and in a contradictory analysis; Rosenshine (2003) published a report in response to their study. Rosenshine's basis for the reanalysis of NAEP data was that Amrein and Berliner analyzed only those states that implemented high stakes testing policies and did not include a control group or a comparison group of states that did not implement testing. In his analysis, Rosenshine's results contradicted Amrein and Berliner's original conclusions and indicated that high stakes testing states outperformed the states without these policies on three of the NAEP tests for a four-year span. However, in a scholarly rebuttal, Amrein-Beardsley and Berliner (2003) defended their results and re-analyzed the data resulting in support for their original data results.

Heilig and Darling-Hammond published a study involving high stakes testing policies in 2008. This study examined the longitudinal data indicating the progress of elementary, middle, and high school students in a large urban school district in Texas. These researchers examined seven years of quantitative and qualitative data including test data and interview data. The testing data were results of the TAAS and Stanford Nine for 270,000 students in the district for seven years. The researchers accounted for 2,500 variables and used student identifiers to track students throughout their school years in the district. The qualitative measures were gathered from staff focus groups and interviews in seven of the high schools within the district. The demographics in these selected schools were predominately minority students living in urban settings. Heilig and Darling-Hammond reported that over 7,000 student scores were missing on the TAAS test from mostly Latino students. Students who took that Spanish version of the test were excluded from the data but these exclusions were not evident in the Stanford

data. The results indicated that in 1997, 26% percent of ninth grade students were retained, with an increase to 31% (one in three students) the following year. Furthermore, in the 1997-1998 test data, 64% of ninth graders never took the reading portion, and of the 36% of ninth graders that took the test, only 12% passed. The ninth grade pass rate to the next grade level was less than 50%. This study also concluded that African American and Latino students suffered the largest number of retentions (Heilig & Darling-Hammond, 2008).

The Impact of Testing on Awarding Diplomas

The public perceived that high stakes tests were meant to improve the education of the student directly while simultaneously improving the value of a diploma. High school diplomas were meant to certify to the public that the student has gained the concrete skills or knowledge required by an educational program, and to signify the general intellectual worth of graduates to society. Diplomas were also meant to improve the status of schools as well as to improve the exchange value of the diploma for future students (Dorn, 2003). As the use of high stakes testing increased as a means of holding students accountable for their learning, the dropout rate began to draw public scrutiny. In 1995, the State of Texas denied diplomas to over 10,862 students for not passing the math section of the TAAS test (Cantu, 1996). Communities became concerned about the number of students who were lacking diplomas and were entering the workforce without these basic credentials. The assumption of the public was that the value of a high school diploma was equivalent to the value of the knowledge and skills presumed to be learned in school. The increasing number of students who were denied diplomas began to cause public tension, as the expectation of a diploma was a perceived part of adolescence

(Dorn, 2003). The tests were becoming the gatekeepers to the rewarding of diplomas and many viewed this as an unfair practice (Moran, 2000). In the series of recommendations included in *A Nation at Risk* (1983), the first recommendation encouraged the strengthening of the high school program by increasing specific curricular requirements. The increases in requirements claimed to raise the productivity of individual students (Lillard & DeCicca, 2001). The employment market depended on the schools to provide workers with knowledge and skills to be productive in the labor force. This "labor market reciprocity" was compromised with higher numbers of students being denied high school diplomas (Dorn, p. 8). The higher dropout rate was inferred to increase the number of citizens depending on social programs as an unintended consequence. A higher dropout rate translated into a reduction of the number of productive citizens graduating from public schools. Diplomas became a form of educational currency, which served as the gateway to higher educational opportunities and the labor force (Dorn). The public's emotional perspective tied the denial of diplomas to very real emotional and economic consequences not just for the students but also for society as a whole. The paradox between the national interest of increasing the number of students who graduated and the increase in high stakes standardized testing began to have legal consequences for states and school districts (Dorn).

Bishop, Moriarty, and Mane (2000) examined the New York Board of Regents initiative to increase standards for awarding a diploma. In May 1994, the State Board of Education announced that all students would be required to take Regents level courses in math and science. In addition, the requirement of passing an end-of-course examination would precede the awarding of a diploma. This study conducted in 1997, examined data

from SAT-I scores, the eighth grade NAEP math achievement scores, school enrollment at the age of 17, and the overall high school graduation rate, to determine the effect of policy implementation on student achievement, and the number of students who completed school and were awarded a diploma (Bishop, Moriarty, & Mane).

An analysis of the SAT-I results indicated that students from New York out performed students in other states by approximately 20%. The NAEP scores revealed that New York's eighth grade students scored almost one academic year above other students, or approximately nine points above other student scores. The data also revealed that "New York's dropout rate [was] not significantly different than that of other states with students with similarly disadvantaged backgrounds" (Bishop et al., 2000, p. 339). The conclusion of this analysis indicated that the New York Regents increase in course and examination requirements had a positive impact on student achievement but did not have a significant influence on the number of students who graduated high school (Bishop et al.).

Lillard and DeCicca (2001) examined the increase in course graduation requirements (CGR) to determine if raising the standards for earning Carnegie units would have an effect on dropout rates. In response to *A Nation at Risk* (1983), Carnegie unit requirements increased during the years 1983-1997 when data was analyzed for their study. Although the increase of less than three Carnegie units seemed insignificant, the researchers predicted that the increased requirements would elevate student attrition rates. Lillard and DeCicca examined a broad base of data including Census data, NELS data, High School and Beyond statistics, employment and population reports, and U.S. Department of Education and the U.S. Department of Labor statistics to compile their

report. The data from states requiring high school exit exams (HST) were flagged. The results indicated that an increase of a standard deviation of 2.5 in course graduation requirements was met with a .8 to 1.6 percent increase in student attrition rate. Translating to real student numbers, this increase equated to an increase of 104,000 to 208,000 students dropping out of high school. According to the 1990 data, if states were to increase CGRs by one standard deviation, the drop out numbers would escalate to 67,000 to 117,000 students leaving school. These data also revealed larger impacts on children from homes with divorced parents, low socio-economic status, minority families (particularly Hispanic) and homes in which the parents dropped out of school. In summary, this research supported that increased graduation requirements, whether CGRs or exit exams, resulted in increased dropout rates (Lillard & DeCicca, 2001). Conversely, the authors noted some benefits to increasing CGRs for those students who chose to stay in school. These students realized increased earnings, better job possibilities, and the likelihood of success in higher education (Lillard & DeCicca).

Bishop and Mane's (2001) study also investigated the effects of higher course graduation requirements on dropout rates. These researchers found that increased graduation requirements significantly raised the probability of dropping out and earning a GED instead of a diploma. However, the increase in requirements did not significantly affect earning a delayed diploma. Moreover, the results indicated that higher course graduation requirements significantly reduced college-attendance rates. An increase in course requirements by four Carnegie units resulted in a decline in college enrollment by two percent. Additionally the Bishop and Mane study revealed that the Minimum Competency Exam (MCE) requirement had a negative effect on high school graduation

rates for students with lower grade point averages (GPA). Lower GPA students residing in states requiring successful completion of the MCE demonstrated 30% likelihood of earning their diploma later than expected or not at all, as compared to 17% of students in non-MCE states. In addition, students that lived in MCE states and struggled with lower GPA scores were more likely to experience delays in college enrollment. Students who attended high-SES schools, higher teacher salary schools, and smaller or Catholic high schools were more likely to enroll in college directly after graduation from high school. Similar to Lillard and DeCicca's (2001) results, another research study noted the effects of MCE policies on graduates' earnings and employment. The results indicated that students attending school in MCE states earned an increase of five percent in earnings income after high school than students from non-MCE states (Bishop & Mane).

The implementation of high stakes testing policies has resulted in mixed findings. However, there were some consistencies in the effects on vulnerable populations such as socio-economically disadvantaged and minority students. Table 1 represents a summary of the findings of the empirical research regarding high stakes testing implementation.

Table 1

Summary of Empirical Data Regarding High stakes Testing

Author and Date	Data Source	Findings
Jacobs (2001)	NELS	1.6% increase in dropout rate Correlation between implementation of high stakes testing policy and higher populations of minority and low SES students
Carnoy & Loeb (2001)	TAAS, NAEP	Increase scores on TAAS resulted in increases on NAEP 10% increase in test scores resulted in a .24% increase in drop out. Disparity between Caucasian graduation rate and minority graduation rate.
Madaus & Clark (2001)	NAEP, NELS, SAT	Increase in student achievement correlated to an increase in dropout rates.
Amrein & Berliner (2002; 2003)	SAT, ACT, NAEP, AP Test	Improved performance on state mandated tests did not translate to improved scores on nationally-normed tests. Minority and low SES students suffered increased drop-out rates.
Rosenshine (2003)	NAEP	Student performance increased in states with mandatory testing policies.
Heiling & Darling-Hammond (2008)	TAAS, Stanford Nine, Interviews	High retention rates among minority students: 26-31% retention in ninth grade and 60% retention in 10th grade.
Bishop, Moriarty, & Mane (2000)	SAT, NAEP, School Enrollment, Graduation rates	States with high stakes testing demonstrated an increase in student performance with no significant impact on the graduation rate
Lillard & DiCicca (2001)	NELS, Census, High School and Beyond statistics, US Department of Labor, Employment and Population reports	An increase of 2.5 Carnegie Units for graduation resulted in 0.8 to 1.6 percent rise in dropout rates.
Bishop & Mane (2001)	GPA	Higher dropout rates in states requiring MCE

The Use of Fair and Reliable Assessments

The NCLB (2001) legislation contained language imposing harsh sanctions against states and schools that did not show increased student performance on the mandated statewide tests and gave credence to the use of high stakes tests for accountability measures. However, it was important to note that although NCLB mandated the use of standardized tests to measure student progress, it did not mandate the use of these tests as a criterion for denial of promotion or diplomas to students.

In contrast to the earlier high stakes tests, the implementation of statewide tests differed in that they were mandated for all schools and students. Additionally, they eliminated local school board discretion in test selection, administration, content coverage, scoring and interpretation. A single statewide test would be administered and carried specified sanctions for poor performance (Airasian, 1988; Amrein & Berlinger, 2002). The sanctions and rewards embedded in the new mandated tests conveyed the public's perceived image of external control (order), unbiased judgment (fairness), toughness (sanctions for poor performance), and strong educational leadership thought to be needed in the nation's public schools (Airasian, 1988; Au, 2007; Smith & Fey, 2000).

Airasian (1988) criticized the high stakes testing movement and called for the use of more valid ways to measure school and student progress. Moreover, Airasian contended that a disparity existed between what the tests seemed to measure and what they actually did measure. He criticized that these types of tests did not reveal any new information about students that teachers and administrators did not already know. He also explained that the testing programs relied heavily on rhetorical constructs such as competence, basic societal and workforce skills, functional and cultural literacy,

excellence and academic standards, and preparation for life. These constructs were difficult to measure accurately in every possible context. "The symbolic richness of high stakes tests creates the danger that such tests can become a convenient, though poor, substitute for other necessary and meaningful actions to improve schools and learning" (Airasian p. 311). Siegel (2004) concurred with Airasian in his belief that a disconnection existed between these testing practices, and the educational aims and ideals desired by society.

Another testing critic, Siegel (2004), argued that high stakes tests resulted in decisions that were based upon judgment and therefore were arbitrary. Siegel claimed that the determination of the criteria for the tests, and the appropriate standards to meet the criteria, were arbitrary (Siegel, 2004). Another researcher voiced concerns regarding the fragmented learning process embedded in standardized testing formats. When the state imposed sanctions for poor performance, the teachers often taught the content in fragmented segments to meet the objectives or standards for the test. This is referred to as *teaching to the test*. The results of teaching to the test indicated a change in the very structure of knowledge; content was taught in isolated pieces and was learned only within the context of the test (Au, 2007). While the literature revealed a small body of evidence of student-centered instruction, content integration, and subject matter expansion, most of the evidence pointed toward fragmented content instruction based upon anticipated test content (Au).

Many questions were raised as to the alignment of these tests to the states' goals and the curriculum mandated by each state. Both the *Debra P. v. Turlington* and the *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of*

Education cases set precedent for the curricular validity of the tests. "Validity is the quality of an instrument to yield truthful inferences about the trait it measures" (Smith & Fey, 2000, p. 336). Phillips defined validity as the "weight of accumulated evidence supporting a particular use of test scores" (2000, p. 348). An instrument's validity is dependent upon the context and use, and in the case of human subjects, the inherent nature of the differences in human characteristics informs the validity of high stakes tests (Smith & Fey). Wellstone's legislation mandated that the tests align with state educational goals to ensure the curricular validity (Moran, 2000). Curricular validity and test alignment were issues identified in the literature. Carnoy and Loeb (2002) stated that the states' "need to set clear standards and align the curriculum and accountability mechanisms with those standards" (p. 306). Furthermore, assessment systems needed to be aligned with the curriculum while the accountability mechanisms needed to provide incentives or sanctions with the success or failure of achieving the standard (Carnoy & Loeb). Valid and reliable instruments were critical to accurate evaluation and the inferences used to make high stakes decisions. The high stakes decisions became one of the mechanisms used for the demanded educational reform.

Judicial Intervention

Judicial Reluctance and Statutory Authority

The courts did not demonstrate eagerness to become involved in educational disputes. The courts were "reluctant to...scrutinize the validity of state educational practices instead deferring to educational authorities" (Elul, 1999, p. 501). The major issue of high stakes testing was confounded with the dueling elements embedded within the concept of statutory authority. The first element was the reluctance of the court to

undermine the states' authority to regulate its system of public education, while the second element related to the federal court's involvement in the determination and interpretation of statutory authority. The courts often determined the element of statutory authority was embedded in the legal language of state constitutions and legislative actions. In some cases, the courts were asked to address the application of state laws in possible constitutional and statutory rights violations. In other cases, the courts were asked to rule on the intent of the legislature when they crafted the law. Nonetheless, the courts were consistent in their reluctance to usurp the authority of the states and consistently upheld the authority granted to the states to regulate public education.

Equal Protection and Disparate Impact Regarding Vulnerable Populations of Students

The equal protection clause of the Fourteenth Amendment protects vulnerable populations from discrimination resulting in *disparate impact.* Disparate impact is described as practices that "proscribe not only overt discrimination but also practices that are fair in form, but discriminatory in operation" (*Griggs v. Duke Power Company,* 1971). In order to substantiate disparate impact, the courts must apply the Equal Employment Opportunities Commission guidelines of the "four-fifths rule" (McDowell, 2000, p. 46). The application of this guideline indicated that an adverse impact had occurred when the selection rate for students of a particular subgroup was less than four-fifths of the rate of the highest scoring group (McDowell, 2000). This guideline was applied in *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education* case as the court recognized disparate impact on minority students evident in the first administration of the TAAS test but indicated that scores for minority students increased after the first year and that the remediation programs established by

the state were working (*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*, 2000).

Students with disabilities were another group of students impacted by high stakes testing policies. Some students identified as having a disability had difficulty demonstrating their acquired knowledge and skills on standardized testing formats (O'Neill, 2001). Accommodations were integrated into the educational program to help students fully participate in the testing procedure. According to the National Research Council Report on high stakes testing (Huebert & Hauser, 1999), there are four basic categories of accommodations for students with disabilities: changes in presentation, changes in response mode, changes in timing, and changes in setting.

These accommodations were meant to support students with disabilities and were included in the child's Individualized Education Plan (IEP). The testing accommodation was meant to provide the most suitable situation for the child to accurately demonstrate their performance and understanding of the concepts. The integration of accommodations for students with disabilities helped to support the students' participation in statewide testing as mandated by NCLB, but these students still represented a subgroup of children who are considered vulnerable. However, in the case of high stakes tests, some posed a concern as to whether the accommodation was appropriate, as providing the accommodation may intentionally enhance or diminish the student's performance (O'Neill, 2001).

Students with disabilities often needed additional supports to participate in the testing programs in their schools. NCLB mandates that almost all students participate in statewide assessments whereas prior to this legislation, students with disabilities often

were not tested to keep school scores high. Federal legislation protecting the rights of students with disabilities prohibited the discrimination of these students and entitled them to participation in testing programs in public schools receiving federal funding. Section 504 of the Rehabilitation Act of 1973, The Americans with Disabilities Act (ADA), and the Individuals with Disabilities Education Act (IDEA) and its most recent reauthorization all include provisions for students with disabilities that in some way extended to participation in statewide assessments or alternative assessments (O'Neill, 2001).

In an analysis of Virginia state Standards of Learning (SOL) scores, Cunningham and Sanzo (2002) investigated the impact of high stakes testing policies on students with low socio-economic status (SES). At the time of this study, 17.7% of the students attending school in Virginia were from families living in poverty. Using correlation regression analysis, the researchers' analyzed data from 245 high schools in Virginia. The results of the analysis pointed toward SES as a major factor in students' scores on the SOL tests. In fact, the results indicated that 41% of the variation in the regression analysis for science scores could be explained by SES. Cunningham and Sanzo warned that "the application of high stakes testing further perpetrate [ed] the socioeconomic inequality in education rather than resolving it" (p. 72). Supporting previous studies, the use of high stakes tests did not recognize the prevailing barriers individual students face and generalize the sanctions imposed upon these children (Cunningham & Sanzo).

As the focus of research seemed to reveal the impacts of high stakes testing policies on minority and economically disadvantaged students, qualitative data was necessary to determine the experiences of these students as the policies were

implemented and student consequences were delivered. Researchers Roderick and Engel (2001) conducted a qualitative study to examine the effects of high stakes testing policies on student motivation, particularly for lower achieving students predominately of African American or Latino heritage.

The data were analyzed and the students were into two groups: those that were in the "high work effort" (Roderick & Engel, 2001, p. 217) category and those in "no substantial work effort;" "substantial home or skill problems" (p. 218) was analyzed as a subgroup of group two. The students in this subgroup were facing multiple barriers both in and out of school that affected their performance and work effort. The test results indicated an overall pass rate of 80% for the students in the "high work effort" category and a 36% overall pass rate for students in the second category and its subgroup. Similarly, authors Madaus and Clark (2001) supported this evidence in their analysis of data. They concluded "...advocates of the motivational potential of examinations have not paid enough attention to who will be motivated and who will not... [and] that all students, regardless of grade level, circumstances, context, and individual differences, were expected to attain" (Madaus & Clark, p. 9).

Although *A Nation at Risk* (1983) expressed concern regarding the effect of this testing practice on vulnerable populations, the press for wide-scale standardized testing continued and the unintended consequences for certain groups of students began to impact the entire educational system. The courts had become a means of restoring justice to an accountability system that was having an adverse effect on particular groups of students.

Some students represented in cases may have already been subjected to segregation practices or inferior educational opportunities. The effects of these issues created a disadvantage for these students in regard to successful completion of mandatory testing practices. Many states' results from state testing programs indicated disparities in passage rates for particular subgroups of students (Moran, 2000). The literature reveals consistent findings in empirical data that suggested that minority and economically disadvantaged students were less likely to meet graduation requirements than white students and were more likely to earn alternative credentials (Borg et al., 2007; Carnoy & Loeb, 2002; Dorn, 2003). Borg et al. (2007) contended that strong evidence suggested accountability systems might have increased the achievement gap between white students, and black and Hispanic students.

With the courts upholding the liberty and property interest of a diploma in the *Debra P. v. Turlington* case, the use of these tests to deny diplomas fell under legal scrutiny. As more cases were brought to court, the examination of the use of testing to make high-stakes decisions revealed the basis for other unfair practices. One practice was the use of the results of standardized testing as the sole criterion to make high stakes decisions such as denial of promotion or graduation. Critics argued that the tests were not developed to be used for this purpose and therefore were invalid as a means of denying a diploma (Moran, 2000). Moreover, the lack of empirical evidence that the tests were valid instruments to make high stakes decisions resulted in incorrect inferences regarding student promotion, retention and the awarding of a diploma (Smith & Fey, 2000).

Opponents of the use of high stakes testing argued that a single score was only a partial perspective of student achievement as a test could only measure "a single aspect of

a construct" (Moran, 2000, p. 37), and that using one test result to make high stakes decisions did not take into account the students' past academic performance prior to the test (Moran).

High stakes testing policies have created cause for concern, controversy, and court reactions to litigation as a means of attempting to resolve a political, social and educational issue. Differing public sentiment regarding the use of tests for certain subgroups of students continued to feed an undercurrent of tension between those who supported high stakes testing and those who were in opposition (Lay & Stokes-Brown, 2008). Moreover, threatened state sanctions under NCLB translated into higher accountability for students with the denial of diploma as a means of motivating students to learn. The application of educational policies such as high stakes testing has often been legitimized in the courts. In order to understand the constitutionality of the implementation of the tests, an analysis of the case law was needed. The results of this analysis would help create a historical framework to guide future policy implementation and to clarify the caveats under which testing policies support the objectives of public education without constitutional violations. The literature has revealed specific issues relating to high stakes testing policies; a further examination of this issue was warranted to help clarify some of the legal issues, and consequences of continuing to use this policy as a sanction against students.

Summary

The studies discussed in this chapter represented the foundation of empirical data regarding the policy framework established by *A Nation at Risk* (standards/increasing graduation requirements) and *NCLB* (testing and accountability/increasing graduation

rate). To address the policy mandates mentioned above, a synthesis of the research findings were presented. First, the policy for increasing graduation requirements in response to *A Nation at Risk* was addressed. A synthesis of these studies indicated that an increase in graduation requirements led to an increase in dropout rates particularly for minority and low SES students (Lillard & DiCicca, 2001). Furthermore, the results of the research suggested that an increase in graduation requirements contributed to an overall decline in college enrollment (Bishop & Mane, 2001). However, the research also revealed although some students dropped out, many students earned GEDs, an alternative to high school credentials.

Some studies reported mixed student outcomes as the result of high stakes testing practices. Bishop et al. (2000) indicated higher student achievement associated with an increase in graduation requirements but also found a higher dropout rate. They contended that the dropout rate was not significantly different from that of other states with similar demographics. The policy established by the NCLB Act of 2001 required states to increase their graduation rates in order to satisfy the AYP mandate. The empirical evidence was consistent regarding dropout rates for minority and low SES students. In states that require high stakes tests for a diploma, minority and low income students were more likely to drop out after the implementation of a high stakes testing program (Amrein & Berliner, 2002; Jacob, 2001; Madaus & Clark, 2001). Students with lower grade point averages were also more likely to drop out than students with higher GPA's (Bishop & Mane, 2001). From a more positive perspective, students from states that required high stakes testing, an increase in test scores translated to a lower dropout rate, and those students who persevered and stayed in school earned five percent more income after

graduation (Carnoy et al., 2001). There are no conclusive results indicating that high stakes testing policies had a negative or positive effect on graduation rates. Neither could researchers agree on whether high stakes testing policies have had an impact on other national test scores such as the NAEP, SAT, or ACT tests. Furthermore, researchers did not determine whether high stakes testing policies increased student motivation. One certainty was that high stakes testing policies have affected minority and low SES learners to a larger degree than non-minority learners (Amrein & Berliner, 2002; Jacob, 2001; Madaus & Clark, 2001). In addition, these policies also affected the decision-making of educational leaders at the state, district and school level as these mandates continued to hold educators and students accountable for educational outcomes.

CHAPTER 3

Methodology

All 50 states function under a unique governmental framework established by the United States Constitution, each state's own constitution, as well as federal and state statutes (Kunz, Schmedemann, Bateson, Downs, & Erlinder, 1992). As discussed in the previous chapter, the Constitution gave each state the authority to regulate its own educational system. Under this framework, the interpretation and application of high stakes testing policies have been varied, and have resulted in a plethora of unique cases with informative, but conflicting, rulings. An analysis of these cases and rulings revealed the specific issues incurred as the result of high stakes testing policy implementation. Furthermore, the application of the policy under law resided in the context of the previously mentioned legal framework as well as the current case law. This context forms the foundation of judicial interpretation and legal understanding as illustrated by Kunz et al. in the following statement "...Without a context, the law is difficult to understand" (1992, p. 17). This study aspired to inform educational leaders, stakeholders, and the general public of the historical framework of the law regarding this policy and the appropriate Constitutional application of the law. The analysis of case law revealed specific claims of violations and judicial interpretations, as well as the evolution of the case law through this framework, which contributed to the understanding of the legal context of the policy.

In addition to the Constitutional and statutory laws of each state, it was important to understand the guiding principles established in case law or common law. "The fundamental goal of case law research is to find binding precedent, or to find the most

persuasive authority available" (Kunz et al., 1992, p. 13). "Because of precedent, judges and other decision-makers are bound to apply existing well-reasoned principles..." (Kunz et al., p. 37). The principle of s*tare decisis* is the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when similar arguments arise in litigation (Garner, 2004). The principle of *stare decisis* implied that the interpretation and application of law is uniform. However, "the law is not a static entity. It is flexible and adapts to changing conditions, needs, and norms of society" (Kunz et al., 1992, p. 138). Theoretically, this flexibility in the law lends support to the concept of a legal evolution of common law regarding issues such as high stakes testing. As the court cases were presented, the rulings were guided by previous courts' interpretations and decisions. It was important to include a descriptive analysis as each case presented a differing set of variables. In addition, the details of the relevant case law contributed to insight as to the broader legal application of high stakes testing policies.

This study intended to construct an understanding of court cases published in legal compilations, and focused on the issues imbedded in the differentiation of selected educational practices implementation, which in some instances, violated student rights. The analysis of each state's high stakes testing litigation aspired to reveal a historical caption outlining details relevant to student rights and implementation issues to help clarify future educational policy ambitions. Specifically, this study addressed the following research questions.

1. What issues related to high stakes testing and the denial of diplomas were revealed in state and federal case law within the 1979-2012 timeframe?
2. Were the issues distinctive based upon regular education or special education

students?

3. What differences were revealed within the case law rulings regarding those in favor of the students and those in favor of the educational agencies?
4. What differences existed between the case law according the geographical regions as defined by regions in published court reporters and listed as follows: Northeastern, Northwestern, Southeastern, Southern, Southwestern, Pacific, and Atlantic regions?

Data Collection

The data in this study consisted of federal and state case law from the timeframe, 1979-2012, resulting in the denial of diplomas for graduating seniors based upon a high stakes testing policy. The 1979 date stemmed from the initial case revealed in the analysis thus constituting the beginning of the case law. This study was limited to cases tried in the federal district and appellate courts, as well as the state appellate courts. As the data were accessible through public records, this study was exempt from the Internal Review Board for research with human subjects. The researcher used electronic databases such as Lexis-Nexis Academic, Westlaw Pro, Google Scholar, and Findlaw, as well as court reporters in bound volumes of case law to access the court opinions. The electronic databases were searched using the following key words established a priori: high stakes testing, high stakes assessment, minimum competency exams, denial of diploma, high school exit exams, and graduation requirements. The researcher then accessed the Center for Educational Statistics database to identify states that required the successful completion of a state assessment as a criterion for the awarding of a diploma. The states that required the test were listed as well as the name of the assessment to expand the

keyword list to increase the breadth of the search. This keyword list was selective, not inclusive of all states as the keyword list only included those states that required the test as a criterion for a diploma. The previously mentioned electronic databases were searched using this expanded key word list specifying the name of each state's test which resulted in the identification of more cases. Table 2 presents the expanded key words based upon each state's particular assessment that were used to conduct additional database searches.

Table 2

High Stakes Assessment by States

State	Test
Alabama	Alabama High Graduation Exam
Arizona	Arizona Instrument to Measure Standards (AIMS)
California	California High School Exit Exam
Georgia	Georgia High School Graduation Tests (GHSGT)
Idaho	Idaho Standards Achievement Test (ISAT)
Indiana	Indiana Graduation Qualifying Exam
Louisiana	Graduation Exit Exam
Maryland	Maryland High School Assessment (HSA)
	Graduation Exit Examination (GEE)
	Graduation Qualifying Exam (GQE)
Massachusetts	Massachusetts Comprehensive Assessment System (MCAS)
Minnesota	Graduation Required Assessment for Diploma (GRAD)
Mississippi	Mississippi Subject Area Testing Program (SATP)
	Graduation Required Assessments for Diploma(GRAD)
Nevada	High School Proficiency Exam (HSPE)
New Jersey	New Jersey High School Proficiency Assessment (HSPA)
	High School Proficiency Examination (HSPE)
New Mexico	New Mexico High School Competency Examination
New York	New York Regents Examinations
North Carolina	North Carolina Competency Tests
Ohio	Ohio Graduation Tests (OGT)
Oklahoma	Oklahoma End-of-Instruction (EOI)
South Carolina	South Carolina High School Assessment Program (HASP)
Tennessee	Tennessee Gateway Examinations
Texas	Texas Assessment of Knowledge and Skills (TAKS)
	Texas Assessment of Academic Skills (TAAS)
Virginia	Standards of Learning (SOL)
Washington	Washington Assessment of Student Learning (WASL) High
	School Proficiency Exam

Another important source for finding primary case law was a multivolume index called a digest that arranged the legal topics alphabetically with cases involving the topic referenced. The researcher searched the Educational Law digest for any pertinent cases; however, this search resulted in cases already located via the electronic searches. Additionally, the researcher read each case thoroughly to reveal any additional cases mentioned in the court documents to determine any releveant cases that did not result through the database searches.

Data Analysis

The researcher applied content analysis in an investigation of case law, a primary source of law. Content analysis is a qualitative research method defined as "the study of particular aspects of the information contained in a document, film, or other forms of communication" (Gall, Gall & Borg, 2003, p. 621). Krippendorf (2004) defined content analysis as "a research technique for making replicable and valid inferences from texts...to the contexts of their use" (p. 18). Krippendorf explained that content analysis "views data as representations not of physical events but as text, images and expressions that are created to be seen, read, interpreted and acted on for their meanings..."(p. xiii). Schwandt stated, "Researchers can regard a text as an object suitable for analysis" (2001, p. 250). He further described qualitative data analysis as the "activity of making sense of, interpreting, or theorizing data" (p. 6). Rossman and Rallis (2003) described the process of content analysis as "the systematic examination of forms of communication to objectively document patterns" (p. 198). The content analysis process used in this study included creating a set of codes, shown in Table 3, systematically applying the codes to the published case law, checking the codes for accuracy, analyzing the codes for

emerging themes, and analyzing these themes for similarities and differences (Rossman & Rallis; Schwandt, 2001).

Table 3

Identification of Coding as Per Issue

Issue	Axial Themes
Equal Protection	English Language Learners
	Minority Students
Due Process	Procedural
	Substantive
Fundamentally Fair Test	
Alternative Test	
Opportunity to Learn:	Remediation
	Multiple Opportunities to take test
Special Education IDEA	
No Single Criterion for Graduation:	
Judicial Reluctance:	
State and Local Authority: Nexus to State Goals	
Free Exercise Clause	

For this study, case law was qualitatively analyzed for the purpose of interpreting the state implementation of high stakes testing, and the legal issues presented to the courts for judicial intervention. For questions one, two, and three, the cases were qualitatively analyzed though coding case law by assigning codes a priori aligned with

the research questions. Strauss and Corbin (1998) defined coding for process as "sequences of evolving action/interaction, changes in which can be traced to changes in structural conditions" (p. 163). The process of the courts interpreting the law forms the evolutionary current for the historical analysis of judicial decision-making. Coding for data analysis provided the process of defining the similarities in the "...series of evolving sequences of action/interaction that occur [within the data'..." (p. 165). In order to conduct coding for process, the strategy of open coding was used. Strauss and Corbin defined open coding as "the analytic process through which concepts are identified and their properties and dimensions are discovered in the data" (p. 101). The resulting concepts and their properties and dimensions were categorized according to the emerging themes illustrating the similarities and unique aspects presented in each case. These themes revealed consistencies and inconsistencies in the courts' interpretation of the interaction of law with policy. The codes were expanded as new coding segments emerged and generated new categories of issues presented to the courts. The analysis of cases intended to provide a detailed history of court interpretation and policy caveats as guides for future policy implementations. As the case law revealed the need for more detailed categorization, it was necessary to employ axial codes to produce subcategories. Axial coding was defined as "the process of relating categories to their subcategories...linking categories at the level of properties and dimensions" (p. 123). In addition, relative to question four, the cases were categorized as from which geographical region they stemmed. The geographical regions, displayed in Table 4, were aligned with the state and federal court system encompassing the Northeastern, Northwestern,

Southeastern, Southern, Southwestern, Pacific, and Atlantic defined by the published volumes of court reporters.

Table 4

Judicial Regions

Northeastern Region	Northwestern Region	Southeastern Region	Southern Region	Southwestern Region	Pacific Region	Atlantic Region
Illinois	Iowa	Georgia	Alabama	Missouri	Alaska	Connecticut
Indiana	Michigan	North Carolina	Florida	Arkansas	Arizona	Delaware
Massachusetts	Minnesota	South Carolina	Louisiana	Tennessee	California	District of Columbia
New York	Nebraska	Virginia	Mississippi	Texas	Colorado	Maine
Ohio	North Dakota	West Virginia		Kentucky	Hawaii	Maryland
	South Dakota				Montana	New Hampshire
	Wisconsin				Nevada	New Jersey
					New Mexico	Pennsylvania
					Oklahoma	Rhode Island
					Oregon	Vermont
					Utah	
					Washington	
					Wyoming	

Summary

High stakes testing has affected students, educators, and stakeholders by enforcing minimum student achievement standards on all students as a *one-size-fits-all* model. Although many factors have evolved into issues concerning high stakes testing, three questions remained in the literature were:

1. What did an analysis of the state and federal case law reveal about this practice?
2. How did it affect the larger goals of education as per students or subgroups of students?
3. How did this policy evolve as a result of the relative litigation?

This researcher aspired to provide an interpretation of a framework embedded in the case law resulting from high stakes litigation. Using qualitative research methods and content analysis of published cases, the researcher hoped to inform the field as to the consistencies and inconsistencies in court opinions involving high stakes testing legal proceedings. The coding process determined the categories and subcategories of cases to create the framework of case law, and to simplify the plethora of case law data to inform policy makers as to the impact of high stakes testing policy implementation.

CHAPTER 4

Analysis of Results

High stakes testing case law has played an important role in the evolution of the implementation of state assessment and accountability practices. Court rulings in the earliest cases established caveats as to the constitutionality of the denial of a high school diploma as the result of a student's failure to pass an exit exam. As cases filtered through the courts, specific facets of case law were extracted and established as fundamental to the application of law. Each new ruling clarified the interpretation as to the constitutionality and fairness of high stakes testing. These court interpretations, embedded deliberations, and rulings developed the framework for the case law that will influence the judicial interpretation of subsequent litigation. In order to facilitate an understanding of the evolution of the case law, a historical presentation of the chronological timeline preceded the analysis and results. The analysis of individual court documents revealed specific issues in each of the cases, the courts' interpretations of the law as applied to these issues, similarities and differences among cases involving students and their unique needs, and distinctions among the rulings in each of the judicial regions.

As cases were brought before the courts, certain recurring issues were contested by the plaintiffs and the defendants, establishing themes relating to the implementation of high stakes testing policies. These themes were analyzed with regard to the courts' application of constitutional and state law as well as the established case law blanketing the application of the policies.

Research Questions

In this study, the issues were first extrapolated using content analysis and coding of the data. Next, the thematic data were combined. The themed issues were then examined by comparing and contrasting the similarities and differences among the court rulings as well as pertinent unique data. The research questions guided the analysis to generate the discussion and the presentation of the themes in the context of the varied yet similar issues presented to the courts; issues relating specifically to students with special needs; similarities and differences in the cases categorized by prevailing party; and the comparing and contrasting of cases in differing judicial regions. The research questions were as follows:

1. What issues related to high stakes testing and the denial of diplomas were revealed in state and federal case law within the 1979-2012 timeframe?
2. Were the issues distinctive based upon regular education or special education students?
3. What differences were revealed within the case law rulings regarding those in favor of the students and those in favor of the educational agencies?
4. What differences existed between the case law according the geographical regions as defined by regions in published court reporters and listed as follows: Northeastern, Northwestern, Southeastern, Southern, Southwestern, Pacific, and Atlantic regions?

Analysis of Applicable Case Law

As the themes emerged through the analysis, the specifics of each case became relevant features of the actions and rulings of the court. This researcher found it

necessary to include many of these details to aid in the understanding of the court rulings since each case was unique and varied in its circumstance. An explanation of the issues without this supporting evidence would not have facilitated the development of a framework, nor provided a clear understanding of the outcomes of the cases. As the research questions were discussed, details of the policy implementation history emerged and interesting points were noted. The intent of this analysis was not only to deepen the understanding of the evolution of the case law, but also to highlight the significant aspects of high stakes testing policies in public education.

A comprehensive search of multiple databases, educational literature, legal literature, and case law resulted in 41 cases involving exit exams at the state and federal level. The cases were selected based upon their nexus to the issue of the denial of a diploma due to the failure of a state assessment or exit exam. Although many of the cases were continuations of previous cases or *nested cases*, each different level of court reexamined and reconsidered the issues revealing new interpretations. Once the initial analysis began, this researcher found it necessary to track cases as they emerged through the court of origin, the appeal process, and final rulings until the parties no longer requested judicial intervention, the cases were dismissed, or the cases were settled out of court. The rational for this approach resided in the case law evolution. The initial filing of the case may have included multiple complaints by plaintiffs. It was necessary to follow the cases through the courts until settlement of the issues to investigate the outcomes of some of these issues as they were challenged at each level of the courts. The additional rulings contained significant details of case law, which gave a rich texture to the analysis. In addition, the case details deepened the discussion of the evolution of the case law and

the impact of high stakes testing policies on students, parents, schools, and other stakeholders. In a broader scope, these details were needed to develop the understanding of subsequent court rulings and the framework resulting from the continuation of the case law.

Specific issues were brought to different levels of the courts. The protocol for court intervention revealed in the analysis required initial administrative hearings by the State Board of Education, which, upon unsatisfactory rulings, were then brought to the judicial system to request legal intervention. Cases involving claims of constitutional violations were heard in the Federal District Courts and some were appealed to the Federal District Appellate Court. Several cases were heard in the State Supreme Courts and one resulted in a petition to the United States Supreme Court. As of 2012, no case regarding high stakes testing and the denial of a diploma was reviewed by the United States Supreme Court.

The results of differing levels of judicial rulings were varied and are explained in this analysis. Many cases were remanded back to the lower courts for further review and actions. Some lower court rulings were upheld by the appellate court, others were overturned and other cases were dismissed. Several court rulings were contradictory to other court rulings. These variances added interest and complexity to the analysis and are discussed later in each relevant section of this chapter.

Summary of Cases Reviewed

Of the states requiring exit exams as a criterion for receiving a diploma, litigation has been brought in 14 states. The states of Alaska, Arizona, California, Florida, Georgia, Indiana, Illinois, Kentucky, Louisiana, Massachusetts, Minnesota, Oregon, New York,

and Texas have had litigation filed in state or federal courts. The cases *Noon et al. v. Alaska State Board of Education and the Anchorage School District* (2004); *Kidd v. California Department of Education* (2008); *Superior Court of California County of Alameda and Valenzuela v. O'Connell* (2007) and *Advocates for Special Kids v. Oregon* (2001) were cases settled out-of-court and lacked judicial rulings. However, some information was extrapolated via the settlement agreements of the parties that were approved by the courts.

One of the many elements revealed in the case law were the differences in cases relating to students with disabilities and cases involving regular education students. Students with disabilities had unique learning needs and were protected by additional federal legislation. The Rehabilitation Act of 1964, The Elementary and Secondary Education Act, The Individuals with Disabilities Act (IDEA) of 1973 as well as subsequent reauthorizations of IDEA all undergirded the constitutional and state laws affecting high stakes testing policies. As the cases involving students with special needs filtered through the courts, the unique needs of students were applied, and court decisions were made according to the protections encased in these laws. Therefore, these applications of law differed somewhat from the applications of law concerning regular education students. In addition, cases involving minority and English Language Learners also revealed a theme worthy of discussion, based upon Title VI and Equal Education Opportunities Act legislation, which protected subgroups of students from discriminatory educational practices.

In most cases, the courts determined a prevailing party as an outcome of the case. However, the prevailing party was usually specific to the individual issues that were

embedded in the cases. The rulings on each issue were discussed as per the themes to illuminate differences and similarities in judicial rulings as per the issue by prevailing party. Finally, as cases were brought before different courts, judicial differences were found as the result of historical, political, and regional issues affected the qualitative details of each case. Therefore, an analysis of the differences in the rulings at each level of the courts as well as the different judicial regions served by the courts was conducted and discussed in the following sections.

Chronological History of Case Law

As the case law evolved through a chronological sequence of cases, this researcher determined that it was necessary to provide a context for each case. The case participants, history of testing policies, and individual state legislative educational provisions, impacted the overall case law. Therefore, a preliminary summary of each case was presented in chronological sequence providing a historical context of the cases to support the overall understanding of the analysis.

Cases from 1970-1979

The first case that documented the controversy regarding state assessments and perhaps inspired the subsequent landmark case of *Debra P. v. Turlington* was brought before the District Court of Appeals of Florida, First District in March 1979. The case of *Florida State Board of Education and Ralph D. Turlington v. Brady,* was brought to the court by the Florida State Board of Education and the Commissioner of Education, Ralph Turlington, with a request to review the final order of a Florida Division of Administrative Hearing Officer regarding the validity of the scoring criteria used for the state assessment. The original hearing was brought by the father of an eleventh grade

student who had passed the state mandated functional literacy test but failed two parts of the basic skills test. The area of deficits were identified and remediated, and the student had an additional opportunity to pass the test prior to being denied his diploma. The student's father, John Brady, filed a request for a state level hearing based upon the claim that the scoring standard was not set by the state legislators but instead was determined by the State Education Commissioner. The Hearing Officer ruled in favor of the student that the scoring standard was invalid due to the fact that the scoring standard was not promulgated by the state legislature during the contemplation of the Florida State Statutes, Chapter 120, the Administrative Procedure Act (*Florida State Board of Education and Ralph Turlington v. John Brady,* 1979).

The State Board of Education therefore brought the case to the Appellate Court. The case was reviewed by the Court of Appeals of Florida, First District in July of 1979 (*Florida State Board of Education and Ralph D. Turlington v. Brady*). The Appellate Court ruled that by including language in the state statutes directing the state to administer a statewide uniform program of assessment, the state was within its authority to enforce additional requirements for graduation. The language in the statute also compelled the state to periodically measure the educational status, progress, and the degree of achievement of the approved state minimum competency standards (*Florida State Board of Education and Ralph D. Turlington v. Brady*).

Subsequently in July of 1979, the parent filed an appeal under the case name *John Brady v. Turlington* challenging the District Court of Appeal's ruling that the scoring standard was valid. The Court of Appeals affirmed the previous ruling establishing the scoring criteria on the state test as valid and not in violation of due process procedures as

the determination of the scoring standard was within the state's authority (*Brady v. Turlington,* 1979). These cases cast a legal light on the Florida State Assessment Program perhaps illuminating the path for the following seminal case that was also brought before the Florida courts.

An analysis of the legal history of cases involving high stakes testing would not be complete without a thorough explanation of the seminal case of *Debra P. v. Turlington,* (1979). This case resulted in the first major decision of the courts regarding the denial of a high-school diploma as the result of students failing to pass state mandated competency testing. This case has influenced all subsequent cases brought before the courts.

As a component of the Educational Accountability Act of 1976, the Florida Legislature enacted Florida State Amendment §229.55 (2)(a), (d), and (f), to ensure that a system of accountability was in place to guarantee that the public school system provided an instructional program that met minimum standards set forth by the state. The Florida Functional Literacy Examination, hence mandated in Florida Statute §229.57, was implemented with the intent of improve the operation and management of the state's public education system. Furthermore, Florida State Statute §232.246 called for the establishment of requirements or standards for the successful completion of public schools and the awarding of the high school diploma as a symbol of meeting the state defined standards. Additionally differentiated diplomas were established as a means of qualifying the level of standards met. The standards established statewide minimum performance limits in the core subject areas of reading, writing and mathematics for students in the eleventh grade.

Furthermore, students were expected to demonstrate the ability to apply basic skills measured by a functional literacy assessment, and the completion of a minimum of academic credits. The State Student Assessment Test Part 2 (SSAT II) was first administered in 1977, and continued in 1978 and 1979. The results of the first administration resulted in a 36% failure rate (41,724 of the 115,901 students who took the test). In the disaggregation of the data, 78% of students of color failed the test as compared to 25% of Caucasian student failures. The subsequent administrations of the test resulted in similar disparities for students of color with failure rates ten times that of Caucasian students. Based upon these data, a group of students petitioned the court requesting an injunction against requiring the exam as a criterion for the issuance of a diploma. Tthe students petitioned against the use of the exam results to structure remediation classes, which could have potentially resulted in the re-segregation of public schools. Ten African-American students brought this case to the United States District Court for the Middle District of Florida, Tampa Division on July 12, 1979. Their claim was that the state requirement of the assessment violated their Constitutional due process and equal protection rights based upon the fact that they did not receive adequate notice of the examination as a requirement for graduation, and therefore did not have adequate time to prepare for the test. In addition, the assessment would perpetuate the discrimination resulting from the previous practice of segregating schools (*Debra P. v. Turlington*, 1979).

The District Court ruled that due to the previous segregation (1967-1971) in Florida's schools, the testing policy was a violation of the students' equal protection rights. The Court determined the administration of the test and resulting sanctions for

students would further perpetuate past discrimination. However, the court stated that test itself served a legitimate state interest in improving education for the public, and only the intended use to deny diplomas to students who did not pass the tests violated the students' due process rights. The court further determined the students had a property right in the expectation of a diploma, and the amount of time given of diploma sanctions was inadequate, and therefore unconstitutional. These two factors, the student property interest in the awarding of a diploma as well as adequate notice of the testing policy, would set the stage for future litigation regarding the implementation of exit exams (*Debra P. v. Turlington*, 1979). As the decade closed and a new one began, additional litigation was presented to the courts for adjudication. The following table presents the three cases heard in the courts from 1970-1979.

Table 5

Cases from 1970-1979

Date	Case
1979	*Florida State Board of Education and Turlington v. Brady*
1979	*Debra P. v. Turlington*
1979	*Brady v. Turlington*

Cases from 1980-1989

The decade from 1980-1989 witnessed the perpetuation of the *Debra P. v. Turlington* case as well as seven other cases. First, the case of *Wells v. Banks,* (1980) was brought against the Georgia State Board of Education as well as the local school board, challenging the implementation of minimum competency standards of student achievement as a graduation requirement. The mandated assessments began in the

students' ninth grade year as a requirement of successful completion prior to receiving the diploma. The plaintiffs contested to both the state and local boards, which upheld the graduation requirement. The plaintiffs then sought the intervention of the Superior Court of Georgia, which affirmed the state's right to test and sanction students. The plaintiffs appealed, which resulted in the court's continued support for the state and local boards and affirmed the Superior Courts ruling. The rational for the ruling resided in the court's belief that the State Board of Education was within its authority to establish minimum competency standards for the public schools and to uphold those standards. In addition, the State Board of Education's policy specifically indicated the authority of the local Boards of Education to impose additional or enhanced standards (*Wells v. Banks,* 1980).

In 1980, the *Love v. Turlington* case was brought before the United States District Court for the plaintiff by Renita Love. The student, on behalf of others similarly situated, petitioned the U. S. District Court for the Middle District of Florida to receive class certification for litigation regarding the state's high school exit exam. In the case of *Love v. Turlington* (1980), the District Court denied awarding the class certification

The case of *Debra P. v. Turlington* was brought back to the courts in May of 1981 in an appeal by the Commissioner of Education on the contention that the former court has erred in its ruling. Ralph Turlington claimed that the test did not violate the students' due process rights and that adequate notice was given to the students. In addition, he contended that the test was a valid instrument of assessment and that the court erred in establishing a property right in the expectation of receiving a diploma. The United States Court of Appeals for the Fifth District ruled on the case. Although an increase in pass rates for minority students was presented in the case, the court held that the state could

not deny diplomas until it had determined fundamental fairness as to the curricular validity of the test. The court's ruling was meant to ensure that the discriminatory impact was not the result of the educational deprivation of students during the dual system of education that had previously existed in the state (*Debra P. v. Turlington*, May 1981). As the interest in the case continued, a member of the Court of Appeals requested a poll of the judges to reconsider the case en banc. The majority of judges voted against the rehearing en banc with two judges dissenting (*Debra P. v. Turlington*, September, 1981).

In 1983, the students in *Debra P. v. Turlington* filed a class action suit against state level officials and the State School Board of Education. The case was again heard in the United States District Court for the Middle District of Florida, Tampa Division in order to determine the constitutionality of the literacy test requirement. This case focused on the curricular validity of the test as the state needed to ensure that the content of the test was actually taught in the state's schools. In order to examine this issue the state commissioned a private consulting firm to design a study to investigate the curriculum content taught in the schools. The study consisted of four components: a teacher survey, a school district survey, a series of site visits for verification of report accuracy, and a student survey administered during the site visitations in eleventh grade English and social studies classes. Expert witnesses were called to report on the data and the resulting court discussions offered many new questions regarding the issues of fairness, adequacy, and sufficiency as compared to what was considered constitutional. Instructional validity became a focus of the court's discussion and was determined to be a component of the curricular validity.

The court ruled that the evidence presented indeed satisfied the overall curricular and content validity requirement. The court noted that it would have been impossible to determine if each student had a fair opportunity to learn the material on the test, but the overall instructional program of the state addressed the content on the test. As the Constitution has never mandated the singular level of result per student, the court ruled that the state had met the burden of proof that the skills assessed on the test were included in the state's curriculum, and that teachers were indeed teaching the necessary skills as deemed essential by the state. Therefore, the court ruled that the state had the right to withhold diplomas for those students who did not pass the exams primarily based upon the multiple chances and remediation students were given. In addition, the court considered that the state had allowed students to stay in school for an additional year to receive remedial instruction to assist them with assessment deficits thereby giving them subsequent opportunities to learn (*Debra P. v. Turlington*, 1983).

The next year, the *Debra P.* plaintiffs requested a review by the United States District Court of Appeals for the Eleventh District to examine the previous judgment as to the validity of the state mandated assessment. The plaintiffs claimed that the disportionality of the pass rates for Caucasian and students of color was unconstitutional. However, upon reexamination, the Court of Appeals affirmed the district court's ruling based on the findings that (a) the students were taught the skills on the test, (b) the use of the test as a diploma sanction would help to remedy the vestiges of the past segregation practices, and (c) the past segregation practices were not found to be causal of the disproportional failures of students of color (*Debra P. v. Turlington,* 1984). The court noted "the state need not correct all the problems of education in one fell swoop and it

has a stronger interest in those for which it pays the cost" (*Debra P. v. Turlington*, 1981, p. 407). As a result of this landmark case, other plaintiffs sought the judicial intervention from the court in regard to the Constitutionality of state mandated, high stakes tests. The sometimes simultaneous and subsequent legal chronology is presented in the following paragraphs.

The next case to be filed in court was *The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach* (1981). In this case, the Board of Education of the Northport-East Northport Union Free School District award diplomas to two high school students with disabilities. One student was a 20 year old female and the other was a 21 year old male, each with a severe learning impairment. Abby, the 20 year old female student was recommended for graduation in 1978, but her parents requested that she remain in school to allow her to participate in a vocational program. Both the state-mandated reading and math tests were administered to her. Abby successfully passed the reading test but did not pass the math exam. Neither test was administered to the male student Richard. As the testing requirement was not imposed until 1979, Abby could have earned her diploma in her initial recommended graduation year, 1978. Both students were recommended for graduation based upon the completion of the goals specified by the Individualized Education Plans (IEP), and were approved to receive their diplomas by the local Board of Education.

The State Board of Education notified the local board that the issuance of the diplomas was in violation of the new state code, and by order invalidated the students' diplomas. Further, the state board demanded the names and addresses of any student on which the local board had conferred diplomas. The local board president refused to

submit the names of the students who had received the diplomas without meeting the state requirements. The local board sought to enjoin the State Board of Education Commissioner from enforcing the state order and requested that the court validate the diplomas that were issued on the basis of equal protection and the due process clauses of the United States Constitution. The petitioners claimed that the diplomas were valid, and that the requirement of the successful completion of state assessments was in violation of Section 504 of the Rehabilitation Act of 1973 (*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach*, 1981).

As established in the *Debra P. v. Turlington* case, the students in *The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach* did have a vested property interest in receiving their diplomas therefore invoking due process rights. Again, relying heavily on the *Debra P. v. Turlington* case, the court referred to the precedence of the adverse effect on the students as a basis for weighing the importance of the issuance of diplomas. Further, the court questioned the concept of functional literacy and the lack of a universally accepted definition of such. The court illustrated that within the context of the evidence presented in this case, there were multiple and varying definitions of functional literacy. The court found that the IEPs of both students did not contain goals to specifically pass the state mandated assessments. As the testing requirement was just implemented three years prior in 1976, the IEP goals designed for both students did not prepare them adequately to pass the exams. On this basis, the State Supreme Court ruled on the case that the requirement for the successful completion of the state assessment was a violation of the students' due process rights and therefore enjoined the State Board of Education from revoking the diplomas (*The Board*

of Education of the Northport-East Northport Union Free School District et al., v. Ambach, 1981).

Continuing with the case chronology, a group of minority students filed a suit in June 1981 against the Tattnall County School District for due process and equal protection violations regarding the denial of diplomas to the students who did not pass the local school board exit exam. This case was restyled from the previous *Wells v. Banks* case and named *Anderson v. Banks; Johnson v. Sikes*. The courts considered the recent ruling in the *Debra P. v. Turlington* case regarding the implementation of exit exams and the prior history of segregation in public schools. This school district already had a criterion-referenced test (CRT) in place to annually evaluate specific skills. However, the local school board also wanted to ensure that their graduates were able to compete on a national level and sought to implement a norm-referenced test. The school district adopted the policy of implementing a norm-referenced assessment in 1976, with notification given to parents and students in the same year. The policy also included the requirement of remedial instruction for those students who were not successful on the initial assessment. The school district selected the California Achievement Test (CAT) as the normed test, and established it as a criterion for graduation. The CAT was implemented during the 1976-1977 school year and continued in the 1977-1978 school year. Students who did not meet the benchmark of performing on a ninth grade level in reading and math were given remediation. In 1978, the requirement of achieving a ninth grade level became a criterion for graduation (*Anderson v. Banks; Johnson v. Sikes*, 1981).

The school district did not conduct a local validation study prior to adopting and implementing the CAT. The plaintiffs conducted their own local validation study and the results revealed that the CAT was not free from bias in Tattnall County. Other concerns of test validity, curricular validity, and reliability troubled the court. In an expert analysis of the test, many of the items on the test were considered invalid. In addition, the assessment was questioned by the court as testimony revealed that not all students, particularly those in the remedial classes, were taught all components of the curriculum. The reliability of the test was questioned due to the number of errors in the hand scoring of the tests with results from one school indicating a 58% error rate on math tests and a 20% rate of hand scoring errors on the reading test (*Anderson v. Banks; Johnson v. Sikes,* 1981).

Another fact that concerned the court was the high occurrence of misplacement of students of color in special classes for students referred to as educable mentally retarded (EMR). Court evidence indicated that students of color were placed in EMR classes almost four times as often as Caucasian students, and Caucasian students were five times more likely to be identified as having a specific learning disability (SLD) as opposed to being found EMR (*Anderson v. Banks; Johnson v. Sikes*, 1981).

The court ruled that the diploma sanction itself was not in violation of the Fourteenth Amendment as the racial impact was "foreseeable, but not actually foreseen: (*Anderson v. Banks; Johnson v. Sikes*, 1981, p. 94). However, the policy could not be considered without the history of the past de jure segregation. Many of the students, who were required to take the test, attended Tattnall schools under the previously segregated system. The court ruled that the exam requirement had a disparate impact on minority

students both for reasons of de jure segregation and the tracking system that violated their equal protection rights. As for the due process complaints, the courts ruled that the curricular validity of the test had not been established and therefore the exam requirement was in violation of the due process protections. The courts ruled that the exam requirement could not be imposed until all students who had experienced past segregation practices in Tattnall County had graduated, and until the district could demonstrate that the test was fair and valid (*Anderson v. Banks; Johnson v. Sikes*, 1981).

A related case was brought before the court in April of 1984 by one of the plaintiffs in the previous case. This nested case *Johnson and Wilcox v. Sikes* was brought before the United States Court of Appeals for the Eleventh District after the U.S. District Court ruling state above. The plaintiffs petitioned the court to review the District Court's ruling regarding the imposition of an exit exam as a requirement for high school graduation. The plaintiffs claimed that the exam requirement was discriminatory. The district court ruling indicated that the school district could reinstate the exams when the students who attended school in previous segregated situations had graduated, and if the district could demonstrate that the assessment to be used was fair and valid. The plaintiffs in this case sought the court's ruling to enjoin the Tattnall County School District from imposing the sanction on future students similarly situated. However, the students in the previous case were all awarded diplomas and therefore this appeal would have only concerned future students if the school district implemented the exam requirement sometime in later years. As this appeal addressed students who have received no injury, the case was not ripe for the court to review (*Johnson and Wilcox v. Sikes*, 1984).

As the chronological history of litigation continued for the decade of 1980-1989, the case of *Brookhart v. Illinois State Board of Education* was filed in the United States Court of Appeals for the Seventh Circuit in October of 1982. The plaintiffs were fourteen students with disabilities in elementary and secondary schools. They petitioned the court to review a ruling by the U.S. District Court for the Central District of Illinois on a local Board of Education's requirement that students pass a Minimum Competency Test (MCT) prior to being awarded a diploma. The plaintiffs claimed that the requirement was in violation of their equal protection and due process rights as well as the Education for All Handicapped Children Act (EHA), Section 504 of the Rehabilitation Act and Illinois State Statutes. The students also claimed that in order for the MCT to have been used as a requirement for graduation, it must have been validated as to the appropriateness for students with disabilities. The plaintiffs claimed that the test lacked construct validity. The construct validity of an instrument would indicate that it actually measured what it was intended to measure. Previously, in an administrative hearing, the State School Board ruled in favor of eleven of the plaintiffs on their claims of due process regarding adequate notice violations and ordered the local school board to award their diplomas. For this ruling, the District Court determined that the plaintiffs attending elementary school did not have a standing due to their not being affected by the test therefore their complaints were rendered moot. The remaining plaintiffs were notified in their junior year that they would be required to pass the MCT.

The District Court ruled that the denial of the diplomas was not a denial of a free and appropriate education as mandated in the EHA, as the students were receiving an education and services required under the Act but were unable to pass the test. Moreover,

the court determined an individual's inability to pass the test was not a violation of the students' rights. Therefore, the District Court overturned the order of the State School Board to award the diplomas on the grounds that no violations of due process protections had occurred (*Brookhart v. Illinois State Board of Education,* 1982).

In an appeal, the appellate court, considered the case differently. They ruled that adequate notice was not given to the students, and that the defendants' suggestion for remedy was for the students to take remedial classes and retake the exam. The court found that these students had already left school and many were employed, therefore attending remedial classes would present a hardship on them. Instead, the court ruled that the most appropriate remedy would be to order the local Board of Education to award the diplomas to the students. The court reversed the District Court's ruling and directed the Lower Court to order the school district to award the diplomas to students who had met all other requirements except the successful completion of the MCT (*Brookhart v. Illinois State Board of Education,* 1983).

The Love v. Turlington (1984) case remerged as an appeal to the U.S. Court of Appeals for the Eleventh Circuit requesting class status for students who were required to take the basic skills assessment in eleventh grade in the State of Florida. The basic skills exam was implemented to identify students at risk of failing and would potentially be denied their diploma. The students who did not pass the test were assigned remediation resulting in a disproportionately large number of students of color in the remedial classes. The plaintiff's complained that the use of the test perpetuated prior racial discrimination in a formerly segregated school system. The plaintiff also contended that inadequate notice was given prior to the test becoming a requirement for graduation (*Love v.*

Turlington, 1984). The U.S. Court of Appeals affirmed the District Court's ruling denying class certification to the plaintiff on the grounds that each school district was responsible for the remedial programs it provided and, therefore, a lack of commonality and typicality existed rendering the case ineligible for class certification (*Love v. Turlington*, 1984). The table below outlines the eleven total witnessed cases that were tried in the courts from 1980-1989.

Table 6

Cases from 1980-1989

Date	Case
1980	*Wells v. Banks*
1980	*Love v. Turlington*
May 1981	*Debra P. v. Turlington*
September 1981	*Debra P. v. Turlington*
1981	*The Board of Education of the Northport-East Northport Union Free School District et al., v. Ambach*
1981	*Anderson v. Banks; Johnson v. Sikes*
1982	*Brookhart v. Illinois State Board of Education*
1983	*Debra P. v. Turlington*
1983	*Brookhart v. Illinois State Board of Education*
1984	*Debra P. v. Turlington*
1984	*Johnson and Wilcox v. Sikes*
1984	*Love v. Turlington*

Cases from 1990-1999

The next case did not appear before the courts until the summer of 1992 when *Grump v. Gilmer Independent School District* was filed in the United States District

Court for the Eastern Division of Texas. The three student plaintiffs in this case petitioned the court to be able to participate in their graduation ceremony although they had not successfully completed the testing requirement for graduation and therefore were denied their diplomas. Two of the students had completed all other requirements for graduation except for passing the TAAS. The students requested a temporary restraining order so that they could participate in the graduation ceremony. Although they had not passed the TAAS for graduation, they signed affidavits that they would retake the exam on the next administration in July. However, the ceremony was to occur at 8:00 pm the evening of May 29th. The due process claim contained in the petition was based upon whether the students received adequate notice. The legal precedent established in prior cases indicated that adequate notice must have been given in order to constitutionally deny diplomas to students. In this case, the test was not a requirement until the fall of 1991 and remedial instruction did not begin until the spring of 1991. Therefore, these students who missed the cut score by two points did not have an opportunity for long-term remediation. Judge William Wayne Justice conducted an in-chambers hearing of both sides of the dispute. The request for a temporary restraining order required the court find that the plaintiffs would have prevailed on the success on the merits. The judge considered if the plaintiffs would have suffered irreparable harm, if the potential harm to the plaintiffs outweighed the potential harm to the defendant, and the temporary restraining order would not disserve the interests of the public. For the two students who had met all other requirements, Judge Justice continued the hearing. For the student who had not met all other requirements, the request for the temporary restraining order was denied (*Crump v. Gilmer Independent School District,* 1992).

Applying the ruling in *Debra P. v. Turlington* case as well as *Brookhart v. Illinois State Board of Education*, Judge Justice calculated the plaintiffs' likely success on the merits. Judge Justice considered that if the two plaintiffs were wrongly denied their diploma, then they would forever lose the opportunity to participate in a ceremony of celebration with their peers. The judge considered a graduation ceremony to be a "...celebration [of] profound personal achievement and hope for the future" (*Crump v. Gilmer Independent School District,* 1992, p. 554). Further, "...a student's high school graduation [was] the source of fond memories and treasured mementos and photographs that cannot be replaced" (1992, p. 554). In addition, Judge Justice ruled that the plaintiffs would have suffered irreparable harm and that it would have been of no harm to the school district to have allowed the students to participate in the ceremony. He did allow the school district to announce during the ceremony that the two students had not yet met the requirements for graduation (*Crump v. Gilmer Independent School District,* 1992).

Shortly after the ruling in *Crump v. Gilmer Independent School District*, the case of *Williams v. Austin Independent School District* (1992) was brought to the United States District Court for the Western District of Texas, Austin Division. Similar to the previously mentioned case, a plaintiff father sought a temporary restraining order for his son to participate in the graduation ceremony despite being denied his high school diploma. The plaintiff contended that his son's due process protections were violated on the basis that the student was not given adequate notice to pass the test and that the instructional program did not prepare his son for the test. The judge found in this case, that the student had knowledge of the test for seven years prior to the requirement for graduation. The high school principal's testimony indicated that all students were given a

high school guide which informed them of the test and that the teachers had frequently discussed the TAAS requirement with the students. The evidence also revealed that the school provided courses that adequately prepared the student for the test. The student had taken the test twice, once in 1991 and again in 1992 and failed the math portion of the test both times. Judge Sam Sparks denied the preliminary injunction on the grounds that the student would not succeed on the merits of the case as he had received adequate notice and was not wrongly denied his diploma (*Williams v. Austin Independent School District*, 1992).

On March 17, 1994, the case of *Rankins v. Louisiana State Board of Elementary and Secondary Education* was decided by the Court of Appeals of Louisiana, First Circuit. The defendant school board requested a review from the Appellate Court of the ruling of the District Court of the Nineteenth Judicial District, which granted a preliminary injunction against the Louisiana State Board of Education. The board had denied five students their diplomas based on the students failing the Graduation Exit Examination (GEE). The first case brought by the students complained that the policy requiring the GEE was invalid and that the administration of the test was a violation of the equal protection clause in the Fourteenth Amendment and was also a violation of the State of Louisiana's Constitution (*Rankins v. Louisiana State Board of Elementary and Secondary Education,* March 1994).

The first case was heard at the trial court level whereas the trial court judge ruled that the test had been unconstitutionally administered and therefore issued a preliminary injunction prohibiting the State Board to withhold the students' diplomas. The plaintiffs' complaint was that the policy of the GEE was unevenly applied as students in religious,

private, or home schools were not required to successfully pass the test prior to receiving their diploma. The plaintiffs also claimed that the state legislature did not mandate, or impose the GEE as a requirement for graduation, therefore the Board of Elementary and Secondary Education did not have the authority to impose the test as a graduation requirement. The Board of Elementary and Secondary Education disagreed and the case was brought before the appellate court (*Rankins v. Louisiana State Board of Elementary and Secondary Education,* March, 1994).

The Appellate Court ruled that the Board of Elementary and Secondary Education was indeed within its authority to mandate the GEE as the language of state law grants them the authority to perform the functions necessary to supervise and control the state's educational system. Furthermore, the court did not recognize the equal protection complaint regarding public and non-public schools. Lastly, the court applied the rational relationship standard in the *Debra P.* case and found that the GEE as an exit exam bore a rational relationship for the purpose of ensuring the literacy of graduating seniors. Therefore, the State of Louisiana had a vested interest in the minimum competency of its students and the awarding of a diploma as an indicator of such. In addition, the state policy also provided for remediation to those students who had failed as well as additional opportunities for the students to retest. The Appellate court reversed the District Court's ruling that the administration of the GEE violated the plaintiffs' equal protection rights and vacated the preliminary injunction from the District Court allowing the Board of Elementary and Secondary Education to withhold the students' diplomas. This case was appealed to the State Supreme Court on April 12, 1994, which denied a

review of the case (*Rankins v. Louisiana State Board of Elementary and Secondary Education,* April 1994).

The case of *Triplett v. Livingston County Board of Education* was brought before the Kentucky Court of Appeals in 1997. The plaintiffs' requested that the appellate court consider the Livingston Circuit Court's ruling that the administration of the Kentucky Instructional Results Information System (KIRIS) was constitutional. The plaintiffs claimed that the KIRIS interfered with their religious beliefs. The parents of two students, one a senior and one an eighth grader, informed the school that they did not want their children to take the KIRIS. At the time, the KIRIS was not a requirement for students, and the parents' request was granted.

Subsequently, however, the Kentucky Board of Education mandated the test for all students with successful completion as a requirement prior to promotion or graduation. The parents requested to review the test and based upon the parental review, the parents refused their children's participation in the administration of the exam. As a result of their not taking the test, neither student was allowed to progress, with the older student not being allowed to graduate. The parents filed suit in May of 1994 seeking a permanent injunction on the denial of their child's diploma and well as the retention of the other student. The parents also requested the court rule on the infringement of their parental rights, due process violations, violation of privacy, and the infringement of their exercise of religion. The school board requested a summary judgment and in 1996, the court granted the school's motion. At that time, the court concluded that the KIRIS was not unconstitutional however also determined that the parents did have a right to review

the test and that the test should have been made available for public viewing (*Triplett v. Livingston County Board of Education,* 1997).

The parents appealed the case to reverse the lower court's ruling regarding the constitutionality of the KIRIS while the school district appealed to the requirement that the test being made available for public viewing. The parents' complaint resided in the fact that the requirement for the students to pass the KIRIS occurred mid-year and did not provide adequate notice thereby violated the due process protections. Further, they contended that the school board had no legal authority to mandate the tests as there was nothing in the state codes requiring the assessment be given to all students. The parents also claimed that the requirement violated their constitutional rights of freedom to exercise their religion and to direct the upbringing of their children. The parents believed that the questions on the KIRIS, offended their religion as it "...established a religious or moral code, invaded the students' religious and moral beliefs, discriminated one the basis of religion and compelled the students to speak against their beliefs by selecting morally objectionable responses" (*Triplett v. Livingston County Board of Education*, 1997, p. 30). The court found that the test did not violate the religious beliefs of the students, nor did it require them to speak against their beliefs. The court also ruled that due to the fact that the KIRIS did not need any preparation beyond the normal academic program, further notice would not have been necessary; therefore, the due process claim was not valid. Since no injury occurred due to the lack of notice, no violation occurred (*Triplett v. Livingston County Board of Education,* 1997). In addition, the court ruled in favor of the school district regarding the pre-assessment viewing of the test. Due to the importance of assessing the students to further the state's goals of improving education, the court ruled

that the test should not be open for general public review. In 1999, the Triplett parents petitioned the Supreme Court of the United States to grant a writ of certiorari to the Court of Appeals of Kentucky. The U. S. Supreme Court denied the petition (*Triplett v. Livingston County Board of Education,* 1999).

The case of *Hubbard by Hubbard v. Buffalo Independent School District* was brought before the court in Waco, Texas in the United States District Court for the Western District of Texas in 1998. The plaintiff was an 11th grade student and her parents. The plaintiffs petitioned the court alleging violations of the Free Exercise clause and the equal protection violations. The student completed one-half of her junior year at a non-accredited private school. As per district policy, she was required to take proficiency exams for all credit courses that she desired to transfer to the public school. She refused to take the test, and she and her parents filed a motion to challenge the schools testing policy. The school district cross-petitioned the court requesting a summary judgment to defend the plaintiff's allegations. The court granted the summary judgment to the school district on the grounds that the testing policy was rationally related to the schools goals and that the school had a legitimate interest in setting advancement and graduation requirements. In addition, the court ruled that the testing policy was religiously neutral and did not infringe on the plaintiffs' right to exercise their religious beliefs (*Hubbard by Hubbard v. Buffalo Independent School District,* 1998). Table 7 presents the seven cases occurring between the years of 1990-1999.

Table 7

Cases from 1990-1999

Date	Case
1992	*Crump v. Gilmer Independent School District*
1992	*Williams v. Austin Independent School District*
March 1994	*Rankins v. Louisiana State Board of Elementary and Secondary Education*
April 1994	*Rankins v. Louisiana State Board of Elementary and Secondary Education*
1997	*Triplett v. Livingston County Board of Education*
1998	*Hubbard by Hubbard v. Buffalo Independent School District*
1999	*Triplett v. Livingston County Board of Education*

Cases from 2000-2012

Another important case was heard by the United States District Court for the Western District of Texas, San Antonio Division in the year 2000. The *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education* case petitioned the court to determine whether the TAAS Test as a high school graduation requirement unfairly discriminated against Texas minority students, or whether the administration of the test was a violation of due process rights. Plaintiffs challenged that the use of this test violated the due process clause and requested an injunction to prevent the state from using the TAAS test as an exit level test for graduation (The *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education,* 2000). The United States District Court for the Western District of Texas, San Antonio Division recognized that education was the particular responsibility of the state and the courts resisted intrusion in curricular decisions. However, the courts had the

responsibility to ensure that the state did not implement practices that created disparate impact on minority groups. Title VI of the Civil Rights Act of 1964 prohibited a federally funded program from implementing policies that had a disparate impact on minorities. As the public schools received federal funding, students fell under the Title VI protections.

Although the *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education* case was ultimately regarding fundamentally fair testing and disparate impact on minorities there were several unique features illuminated in this litigation. The court considered the following unique characteristics of this case:

1. Whether the standardized test measured knowledge rather than predicted performance.
2. Whether the guidelines established by the EEOC in the employment context were adequate for determining whether an adverse effect exists in this context.
3. Determined the deference to be given to a state in deciding how much a student should be required to learn (cut-score issue).
4. Examined the issue of the significant discrepancy in pass scores for Texas minority students (The *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education,* 2000).

The judges particularly noted that this court was not asked to evaluate the wisdom of using standardized tests and the court demonstrated judicial reluctance to do so. In addition, the judges expressed that the court had no authority to tell the State of Texas what a well-educated high school graduate should know prior to graduation, nor could the court decide the merits of teacher evaluation and objective testing. The District Court found that the state was aware of the disparity prior to implementing the TAAS and that

the use of the test was to provide uniformity from school to school. Moreover, the TEA's experts were qualified to testify on the internal test fairness and soundness. However, these experts were not able to testify as to the use of standardized tests as they applied to ethnic minorities in a state where there were challenges providing equal education opportunities to those minorities. The discovery phase of the litigation resulted in the findings that the TAAS test was designed to measure mastery of the state-mandated curriculum as well as higher order thinking and problem solving skills. There was also evidence that the test was reviewed by test writers, teachers, and content experts for validity and reliability (The *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education,* 2000).

All tenth grade students had to take the TAAS and pass the reading, writing, and math sections. If they did not pass, they were given up to seven other opportunities. The test cut score was set at 70 percent and increased 10 percent after the first year of administration. The results of the administration in 1991 revealed that 67 percent of African Americans, 59 percent Hispanic, and 31 percent of Caucasian students did not pass the test (*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*, 2000).

The District Courts found that students were given equal opportunity to learn state mandated curriculum, but that the prevailing standards in education at the time emphasized that high stakes decisions should not be made upon a single test score. Graduation requirements in Texas depended on three independent and separate criteria, however failure to successfully complete the TAAS resulted in denial of a diploma. The court found that there was sufficient evidence that the results of the first time

administration bore a significant adverse effect according to the Equal Employment Opportunities Commission (EEOC) four-fifths rule. The EEOC's *Uniform Guidelines on Employee Selection Procedures* includes the four-fifth or 80% rule which stipulates, "A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact" (Biddle Consulting Group, 2012). However, the court also found that the effects of remediation for eventual success were more profound than the steadily decreasing minority failure rate. The court held that the cut score bore a manifest relationship to the state's legitimate goals and was not arbitrary or unjustified. Moreover, the use of standardized tests to determine mastery of standards mandated by the state as a basis for awarding a diploma had a manifest relationship to state educational goals (*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education,* 2000).

Another of the court's concerns was the number of students who had dropped out of high school. The dropout rates for minorities in the ninth grade were higher and increased just prior to taking the exam. In addition, the retention and overall drop-out rates for minorities were higher. Although a concern, there was no substantial evidence to prove that the dropout and retention rates were linked to TAAS, so there was no causal connection found in evidence presented to the court between the implementation of the TAAS and the higher dropout rates. The district court found that the plaintiffs did make a prima facie showing a significant adverse impact. However, the TEA proved the administration of the TAAS as an educational necessity. Despite the disparate impact on the students, the court ruled in favor of the educational institution in that the TAAS did

not have an impermissible adverse impact and that the administration of the test did not violate the students' due process rights as it was deemed an educational necessity.

Additionally, the court ruled that the TAAS was within educational norms, did not perpetuate prior educational discrimination, and that the disparities in test scores were not the result in flaws in the test or in administration. As the plaintiffs produced no alternative test that adequately addressed the goal of systemic accountability, the TAAS would remain the system of measuring student academic success. However, the court did note that the unequal education was a matter of great concern and needed to be eradicated. The TAAS test attempted to identify the inequalities and to address them. Therefore, the court ruled that the TAAS test did not violate Title VI of the Civil Rights Act of 1964, nor did it violate the equal protection safeguards (*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*, 2000).

In 2001, the *Rene v. Reed* case was brought before the Court of Appeals of Indiana. This case was a class action suit filed by students with disabilities seeking declaratory and injunctive relief regarding the requirement of passing the Graduation Qualifying Exam (GQE) for the awarding of a high school diploma. The court reviewed the evidence presented at the trial court and only the evidence that the appellate court considered most favorable to the trial court's judgment. The appellate court upheld the students' property interest in the expectation of a diploma pending the meeting of all graduation requirements as established in the *Debra P. v. Turlington* case. Therefore, the students did have due process protections in the expectation of a diploma. However, the court ruled that the requirement of the GQE did not violate their due process rights as the court deemed that the three years notice was adequate.

The plaintiffs also claimed that they were not exposed to all the material presented on the exam; therefore, the exam itself was fundamentally unfair. While the students complained that they did not receive adequate notice and only had three years to prepare for the exam, the defendants presented that remediation opportunities were mandated by the state for students who did not initially pass the GQE. In addition, the state also mandated that the curriculum be aligned to the requirements of the GQE in 1996, and that the remedial assistance given to the students provided them with adequate curriculum exposure in order to satisfy the court in the determination that the administration of the GQE was fair. In summary, the notice to the students was adequate and they were exposed to the curriculum assessed on the test. In January of 2002, this case was presented to the Supreme Court of Indiana where the transfer from the appellate court was dismissed (*Rene v. Reed,* 2001).

In January of 2001, the class action suit *Advocates for Special Kids v. Oregon* was filed by the parents of students with disabilities claiming that the requirement that students achieve a certificate of mastery prior to graduation, via the successful completion of a series of test, was discriminatory. Plaintiffs claimed that the Oregon State Board of Education did not consider students with disabilities when formulating the exams. With the support of the Disability Rights Advocates, this case was settled out of court with steps to be taken by the state to ensure that students with disabilities could meaningfully participate in the assessments. These steps included:

1. Broadening the list of accommodations available to students with learning disabilities

2. Providing an alternative to the standard assessment for those learning disabled students who are disadvantaged by the regular assessment
3. Instituting an appeals process
4. Conducting further research to ensure the validity of the tests with respect to students with disabilities
5. Providing greater training and information about the assessment to students, teachers, and parents (Disability Rights Advocates, 2002)

The following year, the case of *New York Performance Standards Consortium v. New York State Education Department* was brought to the courts by the consortium of 28 public schools in the State of New York. The consortium filed suit in May of 2002, to request the court review the New York State Education Department's denial of a variance to allow the schools to substitute their own performance-based assessments for the state mandated Regents examination. The schools were previously issued a variance to allow for the use of performance-based assessments.

However, that variance had expired. The performance-based assessments were permitted beginning with the 1995-1996 school years for a period of five years. At the end of the variance, the consortium petitioned the state and was declined based upon the newer, more stringent learning standards and Regents Examinations. The Commissioner of Education established a State Assessment Panel to review proposed alternatives to the Regents Examinations. Under the new regulations, only assessments that had been approved by the State Assessment Panel could be employed as alternatives to the Regents exams. The consortium petitioned the courts on the grounds that the denial of alternative assessments violated their due process rights. The consortium requested an extension of

the variance and was denied by the New York State Department of Education. The state's reason for denial was that it had adopted a new set of comprehensive learning standards and that the request for the variance did not meet the regulatory requirements. The plaintiff consortium claimed that the Board did not conduct the periodic reviews outlined in the variance and therefore could not deny them an extension. The Supreme Court of Appeals affirmed the judgment on the grounds that the Commissioner of Education had adequately addressed the regulatory criteria of the state and the consortium schools had ample opportunity to provide the required information to permit the proposed performance-based assessments. Therefore, the State Supreme Court denied the petitioners' due process claims (*New York Performance Standards Consortium v. New York State Education Department,* 2002).

Chapman v. California Department of Education was filed in the United States District Court for the Northern District of California in September of 2002. This case was filed by students with disabilities who petitioned the court in a class action suit for a preliminary injunction in order to stop, or make voluntary, the administration of the California High School Exit Exam (CAHSEE). The CAHSEE was administered on a voluntary basis in 2001 but became a requirement for graduation for the class of 2004. The plaintiffs were all students with disabilities and had Individualized Education Plans. However, the IEP teams had not had time to include specific modifications for participation in assessments in the students' IEPs. The Individuals with Disabilities Education Act (IDEA) required that IEPs include a statement of modifications whereas students with disabilities may participate in the administration of state or district-wide assessments. If an IEP team determined that a student could not demonstrate learning

through participation in the state or district assessments, a statement in the IEP must have identified an alternative assessment. All plaintiff students named in the case used classroom accommodations in testing. The plaintiffs requested a preliminary injunction on the grounds that there was no alternative to the CAHSEE and that students were unable to take the test with the required accommodations. They also claimed that the test was invalid, violated due process protections as the plaintiffs claimed that the test covered material that they had not had the opportunity to learn and that the CAHSEE failed to conform to nationally recognized standards (*Chapman v. California Department of Education,* 2002).

The defendants, the educational agency in this case, claimed that this case was not ripe as the injury of the students was not imminent or particularized, as none of the students had taken the CAHSEE as a mandatory requirement. However, in a class action suit, the court may consider injuries alleged by named plaintiffs in the context of harm indicated by the class or group of plaintiffs as a whole, to determine whether a threat of harm exists for the students. Therefore, the plaintiffs had a standing in the request for an injunction. The defendants claimed that the case was not ripe based on the contention that the development of the CAHSEE was a dynamic process and several administrations were needed to refine and finalize the policies. The defendants also brought before the court, a provision in the law, which allowed the State Board of Education to delay the requirement of the CAHSEE as a requirement for graduation. The court found that a state memo that stated an appropriate accommodation for a student was one that allowed the student to participate in the assessment to the extent that the score represented a meaningful measure of the student's academic knowledge. Therefore, the state was

required to permit the accommodations for testing in order to assess to a meaningful degree the level of student achievement. However, the court noted that as a matter of law currently standing, the CAHSEE was a requirement for graduation and students had to pass the CAHSEE in order to receive a high school diploma.

Defendants claimed that there was not private right of action to enforce the provisions in IDEA as regards to alternative assessments, and testing modifications and accommodations. However the court disagreed and determined that IDEA specifically provided a right of action after all administrative remedies were exhausted for claims relating to "the identification, evaluation, or educational placement of a child, or the provision of a free appropriate public education to such child" (220 USC. §1415(b)(6)). The court determined that the case was ripe for adjudication and that as meaningful participation in assessments was an important aspect of public education, there existed a private right of action protection as specified in IDEA. Furthermore, the court determined that the plaintiff students had a right to meaningfully participate in the administration of the test regardless of how the results were to be used (*Chapman v. California Department of Education,* 2002).

The court did not find evidence that the test was invalid as the "present state of evidence [did] not reveal an asymmetry between what students are taught and the material tested on the CAHSEE..." (*Chapman v. California Department of Education,* 2002, p. 989). Therefore, the court ruled in favor of the plaintiffs on two claims. First, the use of accommodations would be allowed on the state assessment as prescribed in IDEA and also that the state would be required to provide an alternate assessment for those students who could not meaningfully participate in the CAHSEE. The court also found

that irreparable harm would have occurred to the students based upon the denial of the right of the students to receive a diploma. Therefore, the probable and possible injuries "implicated a dignity interest in the full participation of the educational process" (*Chapman v. California Department of Education,* 2002, p. 989).

The court ordered that the students could take the CAHSEE with appropriate accommodations and modifications as provided in their individual IEPs or Section 504 plans. If the IEP or 504 Plan did not specifically identify accommodations or modifications for standardized testing, the students shall be permitted to take the CAHSEE with any modifications or accommodations provided for during general classroom testing. The court also directed the state to develop an alternate assessment. Students with disabilities who were entitled to the alternative assessment were permitted to take the alternate but were not be required to take it. The state was also directed to provide notification of this change to all parents of students with IEPs or 504 plans (*Chapman v. California Department of Education,* 2002).

Later in 2002, the nested case of *Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District* was filed in the United States Court of Appeals for the Ninth Circuit for review. The court reviewed the case and determined that the students' rights to modifications and accommodations did not require the Appellate Court's review. However, the challenge that the waiver giving students the option to participate in an alternate assessment if granted was not ripe for appellate review pertained to the future harms that would have occurred as to the denial of the waiver. The appellate court determined that the claim of the uncertainty of the waiver

process "burden[ed] the students' rights to participate in the examination by forcing them to choose between forgoing the use of the modifications or risking the denial of a waiver" (*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*, 2002, p. 781). The court reversed sections of the preliminary injunction regarding the application of the waiver and remanded to the District Court directions to dissolve those sections of the preliminary injunction (*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District,* 2002).

Simultaneous to the Chapman case, *Student v. Driscoll* was filed in the United States District Court of Massachusetts on September 19, 2002. This class action lawsuit was brought before the courts by students who contested the use of the Massachusetts Comprehensive Assessment System exam (MCAS) as a requirement for graduation. These students were 10th grade students who had failed the 2001 administration of the MCAS. The plaintiffs claimed that the requirement of the MCAS for graduation violated their constitutional and statutory rights. As a class action suit, this case involved six subclasses of students: (1) Black/African-American students, (2) Hispanic students, (3) English Language Learner (ELL) students, (4) students with disabilities, (5) students attending vocational technical education schools, and (6) students attending schools in Holyoke School District. The results of the 2001 MCAS administration indicated that approximately 16,000 students did not pass the exam. Of these students, the majority were minority students, students from low-income school districts or schools that were

under-performing schools, vocational technical education students, ELL students, and students with disabilities. The premise of the lawsuit claimed that the state provided unequal education to students in Massachusetts in the vast differences in quality between wealthier school districts and poor school districts. As a result of this inequality, the use of the MCAS as a graduation requirement was perceived as being discriminative and punitive for students in lower quality schools (*Student v. Driscoll,* 2002).

The Massachusetts legislature enacted the Massachusetts Education Reform Act to address the disparity of schools throughout the state. This act was intended to ensure a high quality public education for all of the state's students. The MCAS was a component of this act with the purpose to hold educators responsible for student progress. Plaintiffs claimed that the State Board of Education did not develop the required curriculum frameworks to ensure that the students were taught the material on the test in a timely manner. Therefore, the students did not have adequate time to prepare for the exam (*Student v. Driscoll,* 2002).

Moreover, the students' complaint also indicated that the state had exceeded its authority to require the MCAS as a graduation requirement. The Massachusetts Educational Reform Act did not direct the state board to implement the exam as a requirement for graduation. The intended use was for school district accountability and not for individual student accountability. Further, the plaintiffs claimed that the test was not valid as it did not conform to nationally accepted testing standards. It was upon these claims that the students petitioned for injunctive relief to prohibit the use of the MCAS as a requirement for graduation. They also asked the court for injunctive relief to require professional development for public school teachers to meet the educational needs of the

various classes of students listed on the complaint. Students complained that the test violated that procedural and substantive due process rights. The judge for the U.S. District Court, Michael Ponsor, declined to hear the case at the District level and suggested that the students file suit in state court, but to return to the District Court if they were not awarded relief (*Student v. Driscoll,* 2002).

In November of 2003, a petition was filed to request a direct review of the appeal of the above-mentioned case under the name *Student 9 et al. v. Board of Education et al.* The plaintiffs requested an emergency motion for a preliminary injunction against the enforcement of the state regulation requiring them to pass the MCAS test. The judges of the Supreme Court of Massachusetts affirmed the district court's denial of the preliminary injunction (*Student 9 et al. v. Board of Education et al.,* 2004).

In March of 2004, the case of *Noon et al. v. Alaska State Board of Education and the Anchorage School District* claiming that the High School Graduation Qualifying Exam (HSGQE) violated federal and state rights of students with disabilities. The group Disability Rights Advocates (DRA) also supported the plaintiff's claim that the HSGQE was unfair to students with disabilities as they did not have a fair opportunity to pass the test. As a result of the DRA support for the case, the state immediately issued a waiver to every student with an IEP or a 504, releasing them from the requirement of passing the HSGQE to obtain a high school diploma. The parties reached an out-of-court comprehensive settlement in August of 2004, which included negotiations for suitable assessment requirements for students in the class of 2005, and subsequent years (Disability Rights Advocates, 2005).

The *Coachella Valley Unified School District v. State of California* case was brought before the Court of Appeals for the State of California in 2005. In this case, the Coachella Valley Unified School District petitioned the court for declaratory relief from administering the state assessment to English Language Learners as per state statute that the test only be administered in English. As the NCLB legislation did not require the tests to be administered only in English, the school district petitioned the courts claiming that the State Board of Education violated the assessment requirement under revisions to NCLB. The court ruled that the State Board of Education did not abuse its discretion in adopting the California Standards Test (CST) in 1999 as a system of accountability as well as requiring the CST for high school graduation. The District Court also ruled that the State Board of Education did not abuse its authority to implement the new testing accountability measures and that the court could not award a remedy to the school districts. Therefore, this ruling would end the course of litigation for the school districts (*Coachella Valley Unified School District v. State of California*, 2005).

An unrelated yet important case in California litigation affected the outcome of a significant high stakes testing case. In 2000, plaintiffs Eliezer Williams et al. filed a class action lawsuit on behalf of the public school students of the State of California. Williams charge the state with a failure to provide students with equal educational opportunities in regard to equitable instructional materials, facilities, and qualified teachers (*Williams v. California*, 2004). Governor Arnold Schwarzenegger announced the settlement of the case in 2004 with sweeping reform legislative measures following. The *Williams* case resulted in the allotment of 183 million dollars to be spent for instructional materials and implementation, and oversight requirements. Another 800 million was allotted for

facilities improvements in the state's schools (California Department of Education, 2010). Although this case was not related to denial of diplomas, its impact was important to the understanding of the following litigation.

The case of *O'Connell v. The Superior Court of Alameda County* was filed in August of 2006. This case was brought before the Court of Appeals of California, First Appellate District, Division Four to appeal the ruling of the Superior Court of Alameda County California. The Superior Court had issued a preliminary injunction to restrain the California Board of Education from denying diplomas to seniors of the class of 2006 who had met all graduation requirements except passing the CAHSEE. The Superintendent of Public Instruction, Jack O'Connell, petitioned the Appellate Court for a writ of mandate to vacate the order of the Superior Court. Despite the reform measures implemented as a result of the *Williams* case, the Appellate Court doubted the state's success in eradicating educational inequities. However, the court also noted that the implementation of the CAHSEE was the state legislature's way of addressing the inadequacies of the state's educational system. The state was required to provide remedial instruction for students who did not pass the CAHSEE and therefore was attempting to bridge the gap between the inequitable resources and student success. The court implored the parties to work cooperatively with the trial court to find ways to provide equal and adequate access to remedial assistance to students in order to pass the 2007 administration of the CAHSEE. The court ruled that the trial court erred in granting the preliminary injunction as the trial court relied on the assumption, access to education included access to a diploma. The Appellate Court issued a peremptory writ of mandate to the Alameda County Superior Court to vacate its preliminary injunction. The Superior Court determined a distinction

between an equal protection claim based on the fundamental right to an education, and an equal protection claim based on the asserted
right to a high school diploma.

> "The purpose of an education is not to endow students with diplomas, but to equip them with the substantive knowledge and skills they need to succeed in life. A high school diploma is not an education, any more than a birth certificate is a baby." (*O'Connell v. The Superior Court of Alameda County,* 2006, p. 1478)

The O'Connell case was ultimately settled out of court under the case *The Superior Court of California County of Alameda County and Valenzuela v. O'Connell.* Both parties agreed to the following terms: a package of legislative proposals was presented for students who did not pass the CAHSEE by their intended graduation date. These students were able to continue to study the material tested on the CAHSEE for up to two additional years without charge. An additional option for these students was to enroll in a community college or adult schools, to be re-designated as a senior for an additional year of high school, or pass the GED in order to receive a diploma equivalent (*Superior Court of California County of Alameda and Valenzuela v. O'Connell,* 2007).

In September of 2006, the case of *Californians for Justice Education Fund v. State Board of Education* was filed in the California Appellate Court to appeal a denial from the Alameda County Superior Court of a writ of mandate, and motion for a peremptory writ. The Californians for Justice Education Fund (CJEF) petitioned the lower court to enforce a state law requiring the state to complete their study of alternative assessments to the CAHSEE. The study as to be completed in order for the state legislature to consider the study prior to enforcement of the requirement for successful

completion of the CAHSEE for the awarding of a high school diploma. In May of 2003, a consultant for the Board released a report of the results from the mandated study regarding the validity and appropriateness of the CAHSEE. The report indicated that the requirement of the CAHSEE for awarding a diploma was fair, as it met the professional standards for implementation.

However, the report indicated concerns regarding the fairness of imposing the CAHSEE as a requirement for a diploma on students who could legitimately prove that the public schools had not prepared them to pass the exam. The report included several measures recommended to the Board to counter this concern. The mitigating measures were addressed as lowering the pass rate, reduce the scope of the material presented on the test, allowing high scores on one section to compensate for lower or non-passing scores on another section or allowing for the demonstration of student success using student portfolios. Later, in 2005, the consultant issued another report with the recommendations to implement the use of portfolios as an alternative means of assessment, but to proceed with the implementation of the graduation requirement as scheduled beginning with the class of 2006. After this report was published the CJEF presented letters to the respondents indicating that they were in violation of the order to conduct a study of the alternative assessments.

The Deputy Superintendent of the Department of Education submitted a memo to the Board explaining that the proposed and studies alternatives did not demonstrate equivalent rigor to the CAHSEE and that no alternative was available which would ensure that the students had met the same criteria for graduation as measured by the CAHSEE. In another letter, in January 2006, the Deputy Superintendent clarified his

conclusion and indicated that the alternative assessments were costly to develop, and would require local scoring and predicted a lack of consistency (inter-rater reliability) and would not be reasonably implemented within the timeframe. In an unpublished opinion, the court determined that the required study had been executed and that the statute requiring the study did not set forth a time frame in which it was to be completed. The writ of mandate and motion for a peremptory writ were denied to the plaintiffs (*Californians for Justice Education Fund v. State Board of Education,* 2006).

The Superior Court of Massachusetts presided over the case *Hancock v. Driscoll* in April of 2004. This case was heard by Margot Botsford, Justice of the Superior Court. Previous to this case, *McDuffy v. Secretary of Executive Office of Education* resulted in the court remanding the case to a single judge to retain jurisdiction over the case. The intention of the court was to determine that appropriate legislative action had taken place within a reasonable time to address the issues of the Commonwealth's educational system. Extensive evidence was considered in this case for the court to determine the extent of the problems, and provide remedial relief if necessary. Justice Botsford recommended that the Commonwealth develop a plan, and design for equitable funding implementation to meet these constitutional requirements for educating the Commonwealth's students. She also recommended the retention of a link between the Commonwealth and the court through an appointed judge with jurisdiction over the case to monitor the progress of the Commonwealth's implementation plan (*Hancock v. Driscoll,* 2004).

Later in 2004, the Supreme Court of Massachusetts reviewed the case of *Hancock v. Driscoll* under the case labeled *Hancock et al. v. Commissioner of Education et al.*

This case attempted to revive the *McDuffy v. Secretary of Executive Office of Education* (1993) case. The opinion of the Supreme Court of Massachusetts voiced the opinions of judges Marshall, Greaney, Ireland, Spina, Corwin, Sosman, and Cordy. The prior case appointed a specially assigned judge of the Superior Court who, in a prior ruling, recommended further judicial action to amend the states funding issues for less wealthy districts to increase equitable resources to schools. Students in districts Brockton, Lowell, Springfield, and Winchendon demonstrated lower success rates on the MCAS test as required for high school graduation. The plaintiffs claimed that the Commonwealth's schools in named districts had not improved significantly since the 1993 passing of Massachusetts Educational Reform Act. The plaintiffs contended that the inequitable resources created a disparity for the outcomes of the students, and that this inequitable distribution of resources violated the students' rights. Therefore, the plaintiffs claimed that the state was in violation of its obligation to educate all students, even those from less wealth districts, and particularly students with special learning needs.

The State Supreme Court denied the further judicial action recommended by the lower court, with seven judges concurring and two judges dissenting. Further relief sought by the plaintiffs was denied by the Supreme Court of Massachusetts and the single justice appointed to jurisdiction did not retain jurisdiction over the case. The court disposed the case in its entirety. In the opinion of Marshall, the judge noted that although he accepted the findings of the Superior Court judge, the "...shortcomings, while significant in the focus districts, do not constitute the egregious, statewide abandonment of the constitutional duty identified in the case" (*Hancock et al. v. Commissioner of Education et al.*, 2005, p. 433). Further, concurring judges commented on the Educational

Reform Act as well as the federal mandate of NCLB in generating state educational accountability systems that required student achievement in basic skills. The judges defended the Commonwealth's efforts to improve the educational system, and through an evaluation system, investigated underperforming schools in order to provide additional assistance. The judges noted that although the system was still not perfect, the Commonwealth had made progress in the improvement of the state's schools. Dissenting judges, Greany and Ireland, supported the intervention of the court in the matter; similar to the *McDuffy* case, the disparities in funding for these school districts resembled that of the schools in *McDuffy* and therefore required relief by the court (*Hancock et al. v. Commissioner of Education et al.*, 2005).

The next case in the chronology was filed in 2005 by Miriam Flores against the State of Arizona. This case was brought before the United States District Court for the District of Arizona after the initial case of *Flores v. State of Arizona* in 2002 resulted in the trial court's ruling that the English Language Learners' program was inadequately funded, and ordered that the program be funded in a non-arbitrary and capricious manner. The court ordered the legislature to enact legislation to address the issue of funding; however, the governor vetoed it. The legislature ordered a study of the cost to fully and properly fund the program, however, after three years, the study was not completed and the legislature had failed to act. The court charged the legislature with contempt of court and enjoined the state from requiring that students pass the Arizona Instrument to Measure Standards (AIMS) assessment in order to receive diplomas. The plaintiff, Miriam Flores, sought sanctions against the state and injunctive relief from the District Court due to the continued under-funding of the program.

After six years, the state had not met its obligations to the court. The plaintiff requested the court claim federal highway funds as a sanction against the state. Ms. Flores stated that ELL students failed at three times the rate of English proficient students. She also contended that 82 percent of ELL students continued to fail in reading while 81 percent failed in writing. The plaintiff asserted that the courts should protect all future ELL students from permanent and irreparable harm by enjoining the use of the AIMS test until all ELL programs were fully funded for a sufficient enough time to allow students to have a meaningful opportunity to achieve the standards measured by the AIMS assessment (*Flores v. Arizona*, 2005).

The defendants claimed that the AIMS test was not the only requirement for graduation and that this requirement was not imposed on all ELL students for the preceding five years. Defendants also argued that the plaintiffs failed to meet a prima facie claim, and failed to explain how requiring all ELL students to pass the exam violated their due process and equal protection rights. Defendants contended that adequate notice was given to students regarding the testing requirement. The defendants requested that the money allotted from NCLB be used to cover the cost of funding the ELL program (*Flores v. State of Arizona*, 2005).

The district court ruled that the state failed to comply with court orders, and applied sanctions. The court ordered the least possible power be used to end the dispute, and therefore denied sanctions resulting in seizure of federal highway funds on the basis that these funds had no relationship to ELL students. The court granted injunctive relief to ELL students being required to pass the AIMS test. The court also ordered that the legislature had 15 days to comply with the court's order. Every day after 15 days and up

to 30 days, the court would fine the state $500,000 dollars a day. After 30 days, the state would be fined $1,000,000 dollars a day for a period of 30 days or until the state complied with the court order. Continuing, the state would be fined $1.5 million dollars a day until compliance for another 30 days with the final phase of sanctions resulting in a $2 million dollar a day fine until compliance. Defendants were also ordered to pay plaintiff attorney's fees (*Flores v. State of Arizona*, 2005).

Once again, in May of 2008, the re-emergence of the *Chapman* case entered the judicial arena. After seven years of litigation, a settlement agreement was reached in the cases of *Chapman v. California Department of Education* and *Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District.* The Superior Court of California County of Alameda announced a settlement agreement under the case name of *Courtney Kidd et.al. v. California Department of Education* (2008). In this agreement, the parties settled on the following terms:

1. The defendants would commission an independent study on the CAHSEE via an external consultant.
2. The study would examine students with disabilities who did not pass the CAHSEE with modifications and accommodations specified in their IEPs or 504 Plans as to why they did not pass the test.
3. The consultant would issue a report as to the results of the study and any issues discovered.
4. The report would put forth recommendations as to why the students did not pass the CAHSEE with the use of accommodations and modifications and/or identify

alternative means for students to demonstrate mastery of the content. (*Kidd v. California Department of Education,* 2008).

This settlement agreement marked the end of the *Chapman* case granting the use of accommodations and modification on the CAHSEE for students with disabilities. It also forwarded the study agreed to in *Smiley* and *Chapman* cases to seek alternatives to the CAHSEE for students with disabilities.

One of the most recent cases brought before the courts occurred in the State of Minnesota regarding the case of *Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District Number 1*. This case was brought before the United States District Court for the District of Minnesota in July of 2008. The students in this case were students at Lincoln High School, an alternative high school in Minneapolis. Lincoln High School served students who were foreign-born, with little formal education, and limited English language skills. The plaintiff students were refugees from Somalia and Ethiopia who had fled their countries after having spent time in refugee camps in Kenya. Students varied in ages from 14 to 20, and all had few to no prior schooling experiences and very limited English language skills. The students were required to pass the state-mandated tests in reading, math, and writing in order to graduate high school. Two students passed the tests with accommodations similar to those given to students with disabilities, two students passed the tests without accommodations, and one other student passed the test but no indication was made as to whether she received accommodations for testing. Eight other plaintiffs did not graduate; seven failed all three competency tests. Several of these students were able to remain at

the school past their 21st birthday despite the lack of additional funding for these students.

Plaintiffs charged that the school lacked a quality curriculum, highly qualified teachers, and failed to assess students for disabilities or assess their progress. In addition, plaintiffs claimed that Lincoln High School did not attempt to provide an education to overcome language barriers. The plaintiffs claimed that the school intentionally discriminated against them, and sought injunctive relief to either forbid Lincoln from engaging in any practice found to be unlawful or shut down the school. As five of the plaintiffs had already graduated, and the remaining were too old to attend Lincoln or any other public school, they did not have a standing for injunctive relief. The court found that the plaintiffs lacked evidence that Lincoln High School intentionally discriminated against them and served only students of the protected class, therefore, there were no comparators available to prove discriminatory animus (*Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District Number 1,* 2008). Table 8 lists the cases adjudicated between the years 2000-2012.

Table 8

Cases from 2000-2012

Date	Case
2000	*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*
2001	*Rene v. Reed*
2001	*Advocates for Special Kids v. Oregon*
2002	*New York Performance Standards Consortium v. New York State Education Department*
2002	*Student v. Driscoll*
2002	*Chapman v. California Department of Education*
2002	*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*
2002	*Rene v. Reed*
2004	*Student 9 et al. v. Board of Education et al.*
2004	*Noon et al. v. Alaska State Board of Education and the Anchorage School District*
2004	*Hancock v. Driscoll*
2005	*Hancock et al. v. Commissioner of Education et al.*
2005	*Coachella Valley Unified School District v. State of California*
2005	*Flores v. State of Arizona*
2006	*O'Connell v. The Superior Court of Alameda County*
2006	*Californians for Justice Education Fund v. State Board of Education*
2007	*Superior Court of California County of Alameda and Valenzuela v. O'Connell*
2008	*Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District Number 1*
2008	*Kidd v. California Department of Education*

Research Questions

Question One: What issues related to high stakes testing and the denial of diplomas were revealed in state and federal case law within the 1979-2012 timeframe?

The controversy over high stakes testing resulted in unique situations for which judicial intervention was requested. The courts determined the constitutionality of the issues embedded in the testing policy while having to consider the overarching benefits of public education. The following quote from a judicial ruling provided a cogent rationale for the use of exit exams for determining whether a student had the necessary knowledge and skills to become a productive member of our society.

> A high school diploma stands for something more than testimony to the fact that a student has attended that school for a given number of years. In order for those in the academic field to know that a student has obtained proficiency in any given subject, it would follow as a matter of logic that there would have to be, and traditionally there always have been, tests given to the students on the subjects on which they have received instruction. (*Florida State Board of Education and Turlington v. Brady,* 1979)

Each case presented for judicial review contained valuable insight regarding the implementation of exit exams as a requirement for earning a high school diploma. In the content analysis of the case data, numerous themes emerged that illuminated consistent issues that were presented to the courts. The cases with a direct or indirect nexus to the issue were presented through a discussion of the uniqueness of each case and its specific

judicial interaction regarding the issue. A summary of the issue followed the discussion and included an explanation of each theme.

Due Process

One of the most prevalent concerns addressed in these high stakes testing cases was the infringement of due process rights protected by the Constitution. The due process clause of the Fourteenth Amendment has protected citizens from the deprivation of life, liberty, or property interests without due process of law (O'Neill, 2001). Twenty-five of the cases involved due process complaints. Cases in which due process violation claims were asserted addressed both procedural and substantive due process rights. The cases which involved due process complaints were: *Florida State Board of Education and Turlington v. Brady,* (1979); *Brady v. Turlington*, (1979); *Debra P. v. Turlington*, (1979); *Wells v. Banks,* (1980); *Debra* P v. *Turlington,* (May 1981); *Debra P. v. Turlington*, (September 1981); *Anderson v. Banks, Johnson v. Sikes,* (1981); *The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach* (1981); *Brookhart v. Illinois State Board of Education*, (1982, 1983); *Debra P. v. Turlington*, (1983); *Love v. Turlington*, (1984); *Debra P. v. Turlington*, (1984); *Johnson and Wilcox v. Sikes, (1984); Williams v. Austin Independent School District,* (1992); *Crump v. Gilmer Independent School District,* (1992); *Triplett v. Livingston County Board of Education*, (1997); *Hubbard by Hubbard v. Buffalo Independent School District,* (1998); *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*, (2000); *Rene v. Reed*, (2001); *Advocates for Special Kids v. Oregon*, (2001); *Chapman v. California Department of Education,* (2002); *Noon et al. v. Alaska State Board of Education and the Anchorage School District,* (2004); *Flores v. State of*

Arizona, (2005); and *O'Connell v. The Superior Court of Alameda County*, (2006). The courts ruled consistently on due process issues and relied heavily on the seminal case of *Debra P. v. Turlington.*

The courts determined a due process violation, procedural or substantive, if it found that the plaintiffs had a protected interest in what the defendant (state) sought to limit or deny. Procedural due process guaranteed that procedures depriving property or liberty interests were fair, of "how" a policy or law was implemented. In the argument regarding high stakes testing, procedural due process protection ensured that adequate notice was given to students regarding testing implementation and sanctions they may incur based on the outcome of the testing. In addition, procedural due process referred to the state's authority to implement the testing policy but ensured that the actions of the state were not implemented unconstitutionally. Substantive due process protection guaranteed that the actions of government were not unreasonable, often referred to by the courts as arbitrary or capricious.

In other words, substantive due process regarded the "why" in policy and law implementation. In regard to high stake testing, the substantive due process protections ensured that the test was fundamentally fair by being valid and providing that the students had the opportunity to learn the material on the test. The case analysis illuminated specific information regarding the interaction of due process protection and the implementation of high stakes testing. The following discussion extrapolated the case law regarding due process as per each case and the judicial interpretation of the law as it pertained to the series of circumstances surrounding each case.

State and Local Board Authority

The analysis revealed an issue closely related to that of nexus to state goals, the state and local school boards' authority to impose the testing requirements. Challenges to state and local board authority have been presented in 14 of the cases. The cases involving the state and local boards' authority were *Florida State Board of Education and Turlington v. Brady*, (1979); *Brady v. Turlington*, (1979); *Wells v. Banks,* (1980); *Debra P. v. Turlington*, (May and September 1981); *The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach*, (1981); *Brookhart v. Illinois State Board of Education,* (1982, 1983); *Triplett v. Livingston County Board of Education,* (1994); *Williams v. Austin Independent School District*, (1992); *Rankins v. Louisiana State Board of Elementary and Secondary Education,* (1994); *Hubbard by Hubbard v. Buffalo Independent School District*, (1998); *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education,* (2000); *Chapman v. California Department of Education*, (2002); *Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District* (2002); *Student v. Driscoll* (2002); *Student 9 et al. v. Board of Education et al.*, (2004) and *Coachella Valley Unified School District v. State of California,* (2005). The majority of these cases involved the claim that the Local and State Boards of Education did not have the authority to impose diploma sanctions on students who did not pass the state mandated tests.

The first evidence of state authority in the case law appeared in the *Florida State Board of Education and Turlington v. Brady* case of 1979. The District Court of Appeals

rendered, "Implicit in such direction to the Commissioner of Education [was] granting to him of the authority to determine scoring criteria" (p. 662). As this case was presented regarding the Commissioner of Education's determination of the scoring criteria of the state test, the plaintiffs complained that the Commissioner did not have the authority to determine the scoring standard. The District Court of Appeals clearly disagreed. In the *Wells v. Banks* case of 1980, the appellants claimed that the local board exceeded its power to require additional criteria for graduation. The Court of Appeals for Georgia developed its conclusion based upon the statutory language embedded in the Code of Georgia. The court determined, "Nowhere in that document [Code of Georgia] [was] there any indication that local boards may not impose additional requirements" (p. 582).

Additionally, this case revealed the state's support for local boards to establish additional criteria as well as specific performance objectives and indicators (*Wells v. Banks*, 1980). The analysis revealed the chronology of the courts' opinions regarding states' authority to regulate and determine the components of their educational systems. The *Board of Education Northport-East Northport Union Free v. Ambach* case of 1981 presented the State of New York's legitimate interest in, and, therefore the responsibility of, providing public education to its citizens. "The State had a legitimate interest in attempting to insure the value of its diplomas and to improve upon the quality of education provided. The use of complacency testing to effectuate the goals underlying those interests was within the discretion of the Board of Regents and the Commissioner [of Education]" (*Board of Education Northport-East Northport Union Free v. Ambach*, p. 835). The evidence presented in the *Debra P. v. Turlington* cases from 1979-1984 revealed that the courts' disposition to the issue of state authority.

> "The state has determined that minimum standards must be met and that the quality of education must be improved. We have nothing but praise for these efforts. The state's plenary powers over education come from the powers reserved to the states through the Tenth Amendment, and usually they are defined in the state constitution. As long as it does so in a manner consistent with the mandates of the United States Constitution, a state may determine the length, manner, and content of any education it provides" (*Debra P. v. Turlington*, 1981, p. 403).

Later, in September of the same year, the United States Court of Appeals added, "By and large, public education in our nation is committed to the control of state and local authorities" (*Debra P. v. Turlington,* 1981, p. 1084). The *Brookhart v. Illinois State Board of Education* (1982 & 1983) cases also referenced the state and local boards' authority to enact policy pertaining to increasing graduation requirements. "The State Board of Education has jurisdiction of this matter, [and the] Peoria Board of Education has the right to impose reasonable additional standards for graduation with a regular high school diploma" (*Brookhart v. Illinois State Board of Education,* 1983).

The *Williams v. Austin Independent School District* case of 1992 also provided evidence of the courts' support of the states' authority regarding the imposition of an exam as a diploma requirement. "The right of a free public education in Texas is a Texas Constitutional right, and the level of education and academic achievement necessary to obtain a diploma from a Texas high school was appropriately a judgment call for the persons elected for that state responsibility and those experienced persons responsible for

educating and preparing students to achieve the established level of competence" (*Williams v. Austin Independent School District*, p. 256).

In the *Triplett* case (1997), the Kentucky Court of Appeals ruled that the local school board did have the authority to require all students to take the KIRIS test. The decision was embedded in statutory law, allowing the State Board of Education to promulgate state regulations in regards to high school graduation requirements. Moreover, the state statutes mandated that the State Board of Education review the requirements for high school graduation. Therefore, in this case, the appellate court ruled in favor of the Livingston County Board of Education regarding its authority to impose the graduation requirement of successful completion of the KIRIS (*Triplett v. Livingston County Board of Education*, 1997)

In Louisiana, a case was brought to the court from five plaintiff students who claimed that the state mandated exit exam implemented in 1989 was invalid. The students contended that the State Board of Elementary and Secondary Education exceeded its authority to implement the Graduation Exit Exam as the state legislature did not specifically authorize an exit exam as a criterion for graduation. The court concluded that the state board did not exceed its authority as the state constitution provided the board with the powers of control over the state's public schools (*Rankins v. Louisiana Board of Elementary and Secondary Education,* 1994).

In the decade beginning with the year 2000, courts provided further justification for the states to impose exit exams as a criterion for graduation. In the year 2000, the *GI Forum* case documents stated "Ultimately, resolution of this case turns not on the relative validity of the parties' views on education but on the State's right to pursue educational

policies that it legitimately believes are in the best interests of Texas students" (*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*, 2000, p. 672). The cases *Chapman v. California Department of Education* (2002), *Student v. Driscoll* (2002) and *Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District* (2002) acknowledge the state's traditional authority to establish diploma requirements. "The Court notes at the onset that the State of California is afforded broad latitude in crafting public education policy and setting standards for students and educators" (*Chapman v. California Board of Education*, 2004, p. 984).

In 2004, the *Student 9 et al. v. Board of Education et al.* case stated that the Commonwealth of Massachusetts educated with state funds and those students were subject to competency determinations as deemed appropriate by the Commonwealth, "...the board may promulgate regulations as necessary to fulfill said purposes. Said regulations shall be promulgated so as to encourage innovation, flexibility and accountability to schools and school district" (p. 758). The court determined that the State Legislature of Massachusetts approved the board's use of the state exam (MCAS) as a means of implementing the state's Education Reform Act (*Student 9 et al. v. Board of Education et al.*, 2004). The subsequent case of *Hancock et al. v. Commissioner of Education et al.* (2005) referenced the state's Education Reform Act as having "strengthened the board's authority to establish statewide education policies and standards, focusing on objective measures of student performance and on school and

district assessment, evaluation and accountability" (*Hancock et al. v. Commissioner of Education et al.,* p. 438).

The case of *Coachella Valley Unified School District v. State of California* (2005) referenced the NCLB Act requiring states to assess students, "...each state is required to implement a 'set of high-quality, yearly student academic assessments that will be used as the primary means of determining the yearly performance' of schools within the state..." (*Coachella Valley Unified School District v. State of California*, p. 4).

The analysis also revealed that embedded in the states' authority to implement educational policy, was their responsibility to fund its public educational system. The following cases involved issues of state funding as it regarded implementation of the exit exams: *Flores v. State of Arizona*, (2005); *Hancock et al. v. Commissioner of Education et al.*, (2005); and *O'Connell v. The Superior Court of Alameda County*, (2006). These cases have been previously discussed, but the close connection of state funding to the states' authority to provide their young citizens with a public education was relevant. Table 9 lists the cases, which included judicial information regarding the state and local school boards' authority to implement the testing policy.

Table 9

State and Local Board Authority Cases

Date	Case
1980	*Wells v. Bank.*
1981	*Debra P. v. Turlington*
1981	*The Board of Education of the Northport-East Northport Union Free School District et al., v. Ambach*
1982	*Brookhart v. Illinois State Board of Education*
1983	*Brookhart v. Illinois State Board of Education*
1994	*Rankins v. Louisiana Board of Elementary and Secondary Education*
1997	*Triplett v. Livingston County Board of Education*
2000	*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*
2002	*Student v. Driscoll*
2002	*Chapman v. California Department of Education*
2002	*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*
2004	*Student 9 et al. v. Board of Education et al.*
2005	*Hancock et al. v. Commissioner of Education et al.*
2005	*Coachella Valley Unified School District v. State of California.*

Property Interest

The case law established that the expectation of graduation was a property interest and therefore, was protected under the Fourteenth Amendment. The *Debra P. v. Turlington* (1979) case established the property right in graduation from high school if students had fulfilled the requirements for graduation excluding the passing of the exit exam. The United States Court of Appeals agreed in 1981 that students did indeed have a

property right in the expectation of graduation. "It [was] clear that in establishing a system of free public education and in making school attendance mandatory, the state [had] created an expectation in the students..." (*Debra P. v. Turlington,* May 1981, p. 403). The understanding that if a student attended school for the required number of years and passed the required courses, then he would receive a diploma to certify that the requirements were met. "This [was] a property interest as that term [was] used constitutionally" (1981, p. 404). This understanding between state and student established an expectation that "support[ed] claims of entitlement to those benefits" (1981, p. 403) as "graduation is the logical extension of successful attendance" (*Debra P. v. Turlington,* 1979, p. 266).

A student's property interest was presented through judicial intervention in the subsequent case law of due process claims. *The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach* (1981) also supported the precedent in which the courts proclaimed the property and liberty interest of receiving of a diploma, and was the secondary source of case law on which the foundation of property interest in a high school diploma was established.

In the case of *Brookhart v. Illinois State Board of Education* (1983), the court supported due process protection in awarding diplomas. The Appellate Court for the Seventh Circuit considered the property interests of the students who were required to take the test and the impact that the denial of a diploma would have on their future. The court addressed this impact more specifically by considering the effect on the student's reputation, the possibility of a stigma attached to the student, and the compounding affect this stigma may have on future employment or educational opportunities. Furthermore,

the court ruled that the plaintiffs had sufficient liberty interest in receiving their diplomas and that due process protection was warranted (*Brookhart v. Illinois State Board of Education*, 1983). Similarly, the *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education,* (2000) case determined that due to compulsory attendance laws, the State of Texas has created a student interest in the receipt of a high school diploma. Although the plaintiffs did not prevail in this case, the standard set by the court added further evidence of student property rights in the expectation of a high school diploma (*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*). Additionally, the case of *Florida State Board of Education and Turlington v. Brady* (1979), the court referred to the student's "substantial interest" in passing subjects toward the goal of graduation (*Florida State Board of Education and Ralph v. Brady,* p. 3*)*. The following table presents the cases in which the court upheld a student's property interest in receiving a high school diploma.

Table 10

Property Interest Cases

Date	Case
1979	*Debra P. v. Turlington*
1981	*Florida State Board of Education and Turlington v. Brady*
1981	*Debra P. v. Turlington*
1981	*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach*
1983	*Brookhart v. Illinois State Board of Education*
2000	*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*

Adequate Notice

As the courts established a property interest in the expectation of a high school diploma, they determined that public school students had a protected right under the due process clause. Procedural due process protections ensured that the student must have received adequate notice prior to being denied a right or liberty. "The law demand[ed] that a state provide, at minimum, notice and an opportunity to be heard before it deprive[ed] citizens of certain state-created protected interests" (*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*, 2000, p. 682).

The United States Court of Appeals for the Fifth Circuit established that a state could not impose an exam as a graduation requirement without giving its students adequate notice (*Debra P. v. Turlington*, 1979). In *Debra P*, (1981) the court ruled eighteen months was not adequate notice of the exam requirement. In the case of *Brady v. Turlington* (1979), the plaintiff complained of due process violations on the grounds of the retroactive application of the testing policy therefore lacking the required adequate notice. The Court of Appeals held that the "rule exempt[ed] from retaking the test those who satisfactorily performed before the rule was adopted; and it did not irremediably disadvantage those who did not so perform, for they [had] now have another opportunity to do so" (*Brady v. Turlington*, p. 1165). The case of *Wells v. Banks* (1980) resulted in judicial support for the educational agency in an adequate notice claim.

The court ruled that the plaintiffs were given more than adequate notice based upon the evidence presented in the case, although the court documents did not reflect the length of time given (*Wells v. Banks,* 1980). The *GI Forum, Image de Tejas v. the Texas*

Education Agency and the Texas State Board of Education ruling indicated that the students began taking the test in the third grade and were expected to pass the exit exam beginning in the tenth grade. The period of time before sanctions began was actually seven years. In addition, the students were given multiple opportunities to pass the test before being denied a diploma. The court ruled that the Texas Education Agency had provided adequate notice to the students as to the use and consequences of the test (*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*, 2000). In the case of *The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach,* an expert in the area of competency testing testified that notice to senior students who were to participate in competency testing as a criteria for graduation should have been informed of the requirement as early as the fourth or fifth grade (*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach*, 1981). Further, the court, in this case, determined that the denial of a high school diploma would have had negative consequences on the students and their futures.

Therefore, the court held that early notice should have been given in order to provide ample opportunity to prepare to pass the tests, however the court did not specify the length of time. In *Anderson v. Banks; Johnson v. Sikes* (1981), the court discussion focused on the plaintiffs' claim of due process violations as regard to adequate notice. The District court's opinion held that two years was adequate notice if provisions existed that the students had an opportunity to retake the test and receive remediation (*Anderson v. Banks; Johnson v. Sikes*).

An indirect nexus to the issue of due process violations via high stakes testing and the denial of a high school diploma was revealed in two cases regarding students' right to participate in graduation ceremonies. The theme of due process regarding adequate notice was supported by the rulings in *Crump v. Gilmer Independent School District* (1992) and *Williams v. Austin Independent School District* (1992). The analysis of these cases revealed embedded due process issues as students who did not pass the state mandated exams were denied the opportunity to participate in the graduation ceremony with their peers.

In the two cases, close proximity of time and location, the courts ruled differently. First was the case of *Crump v. Gilmer Independent School District* in May of 1992. In this case, the court ruled that the student would not be awarded his diploma but would suffer irreparable harm if not allowed to participate in the graduation ceremony. Based upon the fact that the student may have had a legitimate claim regarding the due process and adequate notice of the test, the court ruled that the student would have likely succeeded on these merits. Therefore, the student was denied his diploma but was allowed to participate in the graduation ceremony (*Crump v. Gilmer Independent School District*, 1992). However, the next month, a father petitioned the court regarding the same issue after reading about the proceeding case (*Williams v. Austin Independent School District*, 1992).

The U.S. District Court for the Western District of Texas determined that based on notification given to the student in a guide provided to all incoming high school students and that the teachers frequently mentioned the requirement of the exam for graduation, adequate notice had been given. Although the reference in the guide was to

an earlier version of the exam, the judge ruled that the student knew that he would need to pass some form of an exam in order to receive his diploma. A dispute about the discrepancy in difficulty between the former and current version of the test was deemed irrelevant, as increased rigor in examinations was not unconstitutional. "Students should be given a fair opportunity to pass the test, not a guarantee that they will pass the test" (*Williams v. Austin Independent School District*, p. 259). In this case, the courts ruled that the student had adequate notice of the test, and would suffer no irreparable harm, as he would have further opportunity to take and pass the test. The plaintiff was not awarded a diploma and was not permitted to participate in the graduation ceremony. The court determined that the public's interest was best served by the court's non-interference in school matters, which were best addressed by the school district, the Texas legislature, and the State Board of Education (*Williams v. Austin Independent School District*).

The due process claims for students with special learning needs were more complex; the courts indicated that each student's Individualized Education Plan (IEP) specify the testing modifications and accommodations required to prepare for the exam. As a result, students with disabilities claimed due process violations for the implementation of a high stakes testing policy without adequate notice.

In reviewing the time frame requirement for notice it must be emphasized that while these students participated in a program of instruction in the same basic subjects taught to all students the methods and goals utilized were directed to their individual needs therefore the time frame for notice to them is much more crucial than that for non-handicapped students in conventional programs. (*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach,* 1981, p. 981)

In the case of *The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach* (1981), the court ruled in favor of the petitioners. In this case, both students' IEPs were designed to meet their educational goals, not to pass the Basic Competency Tests mandated by the state. The court found that the notification of the testing requirement was not given to the parents in a timely manner, violating an EHA mandate that parents be notified of matters that affect their child's education. The notice of the requirement was given to the parents in April of 1979, prior to the expected graduation date of June of 1979. As a result of the late notification, the students' IEPs would not have been adjusted to provide them the skills necessary to pass the exams. Therefore, the New York State Supreme Court found the denial of a diploma to these students would have been a deprivation of liberty, and upheld their due process protection (*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach*).

In the case of *Brookhart v. Illinois State Board of Education,* (1982) eleven students were denied diplomas as the result of a new testing policy requiring successful completion of a standardized minimum competency test. The District Court ruled that the denial of a diploma was not the denial of a free and appropriate education as mandated in the EHA and supported the denial of the students' diplomas. However, when this graduation requirement policy was implemented, the students' IEPs did not reflect plans for preparing for the test and did not list the modifications or accommodations the students would need in order to prepare for the test. The students appealed in the case of *Brookhart v. Illinois State Board of Education* in 1983. The appellate court ruled that the

students had not received adequate notice and that the suggested remedy of remediation would not be appropriate for the students.

Therefore, the court ruled that the state was in violation of procedural due process, and ordered that students were exempted from the testing requirement and ordered the state to award diplomas to these eleven students (*Brookhart v. Illinois State Board of Education*). A similar case, involving due process violations and students with disabilities, was brought before the Indiana Courts to determine whether the successful completion of the GQE as a requirement for graduation was constitutional, and whether it was in violation of the Individuals with Disabilities Act (IDEA). In the case of *Rene v. Reed* (2001), the plaintiffs filed a class action law-suit against the Indiana State Superintendent claiming that the GQE requirement violated their due process rights to adequate notice, as well as their rights under IDEA.

The case began in the Indiana trial court where the court ruled in favor of the state. The court ruled that the requirement was not an infringement of their rights, three years notice was sufficient, the students were exposed to the curriculum, and additional remediation was offered to prepare the students for the exam. The plaintiffs appealed. The appellate court ruled that three years notice was substantiated, as adequate time in the prior case law. Further, the court ruled that the students had been exposed appropriately to the curriculum. The court noted that although students with disabilities learned at a slower pace than non-disabled students, the state had met the requirements of notice and exposure along with multiple remedial opportunities. Interestingly, the appellate court also "noted initially that the IDEA [did] not require specific results, but

instead it mandate[d] only that disabled students have access to specialized and individualized educational services" (*Rene v. Reed*, 2001, p. 745).

Further, the court found that the denial of a high school diploma to students with disabilities who did not achieve the necessary level of proficiency to pass the GQE, was not a denial of a free and appropriate education (FAPE). A non-related case provided clarity in understanding the judicial perspective of high school graduation. A statement from the courts regarding high school graduation and the relationship to a FAPE, found in *Brett v. Goshen Community School,* noted that the "Supreme Court has refused to equate graduation with a free appropriate public education because it [was] possible for students to advance from grade to grade and graduate without receiving a free appropriate public education" (*Brett v. Goshen Community School*, 2001, p. 943).

Several other cases were brought to court that involved due process claims. The case of *Anderson v. Banks; Johnson v. Sikes* (1981) supported the educational agency in its mission to improve the quality of education through the means of minimum competency testing. In this case, the plaintiffs complained of lack of adequate notice, however the court disagreed and ruled that the "notice period of more than two years, the provisions that the test may be retaken, and the provision of remedial courses considered together [were] not constitutionally inadequate" (*Anderson v. Banks; Johnson v. Sikes*, p. 505). In 1980, Renita Love filed a complaint in the United States District Court claiming that the students in Florida did not receive adequate notice of the denial of diploma for students who failed the SSAT-II (*Love v. Turlington*, 1980). Later, the plaintiffs filed an appeal for class action status partly based upon the due process claim, but were denied as there was no commonality and typicality that existed (*Love v. Turlington,* 1984). In

addition, the cases of *Student v. Driscoll* (2002) and *Student 9, et al., v. Driscoll, et, al.,* (2004) included complaints of adequate notice; however, the cases were dismissed.

The *Triplett v. Livingston County Board of Education* (1997) court case indirectly indicated a violation of due process rights with the state's notification of the requirement during the year of implementation. The Kentucky Instructional Results Information System (KIRIS) was first used to measure the performance of each district's educational program. However, in 1994, the Livingston County School Board adopted a policy requiring students to pass all sections of the KIRIS in order to receive a diploma. The Triplett's claim was that adequate notice was not given to students in order to prepare for the test. However, the appellate court held that the exam requirement did not serve to prejudice the Triplett students, and that the test material was covered in the students' normal academic program (*Triplett v. Livingston County Board of Education*, 1997). In the case of *Hubbard by Hubbard v. Buffalo Independent School District,* (1998), due process violations were brought forth, however during the proceedings the plaintiffs abandoned their claim admitting that they had in fact received adequate notice of the testing policy.

The case of *Rene v. Reed* was heard in the Court of Appeals in Indiana to dispute the adequate notice of the state's testing policy. In this case, the plaintiffs claimed that the state violated due process adequate notice protections. The court ruled that the parents and students had at least three years notice, based upon the precedent set in the *Northport* case this length of time was determined to be adequate (*Rene v. Reed*, 2001). The case of *Chapman v. California Department of Education* (2002) also referenced the issue of due process violations in that the plaintiff students with disabilities were unable to pass the

CAHSEE test without the appropriate accommodations and modifications to allow them to meaningfully participate in the testing. The students' IEPs did not reflect the successful completion of the CAHSEE; therefore, the students had not had adequate time to implement their individualized learning goals. Although the adequate notice issue was not directly addressed by the court, the plaintiffs prevailed and the court awarded them the use of appropriate accommodations and modifications to retake the test (*Chapman v. California Department of Education*).

The *Californians for Justice Education Fund v. California Department of Education* case (2006) indirectly contained an issue of adequate notice. The plaintiffs in the case claimed that they were not given "a real opportunity to appeal in a timely and meaningful manner" (p. 5). The court ruled that due to the plaintiff students not receiving their scores on the LEAP test that they bore no injury considered concrete or particularized. Instead, the likelihood of injury was considered hypothetical or conjecture. Lastly, the *O'Connell v. The Superior Court of Alameda County* case in 2006 noted the State of California's attempt at reforming public schools similar to that of the State of Massachusetts. In this case, the Court of Appeals for the State of California noted their awareness that "the record in this case raise[ed] considerable doubt as to whether the improvements in California schools required by the *Williams* settlement were sufficient, at least in the immediate future, to give all students currently enrolled in high school an adequate opportunity to prepare properly for the CAHSEE" (*O'Connell v. The Superior Court of Alameda County*, p. 1483).

As the above case details disclosed, the courts have clarified the interaction of high stakes testing policies and violations of procedural due process protections. For the

policy to be considered constitutional, the state and local school boards must have given adequate notice to parents and students. The court supported two to three years as adequate notice and consistently ruled as to the constitutionality of these terms of notice. Cases below involve due process claims based upon alleged adequate notice violations.

Table 11

Adequate Notice Cases

Date	Case
1979	*Brady v. Turlington*
1979	*Debra P. v. Turlington*
1980	*Wells v. Banks*
1981	*Debra P. v. Turlington*
1981	*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach*
1981	*Anderson v. Banks; Johnson v. Sikes*
1982	*Brookhart v. Illinois State Board of Education*
1983	*Brookhart v. Illinois State Board of Education*
1984	*Love v. Turlington*
1992	*Williams v. Austin Independent School District*
1992	*Crump v. Gilmer Independent School District*
1997	*Triplett v. Livingston County Board of Education*
1998	*Hubbard by Hubbard v. Buffalo Independent School District*
2000	*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*
2001	*Rene v. Reed*
2002	*Student v. Driscoll*
2002	*Chapman v. California Department of Education*
2006	*Californians for Justice Education Fund v. State Board of Education*
2006	*O'Connell v. The Superior Court of Alameda County*

Substantive Due Process

Substantive due process complaints occurred when the state allegedly violated a student's rights that were "so profoundly inherent in the American system of justice that they cannot be limited or deprived arbitrarily" (*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*, 2000, p. 682). Substantive due process protections ensured that the high stakes testing policies were not implemented in an unreasonable or arbitrary way that would compromise student rights. The analysis of these cases revealed the consistencies in the court rulings as well as some unique decisions that contrasted with the majority of rulings. The results of the analysis were presented below, with details of each case specifically relating to substantive due process claims.

Legitimate Goals of the State

The major component embedded in substantive due process claims was whether the test was linked to the legitimate goals of the state. A policy that was determined as a close nexus to the legitimate goals of the state was less likely to be considered arbitrary and capricious. In all cases where the use of the test was upheld, the courts determined that the test was either an educational necessity or bore a manifest relationship to the states' legitimate educational goals, of providing or improving the states' educational systems.

The following case referenced the test's nexus to the states' objectives: *Debra P. v. Turlington* (1979); *Florida State Board of Education and Turlington v. Brady,* (1979); *Wells v. Banks,* (1980); *Anderson v. Banks; Johnson v. Sikes,* (1981); *Crump v. Gilmer Independent School District*, (1992); *Rankins v. Louisiana State Board of Elementary and*

Secondary Education, (1994); *Triplett v. Livingston County Board of Education,* (1997); *New York Performance Standards Consortium v. New York State Education Department,* (2002); *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education,* (2000); *Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District,* (2002); *Flores v. State of Arizona,* (2005); *Hancock et al. v. Commissioner of Education et al.,* (2005); *Coachella Valley Unified School District v. State of California,* (2005) *and O'Connell v. The Superior Court of Alameda County,* (2006). As mentioned earlier in this paper, the judicial courts were reluctant to become involved in the state's authority to administer the public education of its students. The courts carefully considered the goals of the state's educational program, and in every case, the court upheld the state's authority to improve its educational system.

The case analysis revealed that the courts were consistent in upholding the policy and the state's authority to implement the test as a requirement for a diploma, if the testing policy had a clear nexus to the state goals of improving the education of its students, and the policy did not clearly and distinctly infringe on the rights of the students. Table 12 depicts the cases involving substantive due process claims with a focus on the legitimate goals of the state.

Table 12

Legitimate Goals of the State Cases

Date	Case
1979	*Debra P. v. Turlington*
1979	*Florida State Board of Education and Turlington v. Brady*
1980	*Wells v. Banks*
1981	*Anderson v. Banks; Johnson v. Sikes*
1992	*Crump v. Gilmer Independent School District*
1994	*Rankins v. Louisiana State Board of Elementary and Secondary Education*
1997	*Triplett v. Livingston County Board of Education*
2000	*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*
2002	*New York Performance Standards Consortium v. New York State Education Department*
2002	*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*
2005	*Flores v. State of Arizona*
2005	*Hancock et al. v. Commissioner of Education et al.*
2005	*Coachella Valley Unified School District v. State of California*
2006	*O'Connell v. The Superior Court of Alameda County*

As the courts upheld states' authority to implement a testing requirement, the courts also upheld the nexus to state goals as a factor in determining whether the test was fundamentally fair rather than arbitrary. The following discussion reflects the insights from the analysis and the determination of fairness.

Fundamentally Fair Test

A consistent theme throughout these cases was whether the test in question was a fundamentally fair test. The courts' determinations of whether the tests were fundamentally fair were two pronged distinctions, as part of due process protections and the equal protection guarantees. If the plaintiffs were not of a protected class of students, the fundamental fairness issue was determined under the due process rulings. If the plaintiff students were of a protected class, the rulings were held under the equal protection ruling. In both instances the courts' investigations in determining if a particular test was fair and constitutional revealed two elements in the case law. The tests' fairness was determined by its validity, and nexus to the legitimate objectives of the state. The nexus to the states' legitimate interest in their individual educational systems was discussed in an earlier section.

The issue of the validity of the tests was revealed in the analysis and is presented in the following discussion. As illustrated in several of the cases, the courts went to great measures to find evidence that the tests were valid, reliable, fair, and unbiased. The courts also sought to determine whether the use of test results was to better student learning. For students with disabilities, the complaints were more complex. The analysis revealed specific information regarding high stakes testing and students with disabilities. The following caveats emerged from the data regarding students with disabilities. First, the standardized test must have been valid in measuring what it was intended to measure without reflecting the students' impairment. Second, the students must have had meaningful access to the test (through accommodations) or the results were rendered invalid as an assessment of student capabilities.

Thirteen of the 39 cases presented in this analysis specifically addressed the validity of the test to consider fairness. The courts gave consideration to the following criteria to determine the fairness of state tests:

1. The development of the test.
2. The reliability of the test.
3. The evidence that material on the test was actually taught in the schools.
4. The test was free from bias.
5. The educational agency could prove that the test did not discriminate.

As discussed in previous sections, the first case involving substantive due process claim that addressed the fairness of the test was the *Debra P. v. Turlington* case beginning in 1979. In this case substantive due process violation claims focused whether the material covered on the test was actually taught in Florida schools. The court ruled that the curricular validity of the test had to be established prior to the denial of diplomas to any students. The results of the case heard before the United States District Court for the Middle District of Florida determined that the state met the burden of proof that the test did indeed cover the material on the test (*Debra P. v. Turlington*, 1983). This ruling was upheld by The United States Court of Appeals for the Eleventh Circuit in 1984 (*Debra P. Turlington*, 1984), granting the state the right to deny diplomas to students who did not successfully complete the test.

In 1981, the case of *Anderson v. Bank; Johnson v. Sikes* also brought forth serious allegations of the state test, CAT, being unfair, racially biased, and the test lacked validity and reliability. The court documents reflected that there were indeed serious issues with the scoring of the tests and the tests curricular validity of the test remained in question.

Therefore, the court ordered diplomas to the students who would have received them excluding the requirement of the CAT (*Anderson v. Bank; Johnson v. Sikes*).

The cases of *Crump v. Gilmer Independent School District* (1992) and *Williams v. Austin Independent School District* (1992) presented contrasting court perspectives of substantive due process violations. In *Crump v. Gilmer Independent School District* (1992), the United States District Court for the Eastern District of Texas, ruled that the denial of students' diplomas violated due process protections based upon the "considerable doubt" that the school district could prove that the material on the TAAS was covered in the schools' instruction (*Crump v. Gilmer Independent School District*, 1992, p. 556). The court held that as the school district's administrators and teachers were not allowed prior access to the material on the test, there would have been no way for them to know if the material was actually covered during instruction. "The more vague and broad the elements [of instruction] are, the less likely it is that the examination questions would have specifically corresponded to the school curriculum" (*Crump v. Gilmer Independent School District,* p. 556). In contrast, the *Williams v. Austin Independent School District* case resulted in the United States District Court for the Western District of Texas finding that the school district presented "substantial evidence" that the student took courses which would have adequately prepared him to pass the TAAS test (*Williams v. Austin Independent School District*, 1992, p. 254).

In *Triplett v. Livingston County Board of Education* (1997), the plaintiff's complaint included allegations that the test used by the State of Kentucky (KIRIS) was unreliable, subjective, and arbitrary. The court ruled that the purpose of the exam was to

assure student achievement, and under strict scrutiny, the test fulfilled the state's interest in the improvement of the educational system (1997).

In the year 2000, the *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education* case was presented. The plaintiffs in this case also complained of violations of substantive due process rights on the grounds of curricular validity. The evidence presented to the court included expert witnesses that testified as to the soundness and fairness of the test. Other testimony included expert analysis as to the validity and reliability of the test. The court ruled that the test effectively measured mastery of learner skills. Furthermore, the Texas Education Agency proved that the administration of the test was an educational necessity with a manifest relationship to the legitimate goals of the state. Therefore, the court ruled that the TAAS did not depart from academic norms for curricular validity with a "sufficient degree of reliability," and that the disparities resulting from the administration of the test were not due to flaws in the test itself (*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*, p. 682). In addition, the court held that the students in the State of Texas had sufficient opportunity to learn the material on the test due to the remedial efforts in place and the multiple opportunities to retake the test (*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*).

One year later, the case of *Rene v. Reed* (2001) was brought to the Court of Appeals in Indiana with a request for declaratory and injunctive relief from the Graduation Qualifying Exam. The plaintiffs were students with special needs who claimed that the state violated their due process rights by requiring them to be tested on

material that they did not have an opportunity to learn. The plaintiff students with disabilities argued that the curriculum had not been realigned after the testing requirement and they, as students with disabilities, needed more time to prepare for the test as opposed to regular education students. The court found, however, that the students did not present compelling evidence that the test was not aligned to state standards, and that, given multiple remedial opportunities, the students were most likely exposed to the content covered on the test. The court did note however that the students would have benefited from an earlier adjustment of their curriculum through their IEPs (*Rene v. Reed,* 2001).

The analysis revealed two cases that involved the determination of the fundamental fairness of tests used to assess students with disabilities. The *Brookhart v. Illinois Board of Education* (1983) and the *Chapman v. California Department of Education* (2002) cases identified three issues pertaining to testing students with special learning needs. First, the test must have been valid in measuring what it was intended to measure without reflecting the students' impairment. Second, the students must have had the opportunity to meaningfully participate. Lastly, the courts required evidence as to the curricular validity of the test. The analysis revealed these consistencies when the courts sought to determine the constitutionality of high stakes testing policies and students with disabilities.

The case of *Flores v. State of Arizona* (2005) provided an interesting example of limiting students' rights to educational programs. In this case, the state legislature was ordered by the court to fully fund the English Language Learners (ELL) program, which, at the time, was illegally underfunded. The court held the legislature in contempt, and

ruled that the state had violated students' substantive due process rights in limiting their access to an education. In this case, the court found that ELL students had not had a fair opportunity to learn the material on the Arizona Instrument to Measure Standards (AIMS) test due to inadequate funding of the state's ELL program. The penalty ordered by the court until the state complied with court orders were as follows: $500,000 a day for each day after fifteen days until compliance (up to thirty days); $1,000,000 a day for each day thereafter for up to thirty days; $1,500,000 a day for each day thereafter up to another thirty days, and a stunning $2,000,000 a day thereafter until compliance (*Flores v. State of Arizona*, 2005).

The class action case of *Advocates for Special Kids v. Oregon* (2001) also addressed the curricular validity of the state mandated test for students with special needs. In this case, the plaintiffs claimed that the state test was not valid for students with disabilities in the respect that the State Board of Education did not consider students with disabilities when formulating the exams (*Advocates for Special Kids v. Oregon*, 2001). Similarly, the case of *Noon et al. v. Alaska State Board of Education and the Anchorage School District* (2004), addressed the curricular validity of the High School Graduation Qualifying Exam, and its use for students with disabilities. Both of these cases were settled out of court with supporting evidence indicated in each settlement agreement (*Advocates for Special Kids v. Oregon*, 2001; *Noon et al. v. Alaska State Board of Education and the Anchorage School District*, 2004).

The cases of *Student v. Driscoll* (2002) and *Student 9 et al. v. Board of Education et al* (2004) claimed that the MCAS test was unfair, as it did not measure specifically the core context classes mandated in the Massachusetts Education Reform Act of 1993. The

students complained that the test did not cover the subject areas mandated in the Act and that the competency of a student to be measured by a variety of assessment instruments as stated in the Act. The court found that the students did not show likelihood of irreparable harm in the degree needed to obtain a preliminary injunction (*Student 9 et al. v. Board of Education et al*).

In the case of *O'Connell v. The Superior Court of Alameda Court* (2006), the plaintiff, Superintendent of Public Instruction O'Connell, filed suit against the Superior Court of Alameda County to petition the Appellate Court for a writ of mandate to vacate the court ordered preliminary injunction restraining the California Board of Education from denying diplomas to students who did not pass the CAHSEE. The court found that the appropriate remedy for the state requirement of successful exit exam completion to receive a diploma was to provide both the opportunity to learn a curriculum aligned to the test requirements, and free remedial support for those who did not pass. The court held that if the state met these provisions, there would be no due process violations in the context of state exit exam requirements (*O'Connell v. Superior Court of Alameda County*, 2006). That same year, 2006, the case of *Californians for Justice Education Fund v. State Board of Education* was settled with court documents reflecting a published study, which included concerns regarding the fairness of the test for students who had not been adequately prepared for the test by the public school system. This report also included recommendations and suggestions for the Board to consider when deciding whether to defer the implementation of the CAHSEE (*Californians for Justice Education Fund v. State Board of Education*).

The analysis of data revealed the courts strong support for the curricular validity of the tests to ensure that the students had adequate opportunity to learn the material under the states' individual public education programs. The table below references cases that contained information regarding the fundamental fairness of the tests.

Table 13

Fundamentally Fair Test Cases

Date	Case
1979	*Debra P. v. Turlington*
1981	*Anderson v. Banks; Johnson v. Sikes*
1983	*Debra P. v. Turlington*
1983	*Brookhart v. Illinois State Board of Education*
1984	*Debra P. v. Turlington*
1992	*Williams v. Austin Independent School District*
1992	*Crump v. Gilmer Independent School District*
1997	*Triplett v. Livingston Board of Education*
2000	*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education.*
2001	*Rene v. Reed*
2001	*Advocates for Special Kids v. Oregon*
2002	*Chapman v. California Department of Education.*
2004	*Student 9 et al., v. Board of Education et al.*
2004	*Noon et al. v. Alaska State Board of Education and the Anchorage School District*
2005	*Flores v. State of Arizona*
2006	*Californians for Justice Education Fund v. Board of Education*
2006	*O'Connell v. Superior Court of Alameda County*

Multiple Opportunities to Test

In addition to a fundamentally fair test the analysis revealed specific information regarding the students' opportunities to retake the test multiple times in order to successfully complete the diploma requirement. States often provided multiple opportunities for students to retake the test in order to pass and receive their diplomas. In the analysis, the following cases included information regarding multiple opportunities to take the test: *Anderson v. Banks; Johnson v. Sikes,* (1981); *Brookhart v. Illinois State Board of Education,* (1982); *Johnson and Wilcox v. Sikes,* (1984); *Crump v. Gilmer Independent School District*, (1992); *Williams v. Austin Independent School District,* (1992); *Rankins v. Louisiana State Board of Elementary and Secondary Education*, (1994); *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*, (2000); *Noon et al. v. Alaska State Board of Education and the Anchorage School District State Board of Education* (2004), and *Student 9 et al. v. Board of Education et al.*, (2004). Each of these cases mentioned that students had multiple opportunities to demonstrate mastery of the tested material in order to earn their diploma. Although multiple testing opportunities was not a featured issue presented to the courts, the case law evidence supported the tests as being fundamentally fair and supportive of due process protections. Table 14 lists the cases allowing multiple opportunities for students to retake the tests.

Table 14

Multiple Opportunities to Test Cases

Date	Case
1981	*Anderson v. Banks; Johnson v. Sikes*
1982	*Brookhart v. Illinois State Board of Education*
1984	*Johnson and Wilcox v. Sikes*
1992	*Crump v. Gilmer Independent School District*
1992	*Williams v. Austin Independent School District*
1994	*Rankins v. Louisiana State Board of Elementary and Secondary Education;*
2000	*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*
2004	*Noon et al. v. Alaska State Board of Education and the Anchorage School District State Board of Education*
2004	*Student 9 et al. v. Board of Education et al.*

Remediation

Similar to the multiple opportunities to take the tests, the efforts by the state to provide remediation to students who were not successful on the test also enhanced the states' positions on due process safeguards. These cases included remedial efforts by the state to support the students in their attempts at passing the tests. These efforts provided further opportunities to learn the material on the tests and exemplified the states' due diligence to provide additional support to students before the denial of their diplomas. As mentioned in the previous section, remediation was not a featured issue presented to the courts, but was an axial code that emerged during the data analysis. The following cases offered evidence of remediation to students were: *Debra P. v. Turlington* (1979); *Anderson v. Banks; Johnson v. Sikes* (1981); *Brookhart v. Illinois State Board of*

Education (1983); *Johnson and Wilcox v. Sikes,* (1984); *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education,* (2000); *Rene v. Reed,* (2001); *Student 9 et al. v. Board of Education et al.*, (2004); *Hancock et al. v. Commissioner of Education et al.,* (2005); *Superior Court of California County of Alameda and Valenzuela v. O'Connell*, (2007) and *Mumid et al. v. Abraham Lincoln High School, The Institute for New Americans, and Special School District 1* (2008). The safeguards of multiple opportunities to test and remedial opportunities, provided students with the fair opportunity to successfully complete the requirements for earning their diploma. These two components, along with the tests not being the sole criterion for a diploma positioned the states for success against due process claims. Table 15 includes the cases that referenced remediation in the case documents.

Table 15

Remediation Cases

Date	Case
1979	*Debra P. v. Turlington*
1981	*Anderson v. Banks; Johnson v. Sikes*
1983	*Brookhart v. Illinois State Board of Education*
1984	*Johnson and Wilcox v. Sikes*
2000	*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*
2001	*Rene v. Reed*
2004	*Student 9 et al. v. Board of Education et al.*
2005	*Hancock et al. v. Commissioner of Education et al.*
2007	*Superior Court of California County of Alameda and Valenzuela v. O'Connell*
2008	*Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District 1*

Sole Criterion for Denial of Diplomas

The analysis of the case law revealed that the policy was less likely to be found in violation of due process protections if the test was not the sole criterion required for a diploma. Other criteria, such as earned credits, attendance, and the successful completion of projects, created a broader picture of student success or failure, preventing one criterion as being the basis for denial of diploma. Of the cases analyzed, four specifically addressed the use of high stakes exams as the sole criterion for denying a diploma. The use of exit exams as the sole criterion for the awarding or denial of diplomas was not supported in the analyzed cases. In fact, one case specified that the use of the tests as a sole determinant was contrary to the current prevailing educational standards (*GI Forum,*

Image de Tejas v. the Texas Education Agency and the Texas State Board of Education, 2000). The first case documenting the courts' opinion regarding the sole criterion issue was found in the *Debra P v. Turlington* case of 1979. In this case, the court documents reflect that the state enacted a *Pupil Progression Plan* in which the legislature established three criteria for graduation. However, two of the three criteria included the successful completion of a state mandated test. The first criterion was the satisfactory performance on the functional literacy test, and the second was the mastery of basic skills as measured by the state test. The cases of *Anderson v. Banks; Johnson v. Sikes* (1981) and *Johnson and Wilcox v. Sikes* (1984) noted the compulsory attendance laws mandated attendance as a criterion for graduation. In the *Flores v. State of Arizona* and *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education* cases, the defendants' posture highlighted that the use of the state test was not used as a sole criterion for diploma decision-making. The *Flores* case documents a "number of graduation requirements...a minimum number of credits that students must successfully complete" (*Flores v. State of Arizona,* p. 1116).

Additionally, the Defendant State of Arizona enacted legislation that would enable students to apply grades earned in some high school classes to "augment their AIMS test scores" (*Flores v. State of Arizona,* p. 1117). The *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education* (2000) case specifically addressed the educational practice of a single criterion for denial of diplomas, "Current prevailing standards for the proper use of educational testing recommend[ed] that high stakes decisions, such as whether or not to promote or graduate a student,

should not be made on the basis of a single test score" (*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education,* p. 674-675).

Further, the case provided the requirements for a diploma in Texas as three separate and independent criteria: successful completion of the TAAS, attendance, and course success as demonstrated by a score of 70 percent (2000). *Brookhart v. Illinois State Board of Education* (1983) used the multiple criteria for a diploma as evidence that the use of a standardized test diploma as criteria did not deny students with special needs a free and appropriate education. The case of *Rankins v. Louisiana Board of Elementary and Secondary Education* (1994) mentioned the supplemental requirement of 23 Carnegie units in addition to the state exam for the receipt of a diploma. Similarly, the case *of Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District Number 1* (2008) made clear Minnesota's diploma criteria of earned credits in addition to the state mandated tests. In the *Crump v. Gilmer Independent School District* (1992) and *Triplett v. Livingston County Board of Education* (1997) cases, the courts implied other criteria required for a diploma in the statement "...plaintiffs Crump and Jeffrey ha[d] successfully completed all other requirements for a high school diploma" (*Crump v. Gilmer Independent School District,* 1992, p. 553), and that Chad Triplett had fulfilled all requirements for a diploma (*Triplett v. Livingston County Board of Education* 1997).

Lastly, the case of *O'Connell v. the Superior Court of Alameda County*, (2006) indicated that the same state legislation that created the CAHSEE in California also required the State Board of Education to conduct a study of other "criteria by which high school pupils who are regarded as highly proficient but unable to pass the CAHSEE may

demonstrate their competency" (p. 1460). Neither party in this case disputed that the state did not adopt any other criteria for the receipt of a diploma. Despite the lack of other criteria for the awarding of diplomas, the educational agency prevailed in this case. In summary, the data revealed evidence that overall the tests were not used as the sole criterion for graduation. Table 16 lists the cases that referenced the test as a sole criterion for the awarding of a diploma. Table 17 presents a summary of all the cases involving due process claims.

Table 16

Sole Criterion for Denial of Diplomas Cases

Date	Case
1983	*Brookhart v. Illinois State Board of Education*
1984	*Johnson and Wilcox v. Sikes*
1994	*Rankins v. Louisiana Board of Elementary and Secondary Education*
2000	*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*
2005	*Flores v. State of Arizona*
2006	*O'Connell v. The Superior Court of Alameda County*

Table 17

Summary Case Law Regarding High Stakes Testing Due Process Claims

Date	Case
1979	*Debra P. v. Turlington*
1979	*Florida State Board of Education v. Brady*
1980	*Wells v. Banks*
1980	*Love v. Turlington*
1981	*Debra P v. Turlington*

Date	Case
1981	*Anderson v. Banks; Johnson v. Sikes*
1981	*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach*
1982	*Brookhart v. Illinois Board of Education*
1983	*Debra P. v. Turlington*
1983	*Brookhart v. Illinois Board of Education*
1984	*Bester v. Tuscaloosa*
1984	*Love v. Turlington*
1984	*Debra P. v. Turlington*
1984	*Johnson and Wilcox v. Sikes*
1992	*Crump v. Gilmer Independent School District*
1992	*Williams v. Austin Independent School District*
1994	*Rankins v. Louisiana Board of Elementary and Secondary Education*
1997	*Triplett v. Livingston County Board of Education*
2000	*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*
2001	*Rene v. Reed*
2001	*Advocates for Special Kids v. Oregon*
2002	*Student v. Driscoll*
2002	*Chapman v. California Department of Education*
2004	*Noon et al. v. Alaska State Board of Education and the Anchorage School District*
2004	*Student 9 et al., v. Board of Education et al.*
2005	*Flores v. State of Arizona*
2006	*O'Connell v. The Superior Court of Alameda County*;
2006	*Californians for Justice Education Fund v. State Board of Education*
2008	*Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District 1*
2008	*Kidd v. California Department of Education*

Equal Protection Clause Violations

The Fourteenth Amendment guaranteed equal protection to all citizens. The equal protection clause ensured students the opportunity to learn, and non-discriminatory educational practices. "A large concern of testing's opponents is that tests may violate students' rights to ...Equal Protection" (Heise, 2009, p. 145). Some plaintiffs claimed that they were subject to prior discriminatory practices such as segregation, or lack of preparation due to tracking or ability. The plaintiffs claimed that the effects of these practices created a disadvantage for these students and that their opportunity to learn was compromised. The courts examined the cases carefully under strict scrutiny, and in most cases ordered injunctions granting relief to these students from the application of the testing policies.

Twenty of the cases included in this analysis incorporated the equal protection clause in their complaint or arguments: *Debra P. v. Turlington*, (1979, 1981, 1983, 1984); *Florida State Board of Education and Turlington v. Brady, (*1979); *Wells v. Banks*, (1980); *Anderson v. Banks*; *Johnson v. Sikes*, (1981); *The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach*, (1981); *Johnson and Wilcox v. Sikes*, (1984); *Rankins v. Louisiana State Board of Elementary and Secondary Education*, (1994); *Brookhart v. Illinois State Board of Education,* (1983); *Hubbard by Hubbard v. Buffalo Independent School District*, (1998); *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*, (2000); *Rene v. Reed* (2001); *Chapman v. California Department of Education,* (2002); *Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School*

District, (2002); *Flores v. State of Arizona*, (2005); *O'Connell v. The Superior Court of Alameda County*, (2006); *Kidd v. California Department of Education* (2008); and *Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District Number 1*, (2008).

The seminal case in high stakes testing litigation, *Debra P. v. Turlington* (1979), was brought to the United States District Court for the Middle District of Florida, Tampa Division in July of 1979 challenging the state's Functional Literacy Examination claiming that the testing policy violated their Fourteenth Amendment rights. The plaintiffs requested an injunction on the practice of requiring the exam as criteria for awarding a school diploma as well as on the practice of utilizing the results as a component in structuring remediation classes, which was interpreted by the plaintiffs as an attempt to re-segregate public schools (1979).

The plaintiffs' claims asserted that the state designed and implemented a test that was racially biased, and violated the Fourteenth Amendment's equal protection clause. In addition, the plaintiffs claimed that the use of the test for structuring a remediation program supported the re-segregation of public schools, thus violating the Fourteenth Amendment rights of future students who may fail the state mandated exam. The court evidence revealed a disparity between minority student and white student pass rates, indicating lingering vestiges of the previously segregated schools. This was a significant factor in the court's ruling (*Debra P. v. Turlington,* 1979).

On appeal to the district court in May of 1981, the appellants complained that the court erred in its ruling that the testing policy violated the Fourteenth Amendment and those students did not have a property interest in the awarding of a diploma. Although the

court noted the state's responsibility for maintaining minimum standards and improving the quality of education, the court found that the test's curricular validity could not be established. Upon this conclusion, the courts considered the test fundamentally unfair to the students, resulting in violation of their equal protection and due process rights (*Debra P. v. Turlington,* 1981).

In 1983, the case came back to the District Court on remand from the United States Court of Appeals for the Fifth Circuit. The original injunction of 1979 was to expire and the plaintiffs challenged the state again on the same grounds. The court ruled that the vestiges of past discrimination were no longer present. Therefore, the state could begin to deny diplomas to students who did not pass the state mandated test (*Debra P. v. Turlington,* 1983). The United States Court of Appeals for the Eleventh Circuit upheld this decision in 1984 (*Debra P. v. Turlington,* 1984).

The class action case of *Debra P. v. Turlington* (1979) was filed partially on violation of equal protection claims based upon the statistical evidence indicating the results of the 1977 administration of the state test, SSAT II. Seventy-eight percent of African-American students failed one or both sections of the test compared to 25% failure of white students. The 1978 administration resulted in similar percentages of students of color failing. Overall, the failure rate among students of color was ten times that of Caucasian students. The primary claims in this case were that the requirement of the SSAT II "perpetuate[ed] and reemphasize[ed] the effects of past purposeful discrimination" (1979, p. 250), and that the test was racially biased.

In addition, the plaintiff students claimed that the higher percentage of minority students failing the test was foreseeable and probable, and the Florida State Board of

Education was aware of the adverse consequences on vulnerable populations. Analysis of test data revealed that "race more than any other factor, including social-economic status, [was] a predictor of success on the test" (p. 257). Under these circumstances, the court ruled that utilization of the test as a requirement for a high school diploma was a violation of the Fourteenth Amendment equal protection clause. The claim of racial bias of the test instrument itself was not proven by the plaintiffs, and therefore was ruled to be of minimal threat to the test.

In the case of *Wells v. Banks* (1980), plaintiff students claimed that the local board of education's requirement of successful completion of the state test as a criterion for diploma was a violation of their equal protection rights. The students claimed that the requirement imposed by the local board resulted in them being treated differently than other students in the State of Georgia. The court disagreed with the plaintiffs and found that the local board was acting within its statutory authority to impose additional diploma requirements; other local boards in the state could choose to employ other requirements as well (*Wells v. Banks).*

Similarly, in the class action case stemming from the previously mentioned case, *Anderson v. Banks; Johnson v. Sikes* (1981), plaintiff students claimed that the diploma requirement violated their equal protection rights. Statistical analysis of the testing data indicated that race was a "potent predictor" of success on the test (p. 488). In addition, student placement in classes for mentally retarded students exceeded the national average in Tattnall County, Georgia. The national average of placement in classes for mentally retarded students was 2.3% while in Tattnall County; the average student placement was 7.7%. The pattern of placing students of color in classes for mentally retarded was

"grossly disproportionate" (p. 496). The equal protection violation claim presented in this case was two-pronged. First, the plaintiffs claimed that the diploma policy violated the Fourteenth Amendment, and second the policy perpetuated prior de jure segregation (p. 498). The court found that the policy itself was implemented without racial animus and that the higher percentage of black students failing the test was "foreseeable but not foreseen" (p. 499). However, the court determined that the policy could be considered independently of previous segregation, and that the grouping of students created a "potent predictor" of success on the test (p. 500). Furthermore, the court deemed the tracking system employed by the school district as unconstitutional (*Anderson v. Banks; Johnson v. Sikes*).

In another case, *The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach,* (1981), the local Board of Education brought the Commissioner of Education for the State of New York before the Supreme Court of New York to validate the diplomas of two students with disabilities. The State Board of Education revoked the students' diplomas when it was revealed that the students did not pass the state competency exam. The court ruled that these students were entitled to protections under Section 504 of the Rehabilitation Act of 1973, but the requirement that they pass the test did not violate their equal protection rights. The court determined that they were guaranteed the right to participate in the test without discrimination, but were not guaranteed to succeed on the test. However the court enjoined the state from revoking the diplomas on the basis of a due process violation, that the students would be deprived of their liberty and property interests should they not receive a diploma and would suffer

adverse effects on their futures if they did not receive their diploma (*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach*).

Once again, the *Debra P. v. Turlington* case emerged in the courts in 1981. This time the case was the result of a request for federal judges to reconsider the case in which the majority voted not to review. In one of the two dissenting opinions, Circuit Judge Tjoflat, commented on the previous ruling of the case. In his opinion, he commented that the "federal court has told the State of Florida that it is constitutionally required to award diplomas to students who are functionally illiterate" (p. 1080). In addition, Judge Tjoflat wrote that the federal court also found it "constitutionally impermissible for the State of Florida to presently require the same level of functional literacy from black and white high school students" (p. 1081). In his dissention, Judge Tjoflat disagreed with the prior court's ruling that the "state's requirement perpetuated past racial discrimination was an affront to the principles underlying the landmark case of *Brown v. Board of Education"* (p. 1081). In 1984, *Debra P. v. Turlington* was appealed before the United States Court of Appeals for the Eleventh Circuit. The Court of Appeals review of the case upheld the district court's ruling establishing the curricular validity of the test, that there was no causal link to the disproportional number of failures among black students and the vestiges of past segregation practices, and that the use of the SSAT II as a diploma sanction would ultimately remedy the vestiges of past segregation. Therefore, on these grounds, the Court of Appeals ruled that the State of Florida could begin denying diplomas to students who did not pass the exam in the year 1983 (*Debra P. v. Turlington,* p. 1417).

In the same year, *Johnson and Wilcox v. Sikes* (1984) was brought before the U.S. District Court of Appeals for the Eleventh Circuit for review. The appellants claimed that the court misinterpreted prior case law regarding equal protection claims in the earlier *Anderson v. Banks; Johnson v. Sikes* (1981) case. The judges denied the request for review on the grounds that the district court had not yet entered an order or final judgment permitting the school boards to reinstate the exam requirement. All students who were formerly denied a diploma were awarded diplomas by the Tattnall County School District as a result of the *Anderson v. Banks; Johnson v. Sikes* ruling. The court ruled that this case was not ripe for appellate review.

In January of 1983, a case involving students with learning disabilities was brought to the United States Court of Appeals for the Seventh Circuit. The eleven plaintiff students in *Brookhart v. Illinois State Board of Education* (1983) claimed the application of MCT requirement for students with disabilities violated their equal protection rights. The Appellate court ruled that the students did not have a standing on equal protection claims solely on the basis of the test requirement. The court ruled that the requirement was not a violation on the grounds that students with disabilities who are "incapable of attaining a level of minimum competency will fail the test" (*Brookhart v. Illinois State Board of Education,* p. 184). Further the court determined that altering the test to accommodate the inability of students with disabilities to learn the content tested would be a "substantial modification and a perversion of the diploma requirement" (p. 184).

Further, a "student who [was] unable to learn because of his handicap [was] surely not an individual who is qualified in spite of his handicap" and the denial of

diploma as a sanction for not successfully completing the MCT [was] not discriminatory (p. 184). In the last component of the claim, the plaintiffs contended that the test must have been validated for students with disabilities to determine that the test was suited to the purpose for which it was intended as to the particular population of students. The court decided against issuing an order to the school board to validate the test for the plaintiffs on the grounds that such an order may have affected the validity of the test when applied to all handicapped students. The court noted that the school district had provided free remedial courses to special education students to provide another opportunity for the plaintiffs to be exposed to the curriculum and learn the material. Moreover, the court advised future students with disabilities to "bypass the courts and enroll in those courses when necessary" (p. 188). Ultimately, the court ruled in favor of the plaintiffs and ordered the school district to award diplomas to the eleven students (*Brookhart v. Illinois State Board of Education*).

It was over a decade before the next case was brought to the courts. This case was brought before the Court of Appeals of Louisiana by five public school students who failed to pass the state Graduation Exit Exam (GEE). The complaint of equal protection violations was based upon the state's lack of the same requirement for students in non-public schools, who were homeschooled, or were pursuing a GED. The previous trial judge ruled that due to the uneven application of the requirement as a criterion for awarding a diploma it was a violation of the equal protection clause. However, the appellate court ruled that the lower court erred in its judgment and that the State Board of Education did not have the right to dictate the curriculum requirements in non-public schools. The appellate court vacated the preliminary injunction against the school district

from denying diplomas (*Rankins v. Louisiana Board of Elementary and Secondary Education,* 1994).

Four years later, the case of *Hubbard by Hubbard v. Buffalo Independent School District* (1998) was filed in United States District Court for the Western District of Texas. The plaintiff in this case was a 16 year old who had previously attended the Buffalo *Independent School District* until her seventh grade year. She transferred to an unaccredited private school during her eighth grade year. She later transferred back to the school district in the middle of her junior year. The district's policy on students transferring from a non-accredited school required students to take an exam to demonstrate proficiency in each of the subject areas in order to transfer the credits to the public high school. The court ruled that this policy did not infringe on a fundamental right nor did it "burden a suspect class" (p. 1016); public education was not a fundamental right, and parents who chose to educate their children in private schools were not members of a suspect class. Therefore, the court ruled in favor of the school district to uphold the policy of uniform public school advancement and requirements a diploma and issuance of a diploma (*Hubbard by Hubbard v. Buffalo Independent School District*, 1998).

The case of *Rene v. Reed* was brought to the courts in 2001 with equal protection violation claims by Meghan Rene based upon the contention that the state violated her rights when she was unable to utilize accommodations during the administration of the state test. In this case, the court determined that "an accommodation for cognitive disabilities provided for in a students' IEP must necessarily be observed during the GQE,

or that the prohibition of such an accommodation during the GQE is necessarily inconsistent with the IEP" (2001, p. 744).

In the class action case of *Chapman v. California Department of Education* (2002), the District Court for the Northern District of California ruled in favor of the students after they sought an injunction from the state requiring them to pass the CAHSEE in order to receive their diploma. The plaintiffs in this case were high school students identified as students with special needs and were served by accommodations and modifications in their Individual Education Plans (IEPs). These students were unable to meaningfully participate in the statewide assessment due to their disabilities. However, the state had no other means of alternate assessment available for these students to demonstrate their academic achievement. The students were entitled to accommodations and modifications under IDEA to participate in statewide assessments. This court relied on United States Department of Education Memorandum *Guidance on Including Students with Disabilities in Assessment Programs,* to guide them in their ruling in favor of the students on two parts.

First, students with IEPs should be assessed with appropriate accommodations and modifications necessary to demonstrate their academic success, or in the case of the accommodations and modifications being inadequate to assess student learning, an alternate assessment must be given. The second action taken by the court was to address the timeliness of the assessment and the development of the IEPs, as to whether the students would have sufficient time or notice to prepare for the CAHSEE. The court ruled that the students had a "dignity interest" in full participation of the educational process and therefore would need to participate in assessment (*Chapman v. California*

Department of Education, 2002, p. 10). In addition, the State of California was ordered to develop an alternate assessment to protect the rights of students with special needs. Until then, students identified with special learning needs could participate in the assessment if they so choose. This case was brought back to the courts in 2002 under the case *Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District.* The United States Court of Appeals for the Ninth Circuit heard the case as an appeal of the previously mentioned case, *Chapman v. California Department of Education*. The Appellate Court upheld the ruling granting students with disabilities the right to take the CAHSEE with the appropriate accommodations and modifications specified in their IEPs. Challenges to the waiver provisions were deemed unripe for adjudication as future harm claims, as they may not occur as anticipated.

However, the waiver process and embedded uncertainty of receiving a waiver, burdened the students' rights to participate in the exams by "forcing them to choose between forgoing the use of modifications or risk the denial of a waiver" (*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*, 2002, p. 781). Therefore, the appellate court reversed, in part, the sections regarding the granting of waivers. The court also reversed the section regarding the voluntary participation in the test until an alternate assessment could be implemented, and remanded these sections back to the District Court for dissolution (*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department*

of Education, California Board of Education and Freemont Unified School District, 2002).

Other cases have been brought to the courts for judicial support for the equal protection clause guaranteed in the Fourteenth Amendment (*Brookhart v. Illinois State Board of Education,* 1983; *Johnson and Wilcox v. Sikes,* 1984; *Love v. Turlington,* 1984; *Rankins v. Louisiana Board of Elementary and Secondary Education,* 1994). The case of *Florida State Board of Education and Turlington v. Brady* (1979) mentioned equal protection although it was not claimed in the plaintiff's complaint. The court ruled that the scoring standard set by the Commissioner of Education Ralph Turlington was applied evenly to all students in the state, and therefore was not discriminatory (1979) Although, equal protection complaints were not a featured issue, the court documents included specific language claiming that the plaintiff's complaints were not based upon discrimination. The court noted, "We do not have here a case of discrimination in which the test required of one student was not required of all others. We do not have a situation where one's test papers were graded any differently than all other students in the State of Florida similarly situated" (p. 663). In *Wells v. Banks* (1980), the court ruled that the diploma requirement was uniformly applied to the entire county, and that the plaintiff students were not treated any differently than other students in the county. Although the court did note that other students in the state were not subjected to the diploma requirement, the decision to implement the additional requirement was within the authority of the local boards of education. While other boards had opted not to implement the additional requirement, the students were not being subjected to arbitrary or discriminatory practices (*Wells v. Banks*, 1980).

The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach (1981) was the next case to address the issue of equal protection. In this case, the two students with disabilities were awarded their diplomas. However, the state sought to revoke their diplomas as the students had not successfully completed the state mandated assessment prior to receiving their diplomas. The court considered the equal protection allegations and determined that the students were not denied their equal protection rights as the applicability and implementation of the BCT test was rationally related to the state's interest in education (*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach,* 1981).

The next series of cases included equal protection complaints against the Tattnall County School District protesting the application of the school district's testing requirement (*Anderson v. Banks; Johnson v. Sikes,* 1981; *Johnson and Wilcox v. Sikes*, 1984). The initial complaint resided in the *Wells v. Banks* case discussed previously. The *Wells v. Banks* case was later "restyled" as *Anderson v. Banks; Johnson v. Sikes* (1981, p. 476). The *Johnson and Wilcox v. Sikes* case was brought forth by Kathy Norris Johnson as a request to consolidate her case with *Wells v. Banks.* The consolidation of these cases resulted in a class action complaint brought forth by minority students claiming that the test violated their equal protection rights. As many schools in the south had been previously segregated, lingering effects of the dual systems were still apparent. The plaintiff students claimed that the test had a disproportionate negative impact on black students in Tattnall County Georgia.

The court considered two aspects in the plaintiffs' complaint. The first was whether the diploma policy violated the Fourteenth Amendment. The second aspect was

whether the diploma policy perpetuated the prior de jure segregation. The court ruled that the CAT test was a diploma requirement implemented without racial animus, despite the disproportionate impact on black students. The racial impact was not intentional discrimination; however, the diploma policy itself was under scrutiny in the light of the past discriminatory practices. In the school system, students were placed unfairly into classes based upon test scores with the lower classes not being exposed to the same curriculum as the higher classes. On the basis of this system, the CAT perpetuated discrimination as a result of the tracking system. Therefore, until the school system could present evidence to the court that the effects of previous segregation were eradicated; the diploma policy was in violation of the equal protection clause (1981). The case came under appeal as *Johnson and Wilcox v. Sikes* in 1984. The plaintiffs again challenged the use of the exit exam to deny diplomas to students who did not pass the CAT test in Tattnall County Georgia. The United States Court of Appeals for the Eleventh Circuit dismissed the case on the grounds that the students, who in the original case had been denied their diplomas, had received their diplomas and no current injury needed to be resolved by the court (1984).

The case of *O'Connell v. The Superior Court of Alameda County,* (2006) was filed by plaintiff students claiming that they did not have the educational resources necessary to pass the CAHSEE. The opportunity to learn aspects of this case resided in the California Legislature's appropriation of 20 million dollars in supplemental funding to be distributed to the school districts with the highest percentage of students who did not pass the CAHSEE. Schools that received funding had a failure to pass rate of at least 28% and received 600 dollars per student who had not yet passed the test. The plaintiffs

filed a class action suit in the San Francisco Superior Court requesting a writ of mandate, and for declaratory and injunctive relief upon the grounds that the supplemental funding was arbitrary.

The San Francisco Superior Court granted the plaintiff's request enjoining the state from denying diplomas to students who had otherwise met all requirements for a diploma except passing the CAHSEE. The court also permitted the students to participate in graduation ceremonies upon the claim that the state funding violated the students' equal protection rights. The Appellate Court, however, ruled that the funding was not arbitrary and in fact commended the legislature for its efforts to "ensure that all available funds were allocated to those districts most in need..." (*O'Connell v. The Superior Court of Alameda County*, 2006, p. 1467). Unfortunately, the number of students who did not pass the test was larger than anticipated and the funding was inadequate to provide the plaintiff class members from receiving the remedial instruction to pass the test.

The Appellate Court ruled that the issue brought before them was to determine if the legislatively mandated funding was arbitrary. They found that it was not, and therefore did not violate any student rights (*O'Connell v. The Superior Court of Alameda County*, 2006). As the data analysis revealed, the case law contained, multiple variances in the interpretation of the interaction of the testing policy for a diploma and students' equal protection rights. The *O'Connell* case, as well as the previous nested cases, was finally settled under the case name *Kidd et al., v. California Department of Education et al.* (2008). The parties in the cases consented to settle the case under an agreement specifying requirements for the state to study students in 12th grade who had not successfully completed the CAHSEE despite the use of accommodations and

modifications. If the study found that the students were unable to demonstrate their knowledge through the administration of the CAHSEE, then an alternative means would be explored (*Kidd et al., v. California Department of Education et al.*). Equal protection violations claims were substantial in the case law regarding the denial of diplomas to students who did not successfully complete the state mandated testing. Table 18 references those cases that involved judicial information regarding the equal protection clause.

Table 18

Equal Protection Clause Violations Cases

Date	Case
1979	*Debra P. v. Turlington*
1979	*Florida State Board of Education v. Brady*
1980	*Wells v. Banks*
1981	*Anderson v. Bank; Johnson v. Sikes*
1981	*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach*
1981	*Debra P. v. Turlington*
1983	*Debra P. v. Turlington*
1983	*Brookhart v. Illinois State Board of Education*
1984	*Debra P. v. Turlington*
1984	*Johnson and Wilcox v. Sikes*
1994	*Rankins v. Louisiana Board of Elementary and Secondary Education*
1998	*Hubbard by Hubbard v. Buffalo Independent School District*
2000	*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*
2001	*Rene v. Reed*
2002	*Chapman v. California Department of Education*
2002	*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*
2005	*Flores v. State of Arizona*
2006	*O'Connell v. The Superior Court of Alameda County*
2008	*Kidd et al., v. California Department of Education et al.*

Curricular Validity

Another aspect of equal protection claims involved the issue for the students' opportunity to learn the material for the test. As the issue of the fundamental fairness of the tests was discussed as part of due process, this pertained only to cases involving students of a protected class regarding the issue of curricular validity. The curricular validity of the test involved whether the material on the test was actually taught in the schools and that the students had a fair opportunity to learn the material. The case analysis revealed the court's consideration of curricular validity as an equal protection dominant issue if the students who were denied their diploma were from a protected class of students.

The first case involving a complaint of equal protection regarding curricular validity was the *Debra P. v. Turlington* (1979) case. In this case, equal protection claims focused on whether the material covered on the test was actually taught in Florida schools. In the initial case, the court ruled that the state could not prove that the material on the test was actually taught in the state's schools. The court ruled that the curricular validity of the test had to be established prior to the denial of diplomas to any students. Later the case was heard before the United States District Court for the Middle District of Florida to determine whether the state had met the burden of proof that the test did indeed cover the material on the test (*Debra P. v. Turlington*, 1981; 1983). The evidence provided by the state confirmed that the test covered the material taught in the schools. The next year, this ruling was upheld by The United States Court of Appeals for the Eleventh Circuit in 1984 (*Debra P. Turlington*, 1984) granting the state the right to deny diplomas to students who did not successfully complete the test.

The case of *Anderson v. Banks; Johnson v. Sikes*, (1981) resulted in the court finding for the students as the state had not met the burden of proof that the material covered on the test was part of the adopted curriculum. On these grounds, the court determined that the requirement of the test for a diploma had violated the substantive due process clause, and ordered that the students be awarded their diplomas. In addition, the court ruled that "no exam policy [could] be utilized until it [was] demonstrated that the test used [was] a fair test of what [was] taught" (*Anderson v. Banks; Johnson v. Sikes,* 1981, p. 512). Similar to the Debra P. case, this ruling was later overturned by the United States District Court for the Southern District of Georgia in 1982 finding that the state had met its burden of proof in an evidentiary hearing that the material tested on the California Achievement Test adopted by the county, was indeed taught in the classrooms in the county (*Johnson and Wilcox v. Sikes*, 1984).

In 1992, the concurrent cases of *Crump v. Gilmer Independent School District* and *Williams v. Austin Independent School District* offered conflicting rulings regarding the curricular validity of the TAAS test in the State of Texas. In *Crump v. Gilmer*, the court questioned the legality of the TAAS as the "school district must eventually make a substantial showing to demonstrate the validity of the TAAS examination, and there is little assurance that the district will be able to make this showing" (p. 556). However, in the *Williams* case, the judge in this case, the defendants "presented substantial evidence that McCallum High School provided, and Williams took, courses which adequately prepared him to take and pass the TAAS" (p. 254).

Later in the same decade, the case of *Triplett v. Livingston County Board of Education* (1997) was filed in Kentucky. The Triplett's complaints regarding curricular

validity was based upon claims that the KIRIS exam "[was] subjective and arbitrary, therefore, lacks reliability in that it does not measure either the child's or the schools performance accurately" (p. 33). The court ruled that it was not the role of the court to "judge the relative flaws or merits of the exam, but to adjudge whether its requirement rises to the level of a constitutional or statutory violation" (p. 33). The court held that it did not (*Triplett v. Livingston County Board of Education*).

Another case presented in 2000 was the *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*. The plaintiffs in this case complained of equal protection rights violations on the grounds of curricular validity. Therefore, the court ruled that the TAAS did not depart from academic norms for curricular validity with a "sufficient degree of reliability" and that the disparities resulting from the administration of the test were not due to flaws in the test itself (*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education,* 2000, p. 682). In addition, the court held that the students in the State of Texas had sufficient opportunity to learn the material on the test due to the remedial efforts in place and the multiple opportunities to retake the test (*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*).

One year later, the case of *Rene v. Reed* (2001) was brought to the Court of Appeals in Indiana with a request for declaratory and injunctive relief from the state's Graduation Qualifying Exam. The plaintiff students were students with special needs who claimed that the state violated their equal protection rights by requiring them to be tested on material that they did not have an opportunity to learn. The plaintiff students with disabilities argued that the curriculum had not been realigned after the testing

requirement and they, as students with disabilities, needed more time to prepare for the test as opposed to regular education students. The court, however, found that the students did not present compelling evidence that the test was not aligned to state standards, and that given multiple remedial opportunities the students were mostly likely exposed to the content covered on the test (*Rene v. Reed*, 2001). The court did note however that the students would have benefited from an earlier adjustment of their curriculum through their IEPs (*Rene v. Reed,* 2001).

The case *Chapman v. California Department of Education* was filed in 2002 and revealed plaintiff complaints that the administration of the CAHSEE violated the students' rights in that the items on the test covered material they had not yet had the opportunity to learn. The court found that the state's evidence did not reveal that the items on the test were not covered in the state's curriculum. The court indicated that "...the present state of the evidence does not reveal an asymmetry between what students are taught and the material tested on the CAHSEE implicating due process concerns" (*Chapman v. California Board of Education,* 2002, p. 543). The case of *O'Connell v. The Superior Court of Alameda County,* (2006) included complaints that the "statutory scheme creating the CAHSEE require[d] that the school curriculum be aligned to the test" (p. 1476). The court held that the state's educational reform efforts were designed to ensure that all students who were enrolled in California's public schools received an adequate opportunity to prepare properly for the CAHSEE (*O'Connell v. The Superior Court of Alameda County*). As the issue of curricular validity of the tests filtered through the courts, the states' refined their process of ensuring the material on the tests was

covered in the educational programs offered to public education students. The cases in which the curricular validity of the tests was discussed by the courts are listed below.

Table 19

Curricular Validity Cases

Date	Case
1979	*Debra P. v. Turlington*
1981	*Anderson v. Banks; Johnson v. Sikes*
1983	*Debra P. v. Turlington*
1984	*Debra P. v. Turlington*
1992	*Crump v. Gilmer Independent School District*
1992	*Williams v. Austin Independent School District*
1997	*Triplett v. Livingston County Board of Education*
2000	*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*
2001	*Rene v. Reed*
2002	*Chapman v. California Board of Education*
2006	*O'Connell v. The Superior Court of Alameda County*

English Language Learners

Students who are identified as Limited English Proficiency have been required to participate in state mandated testing in order to earn their high school diplomas. Due to language barriers and inadequately funded programs, some of these students have struggled to pass the exit exams and have been denied their high school diplomas. In several cases, the students and parents filed cases to improve the inequity of the programs and to request court interference in the denial of the students' high school diplomas. Six cases were filed regarding English Language Learners (ELL). The first case was brought

to the United States District Court District of Massachusetts in September of 2002. *Student v. Driscoll* was a class action suit filed by plaintiff students challenging the Massachusetts Comprehensive Assessment System (MCAS) test. The class action suit included subclasses of students who were identified as Black/African American, Hispanic, Limited English Proficient, students with disabilities, students attending vocational technical education schools, and students in the Holyoke School District.

The majority of students who had not passed the MCAS test were members of the first four classes of minority, Limited English Proficient, students with disabilities, and students attending vocational technical schools. The plaintiffs contend that the majority of students who did not pass the test resided in poor school districts and attended lower performing schools. The students in these schools were subjected to overcrowded classrooms in districts with inadequate resources and inferior learning environments, as compared to suburban schools where the students' demographics were predominately white. The plaintiffs sought injunctive relief on the grounds that the students who were denied their diplomas had met all other diploma criteria and as a result of the MCAS test would be denied post-secondary opportunities, would suffer stigmatization, and would have diminished access to employment opportunities (*Student v. Driscoll*, 2002).

Case documents revealed that the student who represented the Limited English Proficient students was one of 1,518 students who had yet to pass the MCAS. These students represented 65% of all ELL students in the class of 2003. The plaintiffs' claimed that, according to state regulations, the ELL students had to take the MCAS if they were recommended for regular education for the following year, or if the student has been enrolled in school in the United States for more than three years. If the student did not

meet these criteria and was to read near grade level in Spanish, they then took the Spanish/English version of test in math and science, but not in English. The ELL students were required to pass the English test in English prior to being awarded their diploma. The plaintiffs claimed that the Equal Educational Opportunities Act of 1974 protected these students under the state requirement to provide an educational program designed to overcome language barriers so that these students could meet the expected standards. Further, they contended that the MCAS had not been validated for ELL students. The case documents stated that 84% of ELL students had not yet passed the MCAS exam. The plaintiffs argued that the state did not determine the effectiveness of the ELL programs, and that limited support was provided to schools and school districts to help ELL students meet the established goals and standards.

Additionally, the plaintiffs claimed that the state had knowledge that the use of the MCAS exam would have an adverse effect on the subclasses. Results of validity studies revealed that differences in test results by race and ethnicity may have been the outcome of different learning opportunities, and that course selection patterns were related to student performance on the 8^{th} and 10^{th} grade tests. Plaintiff students claimed that the state legislature was in violation of the equal protection clause, the Equal Education Opportunity Act, and Title VI of the Civil Rights Act prohibiting the state from discriminating against students due to their national origin. In paragraph 227, the court documents read "the state and local defendants failed to take steps necessary to ensure that the members of the subclass of students with Limited English Proficiency received an education consistent with the requirements of the Equal Educational Opportunities Act of overcome language barriers so that the plaintiffs could participate

meaningfully in their respective school's education program. The students were unable to learn the content and skills on which they could expect to be assessed on the MCAS thus violating of the Equal Educational Opportunity Act, 20 U.S.C. § (f).

Furthermore, the plaintiffs claimed that the MCAS was not validated for ELL students and that it was inappropriate for the Language Arts test to assess ELL students and lastly, that the state failed to ensure that the ELL students received appropriate and effective instructional programs. The U.S. District Court denied the requested injunctive relief to the plaintiffs (*Student v. Driscoll,* 2002).

Student 9 et al. v. Board of Education et al. was filed after an injunction request was denied, and the Superior Court of Massachusetts granted an appellate review was in November 2003. The students claimed that the State Board of Education had exceeded its powers to mandate that students pass competency tests in order to earn their high school diplomas. The State of Massachusetts passed the Education Reform Act of 1993 directly after the release of the *McDuffy* decision, which amended the state regulations to implement a system of establishing and achieving specific educational goals for each student, as well as an effective mechanism for monitoring the progress toward these goals. The Education Reform Act included such a system, identified as a "competency determination" (*Student 9 et al. v. Board of Education et al., 2004, p. 757),* which was to be based on academic standards and the curriculum frameworks for tenth graders in eight subject areas.

The state legislature further stipulated that all students educated with state funds, were subject to the competency determination. The legislature also amended the law to define and include students with disabilities and students with limited English

proficiency. One of the plaintiff students was identified as a student with limited English proficiency. English was one of the core subjects in which mastery was required. Students with disabilities were entitled to the use of accommodations, or in the case of a student with significant disabilities an alternative assessment was available. Students, who were not successful in demonstrating mastery, were able to participate in remedial programs and could retake the exam as many times as they wished. The plaintiff students had not successfully passed either, or both, the English language arts and mathematics sections of the test. The plaintiff students contended that the exam was unlawful because the competency determination only applied to the English language arts and mathematics subject areas, but not to the areas of science and technology, history and social science, and foreign languages as stated in the state statute. The court ruled that the state was within its authority to impose standards and criteria for a diploma, and that the competency determination was an attempt to improve education to meet the state's obligation of providing a public education system of "sufficient quality" (*Student 9 et al. v. Board of Education et al., 2004, p. 755*).

Later, in April of 2004, the *Hancock v. Driscoll* case was brought to the Superior Court of Massachusetts. Justice Margot Botsford provided the opinion in this case to determine if the Massachusetts Constitutional obligations to provide an appropriate education to its students had been met by the state. Justice Botsford was appointed as the single justice with jurisdiction to monitor the provisions of the court resulting from the *McDuffy* case. The evidence in this case centered around four focus districts, and the differences in educational quality between other districts in the state. A particular element in this case was the programming for ELL students. As the school district required

additional funding for these students, the court investigated whether the budget needed to include increased funding for educational programming and support for ELL students. As ELL students were a subgroup under the NCLB Act, Justice Botsford ruled that the budget formula should include the additional funds to supplement ELL educational programming, as these students were required to pass the MCAS test in order to graduate from high school (*Hancock v. Driscoll,* 2005).

Flores v. State of Arizona (2005) was filed in the United States District Court of the District of Arizona on the claim that the English Language Learners program in the State of Arizona was inadequately funded. Six years earlier, a trial judge held that the ELL programs were funded in an arbitrary and capricious manner, which violated the EEOA. The court ordered the legislature to address the issue, but the governor vetoed the legislative remedy. The court then held the legislature in contempt of court and granted injunctive relief to ELL students requiring them to pass the state mandated test Arizona's Instrument to Measure Standards (AIMS). The court further ordered that until the legislature complied with the court order, they would be fined 500,000 dollars per day for 30 days, 1 million dollars a day for the subsequent 30 days, and 1.5 million dollars until the end of the legislative session with a 2 million dollar fine for each day after the end of the session (*Flores v. State of Arizona,* 2005).

Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District Number 1 (2008) was filed in the United States District Court for the District of Minnesota. This case was filed by 13 former students of Lincoln High School, an alternative high school established to serve students with limited English skills and limited experience with formal education. The plaintiffs claimed that the high school

discriminated against them on the basis of national origin in that the school primarily "warehoused" immigrant students until they aged out of the school, and that the school failed to provide them with an education designed to overcome the language barriers as mandated by the Equal Education Opportunities Act. The court held that the discrimination claim was not valid, as former court precedent required that the discrimination be intentional. In this case, the evidence did not indicate that Lincoln High School had intentionally discriminated against the students. The court ruled that the students' claims of being poorly educated were primarily due to incompetence and not animus. "Incompetence that happens to burden only members of a protected class is not, by itself, evidence of discriminatory animus" (*Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District Number 1,* 2008, p. 6). The court further held that the plaintiffs' request for monetary compensation and injunctive relief would not be awarded due to the fact that monetary relief for EEOA violations was not available. Further, the court held that injunctive relief would not be appropriate, as none of the students would attend the high school again; four of the plaintiffs passed the Graduation Required Assessments for Diploma. One student graduated from Lincoln but it was unclear if she passed the exam, the remaining eight did not pass the required tests for receiving a diploma although several of the students stayed enrolled at the school beyond the age of 21. The school did not receive additional monies for the students after this age. The court ruled in favor of Lincoln High School and District 1, the co-defendant.

The analysis of the case law revealed that the issues of ELL were unique and varied with regard to high stakes testing. The following table references all the cases in which students who were ELL filed complaints.

Table 20

English Language Learners Cases

Date	Case
2004	*Student 9 et al. v. Board of Education et al.*
2005	*Hancock et al. v. Commissioner of Education et al.*
2005	*Flores v. State of Arizona*
2008	*Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District Number 1*

The Establishment Clause

The Establishment clause of the U.S. Constitution prohibited governments from coercing persons to participate or support the exercise of religion or acted in a way that establishes a state religious faith. Two cases included complaints of violation of the Establishment clause *(Triplett v. Livingston County Board of Education*, 1997 & *Hubbard by Hubbard v. Buffalo Independent School District*, 1998). In the *Triplett* (1997) case, the Kentucky Court of Appeals found that the KIRIS exam was intended to hold schools accountable for student achievement and that the state had a legitimate interest in the accurate assessment of educational programs across the state. Further, the court pointed out that to measure the educational equality and progress of educational programs in the state, the requirement that all students participate in the administration of the assessment would be important. The court held that mandating the state's students to pass the KIRIS test was not a violation of the Establishment clause as the test did not

"directly or substantially involve the state in religious exercise or in the favoring of a religion as to have a meaningful and practical impact..." (*Triplett v. Livingston County Board of Education*, 1997, p. 32).

Sarah Hubbard and her parents filed suit claiming that the State of Texas denied them free exercise of their religion based upon the state requirement of successful completion of an exit exam prior to graduation. The case was based upon the plaintiff's claim that the school board's refusal to transfer the student's private school credits without testing violated her free exercise rights. The court ruled in favor of the school district, due to the defendant's position that the policy was purely non-religious, and that the student's study time to prepare for the exam did not evoke constitutional protections. Moreover, the policy was generally applicable to all students who wished to transfer credits for the purpose of graduation, and the requested summary judgment was awarded to the school district (*Hubbard by Hubbard v. Buffalo Independent School District*, 1998).

School district policies that are religiously neutral and serve to legitimate interests of the state were deemed constitutional in that they did not infringe on the student's free exercise of religion, nor did they interfere in the parent's right to parent their children and to make choices for the advancement of their educational preferences. Table 21 includes the two cases involving the Establishment Clause cases.

Table 21

The Establishment Clause Cases

Date	Case
1997	*Triplett v. Livingston County Board of Education*
1998	*Hubbard by Hubbard v. Buffalo Independent School District*

Public Viewing of the Tests

Only one case included a complaint regarding the public view of high stakes tests. In the case of *Triplett v. Livingston County Board of Education*, the parents petitioned the court for the right to view the test under a provision included in the Hatch Amendment which mandates that all instructional materials or other supplementary material which will be used as part of any applicable programs shall be available for the inspection by the parents are guardians of the students. Although the Livingston County Circuit Court ruled that the exam must be available for public viewing, the Kentucky Appellate Court held that the interests of the state to maintain the reliability of the exam results superseded the public's right to inspect the exam prior to administration. Therefore, the Kentucky Court ruled that the test should not be open for public viewing without a special showing of necessity. In addition, the Kentucky Court of Appeals ruled that the KIRIS exam was not a part of a students' regular curriculum, and indicated that the KIRIS served no instructional purpose.

Participation in Graduation

Other issues addressed by the courts relating to graduation/promotion were the participation in graduation ceremonies. Case law that provides guidance on issue of graduation participation is contained in *Williams v. Austin Independent School District*

(1992) and *Crump v. Gilmer Independent School District* (1992) and *O'Connell v. The Superior Court of Alameda County* (2006). In both of the first cases, parents petitioned the court to allow their children to participate in graduation ceremonies despite not fulfilling the requirement of successful completion of the state mandated test.

In both the *Crump* and *Williams* cases, the plaintiffs' posture argued that student participation in the graduation ceremony celebrated a profound personal achievement and instills hope for the future. The plaintiffs claimed that the students would suffer harm in the loss of these important memories. The defendants' complaint in these cases contended that by allowing the students to participate in the ceremony would have reduced the significance and the tradition of the school as well as compromised the schools' interest in instilling pride in the students and motivating students to meet the academic requirements. The court ruling conflicted somewhat in the interpretation of the law regarding participation in graduation ceremonies. The judge in *Williams v. Austin Independent School District* held that there was not a constitutionally protected property right to participate in a particular graduation ceremony and that "there [was] no accompanying constitutional right to receive [a] diploma at a specific graduation ceremony..." (*Williams v. Austin Independent School District*, 1992, p. 256). The court stated that the State of Texas has altered the property right in the expectation of receiving a diploma from the court ruling in *Debra P.* The State of Texas specified that the expectation of receiving a diploma was only apparent when the student completed the mandatory attendance requirements, successfully completed required courses, *and* passed the comprehensive examination at the end of their senior year. The court noted that it

respected the principal's decision not to allow students who did not meet the state's requirement for graduation to participate in the graduation ceremony.

Further, the court substantiated the states legitimate interest in accounting to the public that a student who earns a diploma had the necessary skills to enter the workplace or to seek advanced education. The public's best interests would be harmed if the state did not enforce that responsibility. In contrast, the judge in the *Crump v. Gilmer Independent School District* case sympathized with the students and demonstrated the balance of harm to the plaintiffs compared to the harm of the defendants. In this case, the court determined that the students would receive greater harm than the school, and there would be no public harm if the students were to participate in the graduation ceremony.

In the *O'Connell* case of 2006, the court stood firm on the issue of participation in graduation ceremonies despite not having passed the CAHSEE. The Court of Appeal of California concluded that the plaintiff's claim of irreparable injury caused by not being able to participate in graduation ceremonies was not given much weight by the trial court and was reluctant to do so as well. "...the emotional harm caused by exclusion from one's high school graduation ceremony, while undoubtedly distressing, is not of sufficient weight to support the relief granted by the trial court" (*O'Connell v. The Superior Court of Alameda County*, 2006, p. 1469). Table 22 includes the two cases involving the students' rights to participate in graduation ceremonies.

Table 22

Participation in Graduation Cases

Date	Case
1992	*Williams v. Austin Independent School District*
1992	*Crump v. Gilmer Independent School District*
2006	*O'Connell v. The Superior Court of Alameda County*

Question Two: Were the legal issues distinctive based upon regular education or special education students?

The case analysis resulted in the identification of 18 cases involving students with disabilities. Four of the cases were heard in the early 1980s, with no cases heard in the courts during the decade of the 1990s. The majority of the litigation was heard in court during the years of 2000-2010. This researcher speculated that the passing of the NCLB Act in 2001, which mandated strict accountability measures for the nation's schools, ignited the resurgence in litigation. Moreover, the reauthorization of IDEA, with additional protections for students with disabilities, may have contributed to the increase in litigation.

The cases heard in the courts involving students with disabilities were: The Board of *Education of the Northport-East Northport Union Free School District et al. v. Ambach*, (1981); *Anderson v. Banks; Johnson v. Sikes,* (1981); *Brookhart v. Illinois State Board of Education* (1982); *Brookhart v. Illinois State Board of Education,* (1983); *Johnson and Wilcox v. Sikes,* (1984); *Rene v. Reed* (2001); *Advocates for Special Kids v. Oregon*, (2001); *Rene v. Reed,* (2002); *Student v. Driscoll* (2002); *Chapman v. California Department of Education*, (2002); *Smiley, Lyons, Learning Disabilities Association of*

California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District, (2002); *Student 9 et al. v. Board of Education et al.*, (2004); *Noon et al. v. Alaska State Board of Education and the Anchorage School District*, (2004); *Hancock et al. v. Commissioner of Education et al.*, (2005); *Californians for Justice v. State Board of Education*, (2006); *O'Connell v. The Superior Court of Alameda County,* (2006); *Kidd v. California Department of Education,* (2008); and *Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District Number 1*, (2008). The following table references the cases in the analysis that included students with disabilities.

Table 23

Cases Involving Students with Special Needs

Date	Case
1981	*Anderson v. Banks: Johnson v. Sikes*
1981	*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach.*
1982	*Brookhart v. Illinois State Board of Education*
1983	*Brookhart v. Illinois State Board of Education*
1984	*Johnson and Wilcox v. Sikes*
2001	*Rene v. Reed*
2001	*Advocates for Special Kids v. Oregon*
2002	*Student v. Driscoll*
2002	*Rene v. Reed*
2002	*Chapman v. California Department of Education*
2002	*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*
2004	*Student 9 et al. v. Board of Education et al.*

Date	Case
2004	*Noon et al. v. Alaska State Board of Education and the Anchorage School District*
2005	*Hancock et al. v. Commissioner of Education et al.*
2006	*Californians for Justice Education Fund v. State Board of Education*
2006	*O'Connell v. The Superior Court of Alameda County*
2008	*Kidd v. California Department of Education*
2008	*Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District Number 1*

As mentioned before, several of the cases in the analysis were related cases or *nested* cases which were heard multiple times in court, often under different case names, as new plaintiffs joined the lawsuit or several different cases were consolidated under a single case name. The case of *Brookhart v. Illinois State Board of Education* (1982) was appealed to the Federal Appellate Court, and was decided later that year in *Brookhart v. Illinois State Board of Education* (1983). The cases of *Anderson v. Banks; Johnson v. Sikes* (1981) continued through the courts as *Johnson and Wilcox v. Sikes* (1984). Moreover, the case of *Rene v. Reed,* was first heard in 2001, but was later appealed to the State Supreme Court of Indiana in 2002. This appeal was not used in the analysis as it provided limited contribution to the data (*Rene v. Reed*, 2002).

The case of *Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District,* (2002) was a consolidation case of *Chapman v. California Department of Education* (2002), and was finally settled under the case of *Kidd v. California Department of Education* (2008). The cases of *Student v. Driscoll,*

(2002), *Student 9 et al. v. Board of Education et al.*, (2004) were related cases. The *Hancock v. Driscoll* (2004) and *Hancock et al. v. Commissioner of Education et al.* (2005) were also related cases continuing the litigation originally presented to the courts in *McDuffy* v. *The Secretary of Education* (1993). The individual cases were relevant in the data as each case presented new information regarding the court's opinions, and contributed to the evolution to the case law. Additionally, three cases were settled out of court resulting in settlement agreements instead of court rulings (*Advocates for Special Kids v. Oregon,* 2001; *Noon et al. v. Alaska State Board of Education and the Anchorage School District*, 2004; and *Kidd v. California Department of Education,* 2008). One case, *Rene v. Reed*, (2002), was a petition to the State Supreme Court that was denied.

Data Analysis

The analysis of the data embedded in the court documents resulted in the emergence of two major legal themes. Mirroring the themes that emerged from all the cases, the violation of the due process clause and the equal protection clause were the two main complaints concerning students with disabilities. However, for students with disabilities, the courts interpreted the constitutionality of these cases in accordance with other federal protections such as the Education For All Handicapped Children Act, Section 504 of the Rehabilitation Act of 1973, Title VI of the Civil Rights Act of 1964, and Individuals with Disabilities Education Act (IDEA). Similar to cases involving regular education students, the issues regarding property interests and state authority emerged from the case data. However, the courts ruled the same on these issues, for both regular education students and students with disabilities.

The data revealed specific issues regarding equal protection and due process based upon the fundamental fairness for students with special disabilities. Embedded in the equal protection complaints by students, axial themes of opportunity to learn, meaningful inclusion, and the rights of students with disabilities to utilize accommodations and modifications emerged. Interestingly, in the early cases, the court determined that the denial of a diploma was not a denial of a free and appropriate education (FAPE) as required in the EHA. Overall, the courts determined that the denial of a diploma to a student with disabilities was fair if the student did not pass the test but was afforded the following provisions: the student was given adequate notice, the use of the test was within educational norms, the student's IEP reflected the goals for passing the state mandated exam, and the exposure to the material on the test was embedded in the state's curriculum. It was not until the cases after 2001, that the issue of accommodations and modifications was included in the court documents.

The caveats of the cases of students with disabilities for the appropriate use for tests echoed the caveats embedded in cases regarding regular education students. However, two distinct differences were noted between regular education students and students with disabilities. These differences were a.) the courts deemed that adequate notice for some students with disabilities needed to be longer than that of regular education students, and b.) students with disabilities were entitled to accommodations and modifications under special protections granted in legislation regarding persons with disabilities. Mainly, these differences were the result of legislation protecting students with disabilities that afforded these students Individualized Education Plans that

specifically addressed the individual needs of the students regarding testing. Further similarities and differences were summarized in the following sections.

Due Process

Due process protections in the 14th Amendment stated, "nor shall any State deprive any person of life, liberty, or property, without due process of law" (US Const. Amend. 14, § 1). Although not a testing case, the case of *Near v. Minnesota* (1931) resulted in the courts interpretation of the due process clause as protecting rights in the First Amendment from interference by state governments (US Const. Amend. 1). "It [was] no longer open to doubt that the liberty of the press and of speech [was] within the liberty safeguarded by the due process clause of the 14th Amendment from invasion by state action" (*Near v. Minnesota*, 1931, 283 U.S. 697, p. 707). The analysis of the cases revealed that the applications of the testing policy interacted with the due process protections, and resulted in the emergence of themes utilized by the courts to validate or invalidate the Constitutionality of the testing policy under due process scrutiny.

Due process protection themes extrapolated from the high stakes testing case law involved adequate notice of the denial of a right, the use of the tests within educational norms, the tests were within the state's authority, and that the tests had a clear nexus to the state's legitimate goals in doing so made certain that the tests were neither arbitrary nor capricious. In the analysis of the case data, themes that emerged were examined for similarities and differences between students with disabilities and regular education students. It was also noted in the analysis that the fundamental fairness of the tests resided in the requirement of the test and its nexus to the legitimate goals of the state. As in the cases for students who did not qualify for special education services, the courts

supported the states' legitimate interest in improving their educational programs. However, in the cases that involved special education students, this aspect was of particular importance as it proved that the state did not intentionally discriminate against students with disabilities and therefore did not violate the due process safeguards. The specific similar interaction of due process protections and students with disabilities was summarized in the following section. Then the differences between cases involving students with disabilities and regular education students are presented.

State Authority

Similar to the cases involving regular education students, nine of the cases involving students with disabilities reiterated the state's authority to establish diploma criteria and to deny diplomas to students under specific criteria. The cases *of Anderson v. Banks; Johnson v. Sikes,* (1981); *The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach,* (1981); *Brookhart v. Illinois State Board of Education,* (1983); *Chapman v. California Department of Education,* (2002); *Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District,* (2002); *Student v. Driscoll*, (2002); *Student 9 et al. v. Board of Education et al., (2004)*; and *Hancock et al. v. Commissioner of Education et al.,* (2005); and *O'Connell v. The Superior Court of Alameda County,* (2006), all contained specific language in the courts' rulings addressing the state's authority to implement additional graduation requirements. The court rulings consistently held that the states had a legitimate interest in attempting to ensure the value of its diplomas (*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach,*

1981) and clarifying the judicial position in reluctance to "assuming a role in the educational debate" (*Hancock et al. v. Commissioner of Education et al.*, 2005, p. 469). The state's right to impose standards of accountability was not argued in this case law. The Supreme Court of Massachusetts affirmed the state's right to "pragmatic gradualism" in the implementation of such tests (*Student 9 et al. v. Board of Education et al.*, 2004, p. 114). Clearly, the courts agreed that even in cases of students with disabilities, the states had a right to improve the quality of their educational programs as long as the rights of the students were not violated. The table below illustrates the cases that contained information regarding the states' authority to implement testing policies.

Table 24

State Authority Cases

Date	Case
1981	*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach*
1981	*Anderson v. Banks; Johnson v. Sikes*
1983	*Brookhart v. Illinois State Board of Education*
2002	*Chapman v. California Department of Education*
2002	*Student v. Driscoll*
2002	*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*
2004	*Student 9 et al. v. Board of Education et al.*
2005	*Hancock et al. v. Commissioner of Education et al.*
2006	*O'Connell v. The Superior Court of Alameda County*

Adequate Notice

The theme of adequate notice was first evident in the seminal case of *Debra P. v. Turlington,* (1979). "Denial of sufficient notice would make denial of a diploma and its attendant injury to reputation fundamentally unfair" *(Debra v. Turlington,* p. 404). Of the 16 cases, eight claimed that inadequate notice was given to the students. In two early cases, the courts ruled in favor of the plaintiff students.

The cases of *The Board of Education of the Northport-East Northport Union Free School District et al., v. Ambach,* (1981) *and Brookhart v. Illinois Board of Education,* (1983) resulted in the courts finding that the state had provided inadequate notice to the students. In the case of *The Board of Education of the Northport-East Northport Union Free School District et al., v. Ambach*, the court ruled in favor of the students and held that denying the students their diploma would stigmatize the students and "foreclose on their freedom in pursuing employment opportunities" (*The Board of Education of the Northport-East Northport Union Free School District et al., v. Ambach,* p. 572). As in *Debra P.,* the court validated the students' property interest in the expectation of receiving their diploma therefore invoking due process protections. The students were given less than one and one-half years notification prior to the test being a criterion for a diploma. Therefore, the educational agency fell short of its constitutional requirement of procedural safeguard protections as it did not give the students enough time to prepare to pass the test (*The Board of Education of the Northport-East Northport Union Free School District et al., v. Ambach*).

The latter case of *Brookhart v. Illinois State Board of Education* (1983) resulted in the court finding that for students with disabilities, adequate notice of the testing

criterion was only adequate if the students' IEPs could be tailored to include enough time for the student to prepare to learn the material on the test. In this case, the court ruled that the students' individualized educational program of instruction were not designed for them to pass the MCT, and therefore, the students had not been sufficiently exposed to the material on the test. Further, the evidence presented revealed that the well-reasoned decision of the IEP team of parents and teachers focused on the student's needs on other educational requirements, rather than focusing on passing the MCTs. Therefore, the one-and-one half year notice was not adequate to expect a learner with challenges to meet the diploma requirement (*Brookhart v. Illinois Board of Education*, 1983). However, the case of *Anderson v. Banks; Johnson v. Sikes* resulted in the court finding for the educational agency that the "notice period of more than two years, the provision that the test may be retaken, and the provision of remedial courses considered together [were] not constitutionally inadequate" (*Anderson v. Banks; Johnson v. Sikes,* 1981, p. 505).

The case of *Chapman v. The California Department of Education,* (2002) also included comments by the courts regarding adequate notice. Similar to *Brookhart v. Illinois State Board of Education*, the *United States District Court for the Northern District of California* concluded that the students' IEP and 504 teams had not had enough time to specifically address the test as a diploma requirement. "Therefore students and parents should not be penalized if a plan fails to address the CAHSEE specifically" (*Chapman v. California Department of Education*, 2002, p. 989). In this case, the CAHSEE was to be a requirement for graduation in 2004 and was administered in 2001 on a voluntary basis. In 2002, the test was mandatory for all students in the class of 2004 who had not yet passed the test. The court found for the plaintiff students on the grounds

that two years notice was not adequate time for the IEPs to address the test as a requirement for a diploma (*Chapman v. California Department of Education*). Similarly, the cases of *Student v. Driscoll* (2002) and *Student 9 et al. v. Board of Education et al* (2004) contained complaints of adequate notice.

The last case involving adequate notice resulted in the courts finding for the educational agency. This case was brought to the courts beginning as *O'Connell v. The Superior Court of Alameda County,* (2006). The Court of Appeals of California ruled that the school division had notified the students, parents, and guardians for the CAHSEE diploma requirement for three years prior to the case being filed. The court supported the educational agency in the duration of three years notice as adequate notice (*O'Connell v. The Superior Court of Alameda County*, 2006).

The early cases in the case law evolution resulted in the courts finding for the plaintiff students based upon the lack of adequate notice. However, as case law evolved, the courts found for the educational agency in the duration of notice being at least three years or more for the students to adequately prepare for the exams. For students with disabilities, the length of time was based upon the opportunity for the students' IEP goals to include the passing of the test and that they were given the opportunity for remediation before being denied a diploma.

Comparing case law on adequate notice differed for students with disabilities and regular education students. Beginning with *Debra P. v. Turlington* (1979), the court ruled that adequate notice for students was three years. However as the case law evolved, the courts ruled that adequate notice would have been at least two years. For students with disabilities, the timeline for implementation of a diploma requirement of passing a state

mandated test would need to be in excess of two years. In one case, an expert testified "I would like to have seen the students know about [the tests] in the middle---sometime in the middle of their elementary school: fourth or fifth grade" (*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach*, 1981, p. 844). The Supreme Court of New York emphasized that educational programs for students with disabilities should be determined by individual needs, and therefore, the time element of notice for these students was more specialized. The court ruled that early notice for students with disabilities would allow for the proper consideration of whether the goals of the students' IEPs should include preparation for the exams and would afford the appropriate time for preparation and instruction (*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach*).

In summary, the case law revealed that courts upheld mandates that both regular education and students with special needs have appropriate notice to ensure that they had the opportunity to learn the material on the test. The difference for students with disabilities pertained not just to the length of adequate notice, but also to the appropriate goals included in the IEP to ensure FAPE and preparation to pass the state-mandated tests. The cases involving students with disabilities revealed no specific ruling indicating an appropriate length, but did include consistencies in the latter cases of at least three years.

However, the *Brookhart v. Illinois State Board of Education* (1983) case suggested a length of seven years. Overall, the cases indicated that the time of adequate notice resided in the alignment of the students' IEP goals to the intent of preparing the student for passing the test. If the goals were not aligned with the intention of student

success on the tests, then the students may not have had the opportunity to learn and therefore were denied FAPE. In addition, the caveats of remediation and multiple opportunities to pass the tests were included in the court rulings. The following table reflects the cases in which adequate notice was contested for students with disabilities.

Table 25

Adequate Notice Cases

Date	Case
1981	*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach*
1981	*Anderson v. Banks; Johnson v. Sikes*
1983	*Brookhart v. Illinois Board of Education*
2001	*Rene v. Reed*
2002	*Chapman v. California Department of Education*
2002	*Student v. Driscoll*
2004	*Student 9 et al. v. Board of Education et al*
2006	*O'Connell v. The Superior Court of Alameda County*

Remediation

For students who did not successfully complete the tests and were ultimately denied diplomas, the courts supported the state's obligation to provide remedial assistance to the students. In the case of *Brookhart v. Illinois State Board of Education* (1983), the court established that the appropriate remedy for the students who were denied their diplomas was the opportunity for remediation. For cases that involved students with disabilities, which specifically addressed remediation, the court ruled that the students must have had access to remedial opportunities.

The case of *Anderson v. Banks; Johnson v. Sikes*, (1981) revealed further insights into the case law involving remedial programs and students with disabilities. The students were enrolled in a remedial program with disproportionate numbers of minority students in the remedial program. The court determined that, "the educational plan which combine[d] the diploma sanction with a remedial program [was] drastically reducing the departing seniors who scored at the beginning ninth grade level on the CAT" (*Anderson v. Banks; Johnson v. Sikes*, p. 509). The combination of the CAT requirement and the remedial program was "enough to sustain the policy against the charge of irrationality" (p. 509). The closely related case of *Johnson and Wilcox v. Sikes* (1984) was dismissed in favor of the educational agency partly due to the fact that "as part of the testing requirement, the District instituted remedial courses for those who failed to achieve the requisite score..." (*Johnson and Wilcox v. Sikes*, 1984, p. 645). The case of *Johnson and Wilcox v. Sikes* ended this series of complaints against Tattnall County Schools.

In the case of *Brookhart v. Illinois State Board of Education* (1983), remedial opportunities were made available for all students who did not pass the MCT and data was provided to the teachers regarding areas of weakness to assist the students in future attempts to pass the tests. In the subsequent case of *Brookhart v. Illinois State Board of Education,* (1983), the court held that the students were not given a fair opportunity to learn as much as 90% of the material on the test due to the IEPs not being crafted to ensure instruction in the material on the test. In the latter *Brookhart* case, the court the United States Court of Appeals for the Seventh Circuit agreed, and ruled that the students' IEP goals were determined through the well-reasoned and informed decision-making of the IEP team that focused on individual student needs as opposed to passing

the test. This court ruled that more time was needed for the students to receive remediation for instruction. However, this remedy would have presented a hardship on the students who had acquired jobs and would not be able to attend the remediation sessions. Therefore, the court ordered the students be exempted from the requirement of passing the state exam and ordered the school district to award the diplomas to the students (*Brookhart v. Illinois State Board of Education*, 1983).

In 2001, Meghan Rene brought the case of *Rene v. Reed* on complaints that the state violated IDEA when implementing the state assessment as a requirement for a diploma. In the findings of fact, the court determined that a state law required remedial assistance for all students who did not pass the GQE, and concluded that partly through the multiple remedial programs, Meghan and other students similarly situated, had been afforded the opportunity to learn the material on the test (*Rene v. Reed*, 2001).

In the cases of *Student v. Driscoll* (2002) and *Student 9 et al. v. Board of Education et al.,* (2004), the court ruled in favor of the educational agency partly due to the fact that any student who did not pass the Massachusetts Comprehensive Assessment System was given remediation via an education assistance plan, as evidenced in the line budget item appropriations as per the state Legislature (*Student v. Driscoll*, 2002; *Student 9 et al. v. Board of Education et al.* 2004).

The case of *Hancock et al. v. Commissioner of Education et al.* (2005) presented further information regarding remedial programs. The court documents in this case indicated that "Prior to the [Education Reform Act], failing high school students were permitted either to graduate without basic skills or fade away from the public education system altogether. Now they are given extensive remedial opportunities" (*Hancock et al.*

v. Commissioner of Education et al., 2005, p. 1143). This case revisited the state of public education after the *McDuffy* case illuminating disparities in the educational opportunities for the students in Massachusetts. Although the case was not specific to students with disabilities, these students were impacted by the disparity and were included as a subgroup in the case documents (*Hancock et al. v. Commissioner of Education et al.*, 2005). Finally, in *Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District Number 1,* the two plaintiffs who were qualified for special education services prevailed based upon a report indicating that the school violated state regulations requiring them to develop adequate remediation plans for the students who failed the Basic Skills Test (*Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District Number 1*, 2008).

The fundamental fairness of the state exam as a diploma requirement was influenced by the state's evidence that remedial programs were in place and were specifically designed to assist the students to pass the test to receive their diplomas. Providing structured remedial programs as a means of affording students the opportunity to learn was evidenced in the court cases and became a caveat under which the testing requirement was determined to be Constitutional. However, this component was the same for students with disabilities as for regular education students; therefore, there bore no distinct differences between the two categories of cases. Remediation was not independently applicable to students with special needs. Table 26 represents the cases of students regarding involving remediation for students with disabilities.

Table 26

Remediation Cases

Date	Case
1981	*Anderson v. Banks; Johnson v. Sikes*
1983	*Brookhart v. Illinois State Board of Education*
1984	*Johnson and Wilcox v. Sikes*
2001	*Rene v. Reed*
2002	*Student v. Driscoll*
2004	*Student 9 et al. v. Board of Education et al.*
2005	*Hancock et al. v. Commissioner of Education et al.*
2008	*Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District Number 1*

Multiple Opportunities to Take the Tests

Similar to the closely related issues of remedial programs and the subcomponent of the *opportunity to learn*, the courts supported that students have multiple opportunities to take the tests prior to being denied a diploma. In three cases, the court rulings were influenced by the provision of multiple opportunities to pass the test. The case of *Anderson v. Banks, Johnson v. Sikes*, (1981) revealed that the students in Tattnall County who failed to achieve a score of 9.0 on the CAT were permitted to retake the CAT and to enroll in additional coursework until they passed the exam. The court upheld the diploma sanction for students who were properly classified in the remedial programs, and were given multiple opportunities to take the test (*Anderson v. Banks; Johnson v. Sikes,* 1981).

In *Brookhart v. Illinois State Board of Education* (1983), students identified with special needs could continue to take the tests until the age of 21 in order to pass and receive their high school diplomas. Students were given the opportunity to retake specific

subject tests they had not passed, and were not required to retake the subjects that they had previously passed. Despite the provision, though, the courts ruled in favor of the students based upon the fact that the students had not received adequate notice in order to prepare to pass the tests. In the cases of *Student v. Driscoll* (2002) and *Student 9 et al. v. Board of Education et al.,* (2004), the educational agency prevailed partly due to plaintiff students having been given multiple opportunities to pass the Massachusetts Comprehensive Assessment System. The *Noon et al. v. Alaska State Board of Education and the Anchorage School District* (2004) case also included multiple opportunities to pass the tests. In the settlement agreement, the parties agreed that if a student with disabilities did not pass the initial administration of the test the IEP/504 team would then decide whether the students would retake sections of the test with additional accommodations, or whether a modified test with accommodations would be more appropriate for the student (*Noon et al. v. Alaska State Board of Education and the Anchorage School District*). Cases involving multiple opportunities to retake the tests are included in the following table.

Table 27

Multiple Opportunities to Take the Test Cases

Date	Case
1981	*Anderson v. Banks; Johnson v. Sikes*
1983	*Brookhart v. Illinois State Board of Education*
2002	*Student v. Driscoll*
2004	*Noon et al. v. Alaska State Board of Education and the Anchorage School District*
2004	*Student 9 et al. v. Board of Education et al.*

Equal Protection

Equal Protection complaints were prominent issues regarding high stakes testing cases and students with disabilities. Plaintiff students either filed complaints specifically as a feature of the case or, in some cases the equal protection rulings have been included in the discussions of the court reported in the case law. Overall, the analysis revealed evidence of the equal protection theme in ten cases concerning students with disabilities. Some of these cases directly related to equal protection complaints, while others were embedded in the data and emerged in the analysis. As in the cases for regular education students, the data specific to students with disabilities revealed themes that emerged to ensure the fairness of the test such as curricular validity, state provided remediation, multiple opportunities to take the tests, and multiple criteria for graduation. These subcomponents of the case analysis did not reveal any district differences between cases involving students with disabilities and regular education students. However, the analysis of cases specific to students with disabilities, revealed the theme of accommodations and modifications for students to demonstrate their mastery of learning objectives and to have access to alternate assessments. These themes emerged as definitive distinctions as the case law evolution became focused on the states reluctance to allow the use of accommodations and modification, as well as alternate assessments for students with disabilities on standardized high stakes tests.

The evidence concerning equal protection claims first emerged in the case of *Anderson v. Banks; Johnson v. Sikes* (1981). This case included students with disabilities who were incorrectly classified as EMR and were denied a diploma based upon this classification, which was in violation of Section 504 of the Rehabilitation Act of 1973.

Section 504 prohibited the discrimination or denial of benefits or participation in programs if the discrimination was based on the individual's handicap, but was otherwise qualified for such benefit or program. The plaintiff students claimed that being placed in the EMR classes prohibited them from accessing the curriculum needed to successfully pass the CAT test. The court ruled in this case that students who were correctly placed in the EMR classes benefited from that program that was specific to their learning needs.

Therefore, the school district did not intentionally discriminate, and was not required under Section 504 to award diplomas to those students who were unable meet the academic standard set by the state (*Anderson v. Banks; Johnson v. Sikes*). However, the court ordered that a plan be developed to correctly classify and provide a remedial program for the students who had been inappropriately classified and placed in EMR classes without proper procedures. The court held that the diploma sanction did not violate the students' rights as the test was not implemented in as intent to discriminate and the diploma requirements were within the legitimate interests of the state (*Anderson v. Banks; Johnson v. Sikes*). This case emerged again under the case *Johnson and Wilcox v. Sikes* (1984); plaintiff students continued the complaint that the test was discriminatory based upon the failure rate disparity between students of color and Caucasian students. The plaintiffs request to deny the school districts option to reinstate the test if it was able to demonstrate that the benefits of the testing program outweighed the "lingering causal connection between the diploma sanction and the tracking system" (p. 647). The court ruled that the plaintiffs' were based "merely on assumed, potential invasions of their constitutional rights" (p. 648) and therefore the court ruled in favor of the educational agency (*Johnson and Wilcox v. Sikes,* 1984).

The case of *The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach* was filed claiming discriminatory actions by the school district based upon Section 504 of the Rehabilitation Act of 1973, with an additional claim of violation of the Education for All Handicapped Children Act (EHA) that would deny the students a free and appropriate education. The court held that the EHA did not require specific results, and that awarding a diploma was not shown to be a necessary part of an appropriate education. Therefore, the denial of a diploma, as a result of the student not passing the BCT, did not amount to a violation of the EHA and did not intentionally discriminate against the students (*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach,* 1981).

In 1983, the case of *Brookhart v. Illinois* also contained complaints of discriminatory intent, with alleged violations of EHA and Section 504. Again, the court determined that the EHA did not require specific results and only mandated the access to specialized and individualized educational services for students with disabilities. As the students had received their special education services but were unable to pass the MCT, the court ruled that the MCT requirement was not a denial of FAPE, and therefore did not violate the EHA. Additionally, the EHA specified that no single score should be used as the sole criterion in determining an appropriate educational program. The plaintiff students contended that the MCT was used as a single score criterion and therefore violated the EHA. However, the evidence presented to the court provided information regarding multiple criteria needed to earn a diploma and therefore the MCT did not stand as the sole criterion. Further allegations of violations of the Rehabilitation Act were based upon the handicapped students' inability to attain the level of academic progress needed

to pass the MCT. The court ruled that, "A student who is unable to learn because of his handicap is surely not an individual who is qualified in spite of his handicap" (*Brookhart v. Illinois State Board of Education*, 1983, p. 184). Therefore, the court ruled that the MCT was not intentionally discriminatory and was not in violation of Rehabilitation Act.

Rene v. Reed (2001) presented complaints of IDEA violations, as students with disabilities who took the state's GQE but did not pass were unable to graduate. In this case, the court determined that although the evidence reflected the students could have benefited from earlier adjustments to their IEPs to prepare them for passing the GQE, the students had been exposed to the curriculum covered on the GQE. The court stated "...IDEA does not require specific results, but instead it mandates only that disabled students have access to specialized and individualized education services" (*Rene v. Reed*, 2001, p. 1382). Further, the plaintiff students contended that the state violated IDEA by not allowing certain accommodations and modifications specified in the students' IEPs when taking the GQE. The court ruled that the GQE "[was] an assessment of the outcome of that educational plan" and that the "state need not honor certain accommodations called for in the students' IEPs where those accommodations would affect the validity of the test results" (*Rene v. Reed*, p. 1382).

In 2002, the case of *Chapman v. California Department of Education* was filed in the United States District Court for the Northern District of California. This case represented plaintiff students with disabilities who were unable to utilize accommodations on the state mandated test needed to graduate high school and earn their diploma. The court ruled in this case that the denial of students' accommodations for testing, and the lack of an alternative test to the CAHSEE violated Section 504 of the

Rehabilitation Act (RHA) of 1973. The Individuals with Disabilities Education Act (IDEA) supported the rights of students with disabilities to be meaningfully included in the educational program. The court ruled in favor of the plaintiff students, as they were entitled to accommodations and modifications on the CAHSEE if indicated in their IEPs. Further, if the IEP or 504 team determined that an alternative assessment was needed, it would be provided by the state (*Chapman v. California Department of Education*, 2002).

In the same year, the *Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District.*, was filed with the request to review the prior case. The United States Court of Appeals noted that the preliminary injunction to allow the students to take the CAHSEE with the necessary accommodations and modifications was already in effect but the students' challenge to forego the use of the accommodations and modification and risk the denial of the a waiver to the test was unripe for judicial review (*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*, 2002).

The *O'Connell v. The Superior Court of Alameda County* (2006) continued the case as the Court of Appeal for California reviewed the lower court's ruling. The Court of Appeal ruled that the statewide injunction on issuing diplomas was overly broad in scope and that the trial court erred in granting the injunction and reversed the court order of the injunction (*O'Connell v. The Superior Court of Alameda County*). This case was again revisited under the case name *Kidd v. California Department of Education* (2008) in which a settlement agreement was reached between the parties. The parties agreed to a

study to examine twelfth graders who had taken the CAHSEE with the modifications and accommodations specified in their IEPs or 504 plans, but who had not passed the CAHSEE. The study was intended to determine if the students had learned the material but could not demonstrate their knowledge with acceptable accommodations and modification indicating the need for an alternative test (*Kidd v. California Department of Education*, 2008). Cases involving complaints of equal protection violations and students with disabilities are listed in the table below.

Table 28

Equal Protection Cases

Date	Case
1981	*Anderson v. Banks; Johnson v. Sikes*
1981	*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach*
1982	*Brookhart v. Illinois State Board of Education*
1983	*Brookhart v. Illinois State Board of Education*
1984	*Johnson and Wilcox v. Sikes*
2001	*Rene v. Reed*
2002	*Chapman v. California Department of Education*
2002	*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*
2006	*O'Connell v. The Superior Court of Alameda County*
2008	*Kidd v. California Department of Education*

Fair Test

The use of an assessment to deny a diploma fell under equal protection complaints if there was a question of the fairness of the test due to its validity. Eight of the cases specifically referenced the fairness based upon validity of the tests for use with students with disabilities. In the case of *Anderson v. Banks; Johnson v. Sikes,* (1981), the plaintiffs claimed that the test was invalid, as no validation study had been conducted. The court investigated the claims, and found concerns regarding discrepancies in the use of the test for students in Tatnall County. However, the CAT was a normed test, and the court upheld the use of the test in the school division although citing, "It [was] difficult to explain the disparity of the results obtained in the Tatnall County Public Schools. The Court [could] not conclude that this well respected test instrument [was] unsuitable for use in Tattnall County" (p. 509).

The *Brookhart v. Illinois State Board of Education* the plaintiffs sought remedy through the court regarding the validity of the state test, the M.C.T. for evaluating students with disabilities. The plaintiffs suggested that the RHA and EHA specify that a test for evaluation and/or placement, be selected and administered to accurately reflect the student's knowledge or achievement. The court determined that it "need not interpret the scope of these regulations to decide this case" (*Brookhart v. Illinois State Board of Education,* 1983, p. 184). Instead, the court decided that it should refrain from issuing a broad order to the school district that would potentially affect the validity of the M.C.T. for all students with disabilities and decided the case on "less intrusive grounds" (p. 184). The court commented directing the school district to ensure that the students with disabilities were sufficiently exposed to the material on the M.C.T. or they could produce

evidence of a reasoned and well-informed decision by the parents and teachers involved that a particular high school student would be better off concentrating on educational objectives other than preparation for the M.C.T." (p. 188).

The *Rene v. Reed* (2001) case revealed the plaintiff students contended that the curriculum "for a significant number of disabled students had not been realigned to the proficiencies tested on the exam" (p. 744). The court agreed that the students would have benefited from earlier adjustment of the curriculum" (p. 744) but upheld the trial court's determination that the students were exposed to the subjects and material during their high school years (*Rene v. Reed*). The same year, the *Advocates for Special Kids v. Oregon* questioned the validity of the test. The parties in this case reached an out-of-court settlement agreement whereas the state agreed to conduct further research to ensure the validity of the state assessment with regard to students with disabilities.

The *Chapman v. California Department of Education* case also included questions of test validity. The court ruled that for some students, the CAHSEE was not a valid assessment. The court held that some students with disabilities were not able to meaningfully access the CAHSEE, therefore making it an invalid instrument to measure their academic progress. Therefore, as reported earlier, access to an alternative assessment was a salient and prominent feature in this case (*Chapman v. California Department of Education*, 2002). The cases of *Student v. Driscoll* (2002) and *Student 9 et al. v. Board of Education et al.* (2004) argued the test's validity as a criterion for a diploma due to the fact that the state reform act required that students would have the opportunity to demonstrate mastery via a variety of means. However, the courts concluded that the plaintiffs did not show a likelihood of success on the merits of these

claims (*Student v. Driscoll* 2002; *Student 9 et al. v. Board of Education et al.* 2004). Lastly, the case of *Californians for Justice Education Fund v. State Board of Education* (2006) included evidence of test validity concerns for students with disabilities. In this case, the defendant educational agency had the results of a state mandated study that determined that the CAHSEE satisfied all "professional standards for implementation as a high school graduation requirement..." (*Californians for Justice Education Fund v. State Board of Education,* p. 3).

In summary, the courts upheld the fairness of the test, in regards to the validity of the testing instrument, as an important component in improving the states' educational programs, with the exception of the *Chapman* case. The *Chapman* case court ruling negated that the test was appropriate to all students with disabilities thereby requiring an alternative assessment for some students (*Chapman v. California Department of Education*, 2002). The following table addresses the issue of test validity.

Table 29

Fair Test Cases

Date	Case
1981	*Anderson v. Banks; Johnson v. Sikes*
1983	*Brookhart v. Illinois State Board of Education*
2001	*Rene v. Reed*
2001	*Advocates for Special Kids v. Oregon*
2002	*Student v. Driscoll*
2002	*Chapman v. California Department of Education*
2004	*Student 9 et al. v. Board of Education et al.*
2006	*Californians for Justice Education Fund v. State Board of Education*

Meaningful Inclusion

The theme of *meaningful inclusion in assessments* was revealed in seven cases presented to the courts. In this analysis, *meaningful inclusion* was presented in a broad theme with subcategories of *Accommodations and Modifications* and *Alternate Assessments*. As these concepts were intertwined, the interaction of all three will be discussed in the following analysis. These concepts were the main differences between the cases involving students with special needs, and those involving regular education students. Students with disabilities were protected under the Constitution and additional federal legislation, and were therefore assured the opportunity to meaningfully participate in the assessments. However, there were no such provisions for students in regular education programs.

The Education for All Handicapped Children Act required that a student with disabilities be afforded a Free and Appropriate Education (FAPE), which included access to specialized and individualized educational services. Section 504 of the Rehabilitation Act of 1973 required agencies that receive federal funding not exclude persons with handicapping conditions solely on the basis of the handicap. Earlier cases in the analysis present the courts' initial perspective on FAPE and Section 504 regarding meaningful inclusion. As case law evolved, changes in the courts' interpretation were evident. Beginning with *The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach* (1981), the Supreme Court of New York ruled in favor of the educational agency on the basis that Section 504 required that a handicapped student be provided with an appropriate education, but did not guarantee that a student successfully achieve the academic level necessary for receiving a diploma. Moreover, the

Brookhart (1982) case ruling also indicated the court's interpretation of the laws regarding students with disabilities as less pragmatic. The United States District Court ruled that "pretending that such a standard [diploma] has been achieved by a person whose handicap clearly makes attainment of that standard impossible or inappropriate in the overall best interests of that person" (*Brookhart v. Illinois State Board of Education*, 1982, p. 730).

The right for students to be included in assessment has been clarified through the case law presented in this analysis. Specifically, the courts ruled on meaningful inclusion in the *Chapman v. California Department of Education* (2002) case and the *Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District* (2002) cases. These cases specifically addressed the plaintiffs' likelihood for success on the premise that the presence of harm was not dependent upon how the tests were being used, but in the fact that the students had a statutory right to be meaningfully included in the statewide assessments (*Chapman v. California Department of Education*, 2002). This case centered on the accommodations provided to students with disabilities as the gateway for students to meaningfully participate in the tests.

The case of *Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District* (2002) examined the issue of a waiver available to students with disabilities, and the risk to students should they the opted for the waiver but were denied. The court ordered that the Department of Education could grant, but not deny the waiver. On appeal in the Ninth Circuit Court of Appeals, the plaintiffs

challenged this ruling. The court ruled that the choice between forgoing the use of modifications, or risk the denial of the waiver, posed a real and immediate injury to students with disabilities and burdened the students' right to participate in the examinations. The court remanded the case to the U.S. District Court for the Northern District of California to dissolve that portion of the preliminary injunction (*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*).

Under the settlement agreement of *Kidd v. California Department of Education* (2008) the state agreed to conduct a study of students with disabilities who did not pass the CAHSEE. If the study determined that an alternate assessment was needed to ensure the meaningful participation of students with disabilities, an alternate assessment would be evaluated and made available (*Kidd v. California Department of Education*).

The *Noon et al. v. Alaska State Board of Education and the Anchorage School District* (2004) case also involved meaningful participation in statewide testing. Although this case was settled out of court, the settlement agreement documents provided insight into the case law evolution of the rights of students with disabilities to meaningfully participate in state assessments. In the out-of-court resolution of this case, the parties agreed that the Commissioner of Education would recommend regulations to the State Board of Education to clarify and revise the information regarding the High School Graduation Qualifying Examination (HSGQE) in *The Participation Guidelines for Alaska Students in State Assessments* with regard to options for participation by students with disabilities. The revisions were to include descriptions of options for students with disabilities to participate, the implications of each option, and the process by which the

students could appeal (*Noon et al. v. Alaska State Board of Education and the Anchorage School District,* 2004).

The main access agent for participation in assessments is the use of accommodations and modifications through a student's Individualized Education Plan (IEP). The topic of accommodations for testing has dramatically evolved in the case law and begins with the initial case concerning students with disabilities, *Board of Education of the Northport-East Northport Free Union School District v. Ambach,* (1981). Meaningful inclusion was an important aspect of the cases listed in the below table.

Table 30

Meaningful Inclusion Cases

Date	Case
1981	*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach*
1982	*Brookhart v. Illinois State Board of Education*
1983	*Brookhart v. Illinois State Board of Education*
2002	*Chapman v. California Department of Education*
2002	*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*
2004	*Noon et al. v. Alaska State Board of Education and the Anchorage School District*
2008	*Kidd v. California Department of Education*

Accommodations and Modifications

Eight of the 13 cases analyzed involved the rights of students to have accommodations and modification for instruction and testing. In 1981, the first case to

examine the rights of students to have accommodations for testing was brought before the Supreme Court of New York. This issue was not settled in the courts until the case of *Advocates for Special Kids v. Oregon* (2001). The clarification of the use of accommodations to allow students to meaningfully participate in the assessments was a controversial topic, as revealed in the court documents. The evolution of the case law is revealed in the next section.

In the case of *The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach* (1981) students Abbey and Richard were granted diplomas by their local school board, and were later informed by the State Department of Education that they were invalid. The plaintiff students argued that the testing requirement invalidating their diplomas violated Section 504 of the Rehabilitation Act of 1973. The Supreme Court of New York ruled that the testing requirement was not in violation of Section 504. The opinion of the court was that Section 504 required that a handicapped student be provided with an appropriate education, but did not require schools to make substantial modifications in their programs to allow disabled persons to participate. Instead, the court interpreted Section 504 to only require that an otherwise qualified person not be excluded from participation in a federally funded program solely on the basis of a handicap or the assumption of inability to function in a particular context (*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach,* 1981).

The *Brookhart v. Illinois State Board of Education* cases illuminated the court's interpretation of the use of accommodations by students with disabilities. The United

States District Court would not uphold the rights of students with disabilities to have accommodations for testing. The court's opinion resided in the belief:

> To discover a blind person's knowledge, a test must be given orally or in Braille, if appropriate. This however, certainly does not mean that one can discover the knowledge or degree of learning of a mentally impaired student by modifying the test to avoid contact with the mental deficiency. To do so would simply be to pretend that the deficiency did not exist, and to fail completely to measure learning. A diploma issued as a result of passing such a modified test would be a perversion of the program to lend meaning to the diploma as a record of educational achievement....(*Brookhart v. Illinois State Board of Education*, 1982, p. 728).

However, during the appeal, the school district conceded that accommodations to the MCT must, and would be necessary for students with disabilities and offered to re-administer the test with certain modifications to minimize the effects of the students' disabilities (*Brookhart v. Illinois State Board of Education*, 1983).

In the *Chapman* case, the plaintiffs petitioned the court claiming that the under IDEA and Section 504, the students were entitled to testing accommodations. Due to the timing of state mandated test implementation in California, the students' IEP were not amended to reflect the available accommodations. The court held that the issue was two-fold, one element related to the specific accommodation or modification to which the students were entitled. The second element was to whether the federal laws required that the states treat scores of students with accommodations in the same way that it would

treat scores of students without accommodations. The court held that IDEA did offer guidance on IEPs and testing accommodations as per the students' specific needs. In addition, the Court examined the Office of Special Education Program's document, *Guidance on Including Students with Disabilities in Assessment Programs,* which awards the determination of a student's testing accommodations to the student's IEP team. The court ruled that IDEA did not interfere with the states prerogative of implementing educational standards, but ensured that the state was held accountable for helping all students meet them.

Therefore, the court granted relief to the plaintiffs that the students be permitted to take the CAHSEE with any modifications or accommodations written in their IEP or 504 Plan. If the specific language of the IEP did not address the CAHSEE, then the student could take the test with any accommodations or modifications provided for under any standardized testing conditions. The court also held that students had the right to forego any accommodations or modifications to which he or she is entitled. The court reserved from considering future issues as to whether, and to what extent, the state may treat students taking the CAHSEE with unapproved modifications, or taking an alternate assessment when granting a diploma (*Chapman v. California Department of Education*, 2002). The continuation of this case was appealed to the United States Court of Appeals for the Ninth Circuit, which upheld the students' rights for testing accommodations and modifications (*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*, 2002), and settled under *Kidd v. California Department of Education* (2008).

Noon et al. v. Alaska State Board of Education and the Anchorage School District (2004) and *Advocates for Special Kids v. Oregon* (2001) also presented issues of students' entitlement to the use of accommodations for state mandated testing. Both cases were settled out of court, with some agreements to this issue being published in the court settlement documents. *Noon et al. v. Alaska State Board of Education and the Anchorage School District* resulted in a settlement agreement providing for the clarification of accommodations for students. This agreement identified the duration for use of the accommodation in the classroom as three months prior to the accommodations being allowed on the test. The parties also agreed that Department of Education would provide a checklist and guidelines to be used when determining whether an accommodation was appropriate for students with disabilities. Also, the Department of Education would expand the list of accommodations for students with disabilities, and consider other proposed accommodations, as they were to arise. The agreement also included the school district's right to refuse an accommodation on a case-by-case basis with provided reasons for the refusal (*Noon et al. v. Alaska State Board of Education and the Anchorage School District*, 2004). Similarly, the parties of the *Advocates for Special Kids v. Oregon* case agreed to an expansion of the list of accommodations available to students with disabilities to minimize the impact of the disability, and to allow the students to meaningfully participate in the testing (*Advocates for Special Kids v. Oregon,* 2001).

Furthermore, the parties in *Noon et al. v. Alaska State Board of Education and the Anchorage School District* agreed that the students' IEP or 504 team should determine whether a particular proposed modification would be helpful to the students on a subtest of the HSGQE, in the event that a student did not pass. The accommodation was to be

approved by the Department of Education, as the state officials would determine if the potential benefit to the student would outweigh the adverse effect on the test's validity. In addition, if a student did not pass the subtest of the HSGQE, the IEP/504 team would determine whether the student would retake the subtest with other accommodations, or take the modified HSGQE or a non-standard alternate assessment (*Noon et al. v. Alaska State Board of Education and the Anchorage School District*, 2004). The analysis revealed interesting and apparent differences in the courts findings regarding the use of accommodations in testing. The following table lists the nine accommodation cases.

Table 31

Accommodations Cases

Date	Case
1981	*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach*
1982	*Brookhart v. Illinois State Board of Education*
1983	*Brookhart v. Illinois State Board of Education*
2001	*Advocates for Special Kids v. Oregon*
2002	*Chapman v. California Department of Education*
2002	*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*
2004	*Noon et al. v. Alaska State Board of Education and the Anchorage School District*
2008	*Kidd v. California Department of Education*

Alternate Assessments

Alternate Assessment was another axial theme that was revealed in the analysis. There were six cases in which alternative assessments were brought before the courts and were included in the rulings (*Advocates for Special Kids v. Oregon,* 2001; *Chapman v. California Department of Education,* 2002; *Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*; *Student 9 et al. v. Board of Education et al.,* 2004; and *Kidd v. California Department of Education,* 2008). The issue of alternate assessments emerged from cases involving meaningful participation. *Chapman v. California Department of Education* revealed that there was no prior case law regarding alternate assessments in the context of IDEA, but the court noted that that academic literature gave examples of alternative assessments for students with disabilities (*Chapman v. California Department of Education,* 2002). The court ruled that some students were not able to meaningfully access the CAHSEE, regardless of accommodations, and therefore the test was not a valid measure of their academic achievement. The court held that students who were not capable of the high school curriculum were entitled to a valid assessment of their capabilities. The IEP/504 team would determine whether the student needed an alternate assessment, as per the student's ability to participate in the test. Most importantly, this court ruling mandated that the state develop an alternate assessment to meet the needs of the students with disabilities. In August of 2002, the *Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District* case documented that the state had failed to develop an

alternate assessment; however, the U.S. Court of Appeals determined that this aspect of the case was not ripe for adjudication. However, ultimately the plaintiffs in this case prevailed in the settlement agreement under *Kidd v. California Department of Education* (2008).

The cases of *Student v. Driscoll* (2002) and *Student 9 et al. v. Board of Education et al.* (2004) mentioned that the use of alternative assessments by students with disabilities was already in place, and therefore the court did not address this issue. The *Advocates for Special Kids v. Oregon* (2001) case provided a provision for students with disabilities to utilize an alternative assessment so that students could meaningfully participate in the state testing program. The six alternate assessment cases are below.

Table 32

Alternate Assessments Cases

Date	Case
2001	*Advocates for Special Kids v. Oregon*
2002	*Chapman v. California Department of Education*
2002	*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*
2002	*Student v. Driscoll*
2004	*Student 9 et al. v. Board of Education et al.*
2008	*Kidd v. California Department of Education*

Additional Training

Another axial theme that emerged from the data was that of *additional training* for teachers, students, parents, and administrators. This training was to prepare

professionals in the use of accommodations for students with disabilities, and to inform parents and students of their rights concerning the use of the accommodations for state mandated testing. Interestingly, both of the cases in which the additional training was mentioned were settled out of court, and the additional training requirement was featured in the settlement agreements (*Noon et al. v. Alaska State Board of Education and the Anchorage School District,* 2004 and *Advocates for Special Kids v. Oregon,* 2001). In both of these cases, the Center for Disability Advocates supported the plaintiff students. The *Advocates for Special Kids v. Oregon* case resulted in a document, *Do No Harm,* which provided a framework for high stakes testing and their use with students with disabilities. Two additional training cases are listed below.

Table 33

Additional Training Cases

Date	Case
2001	*Advocates for Special Kids v. Oregon*
2004	*Noon et al. v. Alaska State Board of Education and the Anchorage School District*

Question Three. What differences are revealed within the case law rulings in favor of the students and those in favor of the educational agencies?

In the analysis of cases by the prevailing party, several consistent themes emerged from the data. Mainly, the cases that were brought for judicial intervention were embedded with multiple issues. Judicial rulings were administered for each specific issue presented in the cases. Therefore, the prevailing party was decided per each issue. For example, in a case brought before the court for due process and equal protection violation claims, the plaintiffs may have prevailed on the due process claim, but may not have on

the equal protection claim. Therefore, for this analysis, each issue was extrapolated from the cases, and then the issues were categorized according to the prevailing party on the specific issue. This organizational strategy illuminated the judgments and judicial opinions on specific issues as they evolved through the courts.

It was important to note that not all cases were brought to the courts as cases involving students and educational agencies. For example, one case was brought by an educational agency to the state government requesting modification of the testing policy (*New York Performance Standards Consortium v. New York Department of Education*, 2002). This case was not considered in this section of the analysis as only the cases involving both students and educational agencies were included. The following section discusses the similarities of the cases that resulted in a decision in favor of the educational agency, and then a discussion regarding the student as the prevailing party.

Of the 41 cases presented to the courts, seven cases that appealed to higher courts were considered moot, and denied review or were dismissed (*Debra P. v. Turlington*, (1981); *Anderson v. Banks; Johnson v. Sikes*, (1981); *Love v. Turlington*, (1984); *Rankins v. Louisiana Board of Elementary and Secondary Education*, (1994); *Triplett v. Livingston County Board of Education*, (1999); *Student v. Driscoll* (2002) and *Rene v. Reed*, (2002)). Four other cases, that lacked judicial interpretation, were settled out of court: *Advocates for Special Kids v. Oregon,* (2001); *Noon et al. v. Alaska State Board of Education and the Anchorage School District,* (2004); *Kidd v. California Department of Education,* (2008); and *Superior Court of California County of Alameda and Valenzuela v. O'Connell,* (2007). These cases were not considered in the analysis. Therefore, 29 of

the cases resulted in judicial rulings with outcomes in favor of educational agencies or students.

The analysis of cases in which the educational agency prevailed yielded similar themes of court opinion. Overall, fifteen of the cases were won by the educational agencies. Of these fifteen, two cases were continuations of the *Debra P. v. Turlington* case; one establishing the curricular validity of the Florida state exams (*Debra P. v. Turlington*, 1984) and one ruling supporting that students did not suffer from discriminatory educational practices under previously segregated schools (*Debra P. v. Turlington*, 1983). In the analysis of cases resulting in judicial rulings, the following themes emerged from the court documents: *substantive and procedural* due process with the subcategories of *nexus to state goals/legitimate interest, curricular validity, opportunity to learn,* and *adequate notice.* Some cases revealed the following less prevalent issues; *free exercise clause, claims of violations of the Establishment Clause,* and *accommodations for students with special learning needs.* As the cases involving accommodations were discussed thoroughly as part of the last question, it will not be discussed here. The similarities of these issues will be discussed to clarify the judgment of the courts for the educational agency as the prevailing party, and the differences as the student as the prevailing party.

Procedural Due Process

The due process clause protected citizens from the deprivation of life, liberty, or property interests without due process of law (O'Neill, 2001). The due process clause offered procedural and substantive process protections. Procedural due process guaranteed that procedures depriving property or liberty interests conducted in a fair

manner. "Due Process standards [are] applicable when an individual suffers academic consequences form a failure to achieve certain academic standards..." (*Anderson v. Banks; Johnson v. Sikes*, 1981, p. 504). Regarding high stakes testing, procedural due process protection ensured that adequate notice was given to student regarding testing implementation and the application of sanctions. The courts consistently upheld a student's property interest in public education as an entitlement, which has been protected by the due process clause (O'Neill, 2001).

The initial case of *Debra P. v. Turlington* (1979) revealed the court's interpretation of high stakes testing and due process violation claims. The Fifth Circuit Court found that students had a protected liberty and property interest in receiving a diploma. This decision established the basis for future litigation based upon the similar due process claims. The United States Court of Appeals for the Fifth Circuit established that a state could not impose an exam as a requirement for a diploma without giving its students adequate notice as to the use of the test (*Debra P. v. Turlington*, 1981). Educational practices "must balance the students' property interest in receiving a diploma against the eventual purpose of the degree requirement" (Dorn, 2003). "The due process violation potentially goes deeper than the deprivation of property rights without adequate notice. When it encroaches upon concepts of justice lying at the basis of our civil and political institutions, the state is obligated to avoid action which is arbitrary and capricious, does not achieve or even frustrates a legitimate state interest, or is fundamentally unfair" (*Debra P. v. Turlington*, 1981, p. 404).

Adequate Notice

Educational Agency as Prevailing Party. Twelve of the cases brought for due process violation claims based upon adequate notice were won by the educational agency. Adequate notice "[became] constitutionally inadequate when it render[ed] the rule or regulation unreasonable" (*Anderson v. Banks; Johnson v. Sikes*, 1981, p. 505). The case law evolution clarified the differing courts' opinions of reasonable notice for students. However, the cases analysis revealed that the court did not consider adequate notice in isolated context. In the majority of the cases won by the educational agencies, adequate notice rulings were based upon the inclusion of remedial programs and multiple opportunities to take the test. Moreover, the cases in which the educational agency prevailed determined adequate notice as two years notice with the inclusion of these additional caveats.

As discussed in the prior section, the *Debra P.* case resulted in the suspension of state testing. The ruling in *Debra P.* that suspended the state testing and denial of diploma impacted another case involving due process claims based on inadequate notice. In the *Love v. Turlington* case of 1984 plaintiffs opposing the test filed for class action status for students in Florida. The United States District Court for the Middle District of Florida denied the petition. The students appealed to the United States Court of Appeals for the Eleventh Circuit; this court also denied them class status. The Appellate court documents noted that the state provided remediation to students and, at that time, the passing of the SSAT-1 was not a requirement for a diploma due to the suspension of sanctions in *Debra P. v. Turlington*. Therefore, on these grounds, the denial of the

petition to represent a class of students was affirmed, resulting in the educational agency as the prevailing party (*Love v. Turlington*, 1984).

In the case of *Brady v. Turlington* (1979), the court ruled in favor of the educational agency. The court did not specifically address a time period as adequate notice, and instead relied on the fact that students would have other opportunities to test even though the state rule of minimum competency was retroactively applied. As students who satisfactorily completed the test prior to the rule being enacted did not have to retake the test, students who did not successfully complete the test had other opportunities to retake the exam for completion. Similarly, in the case of *Wells v. Banks* (1980) the courts did not specifically indicate a time period for reasonable and adequate notice. In this case, plaintiff students filed a petition in the court to challenge a County Court order that denied students a diploma without passing the state mandated achievement test. The Court of Appeals of Georgia affirmed the trial court's decision finding that the local board had not violated the students' due process rights on the basis of adequate notice. The court declared that the students had received "more than adequate notice of the imposition of this additional requirement for graduation..." although the court documents did not reflect the time period specific to the amount of notice (*Wells v. Banks*, 1980, p. 583).

The *Anderson v. Banks; Johnson v. Sikes* (1981) cases also addressed due process/adequate notice complaints. In this case, the plaintiffs argued that the state had not given them adequate notice. The CAT test was implemented in 1976 with sanctions being enforced in 1978. The United States District Court for the Southern District of Georgia deemed two years notice as adequate. The judges considered "the notice of two

years, the provision that the test [could have been] retaken, and the provision of remedial courses considered together [were] not constitutionally inadequate" (*Anderson v. Banks; Johnson v. Sikes,* 1981, p. 505). The appeal of *Anderson v. Banks; Johnson v. Sikes* was heard in the United States Court of Appeals for the Eleventh Circuit under the case name *Johnson and Wilcox v. Sikes*, (1984). The Federal Court denied to consider the case, and dismissed the appeal on the grounds that the District Court had suspended the use of the test and that until the court ordered a final judgment allowing the court to reinstitute the test, there would be no future harm to students.

The case of *Williams v. Austin Independent School District* in 1992 also resulted in the court finding for the educational agency. The court in this case found that the plaintiff student had received adequate notice prior to being denied his diploma as a result of failing the TAAS test. Additionally, the case of *Triplett v. Livingston County Board of Education* (1997) included the plaintiff students' claims that they were not given adequate notice of the testing policy. However, the court directed that "no advance preparation [was needed] beyond the students' normal academic program, hence, further notice would have served no purpose" (*Triplett v. Livingston County Board of Education*, p. 29).

In addition, the case of *Hubbard by Hubbard v. Buffalo Independent School District* (1998) included a due process violation claim but plaintiffs later abandoned their claim admitting that they had notice of the testing policy, therefore the court ruled in favor of the defendant school district. In the case of *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education* (2000) the plaintiffs challenged that the administration of the TAAS test violated student procedural and

substantive due process. Although this case did not focus on the adequate notice claims, the court documents reflected that the students were given eight opportunities to pass the test with remedial opportunities (*GI. Forum v. Texas Educational Agency*, 2000).

The *Rene v. Reed* (2001) case resulted in the courts finding for the educational agency as the prevailing party regarding adequate notice and students with disabilities. The court found that three years notice was constitutionally sufficient for these students. In addition, the court found that there had been no due process violation in the requirement for testing students with disabilities as the state had offered additional remedial opportunities to learn the required material (*Rene v. Reed,* 2001). The cases of *Student v. Driscoll* (2002) and *Student 9 et al. v. Board of Education et al.* (2004) both included complaints of adequate notice. Both cases resulted in the education agency prevailed. The case of *O'Connell v. The Superior Court of Alameda* (2006) did not result in a court ruling regarding adequate notice however, the court documents reflected that statewide notification of the CAHSEE began in 2001 with the CAHSEE as a requirement for a diploma beginning in 2006. Similarly, the court documents from the case of the *Californians for Justice Education Fund v. State Board of Education* in 2006 implied adequate notice in that the state test the CAHSEE was implemented and "satisfied all professional standards for implementation as a high school graduation requirement" including notification (p. 4). Table 34 lists the cases in which the educational agency was the prevailing party on due process/adequate notice claims.

Table 34

Adequate Notice, Educational Agency as Prevailing Party

Date	Case
1979	*Brady v. Turlington*
1980	*Wells v. Banks*
1981	*Anderson v. Banks; Johnson v. Sikes*
1984	*Love v. Turlington*
1992	*Williams v. Austin Independent School District*
1997	*Triplett v. Livingston County Board of Education*
1998	*Hubbard by Hubbard v. Buffalo Independent School District*
2000	*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*
2001	*Rene v. Reed*
2002	*Student v. Driscoll*
2004	*Student 9 et al. v. Board of Education et al*
2006	*Californians for Justice Education Fund v. State Board of Education*

Students as Prevailing Party. Students were the prevailing party in seven cases in the analysis regarding due process violations and adequate notice. Two of these cases involved special education students, with particular focus on their IEPs and the intent of the state having provided adequate notice for these students.

The first case involving high stakes testing and due process claims in which the student prevailed was the seminal case of *Debra P. v. Turlington* in 1979. In this case, the court determined that the thirteen months between notice and sanctions was fundamentally unfair. Expert testimony was presented that stated that at least four to six years was required to implement a new testing requirement for a diploma. Due to multiple concerning circumstances, such as a prior segregated school system, lack of

established curricular validity, poor quality remedial programs, and sufficiency of instruction since the sanction announcement, the court found in favor of the plaintiff students and suspended the state's use of sanctions against them. However, later the case was brought to the Court of Appeals for the State of Florida in which the court remanded the case back to the District Court to investigate the curricular validity of the test. It was important to note that the *Debra P.* case did not reach a final ruling until April of 1984.

Two of the cases in which students were the prevailing party involved students with disabilities; this factor influenced the ruling in favor of the students. In these cases, the plaintiffs were able to prove due process violations based upon the students' learning goals contained in their IEPs. The court in the case of *The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach* (1981) ruled that two years notice was not sufficient for students with disabilities as their learning goals were directed to meet their individual learning needs. The court decided that the notice given to students with disabilities was more important than notice for regular education students. In the case of *Brookhart v. Illinois State Board of Education*, 1983, the United States Court of Appeal for the Seventh District determined that the plaintiff students with special needs were given only one and one half years to prepare for the test. This period of time was shorter than examples in the case law. This court determined that the time factor was less relevant; instead, the court focused on the students' IEP goals being written to meet the criteria of passing the test. The evidence in this case indicated that the plaintiff students were not exposed to up to 90% of the material on the test, and did not have time to adequately prepare for the test as their IEP goals were not amended to give

adequate time for students with special learning needs to prepare for the test (*Brookhart v. Illinois State Board of Education*, 1983).

In the *Crump v. Gilmer Independent School District* (1992) case regarding adequate notice, the United States District Court for the Eastern District of Texas ruled that the one-year implementation period was insufficient, and that remedial opportunities were not available until the spring in which passing the exam became a requirement. The court found this unconstitutional and therefore sided with the plaintiff students (*Crump v. Gilmer Independent School District*). The *Chapman v. California Department of Education* case of 2002 included a court discussion of adequate notice as per students with disabilities. The Court determined that the IEP/504 teams of the plaintiff students did not have adequate time to address the CAHSEE as a requirement for a diploma as the notification for the testing requirement began in 2001, the year before the case was heard. Adequate notice was an important feature of the case law in Table 35 depicts the cases in which the student was the prevailing party regarding due these process/adequate notice complaints.

Table 35

Adequate Notice, Students as Prevailing Party

Date	Case
1979	*Debra P. v. Turlington*
1981	*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach*
1981	*Debra P. v. Turlington*
1982	*Brookhart v. Illinois State Board of Education*
1983	*Brookhart v. Illinois State Board of Education*
1992	*Crump v. Gilmer Independent School District*
2002	*Chapman v. California Department of Education*

Curricular Validity

Educational Agency as Prevailing Party. The prior section discussed the seminal case of curricular validity in the *Debra P. v. Turlington* cases of 1983-1984. The United States District Court for the Middle District of Florida found that the test was determined to have curricular validity thus finding for the educational agency after the prior litigation (*Debra P. v. Turlington*, 1983). The plaintiffs then appealed the case to the United States Court of Appeals for the Eleventh Circuit, but the Court of Appeals upheld the curricular validity decision of the District Court and allowed the state to begin to deny diplomas to students who did not pass the SSAT-II test with the class of 1983 (*Debra P. v. Turlington,* 1984). In the cases of *Anderson v. Banks: Johnson v. Sikes* (1981) the plaintiffs alleged that the CAT test, used as an exit exam, lacked curricular validity and therefore violated their substantive due process rights. The state presented enough evidence to convince the court that the test did reflect the curriculum taught in the Tatnall

County School System, and that the due process claims therewith were not substantiated. The ruling identified the educational agency as the prevailing party based upon this evidence (*Anderson v. Banks: Johnson v. Sikes,* 1981).

The *Williams v. Austin Independent School District,* (1992) also contained information regarding the theme of curricular validity. The plaintiff student complained that he had not been taught the material covered on the test and therefore was denied his due process protections. However, the court concluded that the school division had provided "substantial evidence" that the student had taken the appropriate courses in which to prepare for the test (p. 254). Therefore, the court supported the educational agency and upheld the denial of the student's diploma (*Williams v. Austin Independent School District*). The court in the case of *Triplett v. Livingston County Board of Education* (1997) also found for the educational agency. The judge commented, "While the KIRIS assessment exam nay not be perfect (doubtless, no testing process is), it is our responsibility only to adjudge whether its requirement rises to the level of a constitutional or statutory violation. We hold that it does not" (*Triplett v. Livingston County Board of Education,* p. 33).

The court documents of the *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education* (2000) provided evidence of the state's process of evaluating test fairness, including the curricular validity. Court documents indicated that the test was reviewed by: "subject matter experts, review committees of teachers and educators, test-construction experts and measurement experts" (*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education,* p. 672). The panel of test evaluators was also asked to "assess whether or not each item

on the TAAS exam cover[ed] information that was sufficiently taught in the classroom by the time of the test administration" (p. 672). The Student Assessment and Curriculum Divisions of the Texas Education Agency conducted a second review of the TAAS, along with additional evaluations by test developers and scoring specialists. With this evidence, the court ruled that the state had exercised due diligence in ensuring the test was fundamentally fair and valid (*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*).

Further evidence was found in the *Rene v. Reed* case of 2001. Plaintiff students in this case complained that they were not exposed to the curriculum in order to successfully pass the test; the court found otherwise. The court asserted that the students "did not submit evidence the GQE [was] not aligned with the curriculum required by state law to be offered at their schools and made available to them through state mandate" (*Rene v. Reed*, p. 744). The case of *Chapman v. California Department of Education* was filed in 2002 in the State of California. The plaintiffs' claim was grounded in the argument that the students had not had the opportunity to learn the material on the test. The court ruled that the plaintiffs did not show a likelihood of success on the merits of the due process claim. Although the students prevailed in the preliminary injunction, they did not prevail on the due process claim. The court determined that the state had met its burden of proof as to the curricular validity of the test and that there was "not an asymmetry between what students [were] taught and the material on the CAHSEE implicating due process concerns" (*Chapman v. California Department of Education*, 2002, p. 989). *Student v. Driscoll* (2002) and *Student 9 et al. v. Board of Education et al.* (2004) both contained

evidence of curricular validity in the court documents. Cases in which the educational agency was the prevailing party regarding complaints of curricular validity are below.

Table 36

Curricular Validity, Educational Agency as Prevailing Party

Date	Case
1981	*Anderson v. Bank and Johnson v. Sikes*
1983	*Debra P. v. Turlington*
1984	*Debra P. v. Turlington*
1992	*Williams v. Austin Independent School District*
1997	*Triplett v. Livingston Board of Education*
2000	*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*
2002	*Rene v. Reed*
2002	*Student v. Driscoll*
2002	*Chapman v. California Department of Education*
2004	*Student 9 et al. v. Board of Education et al.*

Students as Prevailing Party. Eight of the analyzed cases resulted in students prevailing in claims against the curricular validity of the tests. First and foremost, the *Debra P. v. Turlington* cases of 1979 and 1981 questioned the curricular validity of the test. This case provided the foundation for the fundamental fairness of the administration of a test on which the students had not had the opportunity to learn the curriculum. Of course, in subsequent cases under *Debra P.* the state was able to establish the curricular validity ensuring that the state's curriculum did indeed address the content on the test (*Debra P v. Turlington*, 1981). The next year, in 1982, the issue of curricular validity was raised in the case of *Brookhart v. Illinois State Board of Education*. In this case, the

students' IEPs were not written specifically for the students to pass the state mandated test. Due to the misalignment of the students' IEP goals, the students were not exposed to the curriculum assessed on the test. Although the court determined that the appropriate remedy would be to have the students attend remediation and additional testing opportunities, for these students, the remedy would have place an undue burden on them. Therefore, the students prevailed and were awarded their diplomas. However, the court did recommend that future students avoid the courts and take the opportunities for remediation and retesting opportunities (*Brookhart v. Illinois State Board of Education*, 1983).

The *Crump v. Gilmer Independent School District* case of 1992 also resulted in the students prevailing over the educational agency. In this case, the judge noted that "since the defendant's [school district] administrators and teacher [were] not allowed to view the contents of these tests, there is no way of knowing for certain if the TAAS examination is actually based on [the essential elements]" (*Crump v. Gilmer Independent School District*, p. 556). Furthermore, "there [was] no statutory requirements...that the tests be based solely on these elements" (p. 566). Continuing, the judge expressed concern that "even if the TAAS was based on the essential elements established by the Board, the effect of this restriction on the TAAS would depend entirely on how specific those elements [were]" (p. 566).

The cases of *Advocates for Special Kids v. Oregon* (2001) and *Noon et al. v. Alaska State Board of Education and the Anchorage School District* (2004), included statements regarding the validity of the tests and the opportunity for students with disabilities to learn the material on the test. In the *Advocates for Special Kids v. Oregon*

settlement agreement, the state agreed to conduct further research to ensure the validity of the test with respect to students with disabilities. The state appointed a neutral panel of experts to conduct the study (*Advocates for Special Kids v. Oregon*). The *Noon* case also indirectly included the curricular validity as to the settlement agreement. The State School Board agreed to clarifying and modifying the "Participation Guidelines for Alaska Students in State Assessments" with respect to students with disabilities to ensure that the test was fairly administered to students with disabilities (*Noon et al. v. Alaska State Board of Education and the Anchorage School District*).

The *Flores v. State of Arizona* case of 2005 resulted in the court finding for the plaintiff students as the result of underfunding the ELL program. As a result of the underfunding, the state was held responsible for the students not having been exposed to the appropriate curriculum. The court also indicated that the remediation provided by the state did not " remedy the fact that the underfunded ELL programs deprive[d] ELL students of an equal opportunity to pass the AIMS test..."(*Flores v. State of Arizona*, p. 1120).

In the 2006, the California Department of Education was again in court, this time requesting the court to vacate a trial court's preliminary injunction of the denial of diplomas for the students who did not pass the required sections of the CAHSEE. *O'Connell v. The Superior Court of Alameda County* contained evidence of the state's legislation requiring the state to develop the CAHSEE in accordance with the statewide content standards adopted by the State Board of Education. The court ruled that there were some students who were not exposed to all tested curriculum, and that the appropriate remedy would be remedial assistance and additional opportunities to take and

successfully complete the test (*O'Connell v. The Superior Court of Alameda County,* 2006). The court ruled that the state should find a practical solution to provide all students an adequate opportunity to learn the material on the CAHSEE (*O'Connell v. The Superior Court of Alameda County*, 2006). The table below lists the cases resulting in the students as the prevailing party regarding curricular validity.

Table 37

Curricular Validity, Students as Prevailing Party

Date	Case
1979	*Debra P. v. Turlington*
1981	*Debra P. Turlington*
1982	*Brookhart v. Illinois State Board of Education*
1992	*Crump v. Gilmer Independent School District*
2001	*Advocates for Special Kids v. Oregon*
2004	*Noon et al. v. Alaska State Board of Education and the Anchorage School District*
2005	*Flores v. State of Arizona*
2006	*O'Connell v. The Superior Court of Alameda County*

Equal Protection

Educational Agency as Prevailing Party. In analyzing equal protection claims, the courts have established three standards for review "...when legislative enactments classified persons by race or religious beliefs the strict scrutiny standard was applied. For classifications based on birth, age, sex, culture, physical condition, or political ideas or affiliations, an intermediate standard of review was appropriate. All other classifications were analyzed under the rational relationship standard" (*Rankins v. Louisiana Board of Elementary and Secondary Education*, 1994, p. 554)

Similar to the due process requirement that determines whether a state governmental action is arbitrary or capricious, evidence that the action had a clear nexus to the goals of the state was necessary for the educational agency to prevail in claims involving equal protection violation. The analysis of cases concerning equal protection claims, court determinations of nexus to state goals was the hinging factor as to the constitutionality of a testing policy. The following cases represented the court opinions in favor of the educational agencies.

In the case of *Wells v. Banks* (1980), the students contended that they were being treated differently than other students across the state and therefore were entitled to equal protection safeguards. The plaintiffs claimed that the testing requirement was discriminatory as not all counties required students to pass the exit exam. The court ruled that the local school boards had the authority to implement additional standards for graduation and that other boards across the state had the same authority to do so. Moreover, the additional requirements were implemented throughout the county. Therefore, the students were not being treated any differently than any other students in the county and were afforded their equal protection rights (*Wells v. Banks*).

In the case of *The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach* (1981), the court determined that the plaintiffs' claim of equal protection violation was not evidenced in the case. The court affirmed that the implementation of the BCT program and the applicability of the program to plaintiff students Abby and Richard did not fall short of a rational basis and thus, did not violate the equal protection clause. Lastly, in the case of *Florida State Board of Education and Turlington v. Brady* (1979) the plaintiffs did not claim equal protection violations, but the

court proactively determined that the testing policy did not discriminate against students and therefore no equal protection violations occurred (*Florida State Board of Education and Turlington v. Brady*).

In 1984, the *Debra P. v. Turlington* case was finally resolved. In both the 1983 and 1984 cases heard by the courts, the rulings indicated that the students no longer suffered from discriminatory practices of segregated schools and therefore, the testing requirement did not violate the students' equal protection rights (*Debra P. v. Turlington*, 1983, 1984).

In the case of *Hubbard by Hubbard v. Buffalo Independent School District* (1998), the District Court for the Western District of Texas ruled in favor of the educational agency based upon the state's legitimate interest in setting uniform advancement and graduation requirements. The plaintiff claimed that the requirement for students to pass proficiency tests to transfer credits towards graduation from private schools was denying her due process, equal protection, and free exercise rights (1998). The court ruled that the plaintiff was not a member of a protected class as a student coming from private school, and that the plaintiff was informed of the credit transfer requirement prior to enrolling in public school.

Additionally, the requirement was generally applicable to other students (1998). The court determined that the policy had a clear nexus to state goals, and that the policy did not treat the student differently. Therefore, there were no inherent equal protection violations embedded in the application of the policy (*Hubbard by Hubbard v. Buffalo Independent School District,* 1998). Similarly, in *Rankins v. Louisiana Board of Elementary and Secondary Education* (1994) the court reversed the trial court's ruling of

equal protection violations. The plaintiff complained that students in private schools were not required to pass the test to earn their diplomas. The court determined that the classification of public and non-public school students was not recognized and did not contain any suspect classes under the equal protection clause. The court applied the rational relation standard of review and determined that the exam was constitutional based upon their conclusion that the state "ha[d] a strong interest in the public education for which it pays the cost. We conclude that the GEE does not violate the equal protection clause because its administration is rationally related to the state's legitimate interests of insuring minimum competency among persons obtaining a state diploma" (*Rankins v. Louisiana Board of Elementary and Secondary Education,* 1994, p. 555).

The case of *Rene v. Reed* (2001) also contained complaints of violations of the equal protection clause. Although the plaintiff students contended that they were not afforded the opportunity to learn the material on the test due to their disability, the court held that there was not equal protection violation. The court reasoned that although the students would have benefited from earlier adjustments to their curriculum, they were provided multiple opportunities to retake the test as well as remedial instruction (*Rene v. Reed*).

In the case of *O'Connell v. The Superior Court of Alameda County* (2006), the trial court ruled that the CAHSEE requirement violated equal protection laws due to the lack of adequate resources and preparation that resulted in a disproportionate effect on English Language Learners. However the Court of Appeals held that the trial court erred in its ruling and gave undue weight to the plaintiff's claim of irreparable harm. The Appellate Court responded that the trial court did not make the distinction "between an

equal protection claim based upon the well-established fundamental right to an *education* and an equal protection claim based on the asserted fundamental right to be awarded a high school diploma" (p. 1478). The Appellate Court disagreed with the trial court's awarding of diplomas and criticized the trial court's assumption that "access to education include[d] access to a diploma" (p. 1478).The Appellate Court reversed the trial court's order resulting in the educational agency as the prevailing party.

Two cases were brought before the courts claiming violations of Title VI of the Civil Rights Act of 1964. The *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education* (2000) and the *Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District Number 1* (2008) cases both resulted in the educational agency as the prevailing party on this claim. The *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education* (2000) case presented the argument that the testing policy violated the students' civil rights under Title VI.

The U.S. District Court for the Western District of Texas determined the state was not in violation of the Civil Rights Act using the EEOCs four-fifths rule to determine disparate impact. The four-fifths rule required a statistical significance in disparities between the pass rates of white students and minority students. The court considered both single administration results and cumulative administrations of the test and determined "sobering" (*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*, p. 679) and significant statistical differences under the standard. Despite the disparate impact of the test, the court held that the TAAS test did not violate the Title VI regulations, although the test did adversely affect minority

students in significant numbers. The evidence presented to the court found that the Texas Education Agency had demonstrated an educational necessity for the test and that the plaintiffs failed to identify effective alternatives to the TAAS. Therefore, the court ruled in favor of the educational agency.

In the case of *Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District Number 1* (2008), the court examined two methods for proving intentional discrimination under the Civil Rights Act, the direct method and the indirect method. The direct method of examination required the plaintiffs to present strong evidence of discriminatory intent. The indirect method would be used when plaintiffs have weaker evidence of discriminatory intent; the court must then consider the evidence based upon the three steps *McDonnell Douglass* framework. Under this framework, the plaintiff would first need to establish a prima facie case of discrimination. The defendant then would need to provide a legitimate nondiscriminatory explanation of the challenged actions. Finally, the plaintiff would put forth sufficient evidence to the court to determine the discrimination. The United States District Court for the District of Minnesota considered this framework. The court determined that due to the fact that there were no comparators, this framework did not apply. The court therefore, ruled that there was insufficient evidence that the school's actions were intentionally discriminatory (*Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District Number 1*). The educational agency prevailed in eleven cases regarding equal protection, which are listed in Table 38.

Table 38

Equal Protection, Educational Agency as Prevailing Party

Date	Case
1979	*Florida State Board of Education and Turlington v. Brady*
1980	*Wells v. Banks*
1981	*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach*
1983	*Debra P. v. Turlington*
1984	*Debra P. v. Turlington*
1994	*Rankins v. Louisiana State Board of Elementary and Secondary Education*
1998	*Hubbard by Hubbard v. Buffalo Independent School District*
2000	*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*
2001	*Rene v. Reed*
2006	*O'Connell v. The Superior Court of Alameda County*
2008	*Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District Number 1*

Students as Prevailing Party. The initial case of *Debra P. v. Turlington* (1979) brought forth the plaintiffs' claims of equal protection violations on the grounds that the SSAT-II "perpetuate[d] and reemphasize[d] the effects of past purposeful discrimination" (p. 251). The plaintiffs argued that the test was racially based and that the enactment of the test resulted in a disproportionate number of students of color failing the test. Several key witnesses from the State Department of Education as well as Ralph Turlington provided testimony that they anticipated a higher number of black students to fail the test. In addition, they attributed this disparity to be the result of the inferior education that

these students received under the segregated school system formerly established in Florida. The court ruled in favor of the students based upon, "When students regardless of race are permitted to commence and pursue their education in a unitary school system without the taint of the dual school system, then a diploma requirement based upon a neutral test will be permitted" (*Debra P. v. Turlington*, 1979, p. 257). The *Debra P.* case of 1983 questioned the curricular validity of the test therefore resulting in the court finding for the students until the curricular validity of the tests could be established (*Debra P. v. Turlington*, 1983).

In the cases of *Anderson v. Banks; Johnson v. Sikes* (1981) the petitioners requested that the court order the awarding of diplomas to students, and suspend further diploma sanctions based upon previous segregation in the schools. The court found in favor of the plaintiffs and ordered that no further diploma sanctions could be enforced until the first group of students who had been educated after the abolition of the dual system had graduated. The court held that the testing policy had a significant racial impact on African-American students in that these students had been misplaced in remedial classes. The racial make-up of the remedial classes was a strong predictor of success on the test for black students and the testing policy itself was discriminatory (*Anderson v. Banks; Johnson v. Sikes*).

Similarly, in the case of *Johnson and Wilcox v. Sikes* (1984) the plaintiffs claimed that the testing requirement discriminated against them because of their race. In an Appeal from United States District Court for the Southern District of Georgia, the District Court found that the plaintiffs prevailed on equal protection claims due to the lingering connection between the discriminatory tracking system and the diploma sanction.

Plaintiff students were awarded their diplomas. On appeal to the United States Court of Appeals for the Eleventh Circuit, the court dismissed the appeal due to ripeness; no students had been denied their diplomas and no further injury or harm had occurred (*Johnson and Wilcox v. Sikes*).

The *Chapman et al., v. California Department of Education* (2002) and the *Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District* (2002) both involved equal protection complaints resulting in the student prevailing. In order to meaningfully participate in the state mandated testing, the students were awarded the right to use accommodations and modifications to demonstrate their knowledge on the CAHSEE (*Chapman et al., v. California Department of Education).* The subsequent Smiley case affirmed the students' rights to utilize the accommodations and modifications included in their IEPs. However, this case also clarified the court's intention to eliminate the burden place upon the students who wish to forgo their accommodations and apply for a waiver. These students would not have to risk the denial of the waiver if they were to opt to take this course in lieu of taking the test with their accommodations (*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*).

One of the most interesting of these cases was that of *Flores v. State of Arizona* (2005), the United States District Court for the District of Arizona favored the plaintiff's claims of equal protection violations. Students claimed that the state neglected to fairly fund the ELL program for the state resulting in unfair treatment of ELL students in the

State of Arizona. The court agreed and issued a ruling that resulted in the state legislature being held in contempt of court with large daily fines for non-compliance of equitable funding for the state's English Language Learners. The court ordered that students would not be required to pass the AIMS test as a result of arbitrary and capricious funding (*Flores v. State of Arizona*). The next table lists cases regarding equal protection complaints with the student was the prevailing party.

Table 39

Equal Protection, Students as Prevailing Party

Date	Case
1979	*Debra P. v. Turlington*
1981	*Debra P. v. Turlington*
1981	*Anderson v. Banks; Johnson v. Sikes*
1984	*Johnson and Wilcox v. Sikes*
2002	*Chapman v. California Department of Education*
2002	*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*
2005	*Flores v. State of Arizona*

State and Local Board Authority

Educational Agency as Prevailing Party. In all of the cases brought to the courts claiming violations of state and local board authoritative powers, the educational agency prevailed. The courts consistently supported the state and local boards' authority to set scoring criteria, establish testing policies and impose additional graduation requirements including exit exams for students. The following cases represented the courts' opinions extrapolated from the case analysis on state and local board authority.

Again, in this analysis, the case of *Florida Board of Education v. Brady* (1979) initially addressed the issue of state and local board authority. Prior to this case, a state administrative hearing officer determined that the scoring criteria for the test were invalid due to the scoring standard not being promulgated in the state legislature. The State Board of Education appealed the case to the District Court of Appeals, which vacated and set aside the hearing officer's order on the basis that the determination of the scoring standard was a valid exercise of state authority as defined in the state statutes (1979). The *Debra P. v. Turlington* (1979) case also addressed the issue of state and local board authority. Although the plaintiffs did not bring forth a complaint regarding state authority, the court commented on the legitimate interest of the state in implementing a mechanism to evaluate the statewide educational objectives. The court did not question the legitimate interest of the test for the improvement of the state's educational system, but did question the timing of the test as a requirement for graduation (1979). The *Anderson v. Banks*; *Johnson v. Sikes* (1981) cases resulted in similar conclusions of the court. The state and local board authority was supported by the courts but the timing of the test as a requirement for a diploma was under scrutiny in light of past segregation and the impacts of inferior schools on black students.

In the case of *The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach,* (1981), the court ruled, "The state has a legitimate interest in attempting to insure the value of its diplomas and to improve upon the quality of education provided. The use of competency testing to effectuate the goals underlying those interests is within the discretion of the Board of Regents and the Commissioner" (1981; p. 835). The court upheld the state legislature's role of the supervision and support

of a state system of education. Similarly, the *Wells v. Banks* case of 1980 resulted in the courts supporting the legitimate interests of the state. In this case, the plaintiffs claimed that the local school board lacked authority to increase the high diploma requirements. The plaintiff contended that the state statutory language did not grant the local school boards the authority to impose the completion of the test as an additional diploma requirements. The Court of Appeals of Georgia disagreed specifically stating that there was a document presented in the case granting the State Board of Education the right to establish diploma requirements with no "indication that local boards may not impose additional requirements" (1980, p. 271). In addition, the document referenced by the court, granted the local boards the authority to require additional credit units for graduation and to establish performance objectives and indicators. Therefore, the court found that the local board of education had been given the authority to require the testing as a performance objective thus awarding the case to the educational agency (1980). In *Rankins v. Louisiana Board of Elementary and Secondary Education* (1994), the court found that the Louisiana Constitution provided the state's right to supervise and control the state schools. Although there was no evidence of legislative intent to require the state testing as a diploma requirement, the absence of contrary language allowed the State Board of Education to establish the testing requirement for a high school diploma (*Rankins v. Louisiana State Board of Elementary and Secondary Education,* 1994).

In the case of *Hubbard by Hubbard v. Buffalo Independent School District* (1998), the plaintiff student claimed that the testing policy to transfer courses from a private school to a public school was unconstitutional. The court ultimately found that the plaintiff's rights were not violated and that the testing policy to transfer credit for

graduation was rationally related to the state goals. Therefore, the state board had the authority to require the testing to verify the courses to be used toward graduation. The court stipulated "A public education is not a fundamental right and every variation in which education is provided need not be justified by a compelling necessity" (*Hubbard by Hubbard v. Buffalo Independent School District*, 1998, p. 1017)

In *Triplett v. Livingston County Board of Education* (1997), the court ruled in favor of the educational agency on the grounds that the local school board acted within its authority to require the exam for a diploma. The court ruled that the state and local boards were granted authority in the state statutes to establish additional diploma requirements above the minimum set forth by the State Board of Education. As each school district is responsible for their performance on the test, they have the authority to set policy as it relates to the assessment process as long as this policy does not infringe on the state's authority (1997). Additional support can be found in the case of *Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District* (2002), which also contains court statements regarding state and local board authority. In this case the court specifically noted that the state's authority to impose diploma requirements. The court also indicated the distinction between a student's right to meaningfully participate in the state testing and the state's authority to test and set diploma requirements. The evidence found in the case law affirms the state's authority to impose and assessment as a requirement for a diploma. In the cases of *Student 9 v. Driscoll* (2002) and *Student 9 et al. v. Board of Education et al.* (2004), the court also

noted the state's authority to impose additional graduation requirements. The following table lists the cases involving state authority in which the educational agency prevailed.

Table 40

State and Local Board Authority, Educational Agency as Prevailing Party

Date	Case
1979	*Florida State Board of Education and Turlington v. Brady*
1979	*Brady v. Turlington*
1979	*Debra P. v. Turlington*
1980	*Wells v. Banks*
1981	*Anderson v. Bank and; Johnson v. Sikes*
1981	*The Board of Education of the Northport-East Northport Union Free School District v. Ambach*
1994	*Rankins v. Louisiana Board of Elementary and Secondary Education*
1997	*Triplett v. Livingston County Board of Education*
1998	*Hubbard by Hubbard v. Buffalo Independent School District*
2002	*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*
2002	*Student v. Driscoll*
2004	*Student 9 et al. v. Board of Education et al.*

Special Education Accommodations

Educational Agency as Prevailing Party. The right for students with disabilities to testing accommodations has resulted in an interesting evolution in court rulings. Beginning with *Brookhart v. Illinois State Board of Education* (1983), the court's interpretation on the use of accommodations on high stakes testing has provided a shift in perspective regarding the rights of students with disabilities. The following cases were

influenced by other federal legislation that granted increased rights to students with disabilities. The additional scope of rights is mandated under the Education for All Handicapped Children Act, the Rehabilitation Act, and the Individuals with Disabilities Education Act. As the courts considered the following cases, the rulings reflected the changes in interpretation of students' rights under these mandates.

The first case to be considered by the courts was *Brookhart v. Illinois State Board of Education* (1982). In this case, students claimed the testing policy violated their rights under the Education for All Handicapped Children Act. The court determined that the EHA did not require students to attain "specific results" (1983, p. 183). The court stated that the "Denial of diplomas to handicapped children who have been receiving the special education and related services required by the Act, but are unable to achieve the educational level necessary to pass the MCT is not a denial of a free and appropriate public education" (1983, p. 183). In addition, the plaintiffs' claim of an additional violation of EHA was that the passing of the test was the sole criterion for determining an appropriate education for a child by the state. However, the evidence presented in the case reflected that the requirements for graduation also included credits, completion of a constitution test, and a consumer education course. The plaintiffs claimed that the test violated their rights under the EHA and the RHA, as some handicapped students would not be able to successfully complete the test without the use of accommodations and modifications to the test. The court determined that the test did not discriminate on these grounds "altering the content of the MCT to accommodate an individual's inability to learn the test material because of his handicap would be a substantial modification as well as a perversion of the diploma requirement" (1982, p. 184). Moreover, "a student who is

unable to learn because of his handicap is surely not an individual who is qualified in spite of his handicap" (1983, p. 184). Therefore, the court ruled in favor of the educational agency that this testing requirement was not in violation of these two federal acts.

Likewise, in the case of *Rene v. Reed* (2001), the plaintiff students filed a complaint that the requirement for students to take the GQE without certain accommodations stated in their IEPs violated IDEA. The court found that the state did permit some accommodations typically documented in IEPs. However, the court supported the state in the refusal of accommodations that would affect the validity of the test results (*Rene v. Reed*). The two cases in which accommodations for students with special needs were an issue and in which the educational agency was the prevailing party are listed below.

Table 41

Special Education Accommodations, Educational Agency as Prevailing Party

Date	Case
1982	*Brookhart v. Illinois State Board of Education*
2001	*Rene v. Reed*

Students as Prevailing Party. Three cases were found involving the use of accommodations in which the students prevailed. In the first case of *Brookhart v. Illinois State Board of Education* (1983), the defendants (educational agency) in the case conceded that the "modifications of the [M.C.T.] must be made available to the handicapped" (p. 184). The school district offered to readminister the assessment to the students with modifications to accurately assess their knowledge of the material

(*Brookhart v. Illinois State Board of Education*). In the cases of *Chapman v. California Department of Education* (2002) and *Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District* (2002), the courts ruled that the students with disabilities could participate in the California Assessment of High School Exit Examination utilizing their accommodations and modifications as described as part of their IEP or 504 plans. The plaintiffs in the first case, *Chapman v. California Department of Education*, prevailed on their claims that the administration of the CAHSEE without allowing students to meaningfully participate by use of accommodations and modifications was a violation of their equal protection rights. The students were granted the right to take the CAHSEE with their accommodations and modifications provided in their IEP or 504 plans as well as an opportunity to take an alternate assessment if so stated in their IEP or 504. The court further directed the state to develop an alternate assessment and until the alternate assessment is implemented, the students may take the CAHSEE on a voluntary basis. The preliminary injunction prohibiting the state from administering the test to all students was not granted. Further, the state was also required to inform parents and students of the allowances granted by the court.

Later in 2002, *Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District* was brought before Appellate Court for review. The U.S. Court of Appeals reviewed the case and upheld the students' rights to use the accommodations and modifications listed in the IEP or 504 plans in order to participate in the test. The Appellate Court reversed the waiver stipulation, which would burden

students with disabilities with the choice of foregoing the use of modifications or accommodations or risk being denied a waiver of participation. Lastly, the Appellate Court reversed the stipulation that the students may take the CAHSEE on a voluntary basis until an alternate assessment could be developed. The Appellate Court remanded these items back to the district court for dissolution (*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*, 2002) on the ground that they would affect the validity of the test results. The three cases in which the student prevailed on the issue of student accommodations are listed below.

Table 42

Special Education Accommodations, Students as Prevailing Party

Date	Case
1983	*Brookhart v. Illinois State Board of Education*
2002	*Chapman v. California Department of Education*
2002	*Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*

Free Exercise Clause Educational Agency as Prevailing Party. Two cases were brought before the court on the grounds that the state's testing policy violated their Free Exercise rights guaranteed in the First Amendment (*Hubbard by Hubbard v. Buffalo Independent School District*, 2008). The plaintiffs in both cases complained to the courts that the test inhibited their rights to exercise their religion. Both cases resulted in the educational agency as the prevailing party.

In the case of *Hubbard by Hubbard v. Buffalo Independent School District*, the plaintiff contended that the state testing policy burdened her right to free exercise of religion. The plaintiff claimed that the she would need to study and sacrifice to prepare for the tests and that this would violate her, or her parents, free exercise guarantees. The court disagreed and found that, by the parents own admission in their depositions, they did not have objections to the districts testing policy and that their objections with the school division were not entirely based upon religious grounds. The court also determined that the general applicability of the testing policy was religiously neutral and that the extra time to study would not violate the student's free exercise protections (*Hubbard by Hubbard v. Buffalo Independent School District,* 2008). In *Triplett v. Livingston County Board of Education* (1997), the parents of a senior student filed suit claiming that the test violated their free exercise clause protections. The parents contended that the test violated their rights as it established a religious or moral code and invaded their child's religious and moral beliefs. They also claimed that the test compelled the child to speak against their beliefs by having to select objectionable responses. The court ruled that the evidence presented in the case verified that the test did not advance nor inhibit religion nor did it encourage governmental entanglement with religion (*Triplett v. Livingston County Board of Education*, 1997). Table 43 identifies the two cases that the educational agency prevailed.

Table 43

Free Exercise Clause, Educational Agency as Prevailing Party

Date	Case
1997	*Triplett v. Livingston County Board of Education*
1998	*Hubbard by Hubbard v. Buffalo Independent School District*

Question Four. What differences existed between the case law according to the geographical regions as defined by regions in published court reporters and listed as follows: Northeastern, Northwestern, Southeastern, Southern, Southwestern, Pacific, and Atlantic regions?

The analysis of cases concerning high stakes testing and the denial of a high school diploma included cases only heard in the state courts and the federal courts. The state courts ruled on violations of state laws, rules, and regulations, and applied and interpreted the state's own Constitution. The federal court system ruled on federal laws, rules, and regulations, and interpreted the laws or policies in accordance with the Constitution of the United States. The federal court system was comprised of the U.S. Supreme Court, the U.S. Court of Appeals, and the U.S. District Courts. The District Courts heard trial cases in the 94 districts throughout the United States. Most states were served by one or two district courts, while larger states were perhaps served by several district courts. The U.S. Court of Appeals was divided into 12 regional circuits serving the 94 judicial districts. Each of the 11 circuit courts had an appellate court with the twelfth circuit hearing cases only from the District of Columbia. The state level courts were divided into state courts, appellate courts, and State Supreme Courts. All of the courts were categorized into seven judicial regions: Northeastern, Northwestern,

Southeastern, Southern, Southwestern, Pacific, and Atlantic. The cases in each court were reported in the court reporter for that region. This analysis followed the regional template as outlined in the court reporters and categorized the cases according to the state in which they were brought to the court. Table 44 illustrates the different states and their regional assignment.

Table 44

Judicial Regions

Northeastern Region	Northwestern Region	Southeastern Region	Southern Region	Southwestern Region	Pacific Region	Atlantic Region
Illinois (2)	Iowa (0)	Georgia (3)	Alabama (0)	Missouri (0)	Alaska (1)	Connecticut (0)
Indiana (2)	Michigan (0)	North Carolina (0)	Florida (9)	Arkansas (0)	Arizona (1)	Delaware (0)
Massachusetts (4)	Minnesota (1)	South Carolina (0)	Louisiana (2)	Tennessee (0)	California (6)	District of Columbia (0)
New York (2)	Nebraska (0)	Virginia (0)	Mississippi (0)	Texas (4)	Colorado (0)	Maine (0)
Ohio (0)	North Dakota (0)	West Virginia (0)		Kentucky (1)	Hawaii (0)	Maryland (0)
	South Dakota (0)				Montana (0)	New Hampshire (0)
	Wisconsin (0)				Nevada (0)	New Jersey (0)
					New Mexico (0)	Pennsylvania (0)
					Oklahoma (0)	Rhode Island (0)
					Oregon (1)	Vermont (0)
					Utah (0)	
					Washington (0)	
					Wyoming (0)	

Northeastern Judicial Region

The Northeastern Judicial Region included the states of Illinois, Indiana, Massachusetts, Ohio, and New York. There were five unique cases with ten total cases heard in this judicial region in the states of Massachusetts, New York, Indiana, and Illinois. The two main topics addressed by the courts in this region were cases involving students with disabilities and equitable funding. The State of Massachusetts saw the cases of *Student v. Driscoll* (2002) and *Student 9 et al. v. Board of Education et al.* (2004) as well as *Hancock v. Driscoll* (2004) and *Hancock et al. v. Commissioner of Education et al.,* (2005) which were connected to complaints in the *McDuffy* case. The *Student v. Driscoll* was heard at the District Court level while the *Student 9 et al. v. Board of Education et al.* was heard at the Supreme Judicial Court of Massachusetts. The *Hancock v. Driscoll and Hancock et al. v. Commissioner of Education et al.* cases were heard at the Superior Judicial Court of Massachusetts.

Two unique cases were heard in the State of New York. The cases of the *Board of Education of the Northport East Northport Union Free School District v. Ambach,* (1981) and the case of *New York Performance Standards Consortium v. the New York State Education Department* (2002) were brought before the Supreme Court of New York, one as a special term in Albany and the other in the Appellate Division, respectively. The states of Indiana and Illinois heard two cases each with both cases being appeals of an original case (*Brookhart v. Illinois State Board of Education*, 1983; 1984; *Rene v. Reed*, 2001; 2002, respectively). The *Brookhart v. Illinois State Board of Education* case originated in the United States District Court with the court of last jurisdiction being the United States Court of Appeals for the Seventh Circuit. The *Rene v. Reed* (2001) case

originated in the Court of Appeals for Indiana with a request to the Supreme Court of Indiana to review the case but was denied (2002). Of these cases, the *New York Performance Standards Consortium v. New York State Education Department* (2002) was brought to court from an agency representing 28 of the state's public schools, not by students themselves. Otherwise, the remaining five cases involved students with disabilities. In the cases brought to court by student plaintiffs, the courts ultimately denied the diploma requirement in all cases except the *Rene v. Reed* case of 2001.

Two cases were brought to court in the early 1980s; the rest occurred after the 2001 *Rene v. Reed* ruling in favor of the educational agency. After this 2001 case, all other cases were settled in favor of the plaintiff students but included the caveats of remedial assistance, and adequate and fair funding for students. The *Hancock v. Driscoll* (2004) and *Hancock et al. v. Commissioner of Education et al.,* (2005) cases finally resolved the *McDuffy* case of adequate funding for all school districts in the State of Massachusetts. Table 45 lists the cases in the Northeastern Judicial Region.

Table 45

Northeastern Judicial Region Cases

Date	Case
1981	*The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach*
1982	*Brookhart v. Illinois State Board of Education*
1983	*Brookhart v. Illinois State Board of Education*
2001	*Rene v. Reed*
2002	*Rene v. Reed*
2002	*New York Performance Standards Consortium v. New York State Education Department*
2002	*Student v. Driscoll*
2004	*Student 9 et al. v. Board of Education et al.*
2004	*Hancock v. Driscoll*
2005	*Hancock et al. v. Commissioner of Education et al.*

Northwestern Judicial Region

Only one case was heard in the Northwestern Judicial Region. The case of *Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District Number 1* (2008). This case involved immigrant students who complained that they did not receive and adequate education from the school district but due to the very unusual circumstances, the plaintiff students were not successful in receiving monetary damages on their equal protection claims (2008).

Table 46

Northwestern Judicial Region Case

Date	Case
2008	*Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District Number* 1

Southeastern Judicial Region

All of the cases that were heard in the Southeastern Judicial Region were nested cases originating with the *Wells v. Banks* case of 1980. This case originated in the Court of Appeals in Georgia and then was transferred to the United States District Court for the Southern District of Georgia in the case of *Anderson v. Banks; Johnson v. Sikes* in 1981. The case evolution continued as the case was again heard in the United States District Court for the Southern District of Georgia in 1982, and was ultimately forwarded to the federal court level in the United States Court of Appeals for the Eleventh Circuit under *Johnson and Wilcox v. Sikes* (1984), in which the federal court determined the case unripe for review. The original case resulted in a ruling in favor of the educational agency with a reversal a year later under *Anderson v. Banks; Johnson v. Sikes*. The subsequent rulings after this case resulted in rulings in favor of the educational agency. All of the cases heard in this region were nested cases, involving minority students with an interaction between the testing policy and the vestiges of prior discrimination and segregation in the public schools.

One of the unique features of the court rulings in this judicial region was the State of Georgia's prior history with segregated schools for Caucasian and African-American students. The racial discrimination once apparent in the state's school system resulted in

unequal learning opportunities for students of color. The court's ruled that the vestiges of this past discrimination affected the students' ability to learn. Students educated under the dual system would not be held accountable for the state testing requirements until all evidence of the dual system was eradicated. Southeastern Judicial Region cases are listed below.

Table 47

Southeastern Judicial Region Cases

Date	Case
1980	*Wells v. Banks*
1981	*Anderson v. Banks; Johnson v. Sikes*
1984	*Johnson and Wilcox v. Sikes*

Southern Judicial Region

Similar to the Southeastern Judicial Region, past discriminatory practices influenced the cases brought to court, as well as the discussions and rulings of the courts, in the Southern Judicial Region. Cases brought before the courts in the Southern Judicial Region involved only two states: Florida and Louisiana. There were a total of five unique cases that were presented to the courts in eleven different appearances. The first cases were brought in the late 1970s and early 1980s in Florida under the cases of *Florida State Board of Education and Turlington v. Brady* and *Debra P. v. Turlington* originating in 1979. The case of *Florida State Board of Education and Turlington v. Brady* originated in the First District Court of Appeals of Florida, with resolution being determined by the same court in an appeal brought by the plaintiff John Brady; the court affirmed the prior decision (*Brady v. Turlington*, July 1979). The seminal case of *Debra P. v. Turlington*

was brought before the United States District Court for the Middle District of Florida in July of 1979. This case evolved through the courts via the United States Court of Appeals in May and September of 1981. The case was back in the United States District Court for the Middle District of Florida in 1983, with the case finally reaching resolution under the federal court level in an appeal to the United States Court of Appeals for the Eleventh Circuit in 1984. Also the cases of *Love v. Turlington* (1980, 1984) were brought before the United States District Court and the United States Court of Appeals for the Eleventh Circuit respectively, requesting class certification for students similarly situated, but were denied by the court.

In the State of Louisiana, one case was brought before the court. The case was heard in the Court of Appeals of Louisiana First Circuit in the case of *Rankins v. Louisiana State Board of Elementary and Secondary Education* (March 1994). The prevailing party in this case was the educational agency, resulting in the plaintiff students requesting a review by the Supreme Court of Louisiana which was denied (*Rankins v. Louisiana State Board of Elementary and Secondary Education* (April 1994). Similar to the Southeastern judicial region, one of the distinctions revealed in this region was the vestige of past racial segregation in public schools. Due to the dual system of education, the Fifth Circuit Court of Florida upheld the student's rights to a diploma, although they had not successfully completed the state's assessment, due to the prior discrimination and inequitable educational opportunities. In this judicial region, the history of segregated schools affected the court's ruling. Table 48 lists the cases in the Southern Judicial Region.

Table 48

Southern Judicial Region Cases

Date	Case
1979	*Florida State Board of Education and Turlington v. Brady*
1979-84	*Debra P. v. Turlington*
1979	*Brady v. Turlington*
1980	*Love v. Turlington*
1984	*Love v. Turlington*
March 1994	*Rankins v. Louisiana State Board of Elementary and Secondary Education*
April 1994	*Rankins v. Louisiana State Board of Elementary and Secondary Education*

Southwestern Judicial Region

In the Southwestern Judicial Region, six unique cases were presented, with seven court appearances. All but one of the cases heard in this judicial region were heard in the State of Texas. The first two cases brought to the courts in Texas involved contradicting judicial rulings regarding participation in graduation ceremonies after having been denied a diploma due to the students failing state exit exams. The cases of *Crump v. Gilmer Independent School District* (1992) and *Williams v. Austin Independent School District* (1992) were heard in the United States District Court for the Eastern District of Texas and the United States District Court for the Western District of Texas respectively. The case of *Crump v. Gilmer* resulted in a ruling in favor of the plaintiff, while the case of *Williams v. Austin Independent School District* resulted in a ruling in favor of the educational agency.

The next case was brought to the United States District Court for the Western District of Texas in 1998 by Sarah Hubbard seeking a summary judgment challenging the school district's testing policy as the student refused to take the test. The court found in favor of the educational agency on the grounds that the testing policy was a legitimate interest of the advancement of public schools (*Hubbard by Hubbard v. Buffalo Independent School District*, 1998). The next case was the *GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education, which* was brought again before the United States District Court for the Western District of Texas in 2000. This case was filed with the support of the Image de Tejas advocate for ELL students. This case protested the use of the test as a criterion for denial of diploma to minority students, as a disproportionate number of minority students did not pass the test. However, the court found in favor of the educational agency as the court determined that the TAAS test did not result in a disparate impact on minority students, did not perpetuate discrimination, and was an educational necessity (2000). This case continued through the case of *United States of America and LULAC GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education* in 2007 and 2008 under an Equal Educational Opportunity Act claim; however, the high stakes testing issue had already been settled under the previous case.

Only one nested case was brought in the courts in another state in the Southwestern Judicial Region. This case was brought in the State of Kentucky under the case name of *Triplett v. Livingston County Board of Education* in 1997. This case claimed that the KIRIS test inhibited the parents and students' rights to free exercise of their religion. The Court of Appeals for Kentucky found in favor of the educational

agency finding that the test did not violate the Free Exercise Clause. The plaintiffs requested a review by the Supreme Court of the United States in 1999, which was denied. The table below represents the cases heard in the Southwestern Judicial Region.

Table 49

Southwestern Judicial Region Cases

Date	Case
1992	*Crump v. Gilmer Independent School District*
1992	*Williams v. Austin Independent School District*
1997	*Triplett v. Livingston County Board of Education*
1998	*Hubbard by Hubbard v. Buffalo Independent School District*
2000	*GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education*

Pacific Judicial Region

The Pacific Judicial Region saw eight court cases with two resulting in court rulings. Four unique cases were heard in the State of California, and one case was heard in Arizona. Two cases were brought in the states of Alaska and Oregon, *Noon et al. v. Alaska State Board of Education and the Anchorage School District* and *Advocates for Special Kids v. Oregon,* but were settled out of court. Both cases involved the Disability Rights Advocacy Group and resulted in the settlement agreements in favor of the students.

The case of *Flores v. State of Arizona* was brought before the United States District Court for the District of Arizona in 2005. This case resulted in a ruling in favor of the students and held the state legislature in contempt of court for the lack of adequate funding for the ELL students in the State of Arizona.

The rest of the cases were filed in California, several of the cases were nested, resulting from the original case of *Chapman v. California Department of Education* in February of 2002 in the court of the United States District Court for the Northern District of California. The case was then brought to the United States Court of Appeals for the Ninth Circuit under the case name of *Smiley, Lyons, Learning Disabilities Association of California and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District* later in August of 2002. The last case was brought before the Superior Court of Alameda County in 2008, where the final resolution was determined in a settlement agreement between the parties under the case name of *Kidd v. California Department of Education*.

Two cases were filed in the Court of Appeals for the First Appellate District (*Californians for Justice Fund v. State Board of Education,* 2006; *O'Connell v. The Superior Court of Alameda County,* 2006). The case of *Coachella Valley Unified School District v. State of California* (2005) was brought before the United States District Court for the Northern District of California. This case involved the claim of violation of the NCLB act regarding students as ELL The case of *O'Connell v. The Superior Court of Alameda County* was filed in 2006 with complaints of violations of the equal protection and due process clauses. The educational agency prevailed in the case. However, the case was brought back to the court under the case name *The Superior Court of Alameda County and Valenzuela v. O'Connell* (2007). The parties reached a settlement agreement concluding the case in California. A summary of the nine cases heard in the Pacific Judicial Region is presented in Table 50.

Table 50

Pacific Judicial Region Cases

Date	Case
2001	*Advocates for Special Kids v. Oregon*
2002	*Chapman v. California Department of Education*
2002	*Smiley, Lyons, Learning Disabilities Association of California, and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District*
2004	*Noon et al. v. Alaska State Board of Education and the Anchorage School District*
2005	*Flores v. State of Arizona*
2005	*Coachella Valley Unified School District v. State of California*
2006	*Californians for Justice Education Fund v. State Board of Education*
2006	*O'Connell v. The Superior Court of Alameda County*
2008	*Kidd v. California Department of Education*

Atlantic Judicial Region

There were no cases brought to the courts in the Atlantic Judicial Region.

CHAPTER 5

Conclusions

The public school system in our country was established to educate all students to become productive citizens. As the population of the nation increased, the demands on public education to provide a free education to children increased as well. Public scrutiny of the quality of education intensified, resulting in pressure for school accountability to ensure that students were receiving a quality education necessary to maintain our nation's status in global competition.

The high stakes testing policies became one of the methods by which states could hold local school boards, individual schools, administrators and teachers accountable for student outcomes. In addition, the high stakes testing policies were implemented to hold students accountable for their own learning. The denial of high school diplomas based upon student performance on these tests became a controversial issue in some cases requiring judicial intervention. Research questions pertaining to the implementation of this policy and the resulting litigation included:

1. What issues related to high stakes testing and the denial of diplomas were revealed in state and federal case law within the 1979-2012 timeframe?
2. Were the issues distinctive based upon regular education or special education students?
3. What differences were revealed within the case law rulings regarding those in favor of the students and those in favor of the educational agencies?
4. What differences existed between the case law according the geographical regions as defined by regions in published court reporters and listed as follows:

Northeastern, Northwestern, Southeastern, Southern, Southwestern, Pacific, and Atlantic regions?

The courts addressed the issues embedded in the controversy, with outcomes illustrating the interpretation of the constitutionality of the policy. The interpretations per issue were extrapolated from the court cases and synthesized to provide a comprehensive examination of the evolution of the case law, the overall interpretation of the policy as per the constitutionality of each issue, the similarities and differences in the rulings, and specific caveats under which the policy could be implemented without violating students' constitutional rights. Moreover, the analysis revealed rich detail as to the individuals impacted by the policy, and the conditions under which each student incurred the demands of the policy and the results therein. The analysis also provided information as to the prevailing party in each issue and the interaction of the policy with each issue. Lastly, the analysis revealed the states in which the litigation occurred, and investigated the similarities and differences as per judicial region.

Data

The cases examined in this study directly involved the denial of a high school diploma upon the basis of a student's failure to pass an exit exam required by state or local school board. The plaintiffs' claimed the implementation of the test was in violation of students' rights. Coding of the cases by similar topics resulted in the emergence of themes from the data. Often the issues presented in the complaints emerged as the themes however, additional information found in the court documents emerged as subthemes deepening the understanding of the contextual analysis of the data.

The synthesis of the themes in the data created a landscape of the case law regarding the individual issues considered by the courts. A discussion of the analysis of the court's interpretation of each issue clarified the similarities and differences in the interpretations, as well as to illuminate the unique circumstances that influenced the judges' decisions. As a result, a framework was extracted from the case law providing a structure to understand the Constitutionality of the implementation of high stakes testing policies as a requirement for the awarding of a diploma. The unique and relevant details of the cases added depth and condition to the framework, giving it the richness of a study involving the interaction of a policy on students.

Findings and Interpretations

Issues Presented to the Courts Involving High Stakes Testing

The implementation of high stakes testing policies impacted thousands of students across the nation. As schools continued to function under increased accountability measures, high stakes testing became one vehicle for meeting political and societal expectations. Most of the cases sought judicial intervention to challenge the implementation of the policy in order to protect student rights. These cases offered a rich texture to the legal interaction of the policy on the lives of the impacted students. Each unique case presented in this analysis involving high stakes testing contained an individual history of the interaction of policy implementation with student rights. However, despite the diversity of the case histories, many consistent issues emerged within the data. The prevalent themes revealed in the analysis were: due process, equal protection, and issues regarding students with disabilities. The themes embedded in the larger issues were state authority, fundamental fairness of the test, curricular validity,

adequate notice, remediation, multiple opportunities to take the tests, alternative tests, public viewing of tests, claims of violations of the Establishment Clause and accommodations and modifications for students with disabilities. These features of the case law landscape provided much information as to the effects of implementation as well as the interpretation of the courts, which would serve as a resource for similar policy implementation in the future. Additional key concepts and caveats also emerged in the analysis. As the courts considered the constitutionality of the policy, the case law evolved creating a framework for proper implementation with regard to student rights.

A dichotomy between the testing policies and the success of students emerged in the data analysis. The denial of diplomas to students who were unable to pass a state's mandatory state assessment may have incurred possible negative consequences later in life. These consequences would likely affect the future income, job opportunities, and family security of these students. However, the states had a manifest interest in providing verification that its educational program was preparing its students for productive citizenship and basic skills needed for the workforce. High stakes tests became one of the ways that states could collect data to measure the effectiveness of its programs as well as provide information to the states' taxpaying public to ensure accountability that funding provided to the schools was indeed the value expected from effective school systems.

The courts determined that students who attended school and participated in the states' educational program had a reasonable expectation of receiving a diploma. This expectation established a property or liberty interest. The protection of this property interest in the expectation of a diploma fell under the Due Process Clause. Procedural due process ensured that educational officials could not constitutionally implement a testing

policy without adequate notice of the possible consequences of the denial of the diploma. Additionally, the state and local boards must have provided proof that students had adequate time to prepare for the test.

Conversely, student promotion evoked no due process rights as the case law established that there was no reasonable expectation of promotion of a student performing in a substandard manner. A case involving student promotion provided the distinction between promotion and the expectation of a diploma. "Students have no legitimate expectation that the meaning of 'satisfactory work' done in the classrooms will remain constantly fixed at a level that in truth is academically unsatisfactory" (*Bester v. Tuscaloosa Board of Education*, 1984, p. 1516).

Another interesting aspect illuminated in the case law was the gradual transition from the use of Minimum Competency Tests (MCT) in the early case law evolution to the comprehensive exit exams during the middle evolutionary period. Later in the evolution of the testing implementation, the end-of-course tests were used to measure student knowledge so specific course content. Perhaps it was this transition to end-of-course tests, which explains the reduction in the number of cases brought in the later years of the timeframe. As the last case was heard in 2008, this research speculates that the litigation may have diminished as the end-of-course tests were considered more fair to students and fewer students were denied diplomas for failing the tests.

Procedural Due Process

Procedural due process violations involving adequate notice was a main theme revealed in the analysis. The examination of the issues embedded in the case law has established that in order for the high stakes testing policies to be constitutional, the

students must have had adequate notice of, at minimum, two years. Additionally, students must have had the opportunity to learn the material on the test with the burden of proof residing with the state for guaranteeing the court that the state's curriculum covered the material on the test and that curriculum was taught in the classrooms. For students with disabilities, the Individualized Education Plan had to reflect goals of passing the test, and that adequate time was given to the students as well as access to accommodations and/or modifications to demonstrate their knowledge without their disability affecting their test results. The case law also revealed that the tests were to be reliable and valid assessment instruments with the courts often considering the development of the test and the statistical data for outcomes of the test. Moreover, the courts were consistent that students must have remedial opportunities before withholding a student's high school diploma for failure to pass the exam. Additionally, the courts did not support the test as the sole criterion for graduation.

Substantive Due Process

Substantive due process protections ensure that the actions of a governmental agency are not arbitrary or capricious. The analysis revealed that the courts supported the states' authority to establish criteria for a diploma and gave great deference to the states in the functioning of their educational systems. The courts demonstrated reluctance to intervene in state matters and only did so when cases presented allegations of violations of student rights. Courts upheld the states interest in improving their educational programs by implementing the tests. States with disparities in funding among school districts, a history of prior segregation, and seeking to establish a statewide curriculum and student learning objectives utilized assessments as a means to improve the quality of

their educational programs. However, holding students accountable for a minimum level of competency did not align directly with this objective. Student accountability sought to establish the high school diploma as social and economic currency to ensure against the deflation of the value of a diploma. Increasing accountability for students aspired to motivate students toward achieving the minimum standards of the states.

The analysis revealed the students who were denied their diplomas as the result of testing, may have experienced underfunded and inequities in learning environments, poorly aligned curriculum, and the vestiges of prior segregated schools. However, the courts often held that the states employed the tests as a mechanism to eradicate these educational disparities by holding schools, school districts, administrators and teachers accountable for the educational progress of their students.

In every case in the analysis, the courts supported the states' intentions by affirming the nexus to the legitimate goals of the state. The nexus to the states' goals of improving their educational system ensured that the testing policy was not arbitrary and therefore did not violate substantive due process protections.

Curricular Validity

Another component of due process protections involved the curricular validity of the tests. Curricular validity ensures that the students were tested on material, which they had been taught, and that the states' adopted curriculum was aligned to the material covered on the test. In cases involving vulnerable populations of students, the analysis revealed that the curricular validity fell under equal protection if the students had not had the opportunity to learn the material on the test. In some cases, the lack of the opportunity to learn rendered the test discriminatory based upon the protected populations and the fair

access to the curriculum. Cases involving minority students in Florida and Georgia received much of the focus of the curricular validity being considered discriminatory as these states had a history of previously segregated schools and the vestiges of the prior discrimination remained in the school districts.

The court consistently upheld the curricular validity of the tests if the states' Boards of Education could provide evidence that the schools taught material on the test. The court did not require that the educational agency prove that the each student was exposed to the material but that in general the states' curriculum frameworks documented the material tested was taught in the schools.

Fundamentally Fair Test

The court consistently ruled in favor of the educational agency if the test in question was fundamentally fair. The courts considered a test as fair if the state could provide evidence that the test was a valid instrument that measured what it was intended to measure. Additionally, the test was to be a reliable instrument of assessment and that the test questions were not biased. It was also important for the scoring of the tests to be reliable with respect to errors. Again, the test could only be considered fair if the students were given the opportunity to learn the material on the test prior to being denied their diploma.

Remediation and Multiple Opportunities to Test

The courts supported the educational agency's testing policy if the state could provide evidence that it offered remediation to students who were unsuccessful on the tests and that the students had been given additional opportunities to take the tests. The courts did not intend to undermine the states' efforts to maximize the value of a diploma

by awarding diplomas to students in cases resulting in student rights violations. The courts preferred to remedy the students' situation by ensuring that the students received remediation and support to assist them in passing the test. In all the cases presented, the data revealed that the states had remedial programs in place and that the students were afforded additional opportunities to pass the tests. Despite the intentions of the courts, not all cases were remedied by remediation and additional testing opportunities. In some cases, the remedial efforts and testing opportunities would present a hardship to the students. In these cases, the court ordered the school district or state to award the diplomas.

Equal Protection

Complaints of equal protection violations were another major theme emerged from the data. Students of color complained that the test violated their equal protection rights due to the disparity in pass rates for these subgroups of students and Caucasian students. In most cases, unless the state had a history of discrimination via segregated schools, the court held that the educational agency attempted to rectify the discrimination by ensuring that all students received a quality education. The tests were a mechanism to improve the states' instructional programs. In the cases where prior discrimination was evident and students had attended school under discriminatory practices, the courts ruled that the state could not deny diplomas until the vestiges of the prior discrimination were no longer evident. After the students who had attended the previously segregated schools had graduated, the court held that the states could then begin to deny diplomas to the students who were unable to pass the tests. Of course, the consistent caveats of remediation and multiple opportunities to pass the tests were intact in these cases.

English Language Learners

English Language Learners complaints were not frequent in the analysis but were a subtheme that emerged from the data. The cases involving ELL students were the result of underfunding of the ELL programs in the state or the result of fundamentally fair test complaints. These cases were unique and the court rulings were specific to the circumstances of the cases. This researcher found it difficult to determine any generalizations from this section to inform the framework as to the variations in the cases and the data.

The case law included issues regarding the impact of the policy on minority students, students with disabilities, and ELL. The analysis revealed that the testing policy did not violate equal protection rights if the state had a legitimate interest in improving education through the use of the tests to illuminate disparities and inequities in educational programs. Although the analysis indicated that inequitable funding was a contributor to low performance by some subgroups and that, these students were unfairly deprived with an opportunity to learn the material on the test.

Graduation Participation

Similar to the ELL theme, the data for the student's participation in graduation ceremonies was inconsistent and thus unsuitable for generalizations. The three cases reflected differing court opinions on the meaningfulness of graduation and the rulings ultimately resided in the personal position of the judge presiding over the case.

Summary

Educational leaders and policy makers need to be informed as to the implications and broad scope of the policy to deny a high school diploma. The societal impact over

time could challenge the economic stability of our country as public schools prepare the citizens of tomorrow. The diminished employment opportunities, pay disparities, and self-esteem issues resulting from the lack of a high school diploma are very real and detrimental, to both students and our nation. Before a policy with such potential impacts is introduced, leaders and policy makers should be clear as to the constitutional framework regarding the property rights of students as well as the potential unintended consequences and outcomes for students and society.

As the discussion of the analysis revealed both in Chapter 4 and Chapter 5, the information embedded in the case law was unique and multivariate. However, the extrapolated and connected consistencies created the overall framework for the appropriate and constitutional implementation of the high stakes testing policies. Table 51 provides a summary of all cases and the issues revealed in the analysis.

Table 51

Question One Cases

Case	Property Interest	Adq Notice	Auth Goals	Fair Test	Mult Opport	Remed	Sole Crit	Equal Protect	Curr Validity	ELL	Est Clause	Grad
Debra P. v. Turlington, 1979	X	X	X	X		X		X	X			
Florida State Board of Education and Turlington v. Brady, 1979	X		X					X				
Brady v. Turlington, 1979		X										
Wells v. Banks, 1980		X	X					X				
Love v. Turlington			X						X			
Debra P. v. Turlington, May 1981	X	X	X					X				
Debra P. v. Turlington, Sept 1981			X					X				
The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach, 1981	X	X	X					X				

Case	Property Interest	Adq Notice	Auth Goals	Fair Test	Mult Opport	Remed	Sole Crit	Equal Protect	Curr Validity	ELL	Est Clause	Grad
Anderson v. Banks; Johnson v. Sikes, 1981		X	X	X	X	X		X	X			
Brookhart v. Illinois State Board of Education, 1982	X	X	X		X			X				
Debra P. v. Turlington, 1983				X				X	X			
Brookhart v. Illinois State Board of Education, 1983	X	X		X	X	X	X	X				
Debra P. v. Turlington, 1984				X				X	X			
Johnson and Wilcox v. Sikes, 1984					X	X	X	X				
Love v. Turlington, 1984		X	X						X			
Crump v. Gilmer Independent School District, 1992		X	X	X	X				X			X
Williams v. Austin Independent School District, 1992		X		X	X				X			X

Case	Property Interest	Adq Notice	Auth Goals	Fair Test	Mult Opport	Remed	Sole Crit	Equal Protect	Curr Validity	ELL	Est Clause	Grad
Rankins v. Louisiana State Board of Elementary and Secondary Education, March 1994			X		X		X	X				
Rankins v. Louisiana State Board of Elementary and Secondary Education, April 1994	State Supreme Court request denied.											
Triplett v. Livingston County Board of Education, 1997		X	X	X					X		X	
Triplett v. Livingston County Board of Education, 1999	United States Supreme Court request denied											
Hubbard by Hubbard v. Buffalo Independent School District, 1998		X						X			X	

Case	Property Interest	Adq Notice	Auth Goals	Fair Test	Mult Opport	Remed	Sole Crit	Equal Protect	Curr Validity	ELL	Est Clause	Grad
GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education, 2000	X	X	X	X	X	X	X	X	X			
Rene v. Reed, 2001		X		X		X		X	X			
Advocates for Special Kids v. Oregon, 2001				X								
Rene v. Reed, 2002	State Supreme Court request denied.											
New York Performance Standards Consortium v. New York State Education Department, 2002			X									
Chapman v. California Department of Education, 2002		X	X	X				X	X			
Student v. Driscoll, 2002		X	X	X	X					X		

Case	Property Interest	Adq Notice	Auth Goals	Fair Test	Mult Opport	Remed	Sole Crit	Equal Protect	Curr Validity	ELL	Est Clause	Grad
Smiley, Lyons, Learning Disabilities Association of California, and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District,, 2002			X					*X*				
Student 9 et al. v. Board of Education et al., 2004			X	X	X	X				X		
Hancock v. Driscoll, 2004			X			X				X		
Noon et al. v. Alaska State Board of Education and the Anchorage School District State Board of Education, 2004				X	X							
Hancock et al. v. Commissioner of Education et al., 2005			X			X				X		X

Case	Property Interest	Adq Notice	Auth Goals	Fair Test	Mult Opport	Remed	Sole Crit	Equal Protect	Curr Validity	ELL	Est Clause	Grad
Coachella Valley Unified School District v. State of California, 2005			X									
Flores v. State of Arizona, 2005			X	X			X	X		X		X
O'Connell v. The Superior Court of Alameda County, 2006		X	X	X			X	X	X			
Californians for Justice Education Fund v. State Board of Ed, 2006		X		X			X					
Superior Court of California County of Alameda and Valenzuela v. O'Connell, 2007						X						

Case	Property Interest	Adq Notice	Auth Goals	Fair Test	Mult Opport	Remed	Sole Crit	Equal Protect	Curr Validity	ELL	Est Clause	Grad
Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District 1, 2008						X				X		X
Kidd v. California Department of Education, 2008								X				

Regular Education and Students with Disabilities: Case Law Similarities and Differences

Students with disabilities were protected by several pieces of federal legislation. The Education for all Handicapped Children Act, Individuals with Disabilities Education Act and the Rehabilitation Act contain specific language mandating educational protocols for students with disabilities. The case law involving high stakes testing and students with disabilities has evolved dramatically particularly regarding the use of accommodations during the administration of high stakes tests. In the earliest cases, the courts ruled that the use of accommodations and modifications for students with disabilities would affect the validity of the results. However, as the case law evolved, the influence of federal legislation and prior case law regarding students with disabilities and educational issues, the courts ruled differently supporting the students' rights to a Free and Appropriate Education. The use of high stakes tests with students with disabilities required specific guidelines of which educational leaders and policy makers must be knowledgeable.

The interaction of high stakes testing policies with students with disabilities was featured in the analysis. Students' IEPs must have addressed the assessments through the goals for the student. Furthermore, the student must have received adequate notice, particularly so that IEP goals to be developed with the intention of successful completion of the test. Students with disabilities must have accommodations and modifications in place to help them access the curriculum and meaningfully participate in the assessments without the impact of their disability, if possible. If the students were unable to meaningfully participate, then an alternate test must be available. Moreover, students

with disabilities must also have access to remedial opportunities to learn the material covered on the test in the case of demonstrated lack of success on the tests.

The analysis of the case law revealed that the activation of advocacy groups for students with disabilities resulted out-of-court settlement agreements in several cases. These cases often involved the Disability Rights Advocate group co petitioning the courts. This group was instrumental in supporting students with disabilities and in the cases of *Noon et al. v. Alaska State Board of Education and the Anchorage School District*, *Advocates for Special Kids v. Oregon* and *Kidd v. California*. The support of this advocacy group influenced the rights of students to use accommodations and modifications on the state tests and to meaningfully participate in the assessments. Tables 52-54 summarize the cases and issues involving students of disabilities.

Table 52

Question Two Cases

Case	Auth	Adq Notice	Remed	Mult Opport	Equal Protect	Fair Test	Mean Inclusn	Accom	Alt Assess	Add'l Trng
The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach, 1981	X	X			X		X	X		
Anderson v. Banks; Johnson v. Sikes, 1981	X	X	X	X	X	X				
Brookhart v. Illinois State Board of Education, 1982					X	X	X	X		
Brookhart v. Illinois State Board of Education, 1983	X	X	X	X	X	X	X	X		
Johnson and Wilcox v. Sikes, 1984			X		X					
Rene v. Reed, 2001			X		X	X				
Advocates for Special Kids v. Oregon, 2001						X		X	X	X
Student v. Driscoll	X	X	X			X				
Rene v. Reed, 2002	State Supreme Court request denied.									
Chapman v. CA Department of Education, 2002	X	X			X	X	X	X	X	

Case	Auth	Adq Notice	Remed	Mult Opport	Equal Protect	Fair Test	Mean Inclusn	Accom	Alt Assess	Add'l Trng
Smiley, Lyons, Learning Disabilities Association of California, and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District, 2002	X				X		X	X	X	
Student 9 et al. v. Board of Education et al., 2004	X		X	X		X			X	
Noon et al. v. Alaska State Board of Education and the Anchorage School District State Board of Education, 2004				X			X	X		X
Hancock et al. v. Commissioner of Education et al., 2005	X		X							
O'Connell v. The Superior Court of Alameda County, 2006	X	X			X					
Californians for Justice Education Fund v. State Board of Education, 2006						X				
Kidd v. California Department of Education, 2008					X		X	X	X	

Distinctions between Prevailing Parties

The analysis of the cases revealed some distinctions between cases won by the students and the won by the educational agency. It was noted in the data analysis that some cases were brought to the courts by educational agencies requesting judicial interference with other educational agencies. For example, in the case *of The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach*, (1981) the school district petitioned the court for an injunction against the State Education Commissioner to enjoin him and the State Board of Education from revoking the diplomas of two students with disabilities that had previously been awarded their diplomas. In the analysis, the cases that were brought to the courts by other agencies or entities were removed and not considered as part of the data set for this question. The results of the study indicated that the courts supported the educational agencies' implementation of high stakes testing requirements and the withholding of a high school diploma as long as the court could determine that the policy has a nexus to the state goals of improving education. In addition, the courts demonstrated judicial reluctance to become involved in determining the appropriateness of the state mandated testing and instead respected the public's interest in elected officials and educational professionals to determine the policies regarding the states' public education system.

Plaintiff students prevailed in the court if they could prove that they did not receive adequate notice, were impacted by the vestiges of prior segregation, or were not provided or able to access to remediation or were victims of grossly underfunded instructional programs.

Due Process

The data revealed that early in the case law evolution, the student prevailed more often in cases regarding due process/adequate notice. However, in the later cases in the case law evolution, the educational agency prevailed more frequently. This researcher speculates that as the court clarified adequate notice, the educational agencies ensured that the notice given met the requirements of the court in order to avoid litigation.

Curricular Validity

As stated in the discussion previously, the analysis revealed that the curricular validity of the tests was often upheld by the court as the educational agencies were able to provide evidence supporting the validity of the test in the curriculum frameworks of each state. Overall, the analysis yielded more cases won by the educational agency than by plaintiff students.

Equal Protection

Echoing the conclusions regarding curricular validity, the educational agency more often prevailed in cases involving equal protection claims. The analysis revealed that the educational agencies did not intentionally discriminate by implementing the testing policy. Instead, the court interpreted the states' efforts to promote student progress and to improve their instructional programs as attempts to eradicate prior discrimination.

Table 53

Question Three Cases

Case	Adequate Notice		Curricular Validity		Equal Protection		Special Ed Accommodations	
	Education Prevail	Student Prevail	Education Prevail	Student Prevail	Education Prevail	Student Prevail	Education Prevail	Student Prevail
Debra P. v. Turlington, 1979		X		X		X		
Brady v. Turlington, 1979	X							
Florida State Board of Education and Turlington v. Brady, 1979					X			
Wells v. Banks, 1980	X				X			
Love v. Turlington, 1980	X							
The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach, 1981		X			X			
Anderson v. Banks; Johnson v. Sikes, 1981	X		X			X		

Case	Adequate Notice		Curricular Validity		Equal Protection		Special Ed Accommodations	
	Education Prevail	Student Prevail	Education Prevail	Student Prevail	Education Prevail	Student Prevail	Education Prevail	Student Prevail
Debra P. v. Turlington, 1981		X		X		X		
Brookhart v. Illinois State Board of Education, 1982		X					X	
Brookhart v. Illinois State Board of Education, 1983		X						X
Debra P. v. Turlington, 1983			X		X			
Debra P. v. Turlington, 1984			X		X			
Love v. Turlington, 1984	X							
Johnson and Wilcox v. Sikes, 1984						X		
Williams v. Austin Independent School District, 1992	X		X					
Crump v. Gilmer Independent School District, 1992		X		X				

Case	Adequate Notice		Curricular Validity		Equal Protection		Special Ed Accommodations	
	Education Prevail	Student Prevail	Education Prevail	Student Prevail	Education Prevail	Student Prevail	Education Prevail	Student Prevail
Rankins v. Louisiana Board of Elementary and Secondary Education, 1994					X			
Triplett v. Livingston County Board of Education, 1997	X		X					
Hubbard by Hubbard v. Buffalo Independent School District, 1998	X				X			
GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education, 2000	X		X		X			
Advocates for Special Kids v. Oregon, 2001				X				
Rene v. Reed, 2001	X				X		X	
Rene v. Reed, 2002		X	X					
Student v. Driscoll, 2002	X		X					

Case	Adequate Notice		Curricular Validity		Equal Protection		Special Ed Accommodations	
	Education Prevail	Student Prevail	Education Prevail	Student Prevail	Education Prevail	Student Prevail	Education Prevail	Student Prevail
Chapman v. California Department of Education, 2002		X	X			X		X
Smiley, Lyons, Learning Disabilities Association of California, and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District, 2002						X		X
Noon et al. v. Alaska State Board of Education and the Anchorage School District, 2004				X				
Student 9 et al. v. Board of Education et al, 2004	X		X					
Hancock v. Driscoll, 2004	X		X					
Flores v. State of Arizona, 2005				X		X		

Case	Adequate Notice		Curricular Validity		Equal Protection		Special Ed Accommodations	
	Education Prevail	Student Prevail	Education Prevail	Student Prevail	Education Prevail	Student Prevail	Education Prevail	Student Prevail
Hancock et al. v. Commissioner of Education et al., 2005	X		X					
O'Connell v. The Superior Court of Alameda County, 2006				X	X			
Californians for Justice Education Fund v. State Board of Education, 2006	X							
Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District Number 1, 2008					X			

Distinctions by Judicial Regions

The analysis revealed that four judicial regions were the primary litigation regions. These regions were the Northeastern, the Southern, the Southwestern, and the Pacific. Two of the cases in the Northeastern region stemmed from the *McDuffy* case and the attempts of the state of Massachusetts to reform its educational system. Two other cases were related to the passage of the Education Reform Act, which fueled the litigation as inequities in funding prompted plaintiff complaints.

The Southeastern Region also experienced a higher number of cases however these cases were the nested cases of *Wells v. Banks*; *Anderson v. Banks; Johnson v. Sikes*, and *Johnson and Wilcox v. Sikes.*

The Southern Region had 11 cases brought to the courts with five of these being litigation as the *Debra P. v. Turlington* cases from 1979-1984. Four other cases were heard in the state of Florida and two cases being heard in the state of Louisiana. Overall, Florida witnessed the majority of litigation with eight total cases being heard in the state.

The Pacific Region was another active region with nine cases brought forth to the courts. Five of the cases were heard in the state of California with three relating to the nested cases of *Chapman v. The State Board of Education.* This region had the most cases being settled out of court with *Advocates for Special Kids v. Oregon, Noon et al. v. Alaska State Board of Education and the Anchorage School District, Kidd v. California Department of Education and The Superior Court of Alameda County* and *Valenzuela v. O'Connell.*

Table 54

Question Four Regional Cases

Case	Northeastern Region	Northwestern Region	Southeastern Region	Southern Region	Southwestern Region	Pacific Region
Debra P. v. Turlington, 1979				X		
Florida State Board of Education and Turlington v. Brady, 1979				X		
Brady v. Turlington, 1979				X		
Wells v. Banks, 1980			X			
Love v. Turlington, 1980				X		
Debra P. v. Turlington, May 1981				X		
Debra P. v. Turlington, Sept 1981				X		
The Board of Education of the Northport-East Northport Union Free School District et al. v. Ambach, 1981	X					
Anderson v. Banks; Johnson v. Sikes, 1981			X			
Brookhart v. Illinois State Board of Education, 1982	X					
Brookhart v. Illinois State Board of Education, 1983	X					

Case	Northeastern Region	Northwestern Region	Southeastern Region	Southern Region	Southwestern Region	Pacific Region
Debra P. v. Turlington, 1983				X		
Debra P. v. Turlington, 1984				X		
Johnson and Wilcox v. Sikes, 1984			X			
Love v. Turlington, 1984				X		
Crump v. Gilmer Independent School District, 1992					X	
Williams v. Austin Independent School District, 1992					X	
Rankins v. Louisiana State Board of Elementary and Secondary Education, March 1994				X		
Rankins v. Louisiana State Board of Elementary and Secondary Education, April 1994				X		
Triplett v. Livingston County Board of Education, 1997					X	
Hubbard by Hubbard v. Buffalo Independent School District, 1998					X	
GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education, 2000					X	
Rene v. Reed, 2001	X					

Case	Northeastern Region	Northwestern Region	Southeastern Region	Southern Region	Southwestern Region	Pacific Region
Rene v. Reed, 2002	X					
Advocates for Special Kids v. Oregon, 2001						X
New York Performance Standards Consortium v. New York State Education Department, 2002	X					
Chapman v. California Department of Education, 2002						X
Smiley, Lyons, Learning Disabilities Association of California, and Chapman v. California Department of Education, California Board of Education and Freemont Unified School District, 2002						X
Student v. Driscoll, 2002	X					
Student 9 et al. v. Board of Education et al., 2004	X					
Noon et al. v. Alaska State Board of Education and the Anchorage School District State Board of Education, 2004						X
Hancock v. Driscoll, 2004	X					
Hancock et al. v. Commissioner of Education et al., 2005	X					
Coachella Valley Unified School District v. State of California, 2005						X

Case	Northeastern Region	Northwestern Region	Southeastern Region	Southern Region	Southwestern Region	Pacific Region
Flores v. State of Arizona, 2005						X
O'Connell v. The Superior Court of Alameda County, 2006						X
Californians for Justice Education Fund v. State Board of Education, 2006						X
Superior Court of California County of Alameda and Valenzuela v. O'Connell, 2007						X
Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District 1, 2008	X					
Kidd v. California Department of Education, 2008						X

Recommendations

Recommendations for Leaders and Policy Makers

Over the 30 years since the high profile case of *Debra P. v. Turlington,* the controversy over high stakes testing and the denial of a high school diploma created impassioned conflict between parents, students and educational agencies. As the case law evolved, it was evident that a transistion occurred regarding the use of the Minimum Compentency Tests to the comprehensive exit exams which caused the most controversy in the courts. Currently, many states require the end-of-course tests thereby reducing the controversy and the resulting litigation. The disagreement between the interests of the states and the potential future of students fueled the conflict requiring judicial intervention and revisions to the policy. The case law evolution documented the modification of the overall policy to include specific caveats to ensure compliance with the Constitution of the United States. From this case law evolution and the analysis of the consistent issues presented to the courts, a framework for implementation was extrapolated and presented. This information could be vital to leaders for future policy implementation to avoid costly and hostile litigation. The overall framework provides specific guidance to policy makers and educational leaders in order to implement policy in a constitutionally consistent and appropriate format that support student rights and positive public perceptions.

Although controversial, the testing requirement did result in some positive impacts for the improvement of the educational systems throughout the country. States designed and implemented curricular frameworks for provide structure for the day to day instruction taking place in the classrooms, thereby establishing the curricular validty of

the tests. Providing remedial opportunities for students to learn material which they had not yet mastered helped students to become more successful learners of the material due to multiple opportunities to learn the curriculum. Another positive impact of the high stakes testing policies was the improvement of the overall educational systems with the focus on collecting data and improving student learning. Lastly, the high stakes testing policies served as a catalyst for the entitlement of testing accommodations and modifications for students with disabilities. These improvements in the nation's educational systems have benefited all students regardless of whether they were impacted by the policy or not.

The following recommendations to leaders are based upon this framework resulting from the analysis of the cases and the themes that emerged. The recommendations include suggestions in support of due process and the equal protection clauses in the Constitution. Other recommendations involve caveats for remediation, and fundamentally fair testing. Recommendations specific to students with disabilities and students with 504 plans were also derived from the analysis of the data and the resulting framework. A brief discussion of each issue with the recommendations is included in the following text.

Due Process

The future implementation of any broad educational policy must be constitutionally appropriate. As a result of the analysis of cases involving high stakes testing and the denial of diplomas to high school seniors, the due process protections ensured that the policy is neither arbitrary nor capricious. The state educational agency did not have the authority to implement a policy that is "spontaneous" or did not have a

nexus to the legitimate goals of the state. The due process clause afforded students adequate notice of any sanction that may be employed due to the policy implementation. The recommendation of this researcher is that leaders closely examine the policy for the impact on students, particularly students from vulnerable populations such as students with disabilities, minority students, and English Language Learners. These students may need additional support to adjust to the policy prior to receiving a sanctions-based consequence. The implementation plan of the policy should include a time frame that provides the appropriate amount of time required for all students to prepare for the change in policy. Additionally, leaders and policy makers should examine the policy carefully to determine if there exists any component of the policy that is unfair or unjust such as determining the validity and reliability of assessments used to evaluate the policy.

Equal Protection

Recommendations for policy implementation regarding equal protection rights of students reflect the framework extrapolated from the data analysis. The recommendation to policy makers and educational leaders are to consider the impact of the policy on minority students, particularly students from socio-economic conditions that could impede their ability to demonstrate success in learning or achievement. Additionally, leaders must ensure equitable educational funding for state public schools prior to holding students accountable for learning outcomes.

Students must have a fair opportunity to learn any educational content for which they would ultimately suffer sanctions. The opportunity to learn assists in ensuring that the policy is neither arbitrary nor capricious, and affords the student a fair education

advantage. Remedial programs also help to ensure the opportunity to learn, and avoid arbitrary and capricious policies.

Leaders must be aware of the political environment in which educational programs exist. As documented in the analysis, the judicial and political climates affect the environment of schools and students. Understanding the climate and political structures prevalent in the regions of our nation, helps leaders to promulgate and incorporate policy congruent to the prevailing norms.

Recommendations for Practioners

This analysis revealed a framework for educational leaders and policy makers regarding high stakes testing and their use as a criterion for the awarding of a diploma. Additionally, the analysis revealed information relevant to educational practitioners as to the preparation of students for the successful completion of the tests. The researcher extrapolated the following suggestions for practioners in order to support the goals of the states' educational systems as well as assist students in preparation of the exams or similar tests for diploma criterion.

The analysis revealed information of which would be helpful to educational professionals in the field. As principal's, teachers and support personnel strive to meet the educational ambitions of the state, they also must interact with the needs of the learners in the schools. In order to implement the high stakes testing policies fairly and appropriately, these practioners need information regarding the specifics embedded in the case law from which to base the implementation decisions. The information most releveant to the practioners involves the remedial opportunities available to the students, the multiple opportunities for students to test, and the curricular validity of the tests.

Furthermore, for students with disabilities, the practioner knowledge is important in order to craft the students' IEPs to reflect these opportunities as well as specific learner goals addressing the state requirement of successful completion of the test. The following framework is relevant to the district level and school-based practioners regarding the requirement of the exit exam or state-mandated assessment:

1. Personnel should ensure that the curriculum taught in the classrooms adheres to the state expectation of material that would be presented on the test. State curriculum frameworks, blueprints, and scope and sequence information as well as observation and teacher evaluation help to support the curricular validity of the tests.
2. Practioners need to provide multiple opportunities for remediation to students who did not successfully complete the tests.
3. The test should not be considered as the sole criterion for the awarding of a diploma.The academic program must include other criteria such as attendance, student grades, and/or projects for the awarding of a diploma.
4. Multiple opportunities to retest the entire test or specific sections of tests help to support the fundamental fairness of the tests.

In addition, for students with disabilities, practioners should be aware of the following:

5. Students with disabilities are entitled to accommodations and modifications that allow them to meaningfully participate and demonstrate their knowledge on the tests. The students' IEPs must describe the necessary accommodations and modifications.

6. The students' IEP goals must address the intention of successful completion of the state mandated tests or their equivalent in order for the court to uphold any equal protection or due process complaint.

Researcher Reflections

The researcher in this analysis served in the classroom during the implementation of the TAAS test in Texas. Having witnessed firsthand the impact of the TAAS test on the educational context, the topic of this dissertation resonated with the researcher. As the research progressed, the magnitude of the impact on students became more evident. The researcher had the assumptions that the high stake testing policy had a negative impact for students based upon the testing requirement being the sole criterion for graduation. However, as the cases were analyzed, it became more apparent that efforts to remediate students gave them fair opportunity to learn the material on the test. However, this was not always true for the vulnerable populations, for which the testing requirement may have been unfair.

Through the process, the researcher discovered that the state educational agencies intended to improve the quality of their educational programs by setting standards of expected knowledge and skills for productive citizenship. Moreover, the researcher determined that students were expected to achieve an expected level of success with multiple opportunities for passing. As the case law evolved, the researcher began to understand the states' position on the tests as a requirement for a diploma. However, the researcher did disagree with the comprehensive nature of the tests and believes the use of end-of-course tests to be a more fair and valid way to assess student learning. However, even the end of course tests can be problematic for some students as the researcher

witnessed while serving as the summer high school principal. However, in retrospect, the states have a right and an obligation to ensure that the students, whom they educate, are able to demonstrate the essential skills and knowledge in order to become productive citizens. As our nation participates in the global economy, it is even more essential that our students have the necessary skills to compete with students from other nations to ensure that the United States is able to maintain its position as a democratic leader in the world and for our democracy to remain a viable form of government.

Suggestions for Further Research

The number of students denied their diploma as the results of the high stakes testing policies is currently unknown. It would be interesting to know the actual number of students impacted by the policies. A suggestion for student follow-up would be to interview students who were denied their diplomas to see the social impact of the policy. The researcher recommends a qualitative study documenting the personal impact of the policy on individual students as they faced the outcomes of the denial of their high school diploma. As many states are requiring end of course tests, the data these tests generate could be compared to the outcomes of high stakes tests to analyze the overall outcomes for students. Additional suggestions for research related to this analysis are as follows:

1. A study to investigate the differences in graduation rates for states that required the high stakes comprehensive exams and states that required End-of-Course tests.
2. Researchers might study the number of students who were ultimately impacted as they were denied their high school diplomas by the application of the policy.

3. A study to determine if the students who were denied their diplomas were eventually successful in completion of the requirements, and the length of time that the students continued in school.
4. A continued investigation regarding the subgroups of students who eventually earned their diplomas despite the lack of success on the comprehensive assessment.
5. Finally, a research study to determine the amount of funding needed to remediate students who were not successful on the exams and the additional cost to taxpayers when students remain in school until they can be successful on the exams.

REFERENCES

Abowitz, K. (2008). On the public and civic purposes of education. *Educational Theory, 58* (3), 357-363

Advocates for Special Kids v. Oregon retrieved from http://www.dralegal.org/impact/cases/ask-v-oregon on 8.30.2011.

Airasian, P. (1988). Symbolic validation: the case of state-mandated, high-stakes testing *Education Evaluation and Policy Analysis, 10*(4), 301-313

Allensworth, E. (2004). Graduation and dropout rates after implementation of High-stakes testing in Chicago's elementary schools: A close look at students most vulnerable to dropping out. *Dropouts in America: Confronting the Graduation Rate Crisis.* Cambridge, MA; Harvard University Press

Amrein, A., & Berliner, D. (2002). High-stakes testing, uncertainty, and student learning *Education Policy Analysis Archives, 10*(18). Retrieved November 23, 2008 from http://epaa.asu.edu/epaa/v10n18/

Amrein-Beardsley, A. A. & Berliner, D. C. (2003). Re-analysis of NAEP math and reading scores in states with and without high-stakes tests: Response to Rosenshine. Education Policy Analysis Archives, 11(25). Retrieved March 31, 2009 from http://epaa.asu.edu/epaa/v11n25/

Anderson v. Banks; Johnson v. Sikes, 540 F. Supp. 761 (U.S. Dist. 1982)

Au, W. (2007). High-stakes testing and curricular control: a qualitative meta-synthesis. *Educational Researcher, 36*(5). p. 258-267

Baker, P. (2005). The impact of cultural biases on African American students' education. *Education and Urban Society, 37*(3), 243-256

Ball, S. (2007). Policy sociology and critical social research: A personal review of recent education policy and policy research. *British Educational Research Journal*, 23(3), 257-274

Bester v. Tuscaloosa Board of Education, 722 F.2d 1514 (U.S.App. 1984)

Biddle Consulting Group. *Uniform Guidelines on Employee Selection Procedures.* Retrieved from: http://uniformguidelines.com/uniformguidelines.html#49 On 11/30/12

Bishop, J., & Mane, F. (2001). The impacts of minimum competency exam graduation requirements on high school graduation, college attendance and early labor market

success. *Labour Econonics, 8,* 203-222

Bishop, J., Moriarty, J., & Mane, F. (2000). Diplomas for learning, not seat time: the impacts

of New York Regents examinations. *Economics of Education Review, 19*, 333-349

Board of Education *of Northport East Northport Union Free School District, et al.v.Ambach,* 90 Ad2d 227, aff'd 60 NY2d 758 [1983]

Borg, M., Plumlee, P., & Stranahan, H. (2007). Plenty of children left behind: High-stakes

testing and graduation rates in Duval County, Florida. *Educational Policy, 21*(5), 695-716

Brady v. Turlington, 372 So.2d 1164 (Fla. Dist. Ct. App.1979)

Brookhart v. Illinois State Board of Education, 697 F.2d. 179 (U.S.App. 1983)

Brown, W. (1906). *Talks to Teachers on Psychology: and to Students on Some of Life's Ideals.*

New York, NY: Henry Holt and Company

Brown v. Board of Education, 347 U.S. at 495 (74 S. Ct. at 692, 1954)

Californians for Justice Education Fund v. State Board of Education 2006 Cal. App. Unpub. LEXIS 8832

Cantu, L. (1996). TAAS math performance. *Intercultural Development Research Association.* Retrieved from: http://www.idra.org/IDRA_Newsletters/June_-_July_1996_Math_and_Science Education/TAAS_Math_Performance

Carnoy, M., & Loeb, S. (2002). Does external accountability affect student outcomes? A cross-state analysis. *Educational Evaluation and Policy Analysis, 24*(4), 305-331

Carnoy, M., Loeb, S., & Smith, T. (2001). *Do higher state test scores in Texas make for better high school outcomes?* (CPRE Research Report Series, RR-047). PA: Consortium for Policy Research in Education

Chapman v. California Department of Education, 229 F. Supp. 2d 981; 2002 U.S. Dist. LEXIS 21879

Coachella Valley Unified School District v. State of California 2005 U.S. Dist. LEXIS 44825

Crump v. Gilmer. Independent School District, 797 F.Supp. 552 (E.D.Tex. 1992)

Cunningham, W., & Sanzo, T. (2002). Is high-stakes testing harming lower

socioeconomic

status schools? *NASSP Bulletin, 86:*631. Retrieved October 5, 2008, from http://bul.sagepub.com/cgi/content/abstract/86/632/62

Debra P. v. Turlington, 474 F. Supp. 244 (U.S. District 1979)

Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981)

Debra P. v. Turlington, 654 F.2d 1079 (5th Cir. 1981)

Debra P. v. Turlington, 564 F.Supp 177 (M.D.Fla. 1983)

Debra P. v. Turlington, 730 F.2d 1405 (11th Cir. 1984)

Debray, E., Parson, G., & Avila, S. (2003) Internal alignment and external pressure High school responses in four state contexts. In Carnoy, Elmore & Siskin (Ed.) *The new accountability: High schools and high-stakes testing* (p. 55-86). New York, NY: RoutledgeFalmer

Defur, S. (2002). Education reform, high-stakes assessment, and students with disabilities: One state's approach. *Remedial and Special Education, 23*(4), 203-211

Dorn, S. (2003). High-stakes testing and the history of graduation. *Education Policy Analysis Archives, 11*(1). Retrieved 10/18/2008 from http://epaa/asu.edu/epaa/v11n1/

Elul, H. (1999). Making the grade, public education reform: The use of standardized testing to retain students and deny diplomas. *30 Colum. Human Rights L. Rev. 495*

Eric V. v. Causby, 977 F.Supp. 384 (E.D. N.C. 1997)

Fernandez, B. (2001). TAAS and GI Forum v. Texas Education Agency: A critical

analysis and proposal for redressing problems with the standardized testing in Texas. *33 St. Mary's L.J. 143*

Flores v. The State of Arizona, 405 F.Supp.2d 1112 (U.S.Dist. 2005)

Florida State Board of Education and Turlington v. Brady 368 So. 2d (Fla. App. 1979)

Gall, M., Gall, J. & Borg, W. (2003). *Educational Research. In Introduction.* Boston, MA. Allyn and Bacon

Garner, B. (2004). Black's Law Dictionary (8th ed.). St. Paul Mn: Thomson West

GI Forum, Image de Tejas v. the Texas Education Agency and the Texas State Board of Education, 87 F.Supp.2d. 667 (U.S. Dist. 2000)

Griggs v. Duke Power Co.,1971 401 U.S. 424, 431-2

Hames, J., & Ekern, Y. (2006). *Legal research, analysis, and writing: an integrated approach.* Upper Saddle River, NJ: Pearson Education

Hancock, L. (2007). The future of high-stakes testing in an era of educational standards and accountability: symposium article: Keynote address: High Stakes Tests: A contrarian view. 47 *Santa Clara Law Review,* 701-706

Hancock et al. v. Commissioner of Education et al,. 443 Mass. 428; 822 N.E.2d 1134; 2005 Mass. LEXIS 78

Heilig, J., & Darling-Hammond, L. (2008). Accountability Texas-style: The progress and Learning of urban minority students in a high-stakes testing context. *Educational Evaluation and Policy Analysis, 30,* 75

Heise, M. (2009). Pass or fail: litigating high-stakes testing. *From Schoolhouse to Courthouse*

The Judiciary's Role in American Education. Washington D.C.: The Brookings

Institution

Heise, M. (2009). Courting trouble: Litigation, High-Stakes Testing, and Education Policy.

42 Ind. L. Rev. 327.

Heubert, J. & Hauser, R. (Eds.) (1999) High-stakes: Testing for tracking, Promotion, and graduation. *Committee on Appropriate Test Use, National Research Council*

Hubbard by Hubbard v. Buffalo Independent School District. 20 F. Supp.2d 1012 (1998)

Jacob, B. (2001). Getting tough? The impact of high school graduation exams.

Educational

Evaluation and Policy Analysis, 23(2), 99-121

James, W. (1958). Talks to teachers on psychology: And to students on some of life's issues.

W. W. Norton, Incl. New York

Johnson and Wilcox v. Sikes, 730 F.2d 1562 (U.S.App. 1984)

Katsiyannis, A., Zhang, D., Ryan, J., & Jones, J. (2007). High-stakes testing and students with disabilities: Challenges and promises. *Journal of Disability Policy Studies, 18*(3), 160-167

Kidd v. California Department of Education Case No. 2002049636

Kim, J. & Sunderland, G. (2003). Measuring academic proficiency under the No Child Left

Behind Act: Implications for educational equity. *Educational Researcher, 34*(8), 3-13

Koretz, D., McCaffrey, D., & Hamilton, L. (2001). *Toward a framework for validating*

gains under high-stakes conditions. (Center for the Study of Evaluation Rep. 551). Los Angeles, CA: University of California

Krippendorf, K. (2004). Content Analysis: An Introduction to its Methodology. Thousand Oaks, CA: Sage

Kunz, C., Schmedemann, D., Bateson, A., Downs, M., & Erlinder, C. (1992). The process of

Legal research. MA: Boston. Little, Brown and Company

Laird, J. Cataldi, E., KewalRamani, A. & Chapman, C. (2008). *Dropout and completion rates in the United States:2006.* Washington, D.C.: National Center for Education Statistics

Lay, J. & Stokes-Brown, A. (2008). Put to the test: Understanding differences in support for high-stakes testing. Retrieved on December 26, 2009 from: http://apr.sagepub.com/cgi/content/abstract/37/3/429

Lemons, R., Luschei, T., & Siskin, L. (2003). Leadership and the demands of standards-based accountability. In M. Carnoy et al. (Eds.) *The New Accountability.* New York, NY: RoutledgeFalmer

Lillard, D., & DeCicca, P. (2001). Higher standards, more dropouts? Evidence within and across time. *Economics of Education Review, 20,* 459-473

Lipman, P. (2004). High-Stakes Education. Inequality, Globalization, and Urban School Reform. New York: NY, RoutledgeFalmer

Locke, L., Spirduso, W., & Silverman, S. (2007). *Proposals that Work: A Guide for Planning*

Dissertations and Grant Proposals. CA:Thousand Oaks Sage Publications

Love v. Turlington, 733 F.2d 1562 (11th Cir.1984)

Madaus, G., & Clarke, M. (2001). The adverse impact of high stakes testing on minority students: evidence from 100 years of test data. In Orfield and Kornhaber (Eds.), *Raising Standards or Raising Barriers? Inequality and High Stakes Testing in Public Education.* New York: The Century Foundation

McDowell, K. (2000). Teacher competency tests: disparate impact, disparate treatment and teacher competency tests. *The State Education Standard,* 1(*1*), 45-47

Moran, R. (2000). High-stakes testing in the public schools. *34 Akron L. Rev. 107*

Mueller, J. (2001). Facing the unhappy day: Three aspects of the high stakes testing movement. *11 Kan. J.L. & Pub. Pol'y 201*

Mumid et al., v. Abraham Lincoln High School, The Institute for New Americans, and Special School District Number 1 2008 U.S. Dist. LEXIS 54346

National Commission on Excellence in Education. (1983). *A Nation at Risk.* (NCEE Publication No. 065-000-00177-2). Washington, DC: U.S. Government Printing Office

New York Performance Standards Consortium v. New York State Education Department 293 A.D.2d 113; 741 N.Y.S.2d 349; 2002 N.Y. App. Div. LEXIS 4790

No Child Left Behind Act of 2001, 20 U.S.C. §6319 (2008)

Noon, et al. v. Alaska State Department of Education and Anchorage School District, (U.S. Dist. AK. 2004)

O'Connell v. The Superior Court of Alameda County 2005 U.S. Dist. LEXIS 44825

O'Neill, P. (2001). Special education and high stakes testing for high school graduation: an analysis of current law and policy. *Journal of Law & Education.* 30 J.L. &

Educ. 185

O'Neill.P. (2003).High stakes testing law and litigation. *Brigham Young University* Education and Law Journal, 623

Orfield, G., Losen, D., Wald, J., & Swanson, C., (2004). *Losing our future: How minority youth are being left behind by the graduation rate crisis*, Cambridge, MA: The Civil Rights Project at Harvard University. Contributors: Advocates for Children of New York, The Civil Society Institute

Phillips, S. (2000). *GI Forum v. Texas Education Agency:* Psychometric evidence. *Applied Measurement in Education,* 13(*4*), 343-385.

Price, T. & Peterson, E. (2008) *The Myth and Reality of No Child Left Behind. Public Education and High-Stakes Assessment.* Lanham, MD: University Press of America.

Quigley, W. (2001). Due process rights of grade school students subjected to high-stakes testing. *10 B.U. Pub. Int. L.J. 284.*

Rankins v. Louisiana State Board of Elementary and Secondary Education, 93 1879 La. App. 1994)

Rene v. Reed, 751 N.E.2d 736 (Ind. Ct. App. 2001)

Rene v. Reed, 774 N.E.2d 506; 2002 Ind. LEXIS 101

Rhoten, D., Carnoy, M., Chabran, M., & Elmore, R. (2003). The conditions and characteristics of assessment and accountability: The case in four states. In M. Carnoy et al (Eds.), *The new accountability.* New York, NY: Routledge Falmer

Roderick, M., & Engel, M. (2001). The grasshopper and the ant: Motivational responses of low-achieving students to high-stakes testing. *Educational Evaluation and*

Policy Analysis, 23(3), 197-227

Rosenshine, B. (2003). High-stakes testing: Another analysis. *Education Policy Analysis Archives, 11*(24). Retrieved March 27, 2009 from http://epaa/v11n24/.

Rossman, G. & Rallis, S. (2003). *Learning in the field. In introduction to qualitative research.* Thousand Oaks, CA: Sage Publications

Schwandt, T. (2001). *The Dictionary of Qualitative Inquiry.* Thousand Oaks, CA: Sage Publications

Siegel, H. (2004). High stakes testing, educational aims and ideals, and responsible assessment. *Theory and Research in Education, 2*(3), 219-233

Smith, M., & Fey, P. (2000). Validity and accountability in high-stakes testing. *Journal of Teacher Education, 51*(5), 334-344

Smiley, Lyons, Learning Disabilities Association of California, and Chapman v. California Department of Education, and California Board of Education, 45 Fed. Appx. 780; 2002 U.S. App. LEXIS 18466

State of Alaska Department of Education and Early Development. (2011) *State High School*

Exit Exams. Retrieved from: http://www.eed.state.ak.us/tls/assessment/HSGQE/HSExitExams/2011_2012StateHighSchoolExitExams_Nov2011.pdf

Stillwell, R. (2009). *Public School Graduates and Dropouts From the Common Core of Data: School Year 2006–07* (NCES 2010-313). National Center for Education Statistics, Institute of Education Sciences, U.S. Department of Education.

Washington, DC. Retrieved 06/28/2010 from http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2010313

Strauss, A., & Corbin, J. (1998) *Basics of Qualitative Research: Techniques and Procedures For Developing Grounded Theory.* Thousand Oaks, CA. Sage Publications

Student 9 et al. v. Board of Education et al, 440 Mass. 752; 802 N.E.2d 105; 2004Mass.LEXIS 28

Superfine, B. (2008). *The courts and standards-based education reform.* New York: NY: Oxford University Press

Superior Court of California County of Alameda and Valenzuela v. O'Connell Case No. RG06288707

Swanson, C. (2003). Ten questions (and answers) about graduates, dropouts, and NCLB Accountability. *Learning Curve, 3,* 1

Swanson, C., & Chaplin, D. (2003). Counting high school graduates when graduates count: measuring graduation rates under the high stakes of NCLB. *Education Policy Center. The Urban Institute*

The State Education Department of New York Bureau of Elementary and Secondary Testing Programs. (1987). *The history of regents examinations 1865-1987* Retrieved on March 14, 2008, from www.emsc.nysed.gov/osa/hsinfogen/hsinfogenarch/rehistory.html

Thurlow, M., & Johnson, D(2000)High-stakes testing of students with disabilities *Journal of Teacher Education, 51*(4), 305-314

*Triplett v. Livingston County Board of Education, 967 S.W.2d 25, 31 (KY*1997)

*Triplett v. Livingston County Board of Education, 525 U.S. 1104,*119 S. Ct. 870 *(*1999*)*

Wagner, R. (1989) *Accountability in education: A philosophical inquiry*New York, NY: Routledge

Wells v. Banks, 153 GaApp581 (GaApp1980)

Williams v. Austin Independent School District, 796 F.Supp251 (U.S.Dist1992)

Wright, P (2004)The next wave of special education litigation *Harbour House Law Press, Inc.* Retrieved on June, 16, 2008 from:http://www.harborhouselaw.com/articles/highstakes.litigation.wright.htm

APPENDIX

FLORIDA STATE BOARD OF EDUCATION and RALPH D. TURLINGTON, as Commissioner of Education of the State of Florida, Appellants, v. JOHN F. BRADY and JOHN G. BRADY, Appellees and Cross-Appellant

No. KK-378

District Court of Appeal of Florida, First District

368 So. 2d 661; 1979 Fla. App. LEXIS 14388

March 20, 1979

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, state education officials, sought review of a final order entered by a hearing officer of the Florida Division of Administrative Hearings holding that the scoring criteria of a basic skills test administered to all Florida school children were invalid.

OVERVIEW: Appellees, a Florida public school student and his father, challenged the scoring standard used for a basic skills test administered to all public school children. Appellees contended that the scoring standard was not valid because it was not a rule under Fla. Stat. ch. 120. The hearing officer held that the scoring standard was a rule within the meaning of Fla. Stat. ch. 120.52(14) but that it was invalid because it was not promulgated in accordance with Fla. Stat. ch. 120.54. Appellants, Florida education officials, sought review and appellees brought a cross-appeal. The court held that the legislature directed appellants to develop and administer basic skills testing pursuant to Fla. Stat. ch. 229.57(2)(b) (1977) and that the authority to determine scoring criteria was implicit therein. The court noted that the criteria were applied to all students without discrimination. The court held that the scoring standard at issue was a valid exercise of appellants' authority. The court therefore vacated and set aside the hearing officer's order finding the scoring standard invalid.

OUTCOME: The court vacated and set aside the hearing officer's order that found that a scoring standard used for a basic skills test was invalid because it found that the standard was a valid exercise of appellant state education officials' authority.

CORE TERMS: scoring, grade, criterion, graduation, basic skills, proficiency, educational, functional, literacy, testing, capitalization, apostrophe, noun, hearing officer, medical school, contemplation, satisfactory, disciplinary, promulgated, progress, supplied, evenly, senior

COUNSEL: [**1] James D. Little and Judith A. Brechner, Tallahassee, for appellants.

Jack McLean, Ralph Armstead and Anna Bryant Motter, Tallahassee, for appellees and cross-appellants.

OPINION BY: MELVIN

OPINION

[*661] MELVIN, Judge.

The appellants have timely brought for review their challenge to that portion of the final order of date June 15, 1978, entered by the hearing officer of the Division of Administrative Hearings wherein it was held and determined:

> "3. The scoring criterion is a rule within the meaning of the APA, F.S. § 120.52(14).
>
> 4. The scoring criterion by which mastery of the basic skills and satisfactory [*662] performance in functional literacy are determined is invalid for its failure to have been promulgated in accordance with the APA, specifically F.S. § 120.54." (Due Process, Scoring Standard).

The order found and determined that Rule 6A-1.941, as promulgated by the State Board of Education, was a valid rule within the contemplation of Florida Statutes, Chapter 120, the Administrative Procedure Act. The sole question presented for determination here is whether or not, during the time here pertinent, the scoring criterion by which knowledge of the basic skills and satisfactory performance in functional [**2] literacy was measured was a rule within the contemplation of Chapter 120. It is stipulated that the scoring criterion referred to was not adopted as a rule pursuant to Chapter 120, but was set and determined by Ralph D. Turlington, as Commissioner of Education of the State of Florida, pursuant to Section 229.57(2)(b), Florida Statutes (1977).(Due Process: Scoring Standard).

John F. Brady, father of an 11th grade student, John G. Brady, brought this action. At the conclusion of the hearing, a motion was granted to add John G. Brady as a party to the cause. The basis for the Brady complaint was that John G. Brady had passed the functional literacy test but had failed two parts of the basic skills test, relating to apostrophe and noun capitalization. The local school board, pursuant to its obligation, provided young Brady with extra study in the areas in which he reflected deficiency in the test (Opportunity to Learn: Remediation). The sole basis of the Brady complaint was that the scoring standard as determined by the Commissioner of Education of Florida is not valid because such criterion was not a part of the rule referred to nor was it adopted as a separate rule under Chapter 120. With this contention, we do not agree. (Due Process: Procedural: Validity: Scoring Standard).

The test and the scoring [**3] was evenly applied to all students in Florida at grade levels 3, 5, 8 and 11. Young Brady did not have a right to be free from testing. While it is true that a student has a "substantial interest" in passing the various subjects in the various grades through which he progresses towards graduation, he does not have a right to pass any subject as to which he had not obtained the required proficiency. A high school diploma stands for something more than testimony to the fact that a student has attended that school for a given number of years. In order for those in the academic field to know

that a student has obtained proficiency in any given subject, it would follow as a matter of logic that there would have to be, and traditionally there always have been, tests given to the students on the subjects on which they have received instruction.

Whether a student will be considered as having obtained proficiency in any subject is a matter peculiar to the field of education and is not one, in our view, that was intended by the legislature to be arrived at through promulgation of rules under the Administrative Procedure Act. It is our view that the Legislature of Florida had this very **[**4]** subject under consideration when it adopted Section 229.57(2)(b), Florida Statutes (1977), wherein the Commissioner of Education was required and directed to:

> "Develop and administer in the public schools a uniform, statewide program of *assessment* to determine, periodically, educational status and progress *and the degree of achievement of approved minimum performance standards*. . . ." [1] (Emphasis supplied)
>
> 1 Authority is now vested in State Board of Education. See Chapter 78-424 which was filed in the Office of Secretary of State June 27, 1978, and was effective upon becoming a law.

Implicit in such direction to the Commissioner of Education is the granting to him of the authority to determine scoring criteria. (STATE AUTHORITY).. We further note that no adverse effect has been visited upon young Brady because, following a testing procedure, he was required to gain a minimum knowledge with reference to the use of the apostrophe and the proper capitalization of nouns. According to the record, young Brady at the time **[**5]** of the hearing was in the 11th grade and had before him the 12th grade courses to pass before any determination could be **[*663]** made with reference to his entitlement to graduation. Graduation for him, as it is for all other students, will depend also upon his passing his 12th grade courses. There is no testimony to the effect that his graduation is in any way in peril by reason of his having first failed to demonstrate the required knowledge and later having gained the required knowledge of the apostrophe and capitalization of proper nouns. He should appreciate rather than complain about the educational system in Florida that obviously has been of benefit to him.

Of interest in the consideration of this area of school law is *Board of Curators, Univ. of Mo. v. Horowitz,* 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978). In *Horowitz*, the Supreme Court of the United States considered the dismissal of a senior in a state medical school because of her failure to meet academic standards. The court considered the case utilizing the concept of liberty and property under the Fourteenth Amendment and examined the degree of due process that is required in academic dismissal matters. **[**6]** We perceive the reasoning employed by the court in disposing of the case to be of value in the area of school law. First, the court distinguished academic discipline from misconduct disciplinary proceedings and then observed that:

> "Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to judicial and administrative fact-finding proceedings to which we have traditionally attached a full hearing requirement. * * * Like the decision of an individual professor as to the

> *proper grade* for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making.
>
> Under such circumstances, we decline to ignore the historic judgment of educators and thereby formalize the academic dismissal process by requiring a hearing. The educational process is not by nature adversarial; instead it centers around a continuing relationship between faculty and students, . . ." (Emphasis supplied)

If one who is a senior in medical school may be dismissed for academic reasons **[**7]** (which necessarily were predicated upon testing) and such dismissal might be accomplished without the necessity of any hearing, we find the requirement that an 11th grade student submit to an evenly administered test to determine his knowledge of grammar, reading, arithmetic, and writing, and then furnished an opportunity to correct such deficiencies as may thus be revealed, is a proper exercise of the authority granted to the Commissioner of Education of the State of Florida by the provisions of Section 229.57(2)(b).

We do not have here a case of discrimination in which the test required of one student was not required of all others. We do not have a situation where one's test papers were graded any differently than all the other students in the State of Florida similarly situated.

We hold that the scoring criterion complained of was a valid exercise of the authority granting by the Legislature to the Commissioner of Education of the State of Florida and that Rule 6A-1.941, Florida Administrative Code, is a valid rule.(Due Process: Scoring Standard). It follows that the order of the hearing officer of date June 15, 1978, the subject of this opinion, should be and is vacated and set aside to the extent it is **[**8]** not consistent with the views herein expressed.

MILLS, Acting C. J., and MASON, ERNEST E., Associate Judge, concur.

Debra P., a minor, by Irene P., her mother and next friend, Wanda W., a minor, by Ruby W., her mother and next friend, Luwanda K., a minor, by Willa K., her mother and next friend, Terry W., a minor, by Doris W., his mother and next friend, Brenda T., a minor by Willie T., her father and next friend, Vanessa S., a minor, by Mamie S., her mother and next friend, Thomas J. H., Jr., a minor by Thomas J. H., Sr., his father and next friend, Gary L. B., a minor, by Ezell B., his father and next friend, Valisa W., a minor, by Charles W., her father and next friend, Huey J., a minor, by Melvin G., his guardian and next friend, on behalf of themselves and all other persons similarly situated, Plaintiffs, v. Ralph D. Turlington, Individually and as Commissioner of Education, Florida State Board of Education, Governor Bob Graham, Individually and as Chairman thereof, Secretary of State George Firestone, Attorney General Jim Smith, comptroller Gerald A. "Jerry" Lewis, Treasurer William Gunter, Commissioner of Agriculture Doyle Conner, Commissioner of Education Ralph D. Turlington, all individually and as members thereof, Florida, Department of Education, Roland H. Lewis, Individually and as Chairman thereof, Cecil W. Essrig, Carl Carpenter, Jr., Ben H. Hill, Jr., A. Leon Lowery, Sam Rampello, and Marion Rodgers, all Individually and as members thereof, and, Raymond O. Shelton, Individually and as Superintendent of Schools of Hillsborough County, Defendants.

No. 78-892 Civ. T-C

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

474 F. Supp. 244; 1979 U.S. Dist. LEXIS 11065

July 12, 1979

SUBSEQUENT HISTORY: [**1] As Amended August 7 and 8, 1979.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff black public school students challenged the Florida Functional Literacy Examination, Fla. Stat. Ann. § 229.57 et seq., arguing that it violated their U.S. Const. amend. XIV. rights; 42 U.S.C.S. § 2000d; and 20 U.S.C.S. § 1703. Plaintiffs sought an injunction from requiring the exam as a prerequisite to a high school diploma and prohibiting the utilization of exam results as a means of structuring remediation classes.

OVERVIEW: The court held that the separate facilities in Florida public schools for white and black children during the period 1967-1971 violated plaintiffs' equal protection rights and that past purposeful discrimination was perpetuated by the test and the diploma sanction, regardless of its neutrality. The court held that utilization of the exam, as a requirement for a high school diploma, was a violation of the equal protection clause, 42 U.S.C. § 2000d, and 20 U.S.C. § 1703, but the court held that the functional literacy test did bear a rational relation to a valid state interest and thus was constitutional even when applied only to public schools. The court held that plaintiffs had a property right in

graduation from high school with a standard diploma and the inadequacy of the notice provided prior to the invocation of the diploma sanction, the objectives, and the test was a violation of the due process clause. The court held that the implementation schedule was fundamentally unfair. The court, however, held that there was neither a constitutional nor a statutory violation in using the test results as a mechanism for remediation.

OUTCOME: The court declared that the literacy examination was a violation of the equal protection and due process clauses and enjoined the state from requiring passage of the exam as a requirement for graduation for a period of four years. The court declared that the remediation program was not constitutionally or statutorily invalid.

CORE TERMS: functional, educational, literacy, diploma, skill, public schools, black students, graduation, remediation, testing, state board, private schools, segregation, grade, basic skills, dual, literacy test, school system, white students, teacher, construct, inferior, disproportionate, notice, school board, testing program, compensatory, real world, discriminatory, mathematics

COUNSEL: Morris W. Milton, St. Petersburg, Fla., Stephen F. Hanlon, Robert J. Shapiro, Bay Area Legal Services, Tampa, Fla., Diana Pullin, Roger L. Rice, Richard Jefferson, Center for Law and Education, Cambridge, Mass., Terry L. DeMeo, Legal Services for Greater Miami, Miami Fla., for plaintiffs.

James D. Little and Judith A. Brechner, State Board of Education, Tallahassee, Fla., W. Crosby Few, Tampa, Fla., for Hillsborough County defendants.

OPINION BY: CARR

OPINION

[*246] MEMORANDUM OPINION

I

THE CLAIMS AND CLASSES

The Plaintiffs in the instant action present a broad based constitutional and statutory challenge to the Florida Functional Literacy Examination (i. e. State Student Assessment Test, Part II; hereinafter referred to either as the SSAT II or the functional literacy examination). Fla.Stat. § 229.57, Et seq. Plaintiffs contend in a complaint filed October 16, 1978, that the SSAT II violates their Fourteenth Amendment due process and equal protection rights and also violates their rights pursuant to 42 U.S.C. § 2000d and 20 U.S.C. § 1703.

The Court on March 21, 1979, certified three classes of Plaintiffs:

> Class A are all present **[**2]** and future twelfth grade public school students in the State of Florida who have failed or who hereafter fail the SSAT II.
>
> Class B are all present and future twelfth grade black public school students in the State of Florida who have failed or who hereafter fail the SSAT II.

> Class C are all present and future twelfth grade black public school students in Hillsborough County, Florida who have failed or who hereafter fail the SSAT II.

The Defendants in the case are Commissioner of Education, Ralph D. Turlington, the Florida Board of Education, Governor Bob Graham, Secretary of State George Firestone, Attorney General Jim Smith, Comptroller Gerald A. Lewis, Treasurer William Gunter, Commissioner of Agriculture Doyle Conner, [1] the Florida Department of Education (hereinafter referred to as the DOE), the School Board of Hillsborough County, Florida, Roland H. Lewis, Cecile W. Essrig, Carl Carpenter, Jr., Ben H. Hill, Jr., A. Leon Lowery, Sam Rampello, Marion Rodgers, [2] and Superintendent of Schools of Hillsborough County, Raymond O. Shelton.

> 1 The preceding named individual Defendants are the members of the Florida State Board of Education (i. e. the Governor and Florida Cabinet).

[3]**

> 2 The preceding named individual Defendants through Mr. Lewis are the members of the Hillsborough County School Board.

A brief summary of the Plaintiffs' claims in conjunction with the certified classes will facilitate an understanding of the Court's opinion. [3] The first claim asserts that the **[*247]** Defendants have either designed or implemented a test or testing program (i. e., SSAT II) which is racially biased and/or which violates the equal protection clause of the Fourteenth Amendment (Equal Protection), 42 U.S.C. § 2000d, and 20 U.S.C. § 1703. The first claim relates to Classes A, B and C.

> 3 A more extensive and analytical review of the Plaintiffs' claims is presented in Parts IV, V. and VI.

The second claim contends that Defendants have instituted a program of awarding diplomas without providing the Plaintiffs with adequate notice of the requirements (i. e., passage of the SSAT II) or adequate time to prepare for the **[**4]** required examination in violation of the Fourteenth Amendment. (Due Process: Procedural: Adequate Notice) The second claim, like the first, relates to Classes A, B and C.

The third claim asserts that the Defendants have used the SSAT II in conjunction with Fla.Stat. § 236.088 as a mechanism for resegregating the Florida public schools through the use of remedial classes for those students failing the examination in violation of the Fourteenth Amendment, 42 U.S.C. § 2000d, and 20 U.S.C. § 1703. The third claim relates to Classes B and C (Equal Protection).

The Plaintiffs' prayer for relief seeks a declaratory judgment finding that the requirement for passage of the SSAT II as a prerequisite for a normal graduation diploma is a violation of the due process and equal protection clauses of the Fourteenth Amendment, 42 U.S.C. § 2000d and 20 U.S.C. § 1703. The Plaintiffs additionally request an injunction restraining the Defendants from requiring SSAT II passage as a prerequisite to receiving a high school diploma. Finally, Plaintiffs seek an injunction to both purge their scholastic

records of any acknowledgement of the SSAT II failure and to issue an Order prohibiting the utilization of the SSAT II results as a means of structuring classes **[**5]** in remediation.

II

JURISDICTION

The Court has jurisdiction to consider the Plaintiffs' claims pursuant to 28 U.S.C. § 1343(3) and (4) and 28 U.S.C. §§ 2201, 2202.

III

HISTORICAL AND LEGISLATIVE BACKGROUND

A. THE TEST

In 1976, the Florida Legislature enacted a comprehensive piece of legislation known as the " Educational Accountability Act of 1976." Laws of Florida 1976, Vol. 1, Chapter 76-223, pp. 489-508. Part of the stated intent of the legislature was:

> (a) to provide a system of accountability for education in Florida which guarantees that each student is afforded similar opportunities for educational advancement without regard to geographic differences and varying local factors . . . (d) to guarantee to each student in the Florida system of public education that the system provides instructional programs which meet minimum performance standards compatible with the state's plan for education . . . (f) to provide information to the public about the performance of the Florida system of public education in meeting established goals and providing effective, meaningful and relevant educational experiences designed to give students at least the minimum skills necessary to function **[**6]** and survive in today's society. Fla.Stat. § 229.55(2)(a), (d), (f).

In a subsection of the Act entitled "Pupil Progression" the legislature established three standards for graduation from Florida public high schools. Fla.Stat. §§ 232.245(3) (1977); 232.246(1)-(3). The first requirement mandated that the students complete the minimum number of credits for graduation promulgated by their school board. The second requirement made compulsory the mastery of basic skills and the third required "satisfactory performance in functional literacy as determined by the State Board of Education. Fla.Stat. § 232.245(3) (1977). The pupil progression subsection also provided that each school district must develop procedures for remediation of students who were unable to meet the required standards. The legislation also provided for a comprehensive testing program to evaluate basic skill development at periodic intervals. Fla.Stat. § 229.57. **[*248]** [4] In 1978, the Act was amended by the Florida Legislature to require passage of a functional literacy examination prior to receipt of a state graduation diploma. Those students who completed the minimum number of required high school credits **[**7]** but failed the functional literacy examination would receive a certificate of completion. Fla.Stat. § 232.246. [5]

4 Fla.Stat. § 229.57 provides:

(1) Statewide Testing. The primary purpose of the statewide testing program is to provide information needed for state-level decisions. The program shall be designed to:

(a) Assist in the identification of educational needs at the state, district, and school levels.

(b) Assess how well districts and schools are meeting state goals and minimum performance standards.

(c) Provide information to aid in the development of policy issues and concerns.

(d) Provide a basis for comparisons among districts and between districts, the state, and the nation, when appropriate.

(e) Produce data which can be used to aid in the identification of exceptional educational programs or processes.

(2) The Statewide Assessment Program. The Commissioner is directed to implement a program of statewide assessment testing which shall provide for the improvement of the operation and management of the public schools. The statewide program shall be timed, as far as possible, so as not to conflict with on going district assessment programs. As part of the program the commissioner shall:

(a) Establish, with the approval of the state board, minimum performance standards related to the goals for education contained in the state's plan, including, but not limited, to basic skills in reading, writing and mathematics. The minimum performance standards shall be approved by April 1 in each year and they are established, for a period of no less than three, nor more than five, years.

(b) Develop and administer in the public schools a uniform, statewide program of assessment to determine, periodically, educational status and progress and the degrees of achievement of approved minimum performance standards. The uniform statewide program shall consist of testing in grades 3, 5, 8, and 11 and may include the testing of additional grades and skill areas as specified by the Commissioner.

[8]**

5 Fla.Stat. § 232.246 provides: General requirements for high school graduation.

(1) Beginning with the 1978-1979 school year, each district school board shall establish standards for graduation from its schools which shall include as a minimum:

(a) Mastery of the minimum performance standards in reading, writing and mathematics for the 11th grade, established pursuant to §§. 229.565 and 229.57, determined in the manner prescribed by rules of the state board; and

> (b) Demonstrated ability to successfully apply basic skills to everyday life situations as measured by a functional literacy examination developed and administered pursuant to rules of the state board; and
>
> (c) Completion of a minimum number of academic credits, and all other applicable requirements prescribed by the district school board pursuant to §. 232.245
>
> (3) A student who meets all requirements prescribed in subsection (1) shall be awarded a standard diploma in a form prescribed by the state board; provided that a school board may, in lieu of the standard diploma, award differentiated diplomas to those exceeding the prescribed minimums. A student who completes the minimum number of credits and other requirements prescribed by paragraph (1)(c), but is unable to meet the standards of paragraph (1)(a) or paragraph (1)(b), shall be awarded a certificate of completion in a form prescribed by the state board.

[9]** At the time of trial the SSAT II had been administered on three separate occasions: Fall, 1977; Fall, 1978; Spring, 1979. A review of the results of the three administrations will be discussed in the following section.

B. THE TEST RESULTS

A review of the results of the October, 1977, administration of the SSAT II indicates that there were substantial numbers of students who failed the test. Of the 115,901 students taking both sections of the test, approximately 41,724 or 36% Failed one or both sections. A breakdown of the results on a racial basis shows that 78% of the black students failed one or both sections as compared to 25% of the white students. On the communications section of the SSAT II, 26% Of the black students failed as compared to 3% Of the white students.

The second administration results followed a similar pattern. Of the 4,480 black students taking the test for a second time, 3,315 or 74% Failed one or both sections. The percentage of failure among white students retaking both sections was 25% Or 1,675 students. Of the 13,345 black students **[*249]** being reexamined on the mathematics section 46% Or 6,139 failed.

The results of the third administration of the **[**10]** SSAT II which were released during the trial illustrate the same disparity in the failure rates among white and black students. Sixty percent (60%) of the black students retaking the mathematics section of the test for a third time failed as compared to 36% Of the white students. Between October, 1977, and May, 1979, the number of students who were in Florida public high schools first as juniors and then as seniors had been reduced to 91,000 students. Of the approximately 91,000 high school seniors, 3,466 or 20.049% of the black students had not passed the test compared to 1,342 of 1.9% of the white students. The failure rate among black students was approximately 10 times that among white students. In all, approximately 5,300 students or 5.8% had failed to pass the SSAT II by the time of the end of their senior year in high school.

C. THE EFFECTS

Rather than following a specific item by item format for the findings of fact, the Court will utilize a narrative approach. The Court notes that in resolving conflicts in the testimony it relied upon its evaluation of the witnesses and their demeanor while testifying.

The denial of a standard diploma based on the failure of the SSAT II **[**11]** triggers a number of economic and academic deprivations. The State of Florida Career Service Department, for instance, employs only 10% of its labor force from those people who do not have high school diplomas. The jobs found in this 10% "no diploma" category have been described as both "menial" and "dead end" positions. The State of Florida requires only a high school diploma for another 10% of its work force. The remaining 80% of the jobs in state government require a high school diploma and experience or some higher academic degree. A certificate of completion will not be considered a diploma for purposes of employment with the State of Florida.

Similarly, admission to one of the nine universities in Florida is predicated upon receipt of a high school diploma. A certificate of completion will not be considered an adequate substitute for the diploma. The denial of a diploma has a disproportionate effect on the college attendance of black students. [6]

> 6 The evidence provided by Dr. Eckland clearly illustrates that large numbers of black students who graduate in the lowest two deciles of their high school classes go on to participate in higher education if they have a diploma. The black students in the lowest two deciles roughly correlates to those black students who failed the SSAT II. Dr. Eckland's review of the National Longitudinal Study showed that the denial of a diploma to the black students in Florida who failed the SSAT II upon the second administration would result in a 20% Decline in black students college attendance.

[12]** The stigma which results from the failure of the SSAT II is a very serious problem. Students who have failed the test are often branded with the label "functionally illiterate."

D. ADMITTED FACTS AND JUDICIAL NOTICE

Prior to the commencement of the trial, the parties agreed that certain facts need not be proved. A list of those facts is contained in the parties' pretrial stipulation filed April 23, 1979. Those facts pertain primarily to the statutory duties and responsibilities of the Florida State Board of Education and the Florida Department of Education. There is agreement as to the existence of a dual school system in Florida, although the agreement is without temporal boundaries, and as to the fact that historically black children have not fared well on standardized tests in Florida schools. [7]

> 7 Numerous other facts have been admitted which if relevant, will be discussed in the Section IV, V. and VI of this Memorandum Opinion. Further recitation of those facts in this section is unnecessary.

The **[**13]** Court on the first day of trial took judicial notice of certain relevant facts, statutes, and judicial decisions. The majority of the matters which Plaintiffs requested **[*250]** that the Court judicially notice were previously admitted by the Defendants. [8] The Court has specifically taken judicial notice both of the de jure segregation of Florida schools in the period 1885 to 1967 and that as a result of attending segregated schools prior to the implementation of unitary school systems many members of Classes B and C received an unequal education to that received by white students during those years. Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

8 The Court's colloquy on the record with counsel as to those matters is clear as to which facts were admitted and which were judicially noticed. See also Parties' Pretrial Stipulation.

E. RACIAL DISCRIMINATION AND FLORIDA PUBLIC EDUCATION (1885-1967)

Although the Court's principal focus concerning racial discrimination in **[**14]** Florida public education revolves around the period 1967-1979, and more specifically 1967-1971, it is helpful to provide a historical over-view of the conditions existing prior to 1967. [9] From 1890 to 1967 Florida public education operated a dual school system; dual in the sense that there were two complete and separate school systems for black and white Florida public school children. See Green v. County School Board of New Kent County, 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968); Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1969). Likewise, there was absolute segregation of school faculty on a racial basis. Black and white teachers even maintained separate professional associations and unions. The physical facilities, the size and scope of the curricula, the libraries, the duration of the school day and year, the supplies, and the texts in black schools were inferior to those in white schools. Black schools during this period were obviously inferior. [10] The dual school system and its inherent inequality was perpetuated not only by the policies and practices of local school boards, but also by the Florida Constitution and statutes. [11] **[**15]** Although the Supreme Court's holding of separate but equal was the law of the land during the bulk of this period, the corresponding component of equality was constantly overlooked and never enforced in relation to black Florida public schools. Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896).

9 The Court at the commencement of trial specifically limited the focus of the inquiry into discrimination to the period 1967 to present, but permitted Plaintiffs to present expert opinion evidence regarding an overview of the history of discrimination in the Florida public schools.

10 On this issue, the Court cannot help but refer to Judge Heebe's statement in a case involving similar issues:

It becomes readily apparent to anyone familiar with the nature of white and black schools in the South that children going to the white school would be provided with better facilities, faculties, educational materials than their counterparts in the black schools. Moses v. Washington Parish School Board, 330 F. Supp. 1340, 1345 (E.D.La.1971).

11 See Paragraphs 9 to 16 in Plaintiffs' Proposed Request for Judicial Notice. These matters were admitted by the Defendants.

[16]** IV

FIRST CLAIM

A. INTRODUCTION

The Plaintiffs' first claim is a multi-pronged equal protection, Title VI and Equal Educational Opportunities Act challenge to the SSAT II. The essence of the claim is the Plaintiffs' contention that SSAT II perpetuates and reemphasizes the effects of past purposeful discrimination. Beyond this core allegation, Plaintiffs contend (1) that the test is unreliable, invalid and not correlated to the public school curriculum, (2) that the test instrument is racially biased, and finally (3) that passage of the test was not required for graduation in Florida private schools. Plaintiffs further contend that the higher percentage of black twelfth grade failures was the probable and foreseeable consequence of enactment and **[*251]** implementation of the statutory scheme by the Defendants.

B. RACIAL DISCRIMINATION AND FLORIDA PUBLIC EDUCATION (1967-1971)

All three classes of Plaintiffs embarked upon their public school educations in the school term 1967-1968. The testimony has clearly indicated that almost all of the Plaintiffs attended segregated public schools which were part of the dual school alignment of the earlier period. While the expert witness **[**17]** testimony on this issue confirms the existence of segregated schools in Florida on a broad geographic scale, the Plaintiffs have placed special emphasis on Hillsborough County, Florida. A review of the appendix to Judge Krentzman's Opinion in Mannings v. The Board of Public Instruction of Hillsborough County, Florida, No. 3554 Civ. T-K (unpublished opinion, May 11, 1971) [12] illustrates the attendance during 1967-1971 by race at selected Hillsborough County public schools. The evidence is clear and convincing that Hillsborough County schools in the period 1967-1971 were uniformly racially segregated and that a unitary school system did not exist during that period. This finding is applicable to the state as a whole during the same period.

12 Although Judge Krentzman's Opinion in Mannings has been often cited as a model decision in the area, it was never published. In Mannings v. Board of Public Instruction of Hillsborough County, Florida, 427 F.2d 874 (5th Cir. 1970), the Fifth Circuit reversed Judge Lieb's desegregation order and held:

We proceed to a determination of the status with respect to each of the six essential elements which go to disestablish a dual school system. Tested in this frame of reference, we find the Hillsborough system deficient in student assignments to certain schools, and to a degree in faculty and staff assignment throughout the system. Mannings, supra at 876.

The Fifth Circuits finding above was made on May 11, 1970, exactly one year before Judge Krentzman's final desegregation Order was entered. See also

> Mannings v. Board of Public Instruction of Hillsborough County, Florida, 277 F.2d 370 (5th Cir. 1960).

[18]** In Brown v. Board of Education, the Supreme Court held:

> We conclude that in the field of public education the doctrine of "separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the Plaintiffs and other similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of equal protection of the laws guaranteed by the Fourteenth Amendment. Brown, supra, 347 U.S. at 495, 74 S. Ct. at 692.

Thus, it is clear that the separate facilities in Florida public schools for white and black children during the period 1967-1971 violated Plaintiffs' equal protection rights under the Fourteenth Amendment. The Brown finding that separate facilities were inherently unequal is manifestly applicable. [13]

> 13 See Plaintiff's "Request for Court to take Judicial Notice of Facts," No. 23, filed April 20, 1979. The Court at the commencement of trial in light of Brown and with the substitution of the word "unequal" for the word "inferior" took judicial notice of Request No. 23. While Brown made an inherent inequality finding, Judge Krentzman in Mannings found factual inequality in Hillsborough County Schools.

[19]** Beyond the question of inherent inequality due to segregation is the question of the inferiority of black schools during the same period. While Plaintiffs contend that a Brown showing which has been made is sufficient to shift the burden to Defendants, the Plaintiffs produced vast amounts of evidence of the inferiority in fact of black schools during the period 1967-1971. The evidence clearly indicates that black public schools in Florida were inferior in their physical facilities, course offerings, instructional materials, and equipment. There is little doubt but that the pervasive racial isolation condemned in Brown [14] in conjunction with the inferiority of black schools created an atmosphere which was not as conducive to learning as that found in white schools. [15] Further, this educational **[*252]** environment constituted a serious impairment to Class B and C Plaintiffs' ability to learn, especially in the early grades which most educators view as a formative stage in intellectual development. [16]

> 14 Brown, supra note 11, at 494, 74 S. Ct. 686.

> 15 The Defendants at trial attempted to illustrate that at least one white school was older, or more in need of repair, than a black school. The inequality of only one school vis-a-vis only one other school is not the issue in this case. The class action proportion of the instant suit has forced the Court to view the relative quality of the black and white schools from a very broad perspective.

[20]**

> 16 See Fla.Stat. § 230.2311:

> (1) The Legislature recognizes that the early years of a pupil's education are crucial to his future and that mastery of the basic skills of communication and computation is essential to the future educational and personal success of an individual. . . . Early childhood and basic skills development programs shall be made available by the school districts to all school age children, especially those enrolled in kindergarten and grades one through three, and shall provide effective, meaningful, and relevant educational experiences designed to give students at least the minimum skills necessary to function and survive in today's society.

C. THE TRANSITION PHASE (1971-1979)

By the commencement of the school term 1971-1972, the actual physical integration of Florida public schools was generally completed. With integration came a host of human problems. Although children of all races suffered in the initial years of integration, black children suffered to a greater degree. The most significant burden which accompanied black children into the integrated schools was **[**21]** the existence of years of inferior education. Plaintiffs in Classes B and C had attended segregated schools which were inferior for the first four years of their education. Other problems presented to black children were disparate busing schedules, lingering racial stereotypes, disproportionate terminations of black principals and administrators, and a high incidence of suspensions. While the problems enumerated above do not constitute the denial of an equal educational opportunity during this period, they do attest to the difficulty in making significant academic gains. Additionally, the state during part of this period did not offer the leadership or the funding to mount a wide-scale attack on the educational deficits created during segregation. Remediation with specifically delineated objectives and programs did not commence until 1977.

Black children in the period after segregation ended were presented with numerous problems. Not only did the Class B and C Plaintiffs have to adjust to social, cultural and linguistic differences of the integrated schools, but they had to do so without an adequate educational foundation. The vestiges of the inferior elementary education they received **[**22]** still are present and affect their performance. Although remediation is now underway in a meaningful sense, the effects of past purposeful segregation have not been erased or overcome.

D. THE INTENT TO DISCRIMINATE

While Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1977), is instructive that disproportionate impact is "not the sole touchstone of invidious racial discrimination forbidden by the Constitution", it is a relevant factor to be considered. Id. at 242, 96 S. Ct. at 2049. The disproportionate impact of the diploma sanction on black school children imposed by failure of the SSAT II is clear. See Castaneda v. Partida, 430 U.S. 482, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977). The results of the first administration of the SSAT II in October, 1977, indicated that 77% Of the black students taking the mathematics section failed that portion of the test compared to only 24% Of the white students. While numerically less students failed the communication section of SSAT II,

the percentage of failure among black students was eight times that of white students (i. e. 26% Black failures compared to 3% White failures).

The results of the second administration of **[**23]** SSAT II in October, 1978, followed a similar pattern. The percentage of failure among black students was greatly disproportionate to white students. The third and final SSAT II administration results indicated that three times as many black students failed as white students. Since black students comprise approximately one-fifth **[*253]** of Florida public schools, the ratio of black to white failures based on the percentage of population is 10 to 1. Approximately 20% of black students who have taken the test three times have not passed as compared to 1.9% of the twelfth grade white students.

As discussed previously, the policies and practices of local school boards together with the Florida Constitution and statutes attest to the intentional creation and maintenance of a dual school system in Florida. Until the school term 1971-1972, the condition of segregated schools persisted throughout the state. The intent to discriminate in the period 1967-1971 has clearly been identified.

In addition to the evidence of past intent, the Plaintiffs presented evidence relative to present intent. Numerous witnesses who were Florida Department of Education employees testified that they anticipated **[**24]** a high percentage of black failure on the SSAT II. The Defendant, Ralph Turlington, the Florida Commissioner of Education, acknowledged that he also anticipated a high black failure rate with regard to the implementation of the SSAT II testing program. Defendant Turlington additionally admitted that a certain portion of the black failure must be attributed to the inferior education the Plaintiffs in Classes B and C received during the dual school period.(Equal Protection)

With Washington v. Davis, supra, the Supreme Court commenced the redefinition of intent in discrimination cases. [17] Instead of relying solely on disproportionate racial impact, the Court focused on whether an identifiable discriminatory purpose was present. Noting that the Plaintiffs had not asserted a claim for intentional discrimination or purposeful discrimination, the Supreme Court reversed the lower courts' finding of a constitutional violation. In a concurring Opinion Justice Stevens addressed the type of proof necessary to establish discriminatory purpose.

> 17 The Court in this section and Section V. has reviewed a number of law review articles which have been of considerable assistance. Baldwin and Nagan, Board of Regents v. Bakke: The All-American Dilemma Revisited, 30 U.Fla.L.Rev. 843 (1978); Brest, The Supreme Court, 1975 Term-Forward: "In Defense of the Antidiscrimination Principle," 90 Harv.L.Rev. 1 (1976); Lewis, Certifying Functional Literacy: Competency Testing and Implications for due process and Equal Educational Opportunity, 8 J.L. and Educ. 145 (1979); McClung, Competency Testing Programs: Legal and Educational Issues, 47 Fordham L.Rev. 651 (1979); Perry, The Disproportionate Impact Theory of Racial Discrimination, 125 U.Pa.L.Rev. 540 (1977); Tribe, Perspectives on Bakke: Equal Protection, Procedural Fairness or Structural Justice, 92 Harv.L.Rev. 864 (1979); Vernon, due

> process Flexibility in Academic Dismissals: Horowitz and Beyond, 8 J.L. and Educ. 45 (1979); Yudof, Equal Educational Opportunity and the Courts, 51 Texas L.Rev. 411 (1973); Developments in the Law Equal Protection, 82 Harv.L.Rev. 1065 (1969); Note, Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction, 86 Yale L.J. 317 (1976); Note, Proof of Racially Discriminatory Purpose Under the equal protection Clause; Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburg, 12 Harv.C.R.C.L.L.Rev. 725 (1977); Note, Proving Discriminatory Intent from a Facially Neutral Decision with a Disproportionate Impact, 36 Wash. & Lee L.Rev. 109 (1979).

[25]**

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. Id. 426 U.S at 253, 96 S. Ct. at 2054.

In United States v. Texas Education Agency, 564 F.2d 162 (1977), Rehearing denied, 579 F.2d 910 (5th Cir. 1978), Cert. denied, 443 U.S. 915, 99 S. Ct. 3106, 61 L. Ed. 2d 879 (1979) Judge Wisdom addressed the standard for intent after Dayton Board of Education v. Brinkman, 433 U.S. 406, 97 S. Ct. 2766, 53 L. Ed. 2d 851 (1977), Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), and Washington v. Davis, supra. Applying the "objective standard" found in Monroe v. Pape, 365 U.S. 167, 187, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), Judge Wisdom held that "official decisionmakers would be held to have intended the reasonably foreseeable consequences of their decisions". Texas Education **[*254]** Agency, supra at 167. In the instant case, it is clear that the most significant official decision maker, the Commissioner **[**26]** of Education, Ralph Turlington, foresaw that the effect of the implementation of the SSAT II would result in greatly disproportionate numbers of black failures. Even in the face of actual statistics regarding the number of black failures on the field tests and the early administrations, the Commissioner persisted in his opinion that the diploma sanction should be implemented in the 1978-1979 school term. This opinion was maintained even after the Report of the Task Force on Educational Assessment Program, also known as the McCrary Report.(Equal Protection)

The Supreme Court in a recent decision, Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979), discussed the standard for proof of discriminatory intent in a case challenging a veterans preference statute on equal protection grounds. In rejecting a strict foreseeability test, the Court held

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. See United Jewish Organizations v. Carey, 430 U.S. 144, 179, 97 S. Ct. 996, 1016, 51 L. Ed. 2d 229 (concurring opinion). It implies that the decisionmaker, in this case, a state legislature, selected **[**27]** or reaffirmed a particular course of action at least in part

> "because of," not merely "in spite of," its adverse effects upon an identifiable group. Id. at 279 99 S. Ct. at 2296.

In a footnote, however, the Court conceded that inevitability or foreseeability of a consequence has a bearing on the discriminatory intent. Id. note 25, at 279, 99 S. Ct. 2282. While foreseeability was by no means dispositive or the touchstone, it was possible to draw inferences from the action where the adverse consequences were clear and obvious. Whether those inferences, if found, could be dispelled by other legitimate interests was critical to the Court's final determination.

Plaintiffs have not asserted that the Florida legislature in creating the Educational Accountability Act was motivated by racial animus. Plaintiffs, though, have contended that the Commissioner of Education and certain members of the DOE had first hand knowledge of the effects of the test on black school children and the obvious linkage of their performance to the inferior education received during segregation. This information was forwarded to the State Board of Education. The adverse consequences were clear to the State **[**28]** Board of Education at the critical stages of the development and implementation of the SSAT II. (Equal Protection).

The legitimate interest in implementing a test to evaluate the established state-wide objectives is obvious. The minimal objectives established could be continually upgraded and the test could be utilized not only to gauge achievement, but also to identify deficiencies for the purpose of remediation. The legitimate interests in the test program are substantial, but the timing of the program must be questioned to some extent because it sacrifices through the diploma sanction a large percentage of black twelfth grade students in the rush to implement the legislative mandate. While the state Defendants have demonstrated a disregard of the reasons for the disproportionate black failure (i. e. the inferior education received during segregation and the dearth of interim remediation), the Court has not been presented with sufficient proof that the motivation for implementing the program was in Feeney terms "because of" the large black failure statistics. (The Feeney decision was announced after the trial in this case was completed and neither party addressed the issue of intent beyond that posed **[**29]** in United States v. Texas Education Agency, supra, Washington v. Davis, supra, and Arlington Heights, supra. The analysis of the instant decision is not affected by Feeney beyond the question of intent because the Supreme Court has held that neutral mechanisms (i. e. tests) with discriminatory effects are to be analyzed in the same vein as overtly discriminatory mechanisms (i. e. veterans preferences). Feeney, supra, -- - U.S. at -- , 99 S. Ct. 2282.) Although the proof of present intent to discriminate is insufficient, the Court is of the opinion [*255] that past purposeful discrimination affecting Plaintiffs in Classes B and C is perpetuated by the test and the diploma sanction regardless of its neutrality.

The Supreme Court on numerous occasions has invalidated facially neutral programs which perpetuate past racial discrimination. Louisiana v. U. S., 380 U.S. 145, 85 S. Ct. 817, 13 L. Ed. 2d 709 (1965); Guinn v. U. S., 238 U.S. 347, 35 S. Ct. 926, 59 L. Ed. 1340 (1915). In Gaston County v. United States, 395 U.S. 285, 89 S. Ct. 1720, 23 L. Ed. 2d 309 (1969), the Supreme Court held that the use of a literacy test as a method of qualifying voters in North Carolina perpetuated **[**30]** the past denial of equal

educational opportunities. Although the decision was premised on the interpretation of the Voting Rights Act of 1965, the Court addressed a number of issues similar to those presented in the instant case. The Supreme Court focused particularly on the history of educational discrimination in North Carolina finding the "historic maintenance of a dual school system, but (also) . . . substantial evidence that the County deprived its black residents of equal educational opportunity". Id. at 291, 89 S. Ct. at 1723. In finding "it is only reasonable to infer that among black children compelled to endure a segregated and inferior education, fewer will achieve any given degree of literacy than will their better-educated white contemporaries", the Court held "Impartial administration of the literacy test today would serve only to perpetuate the inequities in a different form". Id. at 295, 297, 89 S. Ct. at 1725, 1726. The Fifth Circuit has followed the guidance of the Supreme Court in the perpetuation area. Kirksey v. Board of Supervisors of Hinds County, 528 F.2d 536 (5th Cir. 1976), Rev'd en banc, 554 F.2d 139 (5th Cir. 1977); Meredith v. Fair, 298 F.2d 696 (5th Cir. **[**31]** 1962). Several of the recent Fifth Circuit decisions are worthy of close consideration. In McNeal v. Tate, 508 F.2d 1017 (5th Cir. 1975), and in United States v. Gadsden County School District, 572 F.2d 1049 (5th Cir. 1978), the Fifth Circuit considered the constitutionality Vel non of ability groupings in public schools. [18] In both cases, the ability groupings, which were derived by teacher evaluation and standardized testing, resulted in a high concentration of white students in the upper division or advanced classes and a high concentration of black students in the lower divisions. The McNeal Court focused particularly on the nexus between the inferior education in the dual system and the present ability categorization. Regardless of the fact that the ability groupings fostered segregation, the Court in McNeal proceeded with an analysis which, if proved, would legitimize the segregation. The Court stated:

> 18 The Court will address the application of McNeal And Gadsden County again in Section VI(B) of this Memorandum Opinion relative to the Plaintiffs' allegation that the results of the SSAT II were being used for purposes of resegregation.

[32]**

> If it does cause segregation, whether in classrooms or in schools, ability grouping may nevertheless be permitted in an otherwise unitary system if the . . . method is not based on the present results of past segregation or will remedy such results through better educational opportunities. McNeal, supra at 1020.
>
> The testing rationale of both Singleton [19] and Lemon [20] would bar the use of this method of assignment until the district has operated as a unitary (school) system without such assignments for a sufficient period of time to assure that the underachievement of the slower groups is not due to yesterday's educational disparities. Such a bar period may be lifted when the district can show that steps taken to bring disadvantaged students to peer status have ended the educational disadvantages caused by prior segregation. McNeal, supra at 1020-21.

19 Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1969).

20 Lemon v. Bossier Parish School Board, 444 F.2d 1400 (5th Cir. 1971).

Florida public schools in the main have been physically **[**33]** unitary since 1971. Although the human problems recounted in a previous section have limited the full appreciation **[*256]** of the benefits of a unitary education, the conditions were not such that the system cannot be called unitary. The Defendants have failed to rebut the fact that the disproportionate failure of Class B and C Plaintiffs on the SSAT II resulted from the inferior education they received during the dual school system portion of their education. Defendants have stressed the third component of McNeal and contend the SSAT II, the diploma sanction, and the remediation program will remedy the past effects of discrimination through better educational opportunities. The Defendants emphasized the increase in the percentage of Plaintiffs in Class B and C who have passed the test since its first administration. While the increased passing rate is impressive and Florida teachers and students are to be commended for their achievement, the Court has serious reservations about attaching a constitutional imprimatur to a program which penalizes students who have been denied equal educational opportunity. Certainly the Court wishes that every student could and would pass the SSAT **[**34]** II, but it is not so naive as to assume that there will not be failure regardless of the nature of the test or its takers. Yet failure premised on equal educational opportunities, unaffected by the dual school system of the past is of a completely different genre than that presented in the instant case.

In Green v. County School Board of New Kent County, 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968), the Supreme Court reflected upon the import of Brown I and II.

> It was such a dual systems that 14 years ago Brown I held unconstitutional and a year later Brown II held must be abolished; school boards operating (under) such school systems were required by Brown II "to effectuate a transition to a racially nondiscriminatory school system". Green at 435, 88 S. Ct. at 1693.
>
> Brown II was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary **[**35]** to convert a unitary system in which racial discrimination would be eliminated root and branch. Green, supra at 437-438, 88 S. Ct. at 1694.

After Green Not only was it necessary to eliminate physical segregation of public schools, but it was also necessary to eliminate the effects of such purposeful discrimination. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971). The Supreme Court's decisions in Columbus Board of Education v. Penick, 443 U.S. 449, 99 S. Ct. 2941, 61 L. Ed. 2d 666 (1979) and Dayton Board of Education v. Brinkman, 443 U.S. 526, 99 S. Ct. 2971, 61 L. Ed. 2d 720 (1979)

confirm the Court's analysis in this regard. The Supreme Court in Dayton and Columbus focused on past purposeful segregation in public schools and the effects of such action. The reiteration by the Supreme Court of the affirmative duty to remedy the effects of segregative policies and practices announced in Brown II and followed in Green, Swann, Columbus and Dayton is of particular significance. In the instant case, the principal effect of the dual school system was the inferior education given black school children. The evidence indicates that **[**36]** black school children, in the language of McNeal "still wear (the) badge of their old deprivation underachievement". McNeal, supra at 1019. The effects of racial isolation and the deprivation of equal educational opportunities are again and again cited by Florida school districts in applications for federal funds for educational remediation. While there has been a substantial, but recent effort to eradicate the learning deficits created during the dual school period, the goals of such programs have not been achieved. The results on three administrations of the SSAT II evidence this fact.

The evidence and the ratios of passage of the SSAT II, both numerically and proportionately, indicate that race more than any **[*257]** other factor, including socio-economic status, is a predictor of success on the test. The fact that 20% of the black students failed the SSAT II compared to only 1.9% of the white students indicates that peer status has not been achieved. In the Court's opinion, punishing the victims of past discrimination for deficits created by an inferior educational environment neither constitutes a remedy nor creates better educational opportunities. When students regardless **[**37]** of race are permitted to commence and pursue their education in a unitary school system without the taint of the dual school system, then a graduation requirement based on a neutral test will be permitted. The Court must conclude that utilization of the SSAT II in the present context as a requirement for the receipt of a high school diploma is a violation of the equal protection clause of the Fourteenth Amendment, (STUDENT PREVAILED)42 U.S.C. § 2000d, and 20 U.S.C. § 1703. The Court will discuss in a subsequent section the nature and duration of the injunctive relief to be extended to the Plaintiffs in Classes B and C.

E. THE DEVELOPMENT AND VALIDITY OF THE TEST INSTRUMENT

1. Introduction

In this section the Court will consider the manner in which the test was developed and its validity from both a constitutional and professional testing perspective. The Court is considering the claims in this section as they relate to Classes A, B, and C. The Court will additionally address the effects of the public perceptions of the test as opposed to the state's definition and perceptions of the test. Certain related issues, such as curricular validity and whether the tests were equated, will be discussed in **[**38]** Section V. FUNDAMENTALLY FAIR TEST

2. Test Development

When the Educational Accountability Act became effective on July 1, 1976, it included a provision which required satisfactory performance on an examination of functional literacy for high school graduation in the school year 1978-1979. Fla.Stat. § 232.245(3)

(1977). Although the State Board of Education (i. e. the Governor and Florida Cabinet) was statutorily authorized to approve of the design of the test, the task of formulating a test of functional literacy fell upon the Florida Department of Education.

At the time of the passage of the legislation, the DOE was presented with a formidable task, that of designing a test to meet the scanty legislative language within the strict time limitations established. While the DOE had been working for some time on state-wide objectives for basic skills, it had not been oriented toward designing a functional literacy test. In fact, the Director of the Student Assessment Section of DOE, Dr. Thomas Fisher, summed up the problem in a letter to Senator Donnell C. Childers:

> It is also apparent that most educators have not thought in terms of functional (i. e. practical or applied) skills for high school students, **[**39]** therefore the Department of Education does not have a pre-existent set of functional objectives which may be assessed.
>
> This creates a situation in which we must either create such objectives and then construct matching tests or purchase an existing test thus simultaneously adopting the matching objectives. In other words, in the first case, we define what Florida students should learn and measure it. In the second case, a commercial company tells us what Florida students should learn and this is then measured. Exhibit CT-396.

Soon after this letter, the DOE decided upon objectives for the functional literacy test. Basically, the objectives enumerated in December, 1976, were the practical applications of eleven reading and writing eleventh grade basic skills and thirteen mathematics eleventh grade basic skills. At the same time the objectives were decided upon, the DOE contracted with the Educational Testing Service to draft specific items or questions to match the objectives.

During the period from June, 1976, to February, 1977, the DOE staff was continuing to debate on exactly what "functional **[*258]** literacy" meant. A final definition was promulgated by the **[**40]** DOE on February 18, 1977.

> For purposes of compliance with the Accountability Act of 1976, functional literacy is the satisfactory application of basic skills in reading, writing and arithmetic, to problems and tasks of a practical nature as encountered in everyday life. Exhibit CT-332.

A slight modification of this definition appeared subsequently in both the State Board of Education Rules and the 1978 amendments to the Educational Accountability Act. Rules and Regulations of the State of Florida, Chapter 6A-1.942(2)(a) (1978); Fla.Stat. § 232.246(1)(b) (1978 Supp.).

In March, 1977, the Educational Testing Service provided the DOE with sample items. The DOE at the same time leased several items from another commercial testing company. A field test was conducted in the latter part of March, 1977, in five Florida counties. After the field test, the DOE entered into a contract with the Educational

Testing Service to write item specifications from the items or questions previously drafted. An item specification is essentially a blueprint for a particular question which permits an item writer to design numerous questions using the same assessment criteria but with different **[**41]** factual contexts.

The functional literacy examination which was administered in October, 1977, contained 117 questions covering the twenty-four skill objectives. The test is a criterion-referenced examination; that is, one designed to assess whether the taker has a mastery or competence in the particular skills tested. The functional literacy examination was not designed to rank students vis-a-vis other students, although it obviously sorts out passers and failers by use of a cut-score. The test was created to evaluate achievement in those skills which the DOE and the State Board of Education deemed necessary to meet the legislative mandate of functional literacy.

After the initial administration of the functional literacy test, the DOE contracted with National Evaluation Systems to design additional test items. Utilizing the item specifications created by the Educational Testing Center, National Education Systems produced 240 additional test questions in January, 1978. Those items were field tested in the Spring of 1978.

The test and the item specifications are secure documents. The DOE has labored continuously since the creation of the test to make certain that no test is either **[**42]** stolen or reproduced. Although there have been several breaches of the security precautions, the test has remained, except to eleventh and twelfth grade public school students, a well kept secret.

Before discussing the validity issues, the Court must refer to a matter which is at the crux of the controversy between the litigants. The test as legislatively created was to be one of functional literacy. Functional literacy has not been defined in a way which is acceptable to either all educational academicians or the public. The testimony, in fact, indicates that there are at least eleven known definitions of functional literacy. What is functional literacy to one person may not be functional literacy to another person, but it is clear that the term "functional illiterate" has a universally negative inference and connotation. While "Illiteracy" is itself a negative and impact ladened word, "Functional illiteracy" further compounds these implications by focusing on the individual's inability to operate effectively in society. The categorizing of an individual without reference to a specific standard can be both detrimental and debilitating without justification. As one of the Plaintiffs' **[**43]** experts commented, students who fail the functional literacy test perceive of themselves as "global failures". Another of the Plaintiffs' experts testified that the biggest flaw in the Florida program was its name alone. The Court is in complete agreement. Beyond the economic and academic implications of failure on the test, the stigma associated with the term functional illiteracy is the most substantial harm presented.

[*259] While the Court recognizes this, problem, it cannot be oblivious to the definition of functional literacy provided by the DOE, ratified by the State Board of Education, and legislatively approved. While the meaning of functional literacy is clear to the reader of

the amended statute or the Rules of the State Board of Education, it is not to the Florida public. In an attempt to escape the impact of the terminology utilized in the original statute, the State Board of Education adopted a new name for the functional literacy test: the State Student Assessment Test II (SSAT II). Still the test remains the Florida functional literacy examination in the mind of the public and the name change has not dispelled the implications of the original denomination. Regardless **[**44]** of how the public perceives the test, the Court must analyze it from the definition [21] provided by the state in conjunction with the twenty-four objectives. [22] The Court must not permit public perceptions to be the guide for statutory interpretation.

21 See Exhibit CT-332, quoted at page 258 Supra.

22 Rules and Regulations of the State of Florida, Chapter 6A-1.942(2)(a) (1978) provides:

(2) State Student Assessment Test Part II

(a) . . . The test shall be:

1. Designed to measure the student's ability to successfully apply basic skills to everyday life situations.

2. Composed of two (2) standards, one (1) comprising functional communication skills and one (1) comprising functional mathematics skills, as follows:

(a) Communications.

The student will, in a real world situation, determine the main idea inferred from a selection.

The student will, in a real world situation, find who, what, where, which, and how information in a selection.

The student will, in a real world situation, determine the inferred cause and effect of an action.

The student will, in a real world situation, distinguish between facts and opinions.

The student will, in a real world situation, identify an unstated opinion.

The student will, in a real world situation, identify the appropriate source to obtain information on a topic.

The student will, in a real world situation, use an index to identify the location of information requiring the use of cross-references.

The student will use highway and city maps.

The student will include the necessary information when writing letters to supply or request information.

The student will complete a check and its stub accurately.

The student will accurately complete forms used to apply for a driver's license, employment, entrance to a school or training program, insurance, and credit.

b. Mathematics

The student will determine the elapsed time between two (2) events stated in seconds, minutes, hours, days, weeks, months, or years.

The student will determine equivalent amounts of up to one hundred dollars ($ 100.00) using coins and paper currency.

The student will determine the solution to real world problems involving one (1) or two (2) distinct whole number operations.

The student will determine the solution to real world problems involving decimal fractions or percents and one (1) or two (2) distinct operations.

The student will determine the solution to real world problems involving comparison shopping.

The student will determine the solution to real world problems involving rate of interest and the estimation of the amount of simple interest.

The student will determine the solution to real world problems involving purchases and a rate of sales tax.

The student will determine the solution to real world problems involving purchases and a rate of discount given in fraction or percent form.

The student will solve a problem related to length, width, or height using metric or customary units up to kilometers and miles, conversion within the system.

The student will solve a problem involving the area of a rectangular region using metric or customary units.

The student will solve a problem involving capacity using units given in a table (milliliters, liters, teaspoons, cups, pints, quarts, gallons), conversion within the system.

The student will solve a problem involving weight using units given in a table (milligrams, grams, kilograms, metric tons, ounces, pounds, tons), conversion within the system.

The student will read and determine relationships described by line graphs, circle graphs, and tables.

[45]**

Prior to analyzing the evidence presented concerning the validity of the test, it is critical to understand the applicable legal **[*260]** standards. The Plaintiffs contend that the test is violative of both the due process clause and equal protection clause of the Fourteenth Amendment. Under the Plaintiffs' due process analysis, if the test were shown to be arbitrary and unreasonable, then the Court would be compelled to invalidate it. (Due Process) Thompson v. Gallagher, 489 F.2d 443 (5th Cir. 1973). Similarly, if the test by dividing students into two categories, passers and failers, did so without a rational relation to the purpose for which it was designed, then the Court would be compelled to find the test unconstitutional. Reed v. Reed, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971); Lindsley v. Natural Carbonic Gas Co. 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369 (1911). While the Court can find no decision which is directly on point, several recent decisions involving the utilization of tests for employment purposes warrant consideration. In Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971), the Supreme Court focused on the statutory language in Title VII **[**46]** of the Civil Rights Act to prohibit the utilization of required tests for purposes of employment which have a discriminatory impact if they are unrelated to job qualification or performance. In a case decided solely on constitutional grounds, the Fifth Circuit in Armstead v. Starkville Municipal Separate School District, 461 F.2d 276 (5th Cir. 1972) decided that the use of the Graduate Record Examination (GRE) for hiring and retention of high school teachers was unconstitutional. Finding that the GRE scores created an absolute classification of teachers into two categories, those qualified and those unqualified, the Court then proceeded to determine whether the test was a valid and reliable mechanism for making such a decision. In finding that it was not reasonably related to its purpose, the Court held:

> We agree with the lower Court's finding that GRE score requirement was not a reliable or valid measure for choosing good teachers. It was undisputed that the GRE was not designed to and could not measure the competency of a teacher or even indicate future teacher effectiveness. However, it was established that the cut-off score would eliminate some good teachers. Consequently we **[**47]** find that it has no reasonable function in the teacher selection process. Armstead, supra at 280.

In the instant case, the Court must determine whether the test utilized was a valid and reasonable measure for dividing students into classifications for the purpose of high school graduation (Due Process). While the Courts in Griggs and Armstead concerned themselves with the job relatedness facet of the test, the Court in this case can only be concerned with whether the test reasonably or arbitrarily evaluates the skill objectives established by the State Board of Education. Thus, the Court must not focus on the title of the test or the public perceptions of functional literacy, but rather must analyze the test from the perspective of its objectives and the definition provided by its designers.

Both parties agree that the functional literacy test should have content validity, but they disagree as to whether the test does, in fact, have content validity.

> Evidence of content validity is required when the test user wishes to estimate how an individual performs in the universe of situations the test is intended

> to represent. Content validity is most commonly evaluated for tests of skill or knowledge; [**48] . . .
>
> "To demonstrate the content validity of a set of test scores, one must show that the behaviors demonstrated in testing constitute a representative sample of behaviors to be exhibited in a desired performance domain. American Psychological Association, Standards for Educational and Psychological Tests, 28 (1974)."

The Plaintiffs have persistently contended that the Florida test domain or the boundary for the designated skills or knowledge does not match any definition of functional literacy. While the Court would agree that the domain of the Florida test does not equate with every definition of functional literacy or for that matter with many definitions, it does match the one given by the [*261] DOE and the State Board of Education. It would also appear that the Florida legislature is satisfied with the manner in which the State Board of Education has fulfilled its mandate. The Court is satisfied that the skill objectives of the Florida test are adequately evaluated by the test items and that the test has adequate content validity. DUE PROCESS

Whether the functional literacy test has or needs to have construct validity is another disputed issue. The Plaintiffs contend [**49] that the test must have construct validity and it does not. The Defendants contend that construct validity is not essential for the test, but it has it anyway. A construct is a "theoretical idea developed to explain and organize some aspects of existing knowledge". Id. at 29. Certainly "functional literacy" is, in the abstract, like "anxiety" or "clerical ability" a construct. Functional literacy in the instant case, however, is a construct about which only limited hypotheses can be made. The definition of functional literacy provided by the state does not attempt to address and resolve all the many hypotheses which can be made about functional literacy. In the Court's evaluation it need not. Particularly instructive of this fact is a statement found in the construct validity section of the American Psychological Association's Standards covering testing.

> It is important to note in this that the investigation of construct validity refers to a specific test and not necessarily to any other test given the same label. Id. at 30. (Due ProcesS).

Thus while other states may design tests of functional literacy, they need not all conceive of functional literacy in the same fashion for their tests [**50] to have construct validity. A construct is always capable of definition and the measure of a test's construct validity is whether the hypotheses made about the defined construct will predict behavior. In the instant case, the Court is satisfied that the Florida test has adequate construct validity. EDUCATIONAL AGENCY PREVAILED

The Court has also considered the other alleged flaws [23] in the test development and instrument and find them to be without constitutional merit. The educational experts presented by the Plaintiffs have given the Court an education in "state of the art" educational measurement and testing. But the "state of the art" is not to be equated with the constitutional standards for Fourteenth Amendment due process and equal protection

review. The Court is of the opinion the functional literacy test bears a rational relation to a valid state interest and thus is constitutional (Nexus to State Goals).

> 23 The Plaintiffs mounted a frontal assault upon a number of practices and procedures utilized by the DOE in the design and implementation of the test. Among the flaws asserted and considered were: the failure of DOE to solicit public input into the design of the test and its definition; the drafting of item specifications after the writing of items; the continual use by DOE of definitions of functional literacy extraneous and inconsistent with the official definition; the inadequacy of the research prior to the selection of a cut-score; the questionable research methodology of the Defendants' construct validity study; the failure to follow the APA standards for the design and implementation of tests which affect the lives of the takers in a significant fashion; the failure of DOE to adequately publicize what the test is and its inherent limitations; the inadequacy of the form notice sent to parents and students regarding the interpretations of scores on the test; the reliability of the test. While some of the above mentioned flaws were indeed errors of considerable magnitude, they do not cross either individually or collectively the line between inadequacy and constitutional infirmity.

[51]**

F. TEST ITEMS BIAS

The Plaintiffs contend that the functional literacy test consists of racially biased test questions or items which are less likely to be correctly answered by black students than by white students.

The evidence indicates that the professional testing companies which wrote the items for the functional literacy test reviewed the items for possible racial or ethnic bias. Additionally the DOE staff with the assistance of groups of teachers analyzed the test questions for possible racial bias. The DOE also commissioned a scatter plot analysis of the test to determine the possibility of item bias. While some of the questions do seem to have factual settings unfamiliar to certain racial groups, the **[*262]** Court is of the opinion that this distraction is minimal and unpervasive. The Court is not convinced by the Plaintiffs' evidence that the test or any item should be invalidated for racial or ethnic bias.(Equal Protection: Discrimination) EDUCATIONAL AGENCY PREVAILED

G. THE APPLICATION OF THE SSAT II TO PRIVATE SCHOOLS

1. Introduction

The Plaintiffs contend that the application of the SSAT II testing program to only public schools is a violation of the equal protection and due process clauses of the Fourteenth Amendment. **[**52]** The Plaintiffs have set forth several arguments in this regard. Plaintiffs in Classes B and C first contend that the application of the test to only public schools creates a racial classification. Because of black students' financial inability to attend private schools, they are unable to escape the effect of the test as readily as many white students. Plaintiffs in all classes contend that the application of the test to only

public schools does not bear a rational relationship to the alleged purpose of the legislation. Plaintiffs on this ground assert that the state has an interest in assuring that All of its students, not just public school students, receive instruction in basic practical application skills.(Equal Protection: Discrimination).

2. Private Schools in Florida

Private schools in Florida today educate approximately 10% of the school age students. Prior to desegregation, 8% of the school age children attended private schools. This relative increase in attendance at private schools has outpaced the growth of the state population. In 1960, black students composed 4% of the students attending private schools. By 1970, the percentage of black students in private schools had increased to 5%. Thus at present, [**53] approximately 95% of the students attending private schools are white. The racial composition of Florida public schools is 20% Black students and 80% White students.

3. The State Regulation of Florida Private Schools

Florida private schools are regulated only to a minimal degree. The principal form of regulation is found in Fla.Stat. § 229.808 which requires annual registration. The entire registration process consists of filing a form with only four questions: "the name and address of the institution, names of administrative officers, enrollment, and number of teachers." Id. at § 229.808(1). The exemptions to the registration act essentially void its limited effectiveness. Id. at § 229.808(2). Besides registration, private schools' only other state imposed regulation is that they keep attendance records. Fla.Stat. §§ 232.02, 232.021.

The State of Florida does not regulate any substantive matter affecting education in private schools. There are no regulations regarding instruction in basic skills or in any way mandating a curriculum. The State of Florida does not accredit private schools and does not require them to be accredited by any professional accrediting association. Instruction [**54] in Florida private schools need not be in English, in fact, at least ten schools in Dade County which grant diplomas give instruction in Spanish. Additionally, one school in West Florida teaches its students in Urdu (a Pakistani language). A graduation diploma from any Florida private school meets the state's employment criteria for jobs requiring a diploma. Likewise, a diploma from a Florida private school will meet the initial requirement for admission to one of Florida's state universities.

4. Constitutionality

The Plaintiffs in Classes B and C have attempted to align race with the financial inability (i. e. lack of wealth) to attend private schools. From this alignment, the Plaintiffs would urge application of strict scrutiny to the legislative decision not to apply the SSAT II to private schools. Such an analysis is constitutionally without merit.EDUCATIONAL AGENCY PREVAILED

The Supreme Court in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1978) held that classifications based on [*263] wealth

were not constitutionally suspect, thus not requiring strict scrutiny. The ability to attend private schools is clearly affected by the student's or his **[**55]** parents' financial resources. While it is also clear that blacks in America, as a class, are without substantial financial resources, these two categories, wealth and race, do not merge in this instance into one suspect classification. Quite often decisions of legislative or administrative bodies affect certain groups disproportionately. This alone does not signal strict scrutiny. New York City Transit Authority v. Beazer, 440 U.S. 568, 99 S. Ct. 1355, 59 L. Ed. 2d 587 (1979).

The legislative decision to apply the SSAT II only to public schools also passes constitutional muster under the rational relation analysis. As the Supreme Court stated in Ambach v. Norwick, 441 U.S. 68, 99 S. Ct. 1589, 60 L. Ed. 2d 49 (1979), "(t)he State has a stronger interest in ensuring that the schools it most directly controls, and for which it bears the cost, are as effective as possible . . . ." Id. note 8, 99 S. Ct. at 1595. The state need not correct all the problems of education in one clean sweep, but can attack the problems it identifies in a logical fashion. The decision made in the instant case to apply the SSAT II only to public schools over which the state already had significant curricular, **[**56]** instructional, and financial control was both reasonable and constitutional.

Whether the state could require the taking and passage of the SSAT II for a diploma in private schools and subsidize the cost is not the question presented herein. The Supreme Court will address this issue in its next term. . Committee for Public Education and Religious Liberty v. Levitt, 461 F. Supp. 1123 (S.D.N.Y.1978) cert. granted, 440 U.S. 978, 99 S. Ct. 1785, 60 L. Ed. 2d 238 (1979).

V

SECOND CLAIM

A. INTRODUCTION

In this section, the Court will consider the allegations of the Plaintiffs in all classes in the second count of the complaint concerning the adequacy of the notice prior to and since the implementation of the functional literacy testing program. The Court will also consider the adequacy of the time to prepare for the examination after the objectives were first established. The Plaintiffs' allegations in this claim state that the schedule imposed by the Defendants violated their Fourteenth Amendment due process rights.(Due Process: Procedural: Adequate Notice).

While the Court in Section IV. has discussed the development of the test instrument itself, the Court in this section will review the development of the test in relation to **[**57]** the testing objectives, the implementation schedule and the state-wide, in-school instruction. The Court will also consider in this section whether the test instruments were equated.

B. THE TESTING SCHEDULE

In April, 1977, the State Board of Education formally approved the DOE draft of the Minimum Student Performance Standards. The Standards established objectives for

instruction in mathematics and communication skills for grades 3, 5, 8 and 11. The functional literacy objectives were derived from eleventh grade basic skills objectives. While there had been considerable in-put from public school teachers during the development of the basic skills objectives, the DOE staff designed all the functional literacy objectives without external assistance. Basically, the DOE staff redesigned twenty-four of the basic skill objectives so that they would present the objectives in practical application contexts. During the summer of 1977, the DOE distributed to all Florida public schools the basic skill and functional literacy objectives. It thus appears that public school teachers were aware of the objectives of the functional literacy examination four months in advance of the first administration **[**58]** of the test, but only two months were available for instruction in the application of the skills. The results of the first administration reflect the obvious inadequacy of the prior instruction in the stated objectives.

[*264] From December, 1977, the date the results of the first administration were released, until April, 1979, the date the third and last administration was held, only thirteen months of instructional time intervened. During this period remediation classes for those students who failed were held in almost every Florida county. The DOE had designed instructional materials to assist in the remediation programs, but those materials were not immediately available. During the Spring of 1978, the remediation programs with the assistance of state funds were working effectively. The programs for remediation in most counties are presently on-going and have received additional state funding.(Due Process:Procedural: Adequate Notice)

C. INSTRUCTION IN FLORIDA PUBLIC SCHOOLS

Aside from the questions of the sufficiency of the instruction since the announcement of the functional literacy objectives and the adequacy of the time to prepare for the objectives, the Court must inquire into the instruction of the objectives **[**59]** prior to the implementation of the act. Historically, Florida public education has been administered solely by sixty-seven autonomous county school boards. Each school board controlled the design of the curriculum, the selection of the required textbooks and the establishment of graduation requirements. With local school boards in a controlling position, the interests of the county and their particular region of the state would dictate educational emphasis. The nuances of instruction and objectives would differ greatly between the various counties. The texts used in Florida counties varied a great deal. There was no uniformity as to the selection of instructional materials until very recently. Even now when the DOE approves several texts for use for individual courses in the schools, no one text contains all of the functional literacy objectives. In fact, a review of several texts is necessary for complete instruction in the mathematics or communications functional literacy objectives. After the adoption of the 1968 Florida Constitution, the legislature and the DOE began to play a more centralized role in the education of Florida public school children. The DOE began to plan for basic **[**60]** skill objectives in 1972-1973 and implemented testing programs to evaluate the success of such instruction, but throughout the period of the Plaintiffs' education, the individual counties remained the single most important entities for the design and implementation of instructional programs and the selection of textbooks. CURRICULAR VALIDITY

This problem is indicative of a much larger issue. Although there is evidence that certain skills were not taught in Florida public schools, let us assume Arguendo that all the skills were taught. The atmosphere of the instruction prior to the implementation of the basic skills and functional literacy objectives was neutral and devoid of the present objectives. While all instruction is important, there are obvious methods of motivating students and emphasizing certain skills. The principal problem with the instant program is that the instruction in previous years took place in an atmosphere without the specific objectives now present and without the diploma sanction. Instruction of the skills necessary to successfully complete the functional literacy test is a cumulative and time consuming process. Knowledge of how to successfully perform the functional literacy **[**61]** skills is not taught in any specific grade, in any specific class, or from any specific type of teacher. It is critical that at the time of instruction of a functional literacy skill, the student knows that the individual skill he is being taught must be learned prior to his graduation from a Florida public school. Instruction in the specific skills is critical, but likewise so is identification of whether the skills have been learned. Teaching and learning are not always coterminous. Fla.Stat. § 236.088. Until recently, there was no state-wide testing program to evaluate learning and to direct remediation.

The Plaintiffs' expert witnesses testified that the principal problem with the testing program was not the diploma sanction or the announcement of state-wide objectives but the implementation schedule. The Court is in agreement that the present program **[*265]** of instruction in specific basic skill and functional applications with periodic testing to identify both mastery and deficiencies is a step forward. It sets objectives, defines goals, evaluates achievement and, if necessary, remediates deficiencies. The program acclimates students to standardized testing and will relieve **[**62]** some of the immense pressure when it comes time to take the functional literacy examination. The benefits of the overall program inure differentially to those students who have been in the system for longer periods of time. But as asserted by one of the Plaintiffs' witnesses, "the functional literacy program was a test looking for a plan of instruction".

The Report of Task Force on Educational Assessment Programs, which was appointed by the State Board of Education, summarized the timing problems in the following fashion:

> The problems created by the abrupt schedule for implementing the Functional Literacy Test were most severe for the members of Florida high school graduation class of 1979. At the eleventh hour and with virtually no warning, these students were told that the requirements for graduation had been changed. They were suddenly required to pass a test constructed under the pressure of time and covering content that was presumed to be elementary but that their schools may or may not have taught them recently, well, or perhaps at all.
>
> In retrospect, the Task Force believes that the schedule for implementing state-wide high school graduation standards was too **[**63]** severe. We feel that most of the problems that are identified in later sections of this report are the result of trying to do too much in too little time. Consequently, we believe that the problems can and will be solved over time. Task Force on

Educational Assessment Programs, Competency Testing in Florida Report to the Florida Cabinet (Part 1) 4 (1979).

While the problems identified by the Court and the Task Force are major issues, they are compounded by requiring passage of the functional literacy examination for graduation. If the functional literacy testing program were designed to evaluate skills to aid in remediation alone, then the Court would not find the program suspect in any fashion not already identified. While the Defendants contend the diploma sanction is an essential facet of the program which increases the stimulus to learn and the motivation to achieve, the Plaintiffs contend that the diploma sanction is a punitive measure which is excessive and not the least restrictive manner in which to achieve the goals identified by the state. In Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976), the Fifth Circuit considered the application of due process standards **[**64]** to the denial of an academic degree. In that case the Plaintiff, who was pursuing a graduate degree in education, objected on constitutional and contractual grounds to the university's decision to require a comprehensive examination for receipt of the degree after the commencement of her studies. While the Fifth Circuit reversed the District Court's grant of injunctive relief, it did so on the basis of an analysis of the facts. The Court, in doing so, implicitly acknowledged that termination for academic reasons created a due process right to timely notice.

The Supreme Court in Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978), decided last term that Charlotte Horowitz, the Plaintiff, who had been terminated from medical school for academic reasons, had been afforded ample due process and refused to require a pre-termination hearing. In support of the constitutional ruling, the Court singled out the manifest problems with the intervention of the judiciary into the realm of academic evaluation. Although the Court in a footnote cited with approval the statement that " "(t) here is a clear dichotomy between the student's due **[**65]** process rights in disciplinary dismissals and academic dismissals' ", the distinction between what the rights of the two classes of individuals are is not clearly and unequivocally drawn.

[*266] In Horowitz the Plaintiff had been evaluated in her clinical rotations by a number of physicians in addition to having her work supervised and critiqued by her chief docent. The Plaintiff received repeated warnings of her substandard performance and was placed on academic probation by the Council of Evaluation, a group of physicians and medical students who reviewed academic performance. After further review and recommendations the Council of Evaluation decided that the Plaintiff should not be permitted to graduate. This decision was approved by the Coordinating Committee and the Dean of the Medical School and was also sustained by the University's Provost for Health Services. Considering the practical problems with judicial reevaluation of academic performance and the facts relative to Ms. Horowitz's particular case, the Court decided that the Plaintiff had received adequate due process and a pre-termination hearing was not necessary.

The practical problems in Horowitz were manifest. **[**66]** Sifting through an individual student's past clinical record, rehashing physician evaluations, and litigating bedside

manner were problems foreign to judicial expertise. The factual context in the instant case is very different. The Court is not asked to evaluate an individual student's performance, but to resolve a dispute involving the legislative decision to implement a test which determines graduation from high school with the standard credential, a diploma. While the factual inquiry is considerably different so are the parties. The Plaintiff in Horowitz was pursuing graduate education in advanced studies. The Plaintiffs in all classes in the instant case were participating in secondary education required by the state compulsory education law. Fla.Stat. § 232.01 Et seq. Although some of the Plaintiffs are beyond the sixteen year age limitation in the Florida Statute, the majority of the time they have spent in the Florida public schools was required.

The Court is convinced that the Plaintiffs in Classes A, B, and C have a property right in graduation from high school with a standard diploma if they have fulfilled the present requirements for graduation exclusive of the SSAT II **[**67]** requirement (i. e. successful performance on the SSAT I and completion of the necessary number of credits). Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975). The Supreme Court in Goss recognized that even the suspension of a student for one day infringed upon the students' property right in attending school. Students in Florida are required to attend school pursuant to the state's compulsory attendance statute. Fla.Stat. § 232.01 Et seq. Graduation is the logical extension of successful attendance. While the state has redefined in a sense what successful attendance for purposes of a diploma should be, the Court is of the opinion that the SSAT II requirement should be excluded for the same reasons that the notice of the test has been shown to be inadequate. The Court is also of the opinion that the Plaintiffs have a liberty interest in being free of the adverse stigma associated with the certificate of completion. Wisconsin v. Constantineau, 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971). This stigma is very real and will affect the economic and psychological development of the individual. Although public disclosure of the different graduation credentials did **[**68]** not occur this year, the only reason for this was a settlement between the parties so as to avoid the necessity of the Court hearing preliminary injunction motions during the middle of the trial. (Due Process: Establishing a Property Right and Interest).

Due process has and always will be a flexible standard dependent upon the facts and circumstances of each individual case. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961).

> " "Due process,' unlike some legal rules is not a technical conception with a fixed content unrelated to time, place and circumstances." It is "compounded of history, reason, the past course of decisions." Id. at 895, 81 S. Ct. at 1748 (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162, 71 S. Ct. 624, 643-644, 95 L. Ed. 817 (1951)).

[*267] The Court finds the facts in the instant case compelling. The Plaintiffs, after spending ten years in schools where their attendance was compelled, were informed of a requirement concerning skills which, if taught, should have been taught in grades they had long since completed. While it is impossible to determine if all the skills were taught to all the students, it is obvious that the instruction **[**69]** given was not presented in an

educational atmosphere directed by the existence of specific objectives and stimulated throughout the period of instruction by a diploma sanction. CURRICULAR VALIDITY These are the two ingredients which the Defendants assert are essential to the program at the present time. The Court is of the opinion that the inadequacy of the notice provided prior to the invocation of the diploma sanction, the objectives, and the test is a violation of the due process clause. (Due Process: Procedural: Adequate Notice) STUDENT PREVAILED

Since the time of the release of the results of the first test, remediation classes have been attempting to teach the skills. The effectiveness of the remediation programs is somewhat in doubt at the present time because of the failure of the state defendants to carry out equating studies REMEDIATION. These studies would have shown the relative degree of difficulty among the three administrations of the functional literacy test. Based on the present evidence it is impossible to determine whether the tests are becoming easier or whether the remediation program is accomplishing its goal. In either event, large numbers of students have not passed the functional literacy test. The evidence indicates that the instruction of functional **[**70]** literacy skills to older students is more difficult, particularly because the unidentified deficiencies of earlier years have become ingrained. The expert testimony upon which the Court has relied indicates that four to six years should intervene between the announcement of the objectives and the implementation of the diploma sanction.(Due Process: Procedural: Adequate Notice) While the Court is loathe to interfere in the operations of the Florida public schools, it is compelled to act because of its constitutional obligation. The Defendants had other constitutionally acceptable alternatives such as phased introduction of the objectives in all grades without the diploma sanction and longer term remediation. The Court cannot help but focus on the fact that the present Plaintiffs in all classes have been the victims of segregation, social promotion and various other educational ills but have persisted and remained in school and should not now, at this late date, be denied the diplomas they have earned by mastery of the basic skills and completion of the minimum number of academic credits.

The Defendants are concerned that the momentum, interest, credibility, and support of Florida public education now present will be undermined **[**71]** if the Court finds the test or the implementation schedule invalid. The Defendants are further concerned that they will be without a sanction or deterrent if the Court voids the linkage of the functional literacy test to the diploma. While the denial of the diploma has a certain deterrent value, its application in the instant case would be analogous to asserting that the immediate and indefinite incarceration without a trial of an individual upon the suspicion of the commission of a crime would have a deterrent effect on other potential offenders. No doubt it would. But in our country, the Constitution, including the due process clause, stands between the arbitrary government action and the innocent individual. St. Ann v. Palisi, 495 F.2d 423 (5th Cir. 1974). The implementation schedule in effect relative to the functional literacy testing program with the diploma sanction is fundamentally unfair. The Court in Section VIII will discuss the nature and extent of injunctive relief to be extended to all Plaintiffs.

VI

THIRD CLAIM

A. INTRODUCTION

The Plaintiffs in Classes B and C contend in their third claim that the utilization of the SSAT II to classify and group students for remediation **[**72]** pursuant to the Compensatory Education Act of 1977, Fla.Stat. **[*268]** § 236.088, perpetuates the effects of past purposeful discrimination and resegregates them in violation of the Fourteenth Amendment, 42 U.S.C. § 2000d and 20 U.S.C. § 1703. The Plaintiffs in these classes further assert that the Defendants foresaw that a substantial number of black twelfth grade students would fail the SSAT II and thus would be placed in compensatory education classes with high proportions of black children and low proportions of white children. (Equal Protection)

B. RESEGREGATION

The evidence indicates that the compensatory education program for those students who have failed the SSAT II is disproportionately composed of black children. This is attributable to the fact that more black children have failed the SSAT II than white children. The reason for this has been fully explained elsewhere in this Opinion. Although the Court has found in a previous section that the test is valid and reliable, at least for the purpose of identifying certain skill deficiencies, it has also found that the test perpetuates the effects of past purposeful discrimination. The final question, one posed in McNeal, supra, and Gadsden **[**73]** County, supra, is whether the testing program along with the compensatory education classes, although they cause resegregation of certain classrooms, will remedy the present effects of past discrimination through better educational opportunities.

In addressing this question, the Court must reflect upon the evidence produced upon this issue. While the compensatory education classification results in disproportionate numbers of black children being placed in the classes, the evidence indicates that the pupil alignment in the compensatory education programs is not static. The progression of students out of the compensatory education program seems to be fluid and the increase in the passage percentages evidence the efficacy of the program. Additionally, the compensatory education program constitutes only at most two classes or hours per day. The remainder of the school day is spent in regular classes which do not contain this disproportionate racial composition. The defendants must be constantly wary that the utilization of the SSAT I and II and the compensatory education program do not isolate and stigmatize any children for longer than is necessary to compensate for the identified deficits. **[**74]** Thus far the record is clear that the purpose of the compensatory education program is to assist students and not to resegregate them. The state's obligation to instruct and remediate all students relative to the SSAT II skills has been commenced. The results of the program are encouraging although serious questions concerning equating are still unresolved. The legislature has given the program ample financial support and hopefully it will do so in the future. By the end of the Court's injunction, all students should be ready and able to compete on an equal footing. Thus while the diploma sanction punishes those who suffered under segregation, the compensatory

education program assists him. The McNeal rationale for permitting the program to exist, regardless of its disproportionate racial composition has been satisfied as to the compensatory education facet, but not by the diploma sanction. Accordingly, the Court finds that there has been neither a constitutional nor a statutory violation because of the utilization of the results of SSAT II as a mechanism for remediation even if the compensatory education classrooms are disproportionately black.(Equal Protection: Discrimination: Resegregation).EDUCATIONAL AGENCY PREVAILED

VII

CONCLUSION

In 1954 the Supreme **[**75]** Court recognized the essential role of public education in our society.

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed **[*269]** forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. Brown v. Board of Education, 347 U.S. 483, 493, 74 S. Ct. 686, 691, 98 L. Ed. 873 (1954).

Because of this seminal role, it is critical to Provide and Administer education in a manner which comports with our historical and constitutional notions of fairness and equality. Any deviation from this course would seriously affect not only the individual student but our society as a whole. The Court has herein noted several breaches of this fundamental responsibility of government and has been compelled to act. **[**76]** The injunctive relief granted will be of a limited duration, only that time necessary to purge the taint of past segregation and inadequate notice. At the end of the injunctive period, the state will be permitted to pursue its educational policies and goals free of intervention.

VIII

DECLARATORY AND INJUNCTIVE RELIEF

Pursuant to the findings in Sections IV. D. and V, the Court is of the opinion that declaratory and injunctive relief are both appropriate and proper in the present instance. In a separate Order the Court will declare that Fla.Stat. § 232.246(1)(b) (1978 Supp.) is, as applied, in the present context a violation of the equal protection and due process clauses of the Fourteenth Amendment. 42 U.S.C. § 2000d, and 20 U.S.C. § 1703. The two remaining requirements for graduation found in Fla.Stat. § 232.246(1)(a) and (c) (1978 Supp.) remain in full force and effect.

In light of the evidence relating to the necessary period of time to orient the students and teachers to the new functional literacy objectives, to insure instruction in the objectives, and to eliminate the taint on educational development which accompanied segregation, the Court is of the opinion that the **[**77]** state should be enjoined from requiring passage of the SSAT II as a requirement for graduation for a period of four (4) years. In the school term 1982-1983, the state will be permitted to utilize the SSAT II as a requirement for graduation. In the interim the SSAT II can be administered as directed by the State DOE to assist in the identification and remediation of the SSAT II skill objectives. The state Defendants will be permitted to retain the SSAT II scores in a fashion consistent with the manner in which the state retains other achievement test scores.STUDENT PREVAILED

The Court is of the opinion that the present remediation program is not constitutionally or statutorily invalid. The progress of students out of the program and the limited duration of the daily instruction comports with applicable standards.EDUCATIONAL AGENCY PREVAILED

DONE AND ORDERED in Chambers in Jacksonville, Florida this 12th day of July, 1979.

JOHN G. BRADY, et al., Appellants, v. RALPH TURLINGTON, as Commissioner of Education, et al., Appellees

No. MM-97

Court of Appeal of Florida, First District

372 So. 2d 1164; 1979 Fla. App. LEXIS 15192

July 17, 1979

COUNSEL: [**1] Ralph Armstead, Anna Bryant Motter, Jack L. McLean, Jr., Larry K. White and Kristine Knab of Legal Services of North Florida, Inc., Tallahassee, for appellants.

James D. Little, Gen. Counsel, Miami, and Judith A. Brechner, Deputy Gen. Counsel, State Board of Education, Gainesville, for appellees.

JUDGES: MILLS, Chief Judge, ROBERT SMITH, J. and HENRY CLAY MITCHELL, JR., Associate Judge, concur.

OPINION BY: PER CURIAM

OPINION

[*1165] PER CURIAM.

In a rule challenge proceeding a hearing officer of the Division of Administrative Hearings, Department of Administration, upheld a rule of the State Board of Education requiring that students attempting to qualify for a high school diploma must show attainment of minimum performance standards as measured by a State Student Assessment Test taken before or after the effective date of the rule. As against appellants' claim of an illegal retroactive application of the rule, the hearing officer held that "the proposed rule simply defines mastery and ability and, through the rescoring of existing test results, seeks to apply this definition to students who will graduate this year." In operation the rule exempts from retaking the test those who satisfactorily **[**2]** performed before the rule was adopted; and it does not irremediably disadvantage those who did not so perform, for they may now have another opportunity to do so. The rule is valid as against due process objections. due process : EDUCATIONAL AGENCY PREVAILED.*See Cox v. Hart*, 260 U.S. 427, 43 S. Ct. 154, 67 L. Ed. 332 (1922); *County of Palm Beach v. State*, 342 So.2d 56 (Fla. 1976). *See also Florida State Board of Education v. Brady*, 368 So.2d 661 (Fla. 1st DCA 1979).

AFFIRMED.

MILLS, C. J., and ROBERT P. SMITH, Jr., J., and HENRY CLAY MITCHELL, Jr., Associate Judge, concur.

WELLS et al. v. BANKS et al.

No. 58955

Court of Appeals of Georgia

153 Ga. App. 581; 266 S.E.2d 270; 1980 Ga. App. LEXIS 1909

November 6, 1979, Argued

February 22, 1980, Decided

SUBSEQUENT HISTORY: [***1] Certiorari Applied For.

PRIOR HISTORY: Administrative appeal. Tattnall Superior Court. Before Judge Findley.

DISPOSITION: *Judgment affirmed.*

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant students challenged the judgment of the Tattnall Superior Court (Georgia) that affirmed the Georgia State Board of Education (state board) decision in favor of appellee county members of the county board of education. The students sought an exemption from a graduation requirement imposed by the county board of education based upon standardized test scores.

OVERVIEW: The county board of education established, as a high school graduation requirement, that students achieve standardized test scores indicating proficiency in math and reading at the ninth grade level. The students' challenge to that requirement was rejected by the county board of education, and the decision was affirmed by the state board and the superior court. On appeal from that judgment, the court held that the requirement was a valid exercise of the county board of education's authority. Although under Ga. Code Ann. § 32-653a the state board was authorized to establish minimum standards for public schools, state board policy specifically permitted localities to impose enhanced standards. Under that policy, the county board of education was responsible for establishing performance objectives and performance indicators for measuring "life role skills," including reading and computing skills. The court rejected the students' claim that the requirement constituted an unauthorized imposition of a "course of study." The court also ruled that imposition of the testing requirement did not violate the students' rights to due process or equal protection. The judgment was affirmed.

OUTCOME: The court affirmed the judgment upholding the state board decision in favor of the members of the county board of education. The students challenged the requirement that they achieve a certain standardized test score before graduating from high school.

CORE TERMS: local board, graduation, skills, equal protection, courses of study, diploma, testing, achievement test, school board, authority to impose, high school, boards

of education, local school board, authority granted, achievement, scheduled, indicators, score

COUNSEL: *Richard D. Phillips*, for appellants.

J. Franklin Edenfield, B. Daniel Dubberly, Jr., M. Francis Stubbs, for appellees.

JUDGES: Shulman, Judge. Deen, C. J., and Carley, J., concur.

OPINION BY: SHULMAN

OPINION

[*581] **[**271]** Appellants are students who were scheduled to graduate from high school in Tattnall County in 1978. Prior to the scheduled date of graduation, they formally requested that the Tattnall County Board of Education rescind, or modify so as to exempt appellants from complying with, a policy of the local board which established as a requirement for graduation with a diploma that each student demonstrate by means of a score on an achievement test that he or she possessed the skills in math and reading expected of a student entering the ninth grade. The local board, following a hearing, denied the request. That denial was affirmed by the State Board of Education. Appellants appealed the decision of the State Board of Education to the Superior Court of Tattnall County. It is from the judgment of that court, affirming the decision **[***2]** of the State Board, that this appeal is taken.

1. In two enumerations of error, appellants present arguments to the effect that the local board acted beyond its authority in imposing the achievement test requirement.

Appellants' first argument concerning the authority of the local board to impose the requirement at issue here is founded on Code Ann. § 32-653a, which reads in pertinent part as follows: "The State Board shall establish and enforce minimum standards for operation of all phases of public school in Georgia and for operation of all public elementary and secondary schools and local units of school administration in Georgia so as to assure, to the greatest extent possible, equal and adequate educational programs, curricula, offerings, opportunities and facilities for all Georgia's children and youth . . ." Based on that statutory language, appellants urge that the local board had no authority to impose a requirement for **[*582]** graduation in conflict with the requirements imposed by the State Board.

However, appellants have not pointed out nor have we found, any conflict between the action of the local board and the standards established by the State Board. In fact, **[***3]** there appears in the record of this case a document from the State Board establishing the requirements for high school graduation. Nowhere in that document is there any indication that local boards may not impose additional requirements. On the contrary, the State Board's policy specifically permits local boards to require additional **[**272]** credit units for graduation and makes it the *responsibility* of local boards to establish "performance objectives" (defined in the same document as "objectives established by local boards of education as being acceptable levels of achievement for contemporary life role skills defined by the State Board of Education"), and "performance indicators"

(defined in the State Board's policy as "measures *defined by local school systems* to be used as proof of the student's skills or knowledge.") (Emphasis supplied.) One of the "life role skills" identified by the State Board is explained as follows: "Learner -- Each citizen should have proficiency in reading, writing, listening, analyzing and speaking. He should also have basic computing skills." The State Board's policy on graduation requirements also includes the following comment on "life **[***4]** role skills": "They are not to be construed as a replacement for courses of study; rather, they are identified as a positive reinforcement of skills and knowledge. High school graduation requirements will include these areas in addition to the required clock hours and attendance specified. These broad areas are identified in an effort to allow local boards of education to recognize the thrust of this policy." Considering the authority granted the local boards by the policy considered above, we find no merit in appellants' argument that the local board's imposition of an additional requirement for graduation conflicts with the State Board's requirements.

For the same reasons, we find unpersuasive appellants' argument that the local board's action required prior approval from the State Board because of **[*583]** the responsibility placed on the State Board by Code Ann. § 32-408 to prescribe "a course of study" for all schools and the authority granted by that section to "approve additional courses of study set up by the local units of administration . . ." The very language used by the State Board shows that such objectives and indicators as are here involved are not "courses of **[***5]** study." Testimony presented at the hearing before the local board established that the requirement for a minimal level of achievement in reading and writing, as measured by the testing requirement involved here, was for the same purposes advocated by the State Board's policy.

We conclude, therefore, that the local board had full authority to impose the requirement of which appellants complain. STATE AUTHORITY EDUCATIONAL AGENCY PREVAILED

2. Appellants argue that, even assuming the local board's authority to implement the achievement test score requirement for graduation with a diploma, its application denies them due process of law and equal protection of law. We cannot agree.

We do agree with appellants that, having extended to all children in Georgia the right to an education, the state cannot arbitrarily withdraw that right. Cf. Goss v. Lopez, 419 U.S. 565 (95 SC 729, 42 LE2d 725). We do not, however, find any application of that principle to this case. In the first place, appellants have not been denied the right to take part in the public education system. In fact, rather than denying appellants an education, the testing requirement is clearly designed to ensure that they receive some actual benefit from that system **[***6]** before leaving it with a diploma. In the second place, even if it were conceded that appellants have been deprived of some property interest in an education, the record in this case clearly shows that more than adequate notice of the imposition of this additional requirement for graduation was given to appellants and their parents. In addition, there is a statutorily provided procedure for contesting actions of the school board (Code Ann. § 32-910), which procedure was utilized by appellants. We find

no merit in the claim of a violation of appellants' right to due process. EDUCATIONAL AGENCY PREVAILED due process ADEQUATE NOTICE

The argument that appellants have been denied equal protection is also without merit. That argument is **[*584]** based on appellants' contention that they are being treated differently from students in other counties in Georgia. However, since, as we have held, the local school board was acting within its statutory authority and since our Constitution and Code provide the local school boards with sweeping authority in the governing **[**273]** of local school systems (Code Ann. §§ 2-4302, 32-901, 32-912), the fact that other school boards may choose to employ other methods to control the quality of education **[***7]** in their systems does not evince a denial of equal protection. We must look to the administration of the requirement within Tattnall County rather than the state as a whole. Since the evidence shows without contradiction that the testing requirement is uniformly applied in Tattnall County, appellants have been accorded equal protection. EDUCATIONAL AGENCY PREVAILED

Judgment affirmed.

In the Matter of the Board of Education of the Northport-East Northport Union Free School District et al., Petitioners, v. Gordon M. Ambach, Individually and as Commissioner of Education of the State of New York, et al., Respondents

[NO NUMBER IN ORIGINAL]

Supreme Court of New York, Special Term, Albany County

107 Misc. 2d 830; 436 N.Y.S.2d 564; 1981 N.Y. Misc. LEXIS 2101

January 23, 1981

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioners, students and Board of Education, filed a N.Y. C.P.L.R. 78 proceeding, seeking to permanently enjoin respondent commissioner from enforcing his order and a judgment validating the issuance of certain diplomas.

OVERVIEW: Petitioners, students and Board of Education, filed a N.Y. C.P.L.R. 78 proceeding, to permanently enjoin respondent commissioner of education from enforcing his order. Petitioners sought a judgment validating the issuance of the students' diplomas. The court ruled in favor of petitioners and permanently enjoined the enforcement of respondent's order. The court found that the diploma requirement contained in 8 N.Y.C.R.R. § 103.2(b) was improper as to the students. The court held that the **denial of the diplomas** would have had an adverse effect on their future employment opportunities. The court ruled that **denial of the diplomas** was a deprivation of liberty; therefore, the protections of the due process clause were invoked.

OUTCOME: The court permanently enjoined enforcement of respondent commissioner's order and ruled that the diploma requirement was improper. The court held that **denial of the diplomas** was a deprivation of liberty and would have had an adverse effect on petitioner students.

CORE TERMS: diploma, handicapped, competency, notice, high school diploma, educational, school district, functional, testing, literacy, handicapped children, educational services, graduation, public education, deprivation, handicap, mathematics, Rehabilitation Act, handicapped individual, educational institution, educational program, applicability, elementary, bulletin, tier, Handicapped Children, rational basis, process protection, testing programs, equal protection

COUNSEL: *Ingerman, Smith, Greenberg & Gross* for Board of Education of Northport-East Northport Union Free School District, petitioner, *John P. Bracken*, guardian ad litem, for Abby and another, petitioners. *Robert D. Stone* and *Jean M. Coon* for respondents.

JUDGES: Robert C. Williams, J.

OPINION BY: WILLIAMS

OPINION

[*830] OPINION OF THE COURT

[566]** This is a CPLR article 78 proceeding **[***3]** wherein the petitioners seek to permanently enjoin the respondents from **[*831]** enforcing an order of respondent Blaney, Acting Commissioner of Education, dated August 8, 1979. 1 Petitioners further seek a judgment validating the issuance of certain diplomas by petitioner Board of Education of the Northport-East Northport Union Free School District (Board) to the individual petitioners.

1 That order decreed that: "IT IS HEREBY ORDERED that the Board of Education of the Northport-East Northport Union Free School District transmit to the Commissioner of Education, State Education Building, Albany, New York 12234, by certified mail postmarked not later than 11:00 p.m. on August 17, 1979, the full names and residence, addresses of all students to whom high school diplomas were awarded by the Northport-East Northport Union Free School District in June, 1979, when such students had not met the requirements for a high school diploma set forth in Part 103 of the Regulations of the Commissioner of Education (8 NYCRR Part 103)." **[***4]** The Board brought this matter on by order to show cause issued by the Honorable Con. G. Cholakis on August 15, 1979. Respondents moved to dismiss same on a number of grounds including the limitation upon the review of legislative acts by way of article 78. In its decision and order of September 18, 1979 this court citing *Matter of Town of*

Arietta v. State Bd. of Equalization & Assessment (37 AD2d 431) found that the matter was properly before it. The court further held that the respondents were enjoined from enforcing the order complained of pending the determination herein.

The court *sua sponte* determined that the respective interests of the individual students should be protected. John Bracken, Esq., was appointed guardian ad litem for the students and permitted to interpose a petition on their behalf. Pursuant to CPLR 7804 (subd [h]) a trial on the numerous issues of fact presented was held during a one-week period in the summer of 1980. As directed at trial, following the completion of the lengthy transcript thereof the parties presented posttrial memorandums and proposed findings, a further opportunity to respond to the initial submissions was **[**567]** permitted, **[***5]** the case was fully submitted as of January 16, 1981.

1. Abby and Richard are handicapped within the definition **[*832]** of the applicable Federal and State statutes, Prior to their graduation in June of 1979 they were students in the school district governed by the Board. At the time in question Abby was 20 years old and attended James E. Allen High School in Dix Hills, New York, operated by the Board of Co-operative Educational Services (BOCES). She suffers from a neurological impairment which allegedly effects her ability to handle arithmetical computations. Richard was 21 years of age in June, 1979. He was classified by the school district's Committee on the Handicapped (COH) 6 as trainably mentally retarded and attended James E. Allen School in Melville, New York, also operated by BOCES.

2 (Education of All Handicapped Children Act [EHA] [US Code, tit 20, § 1401 *et seq.]*; Education Law, § 4401.) In order for a State to receive Federal aid it must provide an educational program for handicapped students in compliance with the EHA. (US Code, tit 20, § 1412.) To effectuate same New York passed article 89 of the Education Law. Accordingly, the provisions of article 89 and the regulations promulgated thereunder parallel in substance many of the provisions of the EHA; therefore the court does not feel duty bound in all instances to refer to both statutes. **[***6]**

3 As described by Dr. McNally, Director of Pupil Services for Northport-East Northport School District, BOCES offers a "modified" high school program comprised of the standard academic subjects required for a high school diploma plus a vocational component. The educational program provided is apparently geared to the individual student.

4 See 8 NYCRR 200.4 (a) (6), which provides for a neurologically damaged child being classified as handicapped.

5 Pursuant to section 4401 of article 89 of the Education Law a handicapped individual is entitled to a free education until he attains the age of 21.

6 The formation of a COH is mandated for every school district (Education Law, § 4402, subd 1, par b), being charged with the evaluation and placement of handicapped students within their respective school districts. (Education Law, art 89; 8 NYCRR Part 200.)

7 See 8 NYCRR 200.4 (a) (1). Abby and Richard were assigned individual education plans (IEPs) in compliance with Federal and State statutes.

8. After being recommended for graduation by their respective schools, the COH **[***7]** on March 18, 1979 recommended both Abby and Richard for graduation on the basis of successful completion of their respective IEPs.

9 By resolution of the Board approved June 18, 1979 both Abby and Richard were awarded local high school diplomas.

It appears that Abby was recommended for graduation in 1978 by her school. However after consultation with her parents as required under statute she remained in school at their request in order to allow her further participation in a vocational program (Arbor). At the time of trial she was employed full time in the Arbor program. Absent the request of her parents as set forth above it appears that Abby would have been granted a diploma in 1978 prior to the testing requirement complained of herein.

[*833] At the time of the award of diplomas neither student had met the testing requirement set forth in the Commissioner's Regulations for issuance of diplomas. Section 103.2 of the Regulations of Commissioner **[***8]** of Education (8 NYCRR 103.2) provides in pertinent part:

"(a) *Local diploma.* In order to secure a local high school diploma, the following requirements must be met:

"(2) The demonstration of competency in the basic skills: (i) by passing the following examinations: "(a) effective June 1, 1979 through May 31, 1981, either the Basic Competency Test in Reading or the Regents Comprehensive Examination in English, and either the Basic Competency Test in Mathematics or a Regents examination in mathematics".

Both the Basic Competency Test (BCT) in reading and mathematics were administered to Abby. She successfully completed the English exam but failed the mathematics one. Neither BCT was administered to Richard apparently based on a belief that it **[**568]** would be futile for him to attempt to pass the exams.

Robert R. Spillane, Deputy Commissioner of Education, by way of a letter to Eleanor Roll as President of the Board informed the Board that the award of diplomas to Abby and Richard violated Part 103 of the Commissioner's Regulations (8 NYCRR Part 103). The letter further indicated that "Any students who have been issued diplomas but not completed all State requirements **[***9]** have invalid diplomas. You are hereby required to provide the Education

Department with the names and addresses of any students to whom you have awarded diplomas in violation of State regulations. These students will then be notified by our Department that their diplomas are not valid." In response to the above direction the Board by way of letter from Joseph F. Beattie, President, to Commissioner **[*834]** Ambach dated July 24, 1979 respectfully "[declined] to produce the names of the students to whom these diplomas were awarded." Thereafter the State Education Department issued an order requiring the Board to submit the names requested.

10 See n 1, *supra.*

Both the State and local school district receive Federal monetary assistance. The petitioners seek relief from said order alleging same to be "arbitrary, capricious, unreasonable and unlawful". They contend that the respondent in issuing the order complained of and in requiring the passing of BCTs by the individual petitioners as a prerequisite **[***10]** for the award of a high school diploma violated section 11 of article I and section 1 of article XI of the New York State Constitution, section 504 of the Rehabilitation Act of 1973 (US Code, tit 29, § 794), the EHA (US Code, tit 20, § 1401 *et seq.)*, section 1983 of title 42 of the United States Code (this cause of action is derivative of the alleged violations of section 504 of the Rehabilitation Act of 1973 and the EHA), the equal protection and due process guarantees afforded by the United States Constitution.

A number of eloquent and engaging arguments have been propounded by the petitioners touching on broad questions facing the educational community, however it must be emphasized that the decision of this court is meant to speak solely to the factual circumstances presented and the issues revolving around same in respect to the individual petitioners, Abby and Richard. While the issues surrounding the propriety of competency testing in general, and morespecifically the testing of handicapped children as a "class" are tangentially addressed by this decision it is not the duty nor the intent of this court to resolve same.

The Legislature of this State is charged with **[***11]** the obligation of providing for the "maintenance and support of a system of free common schools, wherein all the children of this state may be educated." (NY Const, art XI, § 1; *Donohue v. Copiague Union Free School Dist.*, 47 NY2d 440.) The Constitution 11 and the statutes of this State 12 vest **[*835]** the control and management of its educational affairs in the Board of Regents, that power is concomitantly

shared with the Commissioner of Education. *(Donohue v. Copiague Union Free School Dist., supra; Matter of New York City School Bds. Assoc. v. Board of Educ.*, 39 NY2d 111.)

11 NY Const, art XI, § 2.

12 Education Law, § 207.

Pursuant to that broad grant of power the Regents and the Commissioner have historically formulated standards for the granting of diplomas. The standards adopted in Part 103 of the Commissioner's Regulations (8 NYCRR Part 103) cannot be said to be beyond the scope of the power vested in the Regents and the Commissioner. While the court agrees with the respondents **[***12]** that the powers set forth above are extremely broad and that the courts have "unalteringly eschewed" making judgment in respect to broad education policy *(Donohue v. Copiague Union Free School Dist., supra*, p 445) it is not contended nor would **[**569]** such a contention be palatable that alleged violations of constitutional or statutory provisions can be hidden behind the cloak of a claim of "educational policy" and as such be beyond judicial review. *(James v. Board of Educ.*, 42 NY2d 357.)

The State has a legitimate interest in attempting to insure the value of its diplomas and to improve upon the quality of education provided. Use of competency testing to effectuate the goals underlying those interests is within the discretion of the Board of Regents and the Commissioner.

13 The petitioners contend however that the application of BCT requirements in respect to Abby and Richard violates section 504 of the Rehabilitation Act of 1973 (US Code, tit 29, §794) in that it denies them a benefit or alternatively that it discriminates against them. The statute provides: "No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this **[***13]** title, shall, *solely* by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or **[*836]** under any program oractivity conducted by any Executive agency or by the United States Postal Service." (Emphasis added.) Though the testing in question has not been shown to be part of a Federally approved program, statute provides for the availability of Federal financial assistance in instituting competency testing programs. The presence of such a program seemingly indicates the acceptance of competency testing as a legitimate method of improving educational services. (Education Amendment of 1978, § 921 [US Code, tit 20, § 3331].)

The petitioners have failed to convince this court that the **denial of diplomas** to Abby and Richard on the basis of their failure to meet the testing requirement of Part 103 (8 NYCRR Part 103) would violate section 504. Webster's Third New **[***14]** International Dictionary Unabridged defines a diploma as a "document bearing record of graduation from or of a degree conferred by an educational institution". It cannot be said that the denial of a diploma based on inability to meet the BCT requirements is the denial of a benefit "solely by reason of" a handicap. An analogy can be drawn to the handicapped person who is wheelchair bound. Section 504 may require the construction of a ramp to afford him access to a building but it does not assure that once inside he will successfully accomplish his objective.

Likewise, section 504 requires that a handicapped student be provided with an appropriate education but does not guarantee that he will successfully achieve the academic level necessary for the award of a diploma.

The Supreme Court interpreted section 504 in *Southeastern Community Coll. v. Davis* (442 U.S. 397). While the factual content of *Davis* is distinguishable from the case at bar 14 the court's construction of section 504 is pertinent *(supra*, p 405): "[This] is the first case in which this Court has been called upon to interpret § 504. It is elementary that '[the] starting point in every case involving **[***15]** the construction of a statute is the language itself.' * * * Section 504 by its terms *does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate.* Instead, it requires only that an 'otherwise qualified handicapped individual' not be excluded from participation in a federally funded program 'solely by reason of his handicap,' indicating only that mere possession of a handicap is not a **[*837]** permissible ground for assuming an inability to function in a particular context." (Emphasis added.) **[**570]** In *Kampmeier v. Nyquist* (553 F2d 296, 299) 15 the Second Circuit stated that the "exclusion of handicapped children from a school activity is not improper if there exists a substantial justification for the school's policy." Even if the court were to determine that this situation was within the ambit of section 504, it would be compelled to defer to the discretion of the Board of Regents and the Commissioner in their establishment of educational policy. *(Donahue v. Copiague Union Free School Dist.*, 47 NY2d 440, *supra; Matter of New York* **[***16]** *City School Bds. Assoc. v. Board of Educ.*, 39 NY2d 111, *supra.)*

Under the statutes implemented to effectuate the Federal policy enunciated in the EHA the power and the duty is placed upon the State Education Department "[to] formulate such rules and regulations pertaining to the physical and educational needs of such children as the commissioner of education shall deem to be in their best interests." (Education Law, § 4403, subd 3.) 16 In light of the above it cannot be said that the respondents in denying diplomas to the individual petitioners would be violating section 504.

14 *Davis* addressed the application of section 504 to a hearing impaired woman's attempt to gain admission to nursing school. Thus, the distinction between post secondary education and level of educational services provided in the present case.

15 In reviewing the denial of a preliminary injunction the court therein held the exclusion of students who were blind in one eye from participation in contact sports by their school did not violate section 504, therefore the petitioners failed to establish the requisite showing of probability of success on the merits.

[*17]**

16 See *Battle v. Commonwealth of Pennsylvania*, 629 F2d 269, 272 (discussion of the intent of the EHA and the burden placed upon the State).

Petitioners further allege that the **denial of diplomas** by the respondent would be a violation of the EHA in that it would deny the individual petitioners a "free appropriate education" as guaranteed under the EHA. "The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, *under public supervision and direction*, and without charge, (B) *meet the standards of the State educational agency*, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414 (a) (5) of this title." (US Code, tit 20, § 1401, subd 18, emphasis added.) As set forth *supra*, article 89 of the **[*838]** Education Law was promulgated to insure compliance with the EHA, subdivision 3 of section 4403 thereof granting the Education Department discretionary **[***18]** power in the development of regulations providing for the education of handicapped students.

"[The] Act contemplates that the determination of appropriate educational goals, as well as the method of best achieving those goals, are matters which are to be established in the first instance by the states." *(Battle v. Commonwealth of Pennsylvania*, 629 F2d 269, 278, *supra.)* Accordingly, deference should be given to the method employed by the State in attempting to reach their goals.

(Battle v. Commonwealth of Pennsylvania, supra; Donohue v. Copiague Union Free School Dist., 47 NY2d 440, *supra.)* The Commissioner's interpretation of the Education Law is certainly entitled to great weight. *(Matter of Eisenstadt v. Ambach*, 79 AD2d 839.)

The EHA does not require specific results *(Battle v. Commonwealth of Pennsylvania, supra)* but rather the availability of a "free appropriate public education". The award of a diploma has not been shown to be a necessary part of an "appropriate public education" therefore denial of same on the basis of failure to meet BCT requirements does not amount to a violation of the EHA.

The provision of educational services is one of the most **[***19]** important functions performed by a State. *(Brown v. Board of Educ.*, 347 U.S. 483.) "But importance of a service performed by a State does not determine whether it must be regarded as fundamental for purposes of examination under the equal protection Clause." *(San Antonio Schoo Dist. v. Rodriguez*, 411 U.S. 1, 30.) Indeed, education is not a fundamental right 17 invoking the application **[**571]** of the "strict scrutiny" test. *(San Antonio*

School Dist. v. Rodriguez, supra; Matter of Levy, 38 NY2d 653; *Bukovsan v. Board of Educ.*, 61 AD2d 685.)

17 The propositions contained in the discussion of equal protection herein are applicable to both the Federal guarantee of the Fourteenth Amendment and the New York guarantee enunciated in section 11 of article I of the New York Constitution.

The status of the individual petitioners as handicapped does not place them in a suspect classification. *(Matter of* **[*839]** *Levy, supra.)* The Court of Appeals, in *Matter of Levy (supra*, p 658) succinctly **[***20]** addressed the equal protection questions presented herein. "At the threshold of consideration of any equal protection claim is the determination of the applicable standard of review. Handicapped children as such do not constitute a 'suspect classification' (cf. *Matter of Lalli*, 38 NY2d 77 [illegitimate children]; *Matter of Malpica-Orsini*, 36 NY2d 568 [illegitimate children]; contrast *Loving v. Virginia*, 388 U.S. 1 [race]; *Hernandez v. Texas*, 347 U.S. 475 [national origin]; *Matter of Griffiths*, 413 U.S. 717 [alienage]). Nor is the right to education such a 'fundamental constitutional right' as to be entitled to special constitutional protection *(San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 6). *Accordingly, the appropriate standard is not the so-called strict scrutiny test or anything approaching it, but rather the traditional rational basis test. (Montgomery v. Daniels*, 38 NY2d 41, 59; cf. *Matter of Jesmer v. Dundon*, 29 NY2d 5, app dsmd 404 U.S. 953.)" (Emphasis supplied.)

The petitioners contend that a "middle tier" analysis as enunciated by the Court of Appeals in *Alevy v. Downstate Med. Center of State of N. Y.* (39 NY2d 326), 18 **[***21]** is applicable. In sum the "middle tier" test requires a showing of a substantial relationship to an important governmental interest. (See *Craig v. Boren*, 429 U.S. 190; *Alevy v. Downstate*

Med. Center of State of N. Y., supra.)

18 *Alevy* proposed the "middle tier" test in respect to allegations of "reverse discrimination".

The court does not agree that the "middle tier" test is applicable. The Appellate Division of this Department, in *Lombardi v. Nyquist* (63 AD2d 1058, 1059, lv. to app den 45 NY2d 710), decided more than two years subsequent to *Alevy*, reaffirmed the decision in *Matter of Levy* by holding that "[the] appropriate standard to be applied in reviewing the application of such legislation [article 89 of Education Law] is 'not the so-called strict scrutiny test or anything approaching it, but rather the traditional rational basis test'".

The respondents have set forth a number of reasons underlying the development of the BCTs and their use as **[*840]** a standard for the award **[***22]** of a diploma; the improvement of educational services by the detection of areas of deficiency, remediation, protection of the value of high school diplomas. Fully recognizing the policy of noninterference with State educational decisions *(San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 43, *supra; Donohue v. Copiague Union Free School Dist.*, 47 NY2d 440, 445, *supra; Lombardi v. Nyquist, supra*, p 1059) it has not been shown that the implementation of a BCT program and the applicability of that program to the individual

petitioners falls short of having a rational basis and thus violates the equal protection clause.

We now turn to the issue of due process. On this point the court finds that the respondents have fallen short of the necessary constitutional requirements. As discussed more fully above, "[it] is true that courts will ordinarily defer to the broad discretion vested in public school officials and will rarely review an educational institution's evaluation of academic performance of its students

Notwithstanding **[**572]** this customary 'hands-off' policy, judicial intervention in school affairs regularly occurs when a state educational institution acts **[***23]** to deprive an individual of a significant interest in either liberty or property. It is well established that when such a deprivation occurs the procedural safeguards embodied in the Fourteenth Amendment are called into play, and courts will not hesitate to require that the affected individual be accorded such protection." *(Greenhill v. Bailey*, 519 F2d 5, 7; see, also, *Goss v. Lopez*, 419 U.S. 565, 574; *James v. Board of Educ.*, 42 NY2d 357, *supra.)*

The first question which must be addressed is whether the individual petitioners have a property or liberty interest in the receipt of a high school diploma which falls within the ambit of the due process protection? Property interests are not stagnant and fixed concepts but rather "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings" *(Board of Regents v. Roth*, 408 U.S. 564, 577). It is clear that absent the BCT requirements in Part 103 of the Commissioner's Regulations there would be no **[*841]** question before this court in respect to the diplomas issued to Abby and Richard. Indeed those diplomas **[***24]** would be issued in the manner in which the Board has reviewed and issued them presently.

The court believes that Abby and Richard had a legitimate expectation of the receipt of a diploma therefore the diploma represents a property interest for the purposes of the due process protection. *(Debra P. v. Turlington*, 474 F Supp 244; *Matter of Goldwyn v. Allen*, 54 Misc 2d 94.) The petitioners have produced testimony tending to indicate that the denial of a diploma will have grave consequence in respect to the future life chances of the individual petitioners, while those factors come into the balance in determining what standards the respondents must meet the gravity of the deprivation is irrelevant in deciding that the due process clause applies. *(Goss v. Lopez*, 419 U.S. 565, 576, supra.)

Further "[the] due process clause also forbids arbitrary deprivations of liberty" *(Goss v. Lopez, supra*, p 574). By stigmatizing an individual or imposing an obstacle which forecloses his freedom in pursuing employment opportunities the State deprives a person of a liberty interest. *(Board of Regents v. Roth*, 408 U.S. 564, *supra; Greenhill v. Bailey*, 519 F2d 5, *supra.)* **[***25]**

The testimony at trial tends to indicate that the denial of a diploma would have an adverse effect upon the future employment opportunities of the individual petitioners.

More importantly the court finds that such denial may stigmatize the individual petitioners. Judge Carr in *Debra P. v. Turlington* (474 F Supp 244, 258) presents a cogent

argument addressing this point. "Before discussing the validity issues, the Court must refer to a matter which is at the crux of the controversy between the litigants. The test as legislatively created was to be one of functional literacy. Functional literacy has not been defined in a way which is acceptable to either all educational academicians or the public. The testimony, in fact, indicates that there are at least eleven known definitions of functional literacy. What is functional literacy to one person may not be functional literacy to another person, but it is clear that the term 'functional illiterate' has a **[*842]** universally negative inference and connotation. While '*illiteracy*' is itself a negative and impact ladened word, '*functional illiteracy*' further compounds these implications by focusing on the individual's **[***26]** inability to operate effectively in society. * * * As one of the Plaintiffs' experts commented, students who fail the functional literacy test perceive of themselves as 'global failures'. Another of the Plaintiffs' experts testified that the biggest flaw in the Florida program was its name alone.

The Court **[**573]** is in complete agreement. Beyond the economic and academic implications of failure on the test, the stigma associated with the term functional illiteracy is the most substantial harm presented." While *Debra P.* dealt with functional literacy tests in respect to black students the above discussion is relevant to the case at bar. Will Abby and Richard be labeled as incompetent because of their failure to pass basic competency tests and thus considered unable to function in society?

Chancellor Theodore Black in a letter dated August 16, 1979 stated, "To grant handicapped students a certificate (an inferior academic award) based on attendance or any other academic standard is to brand a group of students as second-rate and incapable of running the race reserved for other students. Furthermore, such a certificate or any other substitute diploma, does not provide **[***27]** the recipient with the same opportunities for gaining employment or college entrance which accompanies a diploma." In fact a certificate is exactly what the Board of Regents proposes to grant to Abby and Richard. (8 NYCRR 103.5.) Denial of a diploma is a deprivation of liberty, thus the protections afforded by the due process clause are invoked.

"Once it is determined that due process applies, the question remains what process is due." *(Morrissey v. Brewer*, 408 U.S. 471, 481.) due process is a practical and flexible concept. *(Goss v. Lopez*, 419 U.S. 565, *supra; Morrissey v. Brewer, supra.)* [HN8] In determining the applicable requirements the court balances the private interests of the petitioners, the risk of an improper deprivation of such interest and the governmental interest involved. *(Mathews v. Eldridge*, 424 U.S. 319.)

[*843] Petitioners request that the court find the BCTs as applied to handicapped students invalid thus violative of the due process clause, in that it does not accurately measure "Basic Competency" in respect to handicapped students. While questions of validity are raised by the record (no clear definition of "Basic Competency"; testimony by Winsor **[***28]** Lott, Chief of the Bureau of Elementary and Secondary Testing Programs, that the handicapped student population was not taken into account in development and construction of the exam; applicability of the American Psychological Association, Standards for Educational and Psychological Tests and compliance therewith), the court in deference to the broad discretionary powers constitutionally and statutorily granted to

the Board of Regents and the Commissioner as discussed more fully above, and more importantly due to the rule of judicial restraint does not determine this case on the basis of whether the BCTs are valid in respect to handicapped children. The court finds that the respondents failed to provide timely notice of the diploma sanction contained in Part 103 of the Commissioner's Regulations (8 NYCRR Part 103).

The record reflects that Abby and Richard attended public schools for 12 and 15 years respectively. It is apparent that their programs of instruction were not developed to meet a goal of completing a BCT in order to receive a diploma but rather were developed to address individual educational needs. Indeed, since the requirement of BCTs was first noticed to the administrators **[***29]** of their schools in April of 1976 there was no way the developers of their educational programs could have considered the ultimate requirement of passing a BCT and built that goal into their educational programs.

The school district was notified in April, 1976 that the Board of Regents passed a BCT requirement effective June, 1979 as a precondition to the award of a diploma. There appears to have been continuous discussion within the Education Department as to the applicability of the BCT requirement to handicapped students and confusion on the part of the school administration as to such applicability. **[*844]** In April, 1979 Information Bulletin No. 9, which addressed the BCT in respect **[**574]** to handicapped students, clarified that handicapped students must satisfy the requirements of 8 NYCRR 103.2 to be awarded a diploma. The bulletin further elaborated upon alternative testing procedures for certain handicapped students, none of which are applicable to the individual petitioners. The petitioners ostensibly contend that the various reconsiderations and review mechanisms employed set the date that the court should consider as the point of notice on April, 1979 a few **[***30]** short months prior to the June, 1979 graduation date. The court while recognizing that the procedures followed did not provide for the clearest and most articulate notice considers April, 1976 as the point of notice to the Board. It does not appear that any notice was provided to the individual petitioners or their parents. Article 89 of the Education Law clearly favors a policy of providing notice to the parents of handicapped students of matters which effect their children's education. (See Education Law, § 4402, subd 1, par b, cl [3], subdcl [c].) The court however does not find the lack of individual notice to the parents dispositive of this point.

The court finds that based on the factual circumstances presented the notice provided was not timely. The denial of a diploma could stigmatize the individual petitioners and may have severe consequences on their future employability and ultimate success in life. Accordingly, early notice should have been provided in order to afford them every opportunity to pass the BCTs. Doctor Madus, an eminently qualified expert in the area of competency testing, testified that in light of the importance attached to these tests early **[***31]** notice was essential. In response to an inquiry by the court he stated that, "I would like to have seen the students know about that in the middle -- sometime in the middle of their elementary school; fourth or fifth grade". In reviewing the time frame requirement for notice it must be emphasized that while these students participated in a program of instruction in the same basic subjects taught to all students the methods and goals utilized were directed to their individual needs therefore the time frame for notice

to **[*845]** them is much more crucial than that for nonhandicapped students in conventional programs.

Robert R. Spillane, Deputy Commissioner of Education, in a memorandum dated August, 1978 states: "1. *Early Identification*. One of the most important features of the new Regents competency testing program is the *early identification of students who need special help* in developing their skills in reading, writing, and mathematics. *This identification process must begin at the first point of contact between student and school and must continue throughout the student's years in school.*

The process should make use of both formal and informal assessment **[***32]** techniques and should lead to a meaningful and effective program of special help." (Emphasis added.) The necessity of early notice is further emphasized by the following direction contained in Information Bulletin No. 29 dated February, 1980. "The purpose of this bulletin is to inform districts that all children identified as handicapped by Committees on the Handicapped and who exhibit academic competency, must have available to them every educational opportunity to attain a high school diploma. *These opportunities include: the handicapped pupil's full participation in the school-wide administration of the Pupil Evaluation Program (PEP) tests in grades 3 and 6, as well as the preliminary competency tests in grades 8 or 9, appropriate remedial instruction as indicated by the test results*, and access to the required curriculum sequence of course work necessary to attain a high school diploma. These opportunities must be made available to all identified handicapped children in any school placement including those conducted by the Boards of Cooperative Educational Services." (Emphasis added.)

Early notice would allow for proper consideration of whether the goals of the students **[***33]** IEP should include preparation for **[**575]** the BCT and would afford an appropriate time for instruction aimed at reaching that goal. The period of notice provided, in essence less than two school years, was inadequate. The court is not compelled nor is it deemed provident at this juncture to set a specific time period which would be adequate. **[*846]** Accordingly, the enforcement of the order issued by respondent Blaney dated August 8, 1979 is permanently enjoined. Further the court finds that the diploma requirement contained in 8 NYCRR 103.2 (b) is improper as to the individual petitioners Abby and Richard.

DEBRA P., a minor by Irene P., her mother and next friend et al., Plaintiffs-Appellees, Cross-Appellants, v. Ralph D. TURLINGTON, individually and as Commissioner of Education et al., Defendants-Appellants, Cross-Appellees.

No. 79-3074

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT. UNIT B

644 F.2d 397; 1981 U.S. App. LEXIS 13618

May 4, 1981

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Middle District of Florida.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant commissioner of education sought review of a judgment from the United States District Court for the Middle District of Florida, which found that Fla. Stat. Ann. § 232.246(1)(b) (1980), as applied, violated the equal protection clause of the U.S. Const. amend. V. Appellee black students cross-appealed, claiming that the district court erred in limiting the injunction to four years, and in upholding the validity of the test.

OVERVIEW: The state, concerned about the quality of its public education, enacted statutory provisions that required the passing of an examination before receiving a high school diploma. The failing group included a disparate number of black students. Appellee black students filed an action challenging the constitutionality of the Fla. Stat. Ann. § 232.246 (1980), and related statutes. The district court found that Fla. Stat. Ann. § 232.246(1)(b) (1980), as applied in the case, violated U.S. Const. amend. XIV. Appellant commissioner of education contended that the district court erred in finding that the test violated due process because there was adequate notice and property rights were not involved. Appellees cross-appealed on the basis that the test was valid and the injunction was limited to four years. On review, the court held that neither it nor the district court was in a position to determine a state's educational policy, but that a state could not constitutionally deprive appellees of diplomas unless it submitted proof of the curricular validity of the test. The judgment from district court was affirmed in part and vacated in part and remanded for further findings of fact.

OUTCOME: The judgment from the district court, which held that the test as applied in the present context was in violation of due process, was affirmed in part and vacated in part and remanded for further findings of fact. The court held that a state could not constitutionally deprive appellees of diplomas unless the curricular validity of the test had been established, and the racially discriminatory impact was not due to educational deprivation.

CORE TERMS: taught, educational, diploma, graduation, competency, prescribed, functional, literacy, black students, school system, state board, public schools, school students, testing, dual, attendance, classrooms, exam, basic skills, high school diploma, testing program, white students, task force, judicial notice, state constitution, administered, remediation, construct, deprive, teacher

COUNSEL: W. Crosby Few, Tampa, Fla., James D. Little, Gen. Counsel, Judith A. Brechner, Deputy General Counsel, State Board of Education, Tallahassee, Fla., for defendants-appellants cross-appellees.

Irving Gornstein, Washington, D. C., amicus curiae, U. S. A.

Stephen F. Hanlon, Robert J. Shapiro, Bay Area Legal Services, Inc., Tampa, Fla., Diana Pullin, Cambridge, Mass., Roger L. Rice, Richard Jefferson, Center for Law and Ed., Peter M. Siegel, Miami, Fla., for plaintiffs-appellees, cross-appellants.

David Rubin, Stephen J. Pollak, Richard M. Sharp, Washington, D. C., amicus curiae.

JUDGES: Before FAY and VANCE, Circuit Judges and ALLGOOD *, District Judge.

* District Judge of the Northern District of Alabama sitting by designation.

OPINION BY: FAY

OPINION

[*400] The State of Florida, concerned about the quality of its public educational system, enacted statutory provisions leading to the giving of a competency examination covering certain basic skills. Many students passed the examination but a significant number failed. The failing group included a disparate number of blacks (Equal Protection: Discrimination). This class **[**2]** action, brought on their behalf, challenges the right of the state to impose the passing of the examination as a condition precedent to the receipt of a high school diploma. The overriding legal issue of this appeal is whether the State of Florida can constitutionally deprive public school students of their high school diplomas on the basis of an examination which may cover matters not taught through the curriculum CURRICULAR VALIDITY. We hold that the State may not constitutionally so deprive its students unless it has submitted proof of the curricular validity of the test. Accordingly, we vacate the judgment of the district court and remand for further findings of fact. CURRICULAR VALIDITY. STUDENT PREVAILED

I.

In 1976, the Florida Legislature enacted the Educational Accountability Act of 1976. Laws of Florida 1976, Vol. 1, Ch. 76-223, pp. 489-508. The intent of the legislature was to provide a system of accountability for education in the state and to ensure that each student was afforded similar educational opportunity regardless of geographic location. Fla.Stat.Ann. § 229.55(2)(a) (West 1977). The legislature established three standards for graduation from Florida public schools. First, the students were required to complete **[**3]** a minimum number of credits for graduation. Second, they were required to master

certain basic skills. Third, they were required to perform satisfactorily in functional literacy as determined by the State Board of Education. [1] **[*401]** Each school district was directed to develop procedures for remediation, and a statewide testing program was outlined. Fla.Stat.Ann. § 229.57 (West 1977 & Supp.1980). In 1978, the Act was amended to require passage of a functional literacy examination prior to receipt of a state high school diploma.

1 The requirements are set out in Fla.Stat.Ann. § 232.246 (West Supp.1980) to which we will frequently refer:

232.246 General requirements for high school graduation

(1) Beginning with the 1978-1979 school year, each district school board shall establish standards for graduation from its schools which shall include as a minimum:

(a) Mastery of the minimum performance standards in reading, writing, and mathematics for the 11th grade, established pursuant to §§. 229.565 and 229.57, determined in the manner prescribed after a public hearing and consideration by the state board;

(b) Demonstrated ability to successfully apply basic skills to everyday life situations as measured by a functional literacy examination developed and administered in a manner prescribed after a public hearing and consideration by the state board; and

(c) Completion of a minimum number of academic credits, and all other applicable requirements prescribed by the district school board pursuant to §. 232.245.

(2) The standards required in subsection (1), and any subsequent modifications thereto, shall be printed in the Florida Administrative Code even though said standards are not defined as rules.

(3) The state board shall, after a public hearing and consideration, make provision for appropriate modification of testing instruments and procedures for students with identified handicaps or disabilities in order to ensure that the results of the testing represent the student's achievement, rather than reflecting the student's impaired sensory, manual, speaking, or psychological process skills, except when such skills are the factors the test purports to measure.

(4) A student who meets all requirements prescribed in subsection (1) shall be awarded a standard diploma in a form prescribed by the state board; provided that a school board may, in lieu of the standard diploma, award differentiated diplomas to those exceeding the prescribed minimums. A student who completes the minimum number of credits and other requirements prescribed by paragraph (1)(c), but who is unable to meet the standards of paragraph (1)(a) or paragraph (1)(b), shall be awarded a certificate of completion in a form prescribed by the state board. However, any student who is otherwise entitled to a certificate of completion may, in the alternative, elect to remain in the secondary school on either a full-time or a

> part-time basis for up to 1 additional year and receive special instruction designed to remedy his identified deficiencies. This special instruction shall be funded from the district's state compensatory education funds.
>
> (5) The public hearing and consideration required in paragraphs (a) and (b) of subsection (1) and in subsection (3) shall not be construed to amend or nullify the requirements of security relating to the contents of examinations or assessment instruments and related materials or data as prescribed in §. 232.248.

[4]** At the time of the trial of this lawsuit, the examination, the SSAT II, had been administered three times. The failure statistics showed a greater impact on black students than on white students. In the Fall, 1977 administration, 78% of the black students taking the exam failed one or more sections of the test as compared with 25% of the white students. Of the 4,480 black students taking the test for the second time in Fall, 1978, 74% failed one or both sections. Twenty-five percent of the whites retaking the test failed. On the mathematics section alone, 46% of the blacks retaking the test failed. The results of the third administration in Spring, 1978, which were released during trial, indicated that 60% of the blacks taking the mathematics exam for the third time failed as compared with 36% of the whites. In May, 1979, of the approximately 91,000 high school seniors in Florida public schools, 3,466, or 20.049% of the black students had not passed the test as compared with 1,342, or 1.9% of the white students. [2]

> 2 Debra P. v. Turlington, 474 F. Supp. 244, 248-249 (M.D.Fla.1979).

[5]** Plaintiffs-appellees, Florida high school students, filed this class action in the United States District Court for the Middle District of Florida, challenging the constitutionality of the Florida State Student Assessment Test, Part II (SSAT II) under the due process and equal protection clauses of the Fourteenth Amendment. They also challenged the test under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976) and the Equal Educational Opportunities Act, 20 U.S.C. § 1703 (1976). Plaintiffs were certified in three classes:

> Class A all present and future twelfth grade public school students in the State of Florida who have failed or hereafter fail the SSAT II
>
> Class B all present and future twelfth grade black public school students in the State of Florida who have failed or who hereafter fail the SSAT II
>
> Class C all present and future twelfth grade black public school students in Hillsborough County, Florida, who have failed or hereafter fail the SSAT II

Class A, B, and C claimed that appellants [3] designed and implemented a testing **[*402]** program which is racially biased and violates the equal protection clause of the Fourteenth Amendment.

[6]** These three classes also claimed that appellants violated the Fourteenth Amendment in instituting a program denying diplomas without sufficient notice or time to prepare for the exam.

3 Named defendants-appellants are: Commissioner of Education Ralph D. Turlington; the Florida State Board of Education: Governor Bob Graham, Secretary of State George Firestone, Attorney General Jim Smith, Comptroller General Gerald A. Lewis, Treasurer William Gunter, Commissioner of Agriculture Doyle Conner; the Florida Department of Education (DOE); the School Board of Hillsborough County, Florida: Roland H. Lewis, Cecile W. Essrig, Carl Carpenter, Jr., Ben H. Hill, Jr., A. Leon Lowrey; and Superintendent of Schools of Hillsborough County, Raymond O. Shelton. Defendants were sued in their individual as well as official positions.

Classes B and C, the black students, claimed that the SSAT II is a device for resegregating the Florida public schools in violation of the Fourteenth Amendment, 42 U.S.C. § 2000d, and 20 U.S.C. **[**7]** § 1703 because those failing the test are placed in remedial classes which tend to contain more blacks than whites. Plaintiffs sought declaratory and injunctive relief.

The District Court, Debra P. v. Turlington, 474 F. Supp. 244 (M.D.Fla.1979) found that Fla.Stat.Ann. § 232.246(1)(b) [4] as applied in the present context, violated the equal protection clause of the United States Constitution, Title VI of the Civil Rights Act of 1964, and the Equal Educational Opportunities Act as to plaintiffs in classes B and C. It held that section 232.246(1)(b) (West Supp.1981) violated the due process clause of the United States Constitution as to plaintiffs in classes A, B, and C. Defendants-appellants were enjoined from the use of the test as a requirement for receipt of diplomas until the 1982-1983 school year. The court found that the use of the examination for remediation violated neither the Constitution nor statutes.

4 See note 1 supra.

On appeal, the appellants contend that the court erred in finding **[**8]** that the use of the test violates due process because there was adequate notice and no property right was involved. They contend that the graduation requirement is not a punishment, does not deprive students of a "liberty" interest and does not violate the equal protection clause. Appellants contend that the court erred in finding 20 U.S.C. § 1701 and 42 U.S.C. § 2000d to be applicable. In their cross-appeal, plaintiffs-appellees contend that the district court erred in limiting the period of the injunction to four years and in upholding the validity of the examination.

We find, based upon stipulated facts, that because the state had not made any effort to make certain whether the test covered material actually studied in the classrooms of the state and because the record is insufficient in proof on that issue, the case must be remanded for further findings. If the test covers material not taught the students, it is unfair and violates the equal protection and due process clauses of the United States Constitution.

II.

At the outset, we wish to stress that neither the district court nor we are in a position to determine educational policy in the State of Florida. The state **[**9]** has determined that

minimum standards must be met and that the quality of education must be improved. We have nothing but praise for these efforts. [5] The state's plenary powers over education come from the powers reserved to the states through the Tenth Amendment, and usually they are defined in the state constitution. [6] As long as it **[*403]** does so in a manner consistent with the mandates of the United States Constitution, a state may determine the length, manner, and content of any education it provides.

> 5 As of March, 1978, 33 states had taken some type of action to mandate minimum competency standards, and movements were under way in three more. See C. Pipho, Minimum Competency Testing in 1978: A Look at State Standards, 59 Phi Delta Kappan 585 (1978); M. S. McClung, Competency Testing Programs: Legal and Educational Issues, 47 Fordham L.Rev. 651 (1959).
>
> 6 Florida's original grant of educational authority appeared in the Constitution of 1868, Art. VIII, § 2. The section stated that the "legislature shall provide a uniform system of common schools, and a university," and further provided that they would be free. Present authorization is found in the Florida Constitution of 1968, Art. IX, §§ 1-5.

[10]** The United States courts have interfered with state educational directives only when necessary to protect freedoms and privileges guaranteed by the United States Constitution. In 1899, for example, in the case of Cumming v. Board of Education, 175 U.S. 528, 20 S. Ct. 197, 44 L. Ed. 262, the Court upheld the decision of a local board to close a black school while keeping a white school open. Finding that the decision was based on economic reasons, the Court said:

> (T)he education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of the rights secured by the supreme law of the land.

175 U.S. at 545, 20 S. Ct. at 201, 44 L. Ed. at 266. While the outcome of the Cumming case might be questioned in this post Brown era, it must be remembered that it was not until just before the First World War that compulsory school attendance laws were in force in all states. [7] Public education was virtually unknown at the time of the adoption of the Constitution. In 1647 **[**11]** Colonial Massachusetts directed its towns to establish schools, and in 1749, Franklin proposed the Philadelphia academy. Until after the turn of the century, education was primarily private and usually sectarian. Lemon v. Kurtzman, 403 U.S. 602, 645-47, 91 S. Ct. 2105, 2127-28, 29 L. Ed. 2d 745, 774-75 (1976). Once part of the government, however, education became a significant governmental responsibility. As the Court noted in Brown v. Board of Education, 347 U.S. 483, 493, 74 S. Ct. 686, 691, 98 L. Ed. 873, 880 (1954):

> 7 Brown v. Board of Education, 347 U.S. 483, 489-90 n.4, 74 S. Ct. 686, 691, n.4, 98 L. Ed. 873, 878 n.4 (1954).

> Today, education is perhaps the most important function of State and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.

Stating that the provision of education ranks at the apex of the functions of a state, the Court in Wisconsin **[**12]** v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1971) was required to balance the state's need for its citizens to be educated against the citizens' hallowed right to free exercise of religion. "There is no doubt," the Court said, "as to the power of a state, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." 406 U.S. at 213, 92 S. Ct. at 1532, 32 L. Ed. 2d at 24.

Though the state has plenary power, it cannot exercise that power without reason and without regard to the United States Constitution. Although the Court has never labeled education as a "fundamental right" automatically triggering strict scrutiny of state actions, see San Antonio School District v. Rodriguez, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1972), it is clear that if the state does provide an educational system, it must do so in a non-discriminatory fashion. "Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which may be protected by the due process Clause..." Goss v. Lopez, 419 U.S. 565, 574, 95 S. Ct. 729, 736, 42 L. **[**13]** Ed. 2d 725, 734 (1975).

III.

It is in the light of the foregoing discussion of the relationship between the state and federal governments that we must analyze the plaintiffs' claims that SSAT II violates the equal protection and due process clauses of the Fourteenth Amendment. It is clear that in establishing a system of free public education and in **[*404]** making school attendance mandatory, [8] the state has created an expectation in the students. From the students' point of view, the expectation is that if a student attends school during those required years, and indeed more, and if he takes and passes the required courses, he will receive a diploma. This is a property interest as that term is used constitutionally. (Establishment of Property Interest). See Goss v. Lopez, 419 U.S. 565, 579, 95 S. Ct. 729, 738, 42 L. Ed. 2d 725, 737 (1975). Although the state of Florida constitutionally may not be obligated to establish and maintain a school system, it has done so, required attendance and created a mutual expectation that the student who is successful will graduate with a diploma. This expectation can be viewed as a state-created "understanding" that secures certain benefits and that supports claims of entitlement [**14] to those benefits. Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972). As the trial court noted, "graduation is the logical extension of successful attendance." 474 F. Supp. at 266; and as appellees note in brief, before SSAT II, a student completing the necessary number of credits would graduate with a diploma. (Brief of Appellees at 52).

> 8 Fla.Stat.Ann. § 232.01 (West Supp.1981) mandates that children between the ages of 6 and 16 attend school.

Based upon this implied property right, we find that the trial court was correct in holding that the implementation schedule for the test violated due process of law. In its finding, the court quoted from the report of the state's own task force:

> The problems created by the abrupt schedule for implementing the Functional Literacy Test were most severe for the members of Florida high school graduation class of 1979. At the eleventh hour and with virtually no warning, these students were told that the requirements **[**15]** for graduation had been changed. They were suddenly required to pass a test constructed under the pressure of time and covering content that was presumed to be elementary but that their schools may or may not have taught them recently, well, or perhaps at all.
>
> In retrospect, the Task Force believes that the schedule for implementing statewide high school graduation standards was too severe. We feel that most of the problems that are identified in later sections of this report are the result of trying to do too much in too little time. Consequently, we believe that the problems can and will be solved over time. Task Force on Educational Assessment Programs, Competency Testing in Florida Report to the Florida Cabinet (Part 1) 4 (1979).

474 F. Supp. at 265.

The due process violation potentially goes deeper than deprivation of property rights without adequate notice. When it encroaches upon concepts of justice lying at the basis of our civil and political institutions, the state is obligated to avoid action which is arbitrary and capricious, does not achieve or even frustrates a legitimate state interest, or is fundamentally unfair. See St. Ann v. Palisi, 495 F.2d **[**16]** 423, 425 n.5 (5th Cir. 1974). [9] We believe that the state administered a test that was, at least on the record before us, fundamentally unfair in that it may have covered matters not taught in the schools of the state. (DUE PROCESS: CURRICULAR VALIDITY)

> 9 In St. Ann, two students were indefinitely suspended because of their mother's behavior. The court considered this punishment without personal guilt to be a violation of a fundamental concept of liberty. Although the St. Ann case is factually dissimilar to the one we here consider, it is clear that in neither case can the state arbitrarily interfere. The case of Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976) is distinguishable in that in that case the plaintiff sought to require the state to give her a college diploma despite her failure to take a comprehensive examination. The court found that there was no denial of procedural or substantive due process because plaintiff had refused the university's efforts to tailor a special program to her needs. The expectations of college and high school students would certainly be different.

[17]** Testimony at trial by experts for both plaintiffs and defendants indicated that several types of studies were done before and after the administration of the test. **[*405]** The experts agreed that of the several types of validity studies, [10] a content validity study would be most important for a competency examination such as SSAT II. The trial court

apparently found that the test had adequate content validity, 474 F. Supp. at 261, but we find that holding upon the record before us to be clearly erroneous. In the field of competency testing, an important component of content validity is curricular validity, defined by defendants' expert Dr. Foster, as "things that are currently taught." (Tr.2845) [11] This record is simply insufficient in proof that the test administered measures what was actually taught in the schools of Florida.

> 10 Basic types of validity as defined by the American Psychological Association, Standards for Educational and Psychological Tests (1974) are as follows:
>
> Criterion related validity measurements of how well the test items predict the future performance of the test takers and how well the test results correlate with other criteria which might provide the same type of information.
>
> content validity measurements of how well a test measures a representative sample of behaviors in the universe of situations the test is intended to represent.
>
> construct validity how well the test measures the construct (defined as the theoretical idea developed to explain and organize some aspects of existing knowledge) for which it was designed.
>
> For an excellent discussion of the APA Standards as they relate to competency testing, see M.S. McClung, Competency Testing Programs: Legal and Educational Issues, 47 Fordham L. Rev. 651, 683 (1979).

[18]**

> 11 There is evidence in the record that care was taken in constructing a test which would match the objectives of the schools. The trial court's discussion of the development 474 F. Supp. at 257-259, indicates that the test was probably a good test of what the students should know but not necessarily of what they had an opportunity to learn.

During the course of pre-trial litigation, defendant-appellants stipulated as follows:

> No effort was made by the Florida Department of Education to ascertain whether or not all the minimum student performance standards were in fact being taught in Florida public schools. (Stipulation 114)
>
> The Florida Department of Education did not conduct any formal studies which showed whether or not the skills measured on the test were in fact taught in the public schools in the State of Florida. (Stipulation 117)

On oral argument before this Court, counsel for the appellants stated that the stipulations meant only that the state did no formal studies of the correspondence between what was tested and what was taught. She assured this Court that **[**19]** the state could prove that the test covered things actually taught in the classrooms. That may be the case, but this record does not establish such proof.

Dr. Thomas H. Fisher, Administrator of the Student Assessment Section, Department of Education, testified that the DOE merely assumed that things were being taught. (Tr.2844) Dr. John E. Hills, professor of Educational Research at Florida State University, testified that the test reliably and validly assessed applications of basic communications and math skills to everyday situations (Tr.2945), but he agreed that everything on the test might not have been taught. [12] Appellants placed into evidence **[*406]** some math books and communications teaching materials, but at least one teacher, Mr. Crihfield, testified that he did not cover the whole book in class. (Tr.3055).

12 A portion of Dr. Hill's testimony appears below:

Q You're saying then that an item which might include an element that had not been taught in school might cause some problems in this regard?

A Well, an item which is not part of the objectives of what we're trying to teach in school. I don't think you can probably comfortably say that every single thing that a person might have to do on a practical application problem has to be specifically taught. I would feel uncomfortable with that, because I don't think schools can teach every single thing.

But the objective may be. They can apply the problem, the techniques to a tin roof. Did we teach about tin roofs in school? Well, I don't know that we do.

But you sort of assume that that's available to most people.

Q We have no way of knowing though whether something that is included in an objective is in fact included in all of the classrooms in the State of Florida. We have already had that testimony from Dr. Fisher. So it would be possible that a test item might impact more severely on a particular minority group because those children simply did not have as part of their educational experience attention to that particular matter?

A Well, if they have not been taught the basics that it seems are part of the schools' essential material, then I'd say you're right. You know, there's let's turn now to construct validity.

[**20] We acknowledge that in composing items for a test, the writer is dealing with applications of knowledge, and therefore the form of the test question would not necessarily be the same as the form of the information taught in class. We think, however, that fundamental fairness requires that the state be put to test on the issue of whether the students were tested on material they were or were not taught.

CURRICULAR VALIDITY

We note that in requiring the state to prove on remand that the material was covered in class, we are not substituting our judgment for that of the state legislature on a matter of state policy. See Ferguson v. Skrupa, 372 U.S. 726, 731, 83 S. Ct. 1028, 1031, 10 L. Ed. 2d 93, 98 (1963); Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 9, 98 S. Ct. 1554, 1560, 56 L. Ed. 2d 30, 39 (1978). We do not question the right of the state to condition the receipt of a diploma upon the passing of a test so long as it is a fair test of

that which was taught. Nor do we seek to dictate what subjects are to be taught or in what manner. We do not share appellants' fear that our decision would prevent new items from being added to the curriculum. Those decisions would properly be left **[**21]** with the school authorities. As the United States Supreme Court said in San Antonio School District v. Rodriguez, 411 U.S. 1, 43, 93 S. Ct. 1278, 1302, 36 L. Ed. 2d 16, 49 (1972):

> The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

Just as a teacher in a particular class gives the final exam on what he or she has taught, so should the state give its final exam on what has been taught in its classrooms.

It follows that if the test is found to be invalid for the reason that it tests matters outside the curriculum, its continued use would violate the equal protection Clause. In analyzing the constitutionality of the examination under the equal protection Clause, the trial court stated, "(i)f the test by dividing students into two categories, **[**22]** passers and failers, did so without a rational relation to the purpose for which it was designed, then the Court would be compelled to find the test unconstitutional." 474 F. Supp. at 260. Analyzing the test from the viewpoint of its objectives, the court found that it does have adequate construct validity, that is, it does test functional literacy as defined by the Board. [13] We accept this finding and affirm that part of the trial court's opinion holding that having a functional literacy examination bears a rational relation to a valid state interest. That finding is, however, subject to a further finding on remand that the test is a fair test of that which was taught. If the test is not fair, it cannot be said to be rationally related to a state interest. REMAND FOR FUNDAMENTALLY FAIR TEST

> 13 Functional literacy is defined as "the ability to apply basic skills in reading, writing, and arithmetic to problems and tasks of a practical nature as encountered in everyday life." Exhibit CT 26 at 23 (Task Force Report).

We affirm the trial **[**23]** court's finding that the test items were not biased and that the test does not violate due process or equal protection by the fact that it is given only in public schools. As the court pointed out, the state need not correct all the problems of education in one fell swoop and it **[*407]** has a stronger interest in those for which it pays the cost. See Ambach v. Norwick, 441 U.S. 68, 77, 99 S. Ct. 1589, 1595 n.8, 60 L. Ed. 2d 49, 57 (1979). At present, the State of Florida exercises very limited control over private schools. [14] EDUCATIONAL AGENCY PREVAILED

> 14 See Fla.Stat.Ann. §§ 232.021, 229.821 (West 1977).

IV.

In considering appellees' equal protection claim, the trial court was required to consider the impact of the legislative action upon the community, the historical background, and the sequence of events leading up to the legislative action. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-268, 97 S. Ct. 555, 563-65, 50 L. Ed. 2d 450, 4d6566 (1977). The trial judge found that until **[**24]** 1967, Florida operated a dual school system intentionally segregating on the basis of race. The court found that the period from 1967 to 1971, segregation persisted and predominantly black schools remained inferior in physical facilities, course offerings, instructional materials, and equipment. [15] Appellant Turlington admitted that in part the failures of the black students taking the SSAT II could be attributed to the unequal education they received during the "dual schools" period. The record clearly indicates that appellants were aware of the possibility that more blacks than whites would fail the test.

> 15 In making this finding, the trial court relied on "vast amounts of evidence" and upon judicial notice as well as expert testimony. The plaintiffs had originally asked the court to take judicial notice that as a result of attending segregated schools prior to the implementation of unitary school systems, many of the members of Classes B and C received an education inferior to that received by white students during the period. Based upon Brown v. Board of Education, 347 U.S. 483, 495, 74 S. Ct. 686, 692, 98 L. Ed. 873, 881 (1954) and upon Mannings v. Board of Public Instruction of Hillsborough County, Florida, 427 F.2d 874 (5th Cir. 1970), the trial court took judicial notice that the education received by the blacks was unequal. Tr. 36; 474 F. Supp. at 251, n.13.

[25]** Finding insufficient evidence to support a holding that there was present intent to discriminate as defined by the Court in Personnel Administrator v. Feeney, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979) (that the law was enacted in spite of or because of the foreseen racial impact), the trial court held that the past purposeful discrimination affecting appellees in classes B and C is perpetuated by the test and diploma sanction. In attempting to justify the use of an examination having such a disproportionate impact upon one race, the appellants failed to demonstrate either that the disproportionate failure of blacks was not due to the present effects of past intentional segregation or, that as presently used, the diploma sanction was necessary to remedy those effects. See McNeal v. Tate County School District, 508 F.2d 1017 (5th Cir. 1975). The trial judge was, therefore, correct in holding that the immediate use of the diploma sanction would punish black students for deficiencies created by the dual school system. [16] STUDENT PREVAILED

> 16 The trial court took judicial notice that many of the students in classes B and C attended segregated schools prior to the implementation of the unitary school system. As stated by the trial court, the remedy was as follows:
>
> In light of the evidence relating to the necessary period of time to orient the students and teachers to the new functional literacy objectives, to insure instruction in the objectives, and to eliminate the taint on educational development which accompanied segregation, the Court is of the opinion that the state should be

enjoined from requiring passage of the SSAT II as a requirement for graduation for a period of four (4) years.

474 F. Supp. at 269.

[26]** With respect to the question whether administration of the test violates Title VI, 42 U.S.C. § 2000d (1976), [17] counsel for the United States conceded on oral argument before this court that if the test was found to be a fair test of what was taught in the schools, its use as a graduation **[*408]** requirement would not violate Title VI. [18] We agree with this conclusion CURRICULAR VALIDITY REMAND FOR FURTHER PROOF OF CURRICULAR VALIDITY

17 Appellees argue that further studies of the "differential validity" of the test should be done to determine whether the SSAT II tests blacks as blacks. We decline to disturb the trial court's finding that the test was valid in this respect. See 474 F. Supp. at 261 n.23.

18 42 U.S.C. § 2000d:

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

[27]** Because the test perpetuates past discrimination as to classes B and C, the diploma sanction violates the EEOA, 20 U.S.C. § 1703 (1976) which requires an educational agency to take affirmative steps to remove the "vestiges" of dual school systems. [19] We affirm the holding that there is neither constitutional nor statutory violation in using the results of SSAT II as a mechanism for remediation only. 474 F. Supp. at 268. STUDENT PREVAILED

19 If, upon remand, the appellants demonstrate that the examination is a fair test of that which is taught, we assume that the subject of the "vestiges" of the dual school system will again be examined by the trial court. A clarification of the role and effect of the "vestiges" of past discrimination upon appellees in classes B and C would be necessary in order to fashion a remedy.

CONCLUSION

We recognize that the interests of the State of Florida in both the remediation and diploma denial aspects of the basic competency program are substantial. The trial court noted an impressively **[**28]** increasing passing rate for which Florida teachers and students are to be commended. We hold, however, that the State may not deprive its high school seniors of the economic and educational benefits of a high school diploma until it has demonstrated that the SSAT II is a fair test of that which is taught in its classrooms

and that the racially discriminatory impact is not due to the educational deprivation in the "dual school" years.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

ANDERSON, et al., Plaintiffs, v. BANKS, et al., Defendants; JOHNSON, et al., Plaintiffs, v. SIKES, et al., Defendants

Nos. CV478-138, CV479-323

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, SAVANNAH DIVISION

520 F. Supp. 472; 1981 U.S. Dist. LEXIS 15463

June 17, 1981

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, a class of minority students who were or would have been denied a high school diploma solely because of a high school's exit exam policy, brought a due process and equal protection racial discrimination action to challenge defendant school district's requirement that in order to receive a high school diploma, each student was required to pass the California Achievement Test (CAT).

OVERVIEW: Plaintiffs claimed that the diploma policy violated the equal protection and due process clauses. The court found that the diploma policy was reasonably related to legitimate educational goals, but held that it should be evaluated in light of past de jure segregation in the district, for students required to take the test had been educated under the dual system. The court found that the test policy had a significant racial impact, that minority students had been misplaced in classes despite their achievement and I.Q. scores, and that the racial makeup of the classes was a potent predictor of success on the test for minority students. The court held that the exit exam had a discriminatory impact in violation of the equal protection Clause, 42 U.S.C.S. § 2000d et seq., and 20 U.S.C.S. § 1703(b), and that it could not be imposed until all minority students whose poor performance was attributable to their participation in the dual system had graduated. The court held that the due process clause was violated as well, because defendants failed to show that the items tested were actually taught in the schools.

OUTCOME: The court ordered diplomas awarded to all students denied them by the exit exam, ordered that no further diploma sanctions be imposed until graduation of the first group who began their education after the abolition of the dual system, at which time a continued benefits showing would be required. The court scheduled a hearing to determine the particular procedures and timetable necessary to remedy the misclassification of students.

CORE TERMS: score, diploma, grade, achievement, tracking, school districts, educational, placement, mentally retarded, dual, math, discriminatory, segregation, elementary, remedial, testing, school board, classified, measurement, teacher's, high schools, notice, exit, school authorities, high school diploma, curriculum, grouping, classroom, black children, taught

COUNSEL: [**1] Richard D. Phillips, Ludowici, Ga., for plaintiffs in No. CV478-138.

J. Franklin Edenfield, Swainsboro, Ga., M. Francis Stubbs, Reidsville, Ga., for Ben F. Sikes, in both cases.

B. Daniel Dubberly, Jr., Glennville, Ga., Charles Rippin Adams, Adams, Brennan & Gardner, Savannah, Ga., for defendants in both cases.

David Arnold, Ga. Legal Services Programs, Central Office, Atlanta, Ga., for plaintiffs in No. CV479-323.

Spivey & Carlton, P. C., Swainsboro, Ga., for defendants in No. CV479-323.

OPINION BY: EDENFIELD

OPINION

[*476] ORDER

I. Background of the Cases, the Claims and Causes Involved

The impetus for this litigation was the institution by the Tattnall County School District of an exit examination. Beginning with the graduating class of 1978, all diploma candidates have been required, in addition to other already existing diploma requirements, to achieve a grade equivalency score of 9.0 on both the mathematics and reading sections of the California Achievement Test (CAT). Claims were initially raised in an administrative proceeding which progressed from the local school board, to the State Board of Education, and ultimately to the Georgia Court of Appeals. The issues raised **[**2]** in that proceeding were: (1) whether the Tattnall County School Board had the authority under state law to adopt an additional graduation requirement AUTHORITY; and (2) whether a violation of the equal protection clause had occurred since a greater burden was placed on the students of Tattnall County than on the students in other Georgia counties EQUAL PROTECTION. The first suit in this Court challenging the exit exam, styled as Wells v. Banks, CV478-138, was then filed asserting due process and equal protection claims as well as the state law claims. An additional claim concerning irregularities in the School Board voting districts was voluntarily dismissed by the plaintiffs before trial. While the case was pending here, the authority of the School Board to require the examination was upheld in the Georgia courts AUTHORITY. The Georgia courts also found no equal protection violation in the fact that children in other counties were not subjected to the requirement equal protection . There were no black plaintiffs remaining in the case in this Court at time of trial. The case was restyled Anderson v. Banks. In addition, plaintiff's counsel adopted in his proposed pretrial order the outline of legal issues set forth by plaintiff's counsel **[**3]** in Johnson v. Sikes, thus further narrowing the scope of issues in this case to the due process claim. Since Anderson v. Banks is a suit for damages, it was agreed among all **[*477]** counsel and the Court that liability only would be tried presently and a separate trial on the issue of damages would be held later if necessary.

2. The second action here consolidated for trial was filed in October, 1979, by Kathy Norris Johnson. In October, 1979, she moved to proceed in forma pauperis and to

consolidate her case with Wells v. Banks. The motions were granted. The Court certified the following classes:

> 1. All black children who have attended, are attending, or will attend public schools in Tattnall County, Georgia, and who have completed, will complete, or are eligible to complete all valid and legal requirements for receipt of a high school diploma established by Defendant Board of the Georgia State Board of Education, but who did not or will not achieve a particular score on the California Achievement Test, and who, as a result of having failed to achieve a certain score on said test, have been or will be denied a high school diploma by Defendants.
>
> 1.a. All black children **[**4]** who have attended, are attending, or will attend public schools in Tattnall County, Georgia; and who have completed, or will complete all requirements for receipt of a high school diploma established by Defendant Board or the Georgia State Board of Education, other than achieving a particular score on the California Achievement Test, and who, solely as a result of having failed to achieve a certain score on said test, have been or will be denied a high school diploma by Defendants.
>
> 2. All children who have attended, are attending, or will attend public schools in Tattnall County, Georgia, who have been or will be classified by the Tattnall County School District or Board as Educable Mentally Retarded, and who have been or will be foreclosed from receiving a high school diploma by Defendants because of said classification. EQUAL PROTECTION

The issues in the Johnson case are as follows: (1) whether the exit exam violates the equal protection clause of the Fourteenth Amendment; (2) whether the diploma requirement is violative of due process; (3) whether the policy violates Title VI; (4) whether the policy violates 20 U.S.C. §§ 1703, 1706; and (5) whether the policy of excluding educably mentally **[**5]** retarded (EMR) students from the possibility of obtaining a diploma violates Section 504 of the Rehabilitation Act of 1973. EQUAL PROTECTION

The case was brought to trial on August 7, 1980.

After a thorough analysis of the issues, the Court sent a copy of its proposed order to the parties for comment. The Court then reworked the order in light of these very helpful comments. The Court has been very cautious in this matter which is of vital importance to the educators of this state. The recent opinion in Debra P. v. Turlington, 644 F.2d 397 (M.D.Fla.1981), has caused the Court to reconsider major portions of its reasoning.

II. Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1343(3) and (4) over plaintiff's claims asserted under the Fourteenth Amendment and 42 U.S.C. § 1983; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, et seq.; the Rehabilitation Act of 1973, 29 U.S.C.

§ 794; and the Equal Educational Opportunities Act, 20 U.S.C. § 1701, et seq., because each constitutional or statutory provision provides for the protection of equal or civil rights. Cases interpreting the Rehabilitation Act of 1973 have noted the strong similarities in statutory language and **[**6]** legislative history to civil rights legislation. See University of Texas v. Camenisch, 616 F.2d 127 (5th Cir. 1980), review granted, 449 U.S. 950, 101 S. Ct. 352, 66 L. Ed. 2d 213 (1980), vacated and remanded on other grounds, 451 U.S. 390, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981). Jurisdiction over the Equal Opportunities Act claim is also found under 20 U.S.C. § 1708. EQUAL PROTECTION

Defendants have strenuously argued that the plaintiffs' case is basically a challenge to an academic program and academic regulations, which, in the absence of a bad motive, are not subject to judicial scrutiny. As support they cite Mahavongsanan v. **[*478]** Hall, 529 F.2d 448 (5th Cir. 1976). Yet in Mahavongsanan the Fifth Circuit ruled that plaintiff had no action on the merits of the case. The Court did review plaintiff's arguments and decided that no rights of the plaintiff had been violated. In underscoring the reluctance of the courts to review purely academic decisions, the Fifth Circuit did not suggest that the district court should have refused to hear the case at all because it concerned academic matters. A substantive rule of law rather than a jurisdictional rule is announced there. In addition, the **[**7]** diploma of a graduate student rather than a high school student was at stake. Arguably, a high school diploma represents a very different interest, in light of compulsory attendance laws and the realities of our society which would not be applicable to a graduate degree.

In addition, a large portion of plaintiffs' claims here rest on allegations of racial discrimination which, even in an academic setting, are clearly subject to judicial scrutiny. See United States v. Gadsden County School System, 572 F.2d 1049 (5th Cir. 1978). Insofar as the claims allege that particular statutes giving rise to private litigation have been violated the claims are clearly justiciable. Insofar as the due process claims are concerned, in the absence of a protectible liberty or property interest, defendants' argument may have some validity. In that case, plaintiffs fail on the merits. So while agreeing with defendants that, in general, purely academic decisions are not within the province of the judiciary, as a threshold consideration, discussion of this point adds little. due process EDUCATIONAL AGENCY PREVAILS

III. Historical Background

A. Tattnall County

Evidence was submitted concerning the history of race relations in Tattnall County **[**8]** and the sociological makeup of the area. The Court admitted evidence of this nature for the purpose of the determination of whether discriminatory intent played a role in the implementation of the exit exam policy and for the purpose of evaluating the Board's prior efforts in desegregating the schools. However, the Court is also mindful that for the most part the social and racial history of Tattnall County is a history shared with all of the South and standing alone sheds limited light on these recent events.

Tattnall County is located in the coastal area of Georgia. In 1970, its population of 16,557 was 30.8% black. While the population of Tattnall County as a whole is poor with more than 35% having incomes below the poverty line, the black population is poorer according to the 1970 census. More than 64% of the blacks had incomes below the poverty line. Median income for blacks lags behind that of whites. This state of affairs is not peculiar to Tattnall County.

B. The School System

The Tattnall County Board of Education is an elected body which conducts the business of the Tattnall County School District. The superintendent is Ben F. Sikes who is also elected. Mr. Sikes was superintendent **[**9]** at the time the Tattnall County School District abolished separate schools for whites and blacks in the 1970-1971 school year and has held that post to the present.

The Tattnall County Board of Education operates two high schools, Reidsville High School and Glennville High School. These schools are located in the towns whose names they bear. Reidsville is also the location of Tattnall Elementary School which contains classes from kindergarten through sixth grade. Two additional schools are located in Glennville. These are Seckinger Primary School, housing grades kindergarten through fourth grade, and Glennville Middle School which contains grades five through eight. A third primary school is located in Collins, the Collins Junior High School, which, despite its name, houses grades kindergarten through eight. The Tattnall County School District also operates the Ben Sikes School which is a separate school for the trainable mentally retarded students.

C. The History of Segregation in Tattnall County

Plaintiffs introduced evidence to illustrate that racial prejudice was pervasive in **[*479]** Tattnall County prior to and at the time when the Tattnall County School District abolished **[**10]** the dual system. For example, newspaper clippings did indicate a less than substantial dedication to the equality of the races. However, such items are only marginally helpful in assessing the conduct of the School Board in implementing the exit exam policy fifteen years later. EQUAL PROTECTION

The emergence of Tattnall County into the era of integration was not an easy transition. The schools were totally segregated until 1965 when the School Board agreed to introduce a Freedom of Choice program. Four black students applied for admission to the all-white high schools. These were Gail Strong, Roxie Ann Smiley, Johnny Harrison, and Ronald Johnson. At the School Board meeting which took place on September 7, 1965, directly before the plan was to be implemented, the principals were asked to talk to their students and explain "the situation they are facing, stressing the fact that there will be no preferential treatment for any child." School Board Minutes, Plaintiffs' Exhibit 58.

One of these students, now Mrs. Gail Strong Small, testified that she believed that she and her friend Roxie had been chosen to be the ones to integrate the all-white high school. Mrs. Small had graduated from Collins Elementary **[**11]** in 1962, a black school that was closed in 1970 when the dual system was abolished because it was

substandard. Mrs. Small was attending Tattnall Industrial High, the all-black high school at the time of her decision. However, she was induced to change her mind about changing schools. She and her friend were informed at a meeting at Collins High School that because their scholastic training had been so inferior, they would have to be put back a year, or perhaps two, even though Mrs. Small was an honor student at Tattnall Industrial High School. The students decided to remain in the black school.

Mrs. Small testified that during this period she was subjected to harassing phone calls and that strangers shot at her house.

Miss Ophelia McIntosh testified to the condition of Collins Elementary School throughout this period. Classes were crowded with 40 to 60 children in a classroom. The books were old and written in. There were never any maps or other teaching aids. Mrs. Small testified to the poor plumbing facilities and the lack of playground facilities.

Another black child who attempted to attend a white school under the Freedom of Choice plan was Ronald Johnson. His father testified **[**12]** hat during the period when Ronald attended a white school under the Freedom of Choice plan shots were fired into the house from passing cars. Harassment culminated in the burning of the Johnson's barn which destroyed their livestock. The Federal Bureau of Investigation began investigation and the harassment ceased. Ronald Johnson spent only that school year in the white school.

The dual system remained intact in the 1966-1967 school year. On January 20, 1967, the Board voted to forego federal funds rather than integrate the schools. On May 11, 1967, Tattnall County was found to be in violation of Title VI and federal funds were cut off. There were no federal funds received by Tattnall County in the 1968-1969 school year.

Ben Sikes, the present superintendent of schools in Tattnall County, was first elected to his post in 1968 after having been principal of Glennville Middle School for five years. He was superintendent at the time the dual system was abolished. The final impetus for the abolition of the dual system came from a court order. The Georgia Department of Education was under court order to withhold state school funds to any district which had not submitted its desegregation **[**13]** plan. The letter sent by the Board of Education to the citizenry, dated July 14, 1970, clearly spells out that the reasons for integration were financial. The 1970-71 academic year was the first in which blacks and whites attended the same schools. In the reorganization, Collins Elementary School, the formerly all-black elementary school, was closed as substandard.

[*480] Mr. Sikes testified that once the decision had been made, he attempted to implement the plan in a positive manner. He called a meeting of all the teachers and informed them that the dual system was at an end and that anyone who felt unable to work in the integrated system "had better go elsewhere." A university course designed to ease the transition to the unitary system was offered locally but, except for the administrators, few attended. As a measure to aid in the transition to an integrated system, summer school for Title I children was held in the summers of 1970 and 1971. Both blacks and whites attended this program which was financed through Title I funds. Several hundred children attended.

However, Superintendent Sikes' files contained minutes of a meeting with the principals on January 19, 1970, the **[**14]** winter preceding integration. According to the minutes, the principals were informed that attendance laws would not be as important in the biracial schools as they were in the dual system. At that same meeting, according to the minutes, it was suggested that two separate tracks be initiated one for college-bound students and the other for non-college bound students. [1]

1. This two-track system was not implemented.

Even after the abolition of the dual system, the bus transportation to Reidsville High School from Collins, Georgia continues to be racially segregated. Two buses driven by black drivers transport the black students while two buses driven by white drivers transport the white students. Paul Walden, a black student at Reidsville High School, testified that Mr. Rhodes, the principal of Collins Junior High, had instructed the students that they were to ride a bus containing students of their own race. Buses carrying students to extracurricular activities are not segregated.

Except for the programs **[**15]** discussed above, no special effort was made to insure that the establishment of integration in the schools would be successful. The black students who had attended the substandard black schools were incorporated into the schools without any effort at that time to provide remediation.

Dr. Spencer, plaintiff's expert on child psychology and development, testified that it would be very difficult for a child to overcome his early training in a substandard segregated school. In addition, if a child perceives himself as inferior and a low achiever, he tends to divorce himself and his energies from the source of the unpleasant information. Thus, as Dr. Spencer testified, if a child is exposed to those who believe black is inferior or if he is exposed to those who brand him as a low achiever, he is likely to protect his self esteem by ignoring the source. Here, the black children attended inferior schools before they were permitted to attend integrated schools. Both factors worked against the black children and tended to retard their achievement. They had received a poorer education in the segregated schools and they were perceived by themselves and others as inferior. A possible example **[**16]** of this phenomenon is Kathy Johnson, a named plaintiff in the litigation, who had a non-verbal IQ score which fell from 112 to 58 during her school career in Tattnall County.

D. The Tracking System

While a remedial program for the black students was not instituted, a tracking system was adopted in 1970-1971 school year. Defendants characterized this grouping as by achievement rather than by ability but as plaintiff's expert, Mrs. Bryan, testified, the distinction between achievement grouping and ability grouping is an illusory one since it is impossible to measure raw ability.

Tracking was employed in the elementary and junior high schools with the exception of Collins Junior High School which employed heterogeneous grouping. The tracking system often resulted in racially identifiable classrooms. For example, at Seckinger Elementary School in 1971, while the first grade classes were equally proportioned, the

second grade includes a 100% white class, a 100% black class, and an identifiably white class. The Fourth grade **[*481]** which consisted of five classes included all white classes and two predominantly black classrooms. In 1972, almost half of twenty-four classes significantly **[**17]** departed from the one-third black, two-thirds white makeup which one might expect. Racially identifiable classes persisted at Seckinger until 1979-1980 when the school system abandoned its tracking system as a result of an investigation by the Office of Civil Rights. Similar patterns consisting of a large number of racially identifiable classrooms occurred in the other Tattnall County schools which employed the tracking system. [2]

> 2. Charts giving the exact racial percentages in each school in the years during which the tracking system was in force are attached as Appendix A.

Mr. Sikes testified that it was not intended that the black children be placed in the lower tracks it simply turned out to be the case. That a disproportionate number of blacks were enrolled in the slower moving classes is even more surprising in light of the IQ data which came to light during the litigation. In examining the files of the students who have had to meet the CAT requirement in order to graduate, it was discovered that **[**18]** some files contained IQ scores from 1968-1969. There were 137 scores in the files. Ninety-five of the scores were for white children. Defendants strenuously objected to the use of these scores as a basis for any conclusions in the case on the grounds that the test given was a group test and was therefore unreliable and on the basis that there was no way to judge whether the sample composed of the students for whom early IQ scores are available is representative of the population of students who were subjected to the CAT requirement in order to graduate.

Ms. Driver, a psychometrist employed by the Tattnall County School District, testified that she did not believe that group scores were reliable and would make no decisions based on group scores. Dr. Leon Hurley, plaintiff's expert, testified that while he agreed that the placement of an individual child should never be based on an IQ obtained from group testing, his opinion was that the scores were reliable for the group. He also testified that an individual child was likely to do better in an individual testing situation than in a group testing situation. The Court agrees with Dr. Hurley that the group scores are reliable on a group **[**19]** basis.

The problem of the representativeness of the sample for whom IQ scores were available presents a more difficult problem. The number of children for whom scores were available, according to plaintiffs' statistical expert, Mr. Cole, was numerous enough for meaningful statistical analyses to be performed on the data. But the fact that the data are numerous enough does not necessarily indicate that the data are also representative. However, support for their representativeness comes from the data themselves. When the individual IQ scores were plotted, they were normally distributed with a mean of 102, almost exactly duplicating the distribution in the general population. Before the Court, then, is the situation in which the distribution of scores for the 137 students whose files contained early IQ scores is known. The scores of the 137 students appear to be representative of the scores of the general population. If the 137 scores are not representative, then the early IQ scores of all the students who had been subjected to the

CAT graduation requirement are not similar to the scores of the population at large. Instead of believing that the missing scores differ from both those **[**20]** of the entire population and the Tattnall County students for whom scores are available, it is more likely that the scores which are available are representative of those of the group scores which are missing.

Analysis of these early IQ scores according to Mr. Cole and Mr. Huberty, defendant's expert on statistics, demonstrated that race and IQ were not related. The Court therefore concludes that the black and white children who were later subjected to the CAT diploma requirement began their academic careers with generally equal abilities.

In view of this fact, the disproportionate number of black children in the lower **[*482]** groups is difficult to justify. Mr. Sikes testified that children were not placed in the lower tracks by IQ scores. Achievement, not ability, was the criterion used for placement according to Mr. Sikes.

However, even ignoring the difficulty discussed above of distinguishing meaningfully between achievement and ability, it appears that the black students in Tattnall County have not been placed fairly according to any objective criterion. The Court here relies on the factual findings of the Office for Civil Rights (OCR) based on its investigation of student **[**21]** class assignments conducted December 10-13, 1979, after a complaint had been filed alleging that the grouping practices violated Title VI of the Civil Rights Act of 1964. Defendants' present tracking policies were implemented in the 1972-1973 school year. Before integration was implemented, achievement grouping was not practiced. The primary determinant for placement of children entering the first grade is the Scott Foresman Initial Placement Score. Possible scores range from 0 to 57. Teacher judgment also plays a heavy role in placement. The CAT given to the kindergarten children in the eighth month of their kindergarten year plays a role primarily in the placement of borderline cases. The children were placed in one group for all subjects.

OCR found that black students were over-represented in the lower achievement groups and under-represented in the higher groups. This occurred in many cases despite rather than because of the scores achieved by the children. [3] There were no absolute cutoffs for particular groups and the over-lap worked to the disadvantage of the black students. At Seckinger Elementary there were many examples of black children who had been placed in lower groups **[**22]** than white children who had the same scores. Black children were placed as many as three classes below their white counterparts with the same scores. At Tattnall Elementary School, first graders were placed by adding their Scott Foresman scores to their CAT scores. However, the only use which was made of the composite scores was to make an absolute cutoff to determine the A and B groups. Those falling below the cutoff were placed in C, D, and E groups essentially without additional regard to their abilities. These grouping practices at Tattnall Elementary resulted in racially identifiable classrooms on the first grade level and the pattern of racially identifiable classrooms continued in each grade.

3. Specifically, OCR found that the scores overlapped as follows:

Achievement Group	*Range of Reading Scores*
1A	45-57
1B	37-56
1C	40-50
1D	24-49
1E	30-45

UNKNOWN

The tracking system as employed moved the lower groups through the same material which was utilized for the high achievement **[**23]** groups. No particular remediation or enrichment was offered. Students were promoted on the basis of their chronological age rather than their having successfully completed the requirements for a particular grade.

Plaintiffs bolstered their attack on the tracking system with statistical evidence. Two types of statistical analysis were used throughout the trial. The first type of analysis compares the actual distribution of data with its expected distribution. A chi square is the term used to describe the analysis of two variables, each of which is divisible into two mutually exclusive categories. A particular combination of these variables is compared to the expected value. A distribution is considered statistically significant if it would occur no more than five times out of one hundred. This .05 is the level of statistical significance. The second type of analysis is the correlation or linear regression. This analysis seeks to determine the existence of a relationship between two continuous variables or between one continuous variable and two mutually exclusive categories. This relationship is expressed by "Pearson r." Pearson r measures the strength of a relationship. If the value **[**24]** of Pearson r is squared ("r squared"), the resulting figure indicates the extent to **[*483]** which one variable is dependent on or can be predicted by the other variable. Another way of expressing this type of relationship is the probability or "P value." In order to be statistically significant, the P value must be less than .05; in other words, in order to be considered statistically significant, the relationship can be expected to occur by chance fewer than five out of 100 times.

Plaintiffs determined for each child for whom an early IQ score was available, the "race percent average." This figure was obtained by figuring the percentage of black children in a particular student's classes each year after the dual system was abolished and then averaging these figures. Dr. Huberty, defendant's expert on statistics, at one point in his testimony, strongly disagreed that race percent average was a proper variable because it lacked independence. Dr. Huberty argued that since all of the children in a particular class would share the same percentage for that year, the final figures for the race percent average would not be independent many children would necessarily share the same numbers. [**25] Dr. Shapiro, plaintiff's expert, disagreed that the data were not

independent and argued that if Dr. Huberty was correct, the data for race percent average when plotted should line up in columns. When Dr. Shapiro plotted the coordinates, the data were scattered. Thus, the Court concludes that race percent average is an appropriate variable for use in their correlation studies.

Plaintiffs' experts determined the correlation between the early IQ scores and race percent average for blacks and whites. The results support the inference that the black children were not placed according to their abilities while the white children were. For white students there was a significant negative correlation between their early IQ scores and being in a predominantly black class. In other words, for white children, the higher their early IQ scores, the fewer black children were likely to be in the same classroom. The actual data respecting this comparison were likely to occur by chance fewer than once in a thousand instances. However, for black children, the correlation between early IQ scores and being in a predominantly black class was not significant. [4] Thus, even if one posited a generally lower **[**26]** level of intelligence for the black children, an assumption which the evidence in no way supports, one would expect that high IQ black children would have fewer black students in their classes. But the correlations run on the actual figures support the conclusion that, while early IQ scores were not correlated to race, black children were placed disproportionately in the lower levels, placements which were not supported by early IQ scores or the achievement tests administered.

> 4. Dr. Shapiro testified that the results of the correlations were changed only marginally by ignoring the student's own race. The significant negative correlation between IQ and race percent average for whites and the lack of significant correlation between IQ and race percent average for blacks held true.

Achievement grouping was not attempted at Collins Junior High which used a system of stratified homogenous grouping. Since two of the elementary schools in Tattnall County, Seckinger and Tattnall Elementary, profess to group by **[**27]** achievement levels, a comparison can be made between the performance of the students who were grouped and the performance of those who were not grouped. Two objective bases of comparison exist in the Georgia Criterion Reference Test and the CAT.

A criterion referenced test is one which tests specific skills which the students presumably have been taught. Such a test differs from a norm referenced test. A norm referenced test compares the performance of the test taker to the performance of the test-taking population. The score is essentially a relative one. An individual score on a norm referenced test indicates how overall performance compares to that of the group on which the test was normed. The score does not indicate what particular skills are possessed by the student. A criterion referenced test indicates which specific skills have been mastered by **[*484]** the test taker. While a criterion referenced test tells only the skills which have been mastered, obviously these results can be compared between schools or between school districts.

The Georgia Criterion Reference Test (CRT) is given to many Georgia school children every year. This test is constructed to evaluate students' **[**28]** mastery of particular concepts appropriate to the students' particular level. Plaintiffs submitted CRT results for

eighth graders in Tattnall County. Illustrated by means of bar graphs, plaintiffs' exhibits compared the average results achieved in 1977, 1978, and 1979 by the eighth graders in three schools; Collins Junior High, the non-tracked elementary and junior high school; Glennville Middle School, the tracked middle school which is fed by Seckinger Elementary, also tracked; and Reidsville High School which is fed by Tattnall Elementary School which is tracked. In the mathematics sections of the CRT in the category of sets, in 1977, the three schools scored closely together with Reidsville slightly ahead of Collins which was slightly ahead of Glennville. However, in 1978 and 1979 Collins was dramatically ahead. In operations, Collins was well ahead for all three years. In measurements, Collins was ahead in all three years. In probability and statistics, Reidsville was slightly ahead of Collins in 1977 but Collins was the leader in 1978 and 1979. In relations and functions, Reidsville was slightly ahead in 1977, Collins was ahead in 1978 and 1979. In geometry Collins was dramatically **[**29]** ahead in all three years. See Plaintiffs' Exhibit 122.

The reading areas of the CRT appear to reflect similar results for the eighth graders in the three schools. In word recognition, Reidsville High was slightly ahead of Collins in 1977, but Collins was dramatically ahead in 1978 and 1979. In comprehension, Collins was well ahead in all three years. In language usage, Collins was ahead in all three years. In study, Collins was dramatically ahead for all three years.

Defendants did not contradict the above stated evidence but attempted to refute the inference that students learned more efficiently when they were not grouped by achievement by submitting additional evidence. One such item of evidence was the drop in scores of the eighth graders at Collins in 1980 when a new edition of the CRT was introduced.

In addition, students at Collins are using a different curriculum based on different teaching materials. Defendants introduced comparative scores made on the CRT for second and third grade students in 1979 and 1980. The pattern apparent in the scores for both the reading and mathematics sections is that the second graders at Collins do relatively poorly on the CRT while third **[**30]** graders at Collins do very well. The suggested explanation of this discrepancy in the scores of the Collins students offered by plaintiffs was that the different curriculum used by Collins introduced particular concepts at different times than the curriculum used at the other two schools. This explanation makes a great deal of sense.

Although the eighth grade figures appear to support strongly the premise that the non-tracked children out-perform the tracked children, the sixth grade CRT scores apparently demonstrate the opposite. The Collins students performed poorly.

Mr. Akins, principal of Tattnall Elementary School, performed research and came up with some interesting figures. Reidsville High School graduates students from both the non-grouped Collins Junior High line and the grouped Tattnall Elementary line. He determined that more black students who had progressed through tracked programs achieved 9.0 on the CAT. The precise figures for black students meeting the CAT requirement were as follows:

1980 80.5% of tracked, 66.7% of non-tracked;

1979 81.8% of tracked, 63.6% of non-tracked;

1978 77.8% of tracked, 66.7% of non-tracked.

On the basis of all **[**31]** the evidence recited on the merits and non-merits of achievement grouping, I am unable to reach any firm conclusion on whether such grouping is beneficial. **[*485]** The strong showings of the Collins third graders and eighth graders on the CRT appear to demonstrate the benefits of non-grouping and the sixth grade scores and experience of ex-Collins students in passing the CAT appear to show otherwise. The differences in the curriculum used at Collins further cloud the question. Throughout the comparisons, Seckinger, at which achievement grouping is practiced, generally performed poorly, and more significantly, not similarly to Tattnall Elementary where achievement grouping was also practiced. Tattnall County operates only three elementary schools. Since the non-tracked school also uses a different curriculum, I find it impossible to accurately evaluate the effects of achievement grouping. In addition, since children were not grouped in a fair manner, it is difficult to reach any conclusion on the operation of a fairly administered tracking system. I see no basis, however, for concluding that achievement grouping as practiced in Tattnall County has obvious benefits. equal protection STUDENT PREVAILED

IV. The Test

[32] A. Its Inception**

The diploma requirement in Tattnall County that each graduating student must perform at ninth grade level in the mathematics and reading portions of the California Achievement test was first conceived by Mr. Akins, principal of Tattnall Elementary School, and Mr. Russell, principal of Reidsville High School, on an automobile trip. They were concerned that some of the schools in Tattnall County were considered substandard by the State of Georgia. At that time, there was no formal existing procedure to identify those who were not performing at grade level in high school. No remedial programs existed and there was no method of requiring students to enroll in particular courses in high school to improve their basic skills.REMEDIATION Mr. Akins and Mr. Russell passed their idea concerning competency testing onto other teachers and the idea was eventually presented to Superintendent Sikes and the School Board. The School Board adopted the policy in Spring, 1976, but did not impose the diploma sanction until Spring, 1978. Previous to the implementation of the CAT requirement, receipt of a diploma had been conditioned on successful completion of a certain number of credit hours and **[**33]** sufficient attendance. DUE PROCESS

Superintendent Sikes and the School Board did not perform some of the preliminary steps suggested as appropriate by plaintiffs. They did not examine the Technical Bulletin published by CTB McGraw-Hill, the test publishers. They did not perform a local validation of the CAT. They did not specifically address the effect that the CAT would have on students in the lower tracks or students who had previously attended all-black schools. However, Superintendent Sikes testified that he did look up the test in the

Mental Measurement Yearbook, the authoritative source on testing according to plaintiffs' expert on testing, Mrs. Bryan. That source gave a favorable review to the 1970 edition, including a favorable review by Mrs. Bryan. VALIDITY

When questioned about the choice of test, Superintendent Sikes testified that the CAT was chosen because the school district had had good experience with the test. A norm referenced test was chosen rather than, for example, a particular score on the CRT, because the Board wanted to graduate students who compared favorably to national achievement levels. It was felt that in light of the mobility of contemporary society, the school system should **[**34]** prepare its graduates to compete on a national scale. VALIDTY

The school system had had success with its Title I programs. By administering the CAT during the high school years, students who needed remedial help could be identified and required to attend remedial classes in reading or math as indicated REMEDIATION. By employing the diploma sanction, the Board and administration hoped to spark student motivation in both the sense that consequences attached to failure to achieve and that the diploma, for the first time in years, would meaningfully represent a particular level of achievement. Mrs. Bradley, head of the math department at Reidsville, testified that she and others believed that part **[*486]** of the students' poor achievement was due to an overwhelming lack of motivation on the part of the students.

Although Mr. Sikes testified that he did not expect that every student would pass the CAT and acquire a diploma, there was no evidence that the policy was adopted with racial intent. There was no evidence that defendants actually foresaw that the policy would work to the disadvantage of the black students. The testimony of the School Board members was that the policy was intended to improve student **[**35]** performance and not to discriminate in any way. The Court agrees with plaintiffs in that had the Board and administration directed their attention to the possible racial impact of the policy, it would have been apparent that considering the history of the dual system in Tattnall County, a disproportionate number of blacks would be denied diplomas. EQUAL PROTECTION

Thus, the policy adopting the CAT diploma requirement and establishment of remedial classes was accepted by the School Board in 1976 although implementation was deferred. REMEDIATION. Evidence was conflicting on when students and parents were officially notified of the new policy. DUE PROCESS. Loretta Wilcox, a named plaintiff who was a member of the class of 1978 who failed to meet the CAT requirements, testified that she found out about the requirement when she was in the eleventh grade. James Farmer who failed the CAT twice testified that he found out about the CAT requirement by overhearing a conversation when he was in the eleventh grade. However, Mr. Akins testified that the students were informed at the end of the 1975-1976 school year. This testimony was corroborated by Mr. Greg Moran, assistant principal at Reidsville High School. The Court credits the testimony **[**36]** presented by defendants that parents and students were specifically notified. It is incredible that the School Board would adopt a policy of such importance and fail to notify the parents and students. It is more likely that a particular family might not recall the letter or misplace it. However, the notification still occurred only two years before the diploma sanction was imposed. DUE PROCESS

B. Its Implementation

Testing of students was begun at the beginning of the 1976-1977 school year. Remedial classes were established for those who failed to achieve 9.0. REMEDIATION The same procedure was employed at the beginning of the 1977-1978 school year. The 9.0 requirement was applied to the class of 1978 and thirty students, out of a class of 219, received a certificate of attendance instead of a diploma as a result of the imposition of the requirement. Seventeen of those who received a certificate were black. In the graduating class of 1979, twelve students, out of 192, received a certificate of attendance for failing to meet the CAT requirement. Ten of these were black. In 1980, six students, out of 192, received a certificate of attendance due to failure to pass the CAT. All six were black. EQUAL PROTECTION

The graduating **[**37]** class of 1978 was exposed only to the 1970 edition of the CAT. In the 1978-1979 school year, the school system switched to the 1977 edition of the CAT, Form C & D. This test is currently used in the school system.

Students who fail to achieve 9.0 on the CAT by graduation are permitted to retake the CAT and to enroll in further course work if they wish. MULTIPLE OPPORTUNITIES

C. The Racial Impact of the CAT Requirement

The evidence was overwhelming and essentially uncontradicted that the CAT requirement had a disproportionate impact on the black students in Tattnall County. Mr. Cole, who was qualified as an expert in statistics, testified about the methods employed by a statistician in order to determine whether or not certain data can occur by chance. equal protection The statistician begins by positing that no relationship exists between the two variables. The actual values are then compared to the data which could be expected if there were no relationship between the variables. The chi square is used to measure proportionality for two sets of non-overlapping data. For example, a chi square analysis would be appropriate if one **[*487]** were checking to determine whether there was a relationship between religious belief **[**38]** and political affiliation by constructing a square with four cells, one for Catholic/Democrat, one for Catholic/Republican, one for Protestant/Democrat, and one for Protestant/Republican. These actual values would be compared to what would be expected in the absence of any relationship. It is agreed that a value of 3.841 for chi square is the level of statistical significance.

The probability value tells the likelihood of the occurrence in the absence of a relationship. The level of significance is .05, which means that a result is significant if it can be expected to occur by chance five times or less out of every hundred instances. Any value equal to or less than .05 demonstrates statistical significance according to established statistical convention. The standard deviation is a measure of the dispersion of data from the mean. The measure of standard deviation is significant at between two and three standard deviations.

Dr. Cole, a statistical expert, testified for plaintiffs. According to his calculations, the statistical analyses of the racial differences in receiving or failure to meet the CAT requirement are as follows:

Year	*Chi Squared*	*P. Value*	*Standard Deviation*
1978	12.223	.0005	3.496
1979	24.697	.0000	4.970
1980	15.474	.0001	3.934
1978-80	49.020	.0000	7.001

[39]** The significant racial impact of the CAT requirement is obvious.

Mr. Cole also performed correlation studies on the data. A correlation study, as opposed to those statistical analyses which detect the existence of a relationship, measures the strength of the relationship between two variables. For the purpose of the analyses contained in plaintiffs' Exhibit 91, "education" denotes the receipt of a diploma. A strong correlation, as noted above, existed between race percent average and meeting the graduation requirement, the more blacks in a student's classes, the less likely he was to meet the requirement. In addition, for whites, the early IQ scores were positively related (.3541) to success on the CAT. For blacks, there was no significant relationship (.1039) between early IQ scores and success on the CAT and what slight relationship appeared was in a negative direction for blacks. Those with higher IQ's were slightly less likely to perform well on the CAT. EQUAL PROTECTION

A multiple regression analysis was also performed by plaintiffs. A multiple regression analysis makes use of the Pearson or correlation coefficient to analyze the roles played by several variables in an attempt to explain **[**40]** a particular phenomenon. The variables are regressed, that is, considered in order of statistical importance. The r 2 is the percentage of the phenomenon accounted for by a particular variable. As the variables are regressed in order of statistical importance, the change in the 2 represents only that amount of variance attributed solely to the newly regressed variable.

Plaintiffs' expert performed such an analysis correlating High CAT Reading and High CAT Math [5] with race percent average, early IQ scores, special education placement and race. Race percent average, the average of the percent of black children in a student's class from the third to eighth grades, was the most potent predictor of CAT scores. The r squared for race percent average and High CAT reading was .48636. **[*488]** This means that the racial composition of a student's classroom alone accounted for 48% of the variance in scores on the CAT reading section between blacks and whites. Race percent average accounted for 33% of the variance between whites and blacks on the math portion of the CAT. EQUAL PROTECTION

5. These terms mean a student's highest score on the CAT reading or math sections. The scores also reflect corrections made necessary by mistakes in grading.

[41]** The Court finds these figures fairly remarkable in that of all the universe of possible influences race percent average is such a potent predictor. Of course, these figures do not necessarily indicate a causal relationship. They do indicate a high correlation.

The effect of the racial composition of the classroom on CAT scores is especially remarkable in light of the early IQ scores of the students. Those scores accounted for only 1.4% of the variance in the reading section and .5% of the variance in the math section for the black students. Nor can the IQ factor be perceived as subsumed in the race percent average figure since IQ was not related to placement for blacks. Since, as discussed above, placement for blacks was not carried out on an acceptable, consistent rationale and blacks were often placed in spite of rather than because of their achievement scores, the fact that race percent average can account for such a large portion of the variance is remarkable. EQUAL PROTECTION

D. The CAT Itself

The California Achievement Test is a norm referenced test of achievement in reading and math. National norm-referencing means that by testing a large random sample of students and determining what the **[**42]** normal level of achievement is, a basis for comparison is established so that an individual's scores can be compared to his peers' across the nation.

CTB McGraw-Hill used a stratified random sampling procedure in test development. First, examples of curriculum were solicited from state boards of education and many school districts across the country. Then experts are asked to develop test items after studying the curricular objectives obtained. The test is tried out in a pretest on a group which is not as large as the group used for norming purposes. After the pretest, item analyses are performed. The item analyses include checking for item validity. The concept of item validity is discussed more fully below. The test is then standardized on a large stratified random sample of students. School districts are identified as urban, small, etc. and each region of the country is represented. Within these established strata, groups of students are selected randomly. This method insures that school systems representative of the types of systems existing in the country are represented in the norming group. Although there were no Georgia students included in the 1977 norming groups, students **[**43]** in the Southeast were well represented. For the 1970 edition, 203,684 students from 36 states participated in the standardization. Approximately 200,000 students were involved in the standardization process for the 1977 edition. After the standardization process, grade equivalency scores were calculated. Grade equivalency means the typical performance of a student in the standardization sample for that grade. Although the CAT was not given to the norming group in every month, the scores were extrapolated to give a grade equivalency score for each month. For example, the test might have been administered to the norming group in November and May. The grade equivalent scores for the third and ninth month would actually correspond to the typical performance of those in the norming sample. Steady progress was assumed, according to Ms. Bryan, in order to provide grade equivalency scores for those months in which the test was not actually administered to the norming group.

The methods of test construction for the 1970 and 1977 editions were similar. However, the 1977 edition was constructed with more attention to the elimination of bias in the test. The national norms for both editions included **[**44]** proportional representation of minority groups, but in preparing the 1977 edition, particular attention was paid to reviewing items for racial and ethnic bias.

[*489] Both editions of the CAT were well-received in the testing community and the 1970 edition received favorable reviews in the Mental Measurements Yearbook. Both tests were constructed in accord with the standards for educational and psychological testing developed by the American Psychological Association.

Further discussion of the test is aided by the understanding of some terms used in the testing field. The first of these is the standard error of measurement. The concept of the standard error of measurement reflects the fact that it is impossible to say with certainty that a particular score represents the exact achievement level of a particular student. The score instead is indicative of a range in which the student's real score falls. One can be, according to Ms. Bryan, 67% sure that the real score falls between one standard error of measurement above and one standard error of measurement below the observed score. One can be 96% sure that the actual score is between two standard errors of measurement below **[**45]** and two standard errors of measurement above the observed score. According to Dr. Findlay, defendant's expert on testing, the standard error of measurement is less important in the situation where the highest score only is of import and a student takes the test repeatedly, since he will not always fall in the lower part of his range.

"Validity" in the testing field indicates whether a test measures what it is supposed to measure. The degree of difficulty for a particular item is one relevant factor in assessing the validity of the test. The degree of difficulty is the percentage of children who answered the item correctly. If almost none or almost all of the children answer correctly the item is of little worth since it does not differentiate between the test takers. Ms. Bryan testified that an acceptable range of difficulty is from .20 to .90 with the mean on a multiple choice test of .60.

The point biserial is a measure of the validity of a particular item. It measures the relationship between success on a particular item to success on the test as a whole. The point biserial is used in the testing industry as a whole and by CTB McGraw-Hill in order to determine that validity. Ms. **[**46]** Bryan testified that, in her opinion, an item should be discarded if its point biserial is below .30. CTB McGraw-Hill uses .20 as its cutoff figure.

Bias in the test items affects the validity of the test. "Bias" as it is used in the testing industry means results do not have the same meaning for different groups. In other words, when an item or test is biased it is measuring different things for different groups. This concept is distinct from the possibility that one group may not achieve as well as another group.

Except as already noted, no serious attacks were raised by plaintiffs on the test construction and validation performed by CTB McGraw-Hill. VALIDITY

E. The CAT in Tattnall County

Plaintiffs have taken the position that, while viewed alone the CAT is a respectable test instrument, the circumstances of its use in Tattnall County, even apart from problems created by historical racial discrimination, cause the test to be unreasonable and unrelated to any legitimate educational goal. due process RATIONAL RELATION

One of these objections to the use of the CAT in Tattnall County is that defendants have not taken into account the standard error of measurement when assessing a student's performance. Ms. Bryan testified **[**47]** that had one standard error of measurement been taken into account in evaluating their scores that at least eight students who were denied diplomas in 1978 and 1979 would have graduated. The Court is reluctant to place much weight on this particular factor since the School Board's policy might be described as requiring a slightly higher level of performance. The 9.0 points represent one standard error of measurement below the actual required score. In addition, since the CAT is administered to the students on several occasions, the Court credits the testimony of Dr. Findlay that the errors in measurement are reduced over **[*490]** successive administrations. Thus, that the announced policy set the cutoff standard at 9.0 when, taking into account the standard error of measurement and the fact of repeated test administrations the actual cutoff point was slightly higher than 9.0, does not seem to be of much legal significance. DUE PROCESS

A second criticism of the CAT's use in Tattnall County is that no local validation study was performed. A validation study is not normally necessary before a standardized test is used by a local district since such a requirement would negate the reasons for selecting **[**48]** a norm referenced test in the first place. Dr. Shapiro testified that when a test is used for a purpose other than that for which it was designed, it should, according to APA guidelines, be revalidated locally. Mr. Donald Green and Mr. Robert Long, testing experts employed by CTB McGraw-Hill, both testified by deposition that the CAT had not been designed to be used as an exit examination. To some extent, the analysis depends on the definition of "exit exam." Mr. Sikes testified that the CAT was chosen in order to compare the achievement of students in Tattnall County to the achievement of students nationwide. Essentially, according to the testimony of Mr. Sikes, the CAT was employed for its usual function to compare children to the norm group. It was this comparison which was then used to make decisions about the students; i. e., whether or not they would receive diplomas.

The local validation performed by plaintiffs in preparation for trial clearly demonstrates that the CAT did not perform as well in Tattnall County as it had on the groups selected by CTB McGraw-Hill. While, according to the testimony of Mr. Green, the CAT had been examined for bias by the publisher and biased items **[**49]** removed, the test was not free from bias when administered in Tattnall County.

CTB McGraw-Hill utilized a point biserial analysis to determine the existence of bias. The point biserial relates to the student's performance on the test as a whole or on a relevant subtest. A high point biserial a strong relationship between doing well on an item and doing well on the test indicates that the test is valid.

The specific standard utilized by the test publisher in rejecting items appears on page 141 of the Technical Manual for CAT 1977: Point biserials under .20 were considered unsatisfactory for either the "Black" or "other" group, and differences between the groups in excess of .20 were considered evidence of bias. Thus, the item was rejected if either group had a point biserial less than .20 or if the difference between the point biserials was greater than .20. Dr. Huberty, defendant's expert, had a different interpretation of the standard which the Court rejects in light of the plain language of the Technical Bulletin.

Plaintiff's expert, Dr. Shapiro, performed an item analysis on the performance of Tattnall County students on the CAT 1970 and CAT 1977. He defined bias and utilized **[**50]** the point biserial analysis as defined in the publisher's Technical Bulletin. He found that for students at Reidsville High School, 52.9% of the questions on the reading portion of the 1970 CAT and 69.4% of the questions on the math portion of the 1970 CAT were biased by CTB McGraw-Hill's standards. At Glennville, 62.4% of the questions on the reading portion and 62.2% of the math questions on the 1970 CAT were biased. In 1979, both schools used the same form of the CAT 77 and 60% of the questions on the reading portion and 45.9% of the questions on the math section were biased.

Examining the scores of the Tattnall County students only for validity, that is, point biserials equal to or greater than .20 for the items, many items do not appear to be valid. Plaintiffs' Exhibit 95 lists the point biserial calculated. At Reidsville in 1978, more than 50% of the items had biserials below .20. At Glennville in 1978, more than 44% of the items had unacceptably low point biserials. In 1979, almost 42% of the items had unacceptably low point biserials. VALIDITY

The Court is uneasy noting these facts. Plaintiffs' evidence on the bias and validation points was not successfully challenged at trial. Yet **[**51]** it is difficult to believe that **[*491]** the results obtained in Tattnall County can be so different from those obtained by CTB McGraw-Hill VALIDITY. Ms. Bryan testified that there must be significant differences between the students in Tattnall County and the national sample. She did not elaborate on the possible explanation for such a phenomenon.

Plaintiffs also challenged the CAT graduation policy on grounds that the CAT did not test what was being taught in the Tattnall County schools. To some extent, plaintiffs appear to be arguing that an achievement test should not be used to determine who can be awarded a diploma. In arguing that a nearly exact correlation should exist between what the students were taught and the material included in the test, plaintiffs essentially assert that only a criterion referenced test would ever be appropriate as an exit examination.

Defendants' expert, Ms. Larson, an employee of CTB McGraw-Hill, was employed to demonstrate the relationship between the curriculum taught in Tattnall County and the CAT. Her results appear in Defendants' Exhibits 44 and 45. The Court places little weight on her results. She matched objectives in the curriculum, assuming **[**52]** use of the Scott-Foresman Series, to objectives purportedly tested by the CAT. She found that 91% of the Scott-Foresman math skills were tested by CAT 1970 and 71% of Scott-Foresman reading skills were tested by CAT 1970. Comparable results were obtained for CAT 1977 and the Scott-Foresman program. The High Intensity Learning Systems (HILS 2) which

was used for students in the remedial classes fared less well as Ms. Larson testified. CAT 1977 tested 70.4% of the HILS 2 objectives and CAT 1970 tested 67.3%.

Ms. Larson did not limit her correlation to Level 19 of the CAT 1977 or Level 5 of CAT 1970, the actual tests used to determine receipt of a diploma. She included the objectives for all the levels of the CAT. Plaintiffs' point is well taken that lists of curriculum objectives and test objectives are not precisely defined and categories overlap to some extent. It would have been more helpful to establish generally that most of what was taught was tested by the CAT but, more importantly, that the questions posed on the CAT could be traced to the curriculum employed in Tattnall County. This was not done and would be a very difficult task. About a third of the students, those at Collins, **[**53]** do not use the Scott-Foresman curriculum at all. In addition, the Scott-Foresman program was phased in over years so that during some periods of their education, only portions of classes of 1978, 1979, and 1980 were exposed to the Scott-Foresman curriculum. Evidence on this point was vague.

Ms. Larson's testimony also assumes that the students were exposed to the full curriculum. Ms. Bradley, a math department head in Tattnall County, testified that some students in the remedial mathematics program do not complete the curriculum. Ms. Bryan testified that in the areas of geometry, algebra, and measurement that the students do less well the same areas that are the last to be covered in the remedial program.

However, it is important to note that Ms. Bryan agreed that the type of questions covered on the CAT should be included in any standard recognized curriculum. CURRICULAR VALIDITY

In addition to problems with the CAT, validation, bias, curricular correspondence, plaintiffs have brought a few additional disturbing matters to the Court's attention. One additional problem is the prevalence of misgrading the tests, which plaintiffs contend adds to the aura of arbitrariness of the policy as perceived by **[**54]** the students. The tests have been hand-scored in Tattnall County. Ms. Bryan testified that in the testing industry, scoring errors of no more than 3-4% are expected in hand-scoring. However, at Glennville High School in 1978, 58.44% of the math papers and 20% of the reading papers were scored incorrectly. In 1979, 10% of all papers were scored incorrectly. However, it is important to note that no errors in correcting resulted in denying a diploma to a student who qualified under the exit exam policy. Further, the Court is of the opinion that having had **[*492]** these errors brought to their attention, the Tattnall County School Board will insure that errors of this dimension will not reoccur. There is no reason to believe that the errors were anything but inadvertent and may have been precipitated by the use of a stencil to go over answer sheets, which caused some items for which two answers were given to be marked correct.

A more disturbing problem was raised by plaintiffs as to the reliability of the test in Tattnall County. "Reliability" is that characteristic of a test which insures that comparable results will be obtained on a retest given shortly after the initial test. In **[**55]** addition, testimony was uncontradicted that for slower children, a gain of only one-half a year in achievement was expected. Yet the test results for some of the students were plainly

bizarre. For example, defendants' Exhibit 52 shows CAT scores for 1978 Glennville seniors for the tenth, eleventh, and twelfth grade administrations of the test and the twelfth grade reexamination where necessary. Mickey A."s reading score on the CAT in the tenth grade was 3.8. One year later the score was 8.0. At the time of his senior retest, his score had regressed to 4.1. Renwick F. went from a 4.3 in reading and 3.9 in math in the eleventh grade to 10.0 and 9.8 less than two years later. Darlene J., according to Defendants' Exhibit 53 which gives the respective figures for Reidsville, jumped from 3.3 in reading and 5.8 in math in the tenth grade to scores of 9.9 and 9.2 in the twelfth. Kennie K's scores improved from 2.8 in reading and 4.6 in math in the tenth grade to 9.0 and 9.5 on the twelfth grade retest. Vernie A. at Reidsville obtained the following reading scores: 4.9, ninth grade; 2.5, tenth grade; and a whopping 11.5 in the eleventh grade. Progress was not steady. According to Defendants' **[**56]** Exhibit 12 showing the gains by year for 1980 Reidsville seniors in the math section, Talmadge F. showed a gain of 5.0 in his freshman year's CAT score. His score deteriorated each year thereafter. The corresponding exhibit for Glennville, Exhibit 14, shows Ricky B., after having regressed .1 in the ninth grade, showed an incredible gain of more than 7 grade levels in his tenth grade math score.

Ms. Bryan testified that these variant results could be attributed to the test itself, to coaching or cheating, or to differences in student motivation. The Court was not convinced that the school personnel had been guilty of an impropriety in administering the tests and keeping them secure. Ms. Bryan suggested that the teachers had been "teaching to the test. "VALIDITY Yet the Court agrees with Dr. Findlay that if teaching to the test means that the students were educated to be able to answer the kinds of items that appear on the CAT then the teachers are performing as they should. CURRICULAR VALIDITY. No serious criticisms of the CAT as constructed by CTB McGraw-Hill were advanced. Ms. Bryan opined that the group of students in Tattnall County varied significantly from the national norm group. EQUAL PROTECTION

The Court is quite hesitant **[**57]** to assume that the students in Tattnall County are so deviant. A more obvious explanation is that some students were not performing up to potential on these tests and were motivated to apply themselves both to the test and to the remedial courses after the diploma policy was initiated. Other than motivational differences on different occasions, the Court can arrive at no sensible explanation of the varying test results. EQUAL PROTECTION

F. The Benefits

There can be little doubt that scores on the CAT in Tattnall County are improving. The number of non-retarded students who failed the CAT has decreased from thirty in 1978 to six in 1980. As discussed above, the CAT requirement still affects blacks disproportionately. All six of those who failed to graduate because of the CAT requirement in 1980 were black. Plaintiffs' expert, Dr. Spencer, agreed that educational progress was being made in Tattnall County. EQUAL PROTECTION

Witnesses from the ranks of the teachers and administrators of the Tattnall County schools uniformly believed that the diploma policy was having a good effect in Tattnall

County. Superintendent Sikes testified that he believed the policy was beneficial. **[*493]** Ms. Ann Kennedy, a former teacher **[**58]** who is about to retire from her position of counselor, was of the opinion that the students were responding favorably to the responsibility which had been placed on them. Apparently, the CAT policy provides one of the few areas in which the student is forced to take some responsibility since it was generally agreed at trial that the Carnegie unit system had been so debased by the practice of social promotion as to be meaningless.

Phillip Russell, principal of Reidsville High School, testified that he believed that the students overwhelmingly supported the policy and that pride and morale were greater among the student body than before the policy was implemented. William Harrell, principal of Glennville High School, testified that he believed that the students' attitude in general had improved and that there were fewer fights and instances of tardiness. Betty Davis, a teacher, testified that she believed the students were reading more on their own and that they turned in better book reports. Ms. Bradley, a math department head, testified that, as more students become proficient in basic skills, they were electing more math courses. Although thirteen remedial math classes were necessary **[**59]** formerly, only six are needed currently. REMEDIATION

Admittedly, the testimony of the school system's teachers is not as precise as some statistical comparisons might be, yet the Court finds the testimony of these teachers credible. Defendants bolstered these impressions with numbers indicating the progress that had been made. Defendants' Exhibits 38 and 39 demonstrate this progress. The increases shown by the graduating class of 1980 at Glennville High School showed a three-year increase of 3.7 in reading and 2.8 in math. The 1980 graduating class at Reidsville High School showed a 4.28 increase in reading scores and 2.55 increase in math scores over the same period. Although the gains for the graduating classes over the years were impressive, more impressive is the change which is, apparently, taking place throughout the system, including the pre-high school classes. While freshmen at Glennville in 1978 averaged 8.0 in reading and 8.7 in math, the Glennville freshmen in 1980 scored 8.4 and 9.6. At Reidsville, the freshmen of 1978 scored 7.59 in reading and 9.05 in math. The 1980 Reidsville freshmen were scoring 8.7 and 9.72. Since these gains occurred before the students were exposed to the **[**60]** high school remediation program, REMEDIATION some progress must be ascribed to the diploma policy itself since it is more plausible that the threat of denial of a diploma to a teacher's students motivates both the teachers and students below the high school level to work harder on the basic skills.

Dr. Findlay testified that he believed the policy had been helpful to black students, even though the diploma sanction fell disproportionately on black students EQUAL PROTECTION. He pointed out that only fourteen black students had passed the CAT requirement without the help of remedial classes while 112 had passed with remediation. He was of the opinion that the policy had been beneficial to blacks. REMEDIATION

In addition to their argument that the remedial program which they do not attack, and not the diploma sanction, is responsible for the educational progress being made, Plaintiffs' Exhibit 121 compares the scores made by Tattnall County tenth grade students on the

criterion reference test given by the State of Georgia to the average statewide scores for the years 1978, 1979, and 1980. The impression given by these graphs is that Tattnall County's performance is essentially unchanged and generally below the state average.

[61]** Specifically, in the reading comprehension section, Tattnall County showed, over the three years, gains on seven items, some of them slight, and no change on three items. For communication skills, Tattnall County showed gains on two items, losses on one, and no change on one. In writing, there were four gains, three losses, and no change on two items. In numbers systems, Tattnall County gained on four items and remained the same on one. In personal finances, Tattnall County gained on two, **[*494]** lost on one, and remained the same on two. In probability and statistics, Tattnall County gained on two and remained the same on one. In relations/functions, Tattnall County gained on two. In measurement, Tattnall County had two gains and one loss. In geometry, Tattnall County had losses on two items and one remained the same. In problem solving, Tattnall County remained the same on three items.

The scores are generally favorable but not dramatic. These results do not reflect the dramatic increase shown in the CAT scores. However, the tenth grade scores were obtained before the students were fully exposed to Tattnall County's remedial programs. The Court does not conclude that these **[**62]** results obtained by tenth graders Georgia Criterion Reference indicate that the diploma policy does not have a good effect. The Court finds that the policy is producing some educational benefit in Tattnall County.

V. Special Placement

The Tattnall County School District operates special education programs which are financed in part through Title VI-B of the Education of All Handicapped Children's Act of 1975. The School District assures the federal government that Section 504 of the Rehabilitation Act of 1973, as amended, will not be violated. The District in the operation and regulation of its special education programs utilizes the Rules and Regulations for Exceptional Children, promulgated by the State Board of Education. These standards are also found within the District's Annual Program Plan for Title VI-B funding. equal protection SPECIAL EDUCATION

The Court finds plaintiffs' expert on special placement, Dr. Leon Hurley, to be highly qualified and relies substantially on his testimony. Dr. Hurley was a Fulbright scholar who holds a Ph.D. from the University of Illinois in mental retardation. Mental retardation occurs when a child is significantly subaverage in intelligence and, at the same time, shows serious **[**63]** deficits in adaptive behavior, which is defined as his ability to cope with his environment. In deciding whether or not to classify a child as retarded, his IQ must first be determined as within the range of mental retardation. Of the mentally retarded, the category with the highest level of functioning is the educable mentally retarded (EMR). To be placed in an EMR program, a student must have an IQ which registers between two and three standard deviations below the mean on the test utilized. The child placed in EMR classes should have an IQ between 55 and 69. To be classified as trainable mentally retarded (TMR), the next lower level of mental retardation, the tested IQ must be within the range from 55 to 30, which is more than

three standard deviations below the mean. The Court agrees with Dr. Hurley that the regulations as they currently appear in the Georgia Department of Education's regulations do not allow for placement of children whose IQ's are "borderline," that is, above the cutoff scores.

To be included in the retarded range, a child must exhibit abnormalities in addition to his low IQ score. A child who adjusts well to his environment and who possesses good social skills **[**64]** should not be classified as mentally retarded, according to Dr. Hurley.

A specific learning disability (SLD) occurs when a child suffers from a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written. There is a discrepancy between an SLD child's intelligence and his performance in school. Some problems included in the SLD category are minimal brain dysfunction and dyslexia. An SLD student's poor achievement cannot be attributed to mental retardation. If a child of normal intelligence who suffers from a specific learning disability is not diagnosed properly, he may continue to fall behind academically and may eventually test in the retarded range.

The expected incidence of mental retardation nationwide is 2.3%. The evidence of specific learning disabilities can be expected to be about the same according to Dr. Hurley. Some environmental factors such as general health care, diet, and prenatal care can influence the incidence of mental retardation. **[*495]** Biased evaluation procedures can also influence the incidence of special placement.

Tattnall County places a far larger percentage of its students in classes **[**65]** for the mentally retarded than is normal throughout the United States. In the 1977-78 school year, 7.07% of the student population in Tattnall County were classified as mentally retarded. The average percentage in the United States was 2.3%; the average in Georgia for that year was 3.31%. In 1978-1979, the Tattnall County School District placed 5.17% of the student population in classes for the mentally retarded. That year the average in Georgia was 2.3%.

Placement in a class for educable mentally retarded students is advantageous to those who are genuinely retarded. These students profit by the emphasis on social and vocational, rather than academic, skills. The students have potential for unskilled and some semi-skilled jobs. However, placement in the EMR program for a student who is not truly retarded is disastrous. Teacher and peer expectations are far lower for a child placed in EMR classes than for children in regular classrooms. Academic subjects are not emphasized and a child who has been misplaced in an EMR class will not be exposed to material necessary to achieve his potential. The longer the child is misclassified, the more severe and difficult to repair the damage caused **[**66]** by the misclassification becomes. In addition, a social stigma attaches to the children enrolled in the EMR classes. The EMR students may be called names by the other students. Other children may not be permitted to play with retarded children. It is clear that in an appropriate placement for a truly retarded child the benefits of EMR placement outweigh the problems associated with placement. For a child who is not retarded, misclassification is a disaster.

The procedures used for placing children in classes for the mentally retarded or the learning disabled are set out by state regulations. According to these regulations submitted to the Court as Plaintiffs' Exhibit 69, a child is first referred for evaluation. This referral is made usually by a teacher but a parent, judicial officer, social worker, or physician may request that the child be evaluated. Parents must consent to the evaluation and should be notified in advance of the placement committee meetings which they may attend.

Before any educational or psychological testing is performed, the student is tested for physical problems such as poor sight or hearing. Individual psychological tests are then performed. After this testing **[**67]** is completed, the student becomes the subject of a meeting of the Special Education Placement Committee which is to review all the available information and determine the appropriate program for that child. The committee is to consider all the pertinent data not only the information developed specifically for the placement decision. Records are to be kept of the meeting so that one might examine the minutes and discover the basis for the decision. Before the student is placed in a special program, parental consent must be obtained. An individual educational program (IEP) is worked out and reviewed annually. The placement decision itself is reevaluated every three years.

These placement procedures were observed in the Tattnall County School District, according to the testimony of Ms. Driver, the psychometrist for the district. There were two glaring exceptions. In Tattnall County, the practice was to send a consent form to the parents before the evaluation was performed. No additional consent form was used. Perhaps even more importantly, minutes were not kept to reflect accurately the reasons put forth in the Placement Committee meeting supporting a recommendation that a student be **[**68]** classified as EMR. The explanation offered by Ms. Driver was that members of the Committee wished to speak freely and did not wish that their remarks regarding a particular student be recorded. This practice flies in the face of the regulation and its obvious rationale. equal protection SPECIAL EDUCATION

The pattern of placement produced in the Tattnall County School District evidenced **[*496]** that a grossly disproportionate number of black children were classified as mentally retarded while the classes for children with specific learning disabilities were mostly white. The actual figures are as follows: EQUAL PROTECTION

		1976	
	EMR		*LD*
Black	103		2
White	27		15
		1977	
	EMR		*LD*

Black	117		16
White	27		41
		1978	
	EMR		*LD*
Black	71		9
White	21		47

Mr. Cole testified that these figures were extreme and the possibility of their having occurred by chance was almost non-existent. The 1976 figures produced a probability value of 0.0000, and the Pearson Chi Square equaled 33.531 with the level of significance being 3.8. The data represented 5.791 standard deviations. For the 1977 data, the probability value was again 0.0000, the Pearson **[**69]** Chi Square 72.487, and the number of standard deviations 8.514. For the 1978 data, the probability value was again 0.0000, the Pearson Chi Square 52.331, and the number of standard deviations 7.234. Obviously, placement procedures in the Tattnall County School District are having a severe racial impact.

The figures themselves give rise to the inference of misclassification. No tenable explanation of these figures was offered at trial by defendants. Although, as discussed above, the blacks in Tattnall County are generally poorer than the whites and plausibly eat less nutritious foods and may not enjoy adequate health care, it is difficult to find a causal relationship between the poorer position of blacks in Tattnall County and their overrepresentation in the EMR classes and underrepresentation in the LD classes. While a poor environment may possibly cause some increase in the incidence of mental retardation, it is difficult to understand how the same poor environment results in a greatly lowered incidence of learning disabilities. According to the testimony of Dr. Hurley, a non-treated learning disability may eventually result in a lowering of IQ scores. This fact does not explain **[**70]** the disparity in special placement for blacks and whites since the date of misdiagnosis is simply pushed into the past. Ms. Driver testified that when one of the named plaintiffs, Kathy Johnson, was in the primary grades, there were no programs for the learning disabled student. However, this phenomenon of untreated LD students slipping into the mentally retarded range of IQ scores should occur equally in the black and white student populations. Ms. Driver testified that some white parents refused to allow their children to be placed in EMR classes because of the predominance of black children in those classes. Of course, that a predominance of black children exists in the EMR classes is a problem not an answer, and this fact does nothing to explain why black children are underrepresented in the classes for the learning disabled. The inescapable conclusion is that some children are being misplaced. EQUAL PROTECTION

This conclusion is buttressed by the figures set out in Plaintiffs' Exhibit 110. In 1976-1977, at which time the current regulations were in force with a cutoff score of 69 or 70, 26% of the students were classified as educable mentally retarded and had scores of 71 or

above. Overclassification **[**71]** continued in the 1977-1978 and 1978-1979 school years. Ms. Driver explained that, in her view, the regulations had changed and that "borderline" cases were permitted at the time many of these students had been classified. Complete reevaluation is required every three years. But an opportunity to review so easy a matter as checking a recorded IQ score against the state regulation could easily be performed during the required annual check of the student's IEP. Such a check is particularly appropriate **[*497]** when the serious effects of a misclassification are considered.

A complaint was made to the Office of Civil Rights (OCR) concerning special placement in the Tattnall County School District on February 14, 1980, by Kathy Johnson. Pursuant to this complaint, a team of OCR investigators visited Tattnall County. They randomly selected 39 students placed in EMR classes and examined their files. Thirty-one black and eight whites were included in the sample. The OCR team found that twenty-three of the thirty-one did not have adaptive behavior assessments. Seventeen of these were black. Eleven students did not fall within the correct IQ range. Five of the students who were missing adaptive **[**72]** behavior assessments also had IQ scores above 70. Two blacks were assigned to EMR classes in violation of both the adaptive behavior and IQ requirements. Twenty-three black students, in addition to these obviously misplaced two, did not satisfy EMR placement requirements.

Some individual records further document this pattern of misplacement. The school records of Kathy Johnson, a named plaintiff in this action, are an unsettling illustration of the tragedy of a child for whom the educational system has failed. When she was in the third grade, Kathy Johnson was given an IQ test. Her non-language IQ was 111. Her total IQ was 98. The subtest scores were charted. She was above average generally except in her language subtest. She was severely below average in delayed recall. This sort of pattern, according to Dr. Hurley, is typical of children with learning disabilities. There is no doubt that Kathy Johnson was not retarded when she was in the third grade. There was evidence of many absences in the first grade and of some neglect. She did not learn well but was not diagnosed as a child in need of help. She was passed on. Her fifth grade report card indicates that while Kathy could understand **[**73]** what she was told and could express herself orally, she could not read, spell, or write. Nevertheless, she was passed. In the seventh grade, her grades did not reflect what must have been an abysmal state of achievement. She passed every subject and received an 80 in English.

In the tenth grade, she was considered for special placement. At that time, she was performing six grades below her actual grade level. The evaluation was performed by the Cooperative Educational Service Agency (CESA) who contracted to perform testing services for the Tattnall County School District before their full-time psychometrist, Ms. Driver, was employed. As a matter of fact, Ms. Driver participated in some evaluations with CESA at that time. She performed the adaptive behavior assessment on Kathy Johnson.

Kathy Johnson's results on the Weschler Adult Intelligence Scale did not fall within the range of mental retardation. Her verbal IQ range was 72-83; her performance IQ range was 69-79; her full scale IQ range was 70-80. Thus, Kathy appears not to meet the IQ

requirements. The adaptive behavior portion of her evaluation can only be described as outrageous. As discussed above, the adaptive behavior requirement **[**74]** is an important part of the placement process and a child who does not exhibit abnormalities in this area should not be classified as retarded. For Kathy Johnson, the oldest of seven children, the following observations were thought to support the conclusion that she was retarded: "she does not write letters, does not have her own spending money, she buys her own clothing, she goes out unsupervised, she does not follow current events, and she is left to care for others." The Court is at a loss to understand how any of these characteristics support a finding of mental retardation, nor was Ms. Driver's testimony on this point helpful.

Kathy Johnson was misclassified as an EMR student. Other misclassifications occurred. Dale M., a student at Reidsville High School, spent four years in EMR classes before returning to regular classes in the ninth grade. At that time, he scored 3.8 and 3.7 in the reading and math portions of the CAT. By the time of this twelfth grade testing, Dale was able to score 9.2 and 9.0, respectively, this even though slow **[*498]** students can be expected to gain in achievement at a slower rate than the average students who are expected to gain about a year in **[**75]** achievement for each chronological year. Another student, Linda J., after having spent two years in EMR, was able to score 9.1 and 12.0 on her twelfth grade retest only months after having scored 8.1 and 6.3 on the reading and math portions of the CAT. The Court cannot escape the conclusion that misclassification has occurred. EQUAL PROTECTION

Plaintiffs also complain that children enrolled in classes for the mentally retarded are foreclosed from receiving a high school diploma. The State Board of Education, at least at the time evidence was presented in this case, recommended that these students be given diplomas. Sparked by the institution of this suit, the Tattnall County School District has now agreed to give diplomas to any EMR students who meet the CAT requirement. Previously, not all EMR students were allowed to take the CAT. Dr. Hurley testified that although it was very unlikely that a child correctly placed in the EMR program could achieve a 9.0 on the reading and mathematics portions of the CAT, it was possible that a particular child might in time be able to meet the requirement. This policy, which involves the giving of certificates of attendance rather than diplomas to those who fail **[**76]** the CAT, involves no additional factual disputes. The legal implications are discussed below. EQUAL PROTECTION/SPECIAL EDUCATION

VI. The Legal Conclusions

A. The Racial Discrimination Claims

1. equal protection Claims

There are two separate racial classification equal protection claims before the Court, the first being that the institution and administration of the diploma policy in itself violates the Fourteenth Amendment and the second being that the diploma policy constitutes a perpetuation of prior de jure segregation.

In order to find that the diploma policy itself, without regard to history, violates the equal protection clause, plaintiffs must show both that the policy has a discriminatory racial impact and that the policy is tainted by a discriminatory purpose. Unquestionably, the diploma policy in the Tattnall County School District has had a disproportionate racial impact. This part of the test is adequately met by the evidence. But, beginning with Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976), an identifiable discriminatory purpose became a necessary component of a racial discrimination claim brought under the Fourteenth Amendment. Since the subjective state of mind of those **[**77]** implementing a challenged decision is almost always impossible to establish by direct evidence, recent jurisprudence had addressed the question of how circumstantial evidence be employed to prove intent while preserving the requirement that racial animus be proven. The requirement of actual discriminatory intent, first enunciated in Washington v. Davis was repeated in the context of school segregation case in Dayton Board of Education v. Brinkman, 433 U.S. 406, 97 S. Ct. 2766, 53 L. Ed. 2d 851 (1979).

The Fifth Circuit addressed the question of intent in light of Dayton Board of Education v. Brinkman, Washington v. Davis, and Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), in United States v. Texas Education Agency, 564 F.2d 162 (5th Cir. 1977), rehearing denied, 579 F.2d 910 (5th Cir. 1978), cert. denied, 443 U.S. 915, 99 S. Ct. 3106, 61 L. Ed. 2d 879 (1979). In that case, the Fifth Circuit held that the evidence overwhelmingly supported the conclusion that a pervasive intent existed to segregate Mexican-Americans. There, the Fifth Circuit apparently adopted an objective standard for discriminatory intent in a challenge **[**78]** based on equal protection. However, the court there made clear that foreseeability alone will not necessarily support a finding of constitutional violation, but that the absence of justifying factors in the light of clearly foreseeable discriminatory impact can support such a conclusion. The Fifth Circuit stated, "When the official actions challenged as discriminatory include acts and decisions **[*499]** that do not have a firm basis in well accepted and historically sound non-discriminatory social policy, discriminatory intent may be inferred from the fact that those acts had foreseeable discriminatory consequences." Texas Educational Agency, supra, 564 F.2d, at 168.

Subsequent Supreme Court opinions have made clear that satisfaction of a list of factors is not necessarily sufficient to support a finding of discriminatory purposes. This shopping list approach was clearly rejected in Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979). There the fact that the discriminatory effect of a statute on women was clearly foreseeable did not mandate a holding that the law was unconstitutional. The Court, in discussing the proper test **[**79]** to evaluate discriminatory purpose explained, " "Discriminatory purpose' ... implies more than intent as volition or intent as an awareness of consequences .... It implies that the decision maker ... selected or reaffirmed a particular course of action at least in part "because of' not merely "in spite of,' its adverse effects upon an identifiable group." Feeney, supra, 442 U.S. at 279, 99 S. Ct. at 2296. Reading Feeney and Texas Educational Agency together, the Court concludes that foreseeability alone is insufficient to make out a violation of the Fourteenth Amendment. However, a clearly foreseeable impact which is unexplained by any permissible rationale could support such a finding. The fact of a

constitutional violation would then rest not on the fact of foreseeability but on a finding of actual discriminatory purpose reached because the circumstances admit no other explanation.

Defendants point to the Supreme Court's decision in City of Mobile v. Bolden, 446 U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980), in which an at-large method of electing city officials was challenged as violative of the Fourteenth Amendment. There, in assessing the probative value of evidence demonstrating **[**80]** that Negroes suffered discrimination in jobs at the hands of those who were elected under the at-large system, the Court remarked that such evidence of discrimination by white officials after they were elected was relevant only as the most "tenuous and circumstantial" evidence of the constitutionality invalidity of the at-large system under which they obtained their offices. Similarly, the Supreme Court noted that the "substantial history of official racial discrimination" in Alabama could not taint present governmental actions in the manner of original sin. Discriminatory purpose must be proved in each instance.

Defendants argue from Bolden that all evidence of past discrimination is irrelevant in this case and evidence on the question of racial purpose should be limited to events immediately surrounding the decision in favor of the CAT policy and its subsequent implementation. The Court disagrees. In the Court's opinion, Bolden does not hold or advise that evidence in such a case must be so severely limited. Instead, it underlines the fact which actually must be demonstrated and warns against basing such an important and well-defined fact as purposeful discrimination on marginally **[**81]** relevant facts from which only weak inferences may be drawn.

Accordingly, the Court allowed much historical evidence to be admitted. Facts concerning the history of racial segregation in Tattnall County were admitted. The witnesses testifying to the origin of the CAT policy and the reason behind it were carefully observed by the Court. The Court concludes that the policy of requiring a 9.0 on the reading and math portions of the CAT as a graduation requirement was adopted without racial animus. That blacks would suffer a disproportionate impact was foreseeable but not actually foreseen. This is not a case in which foreseeability can arguably be proof of racial animus due to the total lack of justification for the policy. EQUAL PROTECTION. The improvement of the performance of the district's school children is a legitimate and important goal for the Tattnall County School District due process RATIONAL RELATION. The Court finds no evidence whatsoever that the policy was a subterfuge to increase the value of the diploma while denying access to the diploma to **[*500]** black children. Considered alone, the diploma policy does not violate the Fourteenth Amendment on grounds of racial discrimination. EQUAL PROTECTION

However, the diploma policy cannot **[**82]** be considered alone and must be evaluated in light of the past de jure segregation of the Tattnall County School District. The system of achievement grouping followed close on the heels of the disestablishment of the dual system. The system did not operate fairly. There was substantial overlap of scores between sections with the black children generally being placed in the lower possible group and the white children being placed in the higher group. [6] The racial makeup of the classes was a potent predictor of success on the CAT while for black children, their early

IQ scores were not related to their later performance on the CAT. EQUAL PROTECTION

> 6. Since defendants have voluntarily abandoned their tracking system after an investigation by the Office of Civil Rights, the constitutionality of that system is not before the Court, except as it relates to the constitutionality of the exit exam policy.

Undoubtedly, the discriminatory impact of the exit exam cannot be considered separately from the de jure segregation, which **[**83]** preceded it and the tracking system which perpetuated, and, in some instances, exacerbated the effects of prior segregation. Dr. Hurley testified that the first several years of schooling are crucial in a child's educational development. Yet, the black children who have thus far been subjected to the CAT requirement attended segregated schools during these crucial years. Intentionally segregated schools are illegal per se. Brown v. Board of Education, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955). In addition, it has been demonstrated that the former black elementary school, by the School District's contemporaneous admission, was closed as being substandard when the dual system was abolished in the 1970-1971 academic year. The Court does not hesitate to conclude that the formerly all-black elementary school was substandard as a matter of fact.

The duty of a school board in a school system that once operated a de jure segregated school system is clear. Those officials have an affirmative duty to convert to a unitary system in which discrimination is to be eliminated root and branch. Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189, 93 S. Ct. 2686, 37 L. Ed. 2d 548 (1972); **[**84]** Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971). It is also clear that if present facially neutral actions serve to perpetuate past intentional discrimination, there is no requirement that intent be proved again. That present segregation be substantially caused by past intentional discrimination makes out plaintiff's prima facie case even absent proof of a present discriminatory intent. Dayton Board of Education v. Brinkman, 443 U.S. 526, 99 S. Ct. 2971, 61 L. Ed. 2d 720 (1979); Debra P. v. Turlington, 474 F. Supp. 244 (M.D.Fla.1979), aff'd, 644 F.2d 397 (5th Cir. 1981). In the presence of an unsatisfied duty to abolish a dual system, the test is the effectiveness, not the purpose of actions in increasing or decreasing the segregation caused by the dual system. Brinkman, supra, 443 U.S. at 538-539, 99 S. Ct. at 2979, 61 L. Ed. 2d at 734; Wright v. Council of City of Emporia, 407 U.S. 451, 92 S. Ct. 2196, 33 L. Ed. 2d 51 (1972). Thus, insofar as the poor performance of the black children is attributable to their participation in the dual system, the diploma sanction must fall. It cannot be constitutionally imposed on those who attended **[**85]** classes in the dual system. equal protection STUDENT PREVAILED

Yet, in the case at bar, the exit exam policy has a disparate impact said to be caused by both absolute segregation in the crucial primary years of the subject students and the tracking system employed by the defendants. The Court is mindful that the exit exam policy complained of here is two causal links removed from the factual situations in the above-cited cases (with the exception of Debra P. v. Turlington). In those cases, schools

remained segregated, a situation difficult to justify in any circumstance and nearly impossible to justify in light of prior de jure segregation.

[*501] The Fifth Circuit has set out guidelines under which tracking practices are to be evaluated. In McNeal v. Tate County School District, 508 F.2d 1017 (5th Cir. 1975) the Court of Appeals evaluated a "faculty-predicted ability grouping system." The system produced some all-black sections in the elementary grades and a few all-white sections in the advanced grades. The Court stated, "Notwithstanding the fact that tract assignments are made without regard to race, children who have been the victims of educational discrimination in the dual systems of the past may find **[**86]** themselves resegregated in any school in the district solely because they still wear a badge of their old deprivation underachievement." McNeal, supra, 508 F.2d at 1019. Classroom segregation is proscribed. See Adams v. Rankin County Board of Education, 485 F.2d 324 (5th Cir. 1973). When such segregation in the classroom is the result of a facially neutral tracking system, the tracking plan will not be permitted until a unitary system has been established. "At a minimum, this means that the district in question must have for several years operated as a unitary system." Lemon v. Bossier Parish School Board, 444 F.2d 1400, 1401 (5th Cir. 1971). In McNeal, the Fifth Circuit charged the district courts with scrutinizing any plan which assigns students to segregated classrooms with "punctilious care." Such a grouping plan may be approved "if the school district can demonstrate that the assignment method is not based on the present results of past segregation or will remedy such results through better educational opportunities." McNeal, supra, 508 F.2d at 1020; United States v. Gadsden County School District, 572 F.2d 1049 (5th Cir. 1978).

The tracking system practiced until this academic **[**87]** year in the Tattnall County School District clearly cannot pass constitutional muster. The system was adopted on the heels of the abolition of the dual system. The system was not administered fairly; when overlap occurred in placement test scores, black children were placed in the lower section and white children were placed in the higher. equal protection No specific remediation programs were utilized those in the lower levels were simply exposed to less material. REMEDIATION

If the tracking system in an otherwise unitary school system has a discriminatory effect, yet will remedy such effects through better education opportunity, the system may pass muster under the McNeal balancing test. In a system which has not operated as a unitary system, the school system must show that the educational disadvantages caused by prior segregation have ended.

The Court is of the opinion that the CAT policy should be analyzed similarly to tracking systems. The decision to implement tracking and the decision to impose the diploma sanction are both essentially educational decisions but ones which can perpetuate intentional segregation. In order to draw an analogy to the tracking cases, the McNeal reasoning would have to be applied **[**88]** as follows: the now abandoned tracking system in Tattnall County occupies the analytical spot held by de jure segregation in McNeal; the CAT diploma policy here, with its disparate effect on blacks, must be analogized to the tracking system in McNeal. Thus, plaintiffs argue, the Fourteenth Amendment is violated here as it was in McNeal because at present the School Board

cannot show that the educational disadvantages caused by prior segregation have ended. "Prior segregation" here means the discriminatory tracking system equal protection

> 7. The remedial classes, whose racial makeup may differ from the school population as a whole, are not challenged here. Such classes fit the McNeal criteria in that the level of racially identifiable classrooms tainted by prior segregation is offset by the compensatory educational benefits. Unquestionably, these classes have aided the learning of those who had been previously disadvantaged.

However, the Court is not entirely easy with the prospect of superimposing the current issue over **[**89]** the analysis of McNeal. This concern is limited to the substitutions in the analysis; the Court has no qualms **[*502]** about disallowing the imposition of the diploma sanction on those who spent their primary years in the dual system. Yet the Court has some difficulty in equating the tracking system recently abandoned in Tattnall County with the dual system recently abandoned in McNeal. In McNeal, the dual system was such a powerful historical factor that it could taint the resulting tracking system. Although the Fifth Circuit there, in dicta, permitted tracking in a unitary system, even where such tracking caused segregation, if the results of past segregation were being remedied through better educational opportunities, the standard for a system not yet unitary was far stricter. Where a unitary system has not been in effect for a sufficient period to assure that underachievement of the slower groups is not due to former educational disparities, the school district must show that the steps taken to bring disadvantaged students to peer status have ended the educational disadvantages caused by prior segregation. McNeal, supra, 508 F.2d at 1021. Plaintiffs urge the Court that the **[**90]** CAT policy cannot be enforced until the school district has shown that any underachievement of the black children is due to some other factor than prior segregation. Thus, plaintiffs urge that there is no reason to believe that the school district will be able to meet this standard in regard to the graduating class of 1983, the first class never to have attended class under the dual system.

Under plaintiffs' reasoning and if the present case can be successfully analogized to McNeal, the burden on the school district is enormous. The burden on the school district would be to demonstrate that the educational disadvantages brought about by prior segregation have ended. If disparities were still apparent, the school district would be obliged to prove that any disparities could not be traced to the extinct tracking system.

The Court has serious reservations about applying McNeal in this manner. First, the discriminatory tracking system practiced in Tattnall County is not a social evil of such horrible magnitude as the dual system. As undesirable as the tracking system in the Tattnall County School District was (it has been abandoned), it did not affect all of the students. Approximately **[**91]** one-third of the students were never tracked. Not all of the students who were tracked were placed in racially identifiable classrooms. These facts are not stated in defense of the tracking system, which the Court would not hesitate to strike down were it still viable, but rather to show that the tracking system is not identical to a dual system in which a black child goes to school in a substandard building, uses substandard materials, and sees only black teachers and other black students which, he may unfortunately assume, are also substandard.

The second problem in imposing the McNeal reasoning on the facts here is that the practice attacked in McNeal discriminatory tracking is qualitatively different from the diploma policy attacked here. Discriminatory tracking is a whole system, a way of conducting the business of the school. The CAT, on the other hand, is a method of evaluation. The CAT policy does not affect day to day student life. equal protection The CAT policy does affect enrollment in remedial classes but all parties agree that those classes are beneficial REMEDIATION. However, it must be emphasized that the CAT is an evaluative device. [8] The Court is reluctant to hold the school district to the **[**92]** stricter McNeal standard over its choice of an evaluative device. For example, there was testimony at trial that the Carnegie unit had become so devalued as to be meaningless. Both sides decried this state of affairs. By way of illustration, suppose that the school district had tried to rejuvenate the Carnegie unit system by allowing teachers to test on the subject matter by weekly tests and to refuse to credit those who did not achieve passing grades. If more blacks than whites failed, could it be said that teachers should not be allowed to give any tests on the **[*503]** subject matter taught until enough years had passed to make sure that former discriminatory tracking played no part in the results? The criticisms aimed at the CAT could be aimed at any classroom testing. Surely the school district cannot be locked into a system of social promotion until 1992 when no member of the graduating class will have been exposed to discriminatory tracking.

> 8. The Court does not read the Fifth Circuit's decision in Debra P., supra, as requiring a different analysis since the discussion here focuses on the tainting effects of the tracking system.

[93]** The directives in McNeal must act primarily as a guide to this case with its very different facts. Insofar as McNeal stands for the proposition that the lingering effects of the dual system cannot be allowed to prejudice students whose educational careers were compromised by their participation in that system, the Order of this Court is in full agreement. Clearly, no diploma sanction may be imposed until June, 1983, when those graduating will never have been exposed to the dual system.

The question remains, what will happen in 1983? Plaintiffs strenuously argue that the Court is in no position to assess what the situation will be in 1983, even though the Court has recognized that the discriminatory effect on blacks has been steadily decreasing. Yet, McNeal appears to the Court to have assumed that several years of operation as a unitary system have a purging effect and allow school authorities to again exercise their best judgment and remedy the learning needs of the students, even if some remnants of the dual system in the form of disparate achievement levels remain. The Court believes the higher McNeal standard is applicable when school authorities adopt a program which has a racial **[**94]** impact without the intervening period of unitary operation. Showing that educational disadvantages have ended is far more difficult than showing that the policy will remedy the results of past segregation through better educational opportunities, which is the standard set out in McNeal under which to judge tracking in an otherwise unitary system. EQUAL PROTECTION

Because of the factual differences between this case and McNeal, the Court is of the belief that if the equal protection claims were the only bases for challenging the CAT

policy, the school district could reinstate the diploma sanction in June, 1983, if it could then show that the increased educational opportunities outweigh any lingering causal connection between the discriminatory tracking system and the imposition of the diploma sanction EQUAL PROTECTION. Because this area of the law is quickly developing, the Court is careful to analyze plaintiffs' grounds separately. The conclusions on the due process claims dictate a harsher result for the school district than do the equal protection claims DUE PROCESS.

2. The Statutory Claims

In light of this Court's holding that the diploma policy is violative of the equal protection clause of the Fourteenth Amendment, it **[**95]** follows that the policy is also violative of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. See Regents of University of California v. Bakke, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). In light of the Court's holding that the CAT policy violates the Fourteenth Amendment at least until 1983, it is not necessary that any distinction be made at this time between the respective applicable standards. Title VI, at the least, prohibits acts forbidden by the Fourteenth Amendment. Similarly, in light of the holding on plaintiff's equal protection claim, the Court concludes that the imposition of the diploma requirement on black students who previously attended substandard segregated schools and who were then subjected to the tracking system in the Tattnall County schools violates the Equal Educational Opportunities Act, 20 U.S.C. § 1703(b). That section states:

> "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by ... the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps ... to remove the vestiges of the dual **[**96]** system." STUDENT PREVAILED

[*504] B. The due process Claims

Plaintiffs' due process claims essentially concern two themes. The first is the adequacy of the notice and the second is the reasonableness of the CAT requirement in Tattnall County.

The questions here do not easily lend themselves to a traditional procedural due process analysis. due process standards applicable when an individual suffers academic consequences from a failure to achieve certain academic standards are not burdensome. In Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1977), the Supreme Court addressed the question of what constitutes proper procedural due process in an academic dismissal. There a medical student challenged on constitutional due process grounds her dismissal from medical school for academic reasons. The Supreme Court assumed that the medical student had been deprived of a liberty or property interest for purposes of analysis. The Court agreed with the district court that the student had been given ample opportunity "to be absolutely certain that their grading of the (respondent) in her medical skills was correct." Horowitz, supra, at 85, 98 **[**97]** S. Ct. at 952. The Court apparently envisioned that procedural guarantees were directed toward assuring the student that she actually had failed to meet

the standard. Similarly, in Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), where, inter alia, procedural due process claims were made in regard to the Georgia bar examination, the Court of Appeals stated, "(W)hether due process requires a particular procedure in a given situation must be determined by balancing the individual's interest in avoiding the loss which lack of procedure inflicts upon him against the interests which the Government seeks to advance by denying it." Tyler, supra, 517 F.2d at 1089 (citation omitted) (emphasis added). The Court of Appeals also noted that if a hearing were required, which the Court decided was not the case, "the issue, of course, would not be whether the examiner had given an applicant the "correct' grade, but rather whether either a mechanical error had been made in computing the grade or the grade given by the examiner was arbitrary, capricious, and without foundation." Tyler, supra, 517 F.2d at 1104.

The Fifth Circuit in Debra P. has decided that receipt of a high school diploma is a property **[**98]** interest. [9] Still, the Court concludes that a procedural due process analysis is not applicable here despite plaintiffs' argument that the procedural and substantive due process issues are "intertwined." Plaintiffs are not complaining that the students in Tattnall County have no opportunity to be heard on how well they actually scored on the CAT. The question of what action would be taken by the school officials in such circumstances has not been litigated and the Court has no reason to assume that a constitutionally satisfactory arrangement would not be developed as it was by the educational authorities involved in Horowitz and Tyler. The school authorities in this case might be well-advised to give thought to such a mechanism in light of the scoring errors brought to light here even though the Court is confident that, having been informed of scoring problems, the school authorities will make every effort to prevent their reoccurrence.

> 9. There was no evidence that the fact of any student's failure to attain a diploma has been publicized in any manner by school authorities. Thus, no liberty interest was involved. Compare Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975) with Bishop v. Wood, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976).

[99]** An additional problem with a procedural due process analysis is that such an analysis focuses on the interest affected by the lack of due process here, a high school diploma. Traditionally, the due process right concerns an opportunity to be heard on the factual basis underlying the loss of a liberty or property interest, rather than the standard upon which that interest was lost. See Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). Under this reasoning, procedural due process would be required because no diploma was awarded, **[*505]** not because of the nature of the standard applied. Thus, the procedural due process problems are not different from those entailed when a student is denied a diploma for any reason, be it lack of attendance or sufficient credits. due process PROCEDURAL

Language in the opinion of several courts, cautions against judicial interference in school affairs where disciplinary matters are not involved JUDICIAL RELUCTANCE. See Horowitz, supra; Greenhill v. Bailey, supra, 519 F.2d at 7; Gaspar v. Bruton, 513 F.2d 843 (8th Cir. 1975), and cases noted therein.

Plaintiffs' complaint that the notice of the CAT requirement provided was constitutionally inadequate is more properly **[**100]** considered as part of their substantive due process claims. In the Court's view, notice becomes constitutionally inadequate when it renders the rule or regulation unreasonable. To the Court's knowledge, only two reported decisions deal with the constitutional adequacy of notice to students of a changed academic regulation. In Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976), the Fifth Circuit noted the "wide latitude and discretion afforded by the courts to educational institutions in framing their degree requirements." 529 F.2d at 450, citing Militana v. University of Miami, Fla.App.1970, 236 So.2d 162, cert. denied, 401 U.S. 962, 91 S. Ct. 970, 28 L. Ed. 2d 245 (1971). Mahavongsanan concerned a graduate student who was not awarded a degree because she failed a comprehensive test which became a requirement after she had begun her graduate studies. On the student's claim that she had been denied substantive due process, the Fifth Circuit stated,

> A review of the record plainly shows that the university's decision to require the comprehension examination was a reasonable academic regulation within the expertise of the university's faculty. Moreover, appellee received timely notice **[**101]** that she would be required to take the comprehensive examination. This is underscored by the fact that the university gave her ample notice to prepare a second time for taking the test.

Mahavongsanan, supra, 529 F.2d at 450. The Court of Appeals does not make clear whether the notice problem is one of procedural or substantive due process. The district court, believing that the issue was one of procedural due process, held that the notice of the examination requirement was constitutionally inadequate under the due process clause of the Fourteenth Amendment. Mahavongsanan v. Hall, 401 F. Supp. 381 (N.D.Ga.1975), rev'd, 529 F.2d 448. The student had enrolled in January, 1974. The requirement was imposed in Fall, 1974. Absent the requirement, Mahavongsanan would have graduated in June, 1975. The district court opinion does not distinguish between notice of and imposition of the exam requirement. However, since the student did not know of the requirement when she enrolled, maximum notice possible under the facts was slightly over a year. The Fifth Circuit found this notice was "timely," particularly in light of the opportunity for reexamination.

Public school education does differ **[**102]** from state-supported graduate education in several important respects. Attendance for most of a student's school years is required by law. A community has a vital interest in the proper functioning of its primary and secondary schools although this system is directly responsive to the community through the elected school board. Even considering these differences, there appears to be no reason to depart from the reasoning in Mahavongsanan. In the case at bar, a notice period of more than two years, the provision that the test may be retaken, and the provision of remedial courses considered together are not constitutionally inadequate. In view of the judicial system's traditional deference to the educational expertise of school authorities this Court cannot hold that the notice was unreasonable. due process EDUCATIONAL AGENCY PREVAILED

In Debra P. v. Turlington, 474 F. Supp. at 264 (M.D.Fla.1979), aff'd, 644 F.2d at 347 (5th Cir. 1981) the district court was upheld in a similar case, in its decision that thirteen months' notice was unconstitutionally brief. In Debra P., major coordination problems were presented by the exit examination **[*506]** which was applicable to the entire state. In the present case, twenty-four months **[**103]** passed between the notice and the implementation of the diploma sanction. Remedial courses were provided during the period. The district court in Debra P. stated that the Fifth Circuit in Mahavongsanan implicitly acknowledged that termination for academic reasons which have not remained static created a due process right to timely notice. The Fifth Circuit approved this reasoning. Nevertheless, this Court is of the opinion that notice was timely here. No one could seriously contend that academic requirements could never be changed during the twelve years a child typically spends in school. It is also obvious that the CAT requirement could not have been constitutionally imposed a day prior to graduation. Such late notice could serve no academic purpose. Plaintiffs contend that since many skills are taught in the primary grades and defendants' system of social promotion resulted in some students being moved through these grades without having mastered the material appropriate to those grades, it is fundamentally unfair to deny a diploma on the basis of a requirement added at the eleventh hour. This argument overlooks the availability and efficacy of the remedial program, and the motivational **[**104]** value of the diploma sanction .DUE PROCESS

In addition to their attack on the reasonableness of the notice, plaintiffs' general standard by which to judge substantive due process is well-defined in the law. The School Board's actions are entitled to a presumption of legislative validity and the burden is on plaintiffs to show that there is no rational connection between the Board's action and its legitimate interest in improving the educational experience of the students in Tattnall County STATE AUTHORITY. Harrah Independent School District v. Martin, 440 U.S. 194, 99 S. Ct. 1062, 59 L. Ed. 2d 248 (1978). The individual is to be protected against arbitrary government action. Meachum v. Fano, 427 U.S. 215, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976). If an academic decision by a public educational institution is to be reviewed at all, the standard is that it may not be arbitrary and capricious. Horowitz, supra, 435 U.S. at 92, 98 S. Ct. at 956. [10]

DUE PROCESS

> 10. The Court is aware of the factual distinction between Horowitz and the case at bar: that compulsory secondary education is arguably subject to a stricter standard of review. Yet the Court does not find support for this view in the case law or in the reasoning underlying the decisions in Horowitz and Mahavongsanan. The ready accountability of school board members to the community arguably weighs the argument against a stricter standard.

[105]** The objective of the CAT policy, to improve the educational product of the Tattnall County School District, is an obviously legitimate goal within the proper province of the school board. The Court has no reason to doubt that the motives for the CAT policy were as testified to here. Defendants wished to imbue the diploma with additional meaning. They wished to motivate the students to strive for greater academic

achievement and provide the means necessary in remedial classes for students to attain that level of achievement. The Court agrees with the district court in Debra P. that the goal of the exit exam policy is a legitimate goal of the Tattnall County School District. due process

As the Supreme Court has recently reemphasized, the determination of rationality is made at the time of the legislative decision. Whether or not an empirical relationship exists, the legislative purpose and the action taken is not the question. Instead "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.' Vance v. Bradley, 440 U.S. (93), at **[**106]** 111 (99 S. Ct. 939, 59 L. Ed. 2d 171)." Minnesota v. Clover Leaf Creamery Company, 449 U.S. 456, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1981).

Plaintiffs' attack centers on the contention that the means employed, the requirement that each student achieve a 9.0 rating on the CAT in order to receive a diploma, is not reasonably related to the goals expressed. Some of plaintiffs' attacks on the rationality of the CAT requirement are more troublesome than others. DUE PROCESS

[*507] The failure of the requirement of the 9.0 level to take into account the standard error of measurement does not render the CAT requirement irrational. As noted above, Dr. Findlay testified that the importance of the standard error of measurement diminishes with repeated test administrations since the error of measurement will not always operate to a student's disadvantage. In addition, the problem may be one of semantics rather than of constitutional proportion since the concept of the standard error of measurement simply redefines the cutoff score as one somewhat above the announced 9.0. In the absence of convincing argument that the 9.0 level represents the highest level of achievement which may be constitutionally **[**107]** required, the Court is not persuaded that recognition of the fact that a standard error of measurement exists mandates the conclusion that the test requirement is unreasonable. DUE PROCESS

Nor is the Court persuaded that use of Level 19 rather than Level 18 is an irrational decision for purposes of constitutional evaluation. According to Defendants' Exhibit 7, Technical Bulletin for the CAT, Level 19 is appropriate for use from grade 9.6 to 12.9. Plaintiffs argue that since 9.0 is the cutoff point, that level of the test which encompasses the 9.0 point, Level 18, is more appropriate. However, the majority of the CAT testing takes place after the middle of the ninth grade. Thus, except for a small portion of the test administration, the test is being administered in accordance with the instructions in the technical bulletin. The Court finds no denial of substantive due process in use of Level 19. due process EDUCATIONAL AGENCY PREVAILS

Plaintiffs also contend that the test was not designed for the purpose for which it is being used invoking the need for special safeguards. Armstead v. Starkville Municipal Separate School District, 461 F.2d 276 (5th Cir. 1972). In that case, a requirement that school teachers achieve a certain score **[**108]** on the Graduate Record Examination (GRE) was struck down. The GRE was designed to determine the test taker's aptitude for graduate study. In Armstead, the superintendent of schools admitted that he knew that the GRE

had nothing to do with teacher competency. However, the case at bar presents an entirely different set of facts. The CAT is being used to determine how a student is achieving in relationship to other students across the country. That the CAT is well-designed to perform this task was not successfully disputed at trial. Ms. Bryan, plaintiffs' chief expert witness, testified that she favorably reviewed the 1970 edition of the CAT when it was published. Here the school authorities have redesigned the criteria for graduation stating that a student must perform at least on a level four years below his average counterpart across the nation. The CAT was capable of producing just such a comparison. That a student be able to perform at an average ninth grade level was a legitimate and relevant expectation for the school authorities to hold for their students. This state of affairs is in contrast to the situation in Armstead where a teacher's aptitude for doctoral studies admittedly **[**109]** had no relevance to his ability to teach. DUE PROCESS

Since the CAT is being used to measure what it was designed to measure, i. e., relative achievement levels in mathematics and reading, the Court is of the opinion that local revalidation was not necessary. Basing the receipt of a diploma on a ninth grade achievement level was not unreasonable. Defendants did not concoct a homemade examination but chose instead to rely on a professionally constructed and well-regarded examination. VALIDITY

Yet plaintiffs' contentions go beyond the conclusions above. Even if the decision to require achievement at the ninth grade level on the CAT was not in itself unreasonable, plaintiffs contend that, contrary to nationwide experience, the CAT results in Tattnall County schools are neither reliable nor valid. This argument attacks the results of implementing the CAT policy rather than rationality of its adoption. Legislative action may not be invalidated on the grounds that the evidence shows that the legislature was mistaken. Clover Leaf Creamery, supra, -- - U.S. at -- , 101 S. Ct. at 724, 66 L. Ed. 2d at 669. **[*508]** However, even if the results of the CAT policy were relevant, those results would demonstrate **[**110]** that the beneficial result of the policy is "at least debatable." See United States v. Carolene Products Co., 304 U.S. 144, 154, 58 S. Ct. 778, 784, 82 L. Ed. 1234 (1938).

The evidence resulting from the adoption of the CAT policy is only marginally probative on the issue of the rationality of its adoption. However, the results were generally supportive of rationality. On the issue of reliability, plaintiffs' unrefuted evidence showed test results which varied greatly for some students over a period of time. As discussed above, some students made gains beyond what could have been hoped for while some others lost ground on some administrations. While the standardization conducted by CTB McGraw-Hill must have included aberrations in the performance of individual students, the opinion of plaintiffs' expert was that reliability of the CAT in Tattnall County was below what was professionally acceptable. VALIDITY

The issue of validity presents similar difficulties. Although the Court disagrees with plaintiffs' contention that school authorities should have conducted local validation studies before the CAT policy was implemented, those studies have been performed by plaintiffs. As outlined above, **[**111]** many items did not meet the standards set by CTB McGraw-Hill.

Yet the Court is not of the opinion that these difficulties render the CAT policy an irrational means to a legitimate end. The CAT is not a hastily constructed vehicle, but rather a test instrument constructed with the utmost care. It is difficult to explain the disparity of the results obtained in the Tattnall County public schools. The Court cannot conclude that this well-respected test instrument is unsuitable for use in Tattnall County.
VALIDIDTYEDUCATIONAL AGENCY PREVAILED

The only apparent explanation, other than that the students in Tattnall County are very different from students in the rest of the United States, is that the students experienced differences in motivation on successive testings. The fact is difficult to explain.

Nevertheless, evidence of the success of the CAT policy in Tattnall County is enough to sustain the policy against the charge of irrationality, were such results the basis for deciding this issue. The educational plan which combines the diploma sanction with a remedial program is drastically reducing the numbers of departing seniors who cannot score at the beginning ninth grade level on the CAT. The testimony of defendants **[**112]** was essentially uncontradicted that the need for remedial classes has lessened.
REMEDIATION. The motivational change in the students and teachers was testified to and defendants' figures show that those entering high school outperform their counterparts of a few years earlier. It is true that the increases in the CAT scores have not yet been reflected in the Georgia CRT scores. Yet since the results of the policy include better academic performance, an increased enthusiasm for learning, and a reduced need for remediation, the Court holds that the CAT policy, insofar as the above-discussed grounds are concerned, is rationally related to a legitimate goal of the School Board.
STATE AUTHORITY

EDUCATIONAL AGENCY PREVAILED

However, an additional and dispositive argument must be discussed. Plaintiffs have argued that there must be a nearly exact match between the questions on the test and the curriculum. This view was recently upheld by the Fifth Circuit in Debra P., supra. There the Fifth Circuit declared a Florida exit examination violative of substantial due process standards in that it may have covered matters not taught in the schools. The Court of Appeals later stated that the test must be a "fair test" of that which was taught.
VALIDITY

This standard **[**113]** is not easily applied to the facts in this case. Ms. Larson's testimony made it clear that not everything that was taught by the Scott-Foresman series was covered by the CAT. Those in remedial classes had even less of their material covered by the CAT. More importantly, because of the difficulties outlined supra, at 491, the match was not performed the other way, and Ms. Larson did not determine whether all of the materials appearing **[*509]** on the CAT had actually been taught. However, Ms. Bryan did testify that the type of questions included on the CAT should be covered by any recognized standard curriculum.

There are factual distinctions between this case and the situation presented in Debra P. In Debra P. the state hastily concocted an examination and implemented it in a statewide area in the space of slightly more than a year. In the case at bar, the school authorities

selected a reliable and well-established test instrument. This appears to the Court to be sound practice in that the school authorities took advantage of the expertise of professional test constructors rather than hastily put together their own instrument. However, in light of the strong language in Debra P., **[**114]** the Court has no choice but to conclude that the Tattnall County School District has not sustained its burden. The Fifth Circuit in Debra P. concluded that "fundamental fairness requires that the state be put to test on the issue of whether the students were tested on material they were or were not taught." Debra P., at 406. The Court can only conclude that where the award of a diploma depends on the outcome of a test, the burden is on the school authorities to show that the test covered only material actually taught. [11]

> 11. The Court is curious as to whether the ruling in Debra P. will mean that in the future any diploma determinative test, perhaps a final exam in senior English, will require this justification by school authorities.

Since Ms. Bryan's testimony says no more than that the test probably contains items that were taught, the Court must conclude that the school authorities have not met the test of Debra P. Because it has not been demonstrated that the items on the CAT were actually taught in **[**115]** the Tattnall County schools, the use of the CAT as an exit exam must fall on substantial due process grounds. This conclusion must be reached in spite of the demonstrated success of the CAT policy. CURRICULAR VALIDITY STUDENT PREVAILED

C. The Claims of Those Students Classified as Mentally Retarded

Plaintiffs' claim on behalf of this group is essentially two-pronged. First, it is argued that the diploma policy unlawfully forecloses the possibility that mentally retarded students may obtain diplomas. Secondly, it is argued that the diploma policy is unlawful in light of the fact that many children presently classified as mentally retarded have been classified improperly.

1. The Effect of the Diploma Policy on Children Accurately Classified

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, prohibits discrimination or denials of benefits or participation in programs if the discrimination is based on the fact that the individual is handicapped but is otherwise qualified for such program or benefit. 45 C.F.R. § 84.1, § 84.4. The Tattnall County School District is the recipient of federal funds.

The Fifth Circuit has indicated that § 504 is enforceable in a private cause of action. University **[**116]** of Texas v. Camenisch, 616 F.2d 127 (5th Cir. 1980), review granted, 449 U.S. 950, 101 S. Ct. 352, 66 L. Ed. 2d 213 (1980), vacated and remanded on other grounds, 451 U.S. 390, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981). This decision is in accord with decisions in other circuits. See Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977); Kampmeier v. Nyquist, 553 F.2d 296 (2nd Cir. 1977).

That no exhaustion of administrative remedies is required is indicated by Camenisch. The Fifth Circuit held that the question of whether a private cause of action exists is clearly

bound to the question of whether exhaustion of administrative remedies is a prerequisite to suit under § 504. The court reasoned that while the HEW procedures could result in a termination of funding for an educational institution, those procedures "do not provide the most appropriate or exclusive remedy to vindicate personal § 504 rights." Camenisch, supra, 616 F.2d at 134. The court reasoned that the administrative remedies would provide no relief to plaintiff and would worsen plaintiff's position.

[*510] It is true that in the case at bar, a class of individuals is suing and there are procedures **[**117]** available to challenge individual placement decisions. Yet, in light of the Fifth Circuit's pronouncements, this Court has no hesitancy in deciding that a private cause of action exists under § 504 and that exhaustion is not required. See Larry P. v. Riles, 495 F. Supp. 926 (N.D.Cal.1979), at 56.

In evaluating the claim that the diploma policy violates § 504, the question which must be answered is whether the children in the special education programs are "otherwise qualified" to receive a diploma. The Court notes that, although children who are classified as mentally retarded have not been awarded diplomas in the past, school authorities have now agreed to allow the children so classified to take the CAT. Dr. Hurley testified that it was possible, although unlikely, that a child properly classified as mentally retarded might eventually reach the 9.0 level on the CAT. Thus, the situation in which the children classified as mentally retarded are automatically foreclosed from competing for a diploma does not now exist in the Tattnall County schools.

However, plaintiffs argue that by placing those children classified as mentally retarded in special classes these children are never **[**118]** exposed to a curriculum which would enable them to pass the CAT. As Dr. Hurley testified, this is essentially true. The emphasis in programs for the mentally retarded is not on academic matters but on practical skills. While a child who is truly mentally retarded will profit more from such an individualized program of instruction than from the instruction in a regular classroom, he will be less well prepared for a test like the CAT. Plaintiffs acknowledge that the mentally retarded are benefited by the special programs but argue that to deny a diploma to one who has successfully completed the appropriate program of instruction is to discriminate against an "otherwise qualified" handicapped individual.

The case law has not provided a set of circumstances identical to the ones at hand. However, an examination of the cases which do deal with the concept of "otherwise qualified" rely on the concept that if the handicap is extraneous to the activity sought to be engaged in, the handicapped person is "otherwise qualified." In Kampmeier v. Nyquist, 553 F.2d 296 (2nd Cir. 1977) two high school students, each of whom had vision in only one eye, tried to enjoin the public school authorities **[**119]** from excluding them from participation in contact sports. The Second Circuit upheld the denial of a preliminary injunction. In discussing the meaning of "otherwise qualified" the Second Circuit stated:

> As we read § 504, however, exclusion of handicapped children from a school activity is not improper if there exists a substantial justification for the school's policy. Section 504 prohibits only the exclusion of handicapped

> persons who are "otherwise qualified." Here the defendants have relied on medical opinion that the children with sight in only one eye are not qualified to play in contact sports because of the high risk of eye injury.
>
> Kampmeier, supra, 553 F.2d at 299.

The increased risk of injury was inseparable from the combination of the physical handicap and the sought activity. equal protection SPECIAL EDUCATION

In Southeastern Community College v. Davis, 442 U.S. 397, 99 S. Ct. 2361, 60 L. Ed. 2d 980 (1979), the Supreme Court followed this reasoning. The case concerned a woman with serious hearing disability who was not admitted to a program which culminated in an Associate Degree of Nursing which would have made her eligible for state certification as a registered nurse. However, she **[**120]** could understand normal spoken speech only by looking directly at the speaker. Thus, she was at a large disadvantage in the operating room where masks are worn or in any instance when a physician or patient needed to get her attention without being able to face her squarely.

The Supreme Court agreed with the district court and held that plaintiff was not "otherwise qualified." The Court stated that mere possession of a handicap is not a permissible ground for assuming inability to function in a particular context. The Court **[*511]** went on to define "otherwise qualified" as "one who is able to meet all of a program's requirements in spite of his handicap." 442 U.S. at 406, 99 S. Ct. at 2367. Ms. Davis' handicap was inseparable from her ability to perform as a registered nurse. The Court recognized that "the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons will not always be clear. 442 U.S. at 412, 99 S. Ct. at 2370. Yet, the opinion clearly stands for an interpretation of Section 504 which recognizes that if the handicap itself prevents the individual from participation in an activity program, the individual is not **[**121]** "otherwise qualified" within the meaning of the statute.

In the case at bar, actual participation in a program is not at issue. All agree that the special education programs offered to the mentally retarded benefit them more than would the normal academic program available. These children, by the very nature of their handicap, cannot fully participate in the normal academic programs. What the Court is faced with is essentially an argument that an educational institution has no right to define its standards. The definition of "diploma" is what is challenged rather than a barrier to a program. Plaintiffs argue that because the school authorities have chosen to define their diploma to reflect a certain level of academic accomplishment, unlawful discrimination exists against those who cannot meet that standard because of their handicaps. The Supreme Court in Davis stated: "Section 504 imposes no requirement upon an education institution to lower or to effect substantial modifications of standards to accommodate a handicapped person." 442 U.S. at 413, 99 S. Ct. at 2370. While the school authorities are free to award regular diplomas to any student, no matter what the level of achievement **[**122]** reached, the Court concludes that Section 504 does not require such action. EDUCATIONAL AGENCY PREVAILED

The Court is not persuaded by plaintiffs' argument that the reasoning in Davis does not apply here because postsecondary education is encompassed by Subpart F, 45 C.F.R. § 84.41 et seq. of the regulations under the Act while Subpart D dealing with preschool, elementary, and secondary education is relevant here. Plaintiffs point to 45 C.F.R. § 84.3(k) which defines "Qualified handicapped person" as any person of an age where non-handicapped persons are provided such services. The definition appears to aid a school district in determining who must be provided free appropriate education. To suggest that by virtue of that language in the definition, any standard or requirement which has a disparate effect on the handicapped is presumed unlawful is far-fetched. The repeated use of the word "appropriate" in the regulations suggests that different standards for the handicapped are envisioned by the regulations.

The Court notes that it does not believe that the Fifth Circuit's recent decision in S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981), requires a different result here. In that case, several students were **[**123]** expelled for misconduct which may have been a manifestation of the very handicaps the students possessed. To provide for expulsion of students on the basis of their handicap would fly in the face of the statute which guarantees that all school-age handicapped children shall receive an appropriate education. However, in the case at bar, it is not questioned that those properly classified as EMR students are receiving an appropriate education. Whether the recognition of the fact that this appropriate education is not the academic equivalent of the regular scholastic program is not touched on in S-1 v. Turlington.

2. The Effect of the Diploma Policy on Those Misclassified as Mentally Retarded

Section 504 and the regulations issued thereunder do seek to protect the rights of those who have been misclassified as handicapped. Section 84.3(j) of Title 45, Code of Federal Regulations (1979) defines "Handicapped person" as any person who "(i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having **[*512]** such an impairment." Section 84.3(2) (iii) makes clear that one who is **[**124]** misclassified as having such a mental impairment is covered by the statute and regulations. The regulations promulgated under Section 504 set out the criteria which are to be used in evaluating a student for special placement. 45 C.F.R. § 84.35(c). As found above at pp. 45-47, many instances of misclassification or lack of necessary placement procedures have occurred. The records of only a sample of the students classified as mentally retarded have been examined by the Office of Civil Rights. The Court holds that Section 504 has been violated by misclassification and absence of proper procedure. Counsel for plaintiffs and defendants shall meet and submit a plan to the Court to provide for the reevaluation of those presently so classified. equal protection SPECIAL EDUCATION The parties shall also submit a plan to provide for the remediation of those students who have been misclassified. REMEDIATION

3. The equal protection Claims of the Handicapped

The Court is at a loss to understand how the equal protection clause is violated. The Court will insure that those who have been misclassified will be identified and provided

with remediation. The Court does not find any intentional misclassification. Nor does the Court conclude that **[**125]** the diploma policy creates a quasi-suspect class. Plaintiffs have pointed to no opinion by a court of appeals holding that mentally retarded persons are a quasi-suspect class. In addition, since the diploma policy merely sets out an academic qualification for a diploma, it no more discriminates against the mentally retarded than does a requirement that a certain number of Carnegie units be earned. Many academic requirements may be beyond the abilities of these children. Yet, academic standards are obviously important to the legitimate interest of educating students. To applaud the efforts in recent years to develop the potential of these unfortunate students is not to require that a diploma be issued to cover all degrees of academic achievement, no matter how meager. [12]

12. Judge Bua's opinion in Sterling v. Harris, 478 F. Supp. 1046 (N.D.Ill.1979) finding that statutory classifications based on mental illness are quasi-suspect is not helpful here. The Supreme Court reversed in Schweiker v. Wilson, 450 U.S. 221, 101 S. Ct. 1074, 67 L. Ed. 2d 186 (1981), without deciding whether the mentally ill were a suspect class.EQUAL PROTECITON SPECIAL EDUCATION

EDUCATIONAL AGENCY PREVAILED

[126] VI. Summary**

In conclusion, since the CAT policy violates due process, all plaintiffs, including those in Anderson v. Banks, prevail. Defendants are ordered to award diplomas to all students who would have received them except for the existence of the CAT policy. No exit exam policy may be utilized until it is demonstrated that the test used is a fair test of what is taught.

In Johnson v. Sikes, Classes 1 and 1a prevail on their equal protection claim. Defendants may not impose the diploma sanction on any member of these classes until the graduation of the Class of 1983 which will mark the first group who began their education after the abolition of the dual system. The period between this date and June, 1983 will also provide an opportunity for the remedial programs now available to overcome the effects of the now-abandoned tracking system. The school authorities are to outline the continued benefits to the Court in 1983 before any denial of diplomas takes place. Of course, defendants must also remedy the due process violation before any exit exam may be reinstated.

Class 2 in Johnson v. Sikes prevails insofar as misclassification has occurred. Insofar as the students in Class **[**127]** 2 who have been accurately classified, and who are given the opportunity to take the CAT, should it be properly reinstated, the Court finds no fault with the diploma sanction.

Defendants shall submit their proposals for reevaluation of the students classified as related by June 29, 1981. Plaintiffs may respond on or before July 8, 1981, at 1:30 P.M. A hearing will be held at that time to determine the particular procedures and timetable necessary to remedy the misclassification.

DEBRA P., a minor by Irene P., her mother and next friend et al., Plaintiffs-Appellees, Cross-Appellants, v. Ralph D. TURLINGTON, Individually and as Commissioner of Education et al., Defendants-Appellants, Cross-Appellees.

No. 79-3074

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

654 F.2d 1079; 1981 U.S. App. LEXIS 17977

September 4, 1981

PRIOR HISTORY: [**1] Appeals from the United States District Court for the Middle District of Florida; George C. Carr, District Judge.

CASE SUMMARY:

PROCEDURAL POSTURE: A poll of the court was requested by a member of the court for the reconsideration of the cause en banc in which the court rendered an opinion regarding public education.

OVERVIEW: A majority of the judges voted not to reconsider the cause in response to a request by a member of the court, thus, rehearing en banc was denied. However, two of the judges filed dissenting statements from the court's refusal to consider the case en banc, thus, the court filed a statement that explained the panel opinion. The court held that it did not forbid a state from providing quality education, decree that the aim of public education was to confer a diploma rather than educate, find that black children were not ready for quality education, or order educational requirements. The court found that a diploma had unique value, that the state required attendance in school, that the state established a public school system, that if attendance requirements were met and courses were passed, a diploma would be awarded, that mutual expectations were created between the state and students, and that there was a property right in the expectation of a diploma. Further, the court held that to suggest that the state had allowed, or that the panel approved, the awarding of a diploma to any child who had received no learning was to misread both the record and the court's opinion.

OUTCOME: The court denied rehearing en banc because a majority of the judges voted against reconsideration of the cause, however the court filed a statement to further explain the panel opinion regarding public education.

CORE TERMS: diploma, functional, educational, literacy, exam, en banc, educational systems, school system, illiterate, property interest, unequal, skills, public education, segregation, taught, panel opinion, achievement, learning, teaching, literacy test, certification, disciplinary, graduation, segregated, black students, inherently, classroom, black and white, educational institutions, high school diploma

COUNSEL: W. Crosby Few, Tampa, Fla., James D. Little, Gen. Counsel, State Board of Education-Knott Judith A. Brechner, Deputy Gen. Counsel, Tallahassee, Fla., for defendants-appellants, cross-appellees.

Irving Gornstein, U.S. Dept. of Justice, Washington D.C., for amicus curiae U.S.A.

Stephen F. Hanlon, Bay Area Legal Services, Inc., Robert J. Shapiro, Tampa, Fla., Diana Pullin, Center for Law and Education, Roger L. Rice, Richard Jefferson, Cambridge, Mass., Peter M. Siegel, Miami, Fla., for plaintiffs-appellees, cross-appellants.

David Rubin, Stephen J. Pollak, Richard M. Sharp, Washington, D.C., amicus curiae.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(5 Cir., 1981, 644 F.2d 397).

JUDGES: Before FAY and VANCE, Circuit Judges and ALLGOOD *, District Judge.Before GODBOLD, Chief Judge, and RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., HENDERSON, HATCHETT, ANDERSON, and THOMAS A. CLARK, Circuit Judges.

* District Judge of the Northern District of Alabama, sitting by designation.

OPINION BY: PER CURIAM:

OPINION

[2] [*1079]** A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

In dissenting statements from the court's refusal to consider this case en banc, two of our brothers have expressed concern about the ramifications of the panel opinion. With great respect for their views but shocked at their misinterpretations, we file this statement in hope of assisting others involved.

Specifically, the panel assigned this matter did not :

a. Forbid a state from providing quality education.

b. Decree that the aim of public education is to confer a diploma and not to educate.

c. Find that black children were not ready for quality education.

d. Order any educational requirements (high or low) for a state school system.

e. Inject itself in any way in the curriculum of the state school system.

f. Suggest that black students be treated differently from white students.

To suggest that the panel opinion has somehow found a constitutional right to a diploma in the absence of an education is to play word games which we feel are **[**3]** both inappropriate and unfounded. Apparently our dissenting brothers would approve of "social promotions" coupled with a denial of a diploma as complying with the legal requirements of equal educational opportunities within a unitary school system. Even **[*1080]** more distressing is the assumption inherent in the language of the dissents that the black students involved here had not attended class and satisfactorily passed all examinations given in those courses prescribed as necessary for the receipt of a diploma.

What the record in this case clearly establishes and what the panel of this court did hold includes:

a. That a diploma has a unique value in the market place.

b. That the State of Florida requires attendance in school between certain ages.

c. That the State of Florida has established a public school system.

d. That if certain attendance requirements are met and if specified courses of study are satisfactorily completed (passed) a diploma will be awarded.

e. That mutual expectations are thus created between the state and the students.

f. That if a student complies with the established requirements and if he or she has satisfactorily passed these required courses **[**4]** of study, there is a property right in the expectation of a diploma. DUE PROCESS: PROPERTY RIGHT

g. That if a state is going to impose as a condition for receipt of a diploma a functional literacy test over and above whatever tests, examinations or grading requirements exist for specific single classes (world history, business mathematics, etc.), that test must be a fair test of material presented within those required courses of study. CURRICULAR VALIDITY

h. That the State of Florida is to be commended for its concern over the quality of the education being furnished by its public school system.

i. That the State of Florida may utilize a functional literacy examination for both remedial purposes and as a condition for the awarding of a diploma.

To suggest that the State of Florida has allowed, or that the panel approved, the awarding of a diploma to any child who had received no learning is to misread both the record and the court's opinion.

CONCUR BY: RONEY

CONCUR

RONEY, Circuit Judge, specially concurring:

It has been two years since the district court decided this case. Both parties appealed from that decision. Neither party has suggested the case be heard by the en banc court. This is sufficient reason for this Court to **[**5]** decline to consider the case en banc, even without considering the record, the issues and all of the matters discussed by my dissenting colleagues, which have neither been briefed nor argued to nonpanel members, and whether or not the dissents have correctly or incorrectly read the panel decision. In this kind of litigation, the parties' decision as to where they next want to attempt to resolve these complex problems is entitled to great deference without the interference of unrequested, judicially forced, prolonged and expensive en banc procedures which could delay any decision from this Court by at least a year. This Court exists to decide cases, to serve the litigants. We do well when we remember that simple fact. The denial of en banc consideration is justified, whatever the merits of the particular matters argued in the dissents and for whatever reasons an individual judge may have voted.

DISSENT BY: TJOFLATHILL

DISSENT

TJOFLAT, Circuit Judge, dissenting:

A panel of this court has held that public high school students have a constitutionally protected property interest in receipt of a high school diploma, and that the state may not withhold that diploma, despite a student's inability **[**6]** to pass a functional literacy exam, unless the state can prove that it has taught, and perhaps taught well, Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981), the material covered on the exam. Thus, this federal court has told the State of Florida that it is constitutionally required to award diplomas to students who are functionally illiterate.

[*1081] Moreover, the panel has held it constitutionally impermissible for the State of Florida to presently require the same level of functional literacy from black and white high school students. This constitutional prohibition is to continue until the state demonstrates that racially disproportionate student illiteracy cannot be attributed to the educational deprivations of past racial segregation in the schools. The panel has provided no guidance concerning how the state is to go about proving this negative proposition.

These holdings are obviously of great moment; they will have far-reaching effect throughout the six states of the Fifth Circuit and will signal to all other states the futility of attempting to improve educational systems in the face of federal interventionism. In one blow our circuit has created a mighty **[**7]** disincentive for the pursuit of excellence in education. This case undoubtedly is en banc worthy, and I vigorously dissent from the court's refusal to rehear it.

The panel opinion states the facts of this case clearly. Debra P., at 400. My concern is not with the panel's interpretation of those facts, but rather with both the substantive character and the practical ramifications of the law the panel creates and applies to those facts.

To focus this dissent I will restate briefly the two holdings of the panel that are, in my mind, most problematic. The first holding concerns due process. The panel finds that Florida has created a property interest in the expectation of receiving a high school diploma, and that this property interest is protected by the due process clause. Moreover, despite finding that Florida's functional literacy exam accurately tests basic functional literacy skills, Debra P., at 406, the panel holds that refusing diplomas to students failing the exam will violate the students' due process rights if the exam tests matters not covered in the classroom. due process According to the panel, an exam covering such matters is fundamentally unfair. I believe this holding is **[**8]** contrary to establish Fifth Circuit precedent and that it flies in the face of the spirit of the Supreme Court case law on students' educational rights.

The second panel holding that poses great difficulty for me concerns the equal protection clause. The record below indicates that the functional literacy test has a disproportionate impact on black students. The panel views the higher incidence of black failure on the exam as linked directly to the unequal education blacks received during the years of racial segregation. Thus, the argument goes, denying a diploma for failure of the literacy exam perpetuates past racial discrimination. Because the state has failed to demonstrate that denying a diploma is necessary to remedy the continuing effects of past discrimination, the state scheme must fall as violative of the fourteenth amendment. I believe this panel holding is a grievous affront to the fundamental principles underlying the landmark case of Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

The due process Analysis

I believe the panel is incorrect in identifying receipt of a diploma as a property interest protected by the due process clause. [**9] The panel relies upon Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975), to support its discovery of this protected interest, Debra P., at 403, yet Goss should not be read to encompass purely academic matters; in Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978), the Supreme Court indicated that the minimum due process requirement of Goss is limited to disciplinary determinations that inhibit a student's access to education. Horowitz at 87-91, 98 S. Ct. at 954-56. The Court, therefore, has distinguished the role a court may play when called upon to interfere with state disciplinary proceedings and its role in reviewing academic decision making in an educational system. Id. Thus, denying access to education triggers rigorous due process analysis; denying academic certification does not. Other courts have recognized this distinction, see Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975), and indeed, I believe **[*1082]** it to be the basis of controlling case law in this circuit.

In Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976), this circuit held that a university's decision to require students **[**10]** to pass a comprehensive examination as a prerequisite to receiving an M.A. degree was a reasonable academic regulation. In so holding, this court stressed that educational institutions have "wide latitude and discretion ... in framing their academic degree requirements." Id. at 450. Indeed, the court went on to emphasize that a state educational institution is entitled to modify its rules and

regulations "so as to properly exercise its educational responsibility." Id. This was so despite the district court's determination, Mahavongsanan v. Hall, 401 F. Supp. 381, 383 (N.D.Ga.1975) rev'd, 529 F.2d 448 (5th Cir. 1976), unrefuted in the Court of Appeals, that the exam in question tested "abilities and materials which may not necessarily be instructed within the student's program of study." A contrary holding, this court emphasized, could only be explained by confusing "the court's power to review disciplinary actions by educational institutions on the one hand, and academic decisions on the other hand." Mahavongsanan, 529 F.2d at 449. Despite this exhortation, the panel in Debra P. has done just that, converting this confused perspective into law. Thus, I am at a loss in attempting **[**11]** to square Debra P. with the prior, controlling authority of Mahavongsanan.

It follows directly from Horowitz, Bruton and Mahavongsanan that education, not receipt of a diploma, is a property interest deserving of rigorous due process protection. To confuse the two is entirely inappropriate, as education is quite distinct from receipt of a diploma. A diploma supposedly signifies attainment of a certain level of academic proficiency. Thus, ideally, a diploma indicates that the state has performed fully its self-assumed duty to provide a student with an education and that the student has been successful in participating in that education. Therefore, as the panel stresses, at 403, a diploma illustrates successful progress through one's education. Academic success is not a property right the relevant right is to a full and fair opportunity for an education.

By positing a rigorously safe-guarded property interest in receipt of a diploma, the panel has triggered a due process analysis that fails to correspond to the true constitutional character of the student expectation in question. A student's expectation is protectible only insofar as that expectation comports with the reasonable **[**12]** demands of the relevant educational institution. One simply should not be said to have a due process property interest in a diploma absent performance equaling established academic standards, for a student has only a conditional right to a diploma. Horowitz. The panel has turned this reasoning on its head, providing rigorous protection for the diploma interest before student compliance with purely academic requirements.

Even more troublesome than the identification of the diploma property right, however, is the panel's inquiry into the fundamental fairness of Florida's functional literacy exam. No one contests that the Florida Legislature instituted the functional literacy exam as a diploma prerequisite out of a concern for "the quality of its public educational system." Debra P., at 400. Moreover, as noted earlier, the district court has found and the panel accepts that the examination tests validly the everyday, practical application of the basic functional literacy skills of reading, writing and arithmetic. VALIDITY. Id. at 406. For example, the exam tests a student's ability to complete an employment application, to "determine the inferred cause and effect of an action," to comparison-shop, **[**13]** to solve problems "involving purchases and a rate of discount," and to demonstrate other skills of undoubted everyday utility. Debra P. v. Turlington, 474 F. Supp. 244, 259 n.22 (M.D.Fla.1979). We must recognize, therefore, that Florida is testing fundamental, indeed minimal, intellectual maturation; the test inquires not into abstract academic matters but rather into the ability to apply basic skills in the context of real-life performance situations. We also must recognize that the decision to impose this exam

requirement is a clear [*1083] articulation of state policy: the Florida Legislature has decided that successful completion of a public high school education necessarily entails achievement of a minimum level of practical literacy. It would be difficult to formulate a more reasonable or more skeletal policy of public education.

With these considerations in mind, I find very disquieting the panel's determination that the exam must be labeled unfair and constitutionally impermissible if Florida fails to demonstrate that it tested material actually taught in each of its classrooms. This holding places a very onerous burden on the state, for it must prove that each and [**14] every student sitting for the functional literacy test was taught, and perhaps taught well, Debra P., at 404, each bit of knowledge that plays a role in the examination. One can only hypothesize what threshold of proof the district court, in the absence of adequate direction from this court, will require of the state. Several difficulties are clear, however. First, the state will have to prove that the material covered on the functional literacy exam was taught, and, by definition, taught adequately, while simultaneously justifying an inevitable amount of underachievement on the exam CURRICULAR VALIDITY. In effect, the state will have to show that a student's failure to achieve functional literacy after twelve years of public education is not attributable to ineffective instruction. Surely one cannot assert that adequate teaching always produces true learning, yet it is much less self-evident that this disharmony is subject to proof in a court of law. CURRICULAR VALIDITY

Second, this imposing theoretical difficulty of proof will be compounded, for the state must carry this burden for every complaining student in the context of each course that student attended. There is great potential for litigation concerning the [**15] effectiveness of individual teachers. Will a student be entitled to a diploma simply because one of his teachers "did not cover the whole book in class," Debra P., at 406? How will Florida be able to test students who transfer into the Florida educational system? The potential for litigation is almost endless; the state's burden is oppressive at best. CURRICULAR VALIDITY

Third, the nature of the matter tested, functional literacy, belies the reasonableness of the state's burden. As I have stated, to test functional literacy is to test whether a student has absorbed basic skills and, during the process of growth, learned to convert those skills into the attributes of minimum intellectual maturity. One can, with an acceptable degree of error, attempt to measure the teaching of basic skills, but trying to measure the teaching of the process of maturation derived from acquiring those skills is extremely difficult. Under Debra P. the state certainly will have to prove the link between teaching and maturation, and will have to validate the methods employed, (potentially in each classroom), to convey the fruits of that linkage to the student. CURRICULAR VALIDITY

These few reflections illustrate clearly the message Debra [**16] P. conveys to the states. That message is that the federal judiciary will create significant disincentives for state efforts to improve the quality of education. To my mind, the barriers the panel places between the State of Florida and achievement of its educational goals can only be characterized as constitutionally unjustifiable. Furthermore, those barriers portend

subsequent federal intrusions inhibiting state educational policy. For example, will Debra P.'s federally-imposed curricular validity requirement lead to a federally-dictated basic curriculum, or federally-mandated text-book uniformity, thus eliminating the flexibility the states must have in implementing their education programs?

The panel's approach simply paves the way for extremely vexatious litigation, while demonstrating the very intrusiveness into state educational concerns that the Supreme Court has so clearly denounced.

The Supreme Court has recently noted that " "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.... By and large, public education in our Nation is committed to the control of **[*1084]** state and local authorities.' **[**17]** " Horowitz, 435 U.S. at 91, 98 S. Ct. at 955, quoting Epperson v. Arkansas, 393 U.S. 97, 104, 89 S. Ct. 266, 270, 21 L. Ed. 2d 228 (1968). The Court expresses similar sentiment in the landmark case of San Antonio School District v. Rodriguez: "(T)he judiciary is well advised to refrain from imposing on the states inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems ." Rodriguez, 411 U.S. 1, 43, 93 S. Ct. 1278, 1302, 36 L. Ed. 2d 16 (1972). Even the panel acknowledges that

> "(T)he education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of the rights secured by the supreme law of the land." JUDICIAL RELUCTANCE

Debra P., at 403, quoting Cumming v. Board of Education, 175 U.S. 528, 545, 20 S. Ct. 197, 201, 44 L. Ed. 262 (1899). In the face of this authority the panel nevertheless insists upon placing itself between the state of Florida and its high **[**18]** school students.

In sum, the panel has misidentified a property interest and consequently has applied an entirely inappropriate, because both incongruent and excessively instrusive, constitutional analysis to the facts of this case. The decision frustrates an admirable state policy decision to require that public school students be literate before they are certified as academically proficient. One need not be proficient to understand that this frustration will be more than temporary. STATE AUTHORITY. This circuit has given the state a choice between escaping expensive, time-consuming and demoralizing litigation and fighting an expensive two-front war: attempting to improve education while looking over its shoulder to assure that everything possible is being done to prepare for the inevitable onslaught of due process actions founded upon the most arcane of alleged educational deficiencies. See, e.g., Debra P. at 406 (evidence in record that "at least one teacher" did not cover an entire textbook in one of his courses). It is not our place to put state idealism to such a test.

In one step the panel has removed the state incentive to provide quality education, for each state attempt to demand academic **[**19]** proficiency will be subject to the same eviscerating analysis used to reject Florida's attempt to demand functional literacy from

its public school graduates. We have only ourselves to blame if Florida abandons its present policy and reverts to the old, admittedly deficient system of social promotion, graduation and certification. Moreover, we should not be surprised if other states in this circuit heed the panel's signal and avoid even attempting a reformation of their educational policies. The transitory impact of the state gesture will simply not be worth the subsequent sting of federal interventionism. JUDICIAL RELUCTANCE

The equal protection Analysis

The state of Florida has decided that it will demand equal performance from both black and white students on its functional literacy exam. The panel, in the most paternalistic fashion, has found this race-neutral approach violative of the equal protection clause. Its holding, stated simply, is that the constitution prohibits the State of Florida from treating black and white students equally. Besides the inevitable impact this decision will have on black pride and white hubris, it is, in the most fundamental sense, a perversion of the principle **[**20]** of equality enunciated by the high Court in Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

If Brown stands for anything, it is that in the educational arena a state must treat black and white students equally. Any inherently unequal educational treatment of the races is unconstitutional racial discrimination of the most nefarious sort. That discrimination is iniquitous because it is the prerequisite for successful state imposition of unequal status to sanction racially unequal educational achievement is to cripple **[*1085]** and stigmatize, it is forcibly to lock a race of people into a deprived class with cruelly limited horizons and illusory hopes. For me, therefore, it is inexcusably iniquitous to compel the state to certify as academically proficient an avowedly functionally illiterate minority student based on the institutionalized assumption that he cannot be expected to achieve on the same level as white students. Quite simply, it is to celebrate and perpetuate the hollow certification that accompanied black graduation pre-Brown.

The record in Debra P. demonstrates that the functional literacy exam has a disproportionate impact on blacks. **[**21]** There also is evidence in the record indicating that the higher incidence of black failure may be attributable in significant part to the legacy of the inherently unequal education provided by Florida's previously segregated educational system. equal protection When these facts are joined with the construct validity of the literacy exam, VALIDITY they speak volumes. Yet, their message may be put succinctly: at least partly because of racial segregation, black students in Florida are ending their high school years as functional illiterates. The panel has held that the state must give these illiterate students a diploma certifying successful completion of twelve years of public education. This poses a most incongruous resolution of the dilemma. Black students have a right to an equal education. The state has failed to provide that equal education, and thus a significant number of minority students are functionally illiterate. To correct this, Florida established the prerequisite of the literacy exam, coupled with a statutory authorization that "special instruction designed to remedy ... identified deficiencies," Debra P., at 401 n. 1, quoting Fla.Stat.Ann. § 232.246 (West Supp.1980), be provided to those **[**22]** who demonstrate an inability to pass the examination. Moreover, Florida has decided to hold back a high school diploma until a

student does demonstrate literacy, thus providing an added incentive for pursuit of essential skills. To this the panel responds by asserting that Florida has violated the Constitution.

To be in compliance with the fourteenth amendment, the panel asserts, Florida must give illiterate black students a diploma. I can think of no more otiose, worthless equality than this distribution of paper credentials. To deny a student a diploma is, at worst, a regrettable necessity. Under McNeal v. Tate County School District, 508 F.2d 1017, 1020 (5th Cir. 1975), I believe the denial of a diploma is a necessary and entirely reasonable means to remedy the evil, indeed, the badge of slavery, which is black functional illiteracy. In the long run, this state decision seems the wise approach, and it is not for us to second-guess the state. Functionally illiterate graduates possessing a diploma may have less trouble than non-diploma holders in initial employment opportunities, but their futures are bleak. Inadequate performance at work, severely limited opportunities for **[**23]** social mobility, every ill that afflicts the illiterate minority individual will be theirs. It is no remedy for these students, disadvantaged at the hands of the state, to be meaninglessly certified. The wrong has been suffered and now it must be corrected. It is no answer to cover the fundamental hurt with an empty equality of form that ignores the underlying substance. Indeed, if anything, this empty equality is the most wicked perpetuation of the legacy of segregation. EQUAL PROTECTION

Certainly any resolution of this case would be difficult. It will never be easy to try to correct the manifold evils created by generations of racial discrimination. We must however, never lose sight of the fundamental goal of equality. Our duty is to further attempts to eliminate the vestiges of inequality, not to intrude paternally on good-faith state attempts to ensure real educational equality.

To conclude, I simply cannot believe that the fourteenth amendment requires us to force a state to abandon a rational scheme designed to correct the palpable heritage of segregated, inherently unequal education in favor of mandatory state certification of illiterate students. The panel rules that the state must **[**24]** continue to sanction this meaningless graduation until it can demonstrate that disproportionate black student functional **[*1086]** illiteracy is "not due to the educational deprivation (of) the "dual school' years." Debra P., at 408. The state disincentive here is remarkable: how long will it take before the heritage of educational segregation is eradicated? Furthermore, how much litigation will it take before the federal courts determine that each school district in the Fifth Circuit, with its unique history and demography, has outlasted the effects of segregation? We have lived too long with the legacy of racial inequality to believe that the effects of history are of short duration. Indeed, they are all-pervasive, and we do a great deal to extend these all-pervasive effects by requiring Florida to give diplomas signifying educational proficiency to black functional illiterates. We perpetuate the cycle; instead of racial hatred generating racially separate and inherently unequal systems, the spirit of federal paternalism has intervened to impose racially unequal standards of educational proficiency within a single school system. Now the inequality is to be imposed under **[**25]** a single roof, yet the affront to basic racial equality is not lessened. And this racial affront is all the more demeaning because it acts as a great deterrent to

black student achievement why strive to achieve if the rubber stamp of academic certification is available to all?

In my mind, these disincentives are real; they will shape the conduct of both educators and pupils to the detriment of society. When it is appropriate for a federal court to exercise jurisdiction, it should strive to further the spirit of equality. Today, we have done just the opposite. The state should be allowed to correct the deficiencies of the segregated years immediately by requiring of black students the equality of performance that is the only demonstration of equal respect, and by providing the means for these students to attain the necessary level of performance, as Florida has done here. Debra P., at 400-01 n. 1. It will be in the dignity of certification for equal achievement that the proof of social equality is revealed. To mandate anything short of this is to consign the teachings of Brown to the realm of mere idealism. EQUAL PROTECTION

I respectfully dissent. *

> * This dissent was written and circulated among the judges before the panel entered its order denying rehearing en banc. In entering its order, the panel has chosen to comment on this dissent, and that of my Brother Hill, to the denial of en banc rehearing. This commentary takes the form of an attempted explanation of Debra P., and purportedly is issued "in hope of assisting others" in interpreting the decision. This commentary, however, has no legal implications for the interpretation and application of Debra P.; that decision must stand on its own. The commentary of the panel judges has no precedential significance despite its appearance as well-intentioned judicial gloss. It does, however, cast further doubt upon the wisdom of the denial of en banc consideration if Debra P., as originally drafted, requires such a thorough-going attempted explanation, further consideration of the case, if only to clarify with the force of law its holding, seems appropriate.

[26]** HILL, Circuit Judge, dissenting from Court's denial of Petition for Rehearing En Banc.

A majority of the active judges in Administrative Unit B of the court, acting under our rules for the entire court, has voted against rehearing and reconsidering this case en banc. I dissent from this action of our court.

This case finds it constitutionally sound indeed, mandated that a state continue the pre-Brown [1] practice of handing out meaningless high school diplomas to black boys and girls who have not been required to achieve even a minimal education. Our court's refusal to reconsider this case en banc can only be premised upon a conclusion, unstated though it be, that those who labored so long and hard to strike down segregated education were not working to achieve quality education for minority race children but sought to deny it to all children.

1 Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

Specifically, our court has held [2] that:

2 Since the preparation of this dissent, the panel has entered its order denying rehearing. Further, there is added to that order a statement by two judges of this court and a senior district judge writing in the nature of a response to this dissent and to the dissent of Judge Tjoflat. The response undertakes to interpret the panel's opinion.

Assuming without deciding that the panel opinion needs interpretation, its holding for our court does not. Subject to the limited remand discussed in footnote 4 hereafter, the panel opinion affirms the district court's judgment. It is abundantly clear that the district court enjoins the State of Florida from requiring passage of the functional literacy test as a condition for the awarding of a diploma during the next four years. The panel affirms this injunction forbidding the State from using that test. The interpretation of the panel opinion proffered by two of our judges who were on the panel says that the panel held "That the State of Florida may utilize a functional literacy examination ... as a condition for the awarding of a diploma." Rehearing en banc being denied, such a reversal of the district court's injunction cannot be accomplished without rehearing and reconsideration by the panel. If the use of this test be not enjoined in this litigation, my concerns are largely put to rest. What I write is upon the assumption that the district court's injunction has been, on appeal, affirmed.

[27]**

[*1087] (1) The Constitution forbids a state from providing quality education to, and requiring a modicum of learning by, the children in its public school system.

(2) The aim of public education must, under law, be to confer a diploma and must not be to provide an education.

(3) By operating a public school system, a constitutionally protected expectation is created in the attendee that he or she will receive a diploma, not an education.

(4) That, at the time of the Supreme Court's decision in Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), the black children of this land were not ready for non-segregated education in schools providing a quality education and requiring some minimal level of attainment for graduation.

(5) Because black children are a part of the student body, educational requirements of a state school system must be kept at a low level!

None of the teachings of decided cases supports this assault by our court upon the aspirations of the people of Florida for quality education for their children. The goal of the civil rights movement, that minority race children be provided quality education, **[**28]** are frustrated by this holding. The vestiges of segregated education, which handed out public school diplomas to minority race children but did not provide them quality

education, are perpetuated. Before this holding became the law of the Fifth Circuit Court of Appeals, careful and full en banc reconsideration should have been indulged. EQUAL PROTECTION

My expression of concern ought not be taken as a whimsical disregard for the serious attention given this case by our court's panel and by Hon. George C. Carr, the district judge whose opinion, Debra P. v. Turlington, 474 F. Supp. 244 (M.D.Fla.1979), evidences great care and painstaking consideration. Rather, I seek to express my conviction that the judgment is contrary to law and that its premise is the wrong premise.

The premise accepted by the court, from which the entire syllogistic exercise is derived, is that, in education, the diploma is the thing. The child's expectation that he or she will receive a diploma without having achieved even a minimum degree of education is held to be a constitutionally protected property right. due process Yet, before Brown, the evil that existed was largely that diplomas were being awarded to minority race children **[**29]** even though, in "inherently unequal" systems, they were not being afforded education equal to that being administered to others. Nowhere does the court consider the real value of an educational system to the pupil learning. The Supreme Court was not misled by the free and easy award of diplomas. It emphasized the real value of the educational system to the pupil by observing:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition **[*1088]** of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

347 U.S. at 493, 74 S. Ct. at 691.

It is undoubtedly **[**30]** true that the appearance of having been educated may be accomplished by the conferring of a diploma. Nevertheless, if the child has received no learning, even the most emphatic judgment and order of the most diligent court cannot supply it.

The panel's holding makes Mr. Bumble correct. [3] Happily the panel's holding is not the law.

> 3 "If the law supposes that," said Mr. Bumble ... "the law is a ass, a idiot." C. Dickens, Oliver Twist, Ch. 51 (1838).

The panel pays lip service to the law: "Neither the district court nor we are in a position to determine educational policy in the State of Florida." At 402. Nonetheless, they conclude that the expectation of receiving a diploma is a property interest protected by

the Fourteenth Amendment. due process This holding enables the panel (and will require all bound by our opinion) to analyze the diploma requirements established by the State of Florida. Specifically, the panel, in affirming the district court, embraces the view that use of the State's functional literacy **[**31]** test even though validated as to content CURRICULAR VALIDITY [4] see 474 F. Supp. at 261, and not infected with cultural bias towards minority students, equal protection see 407 n. 17, may not be a requirement for graduation under the Constitution of the United States. Today, the court finds a functional literacy test wanting. Tomorrow, the court may find the state's math requirements are unfair. And the next day, the court may find that history is unnecessary to the high school curriculum or that, its teacher being less than adequate, a history test or examination is unconstitutional. I hope this never comes to pass. The fact remains, however, that the panel has established a constitutional basis for the judiciary to assume the role of state educators.

> 4 Of course, the panel held that the test "may have covered matters not taught in the schools of the state." At 404 (emphasis in original). One would suppose that on remand this ambiguity in the record could be quickly resolved in favor of the State by testimony from one familiar with the State's high school curriculum. CURRICULAR VALIDITY

[32]** The panel cites Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975) as authority for its intrusion into the State's educational system. Goss v. Lopez provides no such authority. Rather, Goss v. Lopez simply required "effective notice and (an) informal hearing permitting the student to give his version of the events" before the student could be suspended for ten days and thus denied participation in the learning process for disciplinary reasons. Id. at 583, 95 S. Ct. at 740 (emphasis added). Nowhere in its opinion does the Court approve of judicial review of state academic policy. Furthermore, four members of the Court dissented from the limited holding of Goss v. Lopez reasoning that "(t)he decision unnecessarily opens avenues for judicial intervention in the operation of our public schools that may affect adversely the quality of education." Id. at 585, 95 S. Ct. at 741.

In Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1977) the court vigorously refused to sanction judicial intervention into academic decisions.

> Academic evaluations of a student, in contrast to disciplinary determinations bear little resemblance **[**33]** to the judicial and administrative fact finding proceedings to which we have traditionally attached a full-hearing requirement. In Goss, the school's decision to suspend the students rested on factual conclusions that the individual students had participated in **[*1089]** demonstrations that had disrupted classes, attacked a police officer, or caused physical damage to school property. The requirement of a hearing, where the student could present his side of the factual issue, could under such circumstances "provide a meaningful hedge against erroneous action." Ibid. The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical

> ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information **[**34]** and is not readily adapted to the procedural tools of judicial or administrative decision making.

Id. at 89-90, 98 S. Ct. at 954-955. The same logic prohibits a court from reviewing the graduation requirements established by a State. Indeed, our circuit has long been of the view that academic decisions should be left to the states and the appropriate educational bodies. Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir.1976). In sum, there is a bright line of demarcation between extending minimal due process safeguards to protect a student's access to learning, see Goss v. Lopez and using the due process clause to make decisions regarding the quality of education for the State of Florida. See Horowitz. DUE PROCESS

The district court had presented only the difficulties encountered by minority race students said to result from their having attended the first three grades of elementary education in a segregated system. equal protection Thus, on this record, the district court merely postponed a quality education for three years. See 474 F. Supp. at 269. Of course, a pupil's achievement in an educational system may be affected by home and other social environment outside the classroom. Upon the principle **[**35]** laid down by this case, may we not expect the assertion that it is unconstitutional to provide and require quality education and achievement as long as the environment outside the classroom is affected by previous segregation in society and in education. In short, this case at least suggests that minority race children shall not be subjected to and afforded quality education until history has been repealed and the fact that there was segregation be no longer a fact. We may hand down judgment after judgment, but we will not alter historical fact. EQUAL PROTECTION

It has been said that public education has been in decline in recent years. If it is so, it is deplorable. If it is so, it is not difficult to find at least a cause. There is a limit to the time, effort, funds and other resources that state officials and taxpayers can devote to education and related matters. One has but to review litigation in this court during recent decades to obtain an idea of the amount of those limited resources that have been diverted from the process of educating to devious, clever efforts to thwart the teachings of Brown. There is evidence in the record in this case that at least one state has now resolved to **[**36]** turn from such untenable frustrations and return to the restoration of quality to its educational system. I submit that the judges of this court, charged in brief after brief and argument upon argument with the destruction of public education, should, judiciously (and personally for what that's worth), rejoice at such a development.

Instead, we endorse the charge leveled against the courts and solemnly find that the Constitution and the law mandate that quality education, since Brown, be forbidden.

Subject to the counseling I might have received from the lawyers on rehearing, I am convinced that this is wrong.

DEBORAH BROOKHART, et al., Plaintiffs-Appellants, Cross-Appellees, v. ILLINOIS STATE BOARD OF EDUCATION, et al., Defendants-Appellees, Cross-Appellants

Nos. 82-1659, 82-1718

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

697 F.2d 179; 1983 U.S. App. LEXIS 27923

October 25, 1982, Argued

January 3, 1983, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Central District of Illinois, Springfield Division. No. 81 C 3089 -- Robert D. Morgan, Judge.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff handicapped students challenged defendant school district's requirement that they pass a minimal competency test in order to receive high school diplomas. The United States District Court for the Central District of Illinois, Springfield Division, held that there was no due process violation and reversed the state superintendent and board of education's order directing the school district to issue diplomas. The students appealed.

OVERVIEW: The students claimed that denial of the diplomas violated the Education for All Handicapped Children Act (EHA) and constituted discrimination under the Rehabilitation Act (RHA). The court held that denial of diplomas to the students, who had been receiving the education and services required by the EHA but were unable to pass the test, was not a denial of a "free appropriate public education." The EHA only required access to specialized services, not specific results. A student who was unable to learn because of his handicap was not an individual qualified in spite of his handicap and, thus, denial of a diploma because of inability to pass the test was not discrimination under the RHA. The court held that the school district failed to satisfy due process because the students had a liberty interest in receiving a diploma and, by changing the diploma requirement, the school district deprived the students of a right previously held under state law. The process due included adequate notice of any new diploma requirement in order to allow time to prepare. Given the students' lack of exposure to the goals and objectives of the test, the notice given was constitutionally inadequate.

OUTCOME: The court reversed the district court's judgment and directed the district court to order the school district to issue high school diplomas to the students who satisfied all graduation requirements other than the minimal competency test.

CORE TERMS: school districts, diploma, handicapped, notice, graduation, educational, preparation, competency, modification, adequate notice, special education, liberty

interest, reputation, handicap, exposure, prepare, high school diploma, public education, property interest, Handicapped Children Act, state law, process rights, educational program, handicapping, awarding, teacher, tested, skills, Rehabilitation Act, law requires

COUNSEL: Gary E. Kerr, Kerr & Longwell, Springfield, Illinois

Marilyn Longwell, Chicago, Illinois, (Kerr & Longwell), for Plaintiffs-Appellants, Cross-Appellees.

Rosalyn B. Kaplan, Ofce. of Ill Atty. Gen., Chicago, Illinois

Julian E. Cannell, Kavanagh, Scully, Sudow, White & Fredrick, Peoria, Illinois, for Defendant.

JUDGES: Cummings, Chief Judge, Wood, Circuit Judge, and Marovitz, Senior District Judge. *

> * The Honorable Abraham Lincoln Marovitz, Senior District Judge for the Northern District of Illinois, is sitting by designation.

OPINION BY: CUMMINGS

OPINION

[*181] CUMMINGS, Chief Judge.

Plaintiffs are fourteen handicapped [1] elementary and secondary students who are challenging a Peoria School District (School District) requirement that they pass a "Minimal Competency Test" (M.C.T.) in order to receive a high school diploma. After a hearing, the Illinois State Board of Education (State Board) issued an Administrative Order (A-46 to A-58) in which the State Superintendent of Education decided in favor of eleven of the plaintiffs, **[**2]** stating:

> (1) The State Board of Education has jurisdiction of this matter, (2) [The] Peoria Board of Education [has] the right to impose reasonable additional standards for graduation with a regular high school diploma, (3) Neither the *Education for All Handicapped Children Act*, (20 USC 1401 et seq.), nor Section 504 of the *Rehabilitation Act of 1973*, (29 USC 794), prohibit local school districts from requiring that exceptional students meet all otherwise reasonable standards for graduation including, on its face, the Minimal Competency Test, (4) Federal law requires that school districts make reasonable modifications to tests such as the Minimal Competency Test in order to minimize the effect of an individual student's handicapping condition, equal protection SPECIAL EDUCATION (5) Peoria District #150 violated the "due process" rights of the petitioners by failing to give them adequate and timely notice that the Minimal Competency Test would be a prerequisite to the receipt of a diploma. Accordingly, the Board of Education of Peoria District #150 is ordered to issue the petitioners regular high school

> diplomas in a manner consistent with this opinion and the individual orders attached hereto. DUE PROCESS

[**3] The State Superintendent also found that three of the plaintiffs did not have standing to challenge the M.C.T. An appeal by plaintiffs and the Peoria School District was taken to the district court [2] which held that there was no due process violation and reversed the order directing the School District to issue diplomas. [3] We reverse.

> 1 Plaintiffs manifested a broad spectrum of handicapping conditions. One student was physically handicapped, one was multiply handicapped, and four were educably mentally handicapped. The other eight were learning-disabled. (Pl. Br. 6.)

> 2 Plaintiffs asked the court to sustain the order directing issuance of the diplomas and requiring appropriate modification of the M.C.T. for handicapped students, but also sought an order invalidating the M.C.T. and promulgating validation and modification guidelines. The State Board asked the district court to uphold the order and direct the School District to implement it. The School District asked the district court to affirm the portion of the order upholding the facial validity of the M.C.T. program but reverse the order insofar as it mandated issuing diplomas.

[**4]

> 3 The district court's jurisdiction was based on the Education of All Handicapped Children Act, 20 U.S.C. § 1415(e)(2), which provides that
>
> > any party aggrieved by the findings and decision under subsection (c) of this section [providing for a hearing before the State educational agency], shall have the right to bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

In the spring of 1978, the School District decided to require all students eligible for graduation in the spring of 1980 to pass an M.C.T. as a prerequisite to receipt of a diploma. The test is given each semester. It contains three parts -- reading, language arts, and mathematics -- and a student must score 70% on [**5] each part in order to receive a diploma. If a student fails any particular part, he is eligible to retake that part until he passes or becomes 21 years of age. Refresher courses are available during the school term and over the summer, though the summer program was on a tuition basis and scheduling problems made it impossible for a student to attend refresher courses in all three areas. Students who do not pass, but otherwise qualify for graduation, receive a Certificate of Program Completion at graduation time, and may continue to take the M.C.T. until age 21. MULTIPLE OPPORTUNITIES

[*182] After the M.C.T. policy was adopted in 1978, the School District undertook to notify students of the additional requirement through distribution of circulars in the schools, individual mailings to some parents, and repeated announcements in the mass media. The State Board said in its Administrative Order that "the record does not clearly establish how well these efforts succeeded, and in particular does not establish that they were adequate to bring notice of the additional requirement with all of its possible consequences to the attention of the parents of the exceptional children involved in these complaints." **[**6]** A-49. While apparently accepting this finding, the district court said that "there is neither evidence nor contention that any plaintiff here did not know of the graduation requirement of passing the M.C.T. more than a year before his or her scheduled graduation." *Brookhart v. Illinois State Board of Educ.*, 534 F. Supp. 725, 727 (C.D. Ill. 1982). We disagree that such notice was adequate as discussed in Part 3 *infra*. due process ADEQUATE NOTICE

Plaintiffs claim that the M.C.T. as applied to handicapped students violates federal and state statutes, as well as the due process and equal protection clauses of the Fourteenth Amendment. We note at the outset that in analyzing these claims deference is due the School District's educational and curricular decisions. See *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981), rehearing denied, 654 F.2d 1079 (1981); *Board of Educ. v. Ambach*, 107 Misc. 2d 830, 436 N.Y.S.2d 564 (1981). The School District's desire to ensure the value of its diploma by requiring graduating students to attain minimal skills is admirable, and the courts will interfere with educational policy decisions only when necessary to protect individual statutory or constitutional rights. JUDICIAL RELUCATANCE

[7]** Before turning to the merits, we must address the question of standing to challenge the M.C.T. During the 1978/79 and 1979/80 school years, eleven of the plaintiffs who anticipated graduation in 1980 took the M.C.T. one or more times. None passed all three parts. Of the remaining three plaintiffs, one was eight years old at the time of the administrative hearing and had taken a portion of the third grade pilot M.C.T. while she was a special education pupil in the second grade; one was eleven years old and one was fifteen years old at the time of the hearing and both had not yet taken any portion of the M.C.T. (State Bd. Br. 8). None of these three plaintiffs had standing to challenge the institution of the M.C.T. as a graduation requirement. Two of the plaintiffs did not take the test; the third took a pilot test, the failure of which could not have affected the awarding of a diploma, since she was only in the second grade. These plaintiffs may renew their claims, if appropriate, at a later date. [4]

> 4 In support of their claim that these three plaintiffs have interests which diverge from those of the other eleven, the State Board points to a 1981 amendment of Ill. Rev. Stat., ch. 122, para. 14-6.01. Prior to September 25, 1981, Illinois law authorized but did not require a school district "to issue certificates of graduation to handicapped pupils completing special education programs." The statute was amended in 1981 to read:
>
> > No handicapped student may be denied promotion, graduation or a general diploma on the basis of failing a minimal competency test

> when such failure can be directly related to the student's handicapping condition. For the purpose of this Act, "minimal competency testing" is defined as tests which are constructed to measure the acquisition of skills to or beyond a certain defined standard.

The State suggests that the new statute might well preclude denying a diploma to these three even if their inability to learn is a result of a handicapping condition (State Bd. Br. 19). The question is presently premature for resolution.

[8]** 1. Education for All Handicapped Children Act

Plaintiffs claim that the denial of diplomas in this case violates the Education for All Handicapped Children Act (EHA) because it denies the individual handicapped students a "free appropriate public education." 20 U.S.C. § 1412(1). The Supreme Court recently examined this statutory requirement in *Board of Educ. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690, 50 U.S.L.W. 4925 (1982), a suit brought by a deaf elementary **[*183]** school student seeking a sign language interpreter. The Court noted that the Act expressly defines a "free appropriate public education" to mean

> special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(18). The Court recognized that the "intent of the Act was more to open the **[**9]** door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." [5] 50 U.S.L.W. at 4929.

> 5 The Court expressly rejected the district court's interpretation in *Rowley* that the disparity between the deaf student's "achievement and her potential" meant that she was not receiving a free appropriate public education. *Id.* at 4928.

This analysis implies that the EHA does not require "specific results," *Board of Educ. v. Ambach, supra* at 570, but rather only mandates access to specialized and individualized educational services for handicapped children. Denial of diplomas to handicapped children who have been receiving the special education and related services required by the Act, but are unable to achieve the educational level necessary to pass the M.C.T., is not a denial of a "free appropriate public education." *Board of Educ. v. Ambach, supra*; see also *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980).

Plaintiffs further **[**10]** contend that the imposition of the M.C.T. violates the EHA and corresponding regulation mandating that "no single procedure shall be the sole criterion for determining an appropriate educational program for a child." 20 U.S.C. § 1412(5)(C); see also 34 C.F.R. § 300.532 (1981). Yet plaintiffs admit that graduation requirements in Peoria are threefold: earning seventeen credits, completing State requirements such as a constitution test and a consumer education course, and passing the M.C.T. (Pl. Br. 31). In

the face of this admission, passing the M.C.T. is clearly not the sole criterion for graduation. [6] SOLE CRITERION

6 For the same reason, the M.C.T. requirement does not violate the State Board's regulation ensuring that "no single procedure is used as the sole criterion for determining an appropriate educational program for a child." Rule 9.11(6)(d), *Rules and Regulations To Govern the Administration and Operation of Special Education.*

2. Rehabilitation Act of 1973

Plaintiffs also argue that application of **[**11]** the M.C.T. requirement constitutes unlawful discrimination under Section 504 of the Rehabilitation Act of 1973 (RHA), providing

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794. In *Southeastern Community College v. Davis*, 442 U.S. 397, 60 L. Ed. 2d 980, 99 S. Ct. 2361, the Supreme Court held that an "otherwise qualified" individual entitled to the protection of Section 504 is "one who is able to meet all of a program's requirements in spite of his handicap." *Id.* at 406. The Court held that a State nursing program could deny admission to an applicant with a serious hearing disability because, *inter alia*, the training program required that students be able to communicate orally while attending patients or assisting in operations. The statute does not require "an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person." *Id.* at 413. **[**12]**

Plaintiffs in this case have no grounds on which to argue that the contents **[*184]** of the M.C.T. are discriminatory solely because handicapped students who are incapable of attaining a level of minimal competency will fail the test. Altering the content of the M.C.T. to accommodate an individual's inability to learn the tested material because of his handicap would be a "substantial modification," 442 U.S. at 413, as well as a "perversion" of the diploma requirement. 534 F. Supp. at 728. A student who is unable to learn because of his handicap is surely not an individual who is qualified in spite of his handicap. Thus denial of a diploma because of inability to pass the M.C.T. is not discrimination under the RHA. *Board of Educ. v. Ambach, supra; Anderson v. Banks*, 520 F. Supp. 472, 511 (S.D. Ga. 1981).

However, an otherwise qualified student who is unable to disclose the degree of learning he actually possesses because of the test format or environment would be the object of discrimination solely on the basis of his handicap. It is apparent, as the district court said, that "to discover a blind person's knowledge, a test must be given orally or in braille . . . ." 534 **[**13]** F. Supp. at 728. According to the Superintendent, the School District "concedes that modification of the Minimal Competency Test must be made available to the handicapped," and offered to readminister the test with certain modifications. [7] We agree with the Superintendent that federal law requires administrative modification to

minimize the effects of plaintiffs' handicaps on any future examinations. equal protection SPECIAL EDUCATION EDUCATIONAL AGENCY PREVAILED

> 7 After the Administrative Order was issued, the School District agreed to administer the language arts test to plaintiff Ellen Ioerger with a large print booklet and to administer the mathematics and language arts test to plaintiff Deborah Brookhart in a small, quiet room. Neither plaintiff took advantage of this offer. (School Dist. Br. 29 and n. 12.)

Plaintiffs make one additional argument, urging that federal law requires tests to be validated separately for handicapped students. The purpose of validation is to determine whether tests are suited to the purposes for which they are used with respect to a **[**14]** particular testing population. Cf. *Larry P. v. Riles*, 495 F. Supp. 926, 968-973 (N.D. Cal. 1979). It is true that federal regulations under both the RHA and the EHA specify that a test, at least with respect to evaluation and placement, must be selected and administered so that the "results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills . . . ." 34 C.F.R. §§ 104.35(b)(3) and 300.532(b)(3). However, we need not interpret the scope of these regulations to decide this case. Rather than issuing a broad order to the School District that might affect the validity of the M.C.T. for all handicapped students, we are deciding this case on less intrusive grounds, as explained *infra*. equal protection SPECIAL EDUCATION

3. The due process Claim

Plaintiffs' final argument is that the School District provided them inadequate notice of the M.C.T. requirement, thus depriving them of a protected liberty or property interest without due process of law. [8] Although the issues in this case do not fit easily into a traditional procedural due process analysis, we conclude, **[**15]** after close consideration, that the School District failed to satisfy constitutional requirements. due process ADEQUATE NOTICE/STUDENT PREVALED

> 8 Plaintiffs also raise an equal protection claim for the first time on appeal. They appear to argue only that the M.C.T. requirement is invalid as applied to handicapped students, conceding that the "Peoria School District . . . does have the prerogative to determine that the competency of graduating students is best ensured by determining that certain minimal standards of achievement have been met." (Pl. Br. 16.) Neither the Superintendent nor the district court addressed this issue, and for that reason we decline to do so now. *Sharp v. Ford Motor Credit Co.*, 615 F.2d 423, 424 n. 1 (7th Cir. 1980). See also *Singleton v. Wulff*, 428 U.S. 106, 121, 49 L. Ed. 2d 826, 96 S. Ct. 2868. equal protection SPECIAL EDUCATION

The first question to be decided is whether the plaintiffs have a protected liberty or property interest at stake. Denial of a diploma clearly affects a student's reputation. It attaches a "stigma" that will **[*185] [**16]** have potentially disastrous effects for future employment or educational opportunities. See *Board of Educ. v. Ambach, supra*, at 572-573. Though the Supreme Court held that injury to reputation alone does not implicate a liberty interest, *Paul v. Davis*, 424 U.S. 693, 701-702, 47 L. Ed. 2d 405, 96 S. Ct. 1155, it

went on to say in the same opinion that liberty interests are implicated when injury to reputation is combined with "governmental action [that] deprived the individual of a right previously held under state law." *Id.* at 708-709. The Court in *Paul* reviewed its holding in *Goss v. Lopez*, 419 U.S. 565, 42 L. Ed. 2d 725, 95 S. Ct. 729, involving the procedural due process rights accorded a student suspended from school on charges of misconduct. In holding that such a suspension implicated a protected liberty interest under the due process clause, the Court pointed to two factors. Not only could charges of misconduct seriously damage the student's reputation, but in addition "Ohio law conferred a right upon all children to attend school, and . . . the act of the school officials suspending the student there involved resulted in a denial or deprivation of that **[**17]** right." *Paul v. Davis, supra* at 710. It was the removal of the right or interest "from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the due process clause of the Fourteenth Amendment." *Id.* at 711.

Plaintiffs in this case have more than merely an interest in protecting their reputations and avoiding the stigma attached to failure to receive a high school diploma. They, too, as in *Goss v. Lopez, supra*, had a right conferred by state law to receive a diploma if they met the requirements imposed prior to 1978: completion of seventeen course credits and fulfillment of the State's graduation requirements. In changing the diploma requirement, the governmental action by the School District deprived the individual of a right or interest previously held under state law. Plaintiffs thus have a liberty interest sufficient to invoke the procedural protections of the due process clause. *Board of Educ. v. Ambach, supra* at 572-573. [9]

9 Some courts have held that state law creates a legitimate expectation of receipt of a diploma, thereby creating a property interest for purposes of due process analysis. *See Board of Educ. v. Ambach, supra* at 572; *Debra P. v. Turlington, supra* at 403-404.

[18]**

The consequence of identifying a protected liberty interest is that governmental action cannot be used to deprive an individual of that interest without due process of law. Traditionally, a procedural due process right means "an opportunity to be heard on the factual basis underlying the loss of a liberty or property interest . . . ." *Anderson v. Banks, supra* at 504. A determination of what process is due involves defining the appropriate contours of the "opportunity to be heard." See *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011. This case does not fit into the traditional procedural due process mold. Plaintiffs here do not contest the factual basis underlying the loss of a liberty interest; in fact, they admit that they did not pass the M.C.T. Rather, they demand procedures which would provide sufficient notice of the M.C.T. to enable them to prepare adequately to satisfy the new requirement.

We think that procedural due process protections are flexible enough to encompass notice of this kind. This approach has been followed by the Fifth Circuit and the New York State Appellate Division. In *Mahavongsanan v. Hall*, 529 F.2d 448 (5th Cir. 1976),

[19]** Georgia State University instituted a new degree requirement (consisting of a comprehensive examination) after plaintiff had begun the masters program but before her matriculation. In rejecting both procedural and substantive due process claims, the court emphasized that plaintiff received "timely notice" of the new examination; "ample notice to prepare;" and a "reasonable opportunity to complete additional course work in lieu of the comprehensive examination." *Id.* at 450. The issue arose again in *Debra P. v. Turlington*, 644 F.2d 397, 403-404 **[*186]** (1981), where the Fifth Circuit stated its view that inadequate notice to students that they would be required to pass an exit examination before qualifying for a diploma violated procedural due process. *Board of Educ. v. Ambach*, 107 Misc. 2d 830, 436 N.Y.S.2d 564, 573-575 (1981), was a case essentially "on all fours" with this one. After finding that two handicapped plaintiffs had a protected liberty or property interest in receipt of a diploma, the court held that the school board unconstitutionally deprived them of their interest because inadequate notice precluded preparation for the exam. Following these precedents, **[**20]** we hold that plaintiffs were entitled to notice permitting reasonable preparation for the M.C.T.

This holding does bear some resemblance to a substantive, rather than a procedural due process holding. [10] See *Anderson v. Banks, supra* at 505. As a matter of procedural due process, plaintiffs have a liberty interest in receipt of a diploma that cannot be infringed without notice. Yet, as a matter of substantive due process, the nature of plaintiffs' right is by necessity limited by the School District's authority to change the diploma requirements. Plaintiffs' substantive right therefore is better defined as a right to adequate notice of any new diploma requirement in order to allow time to prepare. Denial of sufficient notice would make denial of a diploma and its attendant injury to reputation fundamentally unfair. *Debra P. v. Turlington, supra* at 404.

> 10 For a discussion of their overlap, see Easterbrook, *Substance and Due Process*, 1982 Sup. Ct. Rev.

We must now consider whether the notice **[**21]** provided to plaintiffs was sufficient to satisfy constitutional requisites. The older eleven plaintiffs were informed that they were subject to the M.C.T. requirement during their junior year in high school. The State Superintendent found they therefore had approximately one and a half years to master the skills necessary to pass the M.C.T. (App. 56); the district court found that all plaintiffs had notice of the M.C.T. requirement one year prior to graduation. 534 F. Supp. at 727. Despite the fact that plaintiffs had been a year and a year and a half to be exposed to the material on the M.C.T., the record shows that individual petitioners lacked exposure to as much as 90% of the material tested (App. 56). due process ADEQUATE NOTICE

Plaintiffs' educational programs were developed in accordance with 20 U.S.C. § 1414(a)(5) requiring that each handicapped student receive an individualized educational program (IEP). An IEP is developed through the cooperative efforts of parents, teachers, and school administrators. Tr. Vol. I, at 148. Plaintiffs' expert at the hearing developed a matrix by which to compare the goals and objectives of the M.C.T. with the goals and objectives of plaintiffs' IEP's. The matrix **[**22]** indicated that as much as 90% of the material on the M.C.T. did not appear on the IEP's (App. 50, 56). The district court found that the "only possible reason" for the lack of exposure was that the students were

incapable of learning the material, 534 F. Supp. at 730, and that therefore the amount of time provided the students for preparation was irrelevant. We agree with the State Superintendent's argument that this was error (State Bd. Br. at 28). First, several plaintiffs passed various parts of the M.C.T., thus indicating that the problem is not uniformly a lack of innate mental capacity. Second, Dr. Aaron Gray, Assistant Superintendent of Special Services in Peoria School District #150, testified at the hearing that it is impossible to know which special education students will pass the M.C.T. and which will not, and that predicting whether a child has the ability to pass "is something that a responsible professional would not do." Tr. Vol. I, at 134. One of the School District's experts, Dr. Siegfried Mueller, first testified that one should not assume that any student cannot pass the M.C.T. The answer was then modified to allow for such an assumption if, for example, a **[**23]** twenty-one-year-old student who has been working **[*187]** with a teacher or administrator for sixteen years is still scoring only ten instead of seventy on the exam, and then only "after a lot of evidence." Tr. Vol. I, at 72-73. The fact that the School District requires all handicapped students except those classified as trainable mentally handicapped to take the M.C.T. at least once (Tr. Vol. I, at 91-92) indicates that administrators are reluctant to speculate on the innate abilities or limitations of their students.

Finally, rather than reflecting an incapacity to pass the M.C.T., the record reflects that the plaintiffs' programs of instruction were not developed to meet the goal of passing the M.C.T., but were instead geared to address individual educational needs. Since plaintiffs and their parents knew of the M.C.T. requirements only one to one and a half years prior to the students' anticipated graduation, the M.C.T. objectives could not have been specifically incorporated into the IEP's over a period of years. If they were incorporated at all, it could only have been during the most recent year and a half. As the Superintendent found, "in an educational system that **[**24]** assumes special education students learn at a slower rate than regular division students," a year and a half at most to prepare for the M.C.T. is insufficient. Thus the length of the notice, rather than a deliberate decision not to instruct plaintiffs because of their incapacity to master the material, explains the overwhelming lack of exposure to M.C.T. goals and objectives.

There is some evidence in the record that after being informed of the M.C.T. requirement, several parents preferred to emphasize aspects of plaintiffs' education other than M.C.T. preparation. In the long run, as Dr. Mueller pointed out, parents and teachers may evaluate students and conclude that energies would be more profitably directed toward areas other than M.C.T. preparation; toward, for example, vocational training. Here however parents had only a year to a year and a half to evaluate properly their children's abilities and redirect their educational goals. We agree with the parents and the State Board that this was insufficient time to make an informed decision about inclusion or exclusion of training on M.C.T. objectives.

The analysis prescribed by the Supreme Court in *Mathews v. Eldridge* **[**25]** , 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893, also dictates advance notice. The private interest at stake here is an interest in protecting reputation and in qualifying for future employment opportunities. The governmental interest in upgrading the value of a diploma is also significant. However, the risk of an erroneous deprivation of plaintiffs' interest in this

case is overwhelming because of the near-total lack of exposure to the material tested. Requiring earlier notice and the attendant opportunity to learn the material will greatly decrease the risk of erroneous deprivation.

As described in *Board of Educ. v. Ambach, supra* at 574-575, early notice would thus have benefitted plaintiffs in two ways: it "would allow for proper consideration of whether the goals of the students' IEP's should include preparation for the [M.C.T.] and would afford an appropriate time for instruction aimed at reaching that goal." We conclude that a year to a year and a half, in light of plaintiffs' overwhelming lack of exposure to the goals and objectives of the M.C.T., is constitutionally inadequate notice. See *Board of Educ. v. Ambach, supra*, at 574-575 (less than two school years **[**26]** is inadequate notice); but see *Anderson v. Banks*, 520 F. Supp. 472, 505-506 (S.D. Ga. 1981) (twenty-four months is adequate notice); *Wells v. Banks*, 153 Ga. App. 581, 266 S.E.2d 270 (1980) (adequate notice though no specific time mentioned). Though we are unable on this record to define "adequate notice" in terms of a specific number of years, the School District can be assured that the requirement would be satisfied if one of the following two conditions for adequate notice is met. due process ADEQUATE NOTICE SPECIAL EDUCATION STUDENT PREVAILED The School District can, first, ensure that handicapped students are sufficiently exposed to most of the material that appears on the M.C.T., or, second, they can produce evidence of a reasoned and well-informed decision by the parents and teachers involved that a particular high school student will be better off concentrating on educational objectives **[*188]** other than preparation for the M.C.T.

We turn finally to the question of remedy. Plaintiffs argue that the only proper remedy is issuance of diplomas, and the district court apparently agreed, stating that "if the M.C.T. program is constitutionally invalid as applied to these students, there is no impediment to issuance of the diplomas." **[**27]** 534 F. Supp. at 729. The School District suggests that plaintiffs should be denied diplomas, but allowed more time to participate in remedial classes and further opportunities to take the M.C.T.

The School District's position is not without merit. Some plaintiffs might have failed the M.C.T. despite decades of preparation; others might have opted out of it even if notified years in advance. By awarding these plaintiffs diplomas, the School District would be putting them in a better position than they would have been in had there been no due process violation. Traditionally, procedural due process remedies provide plaintiffs only with an opportunity to prove their eligibility for a benefit, rather than providing the benefit itself. See *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (welfare benefits provided on interim basis pending hearing on eligibility and subject to recoupment). Awarding diplomas here would amount to awarding the benefit itself. Substantively, the due process right is not a right to a diploma, see *supra* p. 186, but rather a right to adequate notice in order to prepare for the new requirement. Thus the appropriate remedy for the **[**28]** denial of this right is an extended period for preparation.

Plaintiffs argue that it is impossible to put them back in the position that they would have been in had they received adequate notice while still in school. Several are employed and

would be forced to leave their jobs in order to participate in the remedial program and prepare for the M.C.T. Eleven plaintiffs have been away from school for over two years, since June of 1980, and it would be difficult, both psychologically and academically, for them to make up for lost time. They ask, essentially, why they should endure these hardships when the School District was at fault for providing inadequate notice.

We agree with the School District that, in theory, the proper remedy for a violation of this kind is to require it to provide free, remedial, special education classes to ensure exposure to the material tested on the M.C.T., and a reasonable opportunity for plaintiffs to learn that material REMEDIATON. We take note of the fact that the School District presently offers such courses (Tr. Vol. I, at 143-144), and we advise future handicapped students to bypass the courts and enroll in those courses when necessary. In this particular **[**29]** case however it is unrealistic to assume that eleven of these plaintiffs would be able to return to school without undue hardship. Consequently, the School District may not require those plaintiffs to pass the M.C.T. as a prerequisite for a diploma.
OPPORTUNITY TO LEARN: REMEDIATION: STUDENT PREVAILED

The judgment of the district court is reversed with directions to order the School District to issue high school diplomas to the eleven plaintiffs who satisfy the remaining graduation requirements.

DEBRA P., a minor, by Irene P., her mother and next friend, Wanda W., a minor, by Ruby W., her mother and next friend, Luwanda K., a minor, by Willa K., her mother and next friend, Terry W., a minor, by Doris W., his mother and next friend, Brenda T., a minor by Willie T., her father and next friend, Vanessa S., a minor, by Mamie S., her mother and next friend, Thomas J. H., Jr., a minor by Thomas J. H., Sr., his father and next friend, Gary L. B., a minor, by Ezell B., his father and next friend, Valisa W., a minor, by Charles W., her father and next friend, Huey J., a minor, by Melvin G., his guardian and next friend, on behalf of themselves and all other persons similarly situated, Plaintiffs, v. Ralph D. TURLINGTON, Individually and as Commissioner of Education, Florida State Board of Education, Governor Bob Graham, Individually and as Chairman thereof, Secretary of State George Firestone, Attorney General Jim Smith, Comptroller Gerald A. "Jerry" Lewis, Treasurer William Gunter, Commissioner of Agriculture Doyle Conner, Commissioner of Education Ralph D. Turlington, all Individually and as members thereof, Florida Department of Education, School Board of Hillsborough County, Florida, a Corporate Body Public, Roland H. Lewis, Individually and as Chairman thereof, Cecile W. Essrig, Carl Carpenter, Jr., Ben H. Hill, Jr., A. Leon Lowery, Sam Rampello, and Marion Rodgers, all Individually and as members thereof, and, Raymond O. Shelton, Individually and as Superintendent of Schools of Hillsborough County, Defendants

Case No. 78-892-Civ-T-GC

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

564 F. Supp. 177; 1983 U.S. Dist. LEXIS 17193; 13 Fed. R. Evid. Serv. (Callaghan) 1041

May 4, 1983

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff students filed a class action against defendants, school board and officials, challenging the constitutionality of a literacy test requirement. The students' case was before the court on remand from the United States Court of Appeals for the Fifth District for further factual findings.

OVERVIEW: The appellate court remanded the students' case to make further findings on whether on not the functional literacy test covered material actually taught in Florida's classrooms. The appellate court also requested the court to reexamine the role and effect of the vestiges of past discrimination upon the students. On remand, the court entered an order in favor of the school board and the officials, concluding that the literacy test was, at least, curricularly valid. The court concluded further that the proper focus was on whether the skills were included within the curriculum and not on whether each student had identical educational experiences. The court found that the school board and the officials had carried their burden of proving by a preponderance of the evidence that the test was instructionally valid and therefore constitutional. The court reaffirmed its finding

that the vestigial problems did not constitute the denial of an equal educational opportunity. The court found that there was no causal link between the disproportionate failure rate and the present effects of past school segregation. The state could deny diplomas to the students who had not passed the literacy test.

OUTCOME: The court entered an order in favor of the school board and the officials on remand from an order of the appellate court in the students' class action challenging the constitutionality of the literacy test requirement.

CORE TERMS: skill, teacher, instructional, diploma, educational, vestige, segregation, grade, black students, taught, instructionally, mastery, public schools, site, purposeful, testing, administrators, remedial, school students, curriculum, classroom, teaching, preparation, instructional materials, basic skills, mathematics, insure, school districts, failure rate, preponderance

COUNSEL: [**1] Stephen F. Hanlon, Diana Pullin, Richard Jefferson, Roger Rice, for Plaintiff.

William Dorsey, Judith A. Brechner, for Defendant.

JUDGES: Carr, J.

OPINION BY: CARR

OPINION

[*179] MEMORANDUM OPINION AND ORDER

In 1978, the Florida Legislature approved an amendment to the Educational Accountability Act of 1976, Fla. Stat. § 229.55 et seq., which required public school students in the State of Florida to pass a functional literacy examination in order to receive a state high school diploma. Fla. Stat. § 232.246(1)(b). Shortly after its enactment, Florida high school students filed a class action challenging the constitutionality of the literacy test requirement. [1] This Court found that the test violated both the equal protection and due process clauses of the Constitution and enjoined its use as a diploma sanction until the 1982-83 school year. *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D. Fla. 1979). On appeal, the Fifth Circuit Court of Appeals affirmed many of this Court's findings. *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981). However, the appellate court remanded the case for further factual findings on two key issues. Specifically, this Court was directed [**2] to make further findings on whether or not the functional literacy test, the Florida Student State Assessment Test, Part II (SSAT-II), covers material actually taught in Florida's classrooms.CURRICULAR VALIDITY. 644 F.2d at 406. In addition, the Court of Appeals requested this Court to reexamine the "role and effect of the 'vestiges' of past discrimination" upon twelfth grade black students. 644 F.2d at 408 n.19. EQUAL PROTECTION

1 For an outline of the history of this litigation as well as a more detailed summary of the plaintiffs' claims and the defendants' defenses, *see Debra P. v. Turlington*, 644 F.2d 397, 400-02 (5th Cir. 1981).

2 Class B was certified as "all present and future twelfth grade black public school students in the State of Florida who have failed or who hereafter fail the SSAT-II." 474 F. Supp. at 246. Class C was certified as "all present and future twelfth grade black public school students in Hillsborough County who have failed or who hereafter fail the SSAT-II." *Id.*

Following receipt of the mandate from the **[**3]** Court of Appeals, [3] this Court held a series of status conferences aimed at determining the most effective way to comply with the appellate court's directives. It was decided that the issues could best be resolved separately. Thus, trial of the first issue -- the question of instructional validity -- was scheduled for the week of February 28, 1983. An evidentiary hearing on the vestige question was held during the week of April 25, 1983.

3 The Court of Appeals denied a petition for rehearing and petition for rehearing en banc. *Debra P. v. Turlington*, 654 F.2d 1079 (5th Cir. 1981).

I. *The Instructional Validity Issue*

The SSAT-II is a test of a student's ability to successfully apply basic communications and mathematics skills to everyday life situations. *See* Fla. Stat. § 232.246(1)(b); Fla. Admin. Code Rule 6A-1.942(2)(a). The test covers 24 basic skills. Of these, 11 are designated as communications **[*180]** skills and 13 are designated as mathematics skills. [4] *Defendants' Exs.* **[**4]** 77 & 78.

4 The communications skills are: main idea, details, cause/effect, fact/opinion, unstated opinion, references, index, maps, letters, checks, and forms. *Defendants' Exs.* 77 and 78. The mathematics skills are: elapsed time, monetary amounts, whole numbers, decimals/percents, comparison shopping, interest, sales tax, discounts, linear measurement, area, capacity, weight, and graphs/tables. *Id. See* Fla. Admin. Code Rule 6A-1.942(3)(a), (b).

As of October, 1982, 3809 members or 2.77% of the Class of 1983 had not yet passed the mathematics portion of the SSAT-II; 301 or.16 of 1% had not yet passed the communications test. *Defendants' Ex.* 106. If these students do not pass the examination which was given in April of 1983, and this Court does not continue the injunction, they will receive a certificate of completion rather than a diploma when they graduate. CURRICULAR VALIDITY

The Court of Appeals has upheld the denial of a diploma to these students so long as the "test is a fair test of that which was taught." **[**5]** 644 F.2d at 406. The Court reasoned that "if the test is not fair, it cannot be said to be rationally related to a state interest" and therefore it would be violative of the equal protection Clause. *Id.* In other words, the SSAT-II is only constitutional if it is instructionally valid. EQUAL PROTECTION

Before determining whether or not the SSAT-II is instructionally valid, it is necessary to define the term and to determine the scope of the appeals court's mandate with regard to this issue. Although professional educators might dispute its meaning, the parties generally agreed that the term, as used by the Court of Appeals, can be summarized in

just one question. [5] Put simply, the task assigned to this Court by the Court of Appeals was to find out if Florida is teaching what it is testing. Unfortunately, the answer to this apparently easy question is quite complex.

> 5 Although the parties have agreed that the concept described by the Court of Appeals is that of instructional validity, it should be noted that the Court actually referred to this term as "curricular validity." 644 F.2d at 405.

[6]** In an effort to carry its burden of proving that the test is instructionally valid, the defendants commissioned IOX Assessment Associates, a private consultant firm, to develop a study design. IOX designed a study which consisted of four separate components. First, IOX devised a teacher survey which was sent to every teacher in Florida. The survey asked teachers whether they had provided instruction relating to the 24 skills tested on the SSAT-II. If they had, the teachers were then asked if they had provided sufficient instruction for a student to master the skills. The teachers were required to answer separately for each individual skill. In addition, although the survey was anonymous, the teachers were asked to identify whether they were an elementary or secondary teacher and, if a secondary teacher, they were to identify their major field of emphasis.

The second part of the study designed by IOX was a survey sent to the 67 school districts and 4 university laboratory schools in Florida. [6] The districts were required to fill out a set of six forms. The forms were titled:

> I. SSAT-II Skills by Grade Summary
>
> II. Major SSAT-II Instructional Program Variations
>
> III. [**7] Description of SSAT-II Remedial Programs
>
> IV. Summary of SSAT-II Staff Development Activities
>
> V. Instructional Materials Analysis for SSAT-II Skills
>
> VI. Additional SSAT-II District Activities
>
> 6 For the purposes of this opinion, references to the individual school districts should be read as including the individual laboratory schools.

The Skills by Grade Summary asked the districts to estimate at what grade students received preparation in the various SSAT-II skills and when the majority of students would have attained mastery of these skills. Form II asked the districts to report any major instructional variations among the schools in the district. Form III, the Remedial Program Form, asked the districts to describe any remedial programs specifically [***181**] related to attaining mastery of the SSAT-II skills. Form IV. required the district to identify and describe any staff development activities conducted by the district to promote mastery of SSAT-II skills. In response to **[**8]** Form V. the districts were required to list instructional materials that specifically prepared students for any of the

SSAT-II skills. The final form, Form VI, asked the districts to identify any programs directed specifically toward helping students pass the SSAT-II.

The third component of the IOX study consisted of a series of site visits to verify the accuracy of the district reports. The site visit teams were comprised of one employee of the Florida Department of Education and two educators from the districts. At least one site visit team visited each district. The site visitors spent two days in each district interviewing administrators and teachers and comparing the instructional materials used in the district with those listed in the district report. At the conclusion of their visit, the site visitors prepared a report of their findings and impressions about the accuracy of the district report.

The fourth component of the IOX study was a student survey administered by the site visitors to one or two eleventh grade social studies and english classes. The survey asked the students to state whether or not they had been taught in school how to answer the types of questions **[**9]** found on the SSAT-II. The sample questions provided to the students included questions on all 24 SSAT-II skills.

At trial, the defendant offered three expert witnesses who opined, based on the array of data outlined above, that Florida was teaching what it was testing. Specifically, Dr. W. James Popham, the President of IOX and the person primarily responsible for the IOX study design, testified that the results of the study convinced him that the SSAT-II was instructionally valid. After explaining how the study was developed and detailing how it had been modified to insure accuracy, Dr. Popham stated that it is clear that the school districts in Florida are adequately preparing their students for the test. In large part, Dr. Popham found support for his opinion in the results of the Mastery Exposure Index prepared by the Department of Education. The Index, which was prepared at Dr. Popham's suggestion, attempts to distill the statistics adduced from the teacher survey. In essence, it shows how many opportunities a Florida public school student is given to attain mastery of the various SSAT-II skills. The end result of this statistical analysis is that students are given an **[**10]** average of 2.7 opportunities to attain mastery of the SSAT-II skills. According to Dr. Popham, a student need only be exposed once to mastery level instruction for the test to be instructionally valid. As a result, 2.7 exposures were more than sufficient to insure the fairness of the test and the attendant diploma sanction.

The State also called Dr. Donald Henderson as an expert witness. Dr. Henderson accompanied one of the site visit teams on their audit of the Pinellas School District. Dr. Henderson generally described his visit and offered his opinion, based on the survey results and on what he had observed, that the test was instructionally valid. Dr. Henderson also described in detail the efforts being undertaken by the State to monitor remediation throughout the districts. Dr. Henderson explained that the principals of every school were sent questionnaires concerning students who had failed the SSAT-II. The principals were required to describe the steps taken to remediate these students. Follow-up questionnaires were sent to gain more information on the students who were reported as not receiving remediation. The follow-up results showed to Dr. Henderson's

satisfaction **[**11]** that steps had been taken to guarantee that any student who wanted remediation was receiving it.

The defendant's final witness was Dr. Robert Gagne. Dr. Gagne also accompanied a site visit team during one of its audits. In addition, Dr. Gagne testified that he had examined the results of all four parts of the IOX study and that, in his professional opinion, he was convinced that the SSAT-II was instructionally valid. Dr. **[*182]** Gagne also opined that students who flunked the SSAT-II in the tenth grade could learn the necessary skills prior to graduation provided they received suitable instruction. Moreover, he found evidence that suitable instruction was being offered.

The plaintiffs attempted to controvert the defendants' case through the testimony of two experts, Dr. Robert Linn and Dr. Robert Calfee. Dr. Linn testified that instructional validity requires a sufficient degree of preparation and that some students may need more than one exposure to mastery in order for the test to be fair. Dr. Linn also suggested that the survey conducted by the State was not a reliable indicator of what actually went on in the classrooms. In particular, he noted that the survey only **[**12]** covered the 1981-82 school year rather than a twelfth grader's entire school career. In addition, Dr. Linn indicated that the survey was constructed in such a way as to invite positive responses from the teachers and that the survey responses should have been checked by visits to actual classrooms in which SSAT-II skills were taught.

Dr. Calfee studied the teacher responses from all the districts and concluded that the teacher responses were related to the performance of students on the test. Thus, teachers in districts in which students did poorly on the test generally reported that they were not teaching as many SSAT-II skills as their counterparts in high success districts. In particular, Dr. Calfee found a wide variation in the responses of teachers who stated that they taught math skills. Dr. Calfee noted that this disparity in teacher responses was in line with students' actual performance on the test since students were having a much harder time with the math skills on the test than with the english skills.

In addition to presenting these experts, the plaintiffs argued that the Court should not receive the survey results offered by the defendants since they were inadmissible **[**13]** hearsay. The defendants argued that the survey results should be allowed in under Fed.R.Evid. 803(8)(c) or under the residual exception to the hearsay rule, Fed.R.Evid. 803(24). After hearing argument by the parties, the Court ultimately ruled that the survey results were admissible under Fed.R.Evid. 803(24). In the alternative, they were admitted under Fed.R.Evid. 703 as being the basis of the expert opinions presented at trial. [7]

> 7 The landmark case dealing with the admissibility of surveys and polls is *Zippo Manufacturing v. Rogers Imports*, 216 F. Supp. 670 (S.D. N.Y. 1963). *Zippo* was a trademark infringement case in which the trial judge allowed the introduction of a consumer study which attempted to show consumer confusion. The Court reasoned that the hearsay rule should not bar the admission of properly conducted surveys, and held that surveys should be allowed if there is a "circumstantial guaranty of trustworthiness" surrounding the making of the out of court statement.

The *Zippo* decision is in line with the recommendation of the Judicial Conference Study Group which issued a *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351, 425 (1960). In the *Handbook*, the Panel recognizes the need for both polls and surveys in certain types of cases. Although the Panel acknowledged that polls which are offered to prove the truth of the matters asserted by the interviewees are hearsay, it suggested that they should be admissible in certain circumstances.

The Panel went on to advise that a poll's admissibility should depend on the type of methodology used. If it was a proper scientific poll, it should be allowed. Factors which cut against admissibility, according to the Panel, would be a close nexus between the attorneys and the interviewers or knowledge by the interviewers and interviewees of the purpose of the poll.

Because the Panel's *Handbook* and the *Zippo* decision were issued before the codification of the Evidence Code, they do not directly discuss the applicability of Rule 803(24). More recent authority has directly addressed this issue. For example, in *Pittsburgh Press Club v. United States*, 579 F.2d 751, 757-60 (3rd Cir. 1978), the Court did hold that survey results are admissible under Rule 803(24). Based on the facts of that case, however, the Court found that the survey results were inadmissible because they were not sufficiently trustworthy. Like *Pittsburgh Press Club*, the interviewees in this case were aware of the purpose of the poll. Yet, unlike *Pittsburgh Press Club*, the pollsters in this case have attempted to put in safeguards to assure the poll's trustworthiness. Indeed, the plaintiffs' expert, Dr. Calfee, admitted that he had no problem with the survey procedures used by the defendants. Moreover, even if the survey results were not admissible under Rule 803(24), this Court has wide discretion under Rule 703 to allow an expert to explain the basis of his opinion. *Baumholser v. Amax Coal Company*, 630 F.2d 550, 552-53 (7th Cir. 1980). Since all of the defendants' experts testified that they had relied on the survey data, and the plaintiffs were given a substantial opportunity to cross-examine the experts on the study's reliability and to present their own expert opinions of the data, admission of the raw data was not prejudicial to the plaintiffs. *Id.* at 553. Finally, the Court carefully considered the plaintiffs' arguments in deciding what weight, if any, should be given to the survey results.

[14] [*183]** As the foregoing outline of the evidence suggests, the resolution of the instructional validity issue depends both on whose experts are believed and on what sort of proof is required. With regard to the former, it is important to understand that the instructional validity issue, and the related concept of minimum competency testing, are relatively new and highly controversial subjects which seem to have polarized the educational community. [8] Thus, in large part, this Court has been called upon to settle not only a legal argument but also a professional dispute. At times, the distinction between these two spheres has blurred. The experts for both sides spoke in terms of "fairness," "adequacy" and "sufficiency." Yet, these terms are not necessarily synonymous with constitutionality. As noted in a law review article cited frequently by the appellate court, any judicial decision on this issue "will reflect only the minimum standards essential to

fairness under our legal system. Policymakers must meet, but are not limited to, the minimum standards in pursuing the goal of educational equity for students." M. S. McClung, Competency Testing Programs: Legal and Educational **[**15]** Issues, 47 *Fordham L. Rev.* 651, 712 (1979). [9] In other words, even though the defendants might have implemented a much more equitable program, their actions might still pass constitutional muster.

8 For example, the National Institute of Education sponsored a symposium on the pros and cons of minimum competency testing in 1980. The plaintiffs' two experts as well as plaintiffs' lead counsel participated in the symposium and represented the opposition faction. Dr. Popham, the defendants' key witness and the person responsible for designing the state's survey, was the leader of the group who favored the testing.

9 It is interesting to note that Mr. McClung was an attorney at the Center for Law and Education when he authored this article and that Diana Pullin assisted him in the preparation of the section on instructional validity. The Center for Law and Education has represented the plaintiffs throughout this litigation and Ms. Pullin, who is one of its attorneys, has acted as lead counsel. CURRICULAR VALIDITY

But, **[**16]** what does the Constitution require in this instance? It may not be fair to expect students with differing interests and abilities to learn the same material at the same rate, but is it unconstitutional? Similarly, it may be inequitable that some students, through random selection, are assigned to mediocre teachers while others are given excellent instructors, but does this inequity rise to the level of a constitutional violation? [10]

10 In *Plaintiffs' Proposed Findings of Fact* at para. 48, the plaintiffs suggest that the disparity in teachers' abilities should be taken into account.

These questions lead to other issues concerning the appropriate burden of proof. The plaintiffs argue that the defendants have not carried their burden because they have not attempted to follow students throughout their entire careers. They also assert that there is insufficient evidence of what actually goes on in the classrooms. [11] **[*184]** But, absent viewing a videotape of every student's school career, how can we **[**17]** know what really happened to each child? Even assuming that such videotapes were available, how could this Court decide, in constitutional terms, which students received appropriate instruction and which did not? Suppose that there is one student who never encountered a teacher who taught the SSAT-II skills, or a teacher who taught the skills well, should the entire test be declared invalid? What if the number of students were 3,000 rather than 1? CURRICULAR VALIDITY [12]

11 One of the plaintiffs' principal attacks on the defendants' evidence concerns the appropriate burden of proof. Citing *Addington v. Texas*, 441 U.S. 418, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979), the plaintiffs argue that the defendants have the burden of proving by clear and convincing evidence, rather than by a preponderance, that the SSAT-II is instructionally valid. Although the plaintiffs have cited a number of cases in which a more rigorous standard of proof is

appropriate, they have not shown why proof of a preponderance of the evidence would be improper on the instant facts.

> Because proof by a preponderance of the evidence requires that 'the litigants . . . share the risk of error in a roughly equal fashion.' . . it rationally should be applied only when the interests are of roughly equal societal importance.

Santosky v. Kramer, 455 U.S. 745, 787, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982) (Rehnquist, J., dissenting) (citations omitted).

While the plaintiffs' property interests in obtaining their diplomas are of great importance, these interests are roughly equal in societal importance to the State's interest in insuring quality public education for all Florida students. *See* Fla. Stat. § 229.55(2)(a). It follows that the defendants should not be required to carry a heightened burden of proof in this case. *Accord, San Antonio School District v. Rodriguez*, 411 U.S. 1, 40, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973); 644 F.2d at 402-03. DUE PROCESS

[18]**

12 The Court recognizes that the plaintiffs would answer this question affirmatively. *Plaintiffs' Proposed Conclusions of Law* at para. 25 and para. 26.

It is necessary to consider these questions in order to appreciate the dilemma confronted by this Court. Instructional validity is an elusive concept. Moreover, unlike some of the other claims made by the plaintiffs at the first trial, the instructional validity issue strikes at the heart of the learning and teaching process. It also lends itself to individualized determinations rather than objective treatment.

Instructional validity is a subpart of content validity which together with curricular validity, insures that a test covers matters actually taught. As the Court of Appeals noted, and as this Court previously found, the SSAT-II is a "good test of what the students *should* know." 644 F.2d at 405 n.11. That is, the subjects tested parallel the curricular goals of the State. [13] To this end, the Department of Education publishes minimum performance standards and also "periodically examine[s] and evaluate[s] procedures, records, [**19] and programs in each district to determine compliance with law and rules established by the state board." Fla. Stat. § 229.565(2). Thus, although the individual districts are still somewhat autonomous, they no longer have the authority to decide that they will not teach certain minimum skills. [14] See Fla. Stat. § 230.23(4)(f)(1); § 230.23(7)(a); § 230.33(9)(a). In the same vein, the Department of Education, the individual districts, and the separate schools are required to submit annual reports of how well school instructional programs are helping students acquire minimum performance skills. In sum, since at least 1979, school administrators and teachers have been well aware of the minimum performance standards imposed by the State and their duty to teach these skills.

13 The plaintiffs correctly point out that the State has not listed the SSAT-II skills in Chapter 233 as a mandatory course of study. The minimum student performance standards, however, were distributed to the individual schools as early as 1978. *Defendants' Exs.* 1a-72a.

14 Passing the SSAT-II is not the only graduation requirement mandated by the Educational Accountability Act. Students must also demonstrate mastery of the minimum performance standards which are approved by the State Board of Education in reading, writing, and mathematics for the eleventh grade (the SSAT-I), and they must complete a minimum number of academic credits. Fla. Stat. § 232.246(1)(a), (c). Although the emphasis of the programs is different, many of the skills learned in fulfilling one requirement aid in satisfying another requirement. For example, a basic knowledge of reading is required to pass both the SSAT-I and the SSAT-II. As a result, the overall statutory scheme outlined above is directed towards satisfying all three graduation requirements.

[20]** In addition, the districts now have access to state-approved instructional materials; materials which have been screened by the state instructional materials council in an effort to determine the degree to which they "implement the curricular objectives of the schools of the state." Fla. Stat. § 233.09(4). The districts are also required to use their annual allocation of state funds for the purchase of books from the state-approved list. [15] Fla. Stat. § 233.34(2).

15 Up to 50 percent of the annual allocation may be used for books not on the list or for the repair and renovation of textbooks and library materials. Fla. Stat. § 233.34(2).

[*185] The districts also receive funding from the State to remediate students who need special educational assistance in order to master the basic skills. Fla. Stat. § 236.088. Evidence was presented at trial which demonstrated that the State has kept track of these students and has monitored the efforts being taken to remediate them. *Defendants' Ex.* 74. **[**21]** Each district school board is also required to establish pupil progression plans to insure that students are not promoted without consideration of each student's mastery of basic skills. Fla. Stat. § 232.245. The State has also established uniform testing standards for grades 3, 5, 8 and 11 to monitor the acquisition of basic skills by students statewide. *Id.*

These legislative requirements bolster the conclusion that the SSAT-II is, at least, curricularly valid. They lend support to the opinions of the defendants' experts that the SSAT-II is instructionally valid. It is clear from the survey results that the terms of the Educational Accountability Act are not just hollow words found in a statute book. Rather, the district reports, teacher surveys, and site visit audits, as interpreted by the defendants' experts, all indicate that the directives of the Act are a driving force in all of Florida's public schools.

Nevertheless, it is the plaintiffs' position that the instructional validity of the test cannot be established by showing that the skills tested are included in a recognized curriculum. To the contrary, they believe that the only touchstone of the test's validity **[**22]** is proof

of what graduating seniors were *actually*, not theoretically, taught. Without such proof, the plaintiffs posit that no one can tell whether the students had a "fair" opportunity to learn.

The plaintiffs are particularly concerned that the districts are not offering uniform preparation on the SSAT-II skills. Indeed, the plaintiffs' expert, Dr. Calfee, demonstrated that the degree of preparation on SSAT-II skills varied significantly from district to district. The defendants have not suggested that preparation is identical in all the districts. To the contrary, the defendants' expert, Dr. Popham, admitted that no two students will have exactly the same academic experience and that every student will encounter poor teachers and poor administrators during his or her school career. *E.g., Popham* at 66, 347. Nevertheless, despite the disparity among districts, the defendants' experts still believed that students in *all* of Florida's districts were given an adequate opportunity to learn the SSAT-II skills before the end of twelfth grade.

As noted above, it is impossible to prove conclusively the degree to which every one of the more than 100,000 graduating seniors **[**23]** were exposed to the SSAT-II skills. What is known, is that the districts have reported that these skills are included in their curriculum and that a substantial number of public school teachers have stated that they adhere to this curriculum by including these skills in their course of instruction. In addition, and of even greater significance in determining the constitutionality of the test, it is known that students are given five chances to pass the SSAT-II between the tenth and twelfth grades of school and that, if they fail, they are offered remedial help. They also have the option of staying in school for an additional year in order to "receive special instruction designed to remedy [their] identified deficiencies." Fla. Stat. § 232.246(4). [16] Certainly, some remedial programs and teachers will be more effective than others. However, this disparity cannot be said to be unfair in a constitutional sense. While it might be preferable from an educator's standpoint to insure that students learn the requisite skills during their regular courses **[*186]** rather than in remedial sessions, the Constitution clearly does not mandate such a result. What is required is that the **[**24]** skills be included in the official curriculum and that the majority of the teachers recognize them as being something they should teach. [17] Once these basic facts are proven, as they have been in this case, the only logical inference is that the teachers are doing the job they are paid to do and are teaching these skills. *Accord, Anderson v. Banks*, 540 F. Supp. 761 (S.D. Ga. 1982). It strains credibility to hypothesize that teachers, especially remedial teachers, are uniformly avoiding their responsibilities at the expense of their pupils. CURRICULAR VALIDITY

16 A student who has not passed the SSAT-II may stay in school for the extra year on either a full-time or part-time basis. Fla. Stat. § 232.246(4). In addition, a student who has received a certificate of completion rather than a diploma may take adult education courses aimed at remediating SSAT-II skills. Fla. Stat. § 228.072. A student who has received a certificate of completion rather than a diploma may also take the SSAT-II after leaving school even though he or she is not enrolled in an adult education course. Fla. Admin. Code Rule 6A-1.942(2)(b)(2).

[25]**

> 17 The conclusion that the proper focus is on whether the skills are included within the curriculum and not on whether each student had identical educational experiences, is supported by the language used by the appellate court in announcing its holding. The Court wrote, "if the test is found to be invalid for the reason that it *tests matters outside the curriculum*, its continued use would violate the equal protection Clause." 644 F.2d at 406 (emphasis added).

The Court of Appeals held that the State has the right to impose the diploma sanction provided the test covers what is taught. 644 F.2d at 406. If the burden asserted by the plaintiffs were accepted, the State would never be able to exercise that right because instructional validity could never be proven as to every student. [18] Such a result is not mandated either by the Constitution or the Court of Appeals. To the contrary, the appellate court cautioned against,

> Imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even **[**26]** partial solutions to educational problems and to keeping abreast of ever-changing conditions.

644 F.2d at 406, *quoting San Antonio School District v. Rodriguez*, 411 U.S. 1, 43, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1972).

> 18 Significantly, several of the plaintiffs' own witnesses at the first trial suggested that their concerns about the instructional validity of the test could be resolved within a few years. *E.g.*, Dr. Madaus at 1780-83; Dr. Tyler at 2118, 2120, 2141-42. *See Final Argument of Mr. Rice* at 3281.

For the reasons stated above, and based on a review of the evidence presented by both sides, the Court finds that the defendants have carried their burden of proving by a preponderance of the evidence that the SSAT-II is instructionally valid and therefore constitutional. Although the instruction offered in all the classrooms of all the districts might not be ideal, students are nevertheless afforded an adequate opportunity to learn the skills tested on the SSAT-II before it is used as **[**27]** a diploma sanction.
CURRICULAR VALIDITY EDUCATIONAL AGENCY PREVAILED

II. *The Vestiges Issue*

As noted earlier, deciding that the SSAT-II is a fair test of that which is taught in the Florida public schools does not end this Court's inquiry. The Court must still decide whether or not the State should be enjoined from imposing the diploma sanction because the vestiges of past purposeful discrimination have an unconstitutional impact on black high school students.

No one disputes the fact that the SSAT-II failure rate among black students is disproportionately high. Of the three thousand twelfth grade students who have not passed the test, about 57% are black even though blacks only constitute about 20% of the

entire student body. While these statistics are alarming, they do not, standing alone, answer the constitutional question this Court must confront.

In order for this Court to continue to prohibit the State from using the SSAT-II as a diploma sanction, the disproportionate failure rate among today's high school seniors must be found to have been caused by past purposeful segregation or its lingering effects. If the disparate failure of blacks is not due to the present effects of past intentional segregation or if **[**28]** the test is necessary to remedy those effects, then the **[*187]** four year injunction entered in 1979 can not be extended. 644 F.2d at 407.

The Court has already found that the vestiges of past purposeful segregation did exist in the Florida public schools from 1971 to 1979. 474 F. Supp. at 252. At the more recent trial, the plaintiffs presented evidence which indicates that black students are still being suspended more often than white students, that several counties still do not have black administrators, that racial stereotypes still persist, and that blacks are being assigned to EMR classes more readily than whites.

In addition, the plaintiffs' expert, Dr. Roderick McDavis, testified that the racial bias of teachers is a significant problem within the Florida public schools. Dr. McDavis, an expert in the counseling of ethnic minorities who has held workshops in a number of Florida's school districts, related that students and counselors often reported to him that teachers called black students derogatory names and had low expectations for them. The plaintiffs' second expert, Dr. Na'im Akbar, a clinical psychologist, stated that racial animus among teachers and the lack of **[**29]** black administrators in the schools would detrimentally affect the ability of black students to learn by eroding their "self-concept." In other words, if black students feel that they are in an alien environment and are exposed to negative experiences in school, their academic motivation will be diminished. Consequently, minority students might never acquire the basic skills necessary to master more difficult academic tasks.

The testimony offered by Drs. Akbar and McDavis reinforced the testimony which Dr. Gordon Foster offered at the first trial and convinces the Court that the vestiges of past purposeful segregation continue, to some extent, until the present day. The Court does not find, however, that the problems related by the plaintiffs' experts are as widespread as they contend. While it seems clear that some individual teachers, both black and white, carry with them biases which impair their teaching abilities, the Court rejects Dr. McDavis' estimate that as many as 30% of the teachers in Florida's public schools are overtly or covertly racist. Similarly, the evidence belies Dr. Akbar's conclusions concerning the causative effect of the problems he identified. [19] For **[**30]** example, the record reveals that more than 90% of the black students in Florida's schools have successfully taken the test and that black students in counties where there are black administrators have not done appreciably better on the SSAT-II than black students in counties where there are no black authority figures. As a result, the Court reaffirms its finding that the vestigial problems outlined earlier "do not constitute the denial of an equal educational opportunity. . . ." 474 F. Supp. at 252.

> 19 The value of the plaintiffs' expert testimony is undercut by the fact that it is not based on reliable scientific data. Instead, as the defendants have argued, the experts' conclusions were largely based on anecdotal reports rather than on empirical studies.

The mere fact that black students are not doing as well as white students on the test does not direct a different result. As Dr. Akbar pointed out, many of the impediments to learning faced by black students do not have their source in the classroom. To **[**31]** the contrary, according to Dr. Akbar, black students also experience significant difficulties because they are growing up in a predominantly white society. Unfortunately, no matter how much all of us might wish it, these problems are not going to go away today, tomorrow, or even by the end of the decade. Indeed, as long as past purposeful segregation remains part of our collective memory, its vestiges will, sadly, remain with us, not only in our schools, but in every aspect of our lives. EQUAL PROTECTION[20]

> 20 Implicit in this Court's 1979 Opinion was the finding that the vestiges of past purposeful segregation have continued to dissipate over time.

Relying on *Gaston County v. United States*, 395 U.S. 285, 23 L. Ed. 2d 309, 89 S. Ct. 1720 (1969), the plaintiffs seem to argue that the SSAT-II will be invalid as long as any vestiges of discrimination exist. **[*188]** Indeed, they have suggested that the test is unfair because the black parents of this year's graduating class received an inferior education and therefore **[**32]** have a more limited ability to help their children succeed in school. While there may well be some factual validity to the plaintiffs' argument, it does not follow that the test should be enjoined until every vestige of past discrimination, no matter how faint, is erased. The Supreme Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971), is instructive. The Court wrote,

> We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with the myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. . . . The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage.

402 U.S. at 22-23.

The same limits apply in the present case. Thus, it must be remembered that the SSAT-II is constitutionally impermissible only if the disproportionate failure rate among black students is due to the learning deficits created by **[**33]** the past segregation of the Florida public schools or its effects. For the following reasons, the Court finds that there is no causal link between the disproportionate failure rate and the present effects of past school segregation. Moreover, even if there was a causal connection, the defendants have carried their burden of showing that the SSAT-II is necessary to remedy those effects.

The State's principal witness on the vestiges issue was Dr. Barbara Lerner. Dr. Lerner was an extraordinary witness. Although the Court does not accept all of her opinions, her testimony on the key issues in this case was highly persuasive. In sum, it was Dr. Lerner's position that the vestiges of school segregation do not affect a student's academic achievement. In particular, she did not believe that the lack of role models or the presence of racial stereotypes were responsible for the disparate performance of blacks on the SSAT-II. Instead, she testified that the empirical data demonstrated that other factors such as the educational background of a student's parents, the class size, and the amount of homework required were more directly related to student achievement.

Dr. Lerner's testimony **[**34]** concerning the necessity of the SSAT-II to remedy the effects of past segregation was even more significant. According to Dr. Lerner, children need a "climate of order" to be able to learn. Pointing to studies which demonstrate that Catholic school youngsters, regardless of their race or religion, do better than their public school peers on standardized tests, Dr. Lerner opined that the learning process of all students is aided by clear demands, fair testing and appropriate sanctions. She stated without equivocation that the SSAT-II program, with its standardized goals and diploma sanction, met these criteria. She stated further that the test was necessary to overcome whatever effects of past purposeful segregation remain in the schools. By enacting the SSAT-II, the State set equal goals for all children and told students, teachers, and administrators that sanctions would be imposed if these goals were not met. In Dr. Lerner's opinion, knowledge of these goals and sanctions would add to a student's motivation and his or her ability to succeed academically.

The injunction entered in 1979 was premised on the finding that it would be unconstitutional to deny a diploma to a student **[**35]** who did not have an opportunity to gain an equal education. In particular, the Court was concerned about imposing the diploma sanction on students who had attended schools which did not have the same textbooks, curricula, libraries and attendance requirements. 474 F. Supp. at 250. The Court found further that "punishing the victims of past discrimination for deficits created by an inferior educational environment neither constitutes a remedy nor **[*189]** creates better educational opportunities." 474 F. Supp. at 257.

In the 1979 trial, this Court found, "the most significant burden which accompanied black children into the integrated schools was the existence of years of inferior education." 474 F. Supp. at 252. This burden is not shouldered by the Class of 1983. Unlike the Class of 1979, black and white members of the Class of 1983 have had the same textbooks, curricula, libraries and attendance requirements throughout their public school years. Thus, while no two students can have an identical academic experience, their educational opportunities have nonetheless been equal in a constitutional sense. Moreover, to the extent that insidious racism is a problem in the schools, **[**36]** it would seem that a test like the SSAT-II, with objective standards and goals, would lead to its eradication. [21] Testimony of Dr. Lerner; *Defendants' Ex.* 114 (Deposition of Herb A. Sang).

21 This finding also resolves the question of whether or not the defendants, have violated the EOAA, 20 U.S.C. § 1703. The Act is not violated, even if the vestiges of past purposeful segregation still exist, so long as the defendants have

> taken "affirmative steps" to remove the vestiges. The SSAT-II, as presently implemented, is such an "affirmative step."

Twelve years have passed since the Florida public schools became physically unitary. Since that time, the State of Florida has undertaken massive efforts to improve the education of all of its school children. The SSAT-II is an important part of those efforts. Its use can be enjoined only if it perpetuates the effects of past school segregation or if it is not needed to remedy those effects. 644 F.2d at 397. *Castaneda v. Pickard*, 648 F.2d 989, 996-97 (5th **[**37]** Cir. 1981). Applying this standard to the facts presented at both the 1979 and 1983 trials, the Court finds that the injunction should not be extended. The State of Florida may deny diplomas to the members of the Class of 1983 who have not passed the SSAT-II. equal protection EDUCATIONAL AGENCY PREVAILED

Kathy Norris JOHNSON and Loretta Wilcox, individually and on behalf of all others similarly situated, Plaintiffs-Appellants, v. Ben F. SIKES, in his official capacity as Superintendent of the Tattnall County Schools, the Tattnall County School Board, and the Tattnall County School District, Defendants-Appellees

No. 82-8439

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

730 F.2d 644; 1984 U.S. App. LEXIS 23299

April 23, 1984

SUBSEQUENT HISTORY: [**1] As Amended.

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of Georgia.

DISPOSITION: DISMISSED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants challenged a finding from the United States District Court for the Southern District of Georgia, which found that appellee school district could require future students to pass an exit examination to obtain a high school diploma.

OVERVIEW: Appellants challenged appellee school district's requirement that students pass an exit examination to obtain a high school diploma. The complaint alleged that the exit examination discriminated against appellants because of their race. The court held that appellants prevailed on their equal protection claims and ordered appellees not to impose the diploma sanction until the graduation of the class who began their education after the abolition of the segregated school system. The court further held that the school district could reinstate the diploma sanction if it could then show that the increased educational opportunities of the exam outweighed any lingering causal connection between the discriminatory tracking system and the imposition of the diploma sanction. The question of ripeness affected the court's subject matter jurisdiction and could be raised sua sponte at any time. The judgment was affirmed because all students who were denied a diploma because of the exit exam policy were awarded a diploma; therefore, only those future students who might be given the exam would be affected by a review of the district court's rulings. Therefore, the appeal was dismissed for ripeness.

OUTCOME: The court found that the case was not ripe for appellate review because the court would be in a better position later to confront any constitutional questions raised in this case involving a high school exit examination.

CORE TERMS: diploma, exit, tracking, exam, school district, high school diploma, educational, score, school system, reinstate, ripeness, school authorities, reinstitute, testing, taught, ripe, public schools, black students, equal protection claims, causal connection, oral argument, proposed order, disadvantages, graduating, contingent, lingering, outweigh, reimpose, certificates, attendance

COUNSEL: Rose E. Firestein, Savannah, Georgia, Jonathan A. Zimring, Atlanta, Georgia, William J. Cobb, Atlanta, Georgia, for Appellant.

J. Franklin Edenfield, Swainsboro, Georgia, B. Daniel Dubblerly, Jr., Glennville, Georgia, for Appellee.

JUDGES: Hill, Vance and Anderson, Circuit Judges.

OPINION BY: HILL

OPINION

[*645] JAMES C. HILL, Circuit Judge:

Appellants challenge the Tattnall County School District's requirement that students pass an exit examination to obtain a high school diploma. We dismiss the appeal for lack of ripeness.

BACKGROUND

The Tattnall County School District ("the District") abolished separate schools for white and black students beginning with the 1970-71 academic year. During the same school year, the District instituted a tracking or ability grouping system for assigning students in the elementary and junior high schools, with the exception of students at Collins High School. The tracking system often resulted in racially identifiable classrooms and was abandoned in 1979-80 as a result of an investigation by the Office of Civil Rights.

[2]** In 1976, the Tattnall County School Board adopted a diploma policy requiring that, in addition to successful completion of a certain number of credit hours and sufficient school attendance, each graduating student perform at the ninth grade level (a score of 9.0) on the mathematics and reading portions of the California Achievement Test ("CAT"). As part of the testing requirement, the District instituted remedial courses for those who failed to achieve the requisite score and delayed the imposition of the diploma sanction until Spring, 1978.REMEDIATION In 1978, 30 out of a class of 219 students did not obtain the required 9.0 score and, as a result, received certificates of attendance instead of diplomas; seventeen of those who only received certificates were black. **[*646]** Of the 192 members of the graduating class of 1979, 10 out of the 12 students who did not get a diploma because they failed the CAT were black. In 1980, 6 students out of 192 received certificates of attendance; all six were black. EQUAL PROTECTION

This action was filed in October, 1979, by appellant Kathy Norris Johnson on behalf of herself and other black students in Tattnall County, Georgia, who have completed, will complete, **[**3]** or are eligible to complete all requirements for high school graduation

and receipt of a high school diploma other than achieving a particular score on the CAT. Named as defendants were the Tattnall County School District, the Tattnall County School Board, and Ben F. Sikes, the Superintendent of Schools for Tattnall County. The complaint alleged that the exit examination: discriminates against the plaintiffs because of their race, in violation of the equal protection clause of the fourteenth amendment;EQUAL PROTECTION is fundamentally unfair and therefore violates the plaintiffs' rights to due process of law as guaranteed by the fourteenth amendment; due process violates Title VI of the Civil Rights Act of 1964 EQUAL PROTECTION, 42 U.S.C. § 2000d; and violates 20 U.S.C. §§ 1703, 1706. [1] The case was consolidated with a similar case, *Walls v. Banks*, and the district court certified the following classes:

Class 1. All black children who attended, are attending, or will attend public schools in Tattnall County, Georgia, and who have completed, will complete, or are eligible to complete all valid and legal requirements for receipt of a high school diploma established by Defendant Board or the Georgia State Board of Education, **[**4]** but who did not or will not achieve a particular score on the California Achievement Test, and who, as a result of having failed to achieve a certain score on said tests, have been or will be denied a high school diploma by Defendants.

Class 1.a. All black children who have attended, are attending, or will attend public schools in Tattnall County, Georgia, and who have completed, or will complete all requirements for receipt of a high school diploma established by Defendant Board or the Georgia State Board of Education, other than achieving a particular score on the California Achievement Test, and who, solely as a result of having failed to achieve a certain score on said test, have been or will be denied a high school diploma by Defendants.

> 1 The plaintiff was permitted to amend her complaint to add another named plaintiff, to change the class definition, and to add a claim. The new claim, under the fourteenth amendment and section 504 of the Rehabilitation Act, 29 U.S.C. § 794, alleged that the defendants were not administering the exit exam to students classified as Educable Mentally Retarded. Issues concerning the relief afforded to those classified as Educable Mentally Retarded are not raised in this appeal.

[5]** After trial on the consolidated cases, the district court entered its order of June 17, 1981. *See Anderson v. Banks*, 520 F. Supp. 472 (S.D.Ga.1981). The court held that the plaintiffs prevailed on their equal protection claims and ordered the defendants not to impose the diploma sanction until the graduation of the class of 1983 since that would be the first group of graduating students who began their education after the abolition of the segregated school system. After analyzing the standards set forth in *McNeal v. Tate County School District*, 508 F.2d 1017 (5th Cir.1975), the district court further held that the District could reinstate the diploma sanction in 1983 if it could then show that the increased educational opportunities of the CAT outweigh any lingering causal connection between the discriminatory tracking system and the imposition of the diploma sanction. EQUAL PROTECTION

The district court also examined the plaintiffs' due process claims in light of *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir.1981), and held that the school authorities had not demonstrated that the CAT was a fair test of the material actually taught in Tattnall County public schools. The defendants **[**6]** filed a motion for reconsideration of the due process portion of the order, arguing that the *Debra P.* decision **[*647]** was announced after trial and that the decision created a new standard of proof and a shifting of the burden of proof. The court agreed that *Debra P.* changed the applicable law and scheduled an evidentiary hearing to permit the defendants to present additional evidence concerning the match between the CAT and what was actually taught in the classrooms. A second order was issued on June 16, 1982, *see Anderson v. Banks*, 540 F. Supp. 761 (S.D.Ga.1982), holding that the defendants had made a sufficient showing that the CAT is a fair test of the material taught in Tattnall County. A judgment was entered on June 17, 1982, stating that plaintiffs did not prevail on their substantive due process claims.
DUE PROCESS/CURRICULAR VALIDITY

On appeal, plaintiffs-appellants contend that the district court erred in its ruling of June 17, 1981, on plaintiffs' equal protection claims, and in its order of June 16, 1982, on plaintiffs' due process claims. They argue that the court misinterpreted *McNeal v. Tate County School District* in holding that the school authorities could reestablish the **[**7]** competency test in 1983 if they could then show that the increased educational opportunities of the CAT policy outweigh any lingering causal connection between the discriminatory tracking system and the imposition of the diploma sanction. According to appellants, the District can only reinstate the exam policy if it can show that steps taken to bring disadvantaged students to peer status have ended the educational disadvantages caused by the tracking system EQUAL PROTECTION. Appellants also maintain that the court erred in holding that the exit exam covered material taught in Tattnall County public schools CURRICULAR VALIDITY. They assert that the district court misapplied the test set forth in *Debra P. v. Turlington* for determining whether an exit exam comports with the due process clause of the fourteenth amendment. DUE PROCESS

DISCUSSION

In effect, the appellants ask us to announce whether the appellees can reinstate the exit exam at some uncertain future date *if* the appellees choose to reinstitute the test and *if* the appellees are able to demonstrate to the district court that the educational benefits of the testing program outweigh any lingering causal connection between the diploma sanction and the tracking **[**8]** system EQUAL PROTECTION. Before considering the issues raised by appellants, we must first determine whether these issues are properly before this court. *See Buckley v. Valeo*, 424 U.S. 1, 113-14, 96 S. Ct. 612, 679-680, 46 L. Ed. 2d 659 (1976). Prior to oral argument, we requested the parties to brief the issue of the finality and appealability of the district court's orders. Both parties concede that there are still matters to be decided by the district court but contend that the court's rulings constitute a final order as contemplated by 28 U.S.C. § 1291 or, alternatively, an appealable interlocutory denial of an injunction under 28 U.S.C. § 1292(a). [2]

2 Because we hold that this case is not ripe for review, we need not and do not express any view on whether this court would have jurisdiction under 28 U.S.C. §§ 1291 or 1292(a).

Neither party, however, has addressed whether we should defer decision on the constitutional issues raised by the appellants because the controversy is not ripe for review in light of the **[**9]** absence of a ruling by the district court that the school district may reinstate the exit exam policy. The question of ripeness affects our subject matter jurisdiction, *see International Tape Manufacturers Ass'n v. Gerstein*, 494 F.2d 25, 27 (5th Cir.1974); *Duke City Lumber Co. v. Butz*, 176 U.S. App. D.C. 218, 539 F.2d 220, 221 n. 2 (D.C.Cir.1976), *cert. denied*, 429 U.S. 1039, 97 S. Ct. 737, 50 L. Ed. 2d 751 (1977), and may be raised *sua sponte* at any time, *Duke City Lumber Co.*, 539 F.2d at 221 n. 2; *In re Grand Jury, April, 1979*, 604 F.2d 69, 72 (10th Cir.1979). Although at oral argument the parties encourages us to render a decision in this case, "because issues of ripeness involve, at least in part, the existence of a live 'Case or Controversy,' we cannot rely upon concessions of the parties and must determine whether the issues are ripe for decision in the 'Case and Controversy' sense. Further, to the extent that questions of ripeness involve the exercise **[*648]** of judicial restraint from unnecessary decision of constitutional issues, the Court must determine whether to exercise that restraint and cannot be bound by the wishes of the parties." *Regional* **[**10]** *Rail Reorganization Act Cases*, 419 U.S. 102, 138, 95 S. Ct. 335, 356, 42 L. Ed. 2d 320 (1974) (footnotes omitted).

The ripeness doctrine involves both jurisdictional limitations imposed by Article III's requirement of a case of controversy and prudential considerations arising from problems of prematurity and abstractness that may present insurmountable obstacles to the exercise of the court's jurisdiction, even though jurisdiction is technically present. *See id.; Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588, 92 S. Ct. 1716, 1719, 32 L. Ed. 2d 317 (1972); C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3532, at 237-38 (1975). The basic rationale is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. . . . The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 1515, 18 L. Ed. 2d 681 (1967). Moreover, "since ripeness is peculiarly a question of timing, it is the situation **[**11]** now rather than the situation at the time of the District Court's decision that must govern." *Regional Rail Reorganization Act Cases*, 419 U.S. at 140, 95 S. Ct. at 357.

We are convinced that it is preferable for us to defer a decision on the due process and equal protection issues raised in this appeal until the district court enters an order and final judgment permitting the school authorities to reinstitute the test. All students who were denied a diploma because of the exit exam policy have since been awarded a diploma by the Tattnall County School District. [3] Therefore, it is only those future students who may be given the CAT that would be affected by a review of the district court's rulings. While the parties may feel that it is convenient or desirable for this court to determine in advance if the CAT is a fair test of the materials taught in Tattnall County or if the school district need only show that the exit exam will remedy the results of the

tracking system through better educational opportunities, any future harm to the appellants is contingent on uncertain events.

> 3 The parties entered into a stipulation in June, 1982, in which the defendants agreed to award diplomas to all students who would have received diplomas in 1978, 1979, 1980, 1981, and 1982, except for their failure to attain a score of at least 9.0 on the CAT.

[12]** For example, the Tattnall County School District may decide not to reinstate the CAT policy. The District voluntarily chose not to attempt to reinstate the exit exam in 1983. Counsel for appellees stated at oral argument that the school system has no intention of proving that its test will remedy the results of past segregation unless it knows that the district court's announcement of that standard was correct. Appellants have informed us that the Georgia Department of Education is in the process of imposing a similar testing policy across the state; apparently, this statewide testing would supplant the exit exams given by local school districts.

Additionally, even if the District decides to reimpose the CAT, the appellees may be unable to show that the test remedies the results of the tracking system through better educational opportunities. The district court may find that the school system has not sustained their burden of proof and, accordingly, may prevent the appellees from reinstating the diploma sanction.

It is also possible that by the time the appellees decide to reinstitute the CAT they may be able to prove that the school system has completely eliminated all the **[**13]** educational disadvantages caused by the tracking system. In that case, appellees' proof would meet even the more stringent evidentiary burden argued by the appellants.

These examples indicate that the appellants' present claims are based merely on assumed, potential invasions of their constitutional **[*649]** rights. However, the hypothetical and contingent nature of the questions raised in this appeal counsel against issuing an opinion premised on uncertain and contingent future events that may not occur as anticipated or may not occur at all. *See Federal Election Commission v. Lance*, 635 F.2d 1132, 1138 (5th Cir.) (en banc), *cert. denied*, 453 U.S. 917, 101 S. Ct. 3151, 69 L. Ed. 2d 999 (1981). The record in this case does not indicate any injury currently being suffered by the appellants, and the future effect of the district court's rulings is speculative. *See Socialist Labor Party*, 406 U.S. at 589, 92 S. Ct. at 1720. Our decision not to render an opinion advising what the law would be on an assumed set of facts is also consistent with the well-established rule that a court is never to "anticipate a question of constitutional law in advance of the necessity of **[**14]** deciding it." *Ashwander v. TVA*, 297 U.S. 288, 346, 56 S. Ct. 466, 483, 80 L. Ed. 688 (1936) (Brandeis, J., concurring) (quoting *Liverpool, N.Y. & P.S.S. Co. v. Emigration Commissioners*, 113 U.S. 33, 39, 5 S. Ct. 352, 28 L. Ed. 899 (1885)). [4]

> 4 By holding that this appeal is not ripe for review, we do not mean to suggest that it was unwise for the district court to postpone a finding on the remedial benefits of the CAT policy until such time as the school authorities seek to reimpose the test. To the contrary, it appears to us that the district judge's action was wise judicial

> administration. Indeed, the plaintiff suggested that the district court was in no position in 1981 to assess what the educational situation would be in Tattnall County in 1983. The court's proposed order on the plaintiffs' equal protection claims allowed the reimplementation of the testing program in 1983. The proposed order was sent to the parties for comment. The plaintiffs responded in February, 1981, that it would be premature to determine that by 1983 the defendants will have remedied the educational disadvantages caused by the tracking system. Plaintiffs' Memorandum in Response to Proposed Order. Instead, plaintiffs advised the court to establish objective standards against which the school system's efforts to remedy the results of post segregation could be measured when the defendants propose to reinstitute the CAT. *Id.* Thus, the course chosen by the district court, to announce the burden that the school system must meet if it seeks to reimpose the diploma sanction but to delay a decision on whether the defendants have meet their burden until such time as the defendants propose to begin using the CAT again, is the course suggested by the plaintiffs. *See Anderson v. Banks*, 520 F. Supp. at 503.

[15]** Our dismissal of this appeal does not render impossible any review of the district court's orders of June 17, 1981, and June 16, 1982. If and when the district court is called upon to determine if the CAT may be reinstated and issues a final judgment, then the appropriate party will have an opportunity to have all of the court's rulings reviewed. At that point, unlike now, the school authorities' clear intention to proceed with the CAT, the district court's permission to reinstitute the diploma sanction, and the evidence that black students in Tattnall County are more likely to fail the test and be denied diplomas would indicate that "injury is certainly impending." *See Regional Rail Reorganization Act Cases*, 419 U.S. at 142, 95 S. Ct. at 358 (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 595, 43 S. Ct. 658, 664, 67 L. Ed. 1117 (1923)). Accordingly, because we find that we will be in a "better position later than we are now" to confront any constitutional questions raised by this case, *see Regional Rail Reorganization Act Cases*, 419 U.S. at 145, 95 S. Ct. at 359, we hold that this case is not ripe for appellate review. **[**16]** The appeal is

DISMISSED.

CASE WAS DISMISSED AND EDUCATIONAL AGENCY CAN DENY DIPLOMAS

DEBRA P., a minor, by IRENE P., her mother and next friend, et al., Plaintiffs-Appellants, v. Ralph D. TURLINGTON, Individually and as Commissioner of Education, et al., Defendants-Appellees

No. 83-3326

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

730 F.2d 1405; 1984 U.S. App. LEXIS 23094

April 27, 1984

SUBSEQUENT HISTORY: [**1] As Amended.

PRIOR HISTORY: Appeal from the United States District Court for the Middle District of Florida.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, a class of high school seniors, sought review of the judgment of the United States District Court for the Middle District of Florida, which upheld the validity of a state-wide competency examination in appellants' action against appellees, commissioner of education and state, challenging the examination based on an alleged disproportionate impact on black students.

OVERVIEW: Appellants, a class of high school seniors who failed a state competency examination, challenged appellee state's use of the test for diploma denials, arguing that there was an unconstitutionally disproportionate impact on blacks. The district court found that the examination was a fair test of what was taught in Florida's classrooms, that the test's racially discriminatory impact was not due to the present effects of past intentional discrimination, and that the test's use as a diploma sanction remedied any remaining vestiges of past discrimination. The court affirmed, finding that evidence of remedial efforts, student surveys, and recent pass rates supported the finding of instructional validity. The study results were properly admitted under Fed. R. Evid. 803(24) because the study possessed guarantees of trustworthiness. The district court's finding of no causal link between black student performance and effects of past discrimination was supported by expert testimony that other factors more directly related to performance. There was also sufficient evidence that the diploma sanction remedied any present effects of past discrimination by encouraging student performance.

OUTCOME: The court affirmed the district court's judgment that found that the students were actually taught test skills, that vestiges of past intentional segregation did not cause the test's disproportionate impact on blacks, and that use of the test as a diploma sanction helped remedy the vestiges of past segregation. Therefore, the state was allowed to begin denying diplomas to students who had not yet passed the examination.

CORE TERMS: skill, diploma, taught, teacher, vestiges, remedial, black students, segregation, instructional, grade, school districts, educational, disproportionate, teaching, team, school year, causal link, discriminatory, competency, instructionally, circumstantial, administrators, classroom, career, tested, legal standard, failure rate, trustworthiness, exam, expert witnesses

COUNSEL: Stephen F. Hanlon, Tampa, Florida, Marcia Cypen, Legal Services of Greater Miami, Miami, Florida, Center for Law & Education, Inc., Cambridge, Massachusetts, Richard Jefferson, Cambridge, Massachusetts, Stephen Cotton, Cambridge, Massachusetts, Roger Rice, Cambridge, Massachusetts, Robert Pressman, Cambridge, Massachusetts, for Appellant.

William R. Dorsey, Jr., Deputy General Counsel, State Board of Education, Tallahassee, Florida, W. Crosby Few, Tampa, Florida, Frederick Simpson, City Hall, Jacksonville, Florida, Michael Jackson, West Palm Beach, Florida, for Appellee.

JUDGES: Johnson and Anderson, Circuit Judges, and Tuttle, Senior Circuit Judge.

OPINION BY: ANDERSON, III

OPINION

[*1406] R. LANIER ANDERSON, III, Circuit Judge:

A class consisting of Florida high school seniors who have failed a state-wide competency examination appeal findings entered by the district court on remand from *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir.1981) (Unit B). We affirm the decision of the district court.

FACTS

In 1978 the Florida legislature approved an amendment **[**2]** to the Educational Accountability Act of 1976, Fla.Stat. § 229.55 *et seq.*, requiring Florida public school students to pass a functional literacy examination, the SSAT-II, in order to receive a state high school diploma. Fla.Stat. § 232.246(1)(b) (1978). Shortly thereafter, present and future twelth grade students who had failed or would fail the test filed suit, challenging the constitutionality of using the test for diploma denials under the due process and equal protection clauses of the Fourteenth Amendment. They also challenged this use of the SSAT-II under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (1976), and the Equal Educational Opportunities Act ("EEOA"), 20 U.S.C. § 1703 (1976). [1] Central to their challenge was the argument that the diploma sanction had an unconstitutionally disproportionate impact on blacks. At the time of the 1979 hearing, after three test administrations, the failure rate of black students was approximately 10 times greater than that of white students. equal protection [2]

1 For a fuller discussion of this litigation, see *Debra P. v. Turlington*, 644 F.2d 397, 400-02 (5th Cir.1981) (Unit B).

[3]**

> 2 After three test administrations, 20.049% of the black students in the Class of 1979 had not passed the test, compared with 1.9% of the white students in that class. 644 F.2d at 401.
>
> As noted later in this opinion, the pass rate of all students had improved dramatically by the time of the 1983 hearings on remand.

[*1407] The district court held that use of the SSAT-II for diploma denials violated the due process and equal protection clauses, Title VI, and the EEOA. *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D.Fla.1979). The court enjoined the test's use as a diploma sanction until the 1982-83 school year, but allowed the state to use the test in the interim for remediation, which the court found violated neither the Constitution nor statutes. The district court found that the SSAT-II's content was valid, *id.* at 261, which would allow the state to use it as a diploma sanction after 1982.

The district court issued the four-year injunction for two reasons. First, the court found that the examination violated the equal protection clause, Title VI, and the EEOA by perpetuating **[**4]** past discrimination against black students who had attended segregated schools for the first four years of their education. 474 F. Supp. at 250-57.EQUAL PROTECTION. The students in the high school class of 1983 would be the first to have attended physically integrated schools for all 12 years of their educational careers; thus, they would be the first students against whom the diploma sanction could be applied. Second, the court held that the test's implementation schedule provided insufficient notice, in violation of the due process clause. *Id.* at 267. The court determined that because instruction of the skills necessary to complete the SSAT-II is a cumulative and time consuming process, *id.* at 264, four to six years should intervene between announcement of the test and implementation of the diploma sanction. *Id.* at 267. The class of 1983 would be the first with six years notice of the sanction and adequate instruction to take the test. DUE PROCESS

On appeal, the former Fifth Circuit Court of Appeals upheld the district court's injunction, but remanded for further findings on two issues that would affect use of the SSAT-II as a diploma sanction in 1983 and thereafter. First, the circuit court **[**5]** required the state to demonstrate on remand that the competency exam was "a fair test of that which is taught in [Florida's] classrooms." *Debra P. v. Turlington*, 644 F.2d 397, 408 (5th Cir.1981) (Unit B). The circuit court declared clearly erroneous the district court's holding that the test's content was valid; the record was "simply insufficient in proof that the test administered measures what was actually taught in the schools of Florida." *Id.* at 405. Without such proof, use of the test as a diploma sanction would violate the due process and equal protection clauses. *Id.* at 404, 406. Second, the circuit court held that if the state was able to prove that the test tested what was "actually taught CURRICULAR VALDIITY," the state would then have to demonstrate either that the test's racially discriminatory impact was not due to the present effects of past intentional discrimination, or that the test's use as a diploma sanction would remedy those effects. *Id.* at 407-08. EQUAL PROTECTION

On remand, the district court tried the two issues separately. After trial on the first issue, the district court concluded that the state had met its burden of proving by a preponderance of the evidence that the **[**6]** competency examination is "instructionally valid," *i.e.*, a fair test of that which is taught in Florida's schools. *Debra P. v. Turlington*, 564 F. Supp. 177, 186 (M.D.Fla.1983) CURRICULAR VALIDITY. After an evidentiary hearing on the second issue, the court found that although vestiges of past segregation still exist to some extent, and although the test still has a racially discriminatory impact, there is no causal link between the disproportionate failure rate of black students and those present effects of past segregation. *Id.* at 188. The court found, moreover, that even if there were a causal connection, the defendants had carried their burden of showing that the diploma sanction would remedy those effects. *Id.* The propriety of these findings forms the basis for this appeal. Our opinion will refer more particularly to facts adduced at the hearings in the district court on remand. EQUAL PROTECTION

I. INSTRUCTIONAL VALIDITY

Following remand, the Florida Department of Education commissioned IOX Assessment Associates, a private consulting **[*1408]** firm, to design a study to determine whether Florida's school districts teach the skills tested by the competency examination. IOX designed a four-part **[**7]** study. The first part of the study consisted of a teacher survey, which was distributed to all of Florida's 65,000 teachers. Forty-seven thousand teachers responded to the survey. The survey asked whether the teacher had provided instruction during 1981-82 relating to the skills tested on the SSAT-II and if so, whether that instruction had been sufficient for a student to master the skills.

The second part of the study was a district survey completed by all of Florida's 67 school districts and 4 university laboratory schools. The survey requested the districts (1) to estimate in which of grades 2-12 students were taught the test skills and in which grade a majority of students would have mastered the skills, (2) to describe any major variations in instruction among schools in the district, (3) to describe any remedial programs specifically related to mastery of test skills, (4) to describe staff development activities related to teaching test skills, (5) to list instructional materials specifically to teach test skills, and (6) to identify any program designed specifically to help students pass the test. The district survey instructed respondents to consider only the 1981-82 **[**8]** school year.

The third part of the study was a series of site visits to verify the accuracy of the district reports. Each district was visited by at least one visitation team. The visitation teams were composed of one program auditor from the Department of Education and two administrators from school districts other than the one visited. After two days of interviewing teachers and reviewing instructional materials, a team would prepare a report of findings and impressions about the accuracy of the district report.

The fourth portion of the study consisted of surveys given in a randomly selected school within each school district to students in an English or Social Studies class selected at random within the school by the visitation team. The survey asked the students whether they had been taught the skills tested by the competency exam at any point during their educational careers. In all, thirty-two hundred students completed this survey.

At trial, the state introduced the study results, over the objection of the appellants that the results constituted inadmissible hearsay. The state also presented three expert witnesses who concluded on the basis of the data from the **[**9]** IOX study that Florida was teaching what it was testing. One expert was Dr. Popham, designer of the study, who relied in large part on a "Mastery Exposure Index" prepared by the Department of Education. The Index is a distillation of the survey data and purportedly demonstrates that each student is given an average of 2.7 opportunities over the length of his educational career to master test skills. Dr. Popham testified that one such opportunity would be enough to make the competency exam "instructionally valid" -- a fair test of that which is taught.

All three experts for the state testified that their conclusions of instructional validity were bolstered by the state's extensive remedial efforts to help students who initially fail the test pass it before graduation. [3]

> 3 As discussed *infra* slip op. p. 1410, p. 1411, students first take the SSAT-II in 10th grade and have four more opportunities to pass the test before graduation.

Two experts testified on behalf of the appellants that the IOX study **[**10]** did not prove instructional validity. One expert opined that the survey was not a reliable indication of what had been taught to the Class of 1983 because it focused only on the 1981-82 school year, rather than the twelth graders' entire school careers. The other expert testified that the survey demonstrated that in school districts with high rates of SSAT-II failure, students were not taught test skills.

On the basis of the evidence presented at trial, particularly the evidence of remedial **[*1409]** programs and efforts, the district court concluded that the competency exam is instructionally valid because "students are afforded an adequate opportunity to learn the skills tested on the SSAT-II before it is used as a diploma sanction." 564 F. Supp. at 186.

Appellants raise three objections to the district court's finding that the SSAT-II is instructionally valid.

A. *Legal Standard*

First, the appellants argue that the district court applied an improper legal standard in determining the validity of the test's content. They claim that the Fifth Circuit opinion required direct evidence that students were "actually taught" the subjects tested. In essence, they argue **[**11]** that the district court erred by considering circumstantial evidence. [4]

> 4 Parts of what the appellants attack as an "improper legal standard" are properly characterized as the inferences the district court drew from circumstantial evidence. For example, the appellants argue that the district court employed an "improper legal standard" by inferring that test skills were "actually taught" on the basis of evidence that test skills are included in the curriculum and that a majority of teachers realize they should teach the test skills. This is an attack on the district

court's finding of fact, not on the legal standard it employed. We address the court's finding of fact in the next section.

We think that appellants read the prior opinion of this court too restrictively. The opinion gives no indication that in requiring that the state prove "that the test covered things actually taught in the classroom," 644 F.2d at 405, the panel meant to limit the proof to *direct* evidence of classroom activities. [5] **[**12]** In the absence of such an indication, the normal rule that evidence, whether direct or circumstantial, may be considered if relevant, *see* Fed.R.Evid. 402, should apply.

5 In fact, a passage in the opinion stating that the test would be invalid if "it tests matters outside the curriculum," 644 F.2d at 406, indicates just the opposite, *i.e.*, that proof of the contents of the curriculum would be important and that proof need not be limited to direct proof of classroom activities.

Contrary to appellants' contentions, the district clearly understood the question posed to it by the panel opinion: "Put simply, the task assigned to this Court by the Court of Appeals was to find out if Florida is teaching what it is testing." 564 F. Supp. at 180.
CURRICULAR VALIDITY

B. *Factual Findings*

Appellants challenge on several grounds the district court's factual finding that students are afforded an adequate opportunity to learn the SSAT-II **skills**. In examining these contentions, we bear in mind that the district court's findings **[**13]** of fact and inferences drawn therefrom are clearly erroneous only when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 541, 92 L. Ed. 746 (1948).

1. The Focus on the 1981-82 School Year

The appellants object that the IOX study, relied on by the state's experts and the district court, is invalid because it evaluated only the 1981-82 school year. They argue that the most the study can show is that in 1981-82 Florida was providing instruction in grades 2-12 that, considered cumulatively, would prepare a student for the SSAT-II. Thus, they maintain that the study proves that the Class of 1983 was taught the SSAT-II skills only if one assumes that what was taught in Florida schools in 1981-82 has been taught in Florida schools since 1971. Appellants argue that such an assumption is contradicted by the district court's own 1979 findings that "there is evidence that certain skills were not taught in Florida public schools," that instruction prior to 1977 "was neutral and devoid of the present objectives," and that results of the 1977 test **[**14]** "reflect the obvious inadequacy of the prior instruction in the standard objectives." 474 F. Supp. at 263, 264. It was partially on the basis of these findings that the court in 1979 issued its **[*1410]** four-year injunction against use of the test as a diploma sanction. *Id.* at 267.
CURRICULAR VALIDITY

The testimony of Dr. Popham, the designer of the IOX study and expert witness for the state, seems to support the appellants' argument that the study proves instructional validity as to the Class of 1983 only if one assumes that the same instruction was offered since 1971. He testified that "definitive, conclusive evidence" as to what the twelfth graders in the Class of 1983 had been taught could have been obtained only by tracking them back to second grade, 40 R. 73, but that this would have required prohibitively "elaborate and expensive mechanisms." 41 R. 222. Therefore, he devised a "cross-sectional" study of grades 2-12 from which "we could draw reasonable inferences regarding what had transpired at the earlier grade levels." 40 R. 73. Popham concluded that such inferences would be reasonable because there had not been "dramatic modifications in instruction, certainly [not] after the **[**15]** introduction of this legislation." 40 R. 74. Popham had no evidence to support this conclusion, other than his own judgment that "most of the basic reading skills and mathematic skills have *probably* always been emphasized in Florida schools in *most* grades." 42 R. 286 (emphasis added).

Another of Florida's expert witnesses, Dr. Robert Gagne, also based his opinion that then current twelfth graders had been taught SSAT-II skills on the assumption that the skills taught in 1981-82 had been taught "over a period of years." 46 R. 707. In addition, however, he relied on the extensive remedial programs Florida offers to students who initially fail the SSAT-II. *Id.*

One of appellants' experts, Dr. Robert Linn, challenged the assumption that instruction had been the same throughout the twelfth graders' careers as it was in 1981-82. He testified that institution of the SSAT-II in 1976 would have created a change in the emphasis the Florida teachers placed on test skills. 45 R. 533.

The district court did not directly address the charge that the study was invalid because it demonstrated only what was taught in grades 2-12 in 1981-82. However, the court, by emphasizing evidence **[**16]** of Florida's remedial efforts, indicated its view that the evidence of such efforts compensated for any such deficiency in the IOX study.

To the extent that the IOX study relies on an inference that what was taught in 1981-82 was taught as far back as 1971, we acknowledge some concern, given the district court's 1979 findings and the abysmal results of the first SSAT-II administration in the fall of 1977. [6] Even Dr. Popham's testimony indicated his belief that enactment of the 1976 Educational Accountability Act prompted a dramatic modification in instruction. 40 R. 74.

> 6 Seventy-eight percent of the black students and twenty-five percent of the white students taking the test in 1977 failed one or more sections of the test. 644 F.2d at 401.

On the other hand, there was a clearly reasonable inference that the instruction revealed in the 1981-82 survey was substantially the same as the post-Act instruction, *i.e.*, beginning in 1977. Our question about the pre-1977 instruction undermines to some extent **[**17]** our confidence in portions of the IOX study, such as the teacher survey and the Master Exposure Index relied on by Dr. Popham. However, we are not convinced that our doubts concerning the pre-1977 inference would seriously affect our conclusion.

There was evidence that "the bulk of the [SSAT-II] instruction occurs in the latter years" of a child's educational career, which in this case would be the years since 1977. 41 R. 211 (testimony of Dr. Popham). Moreover, other portions of the study do not rely on the questionable inference at all. For instance, the evidence of high school remedial programs as they relate to the Class of 1983 and subsequent classes, and the results of the student survey are not dependent on any inference of what transpired before 1977.

CURRICULAR VALIDITY

Florida's remedial efforts are extensive. The state provides funds to each school district to be used solely for providing remedial **[*1411]** instruction to students who need additional assistance in mastering basic skills. Fla.Stat.Ann. § 236.088 (West Supp.1983). Students have five chances to pass the SSAT-II between 10th and 12th grades, and if they fail, they are offered remedial help. Students may also elect **[**18]** to remain in school for an additional year on a full-time or part-time basis to receive, at the state's expense, "special instruction designed to remedy [their] identified deficiencies." Fla.Stat.Ann. § 232.246(4) (West Supp.1983). [7] If they then pass the SSAT-II, they are awarded their diplomas.

> 7 Students who have obtained a certificate of completion, awarded to students who have satisfied all requirements for graduation except passing the SSAT-II, may also take adult education classes aimed at remediating SSAT-II skill. Fla.Stat.Ann. § 228.072 (West Supp.1983). They may then retake the SSAT-II and receive diplomas if they pass. A student who has received a certificate of completion may also take the SSAT-II after leaving school even if he or she is not enrolled in adult education classes. 564 F. Supp. at 185 n. 16.

The state's experts testified at length about the breadth and effectiveness of the state's remedial efforts. [8] All agreed that the efforts were substantial and bolstered a finding of **[**19]** instructional validity. Dr. Robert Gagne testified "that with suitable instructional programs, and I see a good deal of evidence that those exist, that the skills which may be initially failed on the test, let's say, in 10th grade . . . could readily be learned by the next administration of the test or some next administration of the test in any case." 46 R. 675.

> 8 41 R. 206-07 (testimony of Dr. Popham); 44 R. 454-77 (testimony of Dr. Henderson); 46 R. 663-64; 674-80; 707-08 (testimony of Dr. Gagne).

Significantly, appellants' experts, Dr. Linn and Dr. Calfee, did not examine in any detail the district reports that described the remedial programs. 45 R. 573 (testimony of Dr. Linn); 48 R. 895-97 (testimony of Dr. Calfee). [9] Dr. Linn did not examine responses from remedial teachers because they were not available to him. He conceded that such responses "would be very desirable information to have for this instructional validity question." 45 R. 603. [10]

> 9 Dr. Calfee thought the district reports were "too indirect" to prove instructional validity. 48 R. 897.

[20]**

10 Appellants argue that the existence of remedial instruction has no significance because the state produced no specific evidence about what was taught in the remedial classes. It is true that the district surveys did not contain questions about what skills were taught in remedial programs. However, Dr. Gagne testified that lists of remedial materials contained in the district reports demonstrated that the remedial programs concentrated on SSAT-II skills. 46 R. 677. Moreover, Dr. Popham thought it was clear that SSAT-II skills would be taught in remedial classes specifically designed to help students pass the SSAT-II. 42 R. 263. We cannot disagree with the district court's significant reliance on the remedial programs. REMEDIATION

The results of the student survey are also impressive. Ninety to ninety-nine percent of the students surveyed statewide said they had been taught the test skills. 41 R. 186. Dr. Popham found this "very powerful evidence" of instructional validity. *Id.* [11] CURRICULAR VALIDITY

11 Appellants' expert Dr. Linn questioned the results of the student survey because it was not strictly random. 45 R. 545. Schools to be visited by survey teams were selected by a random sampling technique and the teams were instructed to choose a class in the school at random and administer the survey to it. Dr. Linn was concerned that the second step, because it depended on the discretion of the survey team, would not produce random results. However, he had no evidence that this skewed the results of the survey. 45 R. 591. We find the survey results persuasive.

[21]** The remedial efforts and the student survey, in addition to the evidence that most instruction is provided in the later school years persuade us that there was adequate evidence to support the district court's finding of instruction validity, notwithstanding our reservations about the inference concerning the pre-1977 instruction. We are also persuaded in this regard by the SSAT-II pass rate in the Class of 1983. After four of five test administrations, 99.84 percent of the class had passed the communications portion of the test and 97.23 percent had passed the math portion. 564 F. Supp. at 180. Appellants' **[*1412]** expert Dr. Calfee in fact conceded the instructional validity of the communication section of the test, 49 R. 1011, as did appellants' counsel at oral argument before this court. CURRICULAR VALIDITY

2. Dr. Calfee's Correllation

Dr. Robert Calfee, an expert witness for the appellants, testified that the results of the IOX teacher survey when compared with pass rates in the different school districts demonstrate a correlation between the amount of instruction reported by teachers and performance on the test. Calfee found that students failed the test in greatest numbers in districts **[**22]** where teachers reported teaching the fewest test skills. 47 R. 811. Dr. Calfee concluded that the SSAT-II is not instructionally valid as to some districts.

The state's experts testified on the basis of the results of the same teacher survey that students in *all* of Florida's districts were given an opportunity to learn the SSAT-II skills

before the end of 12th grade. The district court chose to credit the state's experts over Dr. Calfee.

"It is settled law that the weight to be accorded expert opinion is solely within the discretion of the judge sitting without a jury. . . . In the ultimate analysis, the trier of fact is the final arbiter as between experts whose opinions may differ. . . ." *Pittman v. Gilmore*, 556 F.2d 1259, 1261 (5th Cir.1977). *Accord Ludlow Corp. v. Textile Rubber and Chemical Co.*, 636 F.2d 1057, 1060 (5th Cir.1981). We think that the district court was within its discretion in crediting the state's experts over Dr. Calfee. [12]

> 12 The district court itself elicited from Dr. Calfee that his study did not look at *which* skills teachers from a district reported teaching but only how many. 48 R. 845. Thus, if two teachers each reported teaching eight of thirteen skills, Calfee's analysis assumed that they each taught the same eight skills, whereas they might have taught all thirteen between the two of them. Moreover, Dr. Calfee testified that in the case of six or seven school districts his correlation between teacher responses and pass rates completely broke down. 48 R. 851. Dr. Calfee attributed this to "noise in the data," *id.* at 850, although he also said he did not understand why this happened: "Here, I scratched my head." *Id.* at 853. CURRICULAR VALIDITY

[23]** 3. Failure to Focus on Students Who Failed

The appellants object that the state offered no direct and specific evidence that students who never passed the SSAT-II were taught test skills. Appellants assert that these students should have been the focus of the inquiry into instructional validity.

None of the experts at trial suggested that an instructional validity study must focus on students who have failed the test. The experts conceded that there are no accepted educational standards for determining whether a test is instructionally valid. Under these circumstances, we reject the unsupported assertion that the state study does not prove that the SSAT-II is a fair test of that which is taught because it did not focus specifically on students who had failed the test.

4. Inferences Drawn by the Trial Court

The appellants argue that the district court was clearly erroneous in inferring that skills were actually taught from circumstantial evidence presented at trial. Such evidence included evidence of inclusion of the skills in the curriculum, inclusion of the skills by individual teachers in their course of instruction, the existence of remedial efforts, and evidence **[**24]** from the student survey that students remembered receiving instruction in the skills. We cannot say that this inference is clearly erroneous. As our discussion above makes clear, we believe the evidence at trial was such that the district court could reasonably infer that the students were actually taught what was necessary to pass the exam. CURRICULAR VALIDTY

C. *Admissibility of the Study Results*

The appellants argue that the trial judge improperly admitted the IOX study results into evidence.

[*1413] "The trial judge has broad discretion in the matter of admission or exclusion of evidence and will not be overturned absent an abuse of this discretion." *ADP-Financial Computer Services v. First National Bank*, 703 F.2d 1261, 1266 (11th Cir.1983) (*citing Salem v. U.S. Lines Co.*, 370 U.S. 31, 82 S. Ct. 1119, 8 L. Ed. 2d 313 (1962)).

The district court ruled that the study results, although hearsay, were admissible under Fed.R.Evid. 803(24), [13] which provides in part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (24) *Other exceptions*. A statement not specifically covered by any of the foregoing exceptions **[**25]** but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of the material facts; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . . .
>
> 13 Alternatively, the district court admitted the study results under Fed.R.Evid. 703. Because we hold here that the study results were admissible under Rule 803(24), we need not evaluate this alternative ground.

Appellants maintain that the study results do not satisfy two conditions of 803(24). First, they argue that the results were not more probative on the point for which they were offered than any other evidence that the proponent could procure through reasonable efforts. The appellants assert that their experts' testimony demonstrated **[**26]** that there were less expensive methods of obtaining information about instructional validity that would have more directly demonstrated that Florida is teaching what it is testing. Dr. Popham testified, however, that he had considered and rejected these methods as either impractical, prohibitively expensive, or less reliable. *See, e.g.*, 40 R. 53, 81-82; 41 R. 229-30. Given this expert testimony, the district court was within its discretion in determining that the results were more probative than other available evidence.

Second, the appellants claim that the results did not possess sufficient circumstantial guarantees of trustworthiness. They claim that the trustworthiness of the results is questionable because the study respondents were aware of the purpose of the survey, the study was conducted by the state itself, and instructions to respondents placed pressure on them to give answers favorable to the state.

It is true that study respondents were aware of the study's purpose and that the state conducted this study. However, the study did possess guarantees of trustworthiness. For instance, site visitors verified the accuracy of the district reports, and site visitors **[**27]** were told that other visiting teams might audit *their* reports. 41 R. 163. Dr. Popham

testified that steps were taken to remove pressure from teachers to respond positively to the teacher survey: responses were anonymous, teachers were encouraged to answer honestly, and all teachers, not just math and language arts teachers, were surveyed to remove even the perception that the state was seeking only positive responses. 40 R. 73; 41 R. 100. The district court relied on steps taken to safeguard trustworthiness in determining that the study was trustworthy. 564 F. Supp. at 182 n. 7. The district court also noted that appellants' expert Dr. Calfee "had no problem with the study procedures." *Id.* Under these circumstances, the district court was within its discretion in determining that this study was sufficiently trustworthy to qualify for admission under 803(24).

We therefore find no error in the admission of the IOX study results. *See also Jellibeans, Inc. v. Skating Clubs of Georgia, Inc.*, 716 F.2d 833, 844-45 (11th Cir.1983) (consumer survey admissible in trade name case; "alleged technical deficiencies affect the survey's weight and not its admissibility"); *C.A. May* [**28] *Marine Supply [*1414] Co. v. Brunswick Corp.*, 649 F.2d 1049, 1055 n. 10 (5th Cir.1981) (consumer survey in wrongful dealership termination case inadmissible only because irrelevant; "if the inadequacies in the survey had been technical, such as the format of the question or the manner in which it was the survey [sic] was taken, those shortcomings would have borne on the weight of the evidence, not its admissibility"); *Holiday Inns, Inc. v. Holiday Out*, 481 F.2d 445, 447 (5th Cir.1973) (consumer survey admissible in trade name case; "format of the questions and the manner of conducting the survey" go to weight of evidence). CURRICULAR VALIDITY

II. "VESTIGES" OF PAST DISCRIMINATION

The prior Fifth Circuit opinion in this case held that if, upon remand, the state demonstrated that the SSAT-II is a fair test of that which is taught, the trial court should examine the relationship between continuing "vestiges" of past intentional segregation and the test's racially discriminatory impact. Use of the test as a diploma sanction would be permissible only if the state satisfied the test set forth in *McNeal v. Tate County School District*, 508 F.2d 1017 (5th Cir.1975), by demonstrating either [**29] (1) that the disproportionate failure of blacks was not caused by the present effects of past intentional segregation, or (2) that the use of the test as a diploma sanction would remedy those effects. 644 F.2d at 407. [14] EQUAL PROTECTION

> 14 *McNeal v. Tate County School District* held that ability grouping that has a racially discriminatory impact "may nevertheless be permitted in an otherwise unitary system if the school district can demonstrate that its assignment method is not based on the present results of past segregation or will remedy such results through better educational opportunities." 508 F.2d at 1020.
>
> Appellants contend that *McNeal* requires in all cases as a threshold matter that a school system be "unitary" in the sense that its operation has eliminated all vestiges of discrimination. We disagree. An absolute requirement that there be no present effects of past discrimination would be incompatible with both prongs of *McNeal*. Proof that the present effects of past discrimination did not *cause* the disparate impact, *i.e.*, the first *McNeal* prong, and proof that the test or procedure at issue

> would remedy such vestiges of past discrimination, *i.e.*, the second prong, both assume the continued presence of vestiges of past discrimination.
>
> In *McNeal*, the school district, simultaneous with its court-ordered transition from a dual or segregated to a unitary system, employed an ability grouping plan that resulted in substantial classroom segregation. The language of the *McNeal* opinion on which plaintiffs rely barred the use of ability grouping until the school "district can show that steps to bring disadvantaged students to peer status have ended the educational disadvantages caused by prior segregation." 508 F.2d at 1021. In the instant appeal, however, Florida dismantled its dual system in 1971, and the diploma sanction at issue will not be implemented until the students taking the test shall have attended all 12 of their school years after 1971. Although the district court acknowledged the continued existence of some vestiges of past discrimination in its 1979 decision, and that such vestiges continued "to some extent" at the time of the 1983 hearing, the court found that such vestiges "did not significantly affect the educational opportunities of black students who started school after 1971." 7 R. 1542; 564 F. Supp. at 187; 474 F. Supp. at 252, 256. *Accord Debra P. v. Turlington*, 644 F.2d at 407 (approving the application of the two-prong *McNeal* test in the instant case). EQUAL PROTECTION

[30]** Following the trial of this issue on remand, the district court concluded that vestiges of past purposeful segregation still exist to some extent in Florida schools. The district court found that some individual teachers have racial biases that impair their teaching abilities. 564 F. Supp. at 187. The court also noted the plaintiffs' evidence "that black students are still being suspended more often than white students, that several counties still do not have black administrators, that racial stereotypes still persist, and that blacks are being assigned to EMR [educable mentally retarded] classes more readily than whites." *Id.*

The court also noted the undisputed fact that the SSAT-II failure rate among black students is still disproportionately high. Fifty-seven percent of the students in the Class of 1983 who have failed the test are black, even though blacks constitute only 20% of the class. 564 F. Supp. at 186; 50 R. 20-21.

However, the court found on the basis of the evidence at trial that there is no causal **[*1415]** link between the present effects of past school segregation and the disproportionate failure rate. 564 F. Supp. at 188. The district court found, **[**31]** moreover, that even if there were a causal connection, the state had proven that the test will help remedy those effects. *Id.* The appellants challenge these last two factual findings as clearly erroneous. EQUAL PROTECTION

A. *The Finding of No Causal Link*

The district court based its finding that there is no causal link between effects of past discrimination and the SSAT-II's disproportionate impact partly on the testimony of Dr. Barbara Lerner, an expert witness for the state. The court credited her testimony that the existing vestiges of school segregation do not affect performance on the SSAT-II. Dr. Lerner testified that other factors, such as the educational background of a student's

parents, class size, attendance, and amounts of homework, more directly relate to student performance.

The district court also based its finding on evidence that black students in counties where there are black administrators have not performed appreciably better on the SSAT-II than black students in counties where there are no black authority figures, and that more than 90% of black students have passed the test. Finally, the court credited testimony of appellants' expert Dr. Na'im Akbar that many **[**32]** of the impediments to learning faced by black students arise outside the classroom.

We think that this was sufficient evidence upon which to base a finding that whatever vestiges of discrimination remain do not cause the disproportionate failure rate among black students. We are particularly impressed by the very high percentages of blacks who in fact have passed the test. Ninety-nine and one-half percent of the black members of the Class of 1983 passed the communications portion of the test, and ninety-one percent passed the mathematics portion. According to appellants' experts, vestiges of past intentional segregation operate statewide and therefore presumably touch all black students. The fact that ninety-one to ninety-nine percent of the black students nonetheless pass the SSAT-II is strong evidence that the vestiges do not cause blacks to fail the test. [15] equal protection EDUCATIONAL AGENCY PREVAILED

> 15 We also think that Florida's remedial efforts play a role in severing any possible link between vestiges and poor performance by black students. Even assuming that discriminatory vestiges contributed to a student's initial failure to pass the SSAT-II, it seems that the state's extensive remedial programs would enable the student to pass the test before graduation despite the effects of discrimination. It seems unlikely that remedial programs designed specifically to help students who have failed the SSAT-II would be infected by the same vestiges that exist to some extent in other parts of the school system. REMEDIATION

[33]** The appellants vigorously argue that their evidence demonstrates that racial stereotypes, which the district court found still persist to some extent in Florida schools, cause teachers to have lower expectations of black students, which negatively affects the performance of those students. Dr. Lerner's testimony disparaged this lower expectation theory. Dr. Lerner did not suggest that lower teacher expectations do not result in lower performance. However, she testified that numerous studies demonstrate that teachers very quickly correct initial expectations in light of their actual experience with students. 52 R. 232. Appellants contend that the studies relied on by Dr. Lerner were done outside the context of desegregation. Dr. Lerner testified, however, that actual experience will correct initial expectations based on race, except in the case of profoundly bigoted persons. 53 R. 275. Although Dr. Lerner's experience with the problems of desegregation in Florida may have been less than desirable, the district court was entitled to credit her testimony, which was also corroborated by the high pass rate among black students indicating that any lower expectations among Florida teachers **[**34]** did not have a significant effect.

Although the evidence before the district court was far from conclusive, after a careful review of the record, we are convinced **[*1416]** that the inferences and conclusions drawn by the district court are reasonable and supported by the evidence. We conclude that the district court's findings on causation were not clearly erroneous. [16]

> 16 The appellants also argue that the district court employed the wrong legal standard in determining that there was no causal link between present effects of past intentional segregation and the SSAT-II's disproportionate impact. We do not understand the basis for this claim. The district court was instructed to determine on remand whether present effects caused the disproportionate impact. This is precisely the question the district court examined and answered. There was no legal error. EQUAL PROTECTION

B. *The Finding that the Diploma Sanction Remedies Vestiges*

The district court also found that, even assuming there was a causal link between **[**35]** vestiges and disparate impact, the state had satisfied the second prong of the *McNeal* test by demonstrating that use of the SSAT-II as a diploma sanction would remedy the vestiges of past intentional segregation. The district court relied, again, on Dr. Lerner's testimony. Dr. Lerner testified that the best way to encourage student performance is by setting objective standards and creating a "climate of order" to motivate students. Dr. Lerner cited studies showing that such a climate is responsible for greater student achievement in Catholic schools. Dr. Lerner concluded that the use of the SSAT-II as a diploma sanction will "necessarily remedy" vestiges of past segregation by contributing to objective standards and a "climate of order" that motivates students. 52 R. 243.

This evidence supports the district court's finding that the diploma sanction is needed to remedy the present effects of past segregation in Florida's schools. The district court finding is also supported by another fact alluded to by the district court, and of which we take judicial notice, namely, that the diploma sanction will motivate teachers and administrators, as well as students. Although the sanction **[**36]** is to deny the student the diploma, diploma denial reflects adversely on the teachers and administrators of the school system responsible for the student's education. We think it is clear that teachers and administrators will work to avoid this stigma, thus tending to remedy any lingering lower expectations on the part of teachers.

The remarkable improvement in the SSAT-II pass rate among black students over the last six years demonstrates that use of the SSAT-II as a diploma sanction will be effective in overcoming the effects of past segregation. Appellants argue that the improvement has nothing to do with diploma sanctions because the test has not yet been used to deny diplomas. However, we think it likely that the threat of diploma sanction that existed throughout the course of this litigation contributed to the improved pass rate, and that actual use of the test as a diploma sanction will be equally, if not more, effective helping black students overcome discriminatory vestiges and pass the SSAT-II.

Thus, we affirm the finding that use of the SSAT-II as a diploma sanction will help remedy vestiges of past discrimination. We acknowledge a heavy sense of discomfort over **[**37]** the unfairness *if* discriminatory vestiges (albeit much attenuated) have in fact

caused a student to fail the SSAT-II. [17] However, that apparent unfairness would be outweighed by the demonstrated effect of the diploma sanction in remedying the greater unfairness of functional illiteracy.

> 17 For purposes of analysis under the second prong of *McNeal*, we have assumed *arguendo* that there may be a causal link between vestiges and SSAT-II failure by black students. Of course, we have already found in Section II.A, *supra*, that the state demonstrated that there is no such link. EQUAL PROTECTION: EDUCATIONAL AGENCY PREVAILED

CONCLUSION

We affirm the district court's findings (1) that students were actually taught test skills, (2) that vestiges of past intentional segregation do not cause the SSAT-II's disproportionate impact on blacks, and (3) that use of the SSAT-II as a diploma sanction **[*1417]** will help remedy the vestiges of past segregation. Therefore, the State of Florida may deny diplomas to students (beginning with the Class of **[**38]** 1983) who have not yet passed the SSAT-II.

AFFIRMED. EDUCATIONAL AGENCY PREVAILED

Renita LOVE, on behalf of herself and others similarly situated, Plaintiff-Appellant, v. Ralph D. TURLINGTON, as Commissioner of Education; Florida State Board of Education, Governor Robert Graham, Etc., Et Al., Defendants-Appellees

No. 82-3142

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

733 F.2d 1562; 1984 U.S. App. LEXIS 21678; 39 Fed. R. Serv. 2d (Callaghan) 358

June 11, 1984

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Middle District of Florida.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff appealed from the order of the United States District Court for the Middle District of Florida, which denied class certification in an action challenging the constitutionality of a basic skills test administered to eleventh graders throughout the state of Florida.

OVERVIEW: Plaintiff sought class certification for an action challenging the constitutionality of a basic skills test administered to eleventh graders in Florida. The test was designed to identify students who had not mastered minimum performance standards defined in regulations promulgated pursuant to statute. Students who failed the test were targeted for remedial assistance, and a disproportionately large number of those students were black. Plaintiff contended that the state's use of the test to create a pool of students at risk of not receiving a diploma carried forward prior racial discrimination suffered by black students who attended inferior schools in the dual school system, and that inadequate notice was given regarding the test and its objectives. The district court denied class status, and the court affirmed. The court noted that the test at issue simply identified students that were substandard in certain areas in the eleventh grade for the purposes of remediation. Because each school district was responsible for its own remedial program, and thus each student's situation differed, commonality and typicality of plaintiffs required for class status was not present.

OUTCOME: The judgment of the district court denying class certification was affirmed. Because each school district was responsible for the remedial measures to be taken as a result of the test at issue, commonality and typicality of plaintiffs required for class certification did not exist.

CORE TERMS: class certification, diploma, certification, individual claim, commonality, typicality, settlement, remedial, class action, personal stake, judicial resolution, mootness, moot

COUNSEL: Stephen F. Hanlon, Tampa, Florida, Robert Shapiro, Tampa, Florida, Morris W. Milton, St. Petersburg, Florida, Diana Pullin, Center for Law & Educ., Gutman Library, Cambridge, Massachusetts, Robert Pressman, Ronald B. Halpern, Gulf Coast Legal Services, Six South Ft. Harrison, Clearwater, Florida, Cynthis Metzler, Florida Rural Legal Services, Bartow, Florida, Stephen Cotton, Center for Law & Education, Inc., Cambridge, Massachusetts, for Appellant.

(For: State Board of Education), James D. Little, Gen., Cnsl. State Bd. of Education, Tallahassee, Florida, Judith A. Brechner, Deputy Gen. Cnsl., State Bd. of Education, Tallahassee, Florida, (For: School Bd. of Pinellas County), B. Edwin Johnson, Clearwater, Florida.

JUDGES: Godbold, Chief Judge, Roney and Kravitch, Circuit Judges.

OPINION BY: RONEY

OPINION

[*1563] RONEY, Circuit Judge:

Plaintiff Renita Love appeals the district court's denial of class certification in this action challenging the constitutionality of the SSAT-I (State Student Assessment Test), a basic skills test administered to eleventh graders throughout the state **[**2]** of Florida. The SSAT-I is designed to identify students who have not mastered one or more of the minimum performance standards defined in regulations promulgated pursuant to statute. *See* Fla.Stat. § 232.-246(1)(a); Fla.Admin.Code Rule 6A-A.-942(1)(d). Students who fail the test are targeted for remedial assistance. A disproportionately large number of these students are black.

Plaintiff contends that the state's use of the SSAT-I to create a pool of students "at risk" of not receiving a diploma carries forward prior racial discrimination suffered by black students who attended inferior **[*1564]** schools in the dual school system, and that inadequate notice was given regarding the test and its objectives.

We hold that the district court did not abuse its discretion in denying class certification on grounds that the commonality and typicality required by Fed.R.Civ.P. 23(a)(2) and (3) are absent in this case. The district judge had before him the uncontested affidavits presented by the defendant which specified that (1) passage of the SSAT-I is not a requirement for receipt of a high school diploma in Florida, and (2) determinations of remedial assistance to be given **[**3]** those students who fail the SSAT-I are made on a district-by-district basis, and the findings of diploma eligibility are made for each student individually.

While it is true that a trial court may not properly reach the merits of a claim when determining whether class certification is warranted, *Miller v. Mackey International, Inc.*,

452 F.2d 424, 428 (5th Cir.1971), this principle should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to a reasoned determination of whether a plaintiff has met her burden of establishing each of the Rule 23 class action requirements. In *Huff v. N.D. Cass Company of Alabama*, 485 F.2d 710, 713 (5th Cir.1973) (en banc), the Court refused to "accept the idea that to avoid infringing the plaintiff's and the class's right to jury trial district judges must be barred from making any evidentiary inquiry," and further "rejected . . . the argument that the judge is inextricably bound by the face of the pleadings." (footnotes omitted).

Plaintiff's attempt to analogize this case to *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir.1981), in which class certification was granted, is unsuccessful **[**4]** because of the disparity between the uses and effects of the tests at issue in the two cases. *Debra P.* concerned the so-called SSAT-II or "functional literacy test," which determined whether or not high school students throughout Florida would receive diplomas, regardless of their academic records. Commonality and typicality were clearly present. In contrast, the SSAT-I simply identifies, for purposes of remediation, those students who are substandard in certain areas in the eleventh grade year. Each district is responsible for its own remedial program for such students REMEDIATION. The determinations of whether students failing the SSAT-I are ultimately eligible for a diploma are made by individual teachers on the basis of students' individual achievements. Each student's situation differs, and the diploma is denied each student for reasons which are unique to his situation, and which do not necessarily correspond to his performance on the SSAT-I.

A settlement reached subsequent to the district court's denial of certification resolved plaintiff's individual claim. At oral argument, this Court raised the issue of whether or not an appeal from a denial of class certification by a plaintiff **[**5]** who has settled her individual claim is moot, and requested that counsel submit supplemental briefs on the question. It appeared that as a condition of the settlement of Love's individual claim, the defendants agreed not to contest the appealability of the certification order. It is an established principle of law that subject matter jurisdiction cannot be created or waived by agreement of the parties, Fed.R.Civ.P. 12(h)(2); *Sea-Land Service, Inc. v. International Longshoremen's Association*, 625 F.2d 38, 41 (5th Cir.1980), and that lack of jurisdiction may be raised at any point in a proceeding by either party, or by the court itself upon its own motion. *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100, 1102 (5th Cir.1981).

The jurisdictional issue in question was explicitly left open by the Supreme Court in *United States Parole Commission v. Geraghty*, 445 U.S. 388, 404 n. 10, 100 S. Ct. 1202, 1212 n. 10, 63 L. Ed. 2d 479 (1980), which held that a plaintiff whose claim had *expired* could still appeal a denial of class certification. Our review of the briefs and relevant legal precedent persuades us that this plaintiff's appeal of the denial of class certification **[**6]** is not moot.

[*1565] Mootness occurs when the issues in a case are no longer "live," or when the parties lack a legally cognizable interest in the outcome. *Powell v. McCormack*, 395 U.S. 486, 496, 89 S. Ct. 1944, 1950, 23 L. Ed. 2d 491 (1969). The fact that another student affected by the SSAT-I has moved to intervene in this action is sufficient to demonstrate

that this controversy remains a "live" one. At issue, then, is the second aspect of mootness, that is, the parties' interest in the litigation, often referred to as the "personal stake" requirement. *See, e.g., Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 334 n. 6, 100 S. Ct. 1166, 1172 n. 6, 63 L. Ed. 2d 427 (1980); *Ashcroft v. Mattis*, 431 U.S. 171, 172-73, 97 S. Ct. 1739, 1740, 52 L. Ed. 2d 219 (1977); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 755, 96 S. Ct. 1251, 1259, 47 L. Ed. 2d 444 (1976).

The Supreme Court has recognized that a class action plaintiff presents two separate issues for judicial resolution: the claim on the merits, and the claim that he is entitled to represent a class. *Geraghty*, 445 U.S. at 402, 100 S. Ct. at 1211. Application of the personal-stake requirement **[**7]** to a procedural claim such as the right to represent a class is different from application of the requirement to substantive claims. The interest in having a class certified is "more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement," *Geraghty*, 445 U.S. at 403, 100 S. Ct. at 1212. Finding no meaningful distinction between the settlement of the claim here at issue and the expiration of the claim in *Geraghty* for purposes of the ability of the named plaintiff to pursue an appeal of the denial of certification, we hold that a dispute capable of judicial resolution continues to exist with regard to the class certification issue in this case.

While affirming the district court's denial of class certification because of the plaintiff's failure to satisfy the requirements of commonality and typicality, Fed.R.Civ.P. 23(a)(2) and (3), we make no comment upon the merits of the individual actions potentially available to members of the groups for which certification was unsuccessfully sought.

AFFIRMED.

THOMAS CRUMP, ET AL v. GILMER INDEPENDENT SCHOOL DISTRICT

6:92 CV. 315

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION

797 F. Supp. 552; 1992 U.S. Dist. LEXIS 17346

May 29, 1992, Decided

May 29, 1992, Filed and Entered

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff students filed an action pursuant to 42 U.S.C.S. § 1983 against defendant school district for allegedly denying the students the right to participate in their high school graduation ceremony. The student sought a temporary restraining order mandating that the school district allow them to participate in the graduation ceremony.

OVERVIEW: Three students failed to complete successfully the Texas Assessment of Academic Skills Examination (TAAS), a statewide competency examination designed to measure student performance in mathematics and writing, administered by the school district. Except for the TAAS examination, two of the three students had successfully completed all other requirements for a high school diploma. The students filed a § 1983 action against the school district alleging that they were unconstitutionally denied the opportunity to participate in a graduation ceremony. The school district contended that successful completion of the TAAS was required for a high school diploma. The court granted two of the students' requests for a temporary restraining order mandating the school district allow the student to participate in the ceremony. The court found that (1) the students would suffer irreparable harm if they were denied the opportunity to participate in their graduation ceremony; (2) the school district and the public would suffer no harm by allowing the student to participate; and (3) there was a substantial likelihood that the implementation period for the TAAS test was constitutionally deficient.

OUTCOME: The court granted two of the students a temporary restraining order against the school district pending a hearing on the students' motion for a preliminary injunction.

CORE TERMS: graduation, taught, ceremony, high school diploma, curriculum, school district, high school, restraining order, temporary, diploma, notice, successfully completed, competency, pupil, satisfactorily, competency examination, tested, exit, opportunity to participate, injunction, statewide, testing, skills, secondary, preliminary injunction, public interest, essential elements, prerequisite, irreparable, mathematics

JUDGES: [**1] Justice

OPINION BY: WILLIAM WAYNE JUSTICE

OPINION

[*552] *ORDER*

Plaintiffs, Carlos Crump, Sharon Jeffrey, and Wintress Finch, instituted this civil action, pursuant to 42 U.S.C. § 1983, against the Gilmer Independent School District, alleging that they are being unconstitutionally denied a high school diploma and the **[*553]** right to participate in their high school graduation ceremony. Plaintiffs seek a temporary restraining order mandating that the high school allow them to participate in the graduation ceremony, which is scheduled to begin at 8:00 p.m. this evening. An in-chambers hearing on the plaintiffs' application for a temporary restraining order was held on Thursday, May 28, 1992, at 2:00 p.m., at which the court heard the arguments of counsel and the statements of school officials and the plaintiffs. For the reasons stated below, the requested relief will be granted as to plaintiffs Crump and Jeffrey, and denied as to plaintiff Finch.

I. *Facts*

Most of the relevant facts are not in dispute. Plaintiffs are high school seniors at Gilmer High School in Gilmer, Texas, who failed to complete successfully the recently implemented Texas Assessment of Academic Skills Examination **[**2]** (TAAS). Plaintiffs took the examination on April 2, 1992, and received the results on May 11, 1992. [1] Plaintiffs Crump and Jeffrey each failed the examination by two points, while plaintiff Finch failed it by one point.

> 1 The plaintiffs have apparently taken the test on three prior occasions as well, beginning in the fall of 1990.

The TAAS examination is a statewide competency examination designed to measure student performance in mathematics and writing. Texas has required all high school students to pass an examination in order to receive a diploma since 1985. However, successful completion of the TAAS test was only made a requirement for graduation in the fall of 1991. The TAAS examination is substantially more difficult than the test that was previously given to high school students.

Under Texas law, plaintiffs cannot receive a high school diploma until they have successfully completed the TAAS examination. [2] 2 Tex. Educ. Code Ann. § 21.553 (Vernon 1987). The next test is scheduled to be given on July 13, 1992. **[**3]** All three plaintiffs have submitted sworn affidavits stating that they intend to take the test in July 1992, and that they will continue to take any required test until they pass OPPORTUNITY TO LEARN: MULTIPLE OPPORTUNITIES . Except for the TAAS examination, plaintiffs Crump and Jeffrey have successfully completed all other requirements for a high school diploma.

> 2 Section 21.553 provides:

> (a) A pupil who has not performed satisfactorily on all sections of the secondary exit level assessment instrument by the time the pupil has successfully completed the 12th grade level shall not receive a high school diploma until the pupil has performed satisfactorily on all sections of the secondary exit level assessment instrument.
>
> (b) Each time the assessment instrument is administered, a pupil who has not been given a high school diploma because of a failure to perform satisfactorily on all sections of the secondary exit level assessment instrument may retake those sections of the assessment instrument on which the pupil has not performed satisfactorily OPPORTUNITIES TO LEARN.MUTIPLE OPPORTUNITIES
>
> (c) A pupil who has been denied a high school diploma under the provisions of Subsections (a) and (b) above, and who subsequently performs satisfactorily on all sections of the secondary exit level assessment instrument shall be issued a high school diploma.

[4]** II. *Standard for Granting A Temporary Restraining Order*

In order to obtain a temporary restraining order, plaintiffs must demonstrate: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the plaintiff will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury outweighs the threatened harm to the defendant; and (4) that granting the preliminary injunction will not disserve the public interest. *Justin Industries v. Choctaw Securities, L.P.*, 920 F.2d 262, 268 n.7 (5th Cir. 1991); *Mississippi Power & Light v. United Gas Pipe Line,* 760 F.2d 618, 621 (5th Cir. 1985); *Canal Authority of State of Florida v. Callaway,* 489 F.2d 567, 572 (5th Cir. 1974). A temporary restraining order is an extraordinary remedy; it should be granted only if the plaintiff clearly carries the burden of persuasion as to all four factors. *Mississippi Power & Light,* 760 F.2d at 621.

III. *Balancing of Harms*

The last three factors all weigh heavily in favor of the plaintiffs. If it **[*554]** should eventuate that the plaintiffs **[**5]** were wrongly denied their diploma, then they would have forever lost the opportunity to participate in graduation ceremonies with their high school class. It hardly needs emphasizing that high school graduation ceremonies are an occasion to celebrate profound personal achievement and hope for the future. A student's high school graduation is the source of fond memories and treasured mementos and photographs that cannot be replaced. Unquestionably, plaintiffs will suffer irreparable harm if they are denied the opportunity to participate in their graduation ceremony. *Dubey v. Niles Township High Schools District 219,* No. 91- C3523, 1991 U.S. Dist. LEXIS 7739, at *4 (N.D. Ill. June 7, 1991). *Cf. also Albright v. Board, of Educ. of Granite School Dist.*, 765 F. Supp. 682, 686 (D. Utah 1991).

By contrast, defendant will suffer no harm if the students are allowed to participate in the graduation ceremony. The students will not be able to obtain a diploma unless and until they pass the TAAS test or the test is declared invalid. Furthermore, the plaintiffs have no

objection to Gilmer high school announcing in the program or by other **[**6]** means that the plaintiffs have not yet successfully completed the TAAS test.

Defendants assert that the purpose of the graduation ceremony is to reward those students who have completed all their graduation requirements, and that allowing the plaintiffs to participate will cheapen the ceremony for the remaining students. Toward this end, defendants claim that it has always been the practice at Gilmer High School not to allow students to participate in the graduation ceremonies unless they have completed all prerequisites for graduation. Unquestionably, the high school has a strong interest in instilling pride in accomplishment by giving students a strong incentive to complete high school successfully. Plaintiffs do not challenge Gilmer High School's prerogative to require completion of all other graduation requirements, except passing the TAAS test, as a condition to participating in graduation. Nonetheless, plaintiffs Crump and Jeffrey have studied for four years and have completed all other academic requirements. The only element separating plaintiffs Crump and Jeffrey from the other 137 students who will graduate this evening is that they have failed to pass a test which may not **[**7]** be legally valid. Whatever marginal benefits GISD may garner by denying plaintiffs the opportunity to participate in this once in a lifetime experience are outweighed by the tremendous potential for irreparable harm to them.

Nor will allowing plaintiffs to participate in the graduation ceremony cause any harm to the public. The public interest would be ill served if students were wrongly denied an opportunity to reap a benefit to which they were justly entitled. Furthermore, the Texas legislature has determined that the public interest will be adequately served by denying a diploma to students who do not pass the test. *See* 2 Tex. Codes Ann. § 21.553(a) & (c) (Vernon 1987). No statewide law or regulation mandates the additional sanction of denying the student an opportunity to participate in the graduation ceremony.

IV. *Likelihood of Success on the Merits*

The propriety of granting the requested relief therefore turns entirely on whether the plaintiffs are likely to succeed on the merits. The leading case on competency testing of students is *Debra P. v. Turlington,* 644 F.2d 397 (5th Cir. Unit B May 1981), in which the court held unconstitutional **[**8]** a Florida law requiring that students pass a statewide competency examination in order to receive a diploma. [3] In that case, the court held that the state's compulsory attendance law and statewide education program gave students a constitutionally protected expectation that they would receive a diploma if they satisfactorily completed high school. 644 F.2d at 404. *See also Goss v. Lopez,* 419 U.S. 565, 574 (1975). Because **[*555]** the students had a protected property interest, the court held, the state was prohibited from imposing new criteria absent adequate notice due process and a sufficient nexus between the test and the school curriculum. *Id.* BOARD AUTHORITY NEXUS TO STATE GOALS

> 3 For a thorough analysis of potential constitutional problems underlying the establishment of student competency examinations in Texas, *see* Ellen Smith Pryor, *Student Competency Testing in Texas* 16 St. Mary's L. J. 903, 908-921 (1985).

A. *Notice*

With regard to notice, the *Debra P.* court **[**9]** held that due process requires that students be given adequate notice that passing the test is a prerequisite to obtaining a diploma. *Id. Accord Brookhart v. Illinois State Bd. of Education,* 697 F.2d 179, 186 (7th Cir. 1983). Such notice is necessary so that students will have an adequate opportunity to prepare for the test, the school district will have an adequate time to prepare a remedial program, and there will be sufficient time to correct deficiencies in the test and set an appropriate passing score. *See Debra P.,* 644 F.2d at 404; *Brookhart,* 697 F.2d at 186. *See also* Ellen Smith Pryor, *Student Competency Testing in Texas* 16 St. Mary's L. J. 903, 918-919 (1985).

In this case, the students were first exposed to the TAAS test in the fall of 1990, but the test was not made a requirement for graduation until the fall of 1991 DUE PROCESS. Remedial programs tailored to helping students pass the test did not begin until slightly over one year ago, in the spring of 1991 REMEDIATION. Although the notice that must be provided varies according to the circumstance of each case, comparable **[**10]** implementation periods have been declared unconstitutional. *Debra P.,* 644 F.2d at 404 (thirteen month period between implementation of test and denial of diploma violated due process); *Brookhart,* 697 F.2d at 179 (eighteen month period for implementation of competency tests as diploma requirement for handicapped students violated due process).DUE PROCESS In fact, in *Debra P.,* the district court enjoined the state from denying students a diploma for failure to pass the competency examination for four years. *Debra P. v. Turlington,* 474 F. Supp. 244, 267, 269 (M. D. Fla. 1979) *aff'd in part, vacated in part,* 644 F.2d 397 (5th Cir. 1981). The court relied on expert testimony that, in order to meet constitutional standards, at least four to six years was required to implement a new testing requirement. *Id.* Accordingly, it is found that there is a substantial likelihood that the implementation period for the TAAS test will prove to be constitutionally deficient. DUE PROCESS

B. *Nexus Between Curriculum and Examination*

The *Debra P.* court also held that in order for a competency **[**11]** test to be valid, the state must prove that the competency test fairly assessed what was actually taught in the schools. [4] 644 F.2d at 405.

Fundamental fairness requires that the state be put to test on the issue of whether the students were tested on material they were or were not taught.

Just as a teacher in a particular class gives the final exam on what he or she has taught, so should the state give its final exam on what has been taught in its classrooms.

644 F.2d at 406. Significantly, the court refused to accept the state's assurance that the test's content was based on the minimum student performance standards that were required in Florida schools. *Id.* Rather, the court demanded concrete proof that the content of the tests was actually being taught. The court noted that the state had made no effort to ascertain whether or not the minimum student performance standards were actually being taught in Florida public schools. Nor had there been formal studies

conducted to determine whether the skills measured on the test were actually being taught in the schools. 644 F.2d at 405. The court **[**12]** concluded:

We believe that the state administered a test that was, at least on the record **[*556]** before us, fundamentally unfair in that it *may* have covered matters not taught in the schools of the state.

644 F.2d at 404 (emphasis in original). Because of the lack of this proof, the court remanded the case to the district court for a determination of whether the examination was "a fair test of that which was taught." 644 F.2d at 406.

> 4 This requirement is termed "curricular validity." *Debra P.,* 644 F.2d at 405. Curricular validity has two components. First, the test items must adequately correspond to the required curriculum in which the students should have been instructed by the time that they take the test. Second, the test must correspond to the material that was actually taught in the relevant schools, regardless of what should have been taught. E. S. Pryor, *supra* p. 7, 16 St. Mary's L. J. at 915.

[13]** Hence, *Debra P.* indicates that school districts cannot refuse to issue diplomas for failure to pass a state competency examination absent proof that the matters tested are actually taught in the relevant schools. Even at this preliminary stage, there is considerable doubt that the defendant will be able to make this showing. Defendant maintains that the TAAS test is based on the essential elements of English language arts and mathematics, for which each school district is required to provide instruction. [5] However, since defendant's administrators and teachers are not allowed to view the contents of these tests, there is no way of knowing for certain that the TAAS examination is actually based on these elements. There is no statutory requirement, for example, that the test be based solely on these elements. [6] More importantly, even if TAAS is based on the essential elements established by the Board, the effect of this restriction on TAAS would depend entirely on how specific those elements are. The more vague and broad the elements are, the less likely it is that the examination questions will specifically correspond to the school curriculum. Because the district has not given **[**14]** the court any examples of the required elements, the court cannot assess whether those guidelines provide any assurance that TAAS is adequately linked to the school curriculum. Finally, even if the *required* Texas curriculum theoretically covers the materials tested by TAAS, GISD still must prove that the material is actually taught in its schools. *See Debra P.,* 644 F.2d at 405; E. S. Pryor, *supra* p. 7, 16 St. Mary's L. J. at 915.

> 5 Section 21.101 of the Education Code requires school districts to offer "a well balanced curriculum" that includes various subjects including English language arts and mathematics. 2 Tex. Educ. Code Ann. § 21.101(a) (West 1987). The Code further requires the State Board of Education to designate the essential elements of these subjects that must be taught by each school district. 2 Tex. Educ. Code Ann. § 21.101(c) (West 1987).
>
> 6 *See* § 21.551(b) (effective Aug. 28, 1989 (requiring Central Education Agency to adopt exit level assessments based on "competencies for pupils at the 12th grade

level"); § 21.5512(a) (effective Aug. 26, 1991) (requiring State Board of Education to develop performance based examinations based on broad educational goals).

[15]** In sum, the school district must eventually make a substantial showing to demonstrate the validity of the TAAS examination, and there is little assurance that the district will be able to make this showing. On the other hand, there is already some indication that the TAAS examination tests matters outside the curriculum. One of the plaintiffs stated that, based on his experience, TAAS tested areas not covered in the remedial programs or in the regular school curriculum. In addition, school district representatives admitted that they never seen a TAAS examination and were not permitted to view them. Without an opportunity to compare TAAS with its curriculum, it seems likely that there will be at least some divergence between the skills tested by TAAS and the GISD curriculum. Under these circumstances, the court has no choice but to conclude that the plaintiffs have made a substantial showing of a likelihood of success on the merits. STUDENT PREVAILED

V. *Bond Requirement*

Under Fed. R. Civ. P. 65 (b), no security is required if there is no risk of a monetary loss to the defendant if an injunction is granted. *Corrigan Dispatch Co. v. Casa Guzman,* 569 F.2d 300, 303 (5th Cir. 1978); **[**16]** *International Controls Corp. v. Vesco,* 490 F.2d 1334, 1356 (2nd Cir.), *cert. denied,* 417 U.S. 932 (1974). It is found that there is no threat of an injury to the defendant if the injunction is granted; therefore, security is not required.

[*557] VI. *Conclusion*

It is found that plaintiffs Carlos Crump and Sharon Jeffrey have made the requisite showing for a temporary restraining order, and that they have no adequate remedy at law. It is further found that plaintiff Wintress Finch has not made the requisite showing for a temporary restraining order, in that she has not demonstrated that she has completed successfully completed all prerequisites to graduation except for completion of the TAAS exam. It is further found that the posting of security is not required.

Accordingly, the defendant, Gilmer Independent School District, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this temporary restraining order by personal service or otherwise, shall be, and they are hereby, **TEMPORARILY RESTRAINED AND ENJOINED,** pending hearing **[**17]** on plaintiff's motion for preliminary injunction, below ordered, from failing to comply with the following order and injunction:

Defendant, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this temporary restraining order by personal service or otherwise, shall be, and they are hereby, **ORDERED** and **ENJOINED** to permit plaintiffs Carlos Crump and Sharon Jeffrey to participate fully, except as herein provided, in the graduation exercises of the Gilmer High School, scheduled at 8:00 o'clock p.m. on this 29th day of May, 1992;

PROVIDED, however, that defendant may have it announced at ceremonies, if its officials so desire, that such plaintiffs have not yet successfully completed the Texas Assessment of Academic Skills (TAAS) Examination; and **PROVIDED,** further, that defendant shall not be required to issue a diploma to either of such plaintiffs until each, respectively, has successfully completed the state mandated TAAS Examination.

It is further **ORDERED** that plaintiff's motion for preliminary injunction shall be, and it is hereby, set down for hearing on the 9th day **[**18]** of June, 1992, at 10:00 o'clock a.m., before the undersigned judge, in Room 306, United States Courthouse Annex, 211 West Ferguson Street, Tyler, Texas.

It is further **ORDERED** that no bond or other security shall be required of plaintiff to effectuate this order.

SIGNED this 29th day of May, 1992, at 11:42 a.m., in Tyler, Texas.

William Wayne Justice

United States District Judge

Eastern District of Texas

LAURITZ A. WILLIAMS, Plaintiff v. AUSTIN INDEPENDENT SCHOOL DISTRICT, Defendant

CIVIL NO. A-92-CA-346

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

796 F. Supp. 251; 1992 U.S. Dist. LEXIS 8261

June 9, 1992, Decided

June 9, 1992, Filed

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff father filed a motion for a temporary restraining order, requesting the Court to require defendant school district to allow his son to participate in a high school graduation ceremony.

OVERVIEW: The son had failed to pass the mathematics portion of a test required for graduation. The father argued that if the son was not allowed to graduate with his fellow classmates, he would be unconstitutionally denied a high school diploma and the right to participate in the ceremony. To prevail, the father had to show substantial likelihood of success on the merits, substantial threat that the son would suffer irreparable injury, that the threatened injury outweighed harm to the school district, and that the injunction would not disserve the public interest. The court found that it was unlikely that the father would prevail on the merits. The son had sufficient notice that the test would be required and he was provided with the courses he needed to pass the test. He suffered no irreparable injury because he had further opportunity to take and pass the test, and thereby earn his degree. Finally, the court believed the public interest was better served by the court not interfering with the decisions of the school district, the Texas Legislature, the State Board of Education, and the Texas Education Agency.

OUTCOME: The court declined to enter a temporary restraining order or a preliminary injunction.

CORE TERMS: high school diploma, graduation, diploma, ceremony, graduate, high school, school districts, public interest, notice, math, literacy test, injunction, functional, elected, taught, school students, high school senior, level of education, injunctive relief, irreparable injury, public education, process violation, property interest, educational, prevail, restraining order, prepare, temporary, right to participate, preliminary injunction

COUNSEL: [1]** Attorney for Plaintiff: LAURITZ A. WILLIAMS, SR., PRO SE.

Attorney for Defendant: JAMES R. RAUP, McGINNIS, LOCHRIDGE & KILGORE.

JUDGES: SPARKS

OPINION BY: SAM SPARKS

OPINION

[*252] MEMORANDUM OPINION

Plaintiff Lauritz A. Williams ("Williams") filed a Motion for Temporary Restraining Order on June 2, 1992, requesting this Court to require the Austin Independent School District ("AISD") to allow his son, Lauritz A. Williams, Jr., ("Williams, Jr.") to participate in the McCallum High School Graduation Ceremony on June 3, 1992. Because Williams, Jr. would not be allowed to graduate with his fellow classmates, Williams claims he is being "unconstitutionally denied a high school diploma and the right to participate in the McCallum High School Graduation Ceremony." On June 2, 1992, the Court held an evidentiary hearing in which the parties appeared in person and/or by and through counsel of record. After listening to the testimony of witnesses and arguments of counsel, the Court orally denied the temporary restraining order.

Facts

Williams' son, Williams, Jr., is a high school senior at McCallum High School in Austin, Texas who failed to complete successfully the recently implemented Texas Assessment of Academic Skills **[**2]** Examination ("TAAS"). Williams, Jr. failed the math portion of the April, 1991, TAAS test by one point. He was re-tested in April, 1992, and again failed. Williams, Jr. received his latest results in May, 1992. (Opportunity to learn: multiple attempts to pass the test)When Williams attempted to file a formal appeal with the Commissioner of Education for the State of Texas, he was informed that "the appropriate remedy lies with the judiciary." May 26, 1992, letter to Lauritz A Williams, from Joan Howard Allen of the Texas Education Agency.

The TAAS examination is a statewide competency examination designed to measure student performance in mathematics and English language arts. High school students in Texas must pass all sections of the TAAS before he or she may receive a high school diploma. Tex. Educ. Code § 21.553(a). Students may retake the sections he or she previously failed until he or she performs satisfactorily on all sections of the test, at which time he or she "shall be issued a high school diploma." *Id.* § 21.553(b), (c). Students have been required to perform satisfactorily on all sections of a "secondary exit level assessment instrument" in order to graduate since Sept. 1, 1984. *See id.* However, Williams is correct **[**3]** that successful completion of the TAAS in particular was only made a requirement **[*253]** for graduation in the fall of 1991, although the TAAS was first administered in October, 1990. According to Williams, who has never seen nor taken the TAAS, the TAAS is substantially more difficult than the test previously required for graduation by high school students in Texas. [1]

> 1 Williams told the Court he decided to file this lawsuit after reading in the newspaper that Federal Judge William Wayne Justice had ordered the Gilmer Independent School District to allow two students, who had failed the TAAS but completed their other graduation requirements, to participate in the Gilmer High School Graduation Ceremony. Williams' opinion on the difficulty of the TAAS presumably came at least partially from that newspaper article and his son.

Preliminary Injunctive Relief

A. *Standard*

To obtain preliminary injunctive relief, Williams must demonstrate: (1) a substantial likelihood of success on the merits; (2) a substantial threat **[**4]** that Williams, Jr. will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury outweighs the threatened harm to the defendant; and (4) that granting the injunction will not disserve the public interest. *Crump v. Gilmer Indep. School Dist.,* No. 6:92-CV-315, slip op. at 3 (E.D. Tex. May 29, 1992); *Mississippi Power & Light v. United Gas Pipe Line,* 760 F.2d 618, 621 (5th Cir. 1985). A preliminary injunction is an extraordinary remedy, which should only be granted if the plaintiff clearly carries the burden of persuasion on each factor. *Id.*

B. *Analysis*

1. *Likelihood of Success on the Merits*

Whether a high school student should be allowed to graduate from a Texas high school is a question more properly answered by the Texas legislature or the Texas Board of Education. Education is not a fundamental right. Absent allegations of equal protection violations, decisions regarding educational requirements are not generally subject to federal court scrutiny under the Fourteenth Amendment. *JUDICIAL RELUCTANCE See San Antonio School Dist. v. Rodriguez,* 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1972).

With that in mind, it **[**5]** becomes apparent that Williams has a heavy burden. Williams claims his son was unconstitutionally denied a high school diploma and the right to participate in the June 3, 1992, McCallum High School Graduation Ceremony. Construing his complaint liberally, [2] the basis for William's claims are that his son was given inadequate notice that he would have to pass the TAAS due process and that the courses he took at McCallum High School inadequately prepared him to pass the TAAS, OPPORTUNITY TO LEARN violating his son's right to due process under the Fourteenth Amendment. In his complaint, Williams does not make an equal protection violation claim, and during the hearing he confirmed that he was not challenging the TAAS as being racially biased.

2 Williams is representing his son pro se.

The Court recognizes that in enacting systems of free public education with mandatory attendance, States create "legitimate entitlements to a public education as a property interest which may be protected by the due process Clause." *See Goss v. Lopez,* 419 U.S. 565, 574, 95 S. Ct. 729, 736, 42 L. Ed. 2d 725 (1975); **[**6]** *Debra P. v. Turlington,* 644 F.2d 397, 403 (5th Cir. 1981). However, that is not the issue here. Williams is not arguing that the Austin Independent School District is depriving him of an education. Indeed, the very test Williams complains of was designed to ensure that Texas students actually receive a minimum level of education before they are allowed to graduate. NEXUS TO STATE GOALS

The Court also recognizes that the Fifth Circuit in *Debra P. v. Turlington* found that students have a legitimate expectation they will receive diplomas if they attend school for the requisite number of years and take and pass required courses. *Debra P.*, 644 F.2d at 404. In that case, the Court found students had been given inadequate notice that they must pass a **[*254]** functional literacy test before they could graduate. *Id.* The students in *Debra P. v. Turlington* had thirteen months notice between the administration of the first functional literacy test and the administration of the third functional literacy test, which would be the last test given to that year's high school seniors in order to graduate at the normally expected time. *Debra P. v. Turlington,* 474 F. Supp. 244 (M.D. Fla. 1979), **[**7]** *aff'd* 644 F.2d 397 (5th Cir. 1981).

In this case, students in Texas have known for seven years that they must pass a comprehensive examination before receiving their diplomas. According to the testimony of Penny Miller, the principal of McCallum High School, students upon entering McCallum High School are given a high school guide, which discusses the TAAS [3] and the fact that all students must pass the test to graduate. She also testified that teachers frequently discuss the TAAS with their students in class. Williams offered no evidence to contradict her testimony.

> 3 In the case of students entering high school beginning in 1984, but before the TAAS replaced earlier versions of the examination, the guide would presumably have discussed the earlier version of the mandatory examination. In either case, however, students would have been made aware that passage of *some* final comprehensive examination was a prerequisite to graduation from McCallum High School.

That some students who may have **[**8]** passed last year's test will fail this year's allegedly more difficult test does not render the test unconstitutional. Taking the holding of *Debra P. v. Turlington* and stretching it to mean that not only must students be given time to generally prepare for a comprehensive test like the functional literacy test administered in Florida, but they must be given time to specifically prepare for the same, but more difficult, kind of test does not further the purpose of that holding. Students should be given a fair opportunity to pass the test, not a guarantee that they will pass the test. DUE PROCESS

From the evidence presented to the Court, it appears that Williams, Jr. was given adequate notice that he must pass the TAAS to graduate and is unlikely to prevail on the merits based on inadequate notice. due process EDUCATIONAL AGENCY PREVAILED

Williams is also unlikely to prevail on the merits of his second asserted due process violation, that his son was not taught all the material tested on the TAAS. *See Debra P.*, 644 F.2d at 404-06. In *Debra P. v. Turlington* the Court found that a test required for graduation could be "fundamentally unfair" and constitute a due process violation if the test did not measure **[**9]** what was actually taught in school. *Id.* at 404-05. In that case the Fifth Circuit Court of Appeals sent that issue back to the district court on remand

because the State of Florida had "merely assumed" the materials covered on the test were being taught, but offered no real proof that they actually were. *Id.* at 405.

In this case, however, AISD presented substantial evidence that McCallum High School provided, and Williams took, courses which adequately prepared him to take and pass the TAAS. Elton Shillup, Math Coordinator for AISD, testified that the math portion [4] of the TAAS primarily covers algebra and geometry. He and Penny Miller testified that Williams, Jr. took pre-algebra, geometry, algebra, and two tutorial courses designed to help students who had failed the math portion of the TAAS. Mr. Shillup further testified that, although the TAAS is a "closed test", [5] the Texas Education Agency provides the school with a book describing the thirteen objectives of the TAAS, with 138 subcomponents, and giving other general information about what the TAAS covers. From this information, course curricula are designed specifically to include the **[**10]** material described in the objectives to prepare students to take the TAAS. Thus, unlike the State of Florida in *Debra P. v. Turlington* the AISD has not "merely assumed" that the subject **[*255]** matter tested on the TAAS is taught in Texas high schools. CURRICULAR VALIDITY

4 Recall Williams, Jr. failed only the math portion of the TAAS.

5 A "closed test" means teachers and AISD officials are not allowed to view the contents of the test or students' answers.

Again, Williams put on no evidence to contradict the testimony of AISD witnesses, which the Court found both credible and persuasive. Williams is not likely to prevail on the merits of either due process violation claim. due process EDUCATIONAL AGENCY PREVAILED

2. *Irreparable Injury*

Williams suffered no irreparable injury by not being allowed to participate in McCallum High School's June 3, 1992, Graduation Ceremony. While the Court recognizes that high school graduation is an important and memorable occasion in a young person's life, "walking across the stage" certainly does not rise to the level of a constitutionally **[**11]** protected property interest any more than attending one's high school prom, which most young people also expect to do after completing twelve years of public school. It is the actual high school diploma which is the property interest described in *Debra P. v. Turlington. Debra P.* 644 F.2d at 404. There is no accompanying constitutional right to receive that diploma at a specific graduation ceremony, and while this Court certainly has no objection to the Austin Independent School District ("AISD") allowing Williams to participate in McCallum's June 3 Graduation Ceremony tomorrow, it will not order the AISD to do so. Furthermore, the evidence is undisputed that if Williams takes and passes the TAAS in July, or at a later date, he can participate in the August graduation ceremony or in a later graduation ceremony.

Assuming Williams also wanted this Court to issue an injunction requiring AISD to grant Williams, Jr. his high school diploma at the June 3 ceremony, the Court also finds Williams, Jr. is not irreparably injured by not receiving his diploma immediately. Not

only has Texas altered the property right described in *Debra P. v. Turlington* so that students **[**12]** in Texas since 1985 only have a legitimate expectation of receiving a diploma after attending school for the requisite number of years, successfully completing required courses, *and* passing a comprehensive exit examination, but Williams will still receive a high school diploma when he passes the TAAS.

3. *Threatened Injury*

The injury to both Williams, Jr. and the AISD is comparable and does not affect the result in this case. Williams, Jr. will suffer to the extent that participating in one's high school graduation ceremony with his or her peers is important to many students. Nonetheless, Williams, Jr. will still have the opportunity to participate in a graduation ceremony at a later time. As for the AISD, while the Court does not believe the AISD would be greatly injured by allowing Williams, Jr. to participate without receiving a real high school diploma, the Court respects the principals' decision to not allow participation by students who failed the TAAS in order to send a message to students that passing the TAAS really is necessary in order to graduate and to properly recognize those students who have completed all the requirements for graduation. [6]

> 6 Penny Miller, McCallum High School Principal, testified that principals from all the high schools in the Austin Independent School District held a meeting approximately two weeks ago to decide whether students who had failed the TAAS should be allowed to participate in this spring's graduation ceremonies.

[13]** 4. *Public Interest*

The Court believes the public interest is better served by this Court not interfering with the decisions of the AISD, the Texas Legislature, the State Board of Education, and the Texas Education Agency ("TEA"). The Texas Constitution vests the duty of establishing "an efficient system of public free schools" and a State Board of Education in the Texas Legislature. Tex. Const., art. VII, §§ 1, 8. The Texas Legislature, in turn, states that trustees, elected to serve in independent school districts, "shall have the exclusive power to manage and govern the public free schools of the district." Tex. Educ. Code § 23.26(b); *see also* § 23.01; § 23.08; § 23.13. There is no question that the education of Texas **[*256]** children and determination of educational policies in Texas are state matters, with which this Court should interfere only when constitutional rights are clearly being violated. *See Debra P.*, 644 F.2d at 402-03 (citing *Cumming v. Bd. of Educ.*, 175 U.S. 528, 545, 20 S. Ct. 197, 201, 44 L. Ed. 262 (1899); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 74 S. Ct. 686, 691, 98 L. Ed. 873 (1954); *Goss v. Lopez*, 419 U.S. 565, 574, 95 S. Ct. 729, 736, 42 L. Ed. 2d 725 (1975)). **[**14]**

The citizens of Texas are disserved when federal judges substitute their notions of fairness in place of officials elected to make these kinds of policy decisions and judgment calls. Whether or not Williams, Jr. is allowed to participate in the June 3 McCallum High School Graduation Ceremony, the Court does not believe the public interest is substantially effected. Granting Williams, Jr., or any other student who has failed the TAAS, a diploma, however, may disserve the public interest. If, as adjudged by the Texas Legislature, the elected State Board of Education, and the TEA, the ability to pass the

TAAS does indicate that a student has received an acceptable level of education and is prepared to enter the work force or proceed on with higher education, then allowing students who have not passed the TAAS to receive a diploma harms the public. The citizens of Texas have a right to expect that a high school graduate is educated and that a diploma is not a meaningless piece of paper.

Conclusion

The Court declines to enter a temporary restraining order or a preliminary injunction. Williams has not shown this Court that he is likely to succeed on the merits or that his son will **[**15]** be irreparably harmed if a preliminary injunction is not issued. The decisions to not grant Williams' son a diploma or allow him to participate in the June 3, 1992, McCallum High School Graduation Ceremony are decisions belonging to the AISD, the Texas Education Agency, and the Texas Legislature. There being no clear showing of a constitutional injury absent the granting of preliminary injunctive relief, this Court will not interfere with those decisions at this time.

Furthermore, the Court has reviewed Judge William Wayne Justice's opinion of May 29, 1992, in *Crump v. Gilmer Indep. School Dist.,* No. 6:92-CV-315, which was both the catalyst and basis of the filing of this lawsuit by Williams. While the contentions and supporting evidence of these cases are obviously dissimilar, this Court is also in basic disagreement with Judge Justice. The right of a free public education in Texas is a Texas constitutional right, and the level of education and academic achievement necessary to obtain a diploma from a Texas high school is appropriately a judgment call for the persons elected for that state responsibility and those experienced persons responsible for educating and preparing students **[**16]** to achieve the established level of competence. Any interference in this process is simply destructive to the attempts by the state to salvage its educational system, and this includes interference by the federal judiciary.
JUDICIAL RELUCTANCE

SIGNED this 9 day of June, 1992.

SAM SPARKS, UNITED STATES DISTRICT JUDGE

TARCHIA RANKINS, CHAD YANCY, SONOVIA HICKS, SEKARI WILLIAMS, AND KAWANDA BEAUCHAMP v. LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION

No. 93 CA 1879

COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT

93 1879 (La.App. 1 Cir. 03/17/94); 637 So. 2d 548; 1994 La. App. LEXIS 1444

March 17, 1994, Rendered

SUBSEQUENT HISTORY: [**1] Released for Publication May 5, 1994.

PRIOR HISTORY: Appealed from the Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, Louisiana Trial Court No. 394,923, Honorable Joseph Keogh, Judge

DISPOSITION: REVERSED AND RENDERED

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant state board of education sought review of an order of the Nineteenth Judicial District Court, East Baton Rouge Parish (Louisiana), which issued a preliminary injunction prohibiting the board of education from withholding plaintiff students' high school diplomas despite their graduation exit examination (GEE) failure.

OVERVIEW: The students sought the award of their high school diplomas and a declaration as to the invalidity of the board of education's GEE policy. The trial court held that the GEE had been unconstitutionally administered in violation of the equal protection clause of the federal and state constitutions. The court held that the board of education had authority to establish the GEE as a requirement for obtaining a state diploma and that the trial court erred in holding that the GEE was being administered in violation of the equal protection clause. Under constitutional proscriptions, the board of education could not dictate the curriculum or set exit exam requirements in non-public schools; to do so would be an "excessive entanglement" violative of U.S. Const. amend. I. The state could impose an exit exam requirement on students without violating equal protection provided the exam was specifically tied to the curriculum. The court held that the GEE did not violate the equal protection clause because its administration was rationally related to the state's legitimate interest of insuring minimum competency among persons obtaining a state diploma.

OUTCOME: The court reversed the portion of the district court's judgment which stated that the GEE violated the equal protection clause and vacated the preliminary injunction issued with respect to the students' diplomas.

CORE TERMS: non-public, exam, exit, graduation, curriculum, school students, high school diploma, elementary, grade, diploma, taught, equal protection, administered, public schools, supervision and control, home study, vocational-technical, classification, competency, secondary schools, rational relationship, referenced, religious, criterion, insuring, public education, secondary education, special schools, general powers, standards of review

COUNSEL: Ernest Johnson and Ronald Johnson, Baton Rouge, LA, Attorneys for Plaintiffs-Appellees, Tarchia Rankins, et al.

Roy A. Mongrue, Jr. and Margo Fleet, Baton Rouge, LA, Attorneys for Defendant-Appellant Board of Elementary and Secondary Education.

Thomas A. Rayer, Denechaud and Denechaud, New Orleans, LA, Attorney for La. Federation, Citizens for Educational Freedom, Amicus Curiae.

JUDGES: BEFORE: LOTTINGER, C.J., CARTER, CRAIN, LEBLANC, AND WHIPPLE, JJ.

OPINION BY: LOTTINGER

OPINION

[*550] BEFORE: LOTTINGER, CHIEF JUDGE.

The subject of this litigation is Louisiana's graduation exit examination (GEE) which has been a requirement for obtaining a state high school diploma since 1989. The five plaintiffs in this case, all Louisiana public school students, failed to pass the GEE before the end of their senior year in high school. They have all accumulated the required 23 Carnegie units [1] necessary for graduation but, because of their failure to pass the GEE, **[**2]** they have not received their respective diplomas. SOLE CRITERION. Plaintiffs filed this suit seeking the award of their high school diplomas and a declaration as to the invalidity of the Board of Elementary and Secondary Education's (BESE) GEE policy.

> 1 Prior to implementation of the GEE, the only academic requirement for high school graduation was the successful completion of 23 Carnegie units. The required units presently consist of 4 units of English, 3 units of mathematics, 3 units of science, 3 units of social studies, 2 units of health and physical education, 1/2 unit of computer literacy, and 7 1/2 units of electives. Louisiana Department of Education, Louisiana Handbook for School Administrators (revised November 1992). SOLE CRITERION

Following a hearing, the trial judge issued a preliminary injunction prohibiting BESE **[*551]** from withholding the plaintiffs' state high school diplomas despite their failure of the GEE. In his written reasons for judgment, the judge stated that the GEE has been unconstitutionally administered in violation of **[**3]** the equal protection clause of the United States and Louisiana Constitutions. From this judgment, BESE appeals.

The central issues raised by this appeal are:

(1) whether BESE has authority to establish the GEE as a graduation requirement; and

(2) whether the GEE is being administered in violation of the equal protection clause.

BESE'S AUTHORITY

Plaintiffs assert that BESE exceeded the scope of its authority in adopting the GEE because the legislature did not specifically authorize a graduation exit exam. For the reasons assigned below, we conclude that BESE has authority to establish the GEE as a requirement for obtaining a state diploma.

Article VIII Section 3(A) of the Louisiana Constitution provides that:

> The State Board of Elementary and Secondary Education is created as a body corporate. It shall supervise and control the public elementary and secondary schools, vocational-technical training and special schools under its jurisdiction and shall have budgetary responsibility for all funds appropriated or allocated by the state for those schools, all as provided by law. The board shall have other powers, duties, and responsibilities as provided by this constitution [**4] or by law, but shall have no control over the business affairs of a parish or city school board or the selection or removal of its officers and employees.

The Louisiana Supreme Court, in *Aguillard v. Treen*, 440 So. 2d 704, 708 (La. 1983), concluded that this constitutional provision is not self-executing. Thus, BESE's supervision and control of public elementary and secondary education is not unfettered, but is subject to the laws passed by the legislature. [2] *Id.* We therefore look to legislative enactments in search of BESE's authority to establish the GEE.

> 2 In answering a certified question from the United States Fifth Circuit Court of Appeals, the *Aguillard* court discussed the meaning of the phrase "as provided by law" contained in La. Const. art. VIII § 3(A). The court concluded that according to this phrase, "the Board shall supervise and control the public elementary and secondary schools as provided 'by the legislature' or 'by statute.'" *Id.* at 708, *see also Board of Elementary and Secondary Education v. Nix*, 347 So. 2d 147, (La. 1977) (The Louisiana Supreme Court interpreted La. Const. art. VIII § 3(A) to mean that although the legislature shall provide by law for the supervision, control, and budgetary power of the board, the legislature cannot regulate and limit BESE's constitutional grant of power to supervise, control, and budget education.)

[**5] The legislature set forth the general powers of BESE in La. R.S. 17:6. This statute contains numerous grants of specific powers as well as the following general provision:

> A. In the exercise of its supervision and control over the public elementary and secondary schools, vocational-technical and postsecondary vocational-technical schools and programs except in colleges and universities, and special schools under its jurisdiction, and in the exercise of its budgetary responsibility for all funds appropriated or allocated by the state for public elementary and secondary schools, vocational-technical and postsecondary

> vocational-technical programs and schools except colleges and universities, and special schools placed under its jurisdiction, the board shall have authority to:
>
> (15) Perform such other functions as are necessary to the supervision and control of those phases of education under its supervision and control.

Under this grant of general power and in the absence of specific legislation regarding the development of a graduation exit exam, BESE retains the authority to establish the GEE.

In brief, plaintiffs assert that BESE exceeded its **[**6]** authority because "the legislature did not express the intent in [La. R.S. 17: 24.4] that the eleventh grade criterion-referenced **[*552]** test was to be administered as a graduation exit exam." The pertinent parts of this statute provide:

> A. (2) "The Louisiana Educational Assessment Program" means a process of measuring pupil performance in relation to grade appropriate skills, state curriculum standards, and national indices.
>
> F. The Department of Education shall begin implementation of a Louisiana Educational Assessment Program, with the approval of the State Board of Elementary and Secondary Education. . . . A grade eleven criterion-referenced test shall be piloted no later than the 1987-1988 school year with implementation no later than 1988-1989.

La. R.S. 17:24.4.

While plaintiffs are correct in their assertion that the statute is devoid of legislative intent regarding graduation exit exams, this silence does not imply that BESE exceeded the scope of its authority. Under La. R.S. 17:6(A)(15), BESE has broad powers to perform such functions as are necessary for the supervision and control of public education. Because the legislature has not expressed **[**7]** a contrary intent, [3] BESE retains the power under this statute to implement the GEE as a graduation requirement. BOARD AUTHORITY

> 3 House Concurrent Resolution 204 of 1989 provides some evidence of the legislature's intent regarding the GEE. In April of 1989, BESE adopted a resolution requiring all Louisiana students, public and non-public, to pass the GEE before obtaini:ng a state high school diploma. In response to this resolution, the legislature adopted House Concurrent Resolution 204 which expresses the legislature's intent to limit the applicability of the GEE to public school students. Following this action by the legislature, BESE adopted a new policy which stated that the GEE would be mandatory for public students and optional for non-public students.
>
> This resolution is significant in that the legislature did not disapprove of BESE's plans to make the GEE a requirement for Louisiana's public school students.

For the foregoing reasons, we conclude that BESE has authority to establish the GEE as a requirement for obtaining **[**8]** a state high school diploma. Having reached this

conclusion, we now consider whether BESE's administration of the GEE violates the equal protection clause. BOARD AUTHORITY: EDUCATIONAL AGENCY PREVAILED

EQUAL PROTECTION

In challenging BESE's GEE policy, plaintiffs note that students attending state approved non-public schools, home study students, and persons obtaining a General Educational Development Diploma (GED), are not required to take the GEE prior to receiving a state diploma. On the other hand, public school students must successfully complete the 23 Carnegie units and pass the GEE before obtaining a state diploma. Based on this uneven administration of the GEE, the trial judge concluded "that the Graduate Exit Exam (GEE) has been unconstitutionally administered in violation of the equal protection Laws of the Fourteenth Amendment of the U.S. and Louisiana Constitutions."

After a careful review of the applicable constitutional provisions and jurisprudence, we conclude that the trial judge erred in holding that the GEE is being administered in violation of the equal protection clause. EQUAL PROTECTION: EDUCATIONAL AGENCY PREVAILED

A. BESE's Authority Over Non-public Schools

We first consider the scope of BESE's authority over non-public schools. La. Const. **[**9]** art. VIII § 4 gives BESE the limited power to approve "a private elementary, secondary, or proprietary school with a sustained curriculum or specialized course of study of quality at least equal to that prescribed for similar public schools. . . ." According to the testimony of Louisiana State Superintendent of Education, Raymond G. Arveson, the key factor in approving a non-public school is whether the school offers the 23 Carnegie units. In granting or withholding approval, BESE may only compare the quality of the curriculum of the non-public school with the mandated curriculum of the public schools. This limited constitutional authority to approve non-public schools does not empower BESE to mandate the contents of the courses taught or to require that the students pass the GEE prior to graduation.

[*553] BESE's authority over non-public schools is further constrained by the United States Constitution. The United States Supreme Court has held that the First and Fourteenth Amendments prevent the state from intruding into family decisions in the areas of religious freedom and parental control over the rearing of children.

The right of parents to choose the means and methods whereby **[**10]** their children may be educated free from unreasonable or excessive government interference is a liberty protected by the Fourteenth Amendment. In *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), the Court set forth the following:

> Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore

> pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, **[**11]** to recognize and prepare him for additional obligations.

Pierce, 268 U.S. at 534-35.

The Court reaffirmed the constitutional right of parental choice in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). Therein the Court acknowledged that the state may "impose reasonable regulations for the control and duration of basic education." *Id.* at 213. However, the Court limited this power by observing that reasonable regulations must "yield to the right of parents to provide an equivalent education in a privately operated system." *Id.* The Court then concluded:

> thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, "prepare [them] for additional **[**12]** obligations."

Id. at 214.

Under these constitutional proscriptions, BESE cannot dictate the curriculum or set exit exam requirements in non-public schools without infringing upon the rights of parents who choose to send their children to non-public schools or who choose religious over public education

B. The Holdings of *Debra P.*

The seminal case in the area of exit exams arose under similar circumstances in Florida. *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981). In *Debra P.* a group of Florida high school students challenged the validity of the Florida State Student Assessment Test which was a condition for receipt of a high school diploma. [4] The Fifth Circuit held that there was no equal protection violation merely because the exit exam was applied only to public school students. *Id.* at 406. Citing *Ambach v. Norwick*, 441 U.S. 68, 77, 99 S. Ct. 1589, 1595, n.8, 60 L. Ed. 2d 49, 57 (1979), the court stated, "the state need not correct all the problems of education in one fell **[**13]** swoop and it has a stronger interest in those for which it pays the cost." 644 F.2d at 406-07.

> 4 Plaintiffs attempt to distinguish the *Debra P.* case from the present case by noting that "the Louisiana State Legislature has expressed no interest in the implementation of a graduation exit exam which is different from the State of Florida." In light of our conclusions in the first portion of this opinion, this

distinction does not affect the application of the *Debra P.* holdings to the facts of this case.

A second holding in the *Debra P.* case is that an exit exam cannot be made a requirement for graduation unless it is specifically **[*554]** tied to the curriculum taught in the schools. [5] 644 F.2d at 406. This is known as a criterion-referenced examination. The requirement that exit exams be criterion referenced is necessary to avoid equal protection problems which may arise if the test attempts to gauge general knowledge and is consequently biased because of social and noneducational factors.

5 The Fifth Circuit remanded the case to hear evidence on whether Florida's exit exam tested materials actually taught in Florida's public schools and to determine whether the exam had a racially discriminatory impact. 644 F.2d at 408. Following the district court's decision on remand, the case was appealed to the Eleventh Circuit Court of Appeals. *Debra P. v. Turlington*, 730 F.2d 1405 (11th Cir. 1984). The Eleventh Circuit affirmed the district court's findings that the Florida students were taught tested skills, that the exam did not discriminate, and that the exam would help remedy the vestiges of past segregation. 730 F.2d at 1416-17.

[14]** According to *Debra P.*, the state may impose an exit exam requirement on students without violating equal protection, provided the exam is specifically tied to the curriculum. The GEE is a five part, criterion referenced exam which tests skills from Louisiana's mandated public school curriculum. The English Language Arts, Written Composition, and Mathematics portions of the GEE are first administered in the 10th grade CURRICULAR VALIDITY. Students who fail any of these portions may retake them in the 11th and 12th grades. The Science and Social Studies portions are first given in the 11th grade and may be retaken in the 12th grade. [6] Remediation is offered for students who have failed any section of the GEE. Remediation and testing remain available to students after completion of their high school curriculum. REMEDIATION

6 Students are afforded four opportunities to take and pass the Science and Social Studies portions of the exam and they have six opportunities to take and pass the other sections. OPPORUNITY TO LEARN: MULTIPLE OPPORTUNITIES

The GEE requirement applies to public **[**15]** high school students with exceptions for home study students, [7] persons who obtain a GED, [8] and non-public school students. [9] These limited exceptions are not arbitrary, but rather are mandated by the holding of *Debra P.* which prohibits the state from requiring passage of an exit exam unless the exam tests the content of subjects actually taught in the schools. CURRICULAR VALIDITY

7 Home study students who return to the public school system in the eleventh grade are not required to take three of the five parts of the GEE and students returning in the twelfth grade are not required to take any part of the exam.

8 Persons obtaining a GED are not required to take any part of the GEE.

9 BESE maintains a policy of optional participation for approved non-public schools.

As discussed above, the Louisiana and U.S. Constitutions prohibit BESE from dictating the contents of the curriculum in non-public schools and in home study programs. Thus, requiring these students to pass a test covering materials that were not necessarily **[**16]** taught, clearly violates the rule of *Debra P.* Additionally, because *Debra P.* mandates that exit exams be criterion referenced, persons who obtain a GED cannot be required to pass the GEE which is based on the curriculum taught in Louisiana's public schools.

In sum, because BESE cannot mandate the content of the curriculum taught in non-public schools or in home study programs and because *Debra P.* requires that exit exams be criterion referenced, BESE cannot require that non-public students, home study students, or persons obtaining a GED pass the GEE prior to receiving a state diploma. BOARD AUTHORITY: EDUCATIONAL AGENCY PREVAILED

C. The Rational Relationship Standard

In analyzing equal protection claims, the courts have established three standards of review. *Sibley v. Board of Supervisors of Louisiana State University*, 477 So. 2d 1094, 1107 (La. 1985) (on rehearing). When legislative enactments classify persons by race or religious beliefs, the strict scrutiny standard is applied. For classifications based on birth, age, sex, culture, physical condition, or political ideas or affiliations, an intermediate standard of review is appropriate. All other classifications are analyzed **[**17]** under the rational relationship standard.

In the present case, the classification of public versus non-public school students [10] **[*555]** does not involve any of the suspect or intermediate classifications recognized under the equal protection analysis. Thus, the rational relationship standard is the proper standard of review. Under this standard the challenger must establish that the legislative classification at issue is not rationally related to any legitimate state purpose. *Pierre v. Administrator, Louisiana Office of Employment Security*, 553 So. 2d 442, 447 (La. 1989).

10 There is no evidence in the record which attempts to set forth the number of non-parochial schools in Louisiana vis a vis parochial schools. Therefore, under the equal protection analysis, the students are classified as public versus non-public.

In applying the rational relationship standard in Debra P., the court held that the exit exam bears a rational relation to Florida's valid interest of insuring the functional [**18] literacy of its graduating students. Debra P., 644 F.2d at 406. In the present case, the state of Louisiana has a valid interest of insuring the minimum competency of persons obtaining a state diploma. The GEE bears a rational relationship to this goal by insuring that students who obtain a state diploma have reached the required level of competency. We also note that BESE's policies regarding remediation and retesting further the state's interest by providing failing students an opportunity to achieve the required level of competency.

Plaintiffs suggest that because approved non-public schools receive state funding, the state also has an interest in the quality of education in those non-public schools. The United States Supreme Court has recognized that limited financial assistance to non-public school students is permissible provided it does not create an excessive government entanglement with the non-public schools. *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). Limited funding to non-public school students does not authorize the state to impose curriculum or graduation requirements on **[**19]** non-public school students. Any attempt to establish the GEE requirement in a non-public school would be an "excessive entanglement" and thus, violate the First Amendment of the United States Constitution. EQUAL PROTECTION

Although the state provides certain funds for services which directly assist students in non-public schools, we join the *Debra P.* court in acknowledging that the state has a stronger interest in the public education for which it pays the costs. We conclude that the GEE does not violate the equal protection clause because it's administration is rationally related to the state's legitimate interest of insuring minimum competency among persons obtaining a state diploma.BOARD AUTHORITY: LEGITIMATE INTEREST: EDUCATIONAL AGENCY PREVAILED

CONCLUSION

For the foregoing reasons, we conclude that BESE has the authority to establish the GEE as a requirement for obtaining a state high school diploma and that BESE's administration of the GEE does not violate the equal protection clause. Accordingly, we reverse that portion of the trial court's judgment which states that the GEE violates the equal protection clause and we vacate the preliminary injunction issued with respect to the plaintiff's diplomas. Costs of this appeal are assessed against plaintiffs.

[20]** REVERSED AND RENDERED.

TARCHIA RANKINS, ET AL v. LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION

No. 94-C-0783

SUPREME COURT OF LOUISIANA

94-0783 (La. 4/12/94); 635 So. 2d 250; 1994 La. LEXIS 1013

April 12, 1994, Decided

PRIOR HISTORY: **[*1]** IN RE: Rankins, Tarchia; Yancy, Chad; Hicks, Sonovia; Williams, Sekari; Beauchamp, Kawanda; -- Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, First Circuit, Number CA93 1879; Parish of East Baton Rouge Nineteenth Judicial District Court Div. "M" Number 394,923.

JUDGES: Catherine D. Kimball, Pascal F. Calogero, Jr., Walter F. Marcus, Jr., Jack Crozier Watson, Harry T. Lemmon, Pike Hall, Revius O. Ortique

OPINION

Denied.

DENNIS, J., not on panel

CHAD TRIPLETT; TRACEY TRIPLETT; PHILLIP TRIPLETT; AND GWEN TRIPLETT, APPELLANTS v. LIVINGSTON COUNTY BOARD OF EDUCATION; LEE JONES; MIKE JOINER; TONY LASHER; DARRELL STAFFORD; PHILLIP THRELKELD; TIM PORTER; AND TOM COUNTS, APPELLEES AND LIVINGSTON COUNTY BOARD OF EDUCATION; LEE JONES; MIKE JOINER; TONY LASHER; DARRELL STAFFORD; PHILLIP THRELKELD; TIM PORTER; AND TOM COUNTS, APPELLANTS v. CHAD TRIPLETT; TRACEY TRIPLETT; PHILLIP TRIPLETT; AND GWEN TRIPLETT, APPELLEES

NO. 96-CA-1046-MR, NO. 96-CA-1371-MR

COURT OF APPEALS OF KENTUCKY

967 S.W.2d 25; 1997 Ky. App. LEXIS 74

August 15, 1997, RENDERED

SUBSEQUENT HISTORY: [**1] Petition for Rehearing Denied October 10, 1997. Released for Publication June 19, 1998. Certiorari Denied January 19, 1999, Reported at: 1999 U.S. LEXIS 599.

PRIOR HISTORY: APPEAL FROM LIVINGSTON CIRCUIT COURT. HONORABLE BILL CUNNINGHAM, JUDGE. ACTION NO. 94-CI-62.

DISPOSITION: AFFIRMED IN PART AND REVERSED AND REMANDED IN PART

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, parents and students, sought review of the judgment from the Livingston Circuit Court (Kentucky), which declared that the Kentucky Instructional Results Information System (KIRIS) assessment exam and the requirement to take said exam was not in violation of appellants' constitutional rights, nor in violation of certain federal laws. Appellee school district cross-appealed the ruling mandating the exam was open for public review.

OVERVIEW: Appellant parents contended that the Kentucky Instructional Results Information System (KIRIS) assessment exam, which assessed student skills in reading, mathematics, writing, science, and social studies, asked questions that violated 20 U.S.C.S. § 1232h(b). The court disagreed. The court also held, contrary to appellant's contention, that the content of the KIRIS exam questions did not advance or inhibit religion, nor did it foster any government entanglement with religion. The court held that the state's interest in the improvement of the educational system through the use of an assessment program such as the KIRIS exam was sufficiently compelling to require all students to take the KIRIS exam. Because of the importance of the KIRIS exam as a tool

for measuring the efficiency and improvement of Kentucky schools, and its potential for abuse, the court held that the KIRIS exam should not be open for general public viewing without a special showing of necessity beyond simple curiosity as to its content.

OUTCOME: The judgment of the trial court was affirmed in part, and reversed and remanded in part. It was not violative of appellant parent or students' rights or federal law to require Kentucky students to take an assessment exam.

CORE TERMS: exam, religion, religious, religious beliefs, educational, graduation, statewide, exercise of religion, school board, summary judgment, achievement, Hatch Amendment, school year, school districts, strict scrutiny, instructional, inspection, testing, privacy, viewing, rewards, grade, score, novice, matter of law, constitutional rights, public education, public school, public inspection, board of education

COUNSEL: BRIEF AND ORAL ARGUMENT FOR APPELLANTS (IN 96-CA-1046)/APPELLEES (IN 96-CA-1371): James F. Dinwiddie, Leitchfield, Kentucky.

BRIEF AND ORAL ARGUMENT FOR APPELLEES (IN 96-CA-1046/APPELLANTS (IN 96-CA-1371): David L. Yewell, Owensboro, Kentucky.

JUDGES: BEFORE: COMBS, DYCHE, AND SCHRODER, JUDGES. ALL CONCUR.

OPINION BY: SCHRODER

OPINION

[*27] ***OPINION***

AFFIRMING IN PART

AND REVERSING AND REMANDING IN PART

SCHRODER, JUDGE: This is an appeal from a judgment declaring that the Kentucky Instructional Results Information System ("KIRIS") assessment exam and the requirement to take said exam are not in violation of parents' or students' constitutional rights, nor in violation of certain federal laws. This is also an appeal by the school from a ruling mandating that the KIRIS assessment exam shall be open for public review. We affirm the court's decision regarding the constitutionality of the exam and the requirement to take the exam, **[**2]** reverse the open records order, and remand for proceedings consistent with this opinion.

In response to the Kentucky Supreme Court's ruling in Rose v. Council for Better Education, Inc., Ky., 790 S.W.2d 186 (1989), the Kentucky General Assembly enacted the Kentucky Education Reform Act ("KERA"), effective July 13, 1990, which mandated that the Kentucky Board of Education ("KBE") develop a system of public education whereby state government, local committees, parents, students and school employees would share the responsibility of improving public education in Kentucky. Part of KERA mandates that the KBE create and implement "a statewide, primarily performance-based assessment program to ensure school accountability for student achievement of the goals

set forth in KRS 158.645." KRS 158.6453 BOARD AUTHORITY. The goals in KRS 158.645, which codified those set forth in *Rose*, *supra* at 212 are:

> (1) Communication skills necessary to function in a complex and changing civilization;
>
> (2) Knowledge to make economic, social, and political choices;
>
> (3) Understanding of governmental processes as they affect the community, the state, and the nation;
>
> (4) **[**3]** Sufficient self-knowledge and knowledge of his mental and physical wellness;
>
> (5) Sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
>
> (6) Sufficient preparation to choose and pursue his life's work intelligently; and
>
> (7) Skills to enable him to compete favorably with other students in other states.

KRS 158.6453 required that an interim assessment test be given to students in grades 4, 8 and 12 by the 1991-1992 school year and that the permanent assessment program be implemented no later than the 1995-1996 school year.

In establishing the assessment program, KERA provided for the KBE to contract with authorities in the field of performance-based assessment. The KBE contracted with such authority in New Hampshire and ultimately created the Kentucky Instructional Results Information System ("KIRIS") assessment exam which assesses student skills in reading, mathematics, writing, science and social studies.

The primary purpose of the KIRIS test is not for evaluating individual student performance, but for evaluating the progress of the school systems under KERA. Performance levels **[**4]** of Novice (being the lowest), Apprentice, Proficient and Distinguished were established in evaluating the KIRIS exam results. Each of these performance levels was given a rating from 0 points for the Novice, to 140 points for the Distinguished. Through a fairly complicated formula, the grades of the **[*28]** individuals tested are computed into an overall school rating. The testing provides both cognitive (academic) and non-cognitive (dropout rates, attendance, retention rates, etc.) data which come together first to form a baseline score. Once the scores are established, thresholds, or goals, are established for each school to meet. If the school exceeds the threshold by one point and moves ten percent or more of its students out of the "Novice" level, it is considered successful and qualifies for rewards. Schools that improved, but did not meet their goals must develop improvement plans and work to raise their levels of achievement. For those schools in crisis whose scores drop below their baseline, assistance is made available.

Simply put, those school districts where students do well on the KIRIS test are rewarded, and those school districts where students do poorly are penalized. The **[**5]** law provides for sanctions to be imposed upon those in crisis (staff placed on probation), and financial rewards are given to those districts that are successful. KRS 158.6455. Therefore, each school district in this state has a financial interest in the outcome of the test scores of KIRIS examinations given within its district.

Early in 1994, prior to the KIRIS assessment tests' being administered in the spring, the parents of Chad Triplett, a senior, and Tracey Triplett, an eighth-grader (hereinafter "the Tripletts") informed the Livingston County School System (hereinafter "the school") that they did not want their children to take the KIRIS assessment test. When the 1993-1994 school year commenced, the Livingston County schools had no policy requiring students to take the KIRIS tests. Thus, at first, the Tripletts were told by the school that their children would not be required to take the KIRIS test. Subsequently, however, the KBE informed the Livingston County school system that it would hold all schools accountable for the performance of all students and, in the absence of KIRIS assessment information about the performance of a child, the school would be assigned a novice **[**6]** level performance for that child. Consequently, on February 14, 1994, the Livingston County Board of Education passed the following policy:

> Students shall complete all parts of KIRIS assessment before advancing to the next grade or graduating, including math and writing portfolios.

Prior to the tests' being given, Mrs. Triplett requested to review the tests, and on February 16 and February 18, 1994, she was allowed to examine them. There is some question as to how much of the actual tests she was allowed to examine and how long she was given to review the tests. She was not allowed to take any notes or make copies.

Based primarily on religious objections to the tests, the Tripletts refused to let Chad and Tracey take the KIRIS assessment test in 1994. FREE EXERCISE As a result of their not taking the test, the Livingston County School Board refused to allow Chad to graduate and Tracey to be promoted to the ninth grade, although Chad and Tracey had completed all other necessary requirements for graduation and promotion, respectively.

On May 25, 1994, the Tripletts filed the action herein against the Livingston County Board of Education, seeking a permanent injunction to prevent **[**7]** the school board from excluding Chad from graduation and a declaratory judgment establishing that Chad and Tracey had fulfilled all requirements for graduation and promotion, respectively. The petition for declaratory judgment also requested that the court rule regarding the Tripletts' claims of violation of privacy, infringement of their exercise of religion, interference with their parental rights, denial of their due process rights and their rights under certain federal laws.

Both parties filed various affidavits in support of their positions, including some from educational experts giving their opinions regarding the merits or lack thereof of the KIRIS assessment test. Additionally, the Tripletts filed a request for production of the KIRIS assessment test for review in preparation for trial. The court ordered that the test

be delivered by the school to a Special Commissioner who would monitor the review by the Tripletts and their counsel.

[*29] Subsequently, the school made a motion for summary judgment. On February 22, 1996, the circuit court granted the school's motion and dismissed the Tripletts' petition. The court noted that since the petition was for declaratory judgment **[**8]** seeking a permanent injunction, it was an equitable action in which the court must decide both issues of law and fact.

In the court's 21-page opinion and order, the court reviewed the KIRIS exam questions in the record in light of the specific objections raised by the Tripletts, and found that the Tripletts' claims had no merit:

> The Court finds nothing in the examination questions which either interferes with the parental rights or the control in the upbringing of the children, infringes upon the free exercise of religion nor the establishment thereof, nor violates any of the rights under the Family Educational Rights and Privacy Act, nor their right to privacy. While the KIRIS assessment procedure as well as KERA itself may be subject to political debate, the implementation of that law has already been held to be legitimate and is not an exercise of arbitrary power in violation of Section Two of the Kentucky Constitution. (See *Chapman v. Gorman*, 839 S.W.2d 232 (1992)).

The court went on to conclude that it was not unconstitutional to require all students to take the KIRIS exam. The court did, however, agree with the Tripletts' argument as to their right to review **[**9]** the KIRIS exam questions. The court ruled that the KIRIS exam should be made open for review by the public. In a subsequent order the court expanded its earlier ruling to allow the KIRIS exam to be viewed by the public at the Livingston County Circuit Clerk's office PUBLIC REVIEW. From the February 22, 1996 judgment, the Tripletts now appeal the ruling regarding the constitutionality of the KIRIS exam and the requirement to take the KIRIS exam, while the school appeals from the rulings allowing the KIRIS exam to be made open for public viewing.

We first address the Tripletts' argument that summary judgment was premature in this case because material questions of fact existed. They specifically point to the affidavits of the various experts in the record containing opposing views on the KIRIS assessment exam. The Tripletts also maintain that they will present other evidence discrediting the KIRIS exam if the action is allowed to proceed.

Summary judgment should be used to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting judgment in his favor and against the movant. *Steelvest, Inc. v. Scansteel Service* **[**10]** *Center, Inc.*, Ky., 807 S.W.2d 476 (1991). The function of a motion for summary judgment is to secure final judgment as a matter of law when there is no genuine issue of material fact. *Conley v. Hall*, Ky., 395 S.W.2d 575 (1965). We would agree with the lower court that the issues in the present case are matters of law, not fact. While the determination of the constitutionality of the KIRIS exam may involve factual matters, the ultimate decision is one of law. In a similar case challenging a Louisiana act

requiring the teaching of creationism, the United States Supreme Court found that summary judgment was proper, even in the face of uncontroverted affidavits submitted by the respondent. *Edwards v. Aguillard*, 482 U.S. 578, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987). We believe the present case was proper for summary judgment since the record contained everything necessary for the court to decide the issues of law, which we shall now address.

The Tripletts argue that when the Livingston County Board of Education passed the policy requiring that all students take the KIRIS exam mid-year in the school year (February), it failed to provide them with adequate notice of the requirement **[**11]** and, thus, operated as an ex post facto law. We believe this argument is without merit. The passage of the KIRIS exam requirement did not punish any action that had already been taken by the Tripletts and did not serve to prejudice the Tripletts in any way. The KIRIS exam requires no advance preparation beyond the student's normal academic program; hence, further notice would have served no purpose. due process EDUCATIONAL AGENCY PREVAILED

[*30] The Tripletts also argue that the local school board did not have legal authority to require that all students take the KIRIS exam. Although there is nothing in KRS 158.6453 (the statute mandating that the Kentucky Board of Education create and implement an assessment program) specifically requiring that all students must take the assessment exam, we believe statutory authority exists for the local board of education to establish such a policy. KRS 156.160(1)(c) allows the KBE to promulgate regulations regarding the minimum requirements for high school graduation and requires that the KBE review the graduation requirements in light of the expected outcomes for students and schools set forth in KRS 158.6451. 704 KAR 3:305 § 3(1) & (2) provides:

> (1) Each student who satisfactorily completes **[**12]** the requirements of this administrative regulation and such credits and additional requirements as may be imposed by a local board of education shall be awarded a graduation diploma.
>
> (2) Local boards of education may grant different diplomas to those students who complete credits above the minimum number of credits as established by the State Board for Elementary and Secondary Education.

The above regulation permits local boards to establish additional graduation requirements above the minimum requirements set forth by the KBE. Indeed, the concept of decentralization of schools is a large part of KERA. The individual schools are responsible for their own performance on the KIRIS assessment exams and there is much at stake for the individual schools in terms of rewards and penalties. *See* KRS 158.6455. Therefore, each school district should have the authority to set policy which relates to the assessment process so long as it does not conflict with KERA or the responsibilities delegated solely to the KBE by KERA. BOARD AUTHORITY EDUCATIONAL AGENCY PREVAILED

We next move on to the Tripletts' primary claim that requiring the Triplett children to take the KIRIS assessment exam violates: their constitutional right [**13] to free exercise

of religion; their constitutional right as parents to direct the education and upbringing of their children, see Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972); and the Hatch Amendment to the Family Educational Rights and Privacy Act, 20 USCA § 1232 (Hatch Amendment). The thrust of the Tripletts' claim is that the content of the KIRIS exam questions offends their religious beliefs because the test: establishes a religious or moral code; invades the students' religious and moral beliefs; discriminates on the basis of religion; and compels the students to speak against their beliefs by selecting morally objectionable responses.

We shall first address the Tripletts' allegation that the KIRIS exam violates 20 USCA § 1232h(b) of the Hatch Amendment which provides as follows:

> No student shall be required, as part of any applicable program, to submit to a survey, analysis, or evaluation that reveals information concerning -
>
> (1) political affiliations;
>
> (2) mental and psychological problems potentially embarrassing to the student or his family;
>
> (3) sex behavior and attitudes;
>
> (4) illegal, anti-social, [**14] self- incriminating and demeaning behavior;
>
> (5) critical appraisals of other individuals with whom respondents have close family relationships;
>
> (6) legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers; or
>
> (7) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program),without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of an unemancipated minor, without the prior written consent of the parent.

We find there is nothing in the exam which compels a student to reveal any type of information listed in 20 USCA § 1232h(b). A portion of the exam does include a multiple-choice student questionnaire in which the student is asked to give certain factual information [*31] about himself or herself, such as how much time he or she spends on homework each day and whether he or she attended kindergarten, but the questionnaire is prefaced by the caveat that if he or she does not feel comfortable answering any question, he or she may leave it blank. Also, [**15] certain essay questions ask that the child view a situation from his or her own perspective in responding to the question or statement. However, the child is not required to give any specific personal information proscribed by the above Act. FREE EXERCISE: EDUCATIONAL AGENCY PREVAILED

We now turn to the Tripletts' constitutional claims. The Establishment clause of the United States Constitution and its counterpart of the Kentucky Constitution guarantee

that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes state religious faith or tends to do so. Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992); U.S.C.A. Const. Amends. §§ 1, 14; Ky. Const. §§ 1, 5. The Free Exercise clause of both constitutions prevents the government from regulating one's religious beliefs. U.S.C.A. Const. Amend. §§ 1, 14; Ky. Const. §§ 1, 5. In Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), the United States Supreme Court applied the following three-part test in deciding whether the Establishment clause had been violated:

> First, the statute must have a secular legislative purpose; second, its principal or primary [**16] effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243, 88 S. Ct. 1923, 1926, 20 L. Ed. 2d 1060 (1968); finally, the statute must not foster "an excessive government entanglement with religion." [Walz v. Tax Commission of City of New York, 397 U.S. 664, 668, 90 S. Ct. 1409, 1411, 25 L. Ed. 2d 697 (1970)].

Lemon v. Kurtzman, 403 U.S. at 612-613.

In reviewing the KIRIS exam in light of KERA, we see that the exam has the secular legislative purpose provided for in KRS 158.6453(1), "to ensure school accountability for student achievement of the goals set forth in KRS 158.645."BOARD AUTHORITY NEXUS TO STATE GOALS. In reviewing the content of the KIRIS exam questions in the record, we do not see that the exam advances or inhibits religion, nor that it fosters any government entanglement with religion. While some questions contain pop culture references, humorous elements, or touch on current and/or controversial events or issues, we fail to see how they could be interpreted as attempting to promote or influence religious beliefs or send any message regarding religious belief. ESTABLISHMENT CLAUSE: EDUCAITONAL AGENCY PREVAILS

In adjudging that the content of the KIRIS exam itself does not violate the **[**17]** Establishment Clause, we must do so from our own concept of religion, and we do not presume to question the genuineness of the Tripletts' claims that the KIRIS exam offends their religious and moral sensibilities. Nevertheless not every state action implicating religion is invalid if one or a few citizens find such an action offensive. *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992). So long as the state action does not, by any realistic measure, create any of the dangers which the First Amendment was designed to protect and does not so directly or substantially involve the state in religious exercises or in the favoring of a religion as to have a meaningful and practical impact, there is no First Amendment violation. *Lee v. Weisman, supra.*

In *Smith v. Board of School Commissioners of Mobile County*, 827 F.2d 684 (11th Cir. 1987), plaintiffs objected to the school's use of certain home economics, history and social studies textbooks on grounds that they advanced certain religious beliefs and, thus, violated the Establishment Clause. The Court upheld the use of the books and held that the government action must amount to an endorsement of religion **[**18]** in order for the government's conduct to have the primary effect of advancing religion in violation of the

Establishment Clause. The Court further stated that it is not sufficient that the government action merely accommodates religion or confers an indirect, remote, or incidental benefit on a particular religion or happens to harmonize with the tenets of a religion. Similarly, in *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 **[*32]** (6th Cir. 1987) *cert. denied, Mozert v. Hawkins County Public Schools*, 484 U.S. 1066, 108 S. Ct. 1029, 98 L. Ed. 2d 993 (1988), parents objected to a school's requirement that children read from a particular textbook they found offensive to their religious beliefs. The Court held that absent any proof that a student was ever called upon to say or do anything that required the student to affirm or deny a religious belief or to engage or refrain from engaging in any act required or forbidden by the student's religion, there was no violation of their right to free exercise of religion. Even assuming that some KIRIS exam questions do conflict with certain religious beliefs held by the Tripletts, the exam clearly does not have the primary effect of advancing religion, nor do the questions **[**19]** require the students to affirm or deny any religious belief.

In *Rawlings v. Butler*, Ky., 290 S.W.2d 801 (1956), an action was brought against a public school because nuns who were teaching at the school were allowed to dress in religious habit and wear symbols of their religion. The Court held there was no First Amendment violation because the nuns did not inject religion or the dogma of their church into what they taught. Paraphrasing from a concurring opinion of Justice Jackson of the United States Supreme Court in *People of State of Ill. ex rel McCollum v. Board of Education of School Dist. No. 71.*, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948), the Court stated:

> He further states there are 256 separate and substantial religious bodies in this country and if we are to eliminate everything that is objectionable to any of these warring sects, or that which is inconsistent with their doctrines, "we will leave public education in shreds." [*McCollum*, 333 U.S. at 203, 68 S. Ct. at 477.]

Rawlings v. Butler, Ky., 290 S.W.2d at 805.

Even if the governmental action substantially burdens a religious practice, if it is justified by a compelling state interest, it survives **[**20]** a free exercise of religion challenge. *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). The First Amendment does not prevent the government from regulating behavior associated with religious beliefs. *United States v. Lee*, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982).

In *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 1600, 108 L. Ed. 2d 876 (1990), the Court held the "right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Quoting United States v. Lee*, 455 U.S. at 263. In *Smith, supra*, a showing of a compelling state interest was not required because the law was valid and neutral and of general applicability. As to whether a strict

scrutiny analysis is required in the instant case, we turn to the case of *Vandiver v. Hardin County Board of Education*, 925 F.2d 927 (6th Cir. 1991) for guidance.

In *Vandiver, supra*, a student in Kentucky who had been in a home study program sought **[**21]** to transfer to a public school, and the public school required the transferee to pass an equivalency exam in order to gain credit for the school work performed in the home study program, pursuant to 704 KAR 3:307 § 2. The student objected to the testing requirement on rather tenuous religious grounds (studying for the test required more work than God would want him to bear). Nevertheless, the Court considered his claim, as it did not question the sincerity of his religious convictions. Relying heavily on *Smith, supra*, the Court found that the regulation at issue was generally applicable and religion-neutral such that a strict scrutiny analysis was unnecessary. However, in dicta, the Court went on to further interpret *Smith, supra*, and stated that if the statute not only affects the free exercise of religion, but also burdens other constitutionally protected rights such as that of a parent to direct the education and upbringing of his children, the claim remains subject to strict scrutiny. Thus, although we deem the KIRIS testing requirement in the instant case to be generally applicable and religion-neutral, we shall nevertheless proceed with a strict scrutiny analysis **[**22]** since the Tripletts additionally **[*33]** claim that their parental rights have been violated.

The basis of the Court's ruling in *Rose v. Council For Better Education, Inc.*, Ky., 790 S.W.2d 186 (1989) is that education is a fundamental right in Kentucky and that the government must provide an efficient system of common schools that would be substantially uniform throughout the state and afford equal educational opportunities to every child within the state. If a constitutionally efficient educational system is one that is uniform and provides equal opportunities, there must be a way to measure whether all students are receiving equal opportunities beyond simply the resources that are being provided. The performance-based assessment process mandated by KERA is such a measuring device. Our Supreme Court has recognized the importance of statewide assessment of all schools in *Board of Educ. of Boone County v. Bushee*, Ky., 889 S.W.2d 809 (1994), wherein the Court attempted to clarify the responsibilities of the State Board, the local school boards and school councils under KERA. The Court stated:

> Other responsibilities of the State Board are directed in KRS 158.6453. These directives **[**23]** primarily focus on the need for statewide assessment of the achievements of each local institution in terms of the stated statewide objectives. These reflect the need for statewide accountability for achievement of outlined objectives.
>
> These responsibilities clearly reflect that area of education that most effectively rests at the statewide level. In order to assess the overall success of the educational reforms, the legislature recognized that it is imperative that a body representing statewide interests be held accountable for establishing a system whereby these objectives can best be achieved. Further, the statute recognizes that each individual school will be held accountable to the State Board for its performance. Also reflective of this structural approach are the mandates of KRS 158.6455 which require the State Board

> to "establish a system of determining successful schools and dispensing appropriate rewards."

Id. at 813. ESTABLISHEMENT CLAUSE:

It appears that there is no higher priority in Kentucky at the present time than education. Therefore, the state's interest in the improvement of our educational system through the use of an assessment program such as the **[**24]** KIRIS exam is sufficiently compelling to require all students to take the KIRIS exam. We do not see how an assessment process can measure performance in terms of educational equality and progress unless all students are required to take the exam. BOARD AUTHORITY NEXUS TO STATE GOALS EDUCATIONAL AGENCY PREVAILED

We now move on to the Tripletts' claims regarding the KIRIS assessment process. They maintain that the KIRIS exam is subjective and arbitrary and, therefore, lacks reliability in that it does not measure either the child's or the school's performance accurately. One complaint in particular is that the exam should be completely multiple choice. (The exam contains multiple choice, open-response and essay questions.) Both sides have submitted affidavits of experts stating their positions on the KIRIS exam. While the KIRIS assessment exam may not be perfect (doubtless, no testing process is), we are not being called upon, and indeed it is not our place, to pass on the relative merits and flaws of the exam. Rather, it is our responsibility only to adjudge whether its requirement rises to the level of a constitutional or statutory violation. We hold that it does not. VALIDIDTY EDUCATIONAL AGENCY PREVAILED

The final issue before us is the school's appeal of the court's rulings that **[**25]** the KIRIS exam must be open for public inspection. The Tripletts contend that the public should be allowed unfettered examination of such exams.

KRS 61.878(1)(g) provides the following exemption from the Kentucky Open Records Act (KRS 61.870-61.884):

> (1) The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction, except that no court shall authorize the inspection by any party of any **[*34]** materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery.
>
> (g) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination before the exam is given or if it is to be given again.

Assuming the KIRIS exam about which the Tripletts complain will be administered again in the future, the KIRIS exam clearly falls within the above-stated exemption even in view of the strict construction requirement in KRS 61.871. [1] However, the lower court bypassed the statute and, instead, applied **[**26]** a balancing test, finding that "any

prejudice the Defendants may incur because of this public disclosure is far outweighed by the public's need to know."

> 1 Once the test is given *and* if it will not be administered again, KRS 61.878(1)(a) does not apply.

Recently, the Supreme Court of Iowa was faced with the same issue in *Gabrilson v. Flynn*, 554 N.W.2d 267 (Iowa 1996), when a local school board member sought to make public a high school assessment test. The Court declined to apply a balancing test, reasoning that there was no indication that the legislature intended such a balancing of interests since they specifically excepted examinations from the open records law. Hence, the Court ruled that the assessment exam was not covered by the open records law and could not lawfully be disclosed.

The Tripletts argue that KRS 61.878(1) authorizes the court to order that the KIRIS exam be made open for public inspection. The language of the statute does allow a court of competent jurisdiction the authority **[**27]** to order an exempted record to be open for inspection. However, a court does not have unbridled discretion in exercising that authority, and we believe the lower court abused its discretion in the present case when it ordered the KIRIS exam open for public viewing. Given the importance of the KIRIS exam as a tool for measuring the efficiency and improvement of our schools as we have previously discussed in this opinion, and its potential for abuse, we believe the KIRIS exam should not be open for general public viewing without a special showing of necessity beyond simple curiosity as to its content. In our view, permitting the exam to be indiscriminately viewed by the public would interfere with the accomplishment of the objectives for which it was devised. It would certainly jeopardize the integrity and reliability of the exam. However, where, as here, there are specific allegations about the exam that are the subject of a lawsuit, the court could properly order the exam open for limited viewing for purposes of the litigation. Accordingly, the court's orders requiring the KIRIS exam to be open for public inspection are reversed and the cause remanded for an order sealing the portions **[**28]** of the record containing the KIRIS exam questions.

PUBLIC VIEWING OF TEST: EDUCATIONAL AGENCY PREVAILED

The Tripletts also argue that they, as parents, have a right to view the KIRIS exam under the following provision of 20 USCA § 1232h(a) of the Hatch Amendment:

> All instructional materials, including teacher's manuals, films, tapes, or other supplementary material which will be used in connection with any survey, analysis, or evaluation as part of any applicable program shall be available for inspection by the parents or guardians of the children.

In reading the above provision, we do not believe that an assessment exam such as the KIRIS exam falls within its purview. Although the KIRIS exam is a requirement for promotion and graduation, it is not a part of the student's regular curriculum and has no instructional purpose.

For the reasons stated above, the judgment of the Livingston Circuit Court is affirmed in part, and reversed and remanded in part for proceedings consistent with this opinion.

ALL CONCUR.

HUBBARD BY HUBBARD v. BUFFALO INDEP. SCH. DIST.

20 F.Supp.2d 1012 (1998)

Sarah HUBBARD, a Minor, by and through her Parents and Next Friends, John and Linda HUBBARD, and John and Linda Hubbard in their Individual Capacities, Plaintiffs,

v.

BUFFALO INDEPENDENT SCHOOL DISTRICT, et al., Defendants.

Civil No. W-98-CA-156.

United States District Court, W.D. Texas, Waco Division.

September 1, 1998.

Gina G. Parker, Waco, David C. Gibbs, Barbara J. Weller, Gibbs & Craza, P.A., Seminole, FL, for Plaintiffs.

Joe B. Hairston, Mark C. Goulet, Walsh, Anderson, Brown, Schulze & Aldridge, Austin, TX, for Defendants.

MEMORANDUM OPINION AND ORDER

WALTER S. SMITH, Jr., District Judge.

Before the Court are the Plaintiffs' and Defendants' Motions for Summary Judgment. The undisputed facts are these:

Sarah Hubbard, a sixteen year old, attended Buffalo Independent School District ("BISD") from Kindergarten through the seventh grade, and then transferred to the Upper Room Christian Academy ("Upper Room"). Upper Room is a non-accredited private religious institution. It differs from BISD in that 1) it is not accredited by the State of Texas; 2) it does not require its teachers to be certified or have college degrees; 3) it uses a system of student "self-directed" learning for granting both credit and grades in most courses; and 4) it sometimes awards students credit for courses without requiring any testing.

After completing one-half of the eleventh grade year at Upper Room, Sarah transferred to BISD. The BISD policy applied to "Students Entering from Non-accredited Private or Home Schools" was as follows:

> Students who have taken courses through any source other than a public or private school which is fully accredited by the State of Texas or the Department of Education of the state in which the school is located, must be tested for proficiency in the course before graduation credit will be awarded for the course.

> (This testing requirement applies to students who have been "home schooled" and to students who have attended a private school that is not fully state accredited.) An exam must be taken for each semester credit desired. Students must score a minimum of 70 percent on the exam to receive credit toward high school graduation. Exams will be obtained through Texas Tech University. The full fee for each exam will be paid by the student and/or the student's parent/guardian. Credits earned through testing for proficiency will not be included in calculations for grade point average or class ranking.

Under this policy, Sarah was required, for each of the course-credits she wished to transfer, to take and pay for a test that would demonstrate her proficiency in the subject matter. Her other options were to take correspondence courses in the various courses or spend an extra year in high school and graduate a year later. Sarah declined all of these options and this litigation followed.

The issue is this: When a student transfers into a Texas public school from a non-accredited private school, can the student be required to pass a test, thereby proving proficiency as to each course for which the student desires credit?

Plaintiffs call the Court's attention to two state statutes adopted by the last session of the Texas legislature, asserting that these statutes create a state "fundamental right and duty of a parent to direct the upbringing of the parents' child." Plaintiffs' application of these statutes to this case is misplaced.

Section 81.002(b) of the Labor Code of the State of Texas was amended to read:

> Section 3 (a) This Act takes effect September 1, 1997.
>
> b) No state agency may adopt rules or policies or take any action which violates the fund amental right and duty of a parent to direct the upbringing of the parent's child.

Subsection (b), Section 40.002, Human Resources Code was amended to read as follows:

> (b) The department [Department of Protective and Regulatory Services] is the state agency with primary responsibility for:
>
> (1)* * *
>
> (2) providing family support and family preservation services which respect the fundamental right of parents to control the education and upbringing of their children; ...

Simply put, BISD is neither an agency of the State of Texas nor the Department of Protective and Regulatory Services, and these statutes do not control and are not even related to this litigation.

That parents have the primary right and obligation to control the education and upbringing of their children cannot be argued; but that right must have limits —

otherwise a truant's parent could plausibly proclaim that he or she was exercising his or her rights while "home-schooling" a child to be a safecracker or a prostitute. Actually the example fails, because absent limits there could be no compulsory public education laws at all.

Policy decisions made by local school boards must be examined by courts with great deference and care. "We have previously cautioned that courts lack the `specialized knowledge and experience' necessary to resolve `persistent and difficult questions of educational policy.'" Board of Education v. Rowley,458 U.S. 176, 102 S.Ct. 3034, 3052, 73 L.Ed.2d 690 (1982). "Judicial interposition of the operation of the public school system of the Nation raises problems requiring care and restraint ... By and large, public education in our Nation is committed to the control of the state and local authorities." *JUDICIAL RELUCATANCEpperson v. Arkansas,*393 U.S. 97, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968).

The "Free Exercise of Religion" Cause of Action

Plaintiffs contend that BISD's refusal to transfer Sarah's credits without testing violated her rights under the Free Exercise clause of the United States Constitution. The Court finds that Plaintiffs' claim fails for several reasons. As a result, BISD is entitled to summary judgment on Plaintiffs' free exercise claim. FREE EXERCISE CLAUSE

Plaintiffs have failed to demonstrate how BISD's policy has burdened their right to the free exercise of religion. By Plaintiffs' own admission they have no religious objections to the school district's testing policy. *See* Sarah Hubbard Dep. at pp. 31, 33, 36-37, 53; Linda Hubbard Dep. at pp. 32-33; John Hubbard Dep. at pp. 22, 77. Defendants correctly point out that Plaintiffs' objections to BISD's policy are based on purely non-religious grounds. Defendant's Brief at 3. The Court agrees with Plaintiffs that taking the tests would necessitate some study and sacrifice on Sarah's part. However, making time to study for the BISD's testing is not the same as a genuine free exercise claim.

Even if the Court could construe Plaintiffs' objections to the testing policy as religious objections, the policy would still be a valid, religion-neutral policy of general applicability. Laws that are religion-neutral and are of general applicability are valid even when a compelling governmental interest cannot be found. *City of Boerne v. Flores,*521 U.S. 507, 117 S.Ct. 2157, 2161, 138 L.Ed.2d 624 (1997) citing *Employment Division, Dep't of Human Resources v. Smith,*494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). It is not disputed that BISD's policy applies "across the board." That is, the policy applies to all students without regard to the nature of their prior education. The Court finds that a plain reading of the policy demonstrates that it is religion-neutral and applies to all students who wish to transfer outside credits for the purpose of graduation from BISD. FREE EXERCISE

Finally, Plaintiffs have failed to show that any other rights are implicated in this case. As a matter of law and constitutional history, "...[t]he only instances where a neutral, generally applicable law had failed to pass constitutional muster, the *Smith* Court noted, were cases in which other constitutional protections were at stake." *City of Boerne,* 521 U.S. at ___, 117 S.Ct. at 2161. *See also Wisconsin v. Yoder,*406 U.S. 205, 92 S.Ct. 1526,

32 L.Ed.2d 15 (1972). The Court finds that no other constitutional protections are implicated in this case. "No special constitutional protections have been recognized for those who feel burdened by testing ... In the absence of a special constitutionally recognized interest to abstain from test-taking, the court may not entertain a free exercise challenge to the statute in question." *Vandiver v. Hardin County Board of Ed.*, 925 F.2d 927 (6th Cir.1991). Plaintiffs' claim that Sarah must be exempted from BISD's policy as a matter of right. After considering Plaintiffs' arguments carefully, the Court finds no such right. FREE EXERCISE EDUCATIONAL AGENCY PREVAILED

In sum, Plaintiffs' free exercise claim fails because Plaintiffs' objections to the policy are not religious in nature. Further, the policy is a valid, religion-neutral policy of general applicability, and the policy implicates no other constitutional protections. Therefore, the Court finds that BISD is entitled to summary judgment on Plaintiffs' free exercise claim.

Equal Protection Cause of Action Under the U.S. and Texas Constitutions

Plaintiffs claim that BISD's testing policy violates their equal protection rights under both the United States Constitution and the Texas Constitution. The equal protection analysis under the Texas Constitution is identical to that found in the United States Constitution. *Spring Branch Indep. Sch. Dist. v. Stamos*, 695 S.W.2d 556, 559 (Tex. 1985). In the present case, the school district's policy "neither infringes upon fundamental rights nor burdens an inherently suspect class; equal protection analysis requires that the classification be rationally related to the legitimate state interest." *Id.* After reviewing Plaintiffs' arguments, the Court finds that BISD's policy is rationally related to a legitimate state interest. Therefore, BISD is entitled to summary judgment on Plaintiffs' equal protection claim.

BISD's policy concerning "Students Entering from Non-accredited Private or Home Schools" does not treat one group of individuals differently from any other group. Any student coming to BISD from a non-accredited school is subject to the testing policy. Under no circumstances, apparent to the Court, is enforcement of the policy contingent on the nature of the transferring student's previous education. Plaintiffs seek to convince the Court that other BISD policies do treat other groups of students differently. Plaintiffs direct the Court's attention to BISD's policies concerning "Foreign Exchange Students" and "Correspondence Courses." These two policies are easily distinguished from the testing policy.

First, BISD's treatment of foreign exchange students is consistent with its treatment of transferring students. According to BISD's policy, foreign exchange students are not seeking to transfer outside credits into BISD for the purpose of graduation. As a result, they are not subject to the BISD testing policy. However, if a foreign exchange student would seek transfer of outside credits into BISD, such a student would be subject to BISD's testing policy. Jackson Dep. at pp. 115-118. This is the precise treatment that students in Sarah's position receive.

Second, BISD's policy concerning "Correspondence Courses" provides that any such courses be obtained through Texas Tech University, thus assuring the validity of the course work. Likewise, students in Sarah's position must pass tests obtained through

Texas Tech University when they seek to transfer credits from a non-accredited school. Clearly, BISD requires both groups of students to obtain their tests and course work through the same state university to assure the quality and consistency of the materials provided. Jackson Affidavit, Exhibit A; Jackson Dep. at pp. 118-22. Furthermore, a correspondence course provided through a state university would result in credits obtained through an accredited institution. This is not the case with credits obtained through a non-accredited home school, for example. As a result, BISD is entitled to treat these two kinds of credits differently.

Finally, Plaintiffs cannot show that BISD's policy infringes upon a fundamental right or burdens a suspect class. A public education is not a fundamental right and every variation in which education is provided need not be justified by a compelling necessity. *San Antonio ISD v. Rodriguez,*411 U.S. 1, 35, 93 S.Ct. 1278, 1298, 36 L.Ed.2d 16 (1973). People who choose to educate their children outside the public school system are "not members of a suspect class for equal protection purposes." *Vandiver,* 925 F.2d at 931. After reviewing BISD's policy, the Court finds that it is rationally related to BISD's legitimate interest in setting uniform public school advancement and graduation requirements. EQUAL PROTECTION; EDUCATIONAL AGENCY PREVAILED

Due Process Claims

Plaintiffs, at least in oral argument, have abandoned their procedural due process claim. They admit they had notice of the policy of testing to acquire credits and the opportunity to appear before the BISD board. Accordingly, for all of the foregoing reasons, it is **ORDERED** that the Defendant's Motion for Summary Judgment is **GRANTED** as to all of Plaintiffs' claims, and Plaintiffs' Motion for Summary Judgment is in all things **DENIED. due process CLAIMS WERE WITHDRAWN: EDUCATIONAL AGENCY PREVAILED.**

CHAD TRIPLETT, ET AL. v. LIVINGSTON COUNTY BOARD OF EDUCATION, ET AL.

98-760

SUPREME COURT OF THE UNITED STATES

525 U.S. 1104; 119 S. Ct. 870; 142 L. Ed. 2d 771; 1999 U.S. LEXIS 599; 67 U.S.L.W. 3457

January 19, 1999, Decided

PRIOR HISTORY: [*1] Reported below: 1997 Ky. App. LEXIS 74.

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION

Petition for writ of certiorari to the Court of Appeals of Kentucky denied.

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
ALEXANDER NOON, a minor, by his guardian ad litem TRACY BARBEE, et al., Plaintiffs,
v.
ALASKA STATE BOARD OF EDUCATION AND EARLY DEVELOPMENT; ROGER SAMPSON, Commissioner of Education & Early Development, sued in his official capacity; ANCHORAGE SCHOOL DISTRICT; RICHARD SMILEY, Administrator, Standards and Assessment, Alaska Department of Education & Early Development, sued in his official capacity, Defendants.

Case No. A04-0057 CV. (JKS)

CLASS ACTION

SETTLEMENT AGREEMENT

Before The Hon. James K. Singleton

TABLE OF CONTENTS

RECITALS

RECITALS

1. Defendants are the Alaska State Board of Education and Early Development; Roger Sampson, in his official capacity as the Commissioner of Education & Early Development; Richard Smiley, in his official capacity, the Alaska Department of Education & Early Development (collectively, "the Department"); and the Anchorage School District.

2. On or about March 16, 2004, Named Plaintiffs Alexander Noon, Kendall Leibach, Douglas Mate, Tiana Lupie, Irene Takak, and Learning Disabilities Association of Alaska commenced a civil action in the United States District Court for the District of Alaska, Case No. A04-0057 CV. (JKS) ("Lawsuit"), against Defendants, alleging discrimination in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA"), Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq. ("IDEA"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, et seq. ("Section 504"), AS 14.03.075 and AS 18.80.200 et seq. ("state statutes"), and the federal and Alaska Constitutions regarding access to the Alaska High School Graduation Qualifying Exam ("HSGQE") for students with disabilities in Alaska public schools.

3. On or about April 7, 2004, the Court in the Lawsuit entered an Order granting the Parties' stipulated limited interim relief, which (a) excused from the HSGQE graduation requirement those students with disabilities in the Class of 2004 who were otherwise qualified to receive a diploma and (b) included a certification of a Plaintiff Class under FRCP 23.

4. Defendants deny any and all liabilities to the Named Plaintiffs and to Class Members and deny that they have violated any laws pertaining to access to the HSGQE for students with disabilities or that they have discriminated against students with disabilities.

5. The Lawsuit has been vigorously prosecuted and defended.

6. The Parties now desire to resolve their differences and disputes by settling the suit in such a manner as to:

a. Improve access to the HSGQE for students with disabilities;

b. Assure that neither the Named Plaintiffs nor the Class nor any Class Member will attempt to enforce, and Defendants will not thereby be subject to, conflicting standards regarding compliance with the ADA, IDEA, Section 504, state law, and state and federal constitutional law concerning access to and implementation of the HSGQE for students with disabilities.

I. DEFINITIONS

As used in this Agreement, the following terms shall have the meaning ascribed to them in this Section. All other terms shall be interpreted according to their plain and ordinary meaning.

A. Accommodations

An "Accommodation" is a change made in the administration of the HSGQE to ensure that the information obtained from a test is an accurate reflection of what the test is intended to measure rather than a measure of the student's disability. Accommodations are permitted on the regular HSGQE.

B. Board

"Board" means the Alaska State Board of Education.

C. Class or Class Members

"Class" or "Class Members" means and refers to all persons who meet the definition of the Class as entered by the Court in its Order dated April 7, 2004.

D. Class Counsel

"Class Counsel" means and refers to Disability Rights Advocates, the Disability Law Center of Alaska, and Davis Wright Tremaine LLP, including the attorneys therein.

E. Compliance Period

"Compliance Period" means the period from the date of Final Approval of this Settlement Agreement until 30 months from Final Approval. The duration of the Compliance Period can be modified by the Court upon on a showing of good cause.

F. Commissioner

"Commissioner" means the Commissioner of the Alaska Department of Education and Early Development.

G. Defendants

"Defendants" means each of the named Defendants.

H. Department

"Department" means the Alaska Department of Education and Early Development.

I. School District

"District" means an Alaska school district as defined in AS 14.17.990.

J. Fairness Hearing

"Fairness Hearing" means the hearing described in Section II.D and required pursuant to Federal Rule of Civil Procedure 23(e)(1)(C).

K. Final Approval

"Final Approval" means the date when the Court issues an order granting final approval of this Settlement Agreement in Case No. A04-0057 CV. (JKS).

L. Modification

A "Modification" is a change made in the administration of the HSGQE which distorts the measurement of the skills targeted by a test or compromises the validity of the testing results. Modifications are only allowed on the Modified HSGQE.

M. Named Plaintiffs

"Named Plaintiffs" means and refers to Plaintiffs Alexander Noon, by his guardian ad litem Tracy Barbee; Kendall Leibach, by her guardian ad litem Jacqueline Leibach; Douglas Mate; Tiana Lupie, by her guardian ad litem, Evelyn Lupie; Irene Takak; and Learning Disabilities Association of Alaska.

N. Parties

"Parties" means the Defendants and Named Plaintiffs.

O. Preliminary Approval

Preliminary Approval" means the preliminary approval by the Court in Case No. A04-0057 CV. (JKS) of the terms of this Settlement Agreement which shall occur prior to any notice being provided in accordance with Section II.E.

P. Released Claims

"Released Claims" means those claims described in Section IX.

Q. Released Parties

"Released Parties" means those parties described in Section IX.

R. Settlement Agreement

"Settlement Agreement" or "Agreement" means this document.

S. Subtest

"Subtest" or "Subtests" means any one or all of the three subtests which make up the HSGQE: the Writing, Reading, and Mathematics subtests.

II. APPROVAL

A. Joint Approval Action

The parties shall jointly move the Court for an order granting Preliminary Approval of this Settlement Agreement within 15 days of this settlement, directing notice to the settlement class as described in Section II.E, below, and setting a hearing for Final Approval allowing for notice as directed by the Court.

B. Objections

Any Class Member may object to the proposed Settlement Agreement by filing with the Clerk of the Court a written objection ("Objection") filed or postmarked no later than a date set by the Court after Preliminary Approval of the Settlement Agreement.

C. Equitable Provisions Binding

Upon Final Approval of this Settlement Agreement, all Class Members shall be bound by all equitable provisions of this Settlement Agreement and orders issued pursuant thereto, notwithstanding any objection filed by a class member under II.B of this Agreement and subject to Release provisions under IX.A of this Agreement. In the event that the Board does not ultimately adopt the substantive terms of this Agreement in whole as recommended by the Commissioner, this Agreement is null and void.

D. Fairness Hearing

The Court shall hold a hearing under FRCP 23(e)(1)(C) to establish the fairness of the final settlement of the claims of the Class against Defendants and to decide whether there will be Final Approval of the Settlement Agreement. This hearing shall take place at a date allowing for a period of reasonable notice to the Class as the Court may direct. At

this hearing, the Parties shall jointly move for Final Approval of this Settlement Agreement and entry of the Stipulated Injunctive Order. The Parties specifically intend that some sections of the Settlement Agreement shall be implemented prior to formal Court approval of the Settlement in accordance with the timelines set forth herein.

E. Notice to the Class Regarding the Proposed Settlement

The Department will provide at its sole expense notice regarding the terms of the proposed Settlement Agreement. The Parties will prepare a notice plan for submission to the Court at the Fairness Hearing.

III. EQUITABLE PROVISIONS

The Parties agree that, conditioned upon entry of Final Approval, Defendants shall do the following in order to ensure an appropriate opportunity to fulfill the HSGQE graduation requirement for students with disabilities:

A. Accommodations

1. The Commissioner will recommend regulations to the Board that will clarify and revise the information regarding the HSGQE in the "Participation Guidelines for Alaska Students in State Assessments" ("Participation Guidelines") with respect to options for participation by students with disabilities. The information will include descriptions of the options for participation in the HSGQE by students with disabilities, the implication of each of the options, and the appeals process. The Department shall further clarify in the Participation Guidelines (and in any other publications or websites designed to provide information about accommodations on the HSGQE) that:

> a. the guideline concerning the use of a proposed HSGQE accommodation for three months prior to test in the classroom is a recommendation only and is not a requirement;
>
> b. any list (regulatory or otherwise) of approved accommodations published by the Department as a guide for school Districts shall not be deemed exclusive by the Department. With respect to any potential accommodation that is not on the "approved" list, the Department will provide IEP and 504 Plan teams with a checklist and/or guidelines with criteria to be used in determining if an accommodation is appropriate.

2. The Department shall work with Districts to ensure test security while allowing students with disabilities the opportunity to:

> a. take the HSGQE over the course of more than one day if necessary to accurately demonstrate proficiency on the HSGQE; and
>
> b. take the HSGQE at home, provided that, due to a disability, the student's primary instruction location is the student's own home.

3. IEP and 504 Plan teams shall meet in accordance with the timeline set forth herein. Plans for all students with disabilities shall be reviewed in their next annual IEP or 504 Plan review (and then at least annually thereafter) for the presence and appropriateness of accommodations to be used in the HSGQE.

4. In addition to other trainings described below in Section V.3, the Commissioner will recommend regulations to the Board that will require Districts to plan and make available training for parents of special education students in the ninth grade (freshman) regarding the HSGQE and the range of participation options for students with disabilities. The trainings shall occur in preparation for the student's first HSGQE experience the spring of the student's sophomore year.

5. The Department will broaden the current list of appropriate accommodations for students with disabilities and shall at least annually consider the appropriateness of other proposed accommodations that may arise. Districts retain the right to deny a requested accommodation on a case-by-case basis and provide the reasons or basis for the denial.

6. A student's IEP or 504 Plan Team will initially determine whether a particular proposed modification for use on the Modified HSGQE will be helpful to a student on the Subtest(s) of the HSGQE which the student has not passed. The IEP or 504 Plan team will then apply to the Department for approval of the proposed modification. The Department will determine whether the benefit of the modification outweighs its potentially adverse effect on the validity of the test. In balancing the benefits against the potential drawbacks, the Department shall consider the effect of the proposed modification on an entire Subtest, not just on a single construct of that Subtest.

B. Sequence of Testing

1. The Commissioner shall promptly recommend to the Board appropriate regulations concerning the alternative assessment program under the provisions of Alaska Statutes § 14.03.075(c) to implement the following procedure for accessing the HSGQE:

a. If an eligible student fails to pass any subtests of the HSGQE, the student's IEP or 504 Plan team shall determine whether the student should:

i. retake those subtests of the HSGQE with other accommodations; or

ii. take the Modified HSGQE for those subtests with appropriate accommodations and any of the modifications approved by the Department, including, but not limited to:

1. asking a test proctor for clarification of a test question,

2. sign language interpretation of test questions for a deaf student,

3. spell-checker on a word processor,

4. grammar checker on a word processor,

5. oral presentation (read-aloud) of test question (including recorded oral presentation),

6. graphing calculator,

7. dictionary or thesaurus,

8. math or writing resource guides,

9. voice recognition software and word processor,

10. asking test proctor for synonym of unknown word; or

iii. take a non-standardized assessment instrument designed to measure competency in skills tested by HSGQE for whichever subtest(s) the student failed if the IEP or 504 Plan team certifies that the student meets the applicable qualifications (see Section III.C.1 below).

C. Non-standardized Assessment Format that Leads to a Standard Diploma

1. The non-standardized assessment is reserved only for those diploma-track students who:

a. are working at or near grade level;

b. have a documented history of being unable to demonstrate proficiency on a standardized assessment because of one or more of the following conditions:

(i) the student has a severe emotional or behavioral impairment or a pervasive developmental or other disability that causes the student to be unable to maintain sufficient concentration to participate in standard testing, even with accommodations or appropriate modifications;

(ii) the student cannot cope with the demands of a prolonged test administration because of multiple physical disabilities, severe health-related disabilities, or a neurological disorder;

(iii) the student has a significant motor, learning, or communication disability that causes the student to need more time than is reasonable or available for testing, even with the allowance of extended time.

2. The Department shall make available an appropriate non-standardized assessment using formats or a format that fairly assesses a disabled student's mastery of state content standards and eligibility for a standard high school diploma. This non-standardized format:

a. May be, but is not required to be, a student work portfolio that incorporates a review of a student's work and/or classroom performance and/or grades over a period of time which demonstrates mastery of state content standards.

b. May be, but is not required to be, a system of individualized assessment whereby a student's IEP or 504 Plan team develops (with the oversight and approval of the Board or Department of Education) a system of assessment for that particular student that measures the student's qualifications to obtain a high school diploma without directly assessing the student's disability.

3.The Department will provide appropriate and thorough guidance and information to Districts, which will provide training to IEP teams, 504 teams, other instructional planning teams, parents, and students concerning this non-standardized assessment option leading to a standard high school diploma for students who qualify under this provision.

D. Appeals of Accommodation and Modification Decisions

1. Parents of students with IEPs and 504 Plans may request that a District consult with the Department before a District rejects an accommodation or modification on the grounds that the accommodation or modification would make a test invalid. In response to such a request, the Department will provide to the District and parents a non-binding written statement regarding the accommodation or modification. The parent of a student with an IEP or 504 Plan may request mediation, a due process hearing, or a state complaint, consistent with state and federal law and regulations. In this type of an appeal, the procedure will be consistent with 4 AAC 52.550(g) and applicable federal law. The Parties also agree that the Department will issue a directive to all hearing officers that in these appeals, the hearing officers will make every reasonable effort to issue a decision as soon as possible but not later than 25 days. The Parties do not intend that the state shall have to adopt new regulations to implement this provision.

IV. PHASE-IN PROVISIONS FOR CLASS OF 2005

1. For school year 2004-05 only, a District shall grant a waiver to a student with a disability who has an IEP or 504 Plan, is a senior, and has met all other requirements of graduation, and the student's IEP or 504 Plan team does not meet on or before September 24, 2004, and because of the failure to meet,

a. the student does not have two opportunities during the 2004-2005 school year to use an allowable modification that an IEP or 504 Plan team determines the student needs to demonstrate proficiency on the state assessment; or

V. IMPLEMENTATION & REPORTING

1. Defendants shall take all necessary steps to implement the terms of this Agreement. The parties understand that implementation of this Agreement will require adoption of regulations by the Board, and that the Board will exercise its independent judgment in the best interests of the State when adopting regulations. The parties further understand that this Agreement does not purport to bind the Alaska State Legislature, and that a change in state or federal law may moot or otherwise obviate this Agreement.

2. The Department shall designate a State employee or official as the Facilitator responsible for collecting information concerning compliance with this Agreement, and producing the semi-annual reports referenced in Paragraph V.7 below. In addition to

other duties, this or another qualified employee shall be assigned the duty to use independent judgment to monitor the defendants' compliance with this Agreement.

3. The Department will provide notice and statewide trainings regarding the revisions to the HSGQE system under this Agreement for Districts. Specific notice of the terms of this Agreement will be sent to all Districts, with direction that the Districts provide notice to special education teachers, IEP and 504 Plan team members, special education directors, and parents of class members within 30 days of Final Approval that a copy of the Agreement is available for review or may be obtained upon request.

4. The Department shall develop appropriate forms for implementation of the terms of this Agreement.

5. The implementation of the terms of this Agreement shall proceed according to the following timeline:

Issue

Implementation Complete

Accommodations

Clarification/new edition of Participation Guidelines

September 30, 2004

IEP/504 Plan team meetings to review accommodations/modifications for classes of 2005-06 for October 2004 administration.

September 24, 2004, annually thereafter for subsequent classes

IEP/504 Plan team meetings to review accommodations/modifications for class of 2007, and for class of 2006 if they have not already met in the current school year, for April 2005 administration

January 1, 2005, annually thereafter for subsequent classes

First wave of trainings for parents of students in ninth grade (Class of 2008)

June 1, 2005

Review of accommodation validity research

Ongoing

Regulatory changes necessary to implement new accommodations procedure for October 2004 administration

September 30, 2004

Non-Standardized Assessment Program

Deadline for IEP/504 Plan teams to identify and certify students for non-standardized assessment program for March 2005 administration

September 24, 2004, annually thereafter

Development and availability of application and scoring guidelines for Non-standardized assessment program for assessing proficiency in HSGQE skills

September 1, 2004

Appeals Process

Appeals process established

September 15, 2004

Other Implementation

Designation of state implementation Facilitator

Within 30 days of Final Approval

Notice regarding terms of Settlement Agreement to all Districts.

Within 30 days of Final Approval

6. This timeline assumes that Defendants are able to develop and implement the equitable provisions of this Agreement in a timely fashion. If any deadline involving implementation of the equitable provisions for the April 2005 testing date is not met before February 15, 2005, the Parties agree to meet and confer to determine (1) whether students will still have a fair opportunity to access the HSGQE in April 2005 and (2) whether this Agreement should be amended.

7. For a period of 30 months after Final Approval of this Agreement, the Department shall provide written reports on a semi-annual basis to Class Counsel regarding work performed to implement this Agreement. The reports shall detail (a) what steps the State has taken to comply with the Agreement since the last report, (b) whether the State has met the deadlines for implementation set forth in this Agreement, and if not, the extent to which such work has been completed and an explanation for any gaps, (c) what problems if any the State has encountered in complying with the Agreement, (d) what if anything the State plans to do to remedy these problems, and (e) any complaints and any responses to such complaints the State has received regarding the HSGQE with respect to students with disabilities. The first such report shall be due 180 days after the Final Approval of this Agreement.

8. Class Counsel shall receive the semi-annual reports required by this Agreement for purposes of monitoring the State's compliance. Plaintiffs reserve the right to seek monitoring fees under any legal basis available under applicable law, and Defendants reserve the right to oppose Plaintiffs' request for monitoring fees. To the extent that

Defendants are liable for fees under this paragraph, those fees shall not exceed $10,000 per year.

9. In the event that Class Counsel concludes that there has been a significant pattern of violation of the terms of this Agreement, Class Counsel is not precluded from seeking fees and costs for increased monitoring by motion to the Court.

10. Monitoring of the implementation of this Agreement by Class Counsel shall continue for 30 months following the Final Approval. This Compliance Period may be extended by the Court only upon a showing of good cause. The Compliance Period may be either shortened or lengthened by agreement of the Parties or by order of the Court.

VI. MEDIA

The Parties agree to hold a joint press conference.

VII. TERM OF THE AGREEMENT

The term of this Agreement shall consist of the Compliance Period, as set forth in Paragraph I.E above. In addition, Defendants shall be required to submit a Final Report to Class Counsel within 60 days of completion of the 30 month Compliance Period. The complaint shall be dismissed with prejudice when all efforts referenced in Sections III, IV, and V. are complete and the Final Report has been submitted.

VIII. DISPUTE RESOLUTION

1. The Parties will attempt to resolve any claim of material violation of this Agreement through negotiation. An attempt at informal resolution, as described below, will be a prerequisite to any Party's request for relief from the Court for an alleged violation of this Agreement.

2. The Court will retain jurisdiction solely for the purposes of enforcing compliance with this Agreement and adjudicating fees and costs if the Parties are unable to reach agreement.

3. Before relief is sought from the Court, the following process will be used by the Parties: Any Party claiming that a violation has occurred under this Agreement will give notice of the claim in writing to the other Parties and will propose a resolution of the issue to the other Parties.

4. The responding Parties will have twenty (20) days following receipt of the written claim to respond in writing, unless the period is enlarged by agreement of the Parties.

5. If the Party asserting the claim is dissatisfied with another Party's response, or if no response is received, the Party asserting the violation may, after providing ten days written notice to the other Parties, submit the matter to mediation for a non-binding determination. If any Party is dissatisfied with the mediator's determination, that Party may request relief from this Court. The mediator's determination will be considered a recommendation to the Court.

6. In any dispute resolution procedure, attorneys' fees and costs may be claimed under any legal basis available under applicable law.

IX. RELEASES

A. Releases By The Class

In return for the consideration provided for in this Settlement Agreement, on the date of Final Approval, all Class Members, both individually and as a Class, shall release Defendants and their officers, directors, employees, attorneys, agents, and insurers ("Released Parties") from any and all claims, liabilities, obligations, demands, and actions under the ADA, Section 504, IDEA, AS 14.03.075, AS 18.80.200 et seq., 4 AAC 06.775, or any other state or federal statutes or regulations, or the federal and Alaska constitutions, that were brought or could have been brought against the Released Parties for injunctive or declaratory relief relating to access to the HSGQE and implementation of AS 14.03.075 for students with disabilities. Notwithstanding any other term of this Agreement, this Release does not apply to (1) the validity of the HSGQE as a high stakes high school exit exam or (2) any and all issues of instructional validity, curricular validity, and opportunity to learn material tested by the HSGQE. Notwithstanding any other term of this Agreement, Plaintiffs do not release any claims related to the requirement, found in AS 14.03.075(c)(1), of failing the HSGQE once before accessing the Modified HSGQE and/or the non-standardized assessment. Plaintiffs reserve the right to challenge this requirement in judicial forums or though special education due process procedures available under federal law.

B. Releases By Named Plaintiffs

Named Plaintiffs Alexander Noon, Kendall Leibach, Douglas Mate, Tiana Lupie, Irene Takak, and Learning Disabilities Association of Alaska, in return for the consideration set forth in this Agreement, and except for the terms of this Agreement and subject to the exceptions in the foregoing paragraph, hereby release Released Parties from any and all claims, liabilities, obligations, demands, actions, and claims that were brought or could have been brought under the ADA, Section 504, IDEA, AS 14.03.075, AS 18.80.200, 4 AAC 06.775 or any other state or federal statutes or regulations, or the federal and Alaska constitutions against the Released Parties relating to access to the HSGQE and implementation of AS 14.03.075 for students with disabilities.

X. ATTORNEYS' FEES AND COSTS

The Parties have not reached an agreement regarding attorneys' fees and costs. Plaintiffs expressly retain the right to seek reasonable attorneys' fees under any legal basis available under applicable law and will make an appropriate application to the Court within 45 days of Final Approval. Defendants reserve the right to object to all or any part of Plaintiffs' request to recover attorneys' fees and costs on any other basis, including, but not limited to, the reasonableness of rates and time spent. Failure of the Parties to resolve this issue does not invalidate any of the other provisions of the Settlement Agreement.

XI. ORDERS AND DISMISSAL

A. Continuing Jurisdiction

The Court shall maintain jurisdiction over this lawsuit, including jurisdiction to enforce the terms of this Agreement for the duration of the Compliance Period and to resolve disputes over attorneys' fees and costs. The Parties agree that the Court may delegate the determination of attorney's fees and costs to a Magistrate Judge.

B. Dismissal

Within thirty business days after the submission of Defendants' Final Report pursuant to Paragraph VII, Class Counsel shall provide to counsel for Defendants a signed form of Request for Dismissal with Prejudice.

XII. MISCELLANEOUS

A. Entire Agreement

This Agreement contains the entire agreement between the Parties. No modifications or limits will be binding on the Parties unless expressly provided for in this Agreement or made by writing signed by all Parties. This Agreement expresses the complete and final understanding with respect to the subject matter of this Agreement. The Parties hereto understand and agree that the terms of this Agreement supersede any prior discussions, understandings, or agreements between them related to the subject matter hereof.

B. Counterparts

This Agreement may be executed in counterparts, each of which will be considered an original, but all of which, when taken together, will constitute one and the same instrument.

C. Interpretation

The language of this Agreement shall be construed as a whole according to its fair meaning, and not strictly for or against any of the Parties. The headings in this Agreement are solely for convenience and will not be considered in its interpretation. Where required by context, the plural includes the singular and the singular includes the plural. This Agreement is the product of negotiation and joint drafting so that any ambiguity shall not be construed against any Party.

D. Additional Documents

To the extent any documents are required to be executed by any of the Parties to effectuate this Agreement, each party hereto agrees to execute and deliver such and further documents as may be required to carry out the terms of this Agreement.

E. Authority to Bind

Roger Sampson, Commissioner of Education and Early Development, represents and warrants that he is authorized to sign on behalf of, and to bind, the State Defendants to this Settlement Agreement, which include himself, the Alaska State Board of Education and Early Development, and Richard Smiley, in his official capacity as an employee of the Alaska Department of Education & Early Development. Carol Comeau, the Superintendent of the Anchorage School District, represents and warrants that she is authorized to sign on behalf of, and to bind, the Anchorage School District to this Settlement Agreement.

FOR PLAINTIFFS:

Approved as to Form:DISABILITY RIGHTS ADVOCATES
By:_____

Sid Wolinsky Attorneys for Plaintiffs

DAVIS WRIGHT TREMAINE LLP

By: Joan Wilson Attorneys for Plaintiffs

DISABILITY LAW CENTER OF ALASKA

By: David Fleurant

Attorneys for Plaintiffs

FOR DEFENDANTS:

Approved as to Form By:Roger Sampson

Commissioner of Education and Early

Development

By:

Carol Comeau

Superintendent of the Anchorage School District

ATTORNEY GENERAL FOR THE STATE OF ALASKA

By: _____

Gregg Renkes

Attorneys for Defendants

Noon v. Alaska State Bd. of Educ. & Early Dev., Case No. A04-0057 CV. (JKS)

Settlement Agreement

GI FORUM, IMAGE DE TEJAS, RHONDA BOOZER, MELISSA MARIE CRUZ, MICHELLE MARIE CRUZ, LETICIA ANN FAZ, ELIZABETH GARZA, MARK GARZA, ALFRED LEE HICKS, BRANDYE R. JOHNSON, JOCQULYN RUSSELL, Plaintiffs, VS. TEXAS EDUCATION AGENCY, DR. MIKE MOSES, MEMBERS, AND THE TEXAS STATE BOARD OF EDUCATION, in their official capacities, Defendants.

Civil Action No. SA-97-CA-1278-EP

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS,

SAN ANTONIO DIVISION

87 F. Supp. 2d 667; 2000 U.S. Dist. LEXIS 153

January 7, 2000, Decided

January 7, 2000, Filed

DISPOSITION: [**1] Judgment GRANTED in favor of Defendants and against Plaintiffs. Pending motions be STRICKEN from docket as moot, and this case DISMISSED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs challenged use of Texas Assessment of Academic Skills (TAAS) examination because it unfairly discriminated against minority students or violated their right to due process and asked for an injunction preventing Texas Education Agency from using failure of the exit-level TAAS test as a basis for denying high school diplomas.

OVERVIEW: The articulated goals of the implementation of Texas Assessment of Academic Skills (TAAS) requirement were to hold schools, students, and teachers accountable for education and to ensure that all Texas students receive the same, adequate learning opportunities. The goals were within the legitimate exercise of state's power over public education. While the TAAS test did adversely affect minority students, Texas Education Agency (TEA) demonstrated an educational necessity for the test, and plaintiffs failed to identify equally effective alternatives. TAAS test violated neither the procedural nor the substantive due process rights of plaintiffs. TEA provided adequate notice of the consequences of the exam and ensured that the exam was strongly correlated to material actually taught in the classroom. The test was valid and in keeping with current educational norms. The test did not perpetuate prior educational discrimination or unfairly hold minority students accountable for the failures of the state's educational system.

COUNSEL: For GI FORUM, Image De Tejas, RHONDA BOOZER, MELISSA MARIE CRUZ, MICHELLE MARIE CRUZ, LETICIA ANN FAZ, ELIZABETH

GARZA, MARK GARZA, ALFRED LEE HICKS, BRANDYE R. JOHNSON, JOCQULYN RUSSELL, plaintiffs: Albert H. Kauffman, MALDEF, San Antonio, TX.

For PLAINTIFFS: Albert H. Kauffman, MALDEF, San Antonio, TX. Nina Perales, Mexican American Legal Defense, et al, San Antonio, TX.

For TEXAS EDUCATION AGENCY, MIKE MOSES, DR., THE TEXAS STATE BOARD OF EDUCATION, defendants: Geoffrey Amsel, Office of the Attorney General, Austin, TX.

JUDGES: EDWARD C. PRADO, UNITED STATES DISTRICT JUDGE.

OPINION BY: EDWARD C. PRADO

OPINION

[*668] ORDER

The issue before the Court is whether the use of the Texas Assessment of Academic Skills (TAAS) examination as a requirement for high school graduation unfairly discriminates against Texas minority students or violates their right to due process. The Plaintiffs challenge the use of the TAAS test under the due process clause of the United States Constitution and 34 C.F.R. § 100.3, an implementing regulation to Title VI of the **[**2]** Civil Rights Act of 1964, asking this Court to issue an injunction preventing the Texas Education Agency (TEA) from using failure of the exit-level TAAS test as a basis for denying high school diplomas. 1 The Court has considered the testimony and evidence presented during five weeks of trial before the bench, as well as the relevant case law. After such consideration, and much reflection, the Court has determined that the use of the TAAS examination does not have an impermissible adverse impact on Texas's minority students equal protection EDUCATIONAL AGENCY PREVAILED and does not violate their right to the due process of law. due process EDUCATIONAL AGENCY PREVAILED.

The bases for the Courts determination are outlined more fully in its findings of facts and conclusions of law, below. The Court writes separately only to make a few general observations about the legal issues underpinning this case.

1 This suit is also brought individually by nine Texas students who did not pass the TAAS exit-level examination prior to their scheduled graduation dates. Those students who actually testified request that their respective school districts issue their diplomas. Consistent with this Order, that request is denied. Those students who did not appear to testify; Melissa Marie Cruz, Michelle Marie Cruz, and Jocqulyn Russell are dismissed from the case for failure to prosecute.

[3]** In deciding the issues presented, both at the summary judgment stage and at trial, the Court has been required to apply a body of law that has not always provided clear guidance. **[*669]** This case requires the application of law from a number of diverse areas--employment law, desegregation law, and testing law in areas such as bar examinations or teacher certification examinations. Only one case cited by any party or

this [**4] Court is both controlling and directly on point-- *Debra P. v. Turlington,* 644 F.2d 397 (5th Cir. 1981). In *Debra P.,* the United States Court of Appeals for the Fifth Circuit found that a state could overstep its bounds in implementing standardized tests as graduation requirements. Specifically, the court found that a test that did not measure what students were actually learning could be fundamentally unfair. The court also found that a test that perpetuated the effects of prior discrimination was unconstitutional. This Court finds these ideas to be in step with the United States Supreme Court's suggestion in *Regents of University of Michigan v. Ewing,* 474 U.S. 214, 225, 88 L. Ed. 2d 523, 106 S. Ct. 507 (1985), that a state could violate the constitution if it implemented policies that violated accepted educational norms

In addition, this Court has allowed the Plaintiffs to bring a claim pursuant to a regulation adopted in conjunction with Title VI. *See* 34 C.F.R. § 100.3. While [**5] the Court acknowledges that the United States Supreme Court has limited Title VI itself to constitutional parameters (i.e., has required a showing of an intent to discriminate in order to prove a violation), *see United States* v. *Fordice,* 505 U.S. 717, 722 n.7, 120 L. Ed. 2d 575, 112 S. Ct. 2727 (1992), the Court does not find that this limitation has been clearly and unambiguously extended to its implementing regulations. The Court is not alone in reaching this conclusion. *See Cureton v. National Collegiate Athletic Assoc.,* 198 F.3d 107, 1999 U.S. App. LEXIS 33441, 1999 WL 1241077, at *5 (3d Cir. 1999); *Elston v. Talladega Co. Bd. of Educ.,* 997 F.2d 1394, 1406 (11th Cir. 1993); *Harper v. Board of Regents of Ill. State Univ.,* 35 F. Supp. 2d 1118, 1123 (C.D. Ill. 1999); *Valeria G. v. Wilson,* 12 F. Supp. 2d 1007, 1023 (N.D. Cal. 1998); *Graham v. Tennessee Secondary Athletic Ass'n,* 1995 U.S. Dist. LEXIS 3211, No. 1:05- CV-044, 1995 WL 115890, at *12 (E.D. Tenn. Feb. 20, 1995). Nor is the Court alone in concluding that a private right of action exists under this regulation. *See, e.g., Harper,* 35 F. Supp. 2d at 1123; [**6] *Valeria G.,* 12 F. Supp. 2d at 1023; *Graham,* No. 1:05- CV-044, 1995 WL 115890, at *12. The Court believes that it has followed the law as it presently exists in allowing these claims to go forward.

In reviewing the diverse cases that underpin this decision, the Court has had to acknowledge what the Defendants have argued throughout trial this case is, in some important ways, different from those cases relied upon by the Plaintiffs. In the first place, this case asks the Court to consider a standardized test that measures knowledge rather than one that predicts performance. The Court has had to consider whether guidelines established in the employment context are adequate for determining whether an adverse impact exits in this context. In addition, the Court has been required to determine the deference to be given to a State in deciding *how much* a student should be required to learn--the cut-score issue STATE AUTHORITY. Finally, the Court has had to weigh what appears to be a significant discrepancy in pass scores on the TAAS test with the overwhelming evidence that the discrepancy is rapidly improving and that the lot of Texas minority students, at least as demonstrated [**7] by academic achievement, while far from perfect, is better than that of minority students in other parts of the country and appears to be getting better EQUAL PROTECTION.

2 The Court read and heard with interest the conclusions of Plaintiff's expert Amilcar Shabazz on this subject. *See Report of Dr. Amilcar Shabazz,* Plaintiff's expert, at 11-12.

Shabazz rejects the argument that offering focused remedial efforts to students who do not pass the TAAS helps eradicate the effects of past discrimination. A student who fails the test does not graduate. A student who has been remediated and finally passes the test has only passed a test, not necessarily received an adequate education. The Court notes in response that its authority to determine what constitutes an "adequate" education is extremely limited.

[*670] This case is also remarkable for what it does *not* present for the Court's consideration. In spite of the diverse and contentious opinions surrounding the use of the TAAS test, this Court has not been asked to and indeed **[**8]** could not role on the wisdom of standardized examinations. This Court has no authority to tell the State of Texas what a well-educated high school graduate should demonstrably know at the end of twelve years of education. Nor may this Court determine the relative merits of teacher evaluation and "objective" testing. JUDICIAL RELUCTANCE

This case is also not directly about the history of minority education in the State. While that history has had some bearing on some of the due process concerns raised by the Plaintiffs, what is really at issue here is whether the TAAS ex-it-level test is *fair.* As the Court notes below, the test cannot be fair if it is used to punish minorities who have been victimized by state-funded unequal educations. Thus, the Court has carefully considered the claims that Texas schools still offer widely diverse educational opportunities and that, too often, those opportunities depend on the color of a student's skin or the financial resources of the student's school district. 3 To some degree, as discussed below, the Court must accept these claims. But that finding, alone, is an insufficient basis for invalidating this examination. There must be some link between the TAAS test **[**9]** and these disparities. In other words, the Plaintiffs were required to prove, by a pre-ponderance of the evidence, that the TAAS test was implemented in spite of the disparities or that the TAAS test has perpetuated the disparities, and that requiring passage of the test for graduation is therefore fundamentally unfair. The Court believes that this has not been proven. Instead, the evidence suggests that the State of Texas was aware of probable disparities and that it designed the TAAS accountability system to reflect an insistence on standards and educational policies that are uniform from school to school. It is true that these standards reflect no more than what the State of Texas has determined are essential skills and knowledge. It is undeniable that there is more to be learned. However, the Court cannot pass on the States determination of what, or how much, knowledge must be acquired prior to high school graduation.

3 Of course, these are generalizations. The Court recognizes that students in districts with relatively greater resources have failed the TAAS examination.

[10]** This case presented widely differing views of how an educational system should work. One set of witnesses believed that the integrity of objective measurement was paramount; the other believed that this consideration should be tempered with more flexible notions of fairness and justice. Thus, the relative quality of experts in this case is not so simple a matter as either party would make it. On the issue of internal test fairness and soundness, clearly the TEA pre-sented better experts--their experts wrote the test and have written other tests. Their experts are invested in the profession and practice of test-

writing and tire committed to standardized tests as useful exercises for various kinds of educational measurement. However, TEA's experts were not so qualified, the Court finds, to speak on the wisdom of the use of standardized tests as they apply to ethnic minorities in a state educational system that has had its difficulties providing an equal education to those minorities. In that regard, the expert testimony failed to match up. TEA's experts, for example, are not especially qualified to speak on the psychological, social, or economic effects of failing to pass a test used **[**11]** as a requirement for graduation. At least one of those experts testified **[*671]** that whether a given test item disadvantages minority students is a factor that an item reviewer may ultimately *reject* in determining whether an otherwise valid item should be placed on the test. This is so because, as TEA's experts overwhelmingly testified, what is fundamentally important to these psychometricians is that the test objectively measure the material that it purports to measure and that it measure content that students have been exposed to. 4 *See Report of Dr. Susan Phillips,* Defendants' expert, at 16 (a plausible explanation for differential performance is difference in achievement level). On the question, then, of whether it is *wise* to use standardized tests in making high stakes decisions, taking into account all the contextual factors, the Court finds the expert testimony was not fairly joined. Plaintiff's experts had clearly considered this question more fully and given it more weight. The question is-how relevant to this Court's decision is the *wisdom* of the TAAS test and, to the extent that Plaintiffs experts were able to prove that the test is not *wise,* have they been **[**12]** able to show that it actually crosses the line and is impermissible by some legal standard?

4 The Court does not suggest that the psychometricians who testified on behalf of the TEA reject the notion that a test's effects should be fair. Rather, they view the system in place, which provides wholly objective assessment, as the best way to ensure fairness. In addition, De-fendants' expert Dr. Susan Phillips noted that careful scrutiny is given to test items that arc identified as having large differences between the performances of minority and majority students. *See Report of Dr. Susan Phillips,* Defendants' expert, at 3.

Ultimately, resolution of this ease turns not on the relative validity of the parties' views on education but on the State's right to pursue educational policies that it legitimately believes are in the best interests of Texas students. The Plaintiffs were able to show that the policies are debated and debatable among learned people. The Plaintiffs demonstrated that the policies have had **[**13]** an initial and substantial adverse impact on minority students. The Plaintiffs demonstrated that the policies are not perfect. However, the Plaintiffs failed to prove that the policies are unconstitutional, that the adverse impact is avoidable or more significant than the concomitant *positive* impact, or that other approaches would meet the State's articulated legitimate goals. In the absence of such proof, the State must be allowed to design an educational system that it believes best meets the need of its citizens.

FINDINGS OF PACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

5 Any finding of fact more appropriately characterized as a conclusion of law may be considered as such.

THE TEST

Test Construction

In 1984, the Texas legislature passed the Equal Educational Opportunity Act (EEOA), designed to impose an "accountability" system on Texas public school administrators, teachers, and students. The following year, in response to that legislation, the Texas State Board of Education **[**14]** adopted a curriculum of Essential Elements. 6 In addition, the Board moved forward with its plans to implement an objective standardized test that would measure mastery of the state-mandated curriculum. In 1987, Texas instituted the TEAMS high school graduation exit test, given to eleventh-graders.

6 In 1998-1999, the Texas Essential Knowledge and Skills (TEKS) replaced the Essential Elements.

In 1990, Texas replaced the TEAMS test with the Texas Assessment of Academic Skills (TAAS) test, the subject of this lawsuit. Like the TEAMS test, the TAAS test is designed to measure mastery of the state-mandated curriculum. How-ever, the TAAS test seeks to assess higher-order thinking and higher problem-solving skills than did the TEAMS test. The TAAS test is developed and constructed by **[*672]** National Computer Systems (NCS), a private corporation. NCS, in turn, subcontracts development of TAAS items to Harcourt Brace Educational Measurement (HBEM) and Measurement Incorporated. HBEM contracts with individuals to write items **[**15]** for the TAAS test. In addition to the extensive input from these professional test-designers, many of whom are not in the State of Texas, there is a great deal of input from state educators in the design of the TAAS test. Decisions as to which portions of the state-mandated curriculum should be measured by the TAAS test are made by Texas teachers and educational professionals. The Texas Education Agency has ensured that the educators comprise an ethnically diverse group of individuals from across the state. In addition, proposed TAAS questions are reviewed by subject-matter content experts, review committees of teachers and educators, test-construction experts, and measurement experts.

In reviewing test items, educators are instructed to consider the following issues; relevancy of the item, difficulty range, clarity of the item, correctness of the keyed answer choice, and the plausibility of distractors. Reviewers are also asked to consider the more global issues of passage appropriateness, passage difficulty, and interactions between items within and between passages as well as work, graphs, or figures. Reviewers are asked to assess whether or not each item on the TAAS exam covers **[**16]** information that was sufficiently taught in the classroom by the time of the test administration.

After this initial review, a second review is conducted by staff members of the Student Assessment and Curriculum divisions of the TEA and by developmental and scoring contractors.

Selected questions are then field tested. The results of those field tests are reviewed by a Data Review Committee. Committee members are permitted to remove items they consider to be questionable, including questions that a dispro-portionate number of minority students fail to answer correctly. Reviewing members are given "great deference" in this process and are not required to eliminate a question that reflects that any ethnic group bad particular difficulty with the question. *See Report of Dr. Susan Phillips,* Defendants' expert, at 17. If the reviewer finds that an item with a predicted adverse effect on minorities is a "fair measure of its corresponding state objectives *for all students,* and is free of offensive language or concepts that may differentially disadvantage minority students," the item may be retained, even if a significantly larger number of minority students do not answer it correctly. **[**17]** *Id.* (emphasis in original).

Test Validity

Several concepts are key to understanding the arguments raised by the parties regarding the validity of the TAAS examination. The "validity" of a given standardized test refers to the "weight of the accumulated evidence supporting the particular use of the test scores." *Report of Dr. Susan Phillips,* Defendants' expert, at 3. "Content validity" measures the degree to which the test measures the knowledge and skills sought to be measured, in this case the legislatively man-dated minimum essentials. *Id.* "Curricular validity" refers to the issue of whether students have an adequate opportunity to learn the material covered on a given standardized test. *Id.* at 10. "Test reliability" is "an indicator of the consistency of measurement" *Id.* at 4. Reliability may be tested by repeat testing or by various measures based on a single-test measurement. *Id.*

Each form of a standardized test must be valid and reliable. Validity and reliability across different forms of the test are ensured by "equating" test forms, or adjusting for any minor variations in difficulty between the forms. *Id.* at 7. The TAAS test is "equated" **[**18]** under what is called the Rasch Model. *Id.* This model focuses narrowly on item-difficulty parameters and does not provide for "item weighing," as do more complex equating models. *Id.* In other words, part of equating test forms involves using a fairly simple formula, the **[*673]** Rasch Model, to determine how well a student's response on a given question predicts that student's success on the exam as a whole. "Point biserials" measure the degree to which persons who answer an item correctly tend to also have high total test scores and vice ver-sa. *Id.* at 21.

Test Administration

Texas public school students begin taking the TAAS test in the third grade. In the tenth grade, Texas public school students are given what is called the "exit-level" TAAS exam, or the examination they must pass in order to graduate. Students must pass each of three portions of the TAAS test--a reading, mathematics, and writing portion--in order to graduate. Texas public school students who do not pass the test on their first attempt are then given at least seven additional opportunities to take and pass the TAAS exam before their scheduled graduation date.

THE PASSING STANDARD

The initial passing **[**19]** standard, or cut score, on the TAAS test was set at 60 percent, and a 70-percent passing standard was phased in after the first year. In setting the passing standard, the State Board of Education looked at the passing standard for the TEAMS test, which was also 70 percent, and also considered input from educator committees. In addition, the selection of the score reflected a general sense that 70 percent of the required essential elements was sufficient "mastery" for the purposes of graduation. *See TEA Board of Education Minutes,* June 1990.

The TEA understood the consequences of setting the cut score at 70 percent. When it implemented the TAAS test, the TEA projected that, with a 70-percent cut score, at least 73 percent of African Americans and 67 percent of Hispanics would fail the math portion of the test; at least 55 percent of African Americans and 54 percent of Hispanics would fail the reading section; and at least 62 percent of African Americans and 45 percent of Hispanics would fail the writing section. The predictions for white students were 50 percent, 29 percent, and 36 percent, respectively. However, TEA representatives had reason to believe that those projections [**20] were inflated, Experts informed TEA representatives that there is a measurable difference in the motivation between students taking a field examination and students taking a test with actual consequences. While the passing numbers were somewhat better than projected, they were non-etheless alarming. On the October 1991 administration of the exam to tenth graders, 67 percent of African Americans and 59 percent of Hispanics failed to meet the passing cut score. For whites, the number was 31 percent.

OBJECTIVE MEASUREMENT

In spite of projected disparities in passing rates, the TEA determined that objective measures of mastery should be imposed in order to eliminate what it perceived to be inconsistent and possibly subjective teacher evaluations of students. The TEA offered evidence at trial that such inconsistency exists. The TEA also presented testimony that subjectivity can work to disadvantage minority students by allowing inflated grades to mask gaps in learning.

REMEDIATION

Failure to master any portion of the exam results in state-mandated remediation in the specific subject area where the student encountered difficulty. There is no state-mandated approach to remediation, **[**21]** however. Consequently, remedial efforts vary from district to district. The evidence at trial reflected varying degrees of success resulting from remedial efforts. The Court finds that, on balance, remedial efforts are largely successful. TEA's expert Dr. Susan Phillips estimates that 44,515 minority students in 1997 were successfully remediated after having failed their first attempt at the TAAS test in 1995. *Report of Dr. Susan Phillips,* Defendants' expert, at 14. The Court finds this evidence credible.

[*674] ACCOUNTABILITY

Administrators, schools, and teachers are held accountable, in varying degrees, for TAAS performance. The accountability system does not ignore the presence of ethnic minorities in the system or the difficulties minorities may have in passing the examination. Passing and failing scores are dis-aggregated, or broken down into subgroups, so that schools and districts are aware of the degree of success or failure of African American, Hispanic, and white students. If one subgroup fails to meet minimum performance standards, a school or district will receive a low accountability rating.

HISTORY OF TESTING/DISCRIMINATION IN TEXAS

It is beyond dispute **[**22]** that standardized tests have been used in educational contexts to disadvantage minorities. *See Report of Dr. Uri Treisman.* Defendants' expert, at 3. However, the Plaintiffs have presented insufficient evidence to support a finding that the TAAS test, as developed, implemented, and used in Texas, is designed to or does impermissibly disadvantage minorities. While it is true that a number of minority students fail to pass the TAAS test and earn a diploma, there is no evidence that this was the design of the State in initiating the test. On the contrary, there is evidence that one of the goals of the test is to help identify and eradicate educational disparities. The receipt of an education that does not meet some minimal standards is an adverse impact just as surely as failure to receive a diploma.

The Court agrees with Plaintiffs that sufficient evidence, including evidence cited in other state and federal case law, exists to support the Plaintiffs' claim that Texas minority students have been, and to some extent continue to be, the victims of educational inequality, *See Report of Dr. Uri Triesman.* Defendants' Expert, at 7; *see also, e.g.,*

United States v. Texas Educ. Agency, 467 F.2d 848 (5th Cir. 1972), **[**23]** and its progeny; *United States v. Texas,* 330 F. Supp. 235 (E.D. Tex. 1971). Witnesses in this case were questioned by counsel and by the Court about the reasons for this inequa-lity. The evidence was disturbing, but inconclusive. Socio-economics, family support, unequal finding, quality of teaching and educational materials, individual effort, and the residual effects of prior discriminatory practices were all implicated. The Court finds that each of these factors, to some degree, is to be blamed.

However, the Plaintiffs presented insufficient evidence to support a finding that minority students do not have a reasonable opportunity to learn the material covered on the TAAS examination, whether because of unequal education in the past or the current residual effects of an unequal system. The Plaintiffs presented evidence to show that, in a more general sense, minorities are not provided equal educational opportunities. In particular, Plaintiffs demonstrated that minorities are underrepresented in advanced placement courses and in gifted-and-talented programs. Minority students are also disproportionately taught by non-certified teachers. However, because of the rigid, **[**24]** state-mandated correlation between the Texas Essentials of Knowledge and Skills and the TAAS test, the Court finds that all Texas students have an equal opportunity to learn the items presented on the TAAS test, which is the issue before the court. In fact, the evidence showed that the immediate effect of poor performance on the TAAS examination is more concentrated, targeted educational opportunities, in the form of remediation. Moreover, the TEA's evidence that the implementation of the TAAS test, together with school accountability and mandated remedial follow-up, helps address the effects of any prior discrimination and remaining inequities in the system is both credible and persuasive. EQUAL OPPORTUNITY

EDUCATIONAL STANDARDS **

Current prevailing standards for the proper use of educational testing recommend that highstakes decisions, such as whether or not to promote or graduate a student, should not be made on the basis **[*675]** of a single test score. *See Supplemental Report of Dr. Walter Haney,* Plaintiffs expert, at 42 (citing *Standards for Educational and Psychological Testing* (1985)). There was little dispute at trial over whether this standard exists and applies to the TAAS exit-level **[**25]** examination. What was disputed was whether the TAAS test is actually the sole criterion for graduation. As the TEA points out, [HN6] in addition to passing the TAAS test, Texas students must also pass each required course by 70 percent. *See* TEXAS ADMIN. CODE § 74.26(c). Graduation in Texas, in fact, hinges on three *separate and independent* criteria: the two objective criteria of attendance and success on the TAAS examination, and the arguably objec-tive/subjective criterion of course success. However, as the Plaintiffs note, these factors are not weighed with and against each other; rather, failure to meet any single criterion results in failure to graduate. Thus, the failure to pass the exit-level exam does serve as a bar to graduation, and the exam is properly called a "high stakes" test. SOLE CRITERION

On the other hand, students are given at least eight opportunities to pass the examination prior to their scheduled graduation date. In this regard, a single TAAS score does *not* serve as the sole criterion for graduation. The TEA presented persuasive evidence that the

number of testing opportunities severely limits the possibility of "false negative" results and actually increases the possibility **[**26]** of "false positives," a fact that arguably advantages all students whose scores hover near the borderline between passing and failing. OPPORTUNITY TO LEARN

DISPARATE IMPACT

The Court finds as an inescapable conclusion that in every administration of the TAAS test since October 1990, His-panic and African American students have performed significantly worse on all three sections of the exit exam than majority students. However, the Court also finds that it is highly significant that minority students have continued to narrow the passing rate gap at a rapid rate. In addition, minority students have made gains on other measures of academic progress, such as the National Assessment of Educational Progress test. The number of minority students taking college entrance examinations has also increased.

In determining whether a legally significant statistical disparity exists, the Court has had to consider two difficult issues. The first is whether to apply the EEOC's Four-Fifths Rule or some other recognized test for identifying statistical disparity, as the Plaintiffs have argued the Court must do. The second is whether to consider cumulative pass rates or pass rates on a single administration of the **[**27]** examination at the tenth-grade level. The Court's resolution of these is-sues is discussed more fully in the Conclusions of Law, below.

Plaintiff's statistical expert, Mark Fassold, presented evidence that TAAS exit-level exam failure rates have a racially discriminatory effect under the Four-Fifths Rule 7 and the *Shoben* formula. 8 The TEA contends that Fassold's study is flawed in significant ways and must be rejected. The Court acknowledges that Fassold's data include students who did not sit for the exam in the category of students who "passed" the exam. However, the Court has considered this flaw in its proper context. As the Plaintiffs point out, Fassold's methodology almost certainly artificially *inflates* the minority pass rate by coding those who fail to take the examination as passing. *Report of Mark Fassold,* Plaintiff's expert, at 13 n. 10. Because minorities fail to take the test at a higher rate than majority students, the minority pass rate is inflated at a higher rate than that of the majority pass rate. **[*676]** *Id.* Thus, the Court is inclined to agree with Plaintiffs that they have likely over-estimated the minority pass rate. In this context, then, the Court **[**28]** finds there is sufficient evidence that, on first-time administration of the exit-level teat, a legally significant adverse impact exists. While an examination of cumulative pass scores in more recent years does not evince adverse impact under the Four-Fifths Rule, the disparity there, too, is sufficient to give rise to legitimate concern. *See Cureton v. National Collegiate Athletic As-soc.,* 37 F. Supp. 2d 687, 697 (E.D. Pa. 1999) ("no rigid mathematical threshold of disproportionality...must be met to demonstrate a sufficiently adverse impact"), *rev'd on other grounds,* 198 F.3d 107, 1999 U.S. App. LEXIS 33441, 1999 WL 1241077 (3d Cir. 1999). Moreover, as discussed below, there are significant statistical disparities in cumulative pass rates.

7 [HN7] The Four-Fifths Rule finds an adverse impact where the passing rate for the minority group is less than 80 percent of the passing rate for the majority group. 29 C.F.R. § 1607.

8 [HN8] The *Shoben* formula seeks to assess the statistical significance of observed numerical disparities by determining differences be-tween independent proportions. *See Frazier v. Consolidated Rail Corp.,* 271 U.S. App. D.C. 220, 851 F.2d 1447, 1450 n.5 (D.C. Cir. 1988).

[29]** In addition to evaluating the statistical impact of the examination, the Court has, at the behest of both parties, considered the "practical consequences" or "practical impact" of the high failure rates of minorities. That consideration involves careful examination of the immediate and long-term effects of the statistically disparate failure rates. The TEA argues that, because of the presence of largeLy successful remediation, the practical significance benefits minorities. The Plaintiffs note that failure to graduate has serious economic, social, and emotional effects on students. EQUAL PROTECTION

The Court finds that failure of the exit-level TAAS examination during the first seven administrations results in immediate remedial efforts. At the last administration, of course, failure of the exit-level TAAS examination results in a failure to receive a diploma. However, the Court finds, based on the evidence presented at trial, that the effect of remediation, which is usually eventual success in passing the examination and thus receipt of a high school diploma, is more profound than the steadily decreasing minority failure rate. MULTIPLE OPPORTUNITIES/REMEDIATION

DROP-OUT/RETENTION RATES

Plaintiffs presented sufficient evidence **[**30]** to support a finding that Texas students, particularly minority students, dropout of school in significant numbers and are retained at their current grade level in numbers that give cause for concern. Moreover, the Plaintiffs presented evidence supporting their contention that drop-out and retention rates for minorities are peculiarly high at the ninth grade, just before the first administration of the exit-level TAAS. *See Supple-mental Report of Dr. Walter Haney,* Plaintiff's expert, at 21-29- The evidence presented by Plaintiffs also shows that in the year 1991, as the present TAAS test was being phased in, there was a drop in the ratio of high school graduates to grade nine students three years before, and that this drop was most notable for minority students. *See Id.* at 25-26 How-ever, Plaintiffs have failed to make a causal connection between the implementation of the TAAS test and these phenomena, beyond mere conjecture. In other words, Plaintiffs were only able to point to the problem and ask the Court to draw an inference that the problem exists because of the implementation of the TAAS test. That inference is not, in light of the evidence, inevitable. The Defendants hypothesize, **[**31]** just as plausibly, for example, that the ninth grade increase in drop outs is due to the cessation of automatic grade promotion at the beginning of high school in Texas. EQUAL OPPORTUNITY

CONCLUSIONS OF LAW

9 Any conclusion of law more appropriately characterized as a finding of fact may be considered as such.

This lawsuit is properly brought under two causes of action: the implementing regulations of Title VI of the Civil Rights Act of 1964 and the due process clause of the Fourteenth Amendment to the United States Constitution.

TITLE VI REGULATIONS

[HN9] Title VI of the Civil Rights Act of 1964 is a statute enacted "with the **[*677]** 'intent' to invoke the Fourteenth Amendment's congressional enforcement power." *Lesage v. State of Texas,* 158 F.3d 213, 218 (5th Cir. 1998), *cert. filed,* 67 U.S.L.W. 3469 (Jan. 11, 1999). [HN10] The TEA, as a state agency that administers and monitors compliance with educational programs required by state and federal laws and as the recipient of federal funds, is governed **[**32]** by Title VI and its regulations. 42 U.S.C. 2000d et seq.; *Castaneda v. Pickard,* 648 F.2d 989, 992 (5th Cir. Unit A 1981). The Plaintiffs have brought this suit, in pall, pursuant to 34 C.F.R. § 100.3, a regulation promulgated by the Department of Education to implement Title VI. [HN11] That regulation prohibits activity in federally funded programs that has the effect of subjecting individuals to discrimination because of their race, color, or national origin. 34 C.F.R. § 100.3; *Powell* v. *Ridge,* 189 F.3d 387, 396 (3d Cir. 1999), *cert. denied,* 1999 U.S. LEXIS 8029, 120 S. Ct. 579, 1999 WL 783927 (1999); *Elston,* 997 F.2d at 1406. [HN12] The language of the regulation clearly suggests that a disparate impact analysis is appropriate under this regulation, and courts have applied it in that manner. 10 *See Quarles v. Oxford Mun. Separate Sch. Dist.,* 868 F.2d 750, 754 n.3 (5th Cir. 1989); *City of Chicago v. Lindley,* 66 F.3d 819, 827 (7th Cir. 1995); *see also Cureton,* 37 F. Supp. 2d at 697 (gathering cases). Similarly, courts have held that plaintiffs bringing lawsuits pursuant to 34 **[**33]** C.F.R. § 100.3 have a private right of action. *Powell,* 189 F.3d at 398; *Cureton,* 37 F. Supp. 2d at 689. This Court concurs in that conclusion.

10 As noted elsewhere, the TEA has suggested that this regulation has been limited to its constitutional dimensions (i.e., to a requirement that a plaintiff show discriminatory intent) by the United States Supreme Court, in *United States* v. *Fordice,* 505 U.S. 717, 120 L. Ed. 2d 575, 112 S. Ct. 2727 (1992). The Court acknowledges the dicta to which the TEA refers. *See Fordice,* 505 U.S. at 732. However, the Court notes that other courts have not held that the disparate impact analysis under 34 C.F.R. § 100.3 has been abrogated. *See Cureton,* 37 F. Supp. 2d at 697 (collecting cases); *Graham v. Tennessee Secondary Sch. Athletic Assoc.,* 1995 U.S. Dist. LEXIS 3211, No. 1:95-cv-044, 1995 WL 115890, at *12 (E.D. Tenn. Feb. 20, 1995) (joining other courts in maintaining disparate impact claim after *Fordice).* It is this Court's duty to *apply* the law, as near as it is able, and only to *predict* what the law will be when absolutely necessary. *See Charles J. Cooper, Stare Decisis: Precedent & Principal in Constitutional Adjudication,* 73 CORNELL L. REV. 401 at n.6 (1988).

[**34] A disparate impact theory of racial discrimination permits a court to overturn facially neutral acts and policies that have "significant adverse effects on protected groups ... without proof that the [actor] adopted those practices with a discriminatory

intent." *Watson v. Fort Worth Bank and Trust,* 487 U.S. 977, 986-87, 101 L. Ed. 2d 827, 108 S. Ct. 2777 (1988). To delineate a standard for evaluating this disparate impact claim, the Court has looked to employment law un-der Title VII of the Civil Rights Act of 1964, which allows a disparate impact cause of action. *See, e.g., Wards Cove Packing Co., Inc. v. Atonio,* 490 U.S. 642, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); *Watson,* 487 U.S. 977, 101 L. Ed. 2d 827, 108 S. Ct. 2777; *Griggs v. Duke Power Co.,* 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971).

Thus, in determining whether a prima facie case of disparate impact has been established, this Court will apply the burden-shifting analysis established in Title VII cases. Under that analysis, the plaintiff must initially demonstrate that the application of a facially neutral practice has caused a disproportionate **[**35]** adverse effect. *Wards Cove,* 490 U.S. at 656-57. If a plaintiff makes such a showing, a burden of production shifts to the defendant. Under that burden, the defendant must produce evidence that the practice is justified by an educational necessity. *Id.* The plaintiff may then ultimately prevail by demonstrating that an equally effective alternative practice could result in less racial disproportionality while still serving the articulated need. *Watson,* 487 U.S. at 998.

I. Disparate Impact

In determining whether an adverse impact exists in this case, the Court has **[*678]** considered and applied the Equal Employment Opportunity Commission's Four-Fifths Rule. *See* 29 C.F.R. § 1607.4(d). The Court disagrees with the TEA's argument that this test is not suited for identifying the presence of adverse impact in this context. *See Cureton,* 37 F. Supp. 2d at 700 (applying Four-Fifths Rule). In addition, the Court notes that the TEA did not offer in its briefing or at trial a satisfactory substitute for determining a statistical disparity, choosing instead to rely on its arguments that a disparate impact theory should not be applied **[**36]** in a Title VI case or, alternatively, that the Court should consider only the practical effect of remediation.

In addition to the Four-Fifths Rule, the Court has considered the statistical significance of the observed differences in pass rates. The methodology for such consideration, referred to by these parties as the *Shoben* formula, is to find a "z-score," or a number representing the differences between independent proportions--here the pass rates of minority students and the pass rates of majority students. *See Report of Mark Fassold,* Plaintiff's expert, at 4-6; *Preliminary Re-port of Dr. Walter Haney,* Plaintiff's expert, at 13.

The evidence regarding whether Plaintiffs have established the existence of a significant adverse impact on minority students is mixed. Plaintiffs' statistical analysis, while somewhat flawed, demonstrates a significant impact on first-time administration of the exam. This impact, which clearly satisfies the Four-Fifths Rule, is conceded by at least one TEA expert. *See Report of Dr. Susan Phillips,* Defendants' expert, at 13. However, cumulative pass rates do not demonstrate so severe an impact and, at least for the classes of 1996, 1997, **[**37]** and 1998, are not statistically significant under the EEOC's Four-Fifths Rule. *See id.* at 14.

In considering how to handle the dilemma of choosing between cumulative and single-test administration, the Court has taken into account the immediate impact of initial and

subsequent in-school failure of the exam--largely successful educational remediation. In addition, the Court has considered the evidence that minority scores have shown dramatic improvement. These facts would seem to support the TEA's position that cumulative pass rates are the relevant consid-eration here.

The Plaintiffs argue that successful remediation and pass-rate improvement should not be considered in determining whether an adverse impact exists. To support their argument, the Plaintiffs point to case law holding that a "bottom line" defense is insufficient to combat a showing of adverse impact. *See Connecticut* v. *Teal,* 457 U.S. 440, 455, 73 L. Ed. 2d 130, 102 S. Ct. 2525 (1982). The Court is not convinced that this argument is applicable to the case before it.

In *Connecticut* v. *Teal,* the United States Supreme Court held that an employer charged with a Title VII violation could **[**38]** not justify discrimination against one individual by pointing to its favorable treatment of other members of the same racial group. *Id.* at 454. According to the Court, Title VII requires an employer to provide "an equal opportunity for each applicant regardless of race." *Id.* In that case, however, the employer was trying to compensate for a discriminatory selection test by arguing that subsequent affirmative action practices allowed the employer to reach a non-discriminatory "bottom-line." *Id.* at 452-53. As another court has stated, *Teal* stands for the proposition that "the disparate exclusion of minority candidates at the first stage of the selection process was not ameliorated by the favorable end result because excluded candidates were deprived individually of the opportunity for promotion." *Lindley,* 66 F.3d at 829.

The Court will assume that *Teal's* analysis applies in Title VI cases. *Id.* However, the Court is not sure that *Teal* is relevant here. Failure to pass the first administration of the TAAS test does not deny an individual a competitive opportunity. It is only after at least *eight* tries that there **[**39]** is a real negative impact. This is not a case **[*679]** where there are several distinct steps through a selection system. *See Newark Branch, NAACP v. Town of Harrison, N.J.,* 940 F.2d 792, 801 (3d Cir. 1991). Nor is it the TEA's argument that the test is legal because, while some individuals fail and do not receive diplomas, others *do* and so the disparate effect is ameliorated. Rather, the TEA is arguing that each individual student is given at least eight tries to pass the exam and that many students who fail on the first attempt eventually succeed. The Court believes that these facts distinguish this case from *Teal,* and the Court will reject the *Teal* analysis. Thus, the Court has considered, and found relevant, the distinction between pass rates after a single administration and pass rates after eight attempts.

Having said all that, however, the Court finds that, whether one looks at cumulative or single-administration results, the disparity between minority and majority pass rates on the TAAS test must give pause to anyone looking at the numbers. The variances are not only large and disconcerting, they also apparently cut across such factors as socioeconomics. **[**40]** Further, the data presented by the Plaintiffs regarding the statistical significance of the disparities buttress the view that legally meaningful differences do exist between the pass rates of minority and majority students. Disparate impact is suspected if the statistical significance test yields a result, or z-score, of more than two or three standard deviations. *Castaneda v. Partida,* 430 U.S. 482, 496 n.17, 97

S. Ct. 1272, 51 L. Ed. 2d 498 (1977). In all cases here, on single and cumulative administrations, there are significant statistical differences under this standard. Given the sober-ing differences in pass rates and their demonstrated statistical significance, the Court finds that the Plaintiffs have made a prima facie showing of significant adverse impact. *See Supplemental Report of Dr. Walter Haney,* Plaintiff's Expert, at 4-5 (discussing practical adverse impact); *Cureton,* 37 F. Supp. 2d at 697 ("no [HN15] rigid mathematical threshold of disproportionality ... must be met to demonstrate a sufficiently adverse impact").

II. Educational Necessity

Having found that the Plaintiffs have established a prima facie showing of significant adverse impact, the Court must consider **[**41]** whether the TEA has met its burden of production on the question of whether the TAAS test is an educational "necessity." The word "necessity," as an initial matter, is somewhat misleading; the law does not place so stringent a burden on the defendant as that word's common usage might suggest. Instead, an educational ne-cessity exists where the challenged practice serves the *legitimate* educational goals of the institution. *Wards Cove,* 490 U.S. at 659. In other words, the TEA must merely produce evidence that there is a manifest relationship between the TAAS test and a legitimate educational goal. *Teal,* 457 U.S. at 446. The Court finds that the TEA has met its burden.

The articulated goals of the implementation of the TAAS requirement are to hold schools, students, and teachers ac-countable for education and to ensure that all Texas students receive the same, adequate learning opportunities. These goals are certainly within the legitimate exercise of the State's power over public education. To determine whether the TAAS test hears a manifest relationship to these legitimate goals, the Court has considered carefully each of the test's alleged deficiencies-the **[**42]** overall effectiveness of the test, the cut score of the test, the use of the test as a requirement for graduation, the Plaintiffs' allegation that the test has resulted in inferior educational opportunities for minorities, and the alleged relationship between the test and student drop out scores. NEXUS TO STATE GOALS

A. Effectiveness

The Court finds that the TAAS test effectively measures students' mastery of the skills and knowledge the State of Tex-as **[*680]** has deemed graduating high school seniors must possess. The Plaintiffs provided evidence that, in many cases, success or failure in relevant subject-matter classes does not predict success or failure in that same area on the TAAS test. *See Supplemental Report of Dr. Walter Haney,* Plaintiff's expert, at 29-32. In other words, a student may Page 14 87 F. Supp. 2d 667, *; 2000 U.S. Dist. LEXIS 153, ** perform reasonably well in a ninth-grade English class, for example, and still fail the English portion of the exit-level TAAS exam.VALIDITY The evidence suggests that the disparities are sharper for ethnic minorities. *Id.* at 33. However, the TEA has argued that a student's classroom grade cannot be equated to TAAS performance, as grades can measure a variety of factors, ranging from effort and improvement to **[**43]** objective mastery. The TAAS test is a solely objective mea-surement of mastery. The Court finds

that, based on the evidence presented at trial, the test accomplishes what it sets out to accomplish, which is to provide an objective assessment of whether students have mastered a discrete set of skills and knowledge.

B. Cut Score

The Court has paid close attention to testimony in this ease regarding the setting of the 70-percent passing standard for the TAAS test. In addition, the Court has carefully considered the scope of its own authority to address that issue. Ultimately, the Court concludes that the passing standard does bear a manifest relation to a legitimate goal.
NEXUS TO STATE GOAL

Whether the use of a given cut score, or any cut score, is proper depends on whether the use of the score is justified. In *Cureton,* a case relied upon heavily by the Plaintiffs in this case, the court found that the use of an SAT cut score *as a selection practice for* the NCAA must be justified by some independent basis for choosing the cut score. *Cu-reton,* 37 F. Supp. 2d at 708. In addition, the court noted that the NCAA had not validated the use of the SAT as a predictor for graduation **[**44]** rates. *Id.*

Here, the test use being challenged is the assessment of legislatively established minimum skills as a requisite for graduation. This is a conceptually different exercise from that of predicting graduation rates or success in employment or college. In addition, the Court finds that it is an exercise well within the State's power and authority. The State of Texas has determined that, to graduate, a senior must have mastered 70 percent of the tested minimal essentials.

In *Tyler v. Vickery,* 517 F.2d 1089 (5th Cir. 1975), the United States Court of Appeals for the Fifth Circuit noted two criteria for determining whether a standardized test is rationally supportable. *Tyler,* 517 F.2d at 1101. The relevant criterion here is whether the cut score is related to the quality the test purports to measure. *Id.* The court noted that a 70-percent cut score for bar passage "has no significance standing alone" but that it "represents the examiners' considered judgments as to minimal competence required to practice law." *Id.* The Court finds that the 70-percent cut score for the TAAS test reflects similar judgments. *See Report of the State Board* **[**45]** *of Education Committee of Education Committee of the Whole, Work Session Minutes,* July 12, 1990. The Court does not mean to suggest that a state could arrive at *any* cut score without running afoul of the law. However, Texas relied on field test data and input from educators to determine where to set its cut score. It set initial cut scores 10 percentage points lower, and phased in the 70-percent score. *See State Board of Education Minutes,* July 14, 1990. While field test results suggested that a large number of students would not pass at the 70-percent cut score, officials had reason to believe that those numbers were inflated. *See Work Session Minutes,* July 12, 1990. Officials contemplated the possible consequences and determined that the risk should be taken. The Court cannot say, based on the record, that the States chosen cut score was arbitrary or unjustified. Moreover, the Court finds **[*681]** that the score bears a manifest relationship to the State's legitimate goals.

C. Use as a Graduation Requirement

The Court finds that the TEA has shown that the high stakes use of the TAAS test as a graduation requirement guarantees that students will be motivated to learn **[**46]** the curriculum tested. While there was testimony that the test would be useful even if it were not offered as a requisite to graduation, the Court finds that there was no, or insufficient, evidence to refute the TEA's assertion that the use as a graduation requirement boosted student motivation and encour-aged learning. In addition, the evidence was unrefuted that the State had an interest in setting standards as a basis for the awarding of diplomas. The use of a standardized test to determine whether those standards are met and as a basis for the awarding of a diploma has a manifest relationship to that goal. NEXUS TO STATE GOALS

D. Inferior Educational Opportunities

The Plaintiffs introduced evidence that, in attempting to ensure that minority students passed the TAAS test, the TEA was limiting their education to the barest elements. The Court finds that the question of whether the education of minority students is being limited by TAAS-directed instruction is not a proper subject for its review. 11 The State of Texas has determined that a set of knowledge and skills must be taught end learned in State schools. The State mandates no more than these "essential" items. Test-driven instruction **[**47]** undeniably helps to accomplish this goal. It is not within the Court's power to alter or broaden the curricular decisions made by the State.

11 Of course, upon a showing of intentional discrimination, such a claim would implicate the equal protection clause of the Fourteenth Amendment. However, the Court has already held that Plaintiffs have offered no proof of intent in this case. EQUAL PROTECTION

E. Drop-Out and Retention Rates

As discussed above, the Plaintiffs have presented credible evidence that the drop-out and retention rates among minority students in Texas give cause for concern. However, there is no credible evidence linking State drop-out and retention rates to the administration of the exit-level TAAS test. Expert Walter Haney's hypothesis that schools are retaining students in the ninth grade in order to inflate tenth-grade TAAS results was not supported with legally sufficient evidence demonstrating the link between retention and TAAS.

III. Equally Effective Alternatives

In considering **[**48]** whether the Plaintiffs have shown that there are equally effective alternatives to the current use of the TAAS test, the Court must begin with the State's articulated, legitimate goals in instituting the examination, Those goals are to hold students, teachers, and schools accountable for learning and for teaching, to ensure that all students have the opportunity to learn minimal skills and knowledge, and to make the Texas high school diploma uniformly meaningful. Further, as discussed more fully above, the State has set a standard for mastery of 70 percent of the items tested, and the Court has held that this standard is legitimate.

Plaintiffs did offer evidence that different approaches would aid the State in measuring the acquisition of essential skills. Among these approaches was a sliding-scale system that would allow educators to compensate a student's low test performance with high academic grades or to compensate lower grades with outstanding test scores. However, Plaintiffs failed to present evidence that this, or other, alternatives could sufficiently motivate students to perform to their highest ability. In addition, and perhaps more importantly, the present use of the TAAS **[**49]** test motivates schools and teachers to provide an adequate and fair education, at least of the minimum skills required by the State, to all students. *See Debra P. II,* 730 F.2d 1405 at 1416. **[*682]** The Plaintiffs produced no alternative that adequately addressed the goal of systemic accountability.
ALTERNATIVE TO TEST

DUE PROCESS

In order for a court to find a due process violation, it must first find that a plaintiff has a protected interest--either property or liberty--in what the State seeks to limit or deny. *See Michael H.* v. *Gerald D.,* 491 U.S. 110, 121, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989) (substantive due process, liberty interest); *Ewing,* 474 U.S. at 222 (substantive due process, property interest); *Ewing,* 474 U.S. at 229 (procedural due process, property interest). The Court has previously found, and reiterates here, that [HN19] the State of Texas has created a protected interest in the receipt of a high school diploma. *See* TEX. EDUC. CODE § 25.085(b); *Id.* at § 4.002; *id.* at § 28.025(a)(1); *Debra P.,* 644 F.2d at 403-404.

The due process clause has two aspects--procedural and substantive. *Ewing,* 474 U.S. at 229. **[**50]** [HN20] On the procedural side, the law demands that a state provide, at a minimum, notice and an opportunity to be heard before it deprives citizens of certain state-created protected interests. *Frazier v. Garrison I.S.D.,* 980 F.2d 1514, 1529 (5th Cir. 1993). [HN21] On the substantive side, the law holds that some rights are so profoundly inherent in the American sys-tem of justice that they cannot be limited or deprived arbitrarily, even if the procedures afforded an individual are fair. *Ewing,* 474 U.S. at 229; *Robertson v. Plano City,* 70 F.3d 21, 24 (5th Cir. 1995). [HN22] The use of a standardized test as a graduation requirement can implicate both procedural due process concerns and substantive due process concerns. *Debra P.,* 644 F.2d at 404.

The United States Court of Appeals for the Fifth Circuit has held that [HN23] a state cannot impose a standardized test as a graduation requirement without giving its students the procedural protection of adequate notice that such will be the use of the test.(PAN) *Id.* at 404. In addition, the Fifth Circuit has suggested [HN24] a *substantive* component to a student's rights where a state attempts **[**51]** to condition a diploma on standardized test scores: a state may not im-pose an examination where such imposition is arbitrary and capricious(S) or frustrates a legitimate state interest (SG) or is fundamentally unfair, in that it encroaches upon concepts of justice lying at the basis of our civil and political institutions. (FF).*Id.* [HN25] The United States Supreme Court has suggested that a state's educational determinations may be invalid under a substantive due process analysis where they reflect a "substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise

professional judgment." *Ew-ing,* 474 U.S. at 225. The Court has evaluated the use of the TAAS examination under each of these formulations and finds that it does not violate the due process rights of Texas students, minority or majority.

A test that covers matters not taught in the schools is fundamentally unfair. *Debra P.,* 644 F.2d at 404. The Court finds, however, that the TAAS exit-level test meets currently accepted standards for curricular validity. In other words, the test measures what it purports to measure, and it does so with **[**52]** a sufficient degree of reliability. In addition, all students in Texas have had a reasonable opportunity to learn the subject matters covered by the exam. The State's efforts at remediation and the fact that students are given eight opportunities to pass the examination before leaving school support this conclusion, *Debra P. II,* 730 F.2d at 1411.

The Court also finds that the Plaintiffs have not demonstrated that the TAAS test is a substantial departure from accepted academic norms or is based on a failure to exercise professional judgment. Certainly, there was conflicting evidence at trial regarding whether the test, as used, is appropriate. However, there was no testimony demonstrating that Texas has rejected current academic standards **[*683]** in designing its educational system. Educators and test-designers testified that the design and the use of the test was within accepted norms.

The Court, in reaching this conclusion, has considered carefully the testimony of Plaintiffs' expert, Dr. Martin Shapiro, demonstrating that the item-selection system chosen by TEA often results in the favoring of items on which minorities will perform poorly, while disfavoring items where **[**53]** discrepancies are less wide. The Court cannot quarrel with this evidence. However, the Court finds that the Plaintiffs have not been able to demonstrate that the test, as validated and equated, does not best serve the State's goals of identifying and remediating educational problems. Because one of the goals of the TAAS test is to identify and remedy problems in the State's educational system, no matter their source, then it would be reasonable for the State to validate and equate test items on some basis other than their disparate impact on certain groups. In addition, the State need not equate its test on the basis of standards it rejects, such as subjective teacher evaluations.

In short, the Court finds, on the basis of the evidence presented at trial, that the disparities in test scores do not result from flaws in the test or in the way it is administered. Instead, as the Plaintiffs themselves have argued, some minority students have, for a myriad of reasons, failed to keep up (or catch up) with their majority counterparts. It may be, as the TEA argues, that the *TAAS* test is one weapon in the fight to remedy this problem. At any rate, the State is within its power to choose **[**54]** this remedy.

As the Court has stated in prior orders, it would be fundamentally unfair to punish minority students for receiving an unequal, state-funded education. 12 In other words, it would violate due process if the TAAS test were used as a vehicle for holding students accountable for an educational system that failed them. The Court concludes, however, that the TAAS test is not used in such a manner. due process EDUCATIONAL AGENCY PREVAILED

12 In *Debra P. II,* the United States Court of Appeals for the Fifth Circuit articulated this concern in equal protection terms, reiterating the proposition that an educational system still suffering from the effects of prior discrimination cannot classify students based on race unless that classification can be shown either not be a result of prior discrimination or that it will remedy such discrimination. *See Debra P. II,* 730 F.2d at 1411. This Court has dismissed the Plaintiff's equal protection claim. Nonetheless, the Court has stated, and emphasizes again here, that it would be a due process violation to impose standards on minority students whose failure to meet those standards is directly attributable to state action.

[55]** The Court has considered this question carefully. Texas's difficulties in providing an equal education to all its students are well-documented. It is only in the recent past that efforts have been made to provide equal funding to Texas public schools. Several schools in the state remain under desegregation orders. These facts cannot be ignored.

Court finds, however, after listening to the evidence at trial, that the TEA would agree with the proposition that unequal education is a matter of great concern and must be eradicated. The Court has determined that the use and implementation of the TAAS test does identify educational inequalities and attempts to address them. *See Debra P. II,* 730 F.2d at 1415 (remedial efforts help dispel link between past discrimination and poor performance on standardized test). While lack of effort and creativity at the local level sometimes frustrate those attempts, local policy is not an issue before the Court. The results of the *TAAS* test are used, in many cases quite effectively, to motivate not only students but schools and teachers to raise and meet educational standards.

CONCLUSION

ACCORDINGLY, the Court finds that **[**56]** the TAAS exit-level examination does not violate regulations enacted pursuant to Title **[*684]** VI of the Civil Rights Act of 1964. While the TAAS test does adversely affect minority students in significant numbers, the TEA has demonstrated an educational necessity for the test, and the Plaintiffs have failed to identify equally effective alternatives equal protection EDUCATIONAL AGENCY PREVAILED. In addition, the Court concludes that the TAAS test violates neither the procedural nor the substantive due process rights of the Plaintiffs. The TEA has provided adequate notice of the conse-quences of the exam and has ensured that the exam is strongly correlated to material actually taught in the classroom. In addition, the test is valid and in keeping with current educational norms. due process EDUCATIONAL AGENCY PREVAILED. Finally, the test does not perpetuate prior educational discrimination or unfairly hold Texas minority students accountable for the failures of the State's educational system. Instead, the test seeks to identify inequities and to address them. It is not for this Court to determine whether Texas has chosen the best of all possible means for achieving these goals. The system is not perfect, hut the Court can-not say that it is unconstitutional. Judgment is GRANTED **[**57]** in favor of the Defendants, and this case is DIS-MISSED.

SIGNED and ENTERED this 7th day of January, 2000.

EDWARD C. PRADO

UNITED STATES DISTRICT JUDGE

JUDGMENT

In accordance with this Court's opinion of this same date, it is hereby ORDERED, ADJUDGED, and DECREED that judgment is entered in favor of the Defendants and against the Plaintiffs. All costs are to be borne by the parties incur-ring them. It is further ORDERED that all pending motions be STRICKEN from the docket as moot and that this case is DISMISSED.

SIGNED and ENTERED this 7th day of January, 2000

EDWARD C. PRADO

UNITED STATES DISTRICT JUDGE

RENE EX REL. RENE v. REED

751 N.E.2d 736 (2001)

Meghan RENE, by her parents and next Friends, Michael and Robin RENE, et al., Appellants-Plaintiffs,

v.

Dr. Suellen REED, in her official capacity As Indiana State Superintendent of Public Instruction, et. al., Appellees-Defendants.

No. 49A02-0007-CV-433.

Court of Appeals of Indiana.

June 20, 2001.

Kenneth J. Falk, Jacquelyn E. Bowie, E. Paige Freitag, Indiana Civil Liberties Union, Indianapolis, IN, Attorneys for Appellants.

Karen Freeman-Wilson, Attorney General of Indiana, Beth H. Henkel, Frances H. Barrow, Linda S. Leonard, Deputy Attorneys General, Indianapolis, IN, Attorneys for Appellee.

OPINION

MATTINGLY-MAY, Judge.

Meghan Rene and certain other students with disabilities ("the Students") who were or are required to pass the Indiana graduation qualifying examination ("the GQE")[1] brought a class action
against Dr. Suellen Reed as Indiana Superintendent of Public Instruction ("the State"). They sought declaratory and injunctive relief, alleging the State violated their due process rights by imposing the GQE as a condition of high school graduation because the State had not previously required disabled students to meet the standards the State had implemented to prepare students for the GQE. Therefore, the Students say, it did not necessarily expose them to some of the material tested on the GQE. The Students also assert the State violated the Individuals with Disabilities Education Act (IDEA) because they were denied certain test-taking adaptations and modifications required for them pursuant to the IDEA. The trial court entered judgment[2] for the State, and we affirm.[3]

FACTS

We summarized the evolution of this case in *Rene ex rel. Rene v. Reed,* 726 N.E.2d 808, 812-15 (Ind.Ct.App.2000), (hereinafter *Reed I*) where we reversed the trial court's order denying certification to one of the classes and redefining the other:

On May 21, 1998, the Students filed their class action Complaint seeking injunctive and declaratory relief. The Complaint, filed by their parents on the Students' behalf, set forth claims under 42 U.S.C. § 1983 and the Individuals with Disabilities Education Act, 20 U.S.C. § 1401 ("IDEA"). The Students, as defined by proposed Class A, claim that the Appellee/Defendant, Dr. Suellen Reed (Dr. Reed), in her official capacity as Indiana State Superintendent of Public Instruction, violated their due process rights under the United States Constitution and the Indiana Constitution by requiring them to take and pass the Graduation Qualifying Examination ("GQE") when they had previously been exempted from standardized testing and/or had not been taught the subject matter on the tests. The Students, as defined by proposed Class B, claim that Dr. Reed violated their rights under the IDEA by requiring them to take the GQE without the testing accommodations and adaptations required by the Students' case conferences and individualized education programs.

In Indiana, students participate in the Indiana Statewide Testing for Educational Progress (ISTEP) testing program in the third, sixth, eighth and tenth grades. Ind.Code § 20-10.1-16-8. This test measures achievement in mathematics and language arts. Ind. Code § 20-10.1-16-7. The GQE is a portion of the tenth grade ISTEP examination. Subject to two exceptions, all Indiana high school students who wish to receive a high school diploma must take and pass the GQE. Ind.Code § 20-10.1-16-13. This includes students with disabilities. *Id.*

The Students are four Indiana high-school students, who were in the 10th grade at the time the Complaint was filed. The Students belong to first class of Indiana students, the class of 1999-2000, who are required to pass the GQE as a prerequisite to receiving a high school diploma.[4]

As a condition of the State receiving federal financial assistance, the IDEA requires that students with disabilities must receive a public education which is free and appropriate given their specific needs. 20 U.S.C. § 1400(d); 20 U.S.C. § 1412(a)(1). Indiana receives money under the IDEA and is therefore bound by the federal requirements. Ind.Code § 20-1-6-1. The federal requirement that a student receive a free and appropriate education is ensured by means of an individualized education program ("IEP") which is prepared at least annually in a case conference which is attended by the students with disabilities' regular education teachers, special education teachers, parents and others who have knowledge and special expertise. 20 U.S.C. § 1414(d); Ind.Code § 20-1-6-1(5). The IEP contains the outline of the student's education, including the services to be provided and modifications to the general education program, including modifications to any statewide assessments to be given to special education students. 20 U.S.C. § 1414(d).

Prior to the change in the state statute requiring that students pass the GQE, case conference could indicate that a student with disabilities was excused from taking the GQE or other standardized testing, while still on the diploma track. The case conference could also determine that the tests for these diploma bound students would be taken diagnostically, which meant that they were not given under normal testing conditions, and if the student failed, there would be no adverse consequences such as remediation or retention. Prior to the GQE, students with disabilities on the diploma track received a

high school diploma if they satisfied the requirements of their IEPs and the general state curriculum requirements, regardless of whether they took the standardized tests. Furthermore, prior to the GQE, there was not a requirement that in order to graduate, a student master the skills that are now tested by the GQE examination. The Students allege that as a result, many students with disabilities who were on a diploma track were not taught the information now tested on the GQE. Indeed, the State has acknowledged that there was no requirement that, prior to the GQE, students with disabilities be taught the skills which are now tested on the graduation examination.

[Meghan Rene] attends Ben Davis High School in Indianapolis, Indiana, and has received special education since the first grade. Prior to the GQE requirement, Meghan had always been excused from standardized testing. Meghan's IEP provided that she was in the diploma program and if she completed all her course work and complied with her IEP, she would receive a diploma. Meghan's IEP further provided that she be excused from standardized testing and also indicated that all tests were to be read to her. Meghan was first informed that she had to take the GQE in the fall of 1997. Meghan first took the exam in the fall of 1997 and the examination was not read to her. Also, Meghan's IEP provided that she be allowed to use a calculator during testing. This accommodation was also disallowed when she took the GQE. Meghan failed the exam, and as of February 1999, had yet to pass the GQE.

None of the representative plaintiffs are in the Core 40 curriculum program which would exempt them from the GQE. Further, all of the Students allege that they were not given sufficient notice that they would be required to pass the GQE and were not given the opportunity to adjust their curriculum in order to take courses that would specifically prepare them for the GQE. Additionally, the Students assert that they would not qualify under the waiver provision of Ind.Code § 20-10.1-16-13(e) because they have not obtained the necessary proficiencies in the tested areas to allow their teachers to so certify. (footnote two supplied; record citations omitted).

STANDARD OF REVIEW

Because the trial court, pursuant to the agreement of the parties, entered final judgment on the basis of the findings and conclusions it entered *sua sponte* in its order denying injunctive relief, we will consider the findings to be made voluntarily and will treat the decision as a general judgment with respect to issues not covered by the findings. Under that standard, the specific findings control only with respect to the issues they cover, and the general judgment controls as to the issues upon which the court has not found. *Catellier v. Depco, Inc.*, 696 N.E.2d 75, 77 (Ind.Ct.App.1998). We may not reverse the trial court's findings unless they are clearly erroneous. *Id.* The general judgment will be affirmed if it can be sustained upon any legal theory by the evidence introduced at trial. *Id.* In our review, we will consider only the evidence that is most favorable to the trial court's judgment and will not weigh the evidence or judge the credibility of witnesses. *Id.*

DUE PROCESS

The trial court properly found, and the State does not explicitly disagree, that the Students have a property interest protected by due process in the award of a diploma if all

graduation requirements are met. If the state chooses to provide a public education system, it "is constrained to recognize a student's legitimate entitlement to a public education as a property interest which may be protected by the due process Clause." *Debra P. v. Turlington,*644 F.2d 397, 403 (5th Cir.1981), *quoting Goss v. Lopez,*419 U.S. 565, 574, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). In *Debra P.,* students challenged a standardized test required by the State of Florida as a condition for receipt of a high school diploma. The court there noted that the exam might have covered matters not taught through the curriculum and it held the state could not constitutionally deprive its public school students of a diploma on that basis. 644 F.2d at 404.

While the State implicitly concedes there are due process implications in the case before us, it does assert as a threshold matter that there was no due process violation because "[t]he Students wrongly claim they had a legitimate expectation to receive a regular high school diploma because their case conference committees checked a box on their IEPs indicating that they were on a `diploma track'" (Br. of Defendant-Appellant at 24) (hereinafter "State's Br.").[5]

The Students do not argue a property interest had arisen because someone "checked a box on their IEPs;" rather, they rely on *Debra P.,* where the Seventh Circuit found a property right arising from the establishment of a system of free public education and from mandatory attendance laws:

From the students' point of view, the expectation is that if a student attends school during those required years, and indeed more, and if he takes and passes the required courses, he will receive a diploma. This is a property interest as that term is used constitutionally.... This expectation can be viewed as a state-created "understanding" that secures certain benefits and that supports claims of entitlement to those benefits.

644 F.2d at 404.

Although the trial court acknowledged that due process was implicated by the GQE requirement, it found the imposition of the GQE as a condition to the grant of a diploma did not violate the Students' due process rights because the three years' notice the Students were given of the GQE requirement was adequate and because the Students' remedy for the schools' alleged failure to teach the subjects required by the GQE was "continued education and remediation and not the award of a high school diploma." (R. at 1382.)

1. *The Nature of the due process Implications of the GQE Requirement*

We recognized in *Reed I* that due process is violated when a "graduation exam is `fundamentally unfair in that it may have covered matters not taught in the schools of the state,'" 726 N.E.2d at 822 n. 8, quoting *Debra P.,* 644 F.2d at 404. We further noted "due process protections require that handicapped students be given sufficient notice of a minimal competency exam in order for them to prepare adequately to satisfy the new requirement." *Id.,* citing *Brookhart v. Illinois State Bd. of Educ.,*697 F.2d 179, 186-87 (7th Cir. 1983).

2. *The Asserted due process Violations*

The Students allege the implementation of the GQE denied them due process because 1) the Students were not exposed during their schooling to some of the material tested on the GQE, and 2) they had inadequate notice of the requirement and inadequate time to prepare for the GQE.[6] They further assert that additional remediation is not an adequate remedy for the due process violation. Rather, they contend that the State should be enjoined from enforcing the GQE requirement until the GQE represents a fair test of what disabled students have been taught.

A. *Notice of the GQE Requirement*

In *Brookhart,* handicapped students challenged a school district decision in the spring of 1978 to require that all students eligible to graduate in the spring of 1980 pass a "minimal competency test" ("M.C.T") as a condition of the receipt of a diploma. The district publicized the new requirement with announcements in the mass media, distribution of circulars in schools, and individual mailings to some parents. In *Brookhart,* as here, the students did not "contest the factual basis underlying the loss of a liberty interest; in fact, they admit that they did not pass the M.C.T. Rather, they demanded procedures that would provide sufficient notice of the M.C.T. to enable them to prepare adequately to satisfy the new requirement." 697 F.2d at 185.

The *Brookhart* court determined the notice was inadequate despite the absence of evidence any student was unaware of the requirement. *Id.* at 182. There was evidence before the district court that the disabled students' IEPs did not expose them to up to 90 per cent of the material tested on the M.C.T., and the students had only one to one-and-one-half years to prepare for the test:

[t]he plaintiffs' programs of instruction were not developed to meet the goal of passing the M.C.T., but were instead geared to address individual educational needs. Since plaintiffs and their parents knew of the M.C.T. requirements only one to one and a half years prior to the students' anticipated graduation, the M.C.T. objectives could not have been specifically incorporated into the IEPs over a period of years. If they were incorporated at all, it could only have been during the most recent year and a half. As the Superintendent found, "in an educational system that assumes special education students learn at a slower pace than regular division students," a year and a half to prepare for the M.C.T is insufficient. Thus the length of notice, rather than a deliberate decision not to instruct plaintiffs because of their incapacity to master the material, explains the overwhelming lack of exposure to M.C.T. goals and objectives.

Id. at 187.

The *Brookhart* court declined to define "adequate notice" in terms of a specific number of years, but it noted the requirement would be satisfied if the school district 1) ensured that the students were sufficiently exposed to most of the material that appears on the test, or 2) produced evidence of "a reasonable and well-informed decision by the parents and teachers involved that a particular high school student will be better off concentrating on educational objectives other than preparation for the M.C.T." *Id.* at 187-88.

There was evidence in the case before us to support the trial court's determination that the students had adequate notice of the GQE requirement. The State notes the school districts had at least five years' notice of the GQE requirement, and the Students and their parents had at least three. The State cites *Board of Educ. of Northport-East Northport Union Free Sch. Dist. v. Ambach,* 90 A.D.2d 227, 458 N.Y.S.2d 680, 688 (1982), *aff'd* 60 N.Y.2d 758, 469 N.Y.S.2d 669, 457 N.E.2d 775 (1983) as authority for its premise that three years' notice is sufficient. In a portion of its decision the *Ambach* court addressed "remedially," rather than "functionally" handicapped children. It held "the three-school-year notice ... was not of such a brief duration as to prevent school districts from programming the IEPs of [remedially handicapped children] to enable them to pass the basic competency tests required for diploma graduation."

Debra P. and *Anderson v. Banks,* 520 F.Supp. 472 (S.D.Ga.1981) also support the proposition that three years is sufficient notice.[7] In *Anderson,* two years' notice of a requirement that graduating students would need to demonstrate performance at a ninth-grade level was adequate where, as here, the test could be retaken and remediation was provided. In *Debra P.,* one year of notice was found insufficient where the state had not submitted evidence that the test covered material required to be taught in the classroom. On remand, the injunction was lifted after the state provided such evidence. 564 F.Supp. 177 (M.D.Fla.1983), *aff'd* 730 F.2d 1405 (11th Cir.1984). We cannot say the trial court erred to the extent it determined the State provided adequate notice that the Students would be subject to the GQE requirement.

B. *Exposure to the Curriculum*

The Students assert non-disabled students had ten years to prepare for the GQE requirement while the disabled students, who do not learn at a normal rate, had only three. They note that the ISTEP program, without the GQE requirement, was added in 1987, and the State Board of Education was at that time directed to begin adopting educational proficiencies and achievement standards for grades one through eight. However, disabled students whose IEPs did not include regular instruction in mathematics and language arts were exempted from the proficiency standards in that such decisions regarding disabled students were to be made not pursuant to ISTEP but rather pursuant to the disabled students' case conferences and IEPs.

In 1990, the ISTEP statute was amended to apply to high school students, and the disabled students were again exempted. As a result, they assert, the curriculum for non-disabled students has been adjusted and aligned to the material tested on the ISTEP since 1987. The GQE requirement was added by legislation in 1995, with the testing requirement imposed for the first time on the class of 2000. Disabled students are not exempted from the GQE, regardless of any contrary indications in the case conferences or IEPs.[8] The Students point to record evidence that it was not until 1997 that the State's Special Education Director notified school administrators the GQE requirement would apply to disabled students, and that parents of the disabled students did not find out about the requirement until just before the first test was given in 1997.

The trial court found the Students had been exposed to the curriculum tested on the GQE, and we cannot characterize that finding as clearly erroneous. In its findings of fact, the court noted that state law requires remedial assistance be provided to all students who do not meet the academic standards required to pass the GQE, and stated "Given the multiple remediation opportunities mandated by state law for students who take but do not pass the GQE, the Court finds it implausible that the Plaintiff class was not exposed throughout their high school career to the subjects tested on the GQE." (R. at 1375.)
REMEDIATION

The Students correctly note there was evidence presented that in order to learn the material tested on the GQE, students must have the appropriate base knowledge from earlier courses and from building blocks that were in place in elementary school. They note that disabled students, by definition, learn at a slower pace than other students. But, they assert, there was evidence that even after the imposition of the GQE requirement, the curriculum for a significant number of disabled students had not been "realigned to the proficiencies tested on the examination." (Br. of Appellants at 32) (hereinafter "Students' Br.").

While the State notes the school systems were required by statute and regulation to align their curriculum with the state standards, at least as of 1996, it does not directly argue the disabled students' curriculum addressed the GQE requirements in advance of the imposition of the GQE requirement on the Students. Rather, it asserts, the Students did not submit any evidence the GQE is not aligned with "the curriculum required by state law to be offered at their schools and made available to them through state mandate, *given the multiple opportunities provided them to take the exam and the targeted remediation the State has made available at no cost to them.*" (State's Br. at 23) (emphasis supplied). Though the record suggests the Students would have benefited from earlier adjustment of their curriculum in order to prepare them for the GQE requirement, we cannot characterize as clearly erroneous the trial court's determination that the Students were exposed during their high school careers to the subjects tested on the GQE.
equal protection OPPORTUNITY TO LEARN

C. *Adequacy of Remediation Remedy*

The trial court found that if the school systems had failed to teach the Students the subjects tested on the GQE despite the Students' ability to meet the GQE standards, "the remedy is not that the State be required to hand these Plaintiffs a diploma." (R. at 1381.) Rather, it concluded, citing *Brookhart,* that the remedy is to offer the students additional remediation and opportunities to acquire the necessary skills.

The *Brookhart* court did state that "in theory, the proper remedy for a violation of this kind is to require [the school district] to provide free, remedial special education classes to ensure exposure to the material tested...." 697 F.2d at 188.[9]

The Students note that the *Brookhart* case involved only 14 plaintiffs, and they point to *Anderson,* 520 F.Supp. at 512 as authority for their argument that where there is a "systematic failure of due process" (Students' Br. at 35) involving a large number of students, the proper remedy is to enjoin the State from requiring the GQE until such time

as it "is no longer irrational to impose the requirement on the class." (Students' Br. at 35.) They argue that until the GQE requirement has been in effect for the entire educational career of a student, the case conferences should be responsible for making the determination whether it is appropriate for a disabled student to take the GQE in order to graduate.

In *Anderson,* the court ordered the schools to award diplomas to all students who would have received them but for the graduation test policy. It went on to hold that "[n]o exit exam policy may be utilized until it is demonstrated that the test used is a fair test of what is taught." 520 F.Supp. at 512. Similarly, in *Debra P.,* the court held the state could not deprive its high school seniors of the benefits of a high school diploma until it demonstrated its version of the GQE was a fair test of what was taught in its classrooms. 644 F.2d at 408. There, the exam had had a disproportionate impact on black students due to unequal educational opportunities several years before the test was administered.

In light of the evidence before the trial court that the Students had between three and five years' notice they would be subject to the GQE requirement, we cannot say the trial court erred to the extent it determined the remediation offered by the State was an adequate remedy for any due process violation arising from the test requirement. DUE PROCESS/ADEQUATE NOTICE EDUCATIONAL AGENCY PREVALED

INDIVIDUALS WITH DISABILITIES EDUCATION ACT [10]

The trial court made no findings of fact with regard to the students in Class B, who alleged a violation of the IDEA in the form of the State's failure to honor certain modifications and accommodations in the test-taking process. As its only conclusion of law on that issue, the trial court stated the Students had failed to "cite supporting law for their position that the State's policies violate IDEA," (R. at 1382), and therefore they had not established a *prima facie* case on that issue.

We note initially that the IDEA does not require specific results, but instead it mandates only that disabled students have access to specialized and individualized educational services. Therefore, denial of a diploma to handicapped children who cannot achieve the educational level necessary to pass a standardized graduation exam is not a denial of the "free appropriate public education" the IDEA requires. *Brookhart,* 697 F.2d at 183 (addressing the IDEA predecessor statute). Further, the imposition of such a standardized exam does not violate the IDEA where, as in the case before us, the exam is not the sole criterion for graduation. *Id.* "Congress' desire to provide specialized educational services ... cannot be read as imposing any particular substantive educational standard upon the states." *Board of Educ. of Hendrick Hudson Central Sch. Dist. Westchester County v. Rowley,*458 U.S. 176, 200, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

The IDEA requires participating states to offer special education and related services in conformity with the individualized education program (IEP) provided for in 20 U.S.C. 1414(d). The IEPs of the members of Class B state that the class members are on the diploma track but are to be excused from standardized testing or are to have certain accommodations during testing. While the definition of "free appropriate public education" mandated by the IDEA includes special education that meets the standards of

the State educational agency, 20 U.S.C. § 1401(8)(B), *Rowley* notes that it "must also comport with the child's IEP." 458 U.S. at 203, 102 S.Ct. 3034; 20 U.S.C. § 1401(8)(D).

Because the State is requiring all the members of Class B to take and pass the GQE without certain adaptations or accommodations, the Students assert the IDEA is violated. "[S]tate procedures which more stringently protect the rights of the handicapped and their parents are consistent with the [IDEA's predecessor statute] and thus enforceable." *Antkowiak by Antkowiak v. Ambach,* 838 F.2d 635, 641 (2d Cir.1988). However, "those [procedures] that merely add additional steps not contemplated in the scheme of the Act are not enforceable." *Id.* The State, the Students say, accordingly cannot choose to honor some, but not other, of the modifications and adaptations called for in the IEP and cannot require a disabled student to take the GQE if he or she is properly exempted by the case conference.

We cannot say the trial court erred to the extent it determined the State need not honor certain accommodations called for in the Students' IEPs where those accommodations would affect the validity of the test results. The court had evidence before it that the State does permit a number of accommodations typically called for in IEPs. However, the State does not permit accommodations for "cognitive disabilities" that can "significantly affect the meaning and interpretation of the test score." (State's Br. at 44.)

For example, the State permits accommodations such as oral or sign language responses to test questions questions in Braille, special lighting or furniture, enlarged answer sheets, and individual or small group testing. By contrast, it prohibits accommodations in the form of reading to the student test questions that are meant to measure reading comprehension, allowing unlimited time to complete test sections, allowing the student to respond to questions in a language other than English, and using language in the directions or in certain test questions that is reduced in complexity.

Neither the Students nor the State have directed us to decisions that directly address whether the IDEA is violated by prohibiting on a standardized graduation exam accommodations for "cognitive disabilities" that are provided for in a student's IEP. However, a number of administrative decisions have addressed one such accommodation—that of providing the services of a reader for a reading comprehension test. In those decisions, Office of Civil Rights hearing officers have found that states could properly require students to take a reading comprehension test without providing the services of a reader. For example, in *Mobile County Bd. of Educ.* 26 IDELR 695 (1997), the hearing officer decided the State could properly deny an accommodation in the form of a reader on the Alabama "exit exam."[11]

The IEP represents "an educational plan developed specifically for the child [that] sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives." *Board of Educ. of Oak Park & River Forest High School Dist. No. 200 v. Illinois State Bd. of Educ.,* 10 F.Supp.2d 971, 975-76 (N.D.Ill.1998). The GQE, by contrast, is an assessment of the outcome of that educational plan. We therefore decline to hold that an

accommodation for cognitive disabilities provided for in a student's IEP must necessarily be observed during the GQE, or that the prohibition of such an accommodation during the GQE is necessarily inconsistent with the IEP. We cannot say the trial court erred when it determined the prohibition of certain accommodations did not violate the IDEA.

CONCLUSION

While the Students have an interest protected by due process in fair implementation of the GQE requirement, we cannot say the trial court erred when it found the Students were exposed during their schooling to the subjects tested on the GQE, that they had adequate notice of that graduation requirement, and that the remediation and additional opportunities to take the GQE were an adequate remedy if due process was violated. The trial court further did not err to the extent it found the State's refusal to allow certain test-taking accommodations did not violate the IDEA. Accordingly, we affirm.

SHARPNACK, C.J., and BAILEY, J., concur. due process EDUCATIONAL AGENCY PREVAILED

A.S.K. V. OREGON

As a result of a lawsuit filed by Disability Rights Advocates (DRA), Oregon will take extensive steps to modify its current high stakes testing system to ensure that the tests do not discriminate against students with learning disabilities. The settlement is based on the findings of an expert panel that was convened by the parties to examine the impact of Oregon's high stakes testing on students with learning disabilities. Both the expert report and the settlement are first of its kind and have national implications. Under the settlement, Oregon will take extensive steps to modify its current testing system so that students with learning disabilities will not be tested on their disabilities and instead will be able to demonstrate their abilities. These steps include: SPECIAL EDUCATION

1. broadening the list of accommodations available to students with learning disabilities,
2. providing an alternative to the standard assessment for those learning disabled students who are disadvantaged by the regular assessment,
3. instituting an appeals process,
4. conducting further research to ensure the validity of the tests with respect to students with disabilities, and
5. providing greater training and information about the assessment to students, teachers, and parents.

The neutral panel of experts was appointed to study Oregon's assessment. The panel consisted of four prominent educators and researchers from across the country and a retired Oregon Supreme Court justice who acted as the facilitator. The panel was charged with reviewing Oregon's testing system as it relates to students with learning disabilities, and to make recommendations on policies and procedures needed to ensure that learning disabled students have an equal opportunity to participate in the assessment system. The panel received extensive amounts of information from the State and the plaintiffs and studied the assessment system for approximately one year before issuing their recommendations. This is the first time an expert panel has been convened to analyze a testing system specifically with regard to the impact on students with learning disabilities. The panel's work will be invaluable resource not only in Oregon but across the country as well for its outline for all states to follow to ensure that assessment systems are fair to learning disabled students.EQUAL OPPORTUNITY

Meghan Rene, etal v. Dr. Suellen Reed etal

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF INDIANA

774 N.E.2d 506; 2002 Ind. LEXIS 101

January 31, 2002, Decided

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: 49A02-0007-CV-433. Original Opinion of June 20, 2001, Reported at: 2001 Ind. App. LEXIS 1078.

Rene v. Reed, 751 N.E.2d 736, 2001 Ind. App. LEXIS 1078 (Ind. Ct. App. 2001)

OPINION

Transfer Denied.

JULEUS CHAPMAN et al., Plaintiffs, v. CA DEPT OF EDUCATION et al., Defendants.

No. C 01-01780 CRB

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

229 F. Supp. 2d 981; 2002 U.S. Dist. LEXIS 21879

February 21, 2002, Decided

SUBSEQUENT HISTORY: Reversed in part and remanded, Smiley v. **Cal.** Dep't of Educ., 45 Fed. Appx. 780, 2002 U.S. App. LEXIS 18466 (9th Cir. **Cal.** Sept. 4, 2002).

DISPOSITION: Limited temporary injunction granted.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff learning disabled students brought a class action suit against defendants, including the **California Department of Education,** seeking to halt the administration of the **California** High School Exit Exam (CAHSEE), which **California** law required students to pass in order to receive a diploma. The students moved for a preliminary injunction or, in the alternative, to make the CAHSEE voluntary rather than mandatory for all

students.

OVERVIEW: The class consisted of students who were eligible for either an individualized education program (IEP)pursuant to the Individuals with Disabilities Education Act (IDEA) or a § 504 education plan pursuant to the Rehabilitation Act of 1973. The court found that the named students did not have to take and fail the CAHSEE in order to have standing, that ongoing development of the CAHSEE did not render the suit unripe, and that a private right of action existed under the IDEA with respect to participation in state-wide assessments. As the case involved a challenge to defendants' general policies, exhaustion of administrative remedies was unnecessary. A preliminary injunction was warranted because (1) students who were unable to meaningfully access the CAHSEE regardless of accommodations and/or modifications offered were entitled to an alternate assessment and (2) the IDEA required the state to permit accommodations necessary for a student to access the CAHSEE. However, the court limited relief to students who already had either an IEP or a § 504 plan and found that the scope of relief requested by the students would impose significant hardship on defendants.

OUTCOME: The court ordered, inter alia, that students were to be allowed to take the CAHSEE with accommodations, modifications, or alternate assessments provided by their IEPs or § 504 plans for the CAHSEE, general standardized testing, or classroom testing.

CORE TERMS: accommodation, alternate, modification, testing, disability, diploma, learning, disabled, exam, state-wide, standardized, score, high school, right of action, achievement, educational, team, irreparable injury, public education, administrative remedies, administered, hardship, test scores, preliminary injunction, specifically provides, district-wide, exit, school district, invalidate, classroom

COUNSEL: [**1] For Ryan Smiley, Jennifer Lyons, Learning Disabilities Association of **California,** Juleus **Chapman,** Plaintiffs: Alison M. Aubrejuan, Disability Rights Advocates, Oakland, **CA.** Elizabeth J. Cabraser, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, **CA.** Eve H. Cervantez, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, **CA.** Mary Bondy Reiten, Lieff Cabraser Heimann & Bernstein, LLP, San Francisco, **CA.** Melissa W. Kasnitz, Disability Rights Advocates, Oakland, **CA.** Morris A. Ratner, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, **CA.** Rhoda Benedetti, Disability Rights Advocates, Oakland, **CA.** Sid Wolinsky, Disability Rights Advocates, Oakland, **CA.**

For **California Department of Education,** Delaine Eastin, Defendants: Amy Bisson Holloway, **California Department of Education,** Sacramento, **CA.** Douglas M. Press, **CA** Attorney General's Office, San Francisco, **CA.** Michael Hersher, **California Department of Education,** Sacramento, **CA.** Suzanne B. Giorgi, **CA** Attorney General's Office, Sacramento, **CA.** Teresa L. Stinson, **CA** Attorney General's Office, San Francisco, **CA.**

For Fremont Unified School District, Defendant: James R. Hawley, Hoge Fenton Jones & Appel, San Jose, **CA.**

For [**2] **California** State Board of Education, Defendant: Amy Bisson Holloway, **California Department of Education,** Sacramento, **CA.** Douglas M. Press, **CA** Attorney General's Office, San Francisco, **CA.** Suzanne B. Giorgi, **CA** Attorney General's Office, Sacramento, **CA.**

JUDGES: CHARLES R. BREYER, UNITED STATES DISTRICT JUDGE.

OPINION BY: CHARLES R. BREYER

OPINION

[*983] CLASS ACTION

ORDER RE: PRELIMINARY INJUNCTION

Plaintiffs seek a preliminary injunction to halt the administration of the **California** High School Exit Exam ("CAHSEE") currently scheduled for March 5, 6, and 7, 2002. As an alternative, plaintiffs propose making the CAHSEE voluntary for all students. As set forth below, the Court concludes that plaintiffs have shown that preliminary relief is warranted. Absent a court order, the March administration of the CAHSEE is likely to violate rights guaranteed to learning disabled students under federal law. However, the scope of relief prayed for is not warranted. The Court has crafted an injunction that

protects the rights of learning disabled students without derailing the State of **California's** efforts to improve education in the State.

BACKGROUND

The CAHSEE was administered to freshmen in the **[**3]** class of 2004 on a voluntary basis in March 2001. On March 5, 6, and 7 of this year, the CAHSEE will be administered on a mandatory basis to all members of the class of 2004 (sophomores) who have not already passed the exam. Under current **California** law, members of the class of 2004 are required to pass the CAHSEE to receive a diploma. **Cal.** Ed. Code § 60851(a).

The plaintiff class consists of learning disabled students eligible for either an Individualized Education Program ("IEP") pursuant to the Individuals with Disabilities Education Act ("IDEA"), or a Section 504 Education Plan ("504 Plan") pursuant to the Rehabilitation Act of 1973. These plans, created by a team consisting of the student (where appropriate), parents, educators, and other professionals, are the blueprints of a learning disabled child's education. They assess the current performance of a child, set annual goals, and specify special education and related services a child is to receive.

Federal regulations require the IEP to specifically address state-wide assessments such as the CAHSEE. See 34 C.F.R. § 300.347(a)(5)(i) (The IEP must include a "statement of any individual modifications **[**4]** in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in the assessment."). Where the IEP team determines that a child cannot participate in a particular state-wide assessment, even with modifications, the IEP must include a statement of why the state-wide assessment is not appropriate and how the child will be assessed. See 34 C.F.R. § 300.347(a)(5)(ii). **[*984]** The evidence before the Court, however, suggests that, with regard to the CAHSEE, most IEP teams have not had time to comply with these provisions. equal protection SPECIAL EDUCATION

IEPs in **California** do address other testing situations. For example, pursuant to their IEPs, the named plaintiffs take classroom tests with certain accommodations. **Chapman** uses a laptop computer. Smiley uses a calculator and a laptop computer and has his tests presented orally. Lyons is permitted to use a spell checker, a calculator, a computer, a scanner, and a tape recorder. Among other matters, this order addresses the extent to which similar accommodations are appropriate for the CAHSEE.ACCOMMODATIONS

DISCUSSION

Plaintiffs claim that a preliminary injunction is warranted on **[**5]** five independent grounds: 1) there is no alternate assessment to the CAHSEE, 2) required accommodations are not provided to learning disabled students taking the CAHSEE, 3) the test violates due process because it covers materials that students have had no opportunity to learn, 4) the test is invalid, and 5) the CAHSEE fails to conform to nationally recognized standards.

As set forth below, the Court concludes that a limited preliminary injunction is warranted based on the first and second of these grounds.

I. Legal Standard

Traditionally, a preliminary injunction will issue where the plaintiff shows: 1) a likelihood of success on the merits, 2) the possibility of irreparable injury, 3) a balance of hardships favoring the plaintiff, and 4) that preliminary relief is in the public interest. Barahona-Gomez v. Reno, 167 F.3d 1228 (9th Cir. 1999). This test has evolved into the modern test that the plaintiff must "demonstrate either (1) a combination of probable success on the merits and the possibility of irreparable injury if relief is not granted, or (2) the existence of serious questions going to the merits and that the balance of hardships tips sharply **[**6]** in its favor." First Brands Corp. v. Fred Meyer, Inc., 809 F.2d 1378, 1381 (9th Cir. 1987). While this test is phrased in the disjunctive, many courts view it as essentially a single test. Viewed as a single test, the greater the showing of likely success the lighter the burden in terms of the relative hardship, and vice versa. See Regents of Univ. of **Calif.** v. ABC, Inc., 747 F.2d 511, 515 (9th Cir. 1984).

II. Education Policy Generally

The Court notes at the outset that the State of **California** is afforded broad latitude in crafting public education policy and setting standards for students and educators. See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 42-43, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973); Brookhart v. Illinois State Bd. of Educ., 697 F.2d 179 (7th Cir. 1983); Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981). Respecting the state's role in education policy under our system of federalism, this Court "will interfere with educational policy decisions only when necessary to protect individual statutory or constitutional rights." Brookhart, 697 F.2d at 182. **[**7]** Accordingly any relief must be "narrowly tailored to enforce federal constitutional and statutory law only." Clark v. Coye, 60 F.3d 600, 604 (9th Cir. 1995). JUDICIAL RELUCTANCE

III. Likelihood of Success

A. Standing and Ripeness

Defendants claim that plaintiffs lack standing and their claims are not yet ripe for adjudication. Defendants argue that plaintiffs lack standing because they are unable to show particularized or imminent **[*985]** injury. In particular, defendants point to the fact that no student has taken a mandatory CAHSEE. Furthermore, no student can show that failure on the CAHSEE will result in denial of a diploma.

"In order to assert claims on behalf of a class, a named plaintiff must have personally sustained or be in immediate danger of sustaining some direct injury as a result of the challenged statute or official conduct." Armstrong v. Davis, 275 F.3d 849, 860 (9th Cir. 2001) (internal citation omitted). However, in a class action, as alleged here, the Court may consider injuries alleged by name plaintiffs "in the context of the harm asserted by the class as a whole, to determine whether a credible threat" of injury to the named plaintiffs **[**8]** exists. Id. Based on this framework, the Court concludes that the named plaintiffs have standing.

Plaintiffs do not have to take and fail a defective exam to have standing. Furthermore, under the IDEA, plaintiffs have a statutory right to meaningful inclusion in a state-wide assessment, such as the CAHSEE, whether they pass or not. That right is violated, and harm is suffered, at the time the exam in administered. The presence of harm is not dependent upon how the results are used. MEANINGFUL INCLUSION

Defendants make a related ripeness argument. This argument centers around the fact that development of the CAHSEE is a highly dynamic process. Defendants argue that they need the data of several CAHSEE administrations to finalize policies. They argue that the pass rate is likely to be significantly higher in the future. Defendants also point to a provision in the law permitting the Board to delay the date upon which the CAHSEE becomes a graduation prerequisite. **Cal.** Ed. Code § 60859.

The Court accepts all of this as true. However, the CAHSEE has already been administered once and will be administered again in March. While the Board may delay the effective date at which the CAHSEE becomes a graduation **[**9]** requirement, the fact remains that under current law the class of 2004 must either pass the CAHSEE or be granted a waiver to receive a diploma. The mere possibility that intervening action might rectify allegedly illegal behavior does not render this lawsuit unripe.

Even more fundamentally, as stated above, plaintiffs have a right to be meaningfully included in the March CAHSEE, regardless of how the test results are used. This suit is ripe.

B. Private Right of Action

Defendants claim that there is no private right of action to enforce the IDEA's provisions regarding accommodations and alternate assessments. No case cited by either party specifically addresses a private right of action under these provisions.

The IDEA specifically provides a private right of action, after exhaustion of administrative remedies, for claims "relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). Defendants claim that the inclusion of these specific rights of action evinces a Congressional intent to preclude a private right of action for other matters.

[10]** However, as recognized by the Third Circuit in Beth V. by Yvonne V. v. Carroll, 87 F.3d 80 (3rd Cir. 1996), the statute does not just provide a private right to ensure provision of a free appropriate public education. It provides a private right of action for "*any matter relating to* . . . the provision of a free and appropriate public education." 20 U.S.C. § 1415(b)(6) (emphasis added). On the basis of this language, the Beth V. court **[*986]** permitted a private action seeking injunctive and declaratory relief against the Pennsylvania **Department of Education**

for allegedly failing to comply with federal regulations governing the handling of complaints. See id.

Therefore, because meaningful participation in state-wide assessments such as the CAHSEE is an important aspect of public education, it is protected by a private right of action under the IDEA.

C. Exhaustion of Administrative Remedies

The IDEA requires that administrative remedies be exhausted before filing a civil action in some cases. See 20 U.S.C. § 1415(i)(2)(A). As stated by the Ninth Circuit, the IDEA's "exhaustion requirement . . . recognizes **[**11]** the traditionally strong state and local interest in education, as reflected in the statute's emphasis on state and local responsibility." Hoeft v. Tucson Unified School Dist., 967 F.2d 1298, 1303 (9th Cir. 1992). However, a party is not required to exhaust administrative remedies where such efforts would be futile or administrative remedies are inadequate. See id. at 1303-04. Nor is plaintiff required to exhaust administrative remedies where they challenge a policy or practice of general applicability. See id.

In this case the plaintiffs are challenging the general policies of the defendants in administering the CAHSEE exam. Accordingly, the Court finds that the exhaustion requirement is unlikely to bar this action.

D. Alternate Assessment

Plaintiffs claim that some members of the class are entitled to an "alternate assessment" to the CAHSEE, under the IDEA. The IDEA "provides federal funds to assist state and local agencies in educating children with disabilities, but conditions such funding on compliance with certain goals and procedures." Ojai Unified School Dist. v. Jackson, 4 F.3d 1467, 1469 (9th Cir. 1993). With [**12] regard to an alternate assessment, the IDEA requires the following:

> Children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations, where necessary. As appropriate, the State or local educational agency—
>
> > (i) develops guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in State and district-wide assessment programs; and
> >
> > (ii) develops and, beginning not later than July 1, 2000, conducts those alternate assessments.

20 U.S.C. § 1412(a)(17)(A).

Unfortunately there is no case law defining an "alternate assessment" in the context of the IDEA to guide the Court in this case. As defined in the academic literature, an alternate assessment could include an interview and/or oral presentation, teacher observations, checklists and inventories, or a review of a portfolio of the student's work over an academic period. Despite this ambiguity, it is clear that no alternate assessments were offered for the 2001 administration of the CAHSEE.

There is evidence before the Court that some students are unable [**13] to meaningfully access the CAHSEE regardless of the accommodations and/or modifications offered. See Declaration of Dr. Susan Vogel; Declaration of Dr. Kay Runyan. For these students, the CAHSEE will not be a valid measure of their academic achievement. Some of these students are performing at a high school level and have mastered the CAHSEE subject matter. See Vogel Decl. P11; Runyan Decl. P10-14. Some of these students are unable to [*987] master a high school level curriculum. See Vogel Decl. P11; Runyan Decl. P15-20. As is clear from the language of the IDEA, both sets of students are entitled to an alternate assessment. The fact that some of these students are incapable of mastering the content of the CAHSEE is of no importance; they are still entitled to a valid assessment of their capabilities.

Defendants argue that the waiver policy satisfies the IDEA's requirement for an alternate assessment. 1 The waiver policy is evolving. But in its present form, the Court concludes that the waiver policy is unlikely to satisfy the IDEA requirement for an alternate assessment because: 1) the school district not the individual applies for the waiver, 2) the school district has discretion [**14] in determining whether to apply for the waiver, and 3) the State Board of Education retains discretion in determining whether to grant a waiver. See California State Board of Education Policy 01-07 at 1. By contrast the IDEA creates an entitlement on the part of individual students.

> 1 Defendants had previously argued that the IDEA does not apply to the CAHSEE because the CAHSEE is not a "state-wide assessment," but rather a tool for measuring individual achievement. It is not clear whether defendants still make this argument. Regardless, by both the terms of the IDEA and the California implementing statute, the Court is convinced that the IDEA applies to the CAHSEE.

The State has proposed regulations that would require the school district to apply for a waiver. See California State Board of Education document dated January 2002. However, even under the proposed regulations the State Board of Education retains discretion in determining whether to grant a waiver.

But a further, more fundamental, problem [**15] exists under any even speculative version of the waiver policy. The waiver policy does not address that group of students unable to access the CAHSEE regardless of the accommodations and/or modifications provided. As discussed above, the evidence before the Court shows that there are individuals for whom the CAHSEE, even with modification, will not be an accurate measure of academic achievement. For these individuals, the State's waiver policy is meaningless, and therefore cannot satisfy the IDEA requirement for an alternate assessment. For these individuals the waiver policy is meaningless because the possibility of a waiver is only triggered when a student achieves the equivalent of a passing score on the CAHSEE--a test that they are unable to access. Even if the State can ultimately deny a high school diploma to these students, a question which the Court does not reach today,the State cannot deny these students a meaningful assessment of their academic achievement when such an assessment is available to all other students. ALTERNATE ASSESSMENT

E. Accommodation

The question of accommodation on the CAHSEE is substantially confused by the tendency to conflate two separate and distinct issues. **[**16]** The first issue is what accommodations and/or modifications are students entitled to when actually taking the CAHSEE. The second distinct issue is whether federal law requires the State to treat scores achieved with certain accommodations and/or modifications the same way it treats scores achieved by students without accommodation and/or modification. With the CAHSEE only days away, the Court must address the first issue now. No similar urgency requires an answer to the second issue. Any benefit to an immediate answer to the question of what the State must do with the test scores is outweighed by the benefit of extra time to brief and deliberate the issue fully.

[*988] With the understanding that the Court is focused on the issue of what accommodations must be permitted in actually taking the test, the starting point is again the language of the IDEA which provides:

> Children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations, where necessary. As appropriate, the State or local educational agency--

20 U.S.C. § 1412(a)(17)(A). The regulations contain similar language:

> [Children **[**17]** with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations and modifications in administration, if necessary

34 C.F.R. § 300.138.

In defining "appropriate accommodations" under the IDEA the most logical place to look would be to a student's IEP or 504 plan. However, the IDEA does not explicitly incorporate this definition, and there is some limited authority suggesting that the definitions are not identical.

For example, in *Alabama Dept. of Educ.*, 29 IDELR 249 (1998), the Office for Civil Rights (OCR) in the U.S. **Department of Education,** concluded that a state could deny the use of a reading device for a graduation exam, even though the student's IEP permitted it. However, the OCR, by the terms of this decision and others cited by defendants, is charged with interpreting and enforcing Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, not the IDEA. The specific reference to an IEP plan, which is provided for by the IDEA, is somewhat incongruous in this context, but the decision by its terms does not express an opinion as to the permissibility of the state **[**18]** policy under the IDEA.

Defendants also cite to an Indiana Court of Appeals decision. In that case, the court found that the state did not have to permit test taking accommodations prescribed by the IEP to students taking an high school exit exam. See Rene ex rel. Rene v. Reed, 751 N.E.2d 736, 746-47. However, that case reached its conclusion with little analysis. To the extent it

holds that students are not entitled to accommodations during test taking this Court disagrees.

The Court finds a U.S. **Department of Education** memorandum, from the Office of Special Education Programs, entitled "Guidance on Including Students with Disabilities in Assessment Programs," more persuasive in construing the accommodations requirement of the IDEA. In discussing design of IEP plans, the memorandum states:

> IDEA gives the IEP team the authority to determine what, if any, accommodations or modifications are needed in order for a child with a disability to participate in an assessment. However, state and local school agencies have the authority to determine how test scores are reported and used, and the may limit the use of test scores if certain accommodations or modifications **[**19]** are involved.

Memorandum from the U.S. **Department of Education,** Office of Special Education Programs, to State Directors of Special Education et al., # 10 (January 17, 2001), available at http://www.ed.gov/offices/OSERS/OSEP/Products/omip.html. As this memo suggests, an "appropriate accommodation" under the IDEA is one necessary to access the test. Id. at # 6. In the context of the CAHSEE therefore, an "appropriate accommodation" is any accommodation necessary to render a student's score on the CAHSEE a meaningful measure of that student's academic achievement. The determination of what specific accommodations are appropriate for any specific student is ultimately best left to the IEP and Section 504 process.

[*989] The Court's preliminary judgment is that the **Department of Education** memorandum best reconciles a state's wide discretion to set and implement education policy with the IDEA's basic mandate that all students be accorded meaningful participation in any state-wide assessment programs. The state must permit accommodations necessary for a student to access a state-wide assessment such as the CAHSEE. This way a student's score provides a meaningful measure of achievement. **[**20]** This type of feedback when measured against clearly articulated standards helps hold educators accountable for teaching all students--a key goal of the IDEA. The feedback is also valuable to students and parents.

At the same time, a state may set specific standards and require any student seeking a diploma to satisfy them. Of course, federal law places some limits on a state's discretion to set educational standards. Those limits are not set today. By requiring all appropriate accommodations, the IDEA does not interfere with the state's prerogative to set these standards; it merely ensures that the state is held to account for its efforts in helping all students meet them. ACCOMMODATIONS

F. Other Substantive Arguments

The plaintiffs have not made a showing of likely success on the merits in their other substantive claims. Plaintiffs have cited limited case law supporting the proposition that it is a violation of due process to test students on material they have not had an adequate opportunity to learn. However, the present state of the evidence does not reveal an

asymmetry between what students are taught and the material tested on the CAHSEE implicating due process concerns. Plaintiffs' **[**21]** arguments regarding test validity boil down to a battle of experts. At this point the Court cannot credit one expert over another. DUE PROCESS

G. Conclusion

The Court concludes that plaintiffs have shown they are likely to prevail on two separate IDEA claims. First, it appears that the IDEA requires school districts to permit students to take the CAHSEE with appropriate accommodations. Second, under the IDEA it appears that the State must provide an alternate assessment to the CAHSEE to students who are unable to access the test due to a learning disability.

Normally the State would be required to permit accommodations or offer an alternate assessment only to the extent they were prescribed by a student's IEP or Section 504 plan. However, in this instance, the Court concludes that IEP and Section 504 teams have not had sufficient time or notice to address the CAHSEE. Therefore students and parents should not be penalized if a plan fails to address the CAHSEE specifically.

IV. Possibility of Irreparable Injury

As stated above, administration of the CAHSEE threatens to violate specific statutory rights of learning disabled students. Regardless of how the CAHSEE scores are used, **[**22]** the plaintiffs have a right to participate meaningfully in the assessment provided by the CAHSEE. As stated above, it appears that administration of the CAHSEE will violate this right. Furthermore, because the receipt of a diploma is conditioned upon passage of the CAHSEE, administration of the CAHSEE without protections plaintiffs may be entitled to under federal law could effectively deny plaintiffs an opportunity to receive a diploma. EQUAL PROTECTION

Both of these injuries, one probable and the other possible, implicate a dignity interest in full participation in the educational process. Harm to a student's dignity and educational prospects constitutes irreparable **[*990]** injury. See Cupolo v. Bay Area Rapid Transit, 5 F. Supp. 2d 1078, 1084 (stating that "injuries to individual dignity and deprivations of civil rights constitute irreparable injury" with regard to the ADA); see also Chalk v. United States Dist. Court, 840 F.2d 701, 710 (9th Cir. 1988) (finding that reassignment to different job constitutes irreparable injury, even though pay was equivalent, due to psychological harm).

V. Balance of Hardships/Scope of Relief

Because plaintiffs have shown a **[**23]** likelihood of success on the merits and the possibility of irreparable harm, preliminary relief is warranted. Having made this showing, however, the scope of relief remains to be determined. Only a small portion of students scheduled to take the CAHSEE in March are members of the plaintiff class.

As stated above, see section II supra, the State is afforded wide discretion in crafting education policy and setting standards. The Court will not second guess the judgment of the State of **California** that the CAHSEE is a vital component of a standards-based

reform effort. Indeed, **California** is not alone in this judgment. Twenty-seven states have high school exit exams. See American Federation of Teachers, Making Standards Matter 2001 at 5, 29 available at http://www.sft.org/edissues/standards/MSM2001/Index.htm. Indeed the IDEA itself expresses the opinion that learning disabled students can benefit from higher expectations and standards. See 20 U.S.C. § 1400(c)(5) ("Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by . . . having high expectations for such **[**24]** children and ensuring their access in the general curriculum to the maximum extent possible."). Accepting the State's judgment that the CAHSEE is a vital component of an effort to improve public education, the Court has no trouble concluding that granting plaintiffs the relief they seek, either enjoining the March administration of the CAHSEE altogether or making it voluntary for all students, would impose significant hardship on the State. Indeed, in determining the appropriate scope of preliminary relief, this Court must consider the general public interest served by permitting the March CAHSEE to go forward. See Caribbean Marine Services Co., Inc. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988) ("The district court must consider the public interest as a factor in balancing the hardships when the public interest may be affected.")

Because education is a core state function, relief from this Court must be "narrowly tailored" and constrain a state's actions only where necessary to protect the individual rights of the class members. See Clark v. Coye, 60 F.3d 600, 604 (9th Cir. 1995).

CONCLUSION

Therefore, the Court ORDERS as follows:

(1) Students **[**25]** shall be permitted to take the CAHSEE with any accommodations or modifications 2 their IEP or Section 504 plan specifically provides for the CAHSEE. If a student's IEP or Section 504 plan does not address the CAHSEE specifically, the student shall be permitted to take the CAHSEE with any accommodations or modifications their IEP or Section 504 **[*991]** plan provides for standardized testing. If a student's IEP or Section 504 plan does not address either the CAHSEE specifically or standardized testing generally, the student shall be permitted to take the CAHSEE with any accommodations or modifications their IEP or Section 504 plan provides for general classroom testing. 3

(2) A student may choose to forego any accommodation or modification to which he or she is entitled under this Order. STUDENT PREVAILED

(3) At its December 5, 2001 meeting, the State Board of Education adopted policy number 01-07, "**California** High School Exit Examination: Waiver of Test Passage for Specific Special Education Students." Pending further order of this Court, defendants may grant, but may not deny, a waiver under this policy.

(4) If a student's IEP or Section 504 plan specifically provides for an alternate assessment in lieu **[**26]** of the CAHSEE, an alternate assessment shall be provided. If a student's IEP or Section 504 plan does not specifically address the CAHSEE but provides for an alternate assessment in lieu of general standardized testing, an alternate assessment to the CAHSEE shall be provided. If a student's IEP or Section 504 plan does not specifically

address the CAHSEE or standardized testing but provides for an alternate assessment in lieu of general classroom testing, an alternate assessment to the CAHSEE shall be provided. STUDENT PREVAILED

(5) The State is directed to develop an alternate assessment to the CAHSEE forthwith. Students identified as entitled to an alternate assessment in (4) above shall not be required to take the CAHSEE, but may do so if they choose. The State shall provide an alternate assessment to the CAHSEE to these students as soon as practicable.

(6) In order for a student covered by this Order to avail himself or herself of any rights under this Order, no additional IEP or Section 504 team meeting shall be necessary.

(7) Nothing in this Order shall be interpreted to prevent the State from continuing to develop its regulations and policies regarding the CAHSEE.

(8) The State shall direct **[**27]** all school districts to provide a copy of Appendix A to all parents and guardians of children with a IEP or Section 504 plan.

(9) As stated above, the Court reserves for future consideration the issues of whether, and to what extent, the State may treat students taking the CAHSEE with an unapproved modification or given an alternate assessment differently from other students with respect to the granting of a diploma.

(10) The parties are ordered to appear at 10 a.m. on June 7, 2002 in Courtroom 8 to advise the Court on the status of the matters discussed herein.

(11) This Order shall remain in effect until further order of the Court.

2 **California** has defined an "accommodation" as a change in the CAHSEE (in format, student response, timing, or other attribute) that does not invalidate the score achieved. **California** has defined a "modification" as a change in the CAHSEE that invalidates the test score because it fundamentally alters what the test measures.

3 The plaintiff class consists of all students eligible for an IEP or Section 504 plan. This order, however, provides relief only to students with such a plan. The Court finds the practical difficulties of providing relief to the entire class insurmountable. Furthermore, states are already under an affirmative obligation to identify students needing special education and related services. Of course, the Court expects those efforts to continue.

[28] IT IS SO ORDERED**

Dated: February 21, 2002

CHARLES R. BREYER

UNITED STATES DISTRICT JUDGE

Appendix A

NOTICE TO ALL PARENTS AND GUARDIANS OF CHILDREN WITH AN INDIVIDUALIZED EDUCATION PROGRAM (IEP) OR A SECTION 504 PLAN

The case Juleus **Chapman,** et al. v. **California Department of Education,** et al., **[*992]** No. C 01-1780 CRB is currently pending in the United States District Court for the Northern District of **California.** Plaintiffs in the case, a group of learning disabled students, claim that the **California** High School Exit Exam (CAHSEE), to be given to tenth graders on March 5, 6, and 7, 2002, violates rights guaranteed to learning disabled students under federal law. The Court has issued an Order that requires the March CAHSEE to be administered in accordance with the following procedures:

(1) Students shall be permitted to take the CAHSEE with any accommodations or modifications 4 their IEP or Section 504 plan specifically provides for the CAHSEE. If a student's IEP or Section 504 plan does not address the CAHSEE specifically, the student shall be permitted to take the CAHSEE with any accommodations or modifications their IEP or Section 504 plan provides **[**29]** for standardized testing. If a student's IEP or Section 504 plan does not address either the CAHSEE specifically or standardized testing generally, the student shall be permitted to take the CAHSEE with any accommodations or modifications their IEP or Section 504 plan provides for general classroom testing.

(2) Some of the accommodations and modifications to which students are entitled under this Order, pursuant to (1) above, have already been approved by the State. With regard to others, the State has determined that they will "invalidate" the test score and a waiver will be required before a diploma is granted. While this Order requires that students be permitted to take the CAHSEE with any accommodations or modifications defined in (1) above, the Court has not yet decided how taking the CAHSEE with a modification not approved by the State will affect the receipt of a diploma. A student may choose to forego any accommodation or modification to which he or she is entitled under this Order.

(3) If a student's IEP or Section 504 plan specifically provides for an alternate assessment in lieu of the CAHSEE, an alternate assessment shall be provided. If a student's IEP or Section 504 **[**30]** plan does not specifically address the CAHSEE but provides for an alternate assessment in lieu of general standardized testing, an alternate assessment to the CAHSEE shall be provided. If a student's IEP or Section 504 plan does not specifically address the CAHSEE or standardized testing but provides for an alternate assessment in lieu of general classroom testing, an alternate assessment to the CAHSEE shall be provided. Students entitled to an alternate assessment shall not be required to take the CAHSEE, but may do so if they chose.

(4) While this Order requires that an alternate assessment be provided to certain students, the Court has not yet decided how an alternate assessment will affect the receipt of a diploma.

(5) In order for a student covered by this Order to avail himself or herself of any rights under this Order, no additional IEP or Section 504 team meeting shall be necessary.

4 **California** has defined an "accommodation" as a change in the CAHSEE (in format, student response, timing, or other attribute) that does not invalidate the score achieved. **California** has defined a "modification" as a change in the CAHSEE that invalidates the test score because it fundamentally alters what the test measures.

In the Matter of New York Performance Standards Consortium et al., Appellants, v. New York State Education Department et al., Respondents.

90820

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

293 A.D.2d 113; 741 N.Y.S.2d 349; 2002 N.Y. App. Div. LEXIS 4790

May 9, 2002, Decided

May 9, 2002, Entered

PRIOR HISTORY: [***1] Appeal from a judgment of the Supreme Court (Anthony T. Kane, J.), entered November 8, 2001 in Albany County, which dismissed petitioners' application, in a proceeding pursuant to CPLR article 78, to review a determination of respondent Commissioner of Education revoking a variance permitting member schools of petitioner New York Performance Standards Consortium to substitute their own performance-based assessments for the State Regents examinations.

DISPOSITION: Judgment affirmed, without costs.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, a consortium of 28 public schools, requested a variance from respondent New York State Education Department to permit them to substitute their own performance-based assessments for the state regents examinations. After the department denied a variance, the consortium filed suit under N.Y.C.P.L.R. art. 78 to review the department's ruling. The trial court dismissed the consortium's application, and the consortium appealed.

OVERVIEW: The consortium advocated the use of performance-based assessments in lieu of state regents examinations for its students. It received a variance from the department permitting its schools to utilize these assessments. After the variance expired, the department adopted a new set of comprehensive learning standards. It denied the consortium's variance request because it found that the consortium did not meet the applicable regulatory requirements. In so doing, the department discussed the precise manner in which the consortium's members had failed to demonstrate compliance with each of the requisite criteria. On appeal, the consortium contended that the department's failure to conduct the periodic reviews outlined in the earlier variance precluded it from denying an extension. The appellate court held that this was an incorrect interpretation of the terms of the variance; the department's failure to conduct such reviews was not a basis for affording relief. As the consortium did not meet the applicable regulatory requirements for obtaining a variance, the department's denial of a variance was not arbitrary or capricious.

OUTCOME: The judgment was affirmed.

CORE TERMS: variance, arbitrary and capricious, review process, performance-based, error of law, failed to demonstrate, record reflects, participating, disapproving, conditional, recommended, requisite, annual, case law, come forward, inter alia, indefinitely, prematurely, educational, irrational, commencing, graduation, terminate, affording, learning, rigorous, annulled, revised, annul, petitioners contend

COUNSEL: *Weil, Gotshal & Manges L.L.P.,* New York City (*Richard J. Davis* of counsel), for appellants. *Eliot Spitzer, Attorney General,* Albany (*Denise A. Hartman* of counsel), for respondents.

JUDGES: Before: Mercure, J.P., Crew III, Peters, Spain and Lahtinen, JJ. Mercure, J.P., Peters, Spain and Lahtinen, JJ., concur.

OPINION BY: Crew

OPINION

[*114] [350]** Crew III, J.

Petitioner New York Performance Standards Consortium (hereinafter the Consortium) is comprised of 28 public high schools that advocate the use of performance-based assessments in lieu of State Regents examinations. Specifically, these schools require students to successfully **[***2]** complete five performance-based tasks in the core academic disciplines in order to graduate--a research paper, a literary essay, a scientific experiment, a mathematics project and an oral portfolio presentation/defense. SOLE CRITERION In May 1995, the Consortium received a variance from respondent Education Department permitting its members to utilize the foregoing assessments in lieu of the otherwise required Regents examinations. The variance was effective for a five-year period commencing with the 1995-1996 academic year and was subject to a number of conditions including, inter alia, periodic reviews conducted by the Department. ALTERNATE ASSESSMENT

Thereafter, beginning in 1996, the Department adopted a new set of comprehensive learning standards resulting in, inter alia, an increase in the number of credits required for graduation and the administration of more stringent Regents examinations (*see,* 8 NYCRR part 100). In conjunction therewith, the procedure for reviewing and approving alternative assessments also was modified (*see,* 8 NYCRR 100.5 [a] [5]). Under the new regulations, respondent Commissioner of Education established the **[***3]** State Assessment Panel (hereinafter SAP), which was charged with reviewing any proposed alternative assessments and advising the Commissioner as to whether such assessments **[**351]** were aligned with the revised state learning standards and were as rigorous and reliable as the corresponding Regents examinations. Thus, under such regulations, the **[*115]** only permissible substitute for the upgraded Regents examinations was an alternative assessment recommended by SAP and approved for statewide use by the Commissioner (*see,* 8 NYCRR 100.2 [f]).

Throughout 1998 and 1999, the Department notified all public high schools, including the Consortium's members, of the revised educational standards and the criteria/procedure for

the approval of proposed alternative assessments. Indeed, the record reflects that by letter dated June 21, 1999, petitioner Ann Cook, a member of the Consortium's Executive Committee, was expressly notified of the new criteria and of the need for the Consortium's members to satisfy these new requirements for any future variances. Cook also was advised at this time that the new review process was "a rigorous one which [would] **[***4]** require[] extensive time and effort by the entity submitting a proposed alternative assessment." Thereafter, in November 1999, the Consortium applied to SAP for a continuation of the 1995 variance. Upon reviewing such application, and after citing the need for the Consortium to provide it with additional information and data demonstrating the Consortium's compliance with the applicable regulatory criteria, SAP recommended granting a narrow, conditional variance for only those schools included in the original variance and for only those students in the graduating classes of 2000 and 2001 who entered such schools in September 1996 or September 1997. The conditional approval was set to expire in February 2001.

In January 2000, the Commissioner declined to approve the proposed alternative assessment submitted by the Consortium, finding that the Consortium either failed to address certain of the regulatory criteria in its application or failed to submit sufficient information to demonstrate its compliance therewith. As to the requested extension of the then-existing variance, the Commissioner again found insufficient information to render an informed decision on this point. The **[***5]** Commissioner, however, permitted the variance to remain in effect for the 2000-2001 academic year and created the Blue Ribbon Panel (hereinafter the Panel), consisting of nationally recognized testing experts, to evaluate whether the Consortium's proposed alternative assessments satisfied the criteria established by the Department.

In May 2000, the Commissioner and various Department staff members met with the principals and other representatives of the Consortium's member schools to discuss the Panel's evaluation process and to outline the type of data that would **[*116]** be required in order to demonstrate that the proposed alternative assessments complied with the underlying regulatory criteria. Although the Panel initially was scheduled to complete this evaluation by December 2000, the Consortium's member schools apparently were not forthcoming with the requested information and, therefore, the Panel requested and received a three-month extension in order to gather additional data. In March 2001, the Panel issued its report, concluding that the "dearth of evidence" available to it precluded a finding that the proposed alternative assessment program advocated by the Consortium **[***6]** satisfied the regulatory criteria. Instead, the Panel recommended that the Commissioner issue an interim, nonrenewable three-year variance, thereby affording the Consortium and the Department an opportunity to collect and evaluate the information necessary to render a final decision in this regard.

[352]** By determination dated April 19, 2001, the Commissioner found that the proposed alternative assessments submitted by the Consortium did not meet the applicable regulatory requirements and, therefore, approval of such assessments and extension of the requested variance was denied. In so doing, the Commissioner discussed the precise manner in which the Consortium's member schools had failed to demonstrate compliance with each of the requisite criteria. As to the Panel's recommendation that the

Consortium be granted a further opportunity to compile and submit additional information, the Commissioner noted that "the Consortium schools have had more than five years to gather data. I am not convinced that additional time will produce better results." Accordingly, the Commissioner established a Regents examination schedule for the Consortium's member schools, noting that the Consortium **[***7]** had the option in the future of developing additional evidence and again applying for a variance from the Regents examination requirements.

Petitioners thereafter commenced this proceeding pursuant to CPLR article 78 seeking to annul the Commissioner's determination. Supreme Court dismissed petitioners' application, finding that the Commissioner's determination was neither irrational, arbitrary and capricious nor affected by an error of law. This appeal by petitioners ensued. ALTERNATE ASSESSMENT

We affirm. Petitioners initially contend that the Department's apparent failure to conduct the periodic reviews outlined in the 1995 variance precluded the Department from denying the requested extension. The 1995 variance was granted subject to a number of conditions, including an annual review of the **[*117]** participating schools' alternative assessment programs. Such review, in turn, consisted of three parts including, insofar as is relevant to this appeal, a "formative" review by the Department during the first four years of the variance and a "summative" review in the fifth year. The variance further provided that "if for any reason the [Department] does not conduct a review or reviews, the **[***8]** waiver shall nonetheless continue in effect." Seizing upon this final clause of the variance, petitioners argue that the Department's failure to comply with the review procedures entitled the Consortium to an extension of the variance in perpetuity. We cannot agree.

The 1995 variance plainly and unequivocally states that it "shall be effective for a period of five years commencing with the 1995-96 school year" provided the conditions set forth therein are met. In addition to the aforementioned review process, the variance required participating schools to submit an assessment plan on an annual basis and to ensure that the "alternative assessment[s] employed ... measure curriculum content and student performance standards that meet or exceed the standards reflected by Regents examinations or Regents **Competency Tests,** as appropriate." Adopting the construction urged by petitioners would, in our view, render the remaining conditions set forth in the variance meaningless. Affording the words employed in the variance their plain and ordinary meaning (*see, Estate of Hatch v. NYCO Mins.,* 245 AD2d 746, 747), * we conclude that the contested clause simply means that the **[***9]** Department could not prematurely terminate the variance by failing to conduct one or more of the required reviews and not, **[**353]** as petitioners assert, that the five-year variance continues indefinitely until such time as the Department completes the required review. Thus, the Department's apparent failure to conduct such reviews does not afford petitioners a basis for relief.

* As we do not perceive any ambiguity in this regard, we need not consider the extrinsic evidence relied upon by petitioners.

Nor are we persuaded that the Commissioner's determination disapproving the Consortium's proposed alternative assessment program and denying the requested variance must be annulled. Statutory and case law make clear that the Commissioner is vested with the authority to enforce the educational policies of this state (*see,* Education Law § 305 [1]; *see also, Matter of New York City School Bds. Assn. v. Board of Educ. of City School Dist. of City of N.Y.,* 39 NY2d 111, 116), **[***10]** including the power to promulgate rules and regulations governing **[*118]** graduation requirements (*see, Matter of Board of Educ. of Northport-East Northport Union Free School Dist. v. Ambach,* 90 AD2d 227, 231-232, *affd* 60 NY2d 758, *cert denied* 465 US 1101) and the approval of alternative assessment programs (*see,* 8 NYCRR 100.2 [f]). The case law makes equally clear that in reviewing the Commissioner's determination, our inquiry is limited to whether such determination was arbitrary and capricious, lacked a rational basis or was affected by an error of law (*see, Matter of Board of Educ. of Monticello Cent. School Dist. v. Commissioner of Educ.,* 91 NY2d 133, 139).+

Applying these principles to the matter before us, we are unable to discern a basis upon which to annul the Commissioner's determination. In disapproving the proposed alternative assessments and denying the requested variance, the Commissioner addressed each of the regulatory criteria and specified the manner in which the Consortium and its member schools failed to demonstrate compliance therewith. To the extent that **[***11]** petitioners contend that the Commissioner's findings contravene those made by the Panel, we need note only that the Panel played a purely advisory role in this regard and, ultimately, it was the Commissioner's task to determine whether the proposed alternative assessments and variance should be granted. ALTERNATE ASSESSMENTS

Equally unpersuasive is petitioners' assertion that the Department's failure to conduct the required review process somehow precluded them from coming forward with sufficient proof to demonstrate their compliance with the applicable regulatory criteria. The record reflects that the Consortium and its member schools had ample and repeated opportunities to provide SAP and the Panel with the information necessary to permit a finding that the proposed alternative assessments should be approved, and their failure to come forward with the requisite proof does not provide a basis upon which the underlying determination may be annulled.

As a final matter, petitioners contend that it has not been demonstrated that the Regents examinations meet the regulatory criteria used to evaluate proposed alternative assessments and, therefore, the denial of petitioners' assessments and the requested **[***12]** variance was arbitrary and capricious. Again, we cannot agree. The worthiness of the Regents examinations is not at issue on this appeal. Moreover, even assuming that some shortcoming in evaluating the efficacy of the Regents program and examinations may exist (and there certainly is no evidence of that here), any such deficiency nonetheless does not excuse **[*119]** petitioners from demonstrating their compliance with the regulatory provisions governing proposed alternative assessments. **[**354]** Petitioners' remaining contentions, including their assertion that the Commissioner's determination violates their due process rights, have been examined and found to be lacking in merit. due process STATE BOARD OF EDUCATION PREVAILED

Mercure, J.P., Peters, Spain and Lahtinen, JJ., concur.

Ordered that the judgment is affirmed, without costs.

RYAN SMILEY, by his guardian ad litem Krista Smiley; JENNIFER LYONS, by her guardian ad litem Susan Lyons, on behalf of themselves and all others similarly situated; LEARNING DISABILITIES ASSOCIATION OF CALIFORNIA; JULEUS CHAPMAN, by his guardian ad litem Monique Chapman, Plaintiffs-Appellees, v. CALIFORNIA DEPARTMENT OF EDUCATION; DELAINE EASTIN, Superintendent of Public Education; CALIFORNIA STATE BOARD OF EDUCATION, Defendants-Appellants, and FREMONT UNIFIED SCHOOL DISTRICT; SHARON JONES, Superintendent of Fremont Unified School District, Defendants. RYAN SMILEY, by his guardian ad litem Krista Smiley; JENNIFER LYONS, by her guardian ad litem Susan Lyons, on behalf of

themselves and all others similarly situated; LEARNING DISABILITIES ASSOCIATION OF CALIFORNIA; JULEUS CHAPMAN, by his guardian ad litem Monique Chapman, Plaintiffs-Appellees, v. CALIFORNIA DEPARTMENT OF EDUCATION; DELAINE EASTIN, Superintendent of Public Education; CALIFORNIA STATE BOARD OF EDUCATION, Defendants-Appellants, and FREMONT UNIFIED SCHOOL DISTRICT; SHARON JONES, Superintendent of Fremont Unified School District, Defendants.

No. 02-15552, No. 02-15553

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

45 Fed. Appx. 780; 2002 U.S. App. LEXIS 18466

August 14, 2002, Argued and Submitted, San Francisco, California

September 4, 2002, Filed

NOTICE: [**1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of **California.** D.C. No.CV-01-01780-CRB, D.C. No. CV-01-01780-CRB. Charles R. Breyer, District Judge, Presiding.

DISPOSITION: Judgment of the district court reversed and remanded.

COUNSEL: For RYAN **SMILEY,** JENNIFER LYONS, Learning Disabilities Association of **California,** JULEUS CHAPMAN, Plaintiffs-Appellees (02-15552, 02-15553): Sidney M. Wolinsky, Esq., Melissa W. Kasnitz, Esq., DISABILITY RIGHTS ADVOCATES, Oakland, **CA.**

For RYAN **SMILEY,** Plaintiff-Appellee (02-15552, 02-15553): Elizabeth J. Cabraser, Esq., LIEFF, CABRASER, HEIMANN AND BERSTEIN LLP, Eve H. Cervantez, Esq., LIEFF, CABRASER, HEIMANN AND BERNSTEIN, LLP, San Francisco, **CA.**

For JENNIFER LYONS, Learning Disabilities Association of **California,** JULEUS CHAPMAN, Plaintiffs-Appellees (02-15552, 02-15553): Elizabeth Joan Cabraser, Esq., Eve H. Cervantez, LIEFF, CABRASER, HEIMANN & BERNSTEIN, San Francisco, **CA.**

For **California Department of Education,** DELAINE EASTIN, **California** State Board of Education, Defendants-Appellants **[**2]** (02-15552, 02-15553): Michael E. Hersher, Esq., **CALIFORNIA** STATE **DEPARTMENT OF EDUCATION,** Sacramento, **CA.**

For **California Department of Education,** DELAINE EASTIN, **California** State Board of Education, Defendants-Appellants (02-15552, 02-15553): Douglas M. Press, Esq., San Francisco, **CA.**

For **California Department of Education,** DELAINE EASTIN, **California** State Board of Education, Defendants-Appellants (02-15552, 02-15553): Teresa L. Stinson, Esq., **CALIFORNIA** ATTORNEY GENERAL'S OFFICE, San Francisco, **CA.**

For Fremont Unified School District, Defendant (02-15552, 02-15553): James R. Hawley, Esq., HOGE FENTON JONES AND APPEL, San Jose, **CA.**

SHARON JONES, Defendant (02-15552, 02-15553): No Appearance.

JUDGES: Before: HALL, McKEOWN, and CLIFTON, Circuit Judges.

OPINION

[*780] MEMORANDUM *

> * This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: HALL, McKEOWN, and CLIFTON, Circuit Judges.

With respect **[**3]** to paragraphs 1 and 2 of the district court's preliminary injunction order dated February 21, 2002,the State Defendants claim that those provisions, which permit all members of the plaintiff class to take the **California** High School Exit Examination ("CAHSEE") with the necessary accommodations and modifications, are already ineffect. To avoid any ambiguity on this point, we therefore decline to modify paragraphs 1 and 2 of the district court's order.

The challenge to the waiver provisions of the CAHSEE is not currently ripe for adjudication as to claims relating to potential **[*781]** future harms caused by the possible denial of a waiver. *See Texas v. United States,* 523 U.S. 296, 300, 140 L. Ed. 2d 406, 118 S. Ct. 1257 (1998) (noting that the ripeness doctrine is triggered when the claims at issue relate to "contingent future events that may not occur as anticipated, or indeed may not occur at all" (internal quotation marks omitted)).

The challenge is ripe as to the claim that the uncertainty of the waiver process burdens students' rights to participate in the examination by forcing them to choose between forgoing the use of modifications or risking the denial of a waiver. **[**4]** Because they

have alleged a real and immediate injury to all learning disabled students whose IEPs indicate the use of modifications, the plaintiffs have standing to raise this claim. *See City of Los Angeles v. Lyons,* 461 U.S. 95, 102, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983).

However, though the right to participate in statewide testing requires that participation must be meaningful, *see* 20 U.S.C. § 1412(a)(17)(A); H.R. Rep. 105-95, 1997 U.S.C.C.A.N. at 98-99, it does not require us to prohibit the state from exercising its traditional authority to set diploma requirements. Consequently, the plaintiffs have not met their burden to demonstrate probable success on the merits or a sufficiently serious question going to the merits to make the issue a fair ground for litigation. *See Baby Tam & Co. v. City of Las Vegas,* 154 F.3d 1097, 1100 (9th Cir. 1998).

The challenge to the putative failure to establish an alternate assessment process is also insufficiently ripe for adjudication at the present time. *See Texas v. United States,* 523 U.S. at 300.

Therefore, we REVERSE the district court's order with respect **[**5]** to paragraphs 3-5 and 8 of the preliminary injunction and REMAND with directions to dissolve those portions of the preliminary injunction. REVERSED in part and REMANDED. Each party is to bear its own costs on appeal.

STUDENT NO. 9 1 & others 2 vs. BOARD OF EDUCATION & others.

3

1 A minor, by her mother and next friend, "EV."

2 Five public school students in the high school class of 2003, on behalf of themselves and on behalf of other students similarly situated. Eight other public school students, named in the original and in the first amended complaint, have since been dismissed from the case.

3 The Department of Education (department), the chairman of the Board of Education, and the Commissioner of Education (commissioner).

SJC-09046

SUPREME JUDICIAL COURT OF MASSACHUSETTS

440 Mass. 752; 802 N.E.2d 105; 2004 Mass. LEXIS 28

November 6, 2003, Argued

January 27, 2004, Decided

PRIOR HISTORY: **[***1]** Suffolk. Civil action commenced in the Superior Court Department on January 7, 2003. An emergency motion for a preliminary injunction was heard by Margot Botsford, J. The Supreme Judicial Court granted an application for direct appellate review.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: The court granted direct review to an appeal by plaintiff high school students from an order of the Superior Court Department, Suffolk (Massachusetts), denying their emergency motion for preliminary injunctive relief against the application of Mass. Regs. Code tit. 630, § 30.03 (2000), a regulation promulgated by defendant Massachusetts Board of Education pursuant to Mass. Gen. Laws ch. 69.

OVERVIEW: In response to a Massachusetts constitutional mandate, the legislature enacted Mass. Gen. Laws ch. 69, which obliged the board to set competency standards in at least five subjects and to adopt regulations prescribing appropriate assessment tools that students would be required to pass before graduating from high school. When the range of student deficiencies became apparent, the Board adopted an approach that began by requiring students only to pass tests in reading and mathematical skills. Students who had not passed the proficiency tests and faced possible ineligibility for assessment alternatives argued that the Board had exceeded its powers in testing on only two subjects. The high court held that the students had failed to make the required showing for injunctive relief of probable success of their facial invalidity challenge.

The powers bestowed upon the board by Mass. Gen. Laws ch. 69, § 1B were very broad, and the legislature's subsequent funding of the abbreviated proficiency testing program indicated its approval of the approach taken.

OUTCOME: The court affirmed the order denying preliminary injunctive relief.

CORE TERMS: competency, exam, mathematics, graduation, grade, school districts, curriculum, high school, language arts, science and technology, score, skills, preliminary injunction, academic standards, disability, scaled, public schools, social science, graders, budget, tested, prerequisite, portfolio, educated, school students, foreign languages, line items, accountability, accountable, graduating

COUNSEL: Thomas C. Frongillo (David S. Godkin with him), for the plaintiffs.

Pierce O. Cray, Assistant Attorney General (John R. Hitt, Assistant Attorney General, Rhoda Schneider & Lucy Wall with him), for the defendants.

David M. Mandel, for Massachusetts Association of Vocational Administrators, amicus curiae, was present but did not argue.

The following submitted briefs, for amici curiae:

Joel Z. Eigerman & Sumner Z. Kaplan, for Jewish Alliance for Law & Social Action & others.

Sarah R. Wunsch, for American Civil Liberties Union of Massachusetts.

Thomas J. Dougherty, Kurt Wm. Hemr, Alisha Quintana, & Stephen J. Finnegan, for Massachusetts Association of School Committees.

John H. Walsh, for Michael Colin Walsh & others.

Henry C. Dinger & Benjamin M. Wattenmaker, for Massachusetts Business Alliance for Education & others.

Mark Alan Perkins, for Massachusetts Coalition, for Authentic Reform in Education [***2] & others.

David Lee Turner, Town Counsel, for town of Brookline.

JUDGES: Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, Sosman, & Cordy, JJ. IRELAND, J. (concurring).

OPINION BY: GREANEY

OPINION

[107] [*753]** GREANEY, J. The plaintiffs, public school students in the high school class of 2003, challenge the facial validity of 603 Code Mass. Regs. § 30.03 (2000), a regulation adopted by the Board of Education (board), which required them to pass the tenth grade English language arts and mathematics sections of the Massachusetts

Comprehensive Assessment System examination (MCAS exam) in order to graduate from high school. 4 The plaintiffs sought a preliminary injunction enjoining the defendants from enforcing the regulation and from requiring **[*754]** students in the high school class of 2003 to pass the tenth grade English language arts and mathematics sections of the MCAS exam as a prerequisite to the award of a high school diploma. A judge of the Superior Court denied the preliminary injunction, and the plaintiffs appealed. We granted the plaintiffs' application for direct appellate review and now affirm the

judge's order.

[*3]** 1. The background of the case is as follows. In McDuffy v. Secretary of the Executive Office of Educ., 415 Mass. 545, 617-619, **[**108]** 615 N.E.2d 516 (1993), this court held that the Massachusetts Constitution imposes an enforceable duty on the Commonwealth to ensure that all children in its public schools receive an education that is to include certain specific training. 5 Virtually simultaneously with the June 15 release of the McDuffy decision, the Legislature by emergency preamble, on June 18, 1993, enacted the Education Reform Act of 1993 (Act), St. 1993, c. 71. Section 27 of the Act, which rewrote G. L. c. 69, § 1, sets forth its intent and purpose in the following terms:

"It is hereby declared to be a paramount goal of the Commonwealth to provide a public education system of sufficient quality to extend to all children 6 the opportunity to reach their full potential and to lead lives as participants **[*755]** in the political and social life of the Commonwealth and as contributors to its economy. It is therefore the intent of this title to ensure: (1) that each public school classroom provides the conditions for all pupils to engage fully in learning as **[***4]** an inherently meaningful and enjoyable activity without threats to their sense of security or self-esteem, (2) a consistent commitment of resources sufficient to provide a high quality public education to every child, (3) a deliberate process for establishing and achieving specific educational performance goals for every child, and (4) an effective mechanism for monitoring progress toward those goals and for holding educators accountable for their achievement."

St. 1993, c. 71, § 27. NEXUS TO STATE GOASL

Of relevance are three sections of G. L. c. 69, namely, §§ 1D, 1E, and 1I, which were inserted by St. 1993, c. 71, § 29. These provisions imposed various obligations on the commissioner and the board, in furtherance of education reform, including obligations to develop "academic standards" and "curriculum frameworks" in certain "core subjects." See G. L. c. 69, § 1D, 1E. First, the board, through the commissioner, was required "to institute a process to develop academic standards for the core subjects of mathematics, science and technology, history and social science, English, foreign languages and the arts." 7 Id. at § 1D, [**109] second par. Second, the board [***6] was required to direct the commissioner "to institute a process for drawing up curriculum frameworks for the core subjects covered by the academic standards provided in [§ 1D]." Id. At § 1E, first par. [*756] The curriculum frameworks "shall present broad pedagogical approaches and strategies for assisting students in the development of the skills, competencies and knowledge called for by these standards. . . .They shall provide sufficient detail to guide the promulgation of student assessment instruments." Id.

[***7] The Act imposed on the board an obligation to create objective "assessments" to measure both school and student performance. See G. L. c. 69, § 1I, first, second, and third pars., inserted by St. 1993, c. 71, § 29. 8 The first three paragraphs of § 1I, provide, in pertinent part:

"The board shall adopt a system for evaluating on an annual basis the performance of both public school districts and individual public schools. With respect to individual schools, the system shall include instruments designed to assess the extent to which schools and districts succeed in improving or fail to improve student performance, as defined by student acquisition of the skills,

competencies and knowledge called for by the academic standards and embodied in the curriculum frameworks established by the board pursuant to [§§ 1D and 1E] in the areas of mathematics, science and technology, history and social science, English, foreign languages and the arts, as well as by other gauges of student learning judged by the board to be relevant and meaningful to students, parents, teachers, administrators, and taxpayers.

"The system shall be designed both to measure [***8] outcomes and results regarding student performance, and to improve the effectiveness of curriculum and instruction. In its design and application, the system shall strike a balance among considerations of accuracy, fairness, expense and administration. The system shall employ a variety of assessment instruments on either a comprehensive or statistically valid sampling basis. Such instruments shall be criterion referenced, assessing whether students are meeting the academic standards described in this chapter. As much as is practicable, especially in the case of students whose performance is difficult to assess using [*757] conventional methods, such instruments shall include consideration of work samples, projects and portfolios, and shall facilitate authentic and direct gauges of student performance. Such instruments shall provide the means to compare student performance among the various school systems and communities in the Commonwealth, and between students in other States and in other nations, especially those nations which compete with the Commonwealth for employment and economic opportunities. . . .

"In addition, comprehensive diagnostic assessment of individual students [***9] shall be conducted at least in the fourth, eighth and tenth grades. Said diagnostic assessments shall identify academic achievement levels of all students [**110] in order to inform teachers, parents, administrators and the students themselves, as to individual academic performance. The board shall develop procedures for updating, improving or refining the assessment system."(Emphases added.)

The Act also amended G. L. c. 69 to impose a graduation requirement called the "competency determination." G. L. c. 69, § 1D, inserted by St. 1993, c. 71, § 29. The provision reads, in pertinent part:

"The 'competency determination' shall be based on the academic standards and curriculum frameworks for tenth graders in the areas of mathematics, science and technology, history and social science, and English, 9 and shall represent a determination that a [***10] particular student has demonstrated mastery of a common core of skills,

competencies and knowledge in these areas, as measured by the assessment instruments described in [§ 1]. Satisfaction of the requirements of the competency determination shall be a condition for high school graduation. If the particular student's assessment results for the tenth grade do not demonstrate the required level of competency, the student shall have the right to participate in the assessment program for the following year or years. Students who fail to satisfy the requirements of the competency determination [*758] may be eligible to receive an educational assistance plan designed within the confines of the foundation budget to impart the skills, competencies and knowledge required to attain the required level of mastery. . . ." (Emphasis added.) Id. at § 1D, fourth par., (i). 10

All high school students attending public schools, including vocational high schools and charter schools, and all students educated with State funds, are subject to the competency determination.

The Act granted extensive authority to the board:

"The board shall establish such other policies as it deems necessary **[***11]** to fulfill the purposes of this chapter . . . . In accordance with the provisions of [G. L. c. 30A], the board may promulgate regulations as necessary to fulfill said purposes. Said regulations shall be promulgated so as to encourage innovation, flexibility and accountability in schools and school districts."

G. L. c. 69, § 1B, twenty-fourth par., inserted by St. 1993, c. 71, § 29.

The board undertook its mandate to implement the Act, and, over time, established curriculum frameworks for all core subjects and formulated the MCAS exam. The exam is a customized test, designed by a national testing company specifically for Massachusetts to be closely **[***12]** aligned with the curriculum frameworks. The MCAS exam contains multiple-choice questions; short answer questions requiring responses ranging from a number or a few words to several sentences; open response questions, requiring students to write a detailed or descriptive answer up to one-half page long, or a chart or graph; and writing prompts, requiring students to write a composition that develops an idea coherently and uses proper punctuation, spelling, and grammar. There are four levels of "performance levels," or scores, for the MCAS exam. A scaled

score of 200-219 **[**111]** corresponds to "failing," a scaled score of 220-238 corresponds to "needs improvement," a scaled score of 240-258 **[*759]** corresponds to "proficient," and a scaled score of 260-280 corresponds to "advanced." VALIDITY

The MCAS exam was administered for the first time in May, 1998, and initially covered the core subjects of English language arts, mathematics, and science and technology. On May 1, 1998, the department publicly announced that the MCAS exam in four subjects -- English, mathematics, science, and social studies – would be used as the high school competency determination, or graduation requirement, called for in G. L. c. 69, § 1D **[***13]**, to begin with students enrolled in the tenth grade in 2001, who would be graduating in 2003.

In 1998, forty-two per cent of eighth graders taking the MCAS exam failed the mathematics section, fourteen per cent failed the English section, and forty-one per cent failed the science and technology section. The same year, fifty-two per cent of tenth graders failed the mathematics section, twenty-eight per cent failed the English section, and thirty-six per cent failed the science and technology section. In 1999, forty per cent of eighth graders taking the MCAS exam failed the mathematics section, thirteen per cent failed the English section, forty-five per cent failed the science and technology section, and forty-nine per cent failed a newly added history section. That same year, fifty-three per cent of tenth graders failed the mathematics section, thirty-two per cent failed the English section, and thirty-eight per cent failed the science and technology section. Tenth grade students were not tested in history. Board minutes indicated that, at least in part because of those results, the board, in 1999, began to discuss the possibility of phasing various core subjects into the MCAS **[***14]** exam graduation requirement. The board adopted the challenged regulation, 603 Code Mass. Regs. § 30.03, on January 25, 2000, and the regulation became effective on February 18, 2000. The regulation provides:

"Students in the graduating class of 2003 shall meet or exceed the Needs Improvement threshold scaled score of 220 on both the English Language Arts and the Mathematics MCAS grade 10 tests in order to satisfy the requirements of the Competency Determination. The Board **[*760]** intends to raise the threshold scaled score required for the Competency Determination in future years." 11

[*15]** The board also adopted a regulation, 603 Code Mass. Regs. § 30.05,that creates an alternate way for students to satisfy the graduation requirement. The regulation establishes a "performance appeals" process which allows a student to satisfy the MCAS grade ten exam requirement despite a nonpassing score. 603 Code Mass. Regs. § 30.05 (1), (10). The regulation contains several waivable eligibility requirements, including scoring at least a score of 216 on a prior MCAS exam. Id. at § 30.05 (3) (b), (4). No performance appeal can be brought for a student whose knowledge in English language arts and mathematics does not at least meet "a performance level equivalent to 220 on the MCAS **[**112]** grade 10 test **[*761]** required for the competency determination." 12 Id. at § 30.05 (1).

[*16]** Approximately six months after the board promulgated the regulation, the Legislature, by St. 2000, c. 159, § 137, amended § 1I of G. L. c. 69 to require certain school districts to prepare "MCAS success plans." Section 1I provides that:

" Each school district in which more than [twenty] per cent of the students score below level two [i.e., needs improvement] on the [MCAS] exam . . . shall submit an MCAS success plan to the department. The plan shall describe the school district's strategies for helping each student to master the skills, competencies and knowledge required for the competency determination described in [§ 1D, fourth par., (i)]."

The Legislature has also specifically made reference to the MCAS exam in numerous budget line items. The Legislature appropriated funds in the fiscal year (FY) 2003 budget for intensive education programs to assist students in passing the MCAS exam. REMEDIATION See St. 2002, c. 184, § 2, line item 7061-9404. Additional funds were

appropriated in the FY 2004 budget, some directed toward helping students "in the graduating classes of 2003, 2004, and 2005 who have not obtained a competency determination on either the tenth grade English **[***17]** or math MCAS exams." See St. 2003, c. 26, § 2, line item 7061-9404. Both branches of the Legislature also rejected amendments to the FY 2004 budget that would have eliminated the MCAS graduation requirement for students in the classes of 2003 and 2004. See 2003 House J. 261; 2003 Senate J. 242-243.

By March, 2003, approximately ninety per cent of the members of the high school graduation class of 2003 had passed the tenth grade English and math MCAS exams, making them eligible for high school graduation, compared to only sixty-eight per cent when the class first took the exam in 2001. High school juniors and seniors who, as of March, 2003, had not yet passed were given an opportunity to participate in intensive English and mathematics remedial programs, and were permitted to take the MCAS exam again in May, 2003, in time for graduation in June. Students who failed the May, 2003, MCAS exam were given the opportunity to attend free remediation classes during the summer and to take the exam again in August, 2003. Also, the board and the department worked to develop remedial education programs in community colleges and workplace settings for students who satisfied local graduation **[***18]** requirements but had not yet obtained the competency determination. These students have been permitted, at no cost, to take further MCAS exams as many times as they choose. The board has established a "certificate of attainment" which school committees may award to students who meet local high school graduation requirements, but who do not qualify for a diploma because they have not passed the English language arts or mathematics sections of the MCAS exam. REMEDIATION/ MULTIPLE OPPORTUNITIES

[*762] The plaintiffs are members of the high school class of 2003. With one exception, the plaintiffs are public school students. One plaintiff, who is blind, is enrolled at public expense at the Perkins State School for the Blind. Some of the plaintiffs have one or more disabilities and **[**113]** have received special education services. One student has limited English proficiency. All of the plaintiffs have satisfied local graduation requirements, and would have graduated but for their failure to pass either or both the English language arts and mathematics sections of the MCAS exam. Several of the plaintiffs have failed multiple administrations of the mathematics section of the MCAS exam. One plaintiff, on four occasions, has failed both **[***19]** the English language arts and mathematics sections of the MCAS exam, despite his participation in remediation programs. This plaintiff was told that his cohort (class size) was too small to permit a performance appeal.

2. The judge applied the established test in assessing the plaintiffs' application for a preliminary injunction, see Tri-Nel Mgmt. v. Board of Health, 433 Mass. 217, 219, 741 N.E.2d 37 (2001), and she kept in mind the additional requirement that, when a party seeks to enjoin governmental action, the judge must also consider whether the grant of an injunction would adversely affect the public interest. See Landry v. Attorney Gen., 429 Mass. 336, 343, 709 N.E.2d 1085 (1999), cert. denied, 528 U.S. 1073, 145 L. Ed. 2d 663, 120 S. Ct. 785 (2000). The judge also correctly recognized that the significant remedy of

a preliminary injunction should not be granted unless the plaintiffs had made a clear showing of entitlement thereto. Id.

The plaintiffs argue essentially that the regulation is facially invalid because it operates ultra vires in conflict with several provisions of the Act. In challenging the regulation, the plaintiffs have the burden, a formidable **[***20]** one, of demonstrating its illegality. See Massachusetts Fed'n of Teachers v. Board of Educ., 436 Mass. 763, 771, 767 N.E.2d 549 (2002); Greenleaf Fin. Co. v. Small Loans Regulatory Bd., 377 Mass. 282, 293, 385 N.E.2d 1364 (1979). An administrative agency, like the board, has considerable leeway in interpreting a statute it is charged with enforcing, and regulations adopted by the agency stand on the same footing as statutes, with reasonable presumptions to be made in favor of **[*763]** their validity. See Massachusetts Fed'n of Teachers v. Board of Educ., supra; Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgt. Bd., 421 Mass. 196, 210-211, 656 N.E.2d 563 (1995); Quincy v. Massachusetts Water Resources Auth., 421 Mass. 463, 468, 658 N.E.2d 145 (1995). A court will not declare a regulation void unless its provisions cannot, in any appropriate way, be interpreted in harmony with the legislative mandate. See Massachusetts Fed'n of Teachers v. Board of Educ., supra, and cases cited.

The plaintiffs' central contention is that the regulation's limitation of the competency determination, or graduation requirement, to the English language **[***21]** arts and mathematics sections of the MCAS exam conflicts with G. L. c. 69, § 1D, fourth par., (i), which states that the "'competency determination' shall be based on the academic standards and curriculum frameworks for tenth graders in the areas of mathematics, science and technology, history and social science, foreign languages, and English" and must indicate that "a particular student has demonstrated mastery of a common core of skills, competencies and knowledge in these areas . . ." (emphases added). Thus, the plaintiffs conclude, the regulation's use of the MCAS exam is unlawful because the competency determination does not take into account the other core subjects mentioned in the statute.

The language of § 1D, fourth par., (i), and the use of the word "shall," has to be read to effectuate the Legislature's purpose in passing the Act, with attention to **[**114]** the fact that the Legislature has entrusted the board with the Act's implementation. The requirement that the competency determination "shall" be based on multiple subject areas cannot be construed as permissive in the sense that the board can omit entirely and permanently any core subject **[***22]** it chooses. We agree with the judge that, in view of the purpose of § 1D to establish a certain level of knowledge and skills as a prerequisite to graduation, the statute reasonably should be interpreted to direct the board to create a competency determination including multiple subject areas while permitting the board, in its discretion, to phase in those subjects in a reasonable manner and on a reasonable timetable.

The language in § 1D quoted by the plaintiffs does not address **[*764]** the timing or sequence of the implementation of the graduation requirement (except that it could not occur prior to 1998). There is no express prohibition in the statute concerning the phasing-in of core subjects over time and as curriculum frameworks become revised and

finalized. Construing the statute to require the board to delay implementation of the competency determination until it made competence in every core subject a graduation requirement would only delay education reform and frustrate significantly the accomplishment of the Legislature's purpose in enacting § 1D, fourth par., (i), an undesirable result that is to be avoided if reasonably possible. See North Shore Realty Trust v. Commonwealth, 434 Mass. 109, 112, 747 N.E.2d 107 (2001); **[***23]** Watros v. Greater Lynn Mental Health & Retardation Ass'n, Inc., 421 Mass. 106, 113, 653 N.E.2d 589 (1995). "Where the focus of a statutory enactment is reform, the administrative agency charged with its implementation should construe it broadly so as to further the goals of such reform." Massachusetts Fed'n of Teachers v. Board of Educ., supra at 774. The board, therefore, could permissibly exercise its discretion by the form of pragmatic gradualism it undertook, particularly because the fundamental subjects of English language arts and mathematics can be considered the basic foundational requirements with which other core subjects can be studied and mastered. Put more colloquially, the board could properly conclude that a student should have competence in "reading, writing, and arithmetic" before being tested on competence in science, history, and other areas.

We reject the plaintiffs' contention that our construction conflicts with the Act's purpose of holding educators accountable. Rather, the implementation of the regulation is a large stride in accomplishing that goal. Educators have established the required academic standards and curriculum frameworks, **[***24]** and have implemented the competency determination in the subjects of English language arts and mathematics. To be sure, the defendants have not been, and are in no way, excused from requiring a demonstration of competence in the other core subjects as a graduation requirement, and the defendants **[*765]** acknowledge as much. 13 There is no record support for, and no substance to, the plaintiffs' argument that because the graduation requirement has not yet been based on the other core subjects, the students educated in this **[**115]** State with public funds are not being provided with a "comprehensive education."Nothing in the McDuffy decision requires a graduation requirement, let alone a graduation requirement based on an assessment of multiple subjects. Simply put, enjoining the regulation, and enjoining the defendants from requiring the plaintiffs to pass the tenth grade English language arts and mathematics sections of the MCAS exam as a prerequisite to receiving a high school diploma, would undermine educator accountability and hinder education reform. NEXUS TO STATE GOALS EDUCATIONAL AGENCY PREVAILED

[*25]** Our interpretation of the regulation finds additional strong support in two other sources. The first source arises out of other provisions of the Act that give broad discretion to the board to carry out its responsibilities. See St. 1993, c. 71, § 29. 14 The **[*766]** second source, which is much more direct and compelling in its emphasis, is the Legislature's approval of the board's use of the MCAS exam, as presently structured, to implement the Act. The approvals primarily are manifested in budget line items passed by the Legislature over the years, most particularly in FY 2003 and FY 2004, appropriating substantial sums for intensive remediation programs for those who need them in order to pass the MCAS exam. 15 As the judge correctly noted, it makes no sense for the Legislature to provide for targeted, remedial programs, if the Legislature did not both recognize and confirm the board's determination that passage of the English

language arts and mathematics sections of the MCAS exam was to serve as the competency determination that under the Act is a prerequisite for graduation from high school. In this manner the Legislature has expressed its acceptance of the board's phasing-in **[***26]** approach. See Director of the Civil Defense Agency & Office of Emergency **[*767]** Preparedness v. Civil Serv. **[**116]** Comm'n, 373 Mass. 401, 409, 367 N.E.2d 1168 (1977); Canton v. Bruno, 361 Mass. 598, 607-608, 282 N.E.2d 87 (1972); Director of the Civil Defense Agency & Office of Emergency Preparedness v. Leger, 9 Mass. App. Ct. 737, 740, 404 N.E.2d 679 (1980). See also Boston Water & Sewer Comm'n v. Metropolitan Dist. Comm'n, 408 Mass. 572, 578, 562 N.E.2d 470 (1990); Assessors of Melrose v. Driscoll, 370 Mass. 443, 447, 348 N.E.2d 783 (1976).

3. What has been said above turns aside the additional arguments made by the plaintiffs and others 16 in seeking a preliminary injunction, including the contention that the Act requires that the competency of a student be measured by a variety of assessment instruments such as those mentioned in G. L. c. 69, § 1I, second par., including review of an individual student's portfolio work. Because the judge correctly determined that the plaintiffs have not shown that there is a likelihood of success on the facial challenge made, there is no need to consider the judge's determination that the plaintiffs have not shown irreparable harm in the degree needed to obtain a preliminary injunction.
EDUCATIONAL AGENCY PREVAILED

[*28]** 4. The order denying the application for a preliminary injunction is affirmed.

So ordered.

CONCUR BY: IRELAND

CONCUR

IRELAND, J. (concurring). I do not disagree that our result is compelled by the procedural posture of this case and the record before the motion judge. Nonetheless, I write separately to **[*768]** voice my concern regarding the lack of progress in providing a sufficient education to all children educated with public funds in the ten years since this court decided McDuffy v. Secretary of the Executive Office of Educ., 415 Mass. 545, 615 N.E.2d 516 (1993). In other contexts, I have expressed concern for the well-being of our children. See, e.g., Barnett v. Lynn, 433 Mass. 662, 667-668, 745 N.E.2d 344 (2001) (Ireland, J., concurring) (city officials should be expected to take reasonable measures to protect children when they have advance notice of danger); Brum v. Dartmouth, 428 Mass. 684, 708-710, 704 N.E.2d 1147 (1999) (Ireland, J., concurring, with whom Abrams and Marshall, JJs., joined) (school officials should take steps to protect children from harm where they have advance notice of danger).

The education of our children is no less a compelling issue than their [***29] physical safety. "Local schools lie at the heart of our communities. Each morning, parents across the Commonwealth send their children off to school. They entrust the schools with nothing less than the safety and well-being of those most dear to them--their own children. No arm of government touches more closely the core of our families and our children than our schools." Brum v. Dartmouth, supra at 709 (Ireland, J., concurring).

[117]** As the court recalled, ante at & n.5, the McDuffy court held that it was the constitutional "duty" of the legislative and executive branches to provide sufficient education in multiple areas "for all [the Commonwealth's] children, rich and poor, in every city and town." McDuffy v. Secretary of the Executive Office of Educ., supra at 606, 617-619. The McDuffy court left it to the Legislature (and executive branch) "to define the precise nature of the task which they face in fulfilling their constitutional duty to educate our children today, and in the future." Id. at 620.

Declaring that providing a "public education system of sufficient quality to all children [is] a paramount **[***30]** goal," the Education Reform Act of 1993 (Act), St. 1993, c. 71, amending G. L. c. 69, § 1, gave specificity to the McDuffy requirements. Ante at . The Act required, inter alia, curriculum frameworks, objective assessments of both students and schools, and academic standards in core subjects (mathematics, English, science and technology, history and social science, foreign languages and **[*769]** the arts). G. L. c. 69, §§ 1D, 1E, and 1I. Ante at . Annual assessment of the performance of both school districts and individual public schools in improving or failing to improve, inter alia, student competencies in the core subjects is required. G. L. c. 69, § 1I. Ante at.

In this case, there are many claims asserted by the plaintiffs that have yet to be tested at trial. On the record before us today, we know that: (1) the current use of the Massachusetts Comprehensive Assessment System (MCAS) examination means that some core subjects have been omitted from the requisite competency determination; 17 (2) "the record is devoid of evidence **[***31]** about when the board plans fully to implement the Act's curriculum provisions by incorporating the remaining core subjects into the competency determination"; 18 (3) "alternative routes to a high school diploma, theoretically available through a 'performance appeal' or an 'alternate assessment,' as a practical matter are closed to almost all students, particularly those with significant learning disabilities"; 19 (4) there is a "considerable" disparity in pass rates for different subgroups within the Commonwealth, **[**118]** as well as between urban and **[*770]** suburban schools, and between different types of schools; 20 and (5) there is no system in place to assess the performance of the schools in core subjects not tested by the MCAS examination. 21

[*33]** The education of our children is of "crucial importance." Brum v. Dartmouth supra at 709 (Ireland, J., concurring), quoting Care & Protection of Charles, 399 Mass. 324, 334-335, 504 N.E.2d 592 (1987). "The framers' decision to place the provisions concerning education in 'The Frame of Government' -- rather than in the 'Declaration of Rights' -- demonstrates that the framers conceived of education as fundamentally related to the very existence of government . . . [because] education . . . is the means of diffusing wisdom, knowledge, and virtue, [and], therefore a prerequisite for the existence and survival of the Commonwealth." McDuffy v. Secretary of the Executive Office of Educ., supra at 565-566.

I am concerned that in the ten years since the McDuffy case **[*771]** was decided and the Legislature declared education of our children to be a "paramount goal," St. 1993, c. 71, § 27, progress toward providing education in all core subjects to all the Commonwealth's students educated with public funds, disabled and nondisabled, rich and poor, and of

every race and ethnicity, has not advanced more. Schools are not being assessed on their performance **[***34]** in teaching core subjects beyond English and mathematics. In the best of circumstances, it will be 2009 before four of the five core subjects will become part of the assessment, sixteen years after the 1993 McDuffy decision and the 1993 Act. 22 See note 2, supra. The availability of the competency determinations as an assessment instrument is only the first step in remedying **[**119]** poor school performance. How long it will take poorly performing schools or school districts to then be identified, reviewed, and measures taken to make them accountable for the education of their students is unknown. 23 These delays do not seem to be in keeping with McDuffy mandates or the Act, both of which addressed a "state of emergency" in the Massachusetts education system identified in 1991 by the board itself. McDuffy v. Secretary of the Executive Office of Educ., supra at 552.

JULIE HANCOCK & others 1 vs. COMMISSIONER OF EDUCATION & others. 2

1 Public school students in certain cities and towns of the Commonwealth, including Brockton, Springfield, and Winchendon.

2 The chair, vice-chair, and nonstudent members of the board of education.

SJC-09267

SUPREME JUDICIAL COURT OF MASSACHUSETTS

443 Mass. 428; 822 N.E.2d 1134; 2005 Mass. LEXIS 78

October 4, 2004, Argued

February 15, 2005, Decided

SUBSEQUENT HISTORY: As Corrected March 11, 2005.

PRIOR HISTORY: [***1] Suffolk. Civil action commenced in the Supreme Judicial Court for the county of Suffolk on March 27, 1990, and a motion for further relief was filed in the county court on December 22, 1999. The case was reported by Greaney, J. Hancock v. Driscoll, 2004 Mass. Super. LEXIS 118 (Mass. Super. Ct., Apr. 26, 2004)

DISPOSITION: Plaintiffs' motion for further relief is denied, and the single justice's ongoing jurisdiction is terminated.

CORE TERMS: public education, educational, public schools, budget, teacher, funding, score, school districts, curriculum, grade, mathematics, capabilities, spending, educate, school student, progress, special education, fiscal, formula, executive branches, accountability, Reform Act, constitutional duty, language arts, underperforming, elected, concurring opinion, stare decisis, enforceable, proficiency.

COUNSEL: Deirdre Roney, Assistant Attorney General (Juliana deHaan Rice & Jane L. Willoughby, Assistant Attorneys General, with her) for the defendants.

Michael D. Weisman (Rebecca P. McIntyre, Emiliano Mazlen, Peter E. Montgomery, &Alan Jay Rom with him) for the plaintiffs.

The following submitted briefs for amici curiae:.

Harvey J. Wolkoff for State Senator Jarrett T. Barrios & others.

Mark R. Freitas for Massachusetts Alliance for Arts Education & others.

Richard W. Benka for Massachusetts Health Council, Inc., & others.

Joel Z. Eigerman for Jewish Alliance for Law and Social Action & others.

Daniel J. Gleason for Jonathan Kozol.

Roger L. Rice & Jane E. Lopez for Centro Latino de Chelsea & others.

M. Julie Patino, Nadine Cohen, & Laura Maslow-Armand for Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association & others.

Andrea C. Kramer, A. Lauren Carpenter, & Robert E. Sullivan for Massachusetts **[***2]** 2020 Foundation & others.

Ann Clarke, Stephen J. Finnegan, Jeffrey N. Jacobsen, & Michael J. Long for Massachusetts Teachers Association/NEA & others.

Thomas J. Dougherty & Kurt Wm. Hemr for Massachusetts Urban School Superintendents.

Henry C. Dinger & Benjamin M. Wattenmaker for Massachusetts Business Alliance for Education & others.

M. Robert Dushman, Albert W. Wallis, & Samantha L. Gerlovin for MassPartners for Public Schools & another.

Daniel J. Losen for The Civil Rights Project at Harvard University.

Michael D. Vhay for Federation for Children with Special Needs, Inc.

Neil V. McKittrick & Patrick M. Curran, Jr., for Strategies for Children, Inc., & another.

JUDGES: Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, Sosman, Cordy, JJ. MARSHALL, C.J. (concurring, with whom Spina and Cordy, JJ., join). GREANEY, J. (dissenting, with whom Ireland, J., joins).

OPINION

[*430] **[**1136]** BY THE COURT. This matter is before the court on reservation and report by a single justice. A full description of the procedural background of the matter is set forth in **[***3]** the concurring opinion of the Chief Justice.

A majority of the Justices decline to adopt the conclusion of the specially assigned judge of the Superior Court that **[**1137]** the Commonwealth presently is not meeting its obligations under Part II, c. 5, § 2, of the Massachusetts Constitution, and reject her recommendation for further judicial action at this time. The plaintiffs' motion for further relief is therefore denied, and the

single justice's ongoing jurisdiction shall be terminated. By this action, the court disposes of the case in its entirety.

So ordered.

CONCUR BY: MARSHALL; COWIN

CONCUR

MARSHALL, C.J. (concurring, with whom Spina and Cordy, JJ., join). For its effective functioning, democracy requires an educated citizenry. In Massachusetts the democratic

imperative to educate finds strong voice in the "education clause" of the Massachusetts Constitution, Part II, c. 5, § 2 (education clause), 1 **[*431]** which "imposes an enforceable duty on the magistrates and Legislatures of this Commonwealth to provide education in the public schools for the children there enrolled, whether they be rich or poor and without regard to the fiscal capacity of the community or district in which such **[***4]** children live." McDuffy v. Secretary of the Executive Office of Educ., 415 Mass. 545, 621, 615 N.E.2d 516 (1993) (McDuffy). This reflects the conviction of the people of Massachusetts that, because education is "fundamentally related to the very existence of government," id. at 565, the Commonwealth has a constitutional duty to prepare all of its children "to participate as free citizens of a free State to meet the needs and interests of a republican government, namely the Commonwealth of Massachusetts." Id. at 606. Today, I reaffirm that constitutional imperative. The question is whether the Commonwealth presently is meeting its duty to educate.

[*5]** Twelve years ago, in McDuffy, this court declared that the Commonwealth failed to fulfill that obligation, id. at 617, where the Commonwealth had delegated the responsibility for public school education to local communities, and its system of funding primary and secondary public education relied all but exclusively on local property taxes. That system left property-poor communities with insufficient resources to provide students with educational opportunities comparable to those available in property-rich communities. It amounted to an abdication of the Commonwealth's duty to educate. See id. at 614-617. This court left correction of the constitutional violation to the elected branches of government and left to the discretion of a single justice whether to retain jurisdiction of the case. Id. at 550-551, 621.

[*432] Three days after McDuffy issued, the omnibus Education Reform Act of 1993 (act), long under consideration in the Legislature, became law. See St. 1993, 71, enacted by emergency preamble on **[**1138]** June 18, 1993. See generally G. L. c. 69-c. 71. There, the Legislature declared its "paramount goal" to provide a public **[***6]** education system that reflected "a consistent commitment of resources sufficient to provide a high quality public education to every child," and that would extend to all children "the opportunity to reach their full potential and to lead lives as participants in the political and social life of the Commonwealth and as contributors to its economy." G. L. c. 69, § 1. The act, as I shall describe below, radically restructured the funding of public education across the Commonwealth based on uniform criteria of need, and dramatically increased the Commonwealth's mandatory financial assistance to public schools. The act also established, for the first time in Massachusetts, uniform, objective performance and accountability measures for every public school student, teacher, administrator, school, and district in Massachusetts.

The plaintiffs here, all students in Commonwealth public schools, claim that evidence from the public school districts of Brockton, Lowell, Springfield, and Winchendon (which the parties have termed the "focus districts") demonstrates that public education in those districts has not improved significantly since 1993, and that the Commonwealth **[***7]** is still in violation of its constitutional obligation to educate children in its poorer communities, most notably children with special educational needs. A Superior Court judge specifically assigned to hear evidence and report to the single justice agreed. She

found that, while substantial improvements in public education had occurred since 1993, significant failings persisted in the focus districts, and that the Department of Education (department) lacked sufficient resources and capacity to address these failings. She recommended that the department be ordered to determine the "actual cost" of funding a "constitutionally adequate level of education" for all students in the focus districts, and that the Commonwealth be ordered to implement the funding and administrative changes necessary to achieve that result. The single justice reserved and reported the case to the full court.

[*433] I accord great deference to the Superior Court judge's thoughtful and detailed findings of fact. I accept those findings, and share the judge's concern that sharp disparities in the educational opportunities, and the performance, of some Massachusetts public school students persist. The public education **[***8]** system we review today, however, is not the public education system reviewed in McDuffy. Its shortcomings, while significant in the focus districts, do not constitute the egregious, Statewide abandonment of the constitutional duty identified in that case. 2

In the twelve years since McDuffy was decided, the elected branches have acted to transform a dismal and fractured public school system into a unified system that has yielded, as the judge found, "impressive results **[***9]** in terms of improvement in overall student performance." She found that, "spending gaps between districts based on property wealth have been reduced or even reversed. The correlation between a district's median family income **[**1139]** and spending has also been reduced." Public dollars for public education are now being allocated to where they are the most effective: defining core educational goals for all students, evaluating student performance toward those goals, and holding schools and school districts accountable for achieving those goals. See G. L. c. 69, §§ 1 and 1D. A system mired in failure has given way to one that, although far from perfect, shows a steady trajectory of progress.

No one, including the defendants, disputes that serious inadequacies in public education remain. But the Commonwealth is moving systemically to address those deficiencies and continues to make education reform a fiscal priority. It is significant, in my view, that the Commonwealth has allocated billions of dollars for education reform since the act's passage, and that this new and substantial financial commitment has continued even amidst one of the worst **[***10]** budget crises in decades. By creating and implementing standardized Statewide criteria of **[*434]** funding and oversight; by establishing objective competency goals and the means to measure progress toward those goals 3; by developing, and acting on, a plan to eliminate impediments to education based on property valuation, disability, lack of English proficiency, and racial or ethnic status; and by directing significant new resources to schools with the most dire needs, I cannot conclude that the Commonwealth currently is not meeting its constitutional charge to "cherish the interests of . . . public schools." Part II, c. 5, § 2.

[*11]** I interject some words of caution. I do not retreat from the court's holding in McDuffy. 4 The education clause "imposes an enforceable duty on the magistrates and Legislatures of this Commonwealth to provide education in the public schools for the children there enrolled, whether they be rich or poor and without regard to the fiscal

capacity of the community or district in which such children live." Id. at 621. It **[**1140]** remains "the responsibility of the Commonwealth to take such steps as may **[*435]** be required in each instance effectively to devise a plan and sources of funds sufficient to meet the constitutional mandate." Id. I do not suggest that the goals of education reform adopted since McDuffy have been fully achieved. Clearly they have not. Nothing Isay today would insulate the Commonwealth from a successful challenge under the education clause in different circumstances. The framers recognized that "the content of the duty to educate . . . will evolve together with our society," and that the education clause must be interpreted "in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, infact, may **[***12]** even lose its meaning." McDuffy, supra at 620, quoting Seattle Sch. Dist. No. 1 v. State, 90 Wn. 2d 476, 516, 585 P.2d 71 (1978).

[*13]** Here, the legislative and executive branches have shown that they have embarked on a long-term, measurable, orderly, and comprehensive process of reform "to provide a high quality public education to every child." G. L. c. 69,§ 1. They are proceeding purposefully to implement a plan to educate all public school children in the Commonwealth, and the judge did not find otherwise. They have committed resources to carry out their plan, have done so in fiscally troubled times, and show every indication that they will continue to increase such resources as the Commonwealth's finances improve. While the plaintiffs have amply shown that many children in the focus districts are not being well served by their school districts, they have not shown that the defendants are acting in an arbitrary, nonresponsive, or irrational way to meet the constitutional mandate.

I

In summarizing the relevant background, I shall not repeat the facts recounted in McDuffy, except as they are necessary to place the present controversy in its proper context. I summarize the relevant facts subsequent to the McDuffy decision in greater detail, drawing from the judge's findings **[***14]** and other undisputed material of record.

I begin with the situation confronting the Legislature and the court prior to the enactment of the Education Reform Act. At that time, public education in Massachusetts was governed by a **[*436]** loosely connected melange of statutes, local regulations, and informal policies. See McDuffy, supra at 556. Locally elected school boards in hundreds of communities across the Commonwealth had broad, individual discretion to set educational policy and practice. Id. At 607-608. As a direct result of the executive and legislative branches' hands-off approach to public education, property-poor localities were left perennially unable to educate their students. Id. at 614 Although Commonwealth aid for local public school education was mandated, the statutory guidelines went largely unheeded, leaving cities and towns at the mercy of unpredictable annual appropriations from the Legislature. See McDuffy, supra at 613-614. Moreover, communities were not required to differentiate Commonwealth aid for public schools from other Commonwealth aid, or even to use school aid for the schools. Id. at 556. **[***15]** The statutory authority of the department and a board of education (board) to

establish and enforce uniform educational standards existed more on paper than in practice. See id. at 614-615.

[1141]** Beginning in 1978, public school students in property-poor cities and towns in Massachusetts filed suit in the county court against State education officials. A Superior Court action sought a declaration that the Commonwealth's school-financing scheme effectively denied them an opportunity to receive an adequate education in their communities, in contravention of the Massachusetts Constitution. See generally McDuffy, supra at 548-550 & n.4. 5 In 1992, thelawsuits, now consolidated, came to the court on reservation and report of the single justice on facts stipulated by the parties. Id. at 549

[*16]** As various education proposals made their way through the Legislature in the early 1990's, the Legislature was aware of the pending McDuffy case. The representative who chaired a special legislative committee to reform education expressed his hope that Massachusetts would become the first State to overhaul education financing before being ordered to do so by a court. See Education, State House News Service, Jan. 4, 1993. The Governor stated in early January, 1993, six months before the **[*437]** McDuffy decision issued, that the court's decision in the case could make a new funding scheme mandatory. Id. Legislative efforts culminated in the Education Reform Act. 6

[*17]** The act entirely revamped the structure of funding public schools and strengthened the board's authority to establish Statewide education policies and standards, focusing on objective measures of student performance and on school and district assessment, evaluation, and accountability. 7 See G. L. c. 69, § 1B . I discuss briefly the act's sweeping reach.

[*18]** The act eliminated the central problem of public school funding that we identified as unconstitutional in McDuffy. See Doe v. Superintendent of Sch., 421 Mass. 117, 129, 653 N.E.2d 1088 (1995) ("The question before the court in McDuffy . . . was whether the Massachusetts school-financing system was constitutional, and the court held that it was not"). Specifically, the act eliminated the principal dependence on local tax revenues that consigned students in property-poor districts to schools that were chronically short of resources, and unable to rely on sufficient or predictable financial or other assistance from the Commonwealth. The act established for the first time a "foundation budget" for each and every Massachusetts school district, derived from a complex formula designed to account for the number and needs of the children residing in each **[**1142]** district. See G. L. c. 70, §§ 2 et seq. 8 The defendants have described the foundation budget as the State's estimate of the **[*438]** "minimum amount needed in each district to provide an adequate educational program" (emphasis added). 9

The act guarantees that each public school district receive its foundation budget through a combination of Commonwealth and local funds. Where, before 1993, the Legislature ceded to municipalities virtually unlimited control over school budgets, the act now requires municipalities to provide a standardized contribution to education. A municipality's required contribution to its foundation budget depends in large part on its equalized property valuation. G. L. c. 70, § 6. The Commonwealth provides the

difference between **[***20]** municipalities' mandatory funding obligations and their respective foundation budget amounts. G. L. c. 70, § 2. In practice, districts in wealthier communities with high property valuations receive most of their funding from local property tax receipts, while districts serving communities with less valuable property receive most of their funding from the Commonwealth. Localities have flexibility to allocate their foundation budget amounts according to local priorities, but they may not, as previously, use school funds to pay for other municipal services. They must spend them on public education. G. L. c. 70, § 8.

The act also established a centralized system of objective, data-driven, performance assessment and school and district accountability. As the court recently described at some length, **[*439]** see Student No. 9 v. Board of Educ.,440 Mass. 752, 755-759, 802 N.E.2d 105 (2004), the act imposes various obligations on the Commissioner of Education (commissioner) and the board to develop academic standards, and "curriculum frameworks" for attaining those standards (or "competency determination") in certain "core subjects": mathematics, **[***21]** science and technology, history and social science, English language arts, foreign languages, and the arts. See G. L. c. 69, §§ 1B, 1D, 1E, 1I. 10 The act specifically **[**1143]** requires, for the first time in the history of the Commonwealth, that every senior graduating from a school that accepts funds from the Commonwealth (including public, vocational, and charter schools) attain competency in the core subjects of mathematics, science and technology, history and social science, foreign languages, and English language arts, as measured by the student's score on the Massachusetts Comprehensive Assessment System examination (MCAS examination). See G. L. c. 69, § 1D; 603 Code Mass. Regs. § 30.03 (2000); Student No. 9 v. Board of Educ., supra at 758. 11 The requirement is not designed, however, to winnow underperforming students from the graduation process. Prior to the act, failing high school students would have been permitted either to graduate without basic skills or fade away from the public education system altogether. **[***22]** They are now given extensive remedial opportunities. See generally id. at 759-761. At present, theMCAS examination is administered in English and mathematics to students in grades four, eight, and ten. With some exceptions, students need a score in at least the "needs improvement" category in both subjects on the grade ten MCAS examination **[*440]** to receive a high school diploma. See generally id. At 758-760. The department's goal is that every public school student achieve a level of "proficient" or "advanced" on the MCAS examination of English and athematics by 2014. 12 CURRICULAR VALIDITY

The Commonwealth is now required to assist schools and districts that fail to improve student performance. See G. L. c. 69, § 1J. Under the act, schools and districts **[***24]** must demonstrate that they are making "adequate yearly progress" toward achieving, by 2014, student proficiency in English language arts and mathematics. Adequate yearly progress is assessed not only in the aggregate but also with respect to targeted subgroups: students receiving special education services; students with limited English proficiency; and minority students, including African-Americans, Hispanics, and Asians-Pacific Islanders. The purpose of the school performance ratings, as the judge found, "is to permit the department to assess underperformance and where there may be a need for State intervention, and also to look for districts that have experienced distinct improvements in student performance and that can help disseminate information about

successful strategies; the latter are **[**1144]** designated as 'compass schools.'" Schools with low performance ratings and schools that show either no progress toward improvement or worsening conditions are referred for "school panel review." Those schools are given the highest priority for district and Commonwealth support, which may include targeted additional funding or training by department specialists in areas such as curriculum development, **[***25]** instructional practices, and performance improvement planning. If the school panel review determines that a school is "underperforming," the department **[*441]** schedules a fact-finding mission. Fact finding involves extensive, on-site evaluations by a team of specialists who report on ways a school might improve its performance. Underperforming schools must submit an improvement plan to the department. See G. L. c. 69, § 1J ; 603 Code Mass. Regs. § 2.03 (6) (2000). If the school does not improve sufficiently within twenty-four months, the department may deem it "chronically underperforming" and target it for additional corrective action. See G. L. c. 69, § 1J.

A similar evaluation process occurs at the district level. School district review is conducted by the office of educational quality and accountability, a separate agency within the department that began to operate in 2001. See G. L. c. 15, § 55A, as appearing in St. 2000, c. 384, § 4 (establishing office of educational quality and accountability). Chronically underperforming districts may be targeted for receivership. The judge **[***26]** stated that, "according to the department, the school and district accountability system it has developed is one of the first in the United States." See generally Student No. 9 v. Board of Educ., supra at 755-759.

The Legislature also made institutional changes to reform the process of training and certification of public school teachers. The act abolished the long-standing practice of teacher tenure. It imposes stringent initial and renewal certification requirements for teachers that are "designed," in the words of the judge, "in part to link the educational requirements that new teachers must meet with the contents of the Massachusetts curriculum frameworks, and to enhance the quality and subject matter mastery of teachers. The [teacher] examination and these regulations are among the most rigorous teacher qualification programs in the United States." 13

[*27]** In summary, the act revolutionized public education in **[*442]** Massachusetts. Across the board, objective, data-driven assessments of student performance and specific performance goals now inform a standardized education policy and direct the Commonwealth's public education resources. The current, integrated public education system contrasts markedly with the system discussed in McDuffy. I turn now to **[**1145]** the events that precipitated the current litigation.

In December, 1999, the plaintiffs revived the McDuffy case by filing a motion for further relief in the county court. 14 The plaintiffs alleged that the foundation budget in their districts "is insufficient to provide [them] with a constitutionally sufficient education." They further alleged that their school systems "continue to suffer with largely the same

conditions" existing prior to June 1993, and that students were not receiving the public education mandated by McDuffy. 15

[*28]** On June 27, 2002, the single justice directed a specially assigned Justice of the Superior Court to "establish a tracking order, preside over discovery issues, hear the parties and their witnesses, and thereafter make findings of fact and such recommendations as the said pecially assigned justice considers material to the within complaint." Following consultation with the parties, the judge proceeded to trial focusing the factual evidence on a group of districts fewer than the total. The plaintiffs ultimately selected four "focus" districts: Brockton, Lowell, Springfield, and Winchendon. 16 The plaintiffs also offered limited evidence from three other districts -- Brookline, Concord-Carlisle, and Wellesley (comparison districts) – each **[*443]** of which had been presented as a comparison district in the McDuffy proceedings. 17

Trial began on June 12, 2003, and concluded in January, 2004. The judge heard testimony from 114 witnesses and received in evidence more than 1,000 exhibits. On April 26, 2004, the judge issued a 318-page report containing thoughtful and comprehensive findings of fact, conclusions, and recommendations.

I shall discuss the judge's findings in detail below. Here I note only the judge's conclusion that, although the Commonwealth had accomplished substantial reforms in public education since 1993, it had failed to meet its constitutional obligation to equip all students in the focus districts, and especially those in the disadvantaged subgroups, with an education consistent with our holding in McDuffy. She recommended that the court provide **[***30]** remedial relief by directing the Commonwealth defendants (1) to ascertain the actual cost of providing all public school pupils in the focus districts with the educational opportunities described in McDuffy; (2) to determine the costs of providing "meaningful" **[**1146]** educational improvement in the focus districts' capacity "to carry out an effective implementation of the necessary educational program"; and (3) to "implement whatever funding and administrative changes result from the determinations made in (1) and (2)." 18 Further, **[*444]** the judge recommended continued court oversight of the department's progress toward implementing the order. 19

[*31]** On May 20, 2004, the single justice reserved decision and reported the case to the full court, as noted above.

II

A

The question, as framed by the single justice, is "whether, within a reasonable time, appropriate legislative action has been taken to provide public school students with the education required under the Massachusetts Constitution." Put another way, the single justice asked whether, notwithstanding the considerable changes in public education that have occurred since 1993, the Commonwealth remains in violation of the education clause. I apply to the adjudicative task well-settled principles of review. I would accept the judge's findings of fact absent clear error, Buster v. George W. Moore, Inc., 438 Mass. 635, 642-643, 783 N.E.2d 399 (2003). Her conclusions of law I assess de novo.

Wesson v. Leone Enters., Inc., 437 Mass. 708, 712-713, 774 N.E.2d 611 (2002). See Commonwealth v. Murphy, 362 Mass. 542, 551, 289 N.E.2d 571 (1972) (Hennessey, J., concurring). To effectuate the purpose of the education clause, I construe it as "a statement of general principles and not a specification of details." McDuffy, supra at 559, quoting **[***32]** Cohen v. Attorney Gen., 357 Mass. 564, 571, 259 N.E.2d 539 (1970). I am mindful of the presumption of constitutional validity guiding our consideration, see Fifty-One Hispanic Residents of Chelsea v. School Comm. of Chelsea, 421 Mass. 598, 606, 659 N.E.2d 277 (1996) ("Constitutional analysis begins with a presumption of statutory validity"), and the substantial deference afforded to the department in carrying out the act's provisions. See Student No. 9 v. Board of Educ., 440 Mass. 752, 762, 802 N.E.2d 105 (2004) (administrative agency "has considerable leeway in interpreting a statute it is charged with enforcing"); School Comm. of Wellesley v. Labor Relations Comm'n, 376 Mass. 112, 116, 379 N.E.2d 1077 (1978). I emphasize that this is not a case where the Legislature reasonably **[*445]** could be said to have neglected or avoided a constitutional command. Cf., e.g., Perez v. Boston Hous. Auth., 379 Mass. 703, 740, 400 N.E.2d 1231 (1980) (judicial intervention appropriate where public officials "persist[] in indifference to, or neglect or disobedience of court orders").

B

I turn once more to the judge's findings, which comprise more than 300 pages. The judge's findings of fact **[***33]** are a model of precision, comprehensiveness and meticulous **[**1147]** attention to detail. 20 Although I shall set out only a general summary, I am confident that in their entirety the judge's findings will stand as a compelling, instructive account of the current state of public education in Massachusetts.

[*34]** 1. Funding. In the judge's words, the act "changed dramatically the manner in which public school elementary and secondary education is funded in Massachusetts." That change is evident both in dollars spent on public education and on substantially reduced disparities in education funding between rich and poor districts. In sheer dollars, the total amount annually spent on kindergarten to grade twelve education rose from approximately $ 3.6 billion in fiscal year (FY) 1993, prior to passage of the act, to $ 10.1 billion in FY 2002. Annual increases in school funding in that period averaged twelve per cent. State aid, the great bulk of it from foundation budget funding, accounted for about thirty-nine per cent of this annual spending. 21 **[*446]** In all, from 1993 to 2003, the Commonwealth contributed about $ 31 billion to fund public education.

[*35]** The focus districts in particular have seen striking increases in their school spending in the years since the act became law. The judge found that, between 1993 and 2003, annual net school spending nearly doubled in Springfield (from $ 126.2 million to $ 236.4 million), and more than doubled in Brockton (from nearly $ 56 million to $ 143.5 million), Lowell (from $ 61 million to $ 136 million), and Winchendon (from approximately $ 5.78 million to almost $ 14 million).

The act also tackled the huge disparities in public school funding between rich and poor districts that we faulted in McDuffy. The judge found that "spending gaps between districts based on property wealth have been reduced or even reversed. The correlation

between a district's median family income and spending has also been reduced." 22 In the ten-year period following passage of the act, the gap in per pupil spending between high-property-value districts and low-property-value districts was cut by one-half, from thirty-eight per cent in 1993 to approximately eighteen or nineteen per cent in 2003. And while "the top quartile of districts defined by median income is spending more per pupil than the lowest **[***36]** quartile, the difference between them has fallen from [twenty-seven per **[**1148]** cent] to [seven per cent]" from 1993 to 2003.

The public education funding system, however, has not been immune from the effects of recent years of sharply diminished Commonwealth revenues. The judge reported decreases in Commonwealth aid to public schools since the "high water ark" of fiscal year 2002. Fiscal years 2003 and 2004 saw cuts in G. L. c. 70 aid, see note 21, supra, and "drastic" cuts in some public school grants programs. For example, "early literacy grants for early reading programs were . . . **[***37]** cut by two-thirds," **[*447]** from $ 18.3 million in FY 2003 to $ 3.8 million FY 2004. 23 Overall, Commonwealth aid to public education declined about 5.5 per cent in FY 2003 and FY 2004. As the Commonwealth's fiscal situation improved in FY 2005, the Legislature acted to increase funding for public education, see, e.g., Letter from Governor Mitt Romney to the Senate and House of Representatives, June 25, 2004 (noting approval of $ 80 million to increase funding for special education), but prior decreases in funding forced the focus districts to lay off staff and scale back or cut some programs. The judge found that the department faced diminished resources just as its oversight responsibility was increasing significantly. In 2001, the judge found, the department identified between 100 and 200 schools as candidates for "underperforming" status because of "critically low" or "very low" MCAS examination scores. Due to a lack of resources within the department, however, only about twenty-four of those problem schools were accorded full school panel reviews. For the remaining schools, the task of mapping out improvements fell to the school districts themselves.

[*38]** 2. Performance and accountability. The judge reported the quality of public education in the four focus districts to be uneven at best. She also found substantial improvements in student performance and some outstanding examples of successful schools and programs in those same districts. We summarize her findings below.

The judge found that over-all academic performance of students in the focus districts, particularly those with special educational needs, was poor. Her conclusion is amply supported by evidence of MCAS examination scores in the focus districts. In 2003, for example, the Statewide average pass rate on the MCAS mathematics examination for grade ten was eighty-five per cent, but only seventy-three per cent in Brockton, sixty-seven per cent in Lowell, fifty-four per cent in Springfield, and seventy-seven per cent in Winchendon. In all four focus districts, **[*448]** public school students who required special education, and students who had limited English proficiency, came from low-income families, or were members of racial or ethnic minority groups performed at substantially lower levels on the MCAS examinations than did their peers in the focus districts. The pass **[***39]** rates for these targeted populations on the 2003 grade ten MCAS mathematics examination were twenty-three per cent in Brockton, twenty-five per cent in Lowell, fifteen per cent in Springfield, and twelve per cent in Winchendon,

compared with a Statewide average of fifty per cent. Even these statistics overstate the academic achievements of students in the focus districts, because a disproportionately large number of those students pass the MCAS examinations with "needs improvement" scores. See note 11, supra. Pursuant to the provisions of the No Child Left Behind **[**1149]** Act, by 2014 only students who attain the categories of "proficient" or "advanced" will be deemed to have passed the MCAS examination. See note 12, supra.

The judge found that the focus districts lagged in other measures of student achievement as well. Students in the focus districts, especially minorities, are less likely to take the Scholastic Achievement Test (SAT) for college entrance than their peers. And in each focus district, the dropout rate significantly exceeds the Commonwealth norm. 24

[*40]** The judge tied the focus districts' failings in student performance to a lack of educational resources. She amply documented schools in the focus districts that struggle with overcrowded classrooms, outmoded textbooks and libraries, inadequate technology, unsatisfactory services and educational access for special needs students, and decrepit or overcrowded school facilities. The judge found other problems as well, including antiquated curricula, teachers lacking proper teaching certification, and poor leadership and administration, a point we **[*449]** shall return to below. 25 Some of these same conditions characterized the public schools attended by the McDuffy plaintiffs. See McDuffy , supra at 553-554 (listing stipulated conditions of plaintiffs' schools). Not surprisingly, the judge found that, in general, the current conditions in the focus districts compared unfavorably to those of the comparison districts, and often to State wide average.

[*41]** The judge determined that funding for the department was inadequate to enable it to carry out its statutory duties of evaluating and providing corrective measures to low-performing schools and districts. She stated, among other things, that "in the three years since the department developed the school accountability system, it has been able to conduct school panel reviews in only twelve to fourteen schools each year, although the annual pool of schools demonstrating 'low' or 'critically low' performance is in the hundreds." The district review process was similarly underfunded. Although the department's goal is to review every school district every six years, the judge was skeptical about this possibility, given the department funding levels then in effect. She concluded that "the department's own lack of capacity impedes its ability effectively to help the local districts with theirs."

The public education system in place since the 1993 act mandates extensive Commonwealth involvement to improve schools that are underperforming. Notwithstanding that the department currently has difficulty meeting its statutory obligations in this regard, the judge found encouraging signs **[***42]** of progress as a result of the Commonwealth's active stewardship of public education, even amidst the depressing picture of limitations and low performance in the focus districts. She found that MCAS examination scores have been rising in the focus districts since the first **[**1150]** MCAS examinations were administered in 1998. In 1998, for example, forty-four per cent of Brockton's grade ten public school students failed the MCAS **[*450]** English language arts examination, a figure that was reduced by more than one-half

(eighteen per cent) by 2003. MCAS grade ten English language arts examination scores showed similar improvements in Lowell (thirty-six per cent in 1998 and twenty-one per cent in 2003) and Springfield (sixty per cent in 1998 and thirty-four per cent in 2003), although they remained virtually steady at approximately twenty-one per cent in Winchendon. "Failing" scores on the MCAS grade ten mathematics examination from 1998 to 2003 dropped in Brockton, from seventy-six per cent to thirty-three per cent; in Lowell, from sixty-four per cent to thirty-six per cent; in Springfield, from eighty-three per cent to fifty-three per cent; and in Winchendon from fifty-six per cent to thirty-four per **[***43]** cent. 26

In addition to a general improvement over time in MCAS examination scores in the focus districts, the judge found other signs of progress precipitated by the Commonwealth's actions. I highlight some findings from each focus district. The department has designated four elementary schools in Springfield and Brockton **[***44]** as high-achieving "compass schools." In 2002, Brockton High School was one of six high schools designated a Commonwealth compass school in recognition of its significant gains in student achievement. "Overall, Brockton's sixth graders were one year and one month ahead of the national average on the Iowa Basic Skills test in language, six months ahead of the national average in math, and equal to the national average in reading."

Springfield has made considerable progress in developing programs for students struggling in mathematics, implementing successful teacher development programs, and running alternative school programs for students at risk of dropping out of school. Lowell offers full-day kindergarten to all children, has **[*451]** an extended day school program for middle-school children who need extra time to learn reading, writing, and mathematics, and has school libraries that "are in better shape than in other focus districts because Lowell has so many new and renovated schools." Even in Winchendon, one of only two "underperforming" districts in the Commonwealth, see note 25, supra, the judge found "a very good public school preschool program," which, however, lacked resources **[***45]** to accommodate all of the children who need to attend.

3. Conclusion. The evidence leaves no doubt that the act profoundly altered the Commonwealth's role in public education. The Commonwealth has devoted billions of dollars to the task of systemically reforming public education, and has cut funds for public education only when confronted by drastic revenue shortfalls. The evidence also establishes, as the dissenting opinions correctly point out, see post at - (Greaney, J., dissenting), post at (Ireland, J., dissenting), that many schools in the focus districts are **[**1151]** struggling to meet the goals of the act, but that the department is succeeding in raising the levels of student performance in the focus districts and Statewide, although much work remains. I now turn to the judge's conclusions.

C

The judge concluded that the Commonwealth and the department "have accomplished much over the past ten years in terms of investing enormous amounts of new money in local educational programs, ensuring a far greater degree of equitablespending between rich and poor school districts, and redesigning in some fundamental ways the entire

public school educational program. **[***46]** "Notwithstanding these gains, she stated, "the factual record establishes that the schools attended by the plaintiff students are not currently implementing the Massachusetts curriculum frameworks for all students, and are not currently equipping all students with the McDuffy capabilities."

The judge reasoned that "a very important and independent cause" of poor student performance in the focus districts was that the foundation budget formula, on which all Massachusetts public schools depend, is structurally flawed because it fails to **[*452]** account for the true costs of: special education, aligning school districts with the curriculum frameworks, providing adequate teacher salaries (which comprise the "largest category of expenditure" in a school district's budget), and educating students who are bilingual or of limited English proficiency. Another cause of poor student performance, in her view, was that the department "does not presently have enough staff and resources to do the job it is expected and required to do." As a result, "the public school education programs provided to all the children who are enrolled [in the focus districts] do not meet the requirements of [the **[***47]** education clause]." I now examine the merits of the judge's legal conclusions and recommendations.

III

In McDuffy, this court faced an overwhelming, stipulated body of evidence that the structure of public education in Massachusetts was condemning generations of public school students in our poorer communities to an inferior education. It was a record of abysmal failure. The public education system reviewed today has been radically overhauled with one "paramount goal" in mind -- to implement a plan to educate every public school student in Massachusetts. See G. L. c. 69, §

The judge and the parties all agree that the current system of public education has achieved a great deal in the twelve years since its enactment. The curriculum frameworks designed to educate students in core subjects "were uniformly described by witnesses for all parties to be of excellent quality, focusing on knowledge and skills that students need to acquire." They are "rigorous but reasonable," and "articulate a level of knowledge that students need if they are to achieve the McDuffy capabilities." The English language arts framework is of "exceptional quality, **[***48]** " and the mathematics curriculum framework is "a world class document." The arts framework is "excellent," and the health curriculum framework was described by the plaintiffs' expert "to be one of the best if not the best in the nation." The teacher competency tests and the department's teacher licensing regulations "are among the most rigorous **[*453]** teacher qualification programs in the United States." While the dissenting Justices claim that the department's efforts to improve educational standards have not reaped appreciable results, see post at **[**1152]** (Greaney, J., dissenting); post at (Ireland, J., dissenting), the record proves otherwise. New schools are being built. The department is evaluating and addressing problems in underperforming schools and districts according to a plan of "pragmatic gradualism" that employs objective, measurable criteria to gauge progress. See Student No. 9 v. Board of Educ., 440 Mass. 752, 763-764, 802 N.E.2d 105 (2004) (board may phase in competency determinations required by act "in a reasonable manner and on a reasonable timetable"). In the focus districts, MCAS English language arts and math scores are improving. State

spending on public education in **[***49]** the focus districts has more than doubled. Compass schools exist in districts that previously had none. Facilities, equipment, and supplies are being upgraded.

In assessing whether this record of considerable progress, marred by areas of real and in some instances profound failure, offends the education clause, I must consider that clause "in the light of the conditions under which it and its several parts were framed, the ends which it was designed to accomplish, the benefits which it was expected to confer, and the evils which it was hoped to remedy." McDuffy, supra at 559, quoting Cohen v. Attorney Gen., 357 Mass. 564, 571, 259 N.E.2d 539 (1970). I must give its words "a construction adapted to carry into effect its purpose," McDuffy, supra, quoting Cohen, supra, while recognizing that, "the content of the duty to educate which the Constitution places on the Commonwealth necessarily will evolve together with our society." McDuffy, at 620.

The constitutional imperative to "cherish the interests" of public school education requires the elected branches of government to assume actual, not merely titular, control over **[***50]** public education. It is a structural command, dictating a specific organization of government. See McDuffy, supra at 565 (placement of education clause in Massachusetts Constitution "indicates structurally . . . that education is a 'duty' of government . . . . The framers' decision to place the provisions concerning education in 'The Frame of Government' -- rather than in the 'Declaration of Rights' -- demonstrates that the **[*454]** framers conceived of education as fundamentally related to the very existence of government"). 27 The education clause mandates that the Governor and the Legislature have a plan to educate all public school children and provide the resources to establish and maintain that plan. See McDuffy, supra at 621. At the same time, the education clause leaves the details of education policymaking to the Governor and the Legislature. Id. at 610, 620. 28 Where the Governor and the Legislature establish, exercise ultimate control over, and provide substantial and increasing (subject only to dire fiscal circumstances) resources to support, public education in a way that minimizes rather **[**1153]** than accentuates differences **[***51]** between communities based on property valuations, constitutionally impermissible classifications, and other criteria extrinsic to the educational mission, see id. at 621, we cannot conclude that they are presently violating the education clause.

The plaintiffs read the education clause to mandate that all current public school students **[***52]** demonstrate competency in a specific program of education: that is, the seven "capabilities" that were identified in McDuffy. Those capabilities are:

> "(i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable students to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training **[*455]**

> or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient level of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market."

Id. at 618-619, quoting Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989) **[***53]** (Rose). 29 In McDuffy, this court recognized that an "educated child" possesses these "capabilities," McDuffy, supra at 618, but did not mandate any particular program of public education. Student No. 9 v. Board of Educ., 440 Mass. 752, 754, 802 N.E.2d 105 (2004), does not hold otherwise. There, citing to the capabilities of Rose, this court stated that McDuffy "held that the Massachusetts Constitution imposes an enforceable duty on the Commonwealth to ensure that all children in its public schools receive an education that is to include certain specific training." The seven "capabilities" listed in Rose do not in themselves prescribe a specific curriculum. Thus, in Student No. 9 v. Board of Educ., supra, this court held, among other things, that, "nothing in the McDuffy decision requires . . . a graduation requirement based on an assessment of multiple subjects." Student No. 9 v. Board of Educ., supra at 765. The dissenting Justices cite Abbott v. Burke, 153 N.J. 480, 710 A.2d 450 (1998) (Abbott), and Campaign for Fiscal Equity v. State, 100 N.Y.2d 893, 801 N.E.2d 326, 769 N.Y.S.2d 106 (2003) **[***54]** (CFE), to support the position that this court should exercise its authority "to identify the level of spending required" to meet a certain level of education. Post at n.5 (Greaney, J., dissenting). Those cases presented dramatically different circumstances than those we face here. In Abbott and CFE, the respective courts stepped in, only reluctantly, after many years of legislative failure or inability to enact education reforms and to commit resources to implement those reforms, a circumstance not present here. See Abbott, supra at 492 ("sixteen years after the start of the Abbott litigation, the court found that the continuing constitutional deprivation **[*456] [**1154]** had persisted too long and clearly necessitated a remedy"; CFE, supra at 925 ("We are, of course, mindful . . . of the responsibility . . . to defer to the Legislature in matters of policymaking . . . . We have neither the authority, nor the ability, nor the will, to micromanage education financing"). In sharp contrast, the Massachusetts Legislature and Governor responded to adjudication concerning education with a comprehensive and systematic overhaul of State financial aid to and oversight **[***55]** of public schools. The level of responsive, sustained, intense legislative commitment to public education established on the record in this case is the kind of government action the Abbott and CFE courts, in the respective underlying cases, had hoped to see from their Legislatures, and reluctantly concluded would not be forthcoming without a detailed court order. See Abbott, supra at 490 (noting "judicial involvement in the long and tortuous history of the State's extraordinary effort to bring a thorough and efficient education to the children of its poorest school districts"); CFE, supra at 919-925 (documenting State's attempt to distance itself from responsibility for dismal quality of education in New York City public schools). 30

[*56]** The plaintiffs further argue that the Commonwealth is in **[*457]** violation of the education clause because it has had more than sufficient time since McDuffy to bring all students in the Commonwealth to full academic competency, and it has failed to do so. As one of the dissenting opinions point out, the education clause does not "guarantee

equal outcomes in all school districts" according to certain measurable criteria. Post at (Greaney, J., dissenting). Yet the plaintiffs' frustration with the slow, sometimes painfully slow, pace of educational reform in the focus districts is understandable. I am cognizant that, for the student whose special needs go unaddressed, for the student who sits in an overcrowded classroom or an ill-equipped school library, and for their parents or guardians, the prospect of "better things to come" in public education comes too late. The dissenting Justices point to United States Supreme Court cases interpreting the equal protection and due process clauses of the Federal Constitution to suggest that in declining to order relief now members of this court are "naysayers" who have abandoned **[**1155]** the constitutional imperative of McDuffy. See post at, **[***57]** citing Brown v. Board of Educ. of Topeka, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954) (Greaney, J., dissenting), post at, citing Brown v. Board of Educ., supra, and DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989) (Ireland J., dissenting). I emphatically reject any such conclusion. The court has not been called on to interpret the eqaul protection and due process provisions of the Massachusetts Constitution, nor are we confronted with the wholesale abandonment of children that the record in those cases evidenced. Here, the independent branches of government have shown that they share the court's concern, and that they are embracing and acting on their constitutional duty to educate all public school students. In contrast to this court's holding in McDuffy, I cannot conclude on the record before this court that the Commonwealth is presently neglecting or is likely to neglect its constitutional duties, thus requiring judicial intervention. Cf., e.g., Michaud v. Sheriff of Essex County, 390 Mass. 523, 458 N.E.2d 702 (1983); Perez v. Boston Hous. Auth., 379 Mass. 703, 740, 400 N.E.2d 1231 (1980). 31 EDUCATIONAL AGENCY PREVAILED

[*58]** The delay in full implementation of the provisions of the act **[*458]** does not derive from legislative or departmental inaction. Cf. Bates v. Director of the Office of Campaign & Political Fin., 436 Mass. 144, 763 N.E.2d 6 (2002). Some delays have been occasioned by continued public debate, opposition to, and protracted litigation over some provisions of education reform. See, e.g., Student No. 9 v. Board of Educ., 440 Mass. 752, 802 N.E.2d 105 (2004). Some parts of the act, such as foundation budget funding and the implementation of the curriculum frameworks, have been deliberately phased in to permit schools and departments time to adjust to new standards. Still other reforms, as the judge acknowledged, have been slowed by severe revenue shortfalls, which have forced reductions in spending for public education, as well as for other vital public services. We note that, since approximately 2001, Massachusetts has wrestled with a "profound economic downturn." Comprehensive Annual Financial Report at 31 (Dec. 31, 2003). Figures from the Department of Revenue indicate that total tax revenues declined 14.6 per cent in real dollars between FY 2001 and FY 2002, and have not fully recovered. **[***59]** Reserve funds have had to be expended to fund essential services. 32 And the crisis is not over. See Statutory Basis Financial Report at 1 (Oct. 24, 2003) ("Our financial picture will remain cautious for the near future"). Yet through this period the Commonwealth continued to appropriate "substantial sums" toward education reform. See, e.g., Student No. 9 v. **[**1156]** Board of Educ., supra at 766 (noting that, in FY 2003 and FY 2004, Legislature voted "substantial sums for intensive remediation programs for those who need them in order to pass the MCAS exam"); Letter of Governor Romney to

the Senate and House of Representatives (June 25, 2004) (noting approval of $ 80 million to increase funding for special education). Because **[*459]** decisions about where scarce public money will do the most good are laden with value judgments, those decisions are best left to our elected representatives.

[*60]** Implementation of change, fundamental, sweeping change, such as that mandated by the Education Reform Act, is seldom easy. When change is directed at a system as complex and multi-dimensional as public education, where the theories and methodologies of education reform are so varied, 33 and when reforms must apply to hundreds of towns and municipalities spread across a Commonwealth -- localities that include small villages and large cities, communities of new immigrants (many of whom speak no English), and long-established residents, wealthy neighborhoods and those in which far toomany families struggle every day to feed and clothe their children – change must be measured over years. The evidence here is that the Commonwealth's comprehensive Statewide plan for education reform is beginning to work in significant ways.

[*61]** I turn last to the remedy of ordering a cost study, which the dissenting Justices would impose. The Superior Court judge recommended that this court order the department to undertake a wide-ranging study. 34 She further recommended that the department be ordered to "implement whatever funding and administrative changes result from" the adoption of certain educational policies. Contrary to the view of the dissenting Justices, the study would be problematic on at least three counts: First, a cost study itself is likely to retard rather than advance the progress of educational reform. It would divert substantial **[*460]** time and resources from the task of education reform and would needlessly duplicate in many respects the fine work done by the judge.

[*62]** Second, the study the dissenting Justices would order is rife with policy choices that are properly the Legislature's domain. The study would assume, for example, that in order to fulfil its constitutional obligation under the education clause, the Commonwealth "must" provide free preschool for all three and four year old children "at risk" in the focus districts, and presumably throughout the Commonwealth thereafter. That is a policy decision for the Legislature. In fact, as I noted previously, see note 23, supra, the Legislature recently determined to place more emphasis on early childhood education. **[**1157]** Other programs might be equally effective to address the needs of at risk students, such as remedial programs (policy choices that in the judge's view should not be a mandatory component of public education; see note35, infra), nutrition and drug counselling programs or programs to involve parents more directly in school affairs. Each choice embodies a value judgment; each carries a cost, in real, immediate tax dollars; and each choice is fundamentally political. 35 Courts are not well positioned to make such decisions. See post at (Greaney, J., dissenting) (acknowledging **[***63]** "the complexity of education policy in general [,] and the disagreement between competent experts on how best to remediate a nonperforming or poorly performing school district"). It is for these reasons that "we leave it to the [Governor] and the Legislature[] to define the precise nature of the task which they facein fulfilling their constitutional duty to educate our children today, and in the future." McDuffy, supra at 620.

Finally, and most significantly, the study would not be a final order, but a starting point for what inevitably must mean judicial **[***64]** directives concerning appropriations. The Superior Court judge recognized that the ultimate purpose of a study would be to **[*461]** channel more money to the focus districts. Her order would encompass not only a study, but a directive to the department to "implement whatever funding and administrative changes" the study concluded were necessary to meet its educational goals.

The dissenting Justices endorse only the judge's proposed study and reject her proposal that the department be ordered to implement the necessary changes. They then state that their remedy "has nothing to do with orders for the appropriation of money." Post at, (Greaney, J., dissenting). What ails our failing schools cannot be cured by a study. And one cannot gloss over the difficult issue of forcing the Legislature to appropriate more money, see post at (Greaney, J., dissenting), with the assertion that, "if money is needed, and it is not forthcoming, there will be ample time to discuss the matter of appropriations later in a cooperative and non adversary way." Post at (Greaney, J., dissenting). No one reading the judge's report can be left with any doubt that the question **[***65]** is not "if" more money is needed, but how much. Endorsing one aspect of her recommendation (a study) and rejecting the other (the directive to "implement" additional funding) will not cure the constitutional violation the dissenting Justices perceive, and merely evades the true complexities of the issue. Certainly, whether the legislative and executive branches are meeting their constitutional duty is not a matter for "nonadversary" "discussion" between judges and members of the General Court.

The Governor, the Legislature, and the department are well aware that the process of education reform can and must be improved. The board, for example, recently enacted rules to streamline and accelerate the process for intervening in schools identified to be "chronically underperforming." See 603 Code Mass. Regs. §§ 2:00 (Aug. 24, 2004). The amply supported findings of the judge reflect much that remains to be corrected before all children in our Commonwealth are educated. The Legislature may well choose to **[**1158]** rely on these findings as it continues to consider efforts to improve public education. Her findings

are also a testament to the many educators, teachers, parents, business and community **[***66]** leaders who insist that, until that goal is reached, they will continue to demand improvement **[*462]** and will seek the help of our elected officials to ensure that meaningful reform is ongoing.

"The presumption exists that the Commonwealth will honor its obligations." Bromfield v. Treasurer & Receiver Gen., 390 Mass. 665, 669, 459 N.E.2d 445 (1983). I am confident that the Commonwealth's commitment to educating its children remains strong, and that the Governor and the Legislature will continue to work expeditiously "to provide a high quality public education to every child." G. L. c. 69, § 1. I reaffirm the court's holding in McDuffy. The education clause, Part II, c. 5, § 2, of the Massachusetts Constitution "imposes an enforceable duty on the magistrates and Legislatures of this Commonwealth to provide education in the public schools for the children there enrolled, whether they be rich or poor and without regard to the fiscal capacity of the community or district in which such children live." Id. at 621. It remains "the responsibility of the Commonwealth

to take such steps as may be required in each instance effectively to devise a plan and sources **[***67]** of funds sufficient to meet the constitutional mandate." Id.

COWIN, J. (concurring, with whom Sosman, J., joins). I concur in the decision by the court today because the plaintiffs have not demonstrated that the Commonwealth has violated Part II, c. 5, § 2, of the Massachusetts Constitution, the "education clause." I write separately to articulate what I believe is the proper scope of the education clause and the limited role this court should have in public policy debates of the type presented here.

The scope of the education clause. The Constitution is a structural document that confers on the various branches of government broad areas of authority, see generally Part II, c. 1 ("The Legislative Power"); Part II, c. 2 ("Executive Power"); Part II, c. 3 ("Judiciary Power"), and guarantees for the citizens that the government will not interfere with certain basic rights. See generally Part the First ("A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts"). In securing rights and dividing powers, our Constitution protects citizens against government encroachment and provides a broad organizational **[*463]** framework for our Commonwealth. See, **[***68]** e.g., art. 1, as amended by art. 106 of the Amendments of the Massachusetts Constitution ("Equality under the law shall not be denied or abridged . . . "); art. 2 ("no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD"); art. 14 ("Every subject has a right to be secure from all unreasonable searches . . ."); art. 16, as amended by art. 77 of the Amendments of the Massachusetts Constitution ("The right of free speech shall not be abridged"). See also Part II, c. 1, § 1, art. 4 ("full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances"). Even where our Constitution explicitly provides for a legislative role in the enactment of laws or appropriation of funds, it generally confers on the General Court only the power or authority to enact or appropriate, but falls short of requiring that any specific action be taken. See, e.g., art. 49, as amended by art. 97 of the Amendments to the Constitution of Massachusetts ("The general court shall have the power to enact legislation **[**1159]** necessary **[***69]** or expedient to protect [the people's right to clean air and water] [emphasis added]); art. 41, as amended by art. 110 ("Full power and authority are hereby given and granted to the general court to prescribe for wild or forest lands . . . such methods of taxation as will develop and conserve the forest resources . . . " [emphasis added]). I can find no Constitutional provision explicitly mandating the creation of specified public programs or services.

In the past, we have respected these intentional limitations in our Constitution. As we stated in Cohen v. Attorney Gen., 357 Mass. 564, 570-571, 259 N.E.2d 539 (1970), quoting Tax Comm'r v. Putnam, 227 Mass. 522, 523-524, 116 N.E. 904 (1917), and Attorney Gen. v. Methuen, 236 Mass. 564, 573, 129 N.E. 662 (1921):

> "'The Constitution of Massachusetts is a frame of government for a sovereign power. It was designed by its framers and accepted by the people as an enduring instrument, so comprehensive and general in its terms that a free, intelligent and moral body of citizens might govern themselves under its beneficent provisions

> through radical **[*464]** changes in social, economic and industrial conditions. It declares **[***70]** only fundamental principles as to the form of government and the mode in which it shall be exercised . . . . It is a statement of general principles and not a specification of details.' . . . 'It ordinarily is not long, complicated nor detailed and does not descend to the minute particulars appropriate to a statute. Its phrases are chosen to express generic ideas, and not nice shades of distinction.'"

See Brookline v. Secretary of the Commonwealth, 417 Mass. 406, 419, 631 N.E.2d 968 (1994); McDuffy v. Secretary of the Executive Office of Educ., 415 Mass. 545, 559, 615 N.E.2d 516 (1993) (McDuffy).

It is inconsistent therefore with the general structure of our Constitution to interpret the education clause as imposing an enforceable duty on the Commonwealth to create and maintain the kind of highly complex and intricate public school establishment that the Chief Justice's concurring opinion today would presume. Instead, the clause should be construed as a broad directive, intended to establish the central importance of education in the Commonwealth and clarify that the legislative and executive branches will be responsible for the creation and maintenance of our public **[***71]** school system. See Part II, c. 5, § 2 ("it shall be the duty of legislatures and magistrates, 1 in all future periods of the commonwealth, to cherish the interests of literature and the sciences . . . [and] public schools and grammar schools in the towns . . ."). For the full text of the clause, see ante at - n.1] (Marshall, C.J., concurring). While I do not debate that the clause presumes the establishment of some public schools by the legislative and executive branches, nowhere in its text does the clause mandate any particular action on the part of the Commonwealth, or confer any role on the judiciary to enforce it. Public education is a government service, the organization and finance of which is to be determined by the executive and legislative branches.

Nonetheless, in **[***72]** McDuffy, supra at 610-611, 614, this court determined from the broad language of the education clause **[*465]** that the Commonwealth was failing to meet a judicially enforceable duty to educate. I believe the McDuffy opinion read too much into the **[**1160]** education clause, and that the Chief Justice's concurring opinion erroneously endorses that aspect of the decision. See ante at, (Marshall, C.J. concurring). Even assuming that the education clause imposes some continuing duty on the Commonwealth to support a public education system, it clearly does not guarantee any particular level of educational success or mandate specific programmatic choices. In a display of stunning judicial imagination, the McDuffy court used its already bold reading of the education clause to include specific programmatic "guidelines" for the Commonwealth to follow (the seven McDuffy "capabilities") in an attempt to guarantee future levels of scholastic achievement in specific curriculum areas. McDuffy, supra at 618-619. The McDuffy court fashioned these guidelines from a constitutional directive that only speaks of "cherishing" education, under the guise **[***73]** of constitutional "interpretation." Id. at 558-559. To read specific mandates, or even guidance, into the education clause is unsupportable. The clause no more guarantees certain educational results for the children of the Commonwealth than it guarantees any measure of success in any other category that the same section instructs the Legislature to promote -- "humanity," "general benevolence," "industry," "charity," "frugality," "honesty,"

"punctuality," "sincerity," "good humor," "social affections," and "generous sentiments among the people." See Part II, c. 5, § 2. See Doe v. Superintendent of Sch., 421 Mass. 117, 129, 653 N.E.2d 1088 (1995) (Constitution does not "guarantee[] each individual student the fundamental right to an education"). The Massachusetts General Laws, not the Declaration of Rights, structure our government programs, provide for their content, and establish minimum levels of attainment -- this holds true for government services ranging from our educational system to our public ways.

Therefore, I believe that if McDuffy is to stand at all, its overreaching "guidelines" should be rejected and the opinion should be limited **[***74]** to its most generalized holdings: that the education clause creates "a duty to provide an education for all [the Commonwealth's] children, rich and poor, in every city and town," **[*466]** McDuffy, supra at 606, and that the Commonwealth (not this court) must "devise a plan and sources of funds sufficient to meet the constitutional mandate." Id. at 621. Unfortunately, we have missed an opportunity to limit McDuffy to its proper sphere. Under a more limited reading of McDuffy, assuming there is some enforceable duty imposed by the education clause, the Commonwealth has more than fulfilled its obligations. In the twelve years since McDuffy, the Legislature passed the Education Reform Act, see generally G. L. cc. 69-71, and spent billions of dollars toward realizing its goals. That is certainly enough under our broad constitutional directive to satisfy the mandate that the Commonwealth "cherish" our public schools.

The courts' role in educational policymaking. Even if the education clause is to be interpreted as imposing some duty upon the Commonwealth to maintain a public school establishment, a conclusion which is by no means apparent, **[***75]** our Constitution requires that the duty be fulfilled by the legislative and executive branches, without oversight or intrusion by the judiciary. The education clause itself explicitly leaves to the legislative and executive branches responsibility for determining the form and scope of its obligations. See Part II, c. 5, § 2. Where the drafters explicitly conferred authority on only two **[**1161]** of the branches of government, we cannot ordain the third branch "overseer."

In addition to the clause's explicit language conspicuously omitting any reference to the judicial branch, the overarching doctrine of the separation of powers prohibits judicial intervention in otherwise discretionary functions of the executive and legislative branches. See art. 30 of the Massachusetts Declaration of Rights ("the judicial shall never exercise the legislative and executive powers, or either of them"). See, e.g., Bates v. Director of the Office of Campaign & Political Fin., 436 Mass. 144, 183, 763 N.E.2d 6 (2002) (Appendix) (Cowin, J., dissenting to order entered Jan. 25, 2002), quoting Commonwealth v. Leno, 415 Mass. 835, 841, 616 N.E.2d 453 (1993) ("Article 30's principle of separation of power prevents **[***76]** the 'judiciary [from] substituting its notions of correct policy for that of a popularly elected Legislature'"); Matter of McKnight, 406 Mass. 787, 792, 550 N.E.2d 856 (1990) ("A court . . . **[*467]** may not properly exercise the functions of the executive branch of State government"). This case presents none of the extraordinary circumstances that might warrant an exception to this general rule. Contrast, e.g., Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of the Dep't of Mental Retardation, 424 Mass. 430, 446-447, 465, 677 N.E.2d 127 (1997);

Matter of McKnight, supra at 801-802; Attorney Gen. v. Sheriff of Suffolk County , 394 Mass. 624, 630, 631, 477 N.E.2d 361 (1985); O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 509-510, 287 N.E.2d 608 (1972). Indeed, the constitutional requirement that the judiciary stay out of the business of educational policy is echoed in our well-established rule that "allocation of taxpayer dollars, especially in times of limited fiscal resources, is the quintessential responsibility of the popularly-elected Legislature, not the courts." County of Barnstable v. Commonwealth, 410 Mass. 326, 329, 572 N.E.2d 548 (1991). **[***77]** See Bromfield v. Treasurer & Receiver Gen., 390 Mass. 665, 670 n.9, 459 N.E.2d 445 (1983), quoting Opinion of the Justices, 302 Mass. 605, 612, 19 N.E.2d 807 (1939). "Any attempt by this court to compel the Legislature to make a particular appropriation . . . would violate art. 30." Commonwealth v. Gonsalves, 432 Mass. 613, 619, 739 N.E.2d 1100 (2000). Where, as here, the remedy for an alleged deprivation would require a court to order the Commonwealth to spend money that the Legislature has not appropriated, judicial intervention is not permitted. We must be mindful that "not every violation of a legal right gives rise to a judicial remedy." Bates v. Director of the Office of Campaign & Political Fin., supra at 168-169. These separation of powers principles are applicable even where parties assert constitutional violations. See LIMITS v. President of the Senate, 414 Mass. 31, 35, 604 N.E.2d 1307 (1992) ("a judicial remedy is not available whenever a joint session fails to perform a duty that the Constitution assigns to it"). There we declined to intrude in the political debate over term limits:

> "The courts should be most hesitant in instructing the **[***78]** General Court when and how to perform its constitutional duties. Mandamus is not available against the Legislature . . . . The principles [of separation of powers] call for the judiciary to refrain from intruding into the power and function of another branch of government . . . . Restraint **[*468]** is particularly appropriate here where [the Constitution] . . . gives to the courts no enforcement role."

Id.

The McDuffy court cast aside this separation of powers doctrine and improperly inserted a final layer of judicial review on **[**1162]** top of the public policy debate over education. While the Chief Justice's concurring opinion suggests a discomfort with the breadth of ur reading of the education clause in McDuffy, see ante at - (Marshall, C.J., concurring), and an awareness of separation of powers principles, see ante at, „ - (Marshall, C.J., concurring), it would suppress these concerns and embrace McDuffy's judicially constructed authority. Her concurring opinion today engages in a lengthy and inappropriate review of the Superior Court judge's findings for "clear error." Ante at - (Marshall, C.J., concurring). The very fact of this review is symptomatic **[***79]** of a misunderstanding of this court's role in what is a legislative and executive matter. 2 The Chief Justice's articulation of this court's task in reviewing the record underscores a deep misapprehension concerning the court's proper function. In its own words, the Chief Justice's concurring opinion undertakes to "assess[] whether this record of considerable progress, marred by areas of real and in some instances profound failure, offends the education clause." Ante at (Marshall, C.J., concurring). Through an artful review of the Superior Court judge's findings for "clear error" followed by an effective rejection of her

conclusions, the Chief Justice's concurring opinion avoids the need to deal with McDuffy's intrusive and flawed analysis. If the Chief Justice and those Justices who joined with her are concerned about a self-imposed position at the helm of this debate, they should reject much or all of McDuffy. If, on the **[*469]** other hand, they are comfortable with the prospect of determining whether the Commonwealth's educational reforms and expenditures have produced satisfactory results, they should accord the trial judge's findings and conclusions their due deference. **[***80]**

Instead, the Chief Justice's concurring opinion would fashion a new constitutional standard virtually ensuring that the courts will be tangled at the epicenter of our educational policy debate for the foreseeable future. Her concurring opinion proclaims: "Where the Governor and the Legislature establish, **[***81]** exercise ultimate control over, and provide substantial and increasing (subject only to dire fiscal circumstances) resources to support, public education in a way that minimizes rather than accentuates differences between communities based on property valuations, constitutionally impermissible classifications, and other criteria extrinsic to the educational mission . . . we [the Chief Justice, joined by Justices Spina and Cordy] cannot conclude that they are presently violating the education clause." Ante at (Marshall, C.J., concurring). This standard inappropriately and inexplicably injects an eqaul protection analysis where the parties do not claim any violation of eqaul protection guarantees and there is no evidence of discrimination in the record. I do not dispute that, had there been evidence of an **[**1163]** eqaul protection violation in the provision of public education, this court would have the authority under our eqaul protection doctrine to order an appropriate remedy.

However, where the plaintiffs only claim widespread deficiencies in the public school system under the education clause, remedies must come from the legislative and executive branches.

Further cementing our **[***82]** continued encroachment in this debate, the Chief Justice suggests that nothing said today "will insulate the Commonwealth from a successful challenge under the education clause in different circumstances." Ante at (Marshall, C.J., concurring). Given this invitation, we may very well be asked some day to determine whether myriad future changes to educational programs, or to the level of support or nature of resources provided by the Governor and Legislature, "minimize[] rather than accentuate[]" differences. Ante at (Marshall, C.J., concurring). And how will courts answer these questions? As the Superior Court judge's hard work foreshadows, **[*470]** courts will examine voluminous records filled with data on educational outcomes. This cannot be the role that the Constitution envisioned for the judiciary. This court is not a "super Legislature" empowered to review the work of the duly elected members of the General Court. And the constitutionality or unconstitutionality of the Commonwealth's actions are not to be found at the endof a road paved with endless inquiries and thousands of judicial findings.

Justice Greaney, in his dissent, argues that our doctrine of stare decisis **[***83]** requires that we suppress these concerns and reaffirm McDuffy in its totality. See post at - (Greaney, J., dissenting). While he acknowledges that "stare decisis is not a rigid requirement," post at (Greaney, J., dissenting), he would nonetheless have us adhere

uncompromisingly to a decision which, from its genesis, overstepped the limits imposed on this court by our Constitution. 3 This approach misconstrues our rule of stare decisis. Certainly this court must not indulge trivial shifts in our constitutional interpretation. See post at - (Greaney, J., dissenting). However, when we are called on to revisit a decision, no matter how recently decided or thoughtfully drafted, that is plainly wrong in an area of such constitutional significance as our separation of powers doctrine, we must not let our desire for consistency overpower our commitment to the intellectual honesty of our jurisprudence. Stare decisis, while an unquestionably important pillar of our judicial system, does not require slavish adherence to unconstitutional precedent. See Payne v. Tennessee, 501 U.S. 808, 827, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991), quoting Smith v. Allwright, 321 U.S. 649, 665, 88 L. Ed. 987, 64 S. Ct. 757 (1944) **[***84]** (" **[**1164]** when governing decisions are unworkable or are badly **[*471]** reasoned, 'this Court has never felt constrained to follow precedent'"); Vasquez v. Hillery, 474 U.S. 254, 266, 88 L. Ed. 2d 598, 106 S. Ct. 617 (1986) (recognizing exception to stare decisis for precedents that have proved "unworkable, or otherwise legitimately vulnerable to serious reconsideration"). "Stare decisis is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.' . . . This is particularly true in constitutional cases . . . ." Payne v. Tennessee, supra at 828, quoting Helvering v. Hallock, 309 U.S. 106, 119, 84 L. Ed. 604, 60 S. Ct. 444, 1940-1 C.B. 223 (1940). Were stare decisis an absolute rule, we would not have the benefit today of many landmark Supreme Court decisions that vindicated cherished rights after centuries of neglect and corrected misguided judicial decisions to conform to the dictates of the Constitution. Perhaps the most well-known example was the Supreme Court's opinion in Brown v. Board of Educ. of Topeka, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954), squarely overruling the "separate but equal" doctrine of **[***85]** Plessy v. Ferguson, 163 U.S. 537, 41 L. Ed. 256, 16 S. Ct. 1138 (1896). Also of note is Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963), which overruled Betts v. Brady, 316 U.S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252 (1942), and established that the constitutional right to counsel under the Sixth Amendment to the United States Constitution was applicable to the States through the Fourteenth Amendment to the United States Constitution. In Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684, 86 Ohio Law Abs. 513 (1961), the Court determined that evidence obtained by an unconstitutional search was inadmissible in State prosecutions, rejecting its earlier opinion in Wolf v. Colorado, 338 U.S. 25, 93 L. Ed. 1782, 69 S. Ct. 1359 (1949). And there are other examples. See, e.g., United States v. Darby, 312 U.S. 100, 85 L. Ed. 609, 61 S. Ct. 451 (1941) (holding that Congress has power to exclude products made in violation of wage and hour limits from interstate commerce and overruling Hammer v. Dagenhart, 247 U.S. 251, 62 L. Ed. 1101, 38 S. Ct. 529 [1918], among other cases); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578 (1937) (overruling **[***86]** Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 67 L. Ed. 785, 43 S. Ct. 394 [1923], and finding minimum wage laws are not an unconstitutional burden on the right to contract). My belief that the McDuffy opinion should be limited in no way disparages the Supreme Court's decision in Brown v. Board of Educ. of Topeka, supra. To the contrary, I would honor the Brown Court's **[*472]** understanding that, where the Constitution commands it, stare decisis must yield.

[*87]** Education is an emotional issue for many. Equally, it is a topic characterized by numerous and legitimate differences of opinion concerning the course of action most likely to improve our schools and prepare our children for bright futures. Often, these disagreements about education concern how much money to spend and how best to spend it. The issue of public education is thus no different from our political controversies concerning whether we should invest more money in our public transportation system or our roads, how much money we ought to allocate for environmental preservation, and the amount we should provide in public assistance to low-income individuals and families. In other words, the controversy before us today is largely a funding debate. Choices regarding how much money to spend and how to spend it are in every instance political decisions left to the Legislature, to be arrived at with input from the executive branch and the citizenry; they should not be the result of judicial **[**1165]** directives. Our Constitution, in separating judicial functions from legislative and vice versa, restricts policymaking to its intended branch. See generally Part II, c. 1, § 1, art. 4.

Furthermore, **[***88]** there are practical reasons why the courts should refrain from interfering with this design in the hopes of improving our schools. The courts, insulated from the political fray as we are for good reason, are ill suited to craft solutions to complex social and political problems. Unlike State legislators and their staffs, judges have no special training in educational policy or budgets, no funds with which to hire experts in the field of education, no resources with which to conduct inquiries or experiments, no regular exposure to our school system, no contact with the rank and file who have the task of implementing our lofty pronouncements, and no direct accountability to the communities that house our schools. Had this lawsuit been successful and this court were once again to fashion a judicial remedy, the elected officials who, pursuant to our Constitution, ought to bear the ultimate burden of resolving our current educational debate would have been insulated from public accountability. The more this court interferes in policymaking **[*473]** and political funding debates, the more we allow the Legislature to avoid difficult questions, and the more our citizens get accustomed to turning to **[***89]** the courts for solutions rather than to their elected officials. As I said in Bates v. Director of the Office of Campaign & Political Fin., 436 Mass. 144, 185, 763 N.E.2d 6 (2002) (Appendix) (Cowin, J., dissenting to order entered Jan. 25, 2002), "the plaintiffs' remedy, as it always is with political questions, is at the ballot box."

DISSENT BY: GREANEY; IRELAND

DISSENT

GREANEY, J. (dissenting, with whom Ireland, J., joins). As the only remaining member of the court who participated in McDuffy v. Secretary of the Executive Office of Educ., 415 Mass. 545, 615 N.E.2d 516 (1993) (McDuffy), and as the single justice who has supervised these proceedings over several years, I write separately for the following reasons: to emphasize the nature and rule of the McDuffy case; to point out again the crisis that exists in the four focus districts before us; to explain how the court can and should remain involved in the proceedings without impermissibly intruding on legislative or executive prerogatives; and to express regret that the court has chosen to ignore the

principles of stare decisis, thereby effectively abandoning one of its major constitutional precedents.

(a) McDuffy **[***90]** was released with the court's knowledge that the Legislature was poised to enact the Education Reform Act of 1993 (ERA). See St. 1993, c.71. The McDuffy decision, the adoption of the ERA, and the Governor's signing of the ERA into law were harmonious and contemporaneous events which, on the one hand, stated in McDuffy (after comprehensive research of original and modern sources) the constitutional obligation to provide a minimally adequate education for the Commonwealth's children and, on the other hand, put into place measures to satisfy that obligation. Thus, the three events comprised in fact and law a joint enterprise on the part of the three branches of government to seek and compel change and improvement. Over the past decade, McDuffy has never been understood to constitute anything less. And, as emphasized by Justice Ireland, post at (Ireland, J., dissenting), and acknowledged by the Chief Justice, ante at - **[*474]** (Marshall, C.J., concurring), the obligation stated in McDuffy is mandatory and not one which can later be recast as more or less aspirational.

[1166]** (b) By any standard, the extensive findings made by the Superior Court judge conclusively establish that the constitutional **[***91]** imperative of McDuffy is not being satisfied in the four focus districts, when they are examined objectively against the three comparison districts. The factual record establishes that the schools attended by the plaintiff children in the focus districts are not currently implementing the Massachusetts curriculum frameworks in any meaningful way, nor are they otherwise equipping their students with the capabilities delineated in McDuffy as the minimum standard by which to measure an educated child. See McDuffy, supra at 618-619, 621. The judge's decision, reached after a lengthy adversarial trial, documents in comprehensive detail a disturbing state of affairs in the schools of the four focus districts. The following is but a partial recitation of the judge's findings.

Acute inadequacies exist in the educational programs of the four focus districts in the core subjects of English language arts, mathematics, science and technology, and history. In Lowell, a large percentage of elementary school students are reading below grade level. One middle school has insufficient textbooks and supplementary reading materials to accommodate all of its students and **[***92]** no specialized reading teachers at all to assist those students who are reading below grade level. Lowell High School has many students who read below grade level, and thirty to forty per cent of its students lack fluency in English. The school, however, has no funds to create a formal reading program. In Springfield, thirty-six per cent of fourth graders at one elementary school failed the English Language Arts (ELA) Massachusetts Comprehensive Assessment System (MCAS) test in 2002. A significant number of its fifth grade students enter middle school reading two and one-half (or more) years below grade level. There is, nevertheless, only one reading resource teacher to serve all six of Springfield's middle schools. An astounding seventy per cent of Springfield's seventh graders scored below the proficient level on the ELA MCAS test in 2003, and the same dismal percentage of tenth graders failed to achieve proficiency on the ELA MCAS test.

All four of the focus districts have difficulty attracting and **[*475]** retaining certified mathematics teachers. As a result, only fifty per cent of Brockton's middle school mathematics teachers were appropriately certified in 2002 and only thirty-five per cent in 2003. At the high school, twenty-seven **[***93]** per cent of Brockton's mathematics teachers were not certified to teach high school mathematics in 2003. In Winchendon, none of the seventh and eighth grade mathematics teachers is appropriately certified. Only one of three middle school science teachers is certified, but there is no professional development in Winchendon devoted to science instruction. Winchendon cannot provide the range of science courses necessary to meet the needs of students interested in applying to a four-year college. Ninety-five per cent of Winchendon students scored at the warning-failing or needs improvement level on the eighth grade history MCAS test. Winchendon's reading, math, science, and social studies programs are not aligned with the State curriculums framework. Although the State science framework contemplates instruction in a laboratory setting, four of the six middle schools in Springfield lack science laboratories altogether, and those that do exist do not all have running water or electrical outlets. Only one-half of Springfield's elementary schools have a science teacher. The science curriculum framework was adopted in **[**1167]** 2001, but many of Springfield's high school science textbooks are ten years **[***94]** old. The science supply budget for the district as a whole has been $ 2 per student for the last fifteen years, an amount that is utterly insufficient to implement the framework.

Even larger weaknesses are apparent in the areas of health, the arts, and foreign languages. In 2003, the elementary and middle schools in Lowell had a per pupil arts expenditure budget of $ 1.63. Twenty-seven art teachers, thirty-one music teachers, and four theater teachers in Springfield serve a student population of 26,000, and it was estimated that fully one-half of the students in Springfield's graduating class of 2003 went through twelve years of public school without any arts instruction at all. Although Lowell and Springfield have student populations with numerous and serious health issues, including alcohol and marijuana abuse, poor nutrition, high obesity rates, high teenage pregnancy rates, HIV, and domestic violence, neither district has the resources or staff to provide its students with the level of **[*476]** instruction contemplated by the State health curriculum framework. In Brockton, forty-two per cent of its foreign language teachers in the middle school, and twenty-five per cent of its foreign **[***95]** language teachers in the high school, are not certified in the languages they teach.

Libraries in all four of the focus districts lack sufficient staff, an adequate number of current titles and periodicals, and computer resources necessary to equip students with research skills contemplated by the curriculum frameworks. All four focus districts have been designated by the Department of Education (department) as "high needs" school districts with respect to technology, and one has met benchmarks set by the department pertaining to the availability of modern, fully functioning computer equipments or the staff to service them.

All four focus districts have difficulty servicing children referred for special education, due primarily to a lack of psychologists able to perform the necessary evaluations. All lack sufficient space to provide special education services in appropriate settings and fail to provide students with disabilities with meaningful access to the regular education

curriculum in regular education classrooms. Children with disabilities in the focus districts suffer from the absence of meaningful professional development both for regular education teachers on teaching special needs students **[***96]** and for special education teachers on subject matter content areas that children with disabilities need to learn. All of the focus districts lack sufficient personnel to support and assist children with disabilities in regular education classrooms. In 2003, the percentage of special education students who passed the tenth grade math MCAS test in the focus districts ranged from twelve to twenty-five per cent. The percentage of special education students in the focus districts who passed the tenth grade ELA MCAS test was twenty-four to fifty.1 In all four focus districts the scores of students at risk, including students with **[**1168]** disabilities, racial and ethnic minority **[*477]** students, limited English proficient students, and low-income students, were shockingly low and substantially lower than the scores of regular education students.

[*97]** Each of the four focus districts runs a public school preschool program of high quality, but their programs serve only a fraction of all of the three and four year olds who would attend if there were sufficient resources and adequate space. Brockton serves only ten per cent of its three and four year olds; Lowell serves about thirteen per cent; Springfield serves less than thirty per cent; and Winchendon serves about one-third. Twenty-five per cent of kindergarten students in Brockton and Lowell, and close to forty per cent of kindergarten students in Springfield, tested more than one standard deviation below the norm in terms of receptive vocabulary acquisition, "a sign of children who are at considerable risk of school failure because they are already so far behind the starting gate." Because of budget reductions in recent years, however, each of the focus districts has had to cut back on its programs directed toward early childhood education.

In summary (and without attempting to include many other negative findings that add to what is stated above), the judge's report paints a "bleak portrait of the plaintiffs' schools" that is remarkably similar to what the McDuffy **[***98]** court found eleven years ago. Id. at 617. The judge examined a number of objective criteria used by the department as indicators of education program quality: MCAS scores, dropout rates, retention rates, on-time graduation rates, SAT scores and SAT participation rates, and the postgraduation plans of high school seniors. She concluded that, on almost every objective indicator, the four focus districts have, with few exceptions, not improved at all since 1993, and "if one concentrates particularly on the last five years, when one would expect at least to begin seeing the impact of ERA investments, there are almost no exceptions." She concluded that public school students in the plaintiffs' districts are offered significantly fewer educational opportunities, and a **[*478]** lower quality of educational opportunities, than are students in the schools of the comparison districts and, on average, than are students in the Commonwealth in the whole. Despite the many positive changes effected by the ERA, the conclusion is inevitable that the four focus districts are failing to equip their students with the capabilities described in McDuffy as necessary to become free and productive **[***99]** citizens of the Commonwealth. Moreover, even within the four focus districts, those children demonstrating the greatest needs typically receive less than other students of average needs. We have then between the focus districts and the comparison districts a tale of two worlds: the focus districts beset with problems, and lacking anything that can reasonably be called an adequate education for many of their children,

the comparison districts maintaining proper and adequate educational standards and moving their students toward graduation and employment with learned skills necessary to achieve in postgraduate education and function in the modern workplace.

(c) The plaintiffs' situation requires relief by this court. Creating academic standards that are national models cannot be deemed constitutionally appropriate if those standards cannot be implemented in the focus districts where funding is inadequate. Further, creating a rigorous student assessment system cannot be deemed constitutionally appropriate when a majority of students in the focus districts are scoring at the failing-warning, or needs improvement level, under that system. **[**1169]** Similarly, raising certification standards **[***100]** for teachers cannot be deemed satisfactory when schools cannot attract, pay, or retain certified teachers. Changes effected by the Legislature and the department since 1993 have been laudable. These changes, however, ultimately must be judged on results and not on effort (no matter how praiseworthy), and, as pointed out by Justice Ireland, the Commonwealth's insistence to the contrary seeks, in effect, to overrule McDuffy. Post at (Ireland, J., dissenting).

I do not suggest that the Commonwealth must guarantee equal outcomes in all school districts with regard to such measures as MCAS scores, graduation rates, and college admissions (although these certainly would be inspirational goals). The Commonwealth's constitutional duty to educate its children **[*479]** will not be fulfilled, however, until all of its students have a reasonable opportunity to acquire an adequate education, within the meaning of McDuffy, in the public schools of their communities. This, as the judge's report meticulously documents, the Commonwealth has failed to do in the four focus districts. 2 Moreover, there is no evidence whatsoever to justify the Chief Justice's optimism that considerable progress **[***101]** in the focus districts is being made. 3 Ante at (Marshall, C.J., concurring). To the contrary, the judge's report, read as a whole, documents a startling and dismal performance gap between the Commonwealth's privileged and underprivileged children (the hardest and costliest to educate) that continues to hold its course.

[*102]** I would adopt the judge's recommendation that we order the department promptly to conduct a study to assess the actual costs of effective implementation of the educational programs intended to provide an adequate education in the four focus districts. No persuasive consensus exists regarding how much spending is necessary to provide an "adequate" education. Actual spending levels strongly suggest, however, that the formula now relied on by the department to reflect the minimum amount each district needs to provide an adequate education to its students does not reflect the true cost of successful education in the Commonwealth, at least in the focus districts. Between fiscal years 2001 and 2003, each focus district's actual net school spending was at or only slightly above its foundation budget. In contrast, the seventy-five school districts that perform the highest on the MCAS tests spend, on average, 130 per cent of the foundation budget. The comparison districts spent between 151 to 171 per cent of the foundation budget, while the State average was between 115 to 117 per cent of the foundation budget. These figures alone suggest that there are structural **[*480]** deficiencies in the formula **[***103]** for the foundation budget that must be addressed. I am cognizant that money alone will not solve all of the issues that are confronted daily by educators in our

poorer urban districts, as are three of the four focus districts. On the other hand, a realistic assessment of the costs of effectively implementing an educational **[**1170]** plan in such districts reasonably could, and should, contemplate other factors that affect student performance such as poverty, teenage pregnancy, nutrition, family issues, drugs, violence, language deficiencies and the need for remedial teaching and tutoring. It also should include a cost assessment of measures necessary to improve the administrative ability of the districts successfully to implement the educational plan.

Once this study is accomplished, we (meant collectively to include all three branches of government) shall be in a position to understand where assistance, administrative, financial and otherwise, can be targeted in the focus districts (and, eventually in other districts similarly situated) to bring them into reasonable balance with the rest of the State. Additionally, consideration must be given to increasing the personnel and resources of **[***104]** the department, which (as the judge found and Justice Ireland reiterates, post at & n.6 [Ireland, J., dissenting]) are obviously inadequate to apply practical measures to resolve the needs of the focus districts. I would remand this case to the county court so that the single justice can monitor the remedial process and continue to use the judge (who has acquired special expertise on the state of education [or lack of it] in the four focus districts) to provide direction.

In this way, the court will play a vital role in ensuring that the Commonwealth's public schools are adequately financed that would not intrude on the other two branches. The problem is of such magnitude that the collective involvement of all three branches of government is needed. I advocate no role on the part of the court in the department's decisions as how best to bolster achievement of our public school students or how to allocate its resources between districts. In view of the enormity of the task, to remove the court from the process entirely is a great misfortune and mistake.

(d) The McDuffy court held unequivocally that the Commonwealth **[*481]** has an obligation, enforceable by the court, to **[***105]** provide a public education of quality sufficient to provide its students to take their place as knowledgeable and productive citizens. McDuffy, supra at 564, 619-620. McDuffy made clear that the constitutional duty to "cherish" public schools must be understood as a "duty to ensure that the public schools achieve their object and educate the people." Id. at 564. The McDuffy court emphasized what the framers themselves well understood -- that a free public education is a foundation of democracy. We stated:

> "The framers' decision to dedicate an entire chapter -- one of six -- to the topic of education signals that it was to them a central concern. Their decision to treat education differently from other objects of government by devoting a separate chapter to education rather than listing it as a matter within the powers of the legislative or executive branches indicates structurally what is said explicitly by words: that education is a 'duty' of government, and not merely an object within the power of government. Lastly, the framers' decision to place the provisions concerning education in 'The Frame of Government' -- rather than **[***106]** in the 'Declaration of Rights' -- demonstrates that the framers conceived of education as fundamentally related to the very existence of government."

Id. at 565.

The Chief Justice endorses in eloquent language the "constitutional imperative" announced in McDuffy and accepts the judge's factual findings as a "compelling, **[**1171]** instructive account of the current state of public education." Ante at, (Marshall, C.J., concurring). She believes, nonetheless, that the Commonwealth currently is meeting its duty to educate the plaintiff students in the focus istricts, because the fulfillment of its duty to educate depends on effort and not on results. This proposition is way off the mark. The Chief Justice, in effect, would overrule McDuffy. The plurality result reached today both undermines protections guaranteed to the students in the focus districts (and in other districts where the obligations of the education clause are not being fulfilled) and ignores principles of stare decisis.

[*482] The McDuffy court unanimously held that children in the Commonwealth are constitutionally entitled to an education that is reasonably calculated to provide them with **[***107]** the seven capabilities set forth in the Supreme Court of Kentucky's guidelines in Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989). 4 That pronouncement was reached after intensive and scholarly examination of the meaning and provenance of the education clause and consideration of the principles involved. All of the arguments now advanced by the parties were contemplated, and decided, in McDuffy, and there was then no misconception of the points involved. That court was acutely aware (as am I) of the lack of consensus among experts as to what constitutes an adequate education and what the costs of such an education might be. The McDuffy court, nevertheless, allowed the single justice to retain jurisdiction to ensure that the Commonwealth devised a plan and sources of funds sufficient "to provide education in the public schools for the children there enrolled, whether they be rich or poor and without regard to the fiscal capacity of the community or district in which such children live." Stare decisis is not a rigid requirement, but abandonment of precedent (especially when constitutional doctrine is involved) demands special justification. **[***108]** See Arizona v. Rumsey, 467 U.S. 203, 212, 81 L. Ed. 2d 164, 104 S. Ct. 2305 (1984). As recently articulated by a Justice of this court, "in order to overrule a prior case, it is not enough that some or all of the Justices of this court have some intellectual or academic disagreement with the earlier analysis of the issue. There must be something more, above and beyond such a disagreement, that would justify some exception to the doctrine of stare decisis." Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549, 588, 808 N.E.2d 205 (2004) (Sosman, J., concurring). No exception to the doctrine is present in this case.

Justice Cowin, writing separately, **[***109]** boldly proclaims that McDuffy was"a display of stunning judicial imagination" that now should be overruled. Ante at (Cowin, J., concurring). This is a surprising position **[*483]** and one not advanced by the defendants. I strongly take issue with Justice Cowin's assertion that twelve years of retained jurisdiction, several months of trial, and over 300 pages of meticulously prepared findings should now be "for naught," because, in her words, the court has no role to play (and never had a role) in ensuring the Commonwealth's compliance with the mandate embodied in the education clause. Ante at n.2 (Cowin, J., concurring).Interpretation of our Constitution is this court's most solemn function. **[**1172]** It would be intolerable

indeed if our decisions construing constitutional provisions, such as McDuffy and others, were no more constant than the changing membership of our court. See Mabardy v. McHugh, 202 Mass. 148, 152, 88 N.E. 894 (1909) ("it is . . . vital that there be stability in the courts in adhering to decisions deliberately made after ample consideration. Parties should not be encouraged to seek re-examination of determined principles and speculate on a fluctuation of the **[***110]** law with every change in the expounders of it").

Justice Cowin asserts that "where the Constitution commands it, stare decisis must yield." Ante at (Cowin, J., concurring). In support of this pronouncement, she cites "many landmark [United States] Supreme Court decisions that vindicated cherished rights after centuries of neglect and corrected misguided judicial decisions to conform to the dictates of the Constitution." Ante at (Cowin, J., concurring). The decisions she cites, however, represent reevaluations of constitutional provisions in light of changing social circumstances and current perspectives on the nature of individual rights -- that were endorsed unanimously or by the majority of an entire court -- and not the separately expressed opinion of one lone Justice (joined by another) that a unanimous decision of the court, released only twelve years before, was "overreaching," "unsupportable," or otherwise not in accordance with the law. They, thus, are irrelevant.

There are other reasons for not abandoning the plaintiffs and the full force of the McDuffy doctrine. A brief in support of the plaintiff has been filed by many State legislators, arguing (what **[***111]** we all know to be true) that the Commonwealth is not providing any sort of an adequate education to the majority of students **[*484]** who attend public schools in low income districts and urging the court to adopt the judge's recommendations in full. The Governor has, correctly, identified the education crisis facing our schools as the civil rights issue of our generation. 5 Public support is already behind this task.

[*112]** Practically everyone involved in this case assumed that the court was going to use this litigation to order the Legislature to appropriate money to remedy the severe problems identified. This assumption is incorrect. I am well aware of the limitations that apply to unelected members of a court ordering an elected Legislature and executive to appropriate money and, frankly, the difficulties that might be encountered if it became necessary to enforce any orders against recalcitrant elected officials. The problem, of course, is magnified considerably when dealing with expenditures needed to fund public education; the need to allocate resources equitably between **[**1173]** various school districts achieving at different levels; the complexity of education policy in general; and the disagreement between competent experts on how best to remediate a nonperforming or poorly performing school district. But the remedy I propose has thing to do with orders for the appropriation of money. The remedy takes full advantage of the exhaustive and excellent work of the Superior Court judge and brings to bear on the problem the voice and aid of the court as an integral part of the joint enterprise I have **[***113]** described. If money is needed, and is not forthcoming, there will be ample time to discuss the matter of appropriations later in a cooperative and nonadversarial way.

[*485] Surely, our education clause means what McDuffy says it means. Were it otherwise, the clause becomes an empty promise. If the same kind of thinking that

naysayers now espouse occurred in Brown v. Board of Educ. of Topeka, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954) (Brown I), and in Brown v. Board of Educ. of Topeka, 349 U.S. 294, 99 L. Ed. 1083, 75 S. Ct. 753, 71 Ohio Law Abs. 584 (1955) (Brown II), then those decisions would have gone the other way, with the United States Supreme Court refraining from becoming involved in serious matters of educational policy in the States, notwithstanding the compelling nature of the facts and the existence of unambiguous constitutional language (as is the situation here).

Rather than doing that, however, the United States Supreme Court took profound and decisive action and affirmed the status of educational opportunity in words that articulate the dictates of McDuffy:

> "Today, education is perhaps the most important function of state and local governments. Compulsory **[***114]** school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him [or her] for later professional training, and in helping him [or her] to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he [or she] is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

Brown I, supra at 493.

Because our highly respected court has chosen to turn back from McDuffy, at a time when the focus districts most need our help, I respectfully dissent.

IRELAND, J. (dissenting, with whom Greaney, J., joins). Education is one key to success in life. "It is doubtful that any child may reasonably be expected to succeed in life if he is denied **[*486]** the **[***115]** opportunity of an education." Brown v. Board of Educ. of Topeka, 347 U.S. 483, 493, 98 L. Ed. 873, 74 S. Ct. 686 (1954). Today, a plurality of the court has left the children of the Commonwealth, who have been waiting now for over twelve years for the promises of a constitutionally required education this court declared in McDuffy v. Secretary of the Executive Office of Educ., 415 Mass. 545, 621, 615 N.E.2d 516 (1993) (McDuffy), without recourse.

In my view, McDuffy contains clear, unequivocal language concerning the Commonwealth's duty to educate its children. The McDuffy court held that "the Massachusetts Constitution imposes an enforceable duty on the magistrates and Legislatures **[**1174]** of this Commonwealth to provide education in the public schools for the children . . . whether they be rich or poor and without regard to the fiscal capacity of the community or district in which such children live" (emphasis added). Id. at 621. The court extensively analyzed whether the duty to provide education was aspirational, and concluded it was not. Id. at 606. The citizens "of the Commonwealth have a correlative right to be educated." Id. At 566 n.23. **[***116]** 1 The McDuffy court also

concluded that "an educated child must possess 'at least . . . seven . . . capabilities'" (emphasis added). 2 Id. at 618, quoting Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989).

[*117]** The McDuffy court also held that the duty was not being met and that simply offering to aid education was insufficient. McDuffy, supra at 606, 611, 614, 621. The Legislature also is not permitted to shift its duty to local governments. Id. at 606. Moreover, particularly as none of its conclusions is equivocal, I conclude that McDuffy did not envision that this constitutional **[*487]** duty would be subject to the vagaries of budget issues. 3 See also id. at 570-577 (discussing historic statutes calling for fines where communities failed to provide for education).

[*118]** I write separately because I disagree with both concurring opinions. Because I agree completely with the reasons stated by Justice Greaney in his dissent, it is not necessary for me to address Justice Cowin's concurrence. Therefore, this dissent addresses the concurrence of the Chief Justice. I disagree with the Chief Justice's assessment that the enactment of the Education Reform Act and the existence of what she calls "painfully slow" progress fulfils the Commonwealth's enforceable constitutional duty to provide education to public school students. 4 Ante at (Marshall, C.J., concurring). Although admittedly an imperfect analogy, the Chief Justice's endorsement of "painfully slow progress" reminds me of the "with all deliberate speed" standard the United States Supreme Court endorsed concerning school desegregation. Brown v. Board of Educ. of Topeka, 349 U.S. 294, 301, 99 L. Ed. 1083, 75 S. Ct. 753, 71 Ohio Law Abs. 584 (1955). That Court expressed its frustration with the pace of desegregation eight [**1175] years later. See, e.g., Watson v. Memphis, 373 U.S. 526, 531, 10 L. Ed. 2d 529, 83 S. Ct. 1314 (1963). I believe that the Chief Justice's assessment that this painfully slow progress does not **[***119]** violate the education clause implicitly overrules the holding of McDuffy. 5 I see no reason to do so. Rather, I agree with the analysis and conclusions of this court in McDuffy and of the Superior Court judge who was specially assigned to hear this case and report to the single justice, in particular her conclusion that the children of the Commonwealth are not receiving their constitutionally required education. Indeed, the Chief Justice herself states that the "goals of education reform adopted since McDuffy [clearly have not] been fully achieved." Ante at (Marshall, C.J., concurring).

[*488] Although the judge found that the Education Reform Act "changed dramatically the manner in which public school . . . education is funded . . . and changed, almost as dramatically **[***120]** the role that the Commonwealth plays in pubic school education," the judge also concluded that McDuffy compels the court to analyze whether, through this legislation, the Commonwealth is providing students with the capabilities it outlined.

As the Chief Justice states, the judge's findings are a "model of precision, comprehensiveness, and meticulous attention to detail." Ante at (Marshall, C.J., concurring). She evaluated the four districts using two indicators. The first was the curriculum frameworks the defendants have developed to fulfil the seven capabilities identified in McDuffy. The judge found that these frameworks, on paper are "of excellent quality, focusing on knowledge and skills that students need to acquire." Although she

highlighted some positives in the four districts, when she evaluated each district's capacity to implement the frameworks, as detailed by Justice Greaney, ante at - (Greaney, J., dissenting), the judge concluded that the four districts did not meet the constitutionally required minimum level of education.

The judge also compared the four districts to "comparison" districts of Brookline, Concord-Carlisle, and Wellesley (the **[***121]** districts that were comparison district in McDuffy). As criteria for the comparison the judge used objective criteria that the Department of Education and the office of educational quality and accountability use as a way to evaluate the school districts, including MCAS scores, retention rates, on-time graduation rates, SAT scores, and post graduation plans of high school seniors. She made extensive findings, detailed by Justice Greaney's dissent, and concluded:

> "While it is certainly true that MCAS scores in the [four] focus districts have improved, [their] scores are still much lower than the State average, not to speak of the comparison districts. As for the other criteria . . . dropout data, retention rates, graduation rates, SAT scores, post-secondary school plans -- with few exceptions, the four focus districts **[*489]** have not improved at all, and if one concentrates particularly on the last five years, when one would expect at least to begin seeing the impact of [Education Reform Act] investments, there are almost no exceptions" (emphasis added).

After concluding that the students of the Commonwealth were not receiving their constitutionally mandated **[***122]** education, the judge identified areas of critical concern in the four districts: funding, special education, **[**1176]** attracting qualified teachers, and facilities. The judge's findings concerning these areas are detailed by Justice Greaney, therefore I emphasize only some of the judge's findings concerning funding. The judge considered evidence concerning the foundation budget formula and found that even the defendants' own witnesses were not able to say that the foundation budget is adequate to provide the education called for by McDuffy, in terms of the curriculum frameworks. 6 For example, in 2001, a review commission created by the Legislature in the Education Reform Act reviewed the formula and concluded that it was inadequate in certain respects including special education, class-size assumption for elementary grades, low-income factors, and full-day kindergarten. In addition, the commission called for a technology factor to be added to the budget. 7 The judge also noted that State funding has been [*490] cut since fiscal year 2002. These cuts include a reduction of between .1 and 8.8 per cent in G. L. c. 70 aid and cuts in grants for class size reduction, MCAS remediation, preschool **[***123]** and early childhood education, and early reading programs.

In addition to this bleak picture of the four focus districts, I note that nearly one-third of eighth graders across the State failed to pass the MCAS science examination, tentatively scheduled to become a graduation requirement with the class of 2009. Although this alone is cause for concern, Springfield, Brockton, and Lowell had even higher student failure rates of seventy per cent, fifty-six per cent, and fifty-three per cent, respectively. Amid Science Push, Many Students Lag, Boston Globe, Jan. 20, 2005, at A1 and B5. Moreover, in the Commonwealth's report to the Federal government pursuant to the No

Child Left Behind Act of 2001, 20 U.S.C. §§ 6301 et seq. (2002), it was reported that forty-nine per cent of the Commonwealth's schools have not improved test scores of black students and forty-six per cent of schools did not make gains in the scores **[***125]** of their low-income students. Schools Hit on Minority Progress, Boston Globe, Oct. 15, 2004, at B1 and B8. Given this information, coupled with the judge's findings and conclusions, I could not disagree more with the Chief Justice's assessment that the Commonwealth is meeting its constitutional duty.

[1177]** Concerning the remedies ordered by the judge, the defendants rely on a separation of powers argument to state that the court cannot order remedies. However, their argument is undermined by the judge's conclusion:

> "The difficulty with the defendants' solution is that the system they depend on to improve the capacities of schools and districts is not currently adequate to do the job. Since approximately 1980, the department's staff has been reduced by more than half -- from over 1,000 employees to a number less than 400. At the same time, under the [Education Reform Act], the department's responsibilities have multiplied and intensified in critical ways. In terms of reviewing school district performance, in the three years since the department developed the school accountability system, it has been able to conduct school panel reviews in only twelve to fourteen schools **[*491]** each **[***126]** year, although the annual pool of schools demonstrating 'low' or 'critically low' performance is in the hundreds."

I would impose only the remedies ordered by the judge that require the defendants, within six months, to determine the actual costs associated with (1) implementing all seven of the curriculum frameworks that the Commonwealth chose as a way to implement the McDuffy capabilities, and (2) measures that would provide assistance to districts effectively to implement the Commonwealth's educational program. I have faith that the Legislature and the executive, having had pointed out to them the deficiencies of their good faith attempt to provide the children of the Commonwealth with their constitutionally required education, will act to remedy the situation. McDuffy, supra at 619 n.92 ("We shall presume at this time that the Commonwealth will fulfil its responsibility with respect to defining the specifics and the appropriate means to provide the constitutionally-required education"). My faith is based on events that have occurred since the judge heard evidence in this case, indicating that the Legislature is very concerned with the state of education **[***127]** in the Commonwealth. For example, in July, 2004, the Legislature established a Department of Early Education and Care. St. 2004, c. 205. In December, 2004, more than one hundred legislators signed on to a bill that calls for the creation of a commission to examine education financing. See What Cost Education? Area Lawmakers Want to Create a Commission to Answer the Question, MetroWest Daily News, Dec. 15, 2004. 8 Moreover, in this case, the court received an amicus brief from forty-seven legislators urging us to endorse the judge's findings and conclusions.

In Student No. 9 v. Board of Educ., 440 Mass. 752, 768, 802 N.E.2d 105 (2004) 9 **[*492]** (Ireland, J., concurring), quoting Brum v. Dartmouth, 428 Mass. 684, 709, 704 N.E.2d 1147 (1999) (Ireland, J., concurring), **[***128]** I repeated:

> "The education of our children is no less a compelling issue than their physical safety. 'Local schools lie at the heart of our communities. Each morning, parents across the Commonwealth send their children off to school. They entrust **[**1178]** the schools with nothing less than the safety and well-being of those most dear to them -- their own children. No arm of government touches more closely the core of our families and our children than our schools.'" 10

I expressed my concern that in the years that passed since McDuffy was decided "progress toward providing education in all core subjects to all the Commonwealth's students educated with public funds, disabled and nondisabled, rich and poor, and of every race and ethnicity, has not advanced more." Student No. 9 v. Board of Educ., supra at 771 (Ireland, J., concurring). I feel the same today. As I have stated supra, that education is the key to success in life has been long recognized by courts. Brown v. Board of Educ. of Topeka, 347 U.S. 483, 493, 98 L. Ed. 873, 74 S. Ct. 686 (1954) (public education "is a principal instrument in . . . preparing [a child] for later professional **[***129]** training").

In DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989), the State of Wisconsin, although documenting **[***130]** the abuse Joshua DeShaney received at the hands of his father, which abuse left him mentally impaired, did not act to protect him. Joshua sued the Department of Social Services claiming the department's failure to act deprived him of his liberty under the due process clause of the Fourteenth Amendment to the United States Constitution. Id. at 191. The Court expressed its "natural sympathy" for Joshua, but declined to hold that the due process clause offered him any relief. Id. at 202. In his dissent, Justice Blackmun lamented "Poor Joshua!," **[*493]** and stated that given a choice, he would adopt a "'sympathetic' reading [of the due process clause], one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging." Id. at 213 (Blackmun, J., dissenting). Today the Chief Justice states that she has sympathy for the "sharp disparities in the educational opportunities, and the performance, of some" children of the Commonwealth and states that, for many students, it is too late. Ante at, (Marshall, C.J., concurring). See generally **[***131]** ante at - (Cowin, J., concurring). I am disappointed and saddened that, instead of acting to assist our children, five Justices leave them without recourse like "Poor Joshua." 11 Our children deserve better.

Accordingly, I respectfully dissent.

COACHELLA VALLEY UNIFIED SCHOOL DISTRICT, CHULA VISTA ELEMENTARY SCHOOL DISTRICT, ALISAL UNION ELEMENTARY SCHOOL DISTRICT, TERRA BELLA UNION ELEMENTARY SCHOOL DISTRICT, PAJARO VALLEY UNIFIED SCHOOL DISTRICT, OXNARD ELEMENTARY SCHOOL DISTRICT, HAWTHORNE SCHOOL DISTRICT, HAYWARD UNIFIED SCHOOL DISTRICT, SWEETWATER UNION HIGH SCHOOL DISTRICT, SALINAS UNION HIGH SCHOOL DISTRICT, CALIFORNIA ASSOCIATION FOR BILINGUAL EDUCATION, CALIFORNIANS TOGETHER, CALIFORNIA LEAGUE OF UNIFIED LATIN AMERICAN CITIZENS, IVETTE ZAVALA, MELISSA ZAVALA, a Minor, by IVETTE ZAVALA, her Guardian Ad Litem, LUIS OCHOA, JAMILET OCHOA, by LUIS OCHOA, her Guardian Ad Litem, Petitioners/Plaintiffs, v. STATE OF CALIFORNIA, ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California, CALIFORNIA STATE BOARD OF EDUCATION, RUTH E. GREEN, GLEE JOHNSON, ALAN BERSIN, RUTH BLOOM, YVONNE CHAN, DONALD G. FISHER, KENNETH NOONAN, JOE NUNEZ, BONNIE REISS, JONATHAN WILLIAMS, in their official capacities as members of the Board of Education, JACK O'CONNELL, in his official capacity as State Superintendent of Public Instruction, CALIFORNIA DEPARTMENT OF EDUCATION, and DOES 1 through 30, inclusive, Respondents/Defendants.

No. C 05-02657 WHA

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2005 U.S. Dist. LEXIS 44825

August 5, 2005, Decided

August 5, 2005, Filed

CORE TERMS: federal law, federal question, cause of action, proficiency, removal, state law, private right of action, subject-matter, challenging, state cause of action, federal issue, reasonable accommodations, high-quality, proficient,reliable, yearly, intervene

COUNSEL: [*1] For **Coachella Valley Unified School District,** Petitioner: Marc Allen Coleman, LEAD

ATTORNEY, Law Offices of Marc Coleman, Long Beach, CA; Bonfacio Garcia, Burke, Williams & Sorensen, San

Diego, CA; Christy Virginia Keeny, Dan Stormer, Hadsell & Stormer, Inc., Pasadena, CA u.s.; Mary T. Hernandez,

Burke Williams & Sorensen, San Diego, CA US; Virginia Keeny, Hadsell & Stormer, Inc., Pasadena, CA; Yuri Alexis Calderon, Burke, Williams & Sorensen, San Diego, CA.

For Chula Vista Elementary **School District,** Alisal Union Elementary **School District,** Terra Bella Union Elementary **School District,** Pajaro **Valley Unified School District** (PVUSD), Oxnard Elementary **School District,** Hawthorne **School District,** Hayward **Unified School District,** Sweetwater Union High **School District,** Salinas Union High **School District,** California Association for Bilingual Education, Californians Together, California League of **Unified** Latin American Citizens, Ivette Zavala, M.Z., a Minor by Ivette Zavala, Her Guardian Ad Litem, Luis Ochoa, J.O., by Luis Ochoa, Her Guardian Ad Litem, Petitioners: Marc Allen Coleman, LEAD ATTORNEY, Law Offices of Marc Coleman, Long Beach, CA; Bonfacio Garcia, Burke, Williams & Sorensen, **[*2]** San Diego, CA; Dan Stormer, Hadsell & Stormer, Inc., Pasadena, CA u.s.; Mary T. Hernandez, Burke Williams & Sorensen, San Diego, CA US; Virginia Keeny, Hadsell & Stormer, Inc., Pasadena, CA; Yuri Alexis Calderon, Burke, Williams & Sorensen, San Diego, CA.

For Juan H, Intervenor Plaintiff: Cynthia L. Rice, LEAD ATTORNEY, California Rural Legal Assistance, San Francisco, CA.

For State of California, Governor Arnold Schwarzenegger, in his official capacity as Govenor of the State of California, California State Board of Education, Ruth E. Green, in her official capacity as a Member of the Board of Education, Glee Johnson, in her official capacity as a Member of the Board of Education, Alan Bersin, in his official capacity as a Member of the Board of Education, Ruth Bloom, in her official capacity as a Member of the Board of Education, Yvonne Chan, in her official capacity as a Member of the Board of Education, Donald G. Fisher, in his official capacity as a Member of the Board of Education, Kenneth Noonan, in his official capacity as a Member of the Board of Education, Joe Nunez, in his official capacity as a Member of the Board of Education, Bonnie Reiss, in her official

capacity **[*3]** as a Member of the Board of Education, Jonathan Williams, in his official capacity as a Member of the Board of Education, Respondents: Angela Botelho, LEAD ATTORNEY, CA State Attorney General's Office, San Francisco, CA.

For Jack O'Connell, in his official capacity as State Superintendent of Public Instruction, California Department of Education, Respondents: Amy Bisson Holloway, LEAD ATTORNEY, California Department of Education, Legal Division, Sacramento, CA; Eileen Gray, California Department of Education, Sacramento, CA Sacra.

JUDGES: WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

OPINION BY: WILLIAM ALSUP

OPINION

ORDER

(1) REMANDING CASE; (2) FINDING MOTION TO INTERVENE MOOT; AND (3) VACATING HEARING

INTRODUCTION

In this education-rights action brought under California state law, plaintiffs move to remand this case to the Superior Court of San Francisco due to lack of subject-matter jurisdiction. Because the complaint does not raise a substantial issue of federal law, there was no basis for removal under 28 U.S.C. 1441(b). Accordingly, this order **GRANTS** plaintiffs' motion to remand the action.

STATEMENT

Plaintiffs are various public **[*4] school districts,** non-profit organizations, students and parents challenging California's failure to comply with the No Child Left Behind Act ("NCLBA")(20 U.S.C. 6301 *et seq.*) with respect to students who are not yet proficient in English. Defendants are collectively responsible for implementing education policies in compliance with the NCLBA for California public schools. The NCLBA is a comprehensive educational-reform statute enacted "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments." 20 U.S.C. 6301.

In furtherance of this goal, each state is required to implement "a set of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading or language arts, and science that will be used as the primary means of determining the yearly performance" of schools within the state. 20 U.S.C 6311(b)(3)(A).

For students learning English as a second language, annual assessments of English **[*5]** proficiency is also required. 20 U.S.C. 6311(b)(7). The NCLBA specifically provides that "limited English proficient students...shall be assessed in a valid and reliable manner and provided reasonable accommodations on assessments...including, to the extent practicable, assessments in the language and form most likely to yield accurate data on what such students know and can do in academic content areas, until such students have achieved English language proficiency." 20 U.S.C. 6311(b)(3)(C)(ix)(III). Academic

assessments in another language (other than English) are expressly permitted, although it is presumed that students will develop English competency within three to five years. 20 U.S.C. 6311(b)(3)(C)(x). Plaintiffs challenge defendants' alleged refusal to provide reasonable accommodations on assessments of students with limited English proficiency. In particular, plaintiffs argue that California, unlike fourteen other states, refuses to utilize a Spanish-language test or a modified-English test which reduces unnecessary linguistic complexity (Br. 2). The complaint, filed on June 1, 2005, (1) seeks a **[*6]** writ of mandate under California Code of Civil Procedure § 1085 to compel defendants to implement "valid and reliable" testing of students with limited English proficiency; (2) alleges illegal expenditures of taxpayers' funds in violation of California Code of Civil Procedure § 526(a); (3) alleges a violation of plaintiffs' right to education under the California Constitution; and (4) seeks declaratory relief. This action was removed by defendants on June 29, 2005. Plaintiffs now move for remand.

ANALYSIS

1. LEGAL STANDARD.

Removal under 28 U.S.C. 1441(b) is permitted for actions involving a federal question over which the district court would have had original jurisdiction pursuant to 28 U.S.C. 1331. The removing party always bears the burden of establishing removal is proper. *Emrich v. Touche Ross & Co.,* 846 F.2d 1190, 1195 (9th Cir. 1990).

The "well-pleaded complaint rule" provides that federal jurisdiction only exists when a federal question is presented on the face of plaintiff's properly pleaded complaint, unaided by the answer or by the petition for removal. *Gully v. First Nat'l Bank in Meridian,* 299 U.S. 109, 113, 57 S. Ct. 96, 81 L. Ed. 70 (1936) **[*7]** (further noting that the federal issue must not be "merely a possible or conjectural one"). A federal defense, even if anticipated, is not part of a plaintiff's cause of action. *Rivet v. Regions Bank,* 522 U.S. 470, 475, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998). This rule thus enables the plaintiff, as "master of the complaint," to have his action heard in state court "by eschewing claims based on federal law." *Caterpillar Inc. v. Williams,* 482 U.S. 386, 399, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987). Subject-matter jurisdiction clearly exists where federal law creates the cause of action. Where the plaintiff only asserts causes of action under state law, the case may nonetheless be deemed to "arise under" federal law "where the vindication of a right under state law necessarily turn[s] on some construction of federal law." *Merrell Dow Pharms., Inc. v. Thompson,* 478 U.S. 804, 808, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986). The mere presence of a federal issue in a state cause of action, however, does not automatically raise a federal question. *Id.* at 813. Indeed, the Supreme Court has explicitly found that "a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has **[*8]** determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States.'" *Id.* at 817. In other words, "if a federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a 'substantial' federal question." *Utley v. Varian Assocs., Inc.,* 811 F.2d 1279, 1283 (9th Cir. 1987).

2. PLAINTIFFS' COMPLAINT RAISES NO FEDERAL QUESTION.

There is no dispute that the complaint only alleges causes of action under California law. The issue, then, is whether this action nonetheless "arises under" federal law. In essence, defendants argue that "one of the substantial federal questions posed by this case" is whether the NCLBA creates a private cause of action, although defendants insist there is none

(Opp. 11). The Ninth Circuit has not yet addressed this issue. At least two other district courts, however, have held that it does not. *Ass'n of Community Orgs. for Reform Now v. New York City Dep't of Educ.*, 269 F. Supp.2d 338 (S.D.N.Y. 2003); *Fresh Start Academy v. Toledo Bd. of Educ.*, 363 F. Supp.2d 910 (N.D. Ohio 2005). **[*9]** This Court agrees. Indeed, at the case management conference, plaintiffs were willing to stipulate that they did not have a private cause of action under the NCLBA. We thus have the curious situation in which *everyone* in this action agrees that there is no private right of action under this statute. It would seem that defendants have manufactured an issue out of thin air in a vain effort to bootstrap their *own* issues into federal court. Plaintiffs' allegations that defendants have failed to comply with the NCLBA do not raise a substantial federal question. *Utley,* 811 F.2d at 1283.

Nor do plaintiffs appear to be challenging the validity or construction of the NCLBA itself. Defendants argue that the Court should construe 20 U.S.C. 6311(b)(3)(C)(ix)(III) because it "will be totally outcome determinative" (Opp. 7). Because subject-matter jurisdiction is lacking, however, the undersigned declines to engage in any substantive

interpretation of the NCLBA. This case must be remanded. In any event, it may very well be, as defendants argue, that California Code of Civil Procedure § 1085 cannot create a right (but can only be used to enforce one), **[*10]** such that if plaintiffs have no private right of action under the NCLBA, their first cause of action necessarily fails (Opp. 10). But this is for the state court to decide.

CONCLUSION

For the foregoing reasons, plaintiffs' motion to remand is **GRANTED.** This action is immediately **REMANDED** to the Superior Court of California for the County of San Francisco. In light of this ruling, the pending motion to intervene is **RENDERED MOOT.** The hearing on these two motions, currently scheduled for **AUGUST 18, 2005 AT 8:00 A.M.,** is **VACATED.**

IT IS SO ORDERED.

Dated: August 5, 2005

WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE

IRIAM FLORES, individually and as parent of Miriam Flores, a minor child, et al., Plaintiffs, vs. STATE OF ARIZONA, et al., Defendants.

No. CV. 92-596-TUC-RCC

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

405 F. Supp. 2d 1112; 2005 U.S. Dist. LEXIS 35313

December 15, 2005, Decided

SUBSEQUENT HISTORY: Vacated by, Remanded by Flores v. Rzeslawski, 2006 U.S. App. LEXIS 21921 (9th Cir. Ariz., Aug. 23, 2006)

PRIOR HISTORY: Flores v. Arizona, 2002 U.S. Dist. LEXIS 23177 (D. Ariz., June 11, 2002)

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, a parent and her minor child, sued defendants, the State of Arizona and state entities, alleging the English Language Learners (ELL) program was inadequately funded. Plaintiffs sought sanctions, including injunctive relief, for the State's failure to comply with a court order that the ELL program had to be funded in non-arbitrary and capricious manner. Defendants sought an advisory opinion as to the status of federal funds.

OVERVIEW: Nearly six years earlier, a trial judge had held that the ELL programs were inadequately funded in an arbitrary and capricious manner, in violation of the Equal Education Opportunity Act, and ordered the legislature to enact legislation to address this problem. It did so, but the governor vetoed it. Defendants alleged they acted in good faith, but disputes between the legislative and executive branches impeded the legislation. The court, noting that there was no good faith exception to the requirement of obeying court orders, held defendants in contempt. Evidence that over 80 percent of ELL high school students failed Arizona's Instrument to Measure Standards (AIMS) test was adequate for injunctive relief in light of the egregious delay in complying with the orders. It therefore enjoined defendants from requiring ELL Students to pass the AIMS test as a requirement for graduating from high school. It declined defendants' request to issue an advisory opinion as to the availability of federal funds. It denied plaintiffs' request to enjoin the receipt of federal highway funds as a sanction, as there was no connection between the funds and ELL students.

OUTCOME: Until defendants complied with the order, they were enjoined from requiring ELL Students to pass the AIMS test before graduating, and would be fined $ 500,000 per day for 30 days, starting 15 days after the next legislative session began, $ 1 million per day for the next 30 days, $ 1.5 million per day until the end of the session, and $ 2 million per day thereafter. They were to pay the attorney's fees plaintiffs incurred after the last order.

CORE TERMS: graduation, funding, funded, high school, academic standards, good faith, enjoin, school system, diploma, unfair, federal funds, attorney's fees, complied, equitable powers, black students, civil contempt, injunction, disparate, graduate, enjoined, contempt, legislative session, highway funds, fine, failure rate, equal protection, graduating, pertains, testing, scores

COUNSEL: **[**1]** For Superintendent Thomas C Horne, Defendant: Eric J Bistrow, Burch & Cracchiolo PA, Phoenix, AZ.

For American Council of Engineering Companies of Arizona, Intervenor: James J Sienicki, Ronald W Messerly, Snell & Wilmer LLP, Phoenix, AZ.

For Associated General Contractors of America, Arizona Chapter, Intervenor: Keith F Overholt, Michael J Farrell, Jennings Strouss & Salmon PLC, Collier Ctr, Phoenix, AZ.

For C Diane Bishop, Superintendent of Public instruction, Eugene Hughes, member of the state board of education, David Silva, member of the state board of education, Claudine Bates Arthur, member of the state board of education, John Hosner, member of the state board of education, Ken Bennett, member of the state board of education, Ray Kellis, member of the state board of education, Defendants: Lynne Christensen Adams, Lewis & Roca LLP, Phoenix, AZ.

For Jim Allman, member of the state board of education, Defendant: Lynne Christensen Adams, Lewis & Roca LLP, Phoenix, AZ; Susan P Segal, Office of the Attorney General, Education & Health Section, Phoenix, AZ.

For Arizona, State of, Defendant: Jose A Cardenas, Lynne Christensen Adams, David D Garner, Lewis & Roca **[**2]** LLP, Phoenix, AZ.

For Miriam Flores, individually and as a parent of Miriam Flores, minor child, Rosa Rzeslawski, individually and as a parent of Mario Rzeslawski, minor child, Plaintiffs: Timothy Michael Hogan, Arizona Ctr for Law in the Public Interest, Phoenix, AZ.

JUDGES: Raner C. Collins, United States District Judge.

OPINION BY: Raner C. Collins

OPINION

[*1113] ORDER "WO"

On October 31, 2005, the Court took under advisement a request made by Plaintiffs for sanctions due to the State of Arizona's failure to take action to comply with the Court Order (Docket No. 296), that found that English Language Learners ("ELL") programs must be funded in a manner that is not arbitrary and capricious. Also, the Court took under advisement the following motions: Defendant's Opposition to Motion for Sanctions and Request for Accelerated Determination Re: Consideration of Federal Funds (Docket No. 303), and the Opposition of ACEC and AGC to Plaintiffs' Motion for Sanctions (Docket No. 300).

The Court was also asked to preclude the State from requiring ELL students to pass the Arizona's Instrument to Measure Standards ("AIMS") test as a necessary criteria to receive a diploma and graduate from high school **[**3]** until the State has properly funded ELL programs for a sufficient period of time to provide ELL students with a meaningful opportunity to achieve the State's academic standards that are measured by the AIMS test.

Defendants have asked the Court for an advisory opinion to decide the status of federal funds in relation to the determination regarding the adequacy of ELL funding. Plaintiffs have asked the Court for attorney's fees for their continued efforts in trying to get the State to comply with its legal obligations to fund ELL programs properly.

The Court has reviewed this case from its inception which was 1992. Thousands of children who have now been impacted by the State's continued inadequate funding of ELL programs had yet to begin school when Plaintiffs filed this case. After extensive lawyering on both sides, the case finally resulted in Judge Marquez deciding in February 2000, that the method used by the State for funding ELL programs bore no rational relationship to the actual cost of providing such programs and was inadequately funded in an arbitrary and capricious manner that was violative of the Equal Education Opportunity Act ("EEOA") of 1974. EQUAL PROTECITON

The legislature in the **[**4]** first instance decided after some prodding by both the Plaintiff and the Court, that they would do a cost study for determining the amounts necessary to achieve this purpose. In December of 2001, the legislature passed **[*1114]** House Bill ("HB") 2010. This bill was to be an interim measure that would allow for the study to be completed and for the legislature to have time to pass the necessary legislation to comply with the Court's order. Ultimately, with the Court's consent, the legislature gave itself nearly three years to accomplish this process. In January 2005, Plaintiffs approached the Court to complain that the study had yet to be completed and that they believed more than enough time had passed for the legislature to complete its obligation.

On January 28, 2005, the Court gave the State until the close of the 2005 legislative session to comply with the Court's Order and essentially to fulfill its promise to set the appropriate funding for ELL programs. When the Court issued that Order, it had already been asked by the Plaintiffs to apply sanctions for the State's failure to live up to its obligation. It was with that backdrop that the Court gave the legislature and the State one last **[**5]** chance to comply with Judge Marquez' Order of February 2000.

Defendants allege that they take their obligation to establish adequate funding for ELL programs very seriously. Defendants assert that due to good faith differences between the States' executive and legislative branches as it pertains to the needs of the ELL students, they were unable to enact the legislation contemplated by the January 28, 2005, Court order. Defendants argues that their non-compliance does not equate to "indifference" as asserted by the Plaintiffs' Motion for sanctions.

The legislature passed HB 2718 at the end of the 2005 session, and the Governor vetoed it because she believed it was inadequate to comply with the Court's Order. Not much

activity has transpired since. The legislature believes that it has complied with the Court's Order. The Governor disagrees. Whether or not the legislative or executive branch is right or wrong and whether or not either has acted in good faith is of no moment because nearly six years have passed since the Court issued the original Order requiring the State to establish adequate funding for ELL programs.EQUAL PROTECTION

The Court can only imagine how many students have started school **[**6]** since Judge Marquez entered the Order in February 2000, declaring these programs were inadequately funded in an arbitrary and capricious manner that violates ELL students' rights under the EEOA. How many students may have stopped school, by dropping out or failing because of foot-dragging by the State and its failure to comply with the original Order and compliance directives such as the Order issued on January 28, 2005? Plaintiffs are no longer inclined to depend on the good faith of the Defendants or to have faith that without some extraordinary pressure, the State will ever comply with the mandates of the respective Orders issued by this Court.

Plaintiffs contend that after nearly six years, it is clear that using Court Ordered deadlines is not an effective means for enforcing the State's compliance with the EEOA of 1974 and this Court's declaratory judgement. Plaintiffs assert that the establishment of yet another deadline by this Court will not guarantee relief. As such, Plaintiffs argue, that this Court must consider more meaningful sanctions as a coercive measure to ensure the State's full and swift compliance and provide ELL students with the rights to which they are entitled **[**7]** under the law.

I. Motion for Injunctive Relief

Plaintiffs assert that in 1991, the State Board of Education adopted academic standards that prescribed the content knowledge in subjects including reading, writing and mathematics that students **[*1115]** should master at every grade level. Plaintiffs also assert that after the adoption of the academic standards, legislation was enacted that required the State Board of Education to adopt a competency test as a prerequisite to graduation from high school. A.R.S. § 15-701.01(A)(3). The AIMS test is designed to measure student achievement of the State Board adopted academic standards in reading, writing and mathematics. A.R.S. § 15-741.NEXUS TO STATE GOALS

Plaintiffs contend, regardless of their performance, requiring ELL students to pass the AIMS test to graduate while being denied the equal participation guaranteed to them under federal law, is patently unfair. Plaintiffs assert that this case was filed to protect the rights of ELL students under the EEOA to equal participation in instructional programs. 20 U.S.C. § 1703(f). As such, Plaintiffs argue that the relief this Motion **[**8]** seeks is necessary to ensure that ELL students are not harmed any further by the State's intransigence as it pertains to the Court's order and the law.

Plaintiffs assert that regardless of AIMS test scores, ELL students have been attending schools with ELL programs that this Court declared are illegally underfunded. Additionally, Plaintiffs argue, it is unfair to those students that they be required to pass a graduation test that is premised on a system in which all students have the same opportunity to achieve the State's academic standards. Plaintiffs further argue that the

relief requested in this motion would be necessary even if ELL students as a group, were performing as well as, or better than, their peers on the AIMS test.

Plaintiffs state that the ELL failure rate is more than three times the failure rate of English proficient students. Plaintiffs contend that 82% of ELL students continue to fail the AIMS test in reading and 81% ELL students continue to fail in writing. As such, Plaintiffs argue without adequately funded programs, ELL students cannot be expected to succeed to the same extent as their peers until the language barriers that impede their equal participation **[**9]** are removed as required by the EEOA.

Plaintiffs argue that this Court should exercise its broad equitable powers to protect ELL students from permanent and irreparable harm due to the State's continuing failure to comply with the Court's judgement and the EEOA. Plaintiffs argue that if past discrimination is sufficient for the exercise of the Court's equitable powers, then the current discrimination that is visited on ELL students by the State should be more than sufficient to invoke the Court's equitable powers to protect ELL students. *See Spallone v. United States*, 493 U.S. 265, 276, 110 S. Ct. 625, 107 L. Ed. 2d 644 (1990).EQUAL PROTECTIONN

Here, Plaintiffs argue that courts have enjoined the administration of high stakes graduation tests when their application would be unfair or perpetuate past discrimination. ***Debra P. v. Turlington***, 644 F.2d 397 (5th Cir. 1981). In, ***Debra P.***, the Court enjoined the administration of the graduation test on both due process and eqaul protection grounds. [1] Plaintiffs argue that the application of ***Debra P.***, in this case is clear. Plaintiffs contend that just as it was unfair to punish black students for deficiencies created by the dual school system in **[**10]** ***Debra P.***, it would be equally unfair to punish ELL students for the deficiencies caused by Arizona's continuing failure to adequately fund ELL programs. As such, Plaintiffs request that **[*1116]** the Court enjoin the State from requiring ELL students to pass the AIMS test in order to graduate from high school. Additionally, Plaintiffs request that the AIMS test not be used to preclude ELL students from graduating until ELL programs have been adequately funded for a sufficient period of time so that ELL students will have a meaningful opportunity to achieve the academic standards that are assessed by the AIMS test.

> 1 In ***Debra P.***, the Court determined that, in part, the failures of black students taking the test could be attributed to the unequal education they received during the period when Florida maintained a dual school system based on race. EQUAL PROTECTION

Defendants assert that the AIMS issue raised by the Plaintiffs was rejected by the Court in 1999. Defendants further argue that Plaintiffs did not appeal that decision and **[**11]** cannot now circumvent that ruling by claiming they are entitled to the same result as a way of enforcing compliance with the Court's EEOA ruling. Defendants also contend that Plaintiffs failed to meet their burden of proof as it pertains to the AIMS test.

Defendants contend that the Court prefaced its January 2000 Order by noting that the August 1999 trial "addressed only two specific issues . . . 1) whether or not Defendants' [sic] adequately fund and oversee the LAU program in NUSD, and 2) whether or not the

AIMS test disparately impacts minority students at NUSD." *Flores v. Arizona*, 172 F. Supp. 2d 1225, 1226 (D. Ariz. 1999). [2] Finally, Defendants argue that although Arizona is approaching the first year in which passing the AIMS test will be a requirement for graduation from high school for all students, this is a fact that Plaintiffs knew six years ago. [3]

> 2 The Court then stated, "Plaintiffs' Second Amended Complaint did not include the AIMS Challenge; nevertheless, the Court heard the parties' arguments and finds that Plaintiffs failed to present evidence at trial to make a prima facie case of disparate impact." *See also Lau v. Nichols*, 414 U.S. 563, 94 S. Ct. 786, 39 L. Ed. 2d 1 (1974).

[12]**

> 3 "The State Board has also determined that in order to receive high school diplomas, all students in the Arizona public school system, except those with certain disabilities, must earn satisfactory AAS/Essential Skills scores on the AIMS tests, effective in 2000-2001." *Flores v. Arizona*, 48 F. Supp 2d 937, 956 (D. Ariz. 1999).

Here, Defendants contend that Plaintiffs are reduced to arguing that they are entitled to relief because ELL students attend schools that this Court declared are illegally underfunded. Defendants argue that this logic is incorrect for two reasons. First, it would effectively allow Plaintiffs to use their victory on their EEOA claim as a basis for getting relief on the AIMS clam that they lost. Second, passing the AIMS test is not the only graduation requirement for Arizona students including ELL students. eqaul protection There are a number of graduation requirements, for example, a minimum number of credits that students must successfully complete. Defendants contend that under Plaintiffs' arguments, if the AIMS testing requirement is not imposed on ELL students this **[**13]** year, it should not have been imposed at any time over the past 5 years. SOLE CRITERION

Defendants argue that granting relief requested by Plaintiffs might actually create rather than eliminate impermissible disparate treatment and thus possibly raise eqaul protection issues. Defendants contend the non-application of the AIMS test would raise significant eqaul protection issues because ELL students would be exempt from passing the AIMS test, however, the AIMS test graduation requirement would stand for all non-ELL students. EQUAL PROTECTION

Defendants contend that Plaintiffs not only failed to present a prima facie claim, but they failed to even explain how requiring ELL students to pass the AIMS test to graduate violates due process and eqaul protection rights. Defendants argue that in ***Debra P.***, the Court initially concluded that due process concerns were implicated **[*1117]** because the testing requirement was imposed at "the eleventh hour." [4] Unlike ***Debra P.***, Defendants argue, Arizona students have had nearly ten years notice that passing the AIMS test would become a graduation requirement. Defendants further state that the underlying district court decision in ***Debra P.*** found four to six years sufficient. **[**14]** [5] Defendants contend that ***Debra P.*** did find an eqaul protection violation that was based on the trial

court's finding that black students' poor performance on the exit exams was related to Florida's relatively recent operation of a school system segregated on the basis of race. However, Defendants argue, no such claim has been made here. due process ADEQUATE NOTICE

4 ***Debra P.***, 644 F.2d 397 (5th Cir. 1981).

5 ***Debra P.***, 730 F.2d at 1407 (citing ***Debra P. v. Turlington***, 474 F. Supp. at 244, 267) (M.D. Fla. 1979); *cf. Williams v. Austin Indep. Sch. Dist.*, 796 F. Supp. 251, 253-54 (W.D. Tex. 1992) (upholding exit exam requirement and distinguishing ***Turlington*** because "In this case, students in Texas have known for seven years that they must pass a comprehensive examination before receiving their diplomas.").

Defendants argue that Plaintiffs failed to mention that, upon remand, the district court lifted its injunction against the use of high stakes testing. ***Debra P. v. Turlington***, 564 F. Supp. 177, 189 (M.D. Fla. 1983), **[**15]** *aff'd* 730 F.2d 1405 (11th Cir. 1984). Defendants state the court did so because of its decision that the Florida test was "constitutionally impermissible only if the disproportionate failure rate among black students is due to the learning deficits created by the past segregation of the Florida public schools or its effects." *Id.* at 188.

Defendants argue students have known for years that passage of the AIMS test would eventually be required for graduation; students have five separate opportunities to pass the test; and the State has made available tutoring funds for remedial efforts designed to help students, including ELL students, who may need additional assistance. MULTIPLE OPPORTUNITIES AND REMEDIATION. Additionally, Defendants argue, under recently enacted legislation, students graduating in 2006 or 2007 will be able to apply grades received in some high school classes to augment their AIMS test scores. A.R.S. § 15-701.01.SOLE CRITERION

Defendants state that the Tenth Amendment requires that the Court should give due deference to the State's decision to require students to pass the AIMS test. Defendants argue that in the absence of proof of discrimination, courts are **[**16]** rightly reluctant to interfere with the great latitude given the States in the area of education JUDICIAL RELUCTANCE. Defendants state that even the cases Plaintiffs cite acknowledge this principle. Also, Defendants argue that the *Williams* court acknowledged this principle in its analysis. [6] Defendants submit that Plaintiffs have failed to prove the extraordinary circumstances that would warrant the extraordinary interference they seek. As such, Defendants argue that Plaintiffs' motion seeks a remedy for a claim that they not only have not proved, but that has been rejected. Defendants' request that Plaintiffs' motion be denied.

6 "The level of education and academic achievement necessary to obtain a diploma . . . is appropriately a judgement call for the person elected for that state responsibility and those experienced persons responsible for educating and preparing students to achieve the established level of competence. Any interference in this process is simply destructive to the attempts by the state to salvage its

educational system, and this includes interference by the federal judiciary." 796 F. Supp. at 256. NEXUS TO STATE GOALS

[17]** As an alternative, Plaintiffs assert, Defendant's lack of concern for Arizona's ELL students and lack of respect for this Court's orders, the Court should enjoin the receipt of federal highway funds. Plaintiffs also ask the Court to delay the proposed sanctions for at least 30 days from the **[*1118]** issuance of the Court's order so that the Defendants have an opportunity to enact the remedial legislation that is required.

The Court views their request for injunctive relief as different and distinct from determining that the AIMS test is biased or has a disparate effect. This is about requiring something of ELL students for which the State has failed to provide the proper foundation and for which the State still wishes to require ELL students to nevertheless hold up the walls.

Plaintiffs submission that more than 80% of ELL students in high school have failed the AIMS graduation test is adequate for injunctive relief in light of the egregious delay in complying with the Court's Orders. Until Defendants make the appropriations required for properly funding ELL programs, the State is requiring something of ELL students for which the State has failed to provide the proper foundation. The Court's **[**18]** finding that the AIMS test be enjoined for ELL students is based soley on the facts of this case, and the February 2000 Order, and is not to be construed as any broad characterization of whether or not the AIM S test has a disparate effect on limited English speaking students. EQUAL PROTECTION

II. Defendant's Request for Court to Make a Ruling

Defendants allege that monies made available through No Child Left Behind ("NCLB") and other funds are now a significant part of the ELL landscape. Defendants argue that the Court should decide whether and to what extent those federal funds can be used in determining the adequacy of ELL funding in Arizona. Defendants assert that in their response to Plaintiffs' motion for injunction on January 9, 2002, they stated that the NCLB "will significantly affect public education in general and the provision of language acquisition programs." Defendants contend that the issue of whether HB 2010 should be evaluated by considering all available funding for ELL programs, including that provided by federal funds was not addressed by the Court. Defendants further argue that in the Court's January 28, 2005, Order, it did not say whether Federal funds may be considered **[**19]** in deciding whether the State has "appropriately and constitutionally" funded its ELL programs.

Plaintiffs contend that federal funding was addressed at the trial in this case and discussed in the Court's judgement. [7] Plaintiffs state that Defendants request for the Court to consider federal funding is an attempt to relitigate issues that the Court has already decided. Plaintiffs argue that statutorily, federal funds must supplement and not supplant the State's obligation. [8] Moreover, Plaintiffs argue if the Court were to take time to issue an advisory opinion in this matter, its only outcome would be more delay and would not resolve anything at all.

7 *Flores*, 172 F. Supp.2d at 1236-7(D. Ariz. 2000).

8 No Child Left Behind Act, P.L. 107-110, Secs. 1114(a)(2)(B), 3115(g).

The Court agrees. The Court sees this issue as a request to issue an advisory opinion and declines to do the same.

Plaintiffs state that the Court should award their attorney's fees due to Defendant's non-compliance **[**20]** with the Court's judgement on January 28, 2000. Plaintiffs allege that for nearly six years the State has done nothing to comply with the Court's judgement. Plaintiffs argue that after the Court ordered the State to perform a cost study in October of 2000, the State took no action even though the cost study was performed. Also, Plaintiffs contend that they returned to the Court to **[*1119]** establish a deadline for compliance in August of 2004 however, the cost study was not submitted. As a result, Plaintiffs state they returned again to the Court in an effort to ensure compliance. Finally, Plaintiffs argue that the State has failed to comply and request the Court to award attorney's fees and costs for the work related to enforcement of the Court's orders that they have performed on this case since judgement was issued on January 24, 2000.

LEGAL STANDARD

The Court has jurisdiction over the present action against Defendants by its order dated January 28, 2005, and under the Declaratory Judgement Act, A.R.S. §§ 12-1831 et seq., A.R.S. § 12-864, and Rule 65 (d) of the Federal Rules of Civil Procedure.

"Courts have inherent **[**21]** power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370, 86 S. Ct. 1531, 16 L. Ed. 2d 622 (1966). This power has been relied on to hold city and state legislatures in contempt. *See Spallone v. United States*, 493 U.S. 265, 276, 110 S. Ct. 625, 107 L. Ed. 2d 644 (1990). "When a district court's order is necessary to remedy past discrimination, the court has an additional basis for the exercise of broad equitable powers." *Id.* However, these powers are not unlimited, and the Court is obliged to use the "least possible power adequate to the end proposed." *Id. quoting Anderson v. Dunn*, 19 U.S. 204, 231, 5 L. Ed. 242 (1821). In devising a remedy, the Court must take into account the interests of State and local authorities in managing their own affairs, consistent with the Constitution. *Id.*

A district court has the power to adjudge in civil contempt any person who willfully disobeys a specific and definite order of the court. *Gifford v. Heckler*, 741 F.2d 263, 265 (9th Cir. 1984). However, the contempt does not need to be willful and there is no good faith exception to the requirement of obedience to a court order. *In re Dual-Deck Video Cassette Recorder Antitrust Litigation*, 10 F.3d 693, 695 (9th Cir. 1993). **[**22]** [HN3] A court has wide latitude in determining whether there has been contemptuous defiance of its order. *Gifford*, 741 F.2d at 266. A party should not be held in contempt if the "action appears to be based on a good faith and reasonable interpretation of the [court's order]." quoting *Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir. 1982). "Substantial compliance" with the court order is a defense to civil contempt. *Id.* [HN4] The party alleging civil contempt must demonstrate the alleged contempt or violation of the court's order by clear and convincing evidence, not a preponderance of

the evidence. *Id.* While the set of rules the court should use is easy to articulate, they may be difficult to apply. *Id.* The court should determine (1) that the party violated the court order, (2) beyond substantial compliance, (3) not based on a good faith and reasonable interpretation of the order, (4) by clear and convincing evidence. *Id.* The record in this case supports that the Plaintiffs have passed this test.

DISCUSSION AND ANALYSIS

It is therefore the judgement of the court that the State has failed to comply with **[**23]** this Court's Order, and the Court will apply appropriate sanctions. The Plaintiffs have asked the Court to enjoin the State from receipt of federal highway funds as a sanction. The Court does not think this is an appropriate remedy.

The American Council of Engineering Companies of Arizona and Associated General Contractors of America, Arizona Chapter ("Intervenors") argue that Plaintiffs' **[*1120]** motion for sanctions are not related to Arizona's highway funding. Also, Intervenors assert that the Plaintiffs' request for sanctions is made without consideration or respect of the limitations on the authority of the Court both as a matter of applicable law, inherent powers of equity, and the Constitution of the United States. Intervenors further argue that if the relief sought by Plaintiffs is granted, it would have a direct, immediate, and significant impact on Intervenors' member firms.

The Court must use the least possible power to the end proposed. The remedy the Plaintiffs request, enjoining federal highway funds, has no relationship to ELL students. If the Court were to enjoin federal educational funds, it would not only harm ELL students, it would hurt all students in the Arizona school **[**24]** system. Therefore, the Court will **DENY** Plaintiffs' request to enjoin the receipt of federal highway funds as a sanction.

During the October 2005 hearing, mention was made whether someone should go to jail. Under the circumstances, this is not an appropriate remedy at this time.

The Court has been asked by the Plaintiffs to enjoin the state from requiring that ELL students be subject to passing the AIMS test as a graduation requirement until such time as ELL student's education have been funded at an appropriate level and have had appropriate time to benefit from such funding.

The state of Arizona has spent a great deal of time dealing with the AIMS situation and revised the test several ways to increase the passage rates of those students who are required to take it. However, the State has failed to comply with the Court's judgement for almost six years by under-funding ELL programs, which would provide ELL students with the necessary tools to pass the AIMS test. The State's offering tutoring outside the classroom and other things to all students for the purpose of passing the AIMS REMEDIATION test does not remedy the fact that the under-funded ELL programs deprive ELL students of an **[**25]** equal opportunity to pass the AIMS test in the first instance EQUAL PROTECTION

The Court therefore **GRANTS** the injunction for relief requested by the Plaintiff and orders that ELL students not be required to pass the AIMS test to secure their diploma until the State has properly funded ELL programs and there has been sufficient time to allow ELL students to compete equally on the test. eqaul protection STUDENT PREVAILED

SANCTIONS

Accordingly,

IT IS ORDERED that until Defendants fully comply with the mandates of the February 2000 Order, the State is enjoined from requiring ELL Students to pass the AIMS test as a requirement for graduating from high school.

FURTHER, it is ordered that upon full compliance, the State may file a motion to lift the injunction and present evidence as to the reasonable time ELL students should remain exempt from the AIMS test as a requirement for high school graduation.

FURTHER, it is ordered that the legislature has 15 calendar days after the beginning of the 2006 legislative session to comply with the January 28, 2005 Court order. Everyday thereafter and for the ensuing 30 days that the State fails to comply with this Order, a **$ 500,000** per day fine for the **[**26]** next 30 days will be imposed until the State is in compliance.

FURTHER, if after that, the State has still not complied, the Court will impose a **$ 1 million dollar** per day fine for the following 30 days until the State is in compliance.

FURTHER, if after that, the State has still not complied, the Court will impose a **[*1121] $ 1.5 million dollar** per day fine until the end of the 2006 legislative session.

FURTHER, if after that, the State has not complied by the end of the 2006 legislative session, a $ 2 **million dollar** per day fine will be imposed until the State has complied with the January 28, 2005 Court order.

FURTHER, it is therefore ordered that Defendants' are to pay Plaintiffs' reasonable attorney's fees for the time period beginning after the January 28, 2005, Court order. Plaintiffs counsel is to submit calculations for said attorney's fees and a proposed order for the Court to approve.

DATED this 15th day of December, 2005.

Raner C. Collins

United States District Judge

JACK O'CONNELL, as Superintendent of Public Instruction, etc., et al., Petitioners, v. THE SUPERIOR COURT OF ALAMEDA COUNTY, Respondent; LILIANA VALENZUELA et al., Real Parties in Interest.

A113933

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

141 Cal. App. 4th 1452; 47 Cal. Rptr. 3d 147; 2006 Cal. App. LEXIS 1236; 2006 Cal. Daily Op. Service 7460; 2006 Daily Journal DAR 10684

August 11, 2006, Filed

PRIOR HISTORY: [***1] Superior Court of Alameda County, No. JCCP 4468, Robert B. Freedman, Judge. O'Connell v. S.C. (Valenzuela), 2006 Cal. LEXIS 6400 (Cal., May 24, 2006)

CASE SUMMARY:

PROCEDURAL POSTURE: The Superior Court of Alameda County, California, issued a preliminary injunction restraining defendants, the California Board of Education and associated officials, from denying diplomas to members of the 2006 graduating class at California public high schools who were otherwise eligible to graduate, but who had not passed both portions of the California high school exit exam (CAHSEE). Defendants sought a writ of mandate to vacate

that order.

OVERVIEW: Plaintiff students claimed it was a violation of the state constitution's eqaul protection clause to apply the CAHSEE diploma requirement, Ed. Code, § 60851, subd. (a), to students who allegedly had passed all the course requirements for graduation, but who had not been provided with the educational resources necessary to enable them to pass the CAHSEE. The court held that the trial court erred in granting a statewide preliminary injunction enjoining

defendants from enforcing the statute mandating the CAHSEE diploma requirement, because in so doing, the trial court gave undue weight to the students' claim of irreparable injury and insufficient weight to defendants' countervailing concerns, and because the relief was legally impermissible, misdirected in character, and overbroad in scope. The trial court did not give due consideration to the obligation to preserve the status quo or take into account the public interest

in enforcing the CAHSEE diploma requirement as an integral part of the statutory scheme adopted by the legislature in an effort to raise academic standards in California public schools. The relief granted was not tailored to the fundamental right allegedly infringed.

OUTCOME: The court issued a peremptory writ of mandate compelling the trial court to vacate its order, insofar as that order granted a preliminary injunction.

CORE TERMS: diploma, high school, injunction, preliminary injunction, school districts, educational, eqaul protection claim, exit, exam, supplemental, funding, pupil, fundamental right, graduation, graduate, skills, interim, injunctive relief, status quo, disadvantaged, proficiency, eligible, economically, issuance, class members", statewide, remedial, high school, relief granted, grade

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY The trial court issued a preliminary injunction that restrained the State Board of Education and its officials from denying diplomas to members of the 2006 graduating class at California public high schools who were otherwise eligible to graduate, but who had not passed both portions of the California

high school exit exam (CAHSEE). The students' suit claimed that it was a violation of the eqaul protection clause of the California Constitution to apply the CAHSEE diploma requirement (Ed. Code, § 60851, subd. (a)) to students who, they alleged, had passed all of the course requirements for graduation, but who had not been provided with the educational resources necessary to enable them to pass the CAHSEE. The injunction was later stayed by the California Supreme Court. (Superior Court of Alameda County, No. JCCP4468, Robert B. Freedman, Judge.)

The trial court issued a preliminary injunction that restrained the State Board of Education and its officials from denying diplomas to members of the 2006 graduating class at California public high schools who were otherwise eligible to graduate, but who had not passed both portions of the California high school exit exam (CAHSEE). The students' suit claimed that it was a violation of the eqaul protection clause of the California Constitution to apply the CAHSEE diploma requirement (Ed. Code, § 60851, subd. (a)) to students who, they alleged, had passed all of the course requirements for graduation, but who had not been provided with the educational resources necessary to enable them to pass the CAHSEE. The injunction was later stayed by the California Supreme Court. (Superior Court of Alameda County, No. JCCP4468, Robert B. Freedman, Judge.)

The Court of Appeal issued a peremptory writ of mandate compelling the trial court to vacate its order, insofar as that order granted a preliminary injunction. The court held that, in granting a statewide preliminary injunction, the trial court gave undue weight to the students' claim of irreparable injury and insufficient weight to the board's countervailing concerns. Further, the relief was legally impermissible, misdirected in character, and overbroad in scope. The injunction exceeded the limits of judicial power because, rather than requiring defendants to develop a plan to remedy an infringement of educational equality, the trial court imposed its own remedy by enjoining the enforcement of the statute imposing the CAHSEE diploma requirement. The trial court failed to give due consideration to the obligation to preserve the status quo and also failed to take into account the public interest in enforcing the CAHSEE diploma requirement as

an integral part of the statutory scheme adopted by the Legislature in an effort to raise academic standards in California public schools. The relief granted by the injunction, requiring that diplomas not be withheld, was not tailored to the fundamental right allegedly infringed. (Opinion by Ruvolo, P. J., with Reardon and Sepulveda, JJ., concurring.) **[*1453]**

COUNSEL: Bill Lockyer, Attorney General, Manuel M. Medeiros, State Solicitor General, James M. Humes, Chief Assistant Attorney General, Thomas R. Yanger, Assistant Attorney General, Douglas M. Press, Kara Read-Spangler, Hadara R. Stanton and Karin S. Schwartz, Deputy Attorneys General, for Petitioners.

Allan Zaremberg for California Chamber of Commerce, California Business Roundtable and California Business for Education Excellence as Amici Curiae on behalf of Petitioners.

Raneene Rae Belisle for Las Familias del Pueblo as Amicus Curiae on behalf of Petitioners.

No appearance for Respondent.

Morrison & Foerster and Arturo J. González, Shane Brun, Vanina Sucharitkul, Chris J. Young and Johanna Hartwig for Real Parties in Interest.

Public Advocates, John Affeldt, Jenny Pearlman and Tara Kini for Campaign for Quality Education, Asian/Pacific Islander Youth Promoting Advocacy and Leadership, California Association of Community Organizations for Reform Now, Californians **[***2]** for Justice, California Tomorrow, Coalition for Educational Justice, Community Asset Development Redefining Education, Justice Matters, Parents for Unity, United Teachers Los Angeles, Youth in Focus and Youth Together as Amici Curiae on behalf of Real Parties in Interest.

Melissa W. Kasnitz for Disability Rights Advocates as Amicus Curiae on behalf of Real Parties in Interest.

JUDGES: Ruvolo, P. J., with Reardon and Sepulveda, JJ., concurring.

OPINION BY: Ruvolo **[*1457]**

OPINION

[150] RUVOLO, P. J.--**

I.

INTRODUCTION

By order of the California Supreme Court, we are charged with reviewing defendants' 1 petition for writ of certiorari, mandate, and other appropriate relief, challenging a preliminary injunction issued by the Alameda County Superior Court, but later stayed by the California Supreme Court. That injunction restrained defendants from denying

diplomas to members of the 2006 graduating class at California public high schools who were otherwise eligible to graduate, but who had not passed both portions of the California high school exit exam, otherwise known as the CAHSEE.

1 For simplicity and clarity, we will refer to the petitioners in this writ proceeding, who were the defendants and respondents in the trial court, as defendants, and to the real parties in interest, who were the plaintiffs and petitioners in the trial court, as plaintiffs.

[*3]** We conclude, inter alia, that: (1) the trial court's determination that plaintiffs were likely to prevail on their primary eqaul protection claim was supported by substantial evidence and legally proper, although the court's determination as to their secondary claim was not; (2) the trial court abused its discretion in the manner in which it balanced the factors it was legally required to consider in deciding a motion for preliminary injunction, and in concluding that the injunction was necessary in order to maintain the status quo while the underlying litigation

proceeded; and (3) the remedy exceeded what the court had the legal authority to impose, and was otherwise overbroad in its scope. Accordingly, we grant defendants' writ petition, and vacate the preliminary injunction.

II.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The historical background facts relevant to this litigation are largely a matter of public record, and are not in dispute. In **[**151]** March 1999, the California Legislature found that "[l]ocal proficiency standards" set by individual school districts were "generally set below a high school level and [were] not consistent with state adopted academic content **[***4]** standards." (Stats. 1999, 1st Ex. Sess. 1999-2000, ch. 1, § 1(a).) The Legislature concluded that "[i]n **[*1458]** order to significantly improve pupil achievement in high school and to ensure that pupils who graduate from high school can demonstrate grade level competency in reading, writing, and mathematics, the state must set higher standards for high school graduation." (Stats. 1999, 1st Ex. Sess. 1999-2000, ch. 1, § 1(b).)

(1) In order to further this goal, the Legislature directed that defendant "Superintendent of Public Instruction, with the approval of [defendant] State Board of Education, shall develop a high school exit examination in English language arts and mathematics in accordance with ... statewide academically rigorous content standards adopted by [defendant] State Board of Education ... ." (Ed. Code, § 60850, subd. (a).)2 The examination developed under that mandate has come to be known as the CAHSEE. The CAHSEE is administered to all public high school students starting in grade 10, and each student is permitted to continue to take the CAHSEE at each subsequent administration, several times a year, until he or she has passed both sections. **[***5]** (§ 60851, subd. (b).) School districts are required to offer "supplemental instructional programs for pupils ... who do not demonstrate sufficient progress toward passing the [CAHSEE]." (§ 37252, subd. (a); see also § 60851, subd. (f).)

2 All further references to statutes are to the Education Code unless otherwise noted.

The legislation creating the CAHSEE provided that passage of the examination would be required as a condition of astudent's receipt of a high school diploma (the CAHSEE diploma requirement). (§ 60851, subd. (a).) Originally, the Legislature directed that the CAHSEE diploma requirement take effect commencing with the 2003-2004 school year. (*Ibid.*) In 2001, however, the Legislature gave defendant State Board of Education the authority, at any time prior to August 1, 2003, to delay implementation of the CAHSEE diploma requirement if it determined, based on an independent study mandated by the legislation, that "the test development process or the implementation of standards-based **[***6]** instruction [did] not meet the required standards for a test of this nature." (§ 60859, subd. (a); see Stats. 2001, ch. 716, § 3.) As permitted by this legislation, defendant State Board of Education determined in July 2003 not to impose the CAHSEE diploma requirement on students graduating prior to the spring of 2006. A motion to defer the requirement for one additional year, until 2007, failed by one vote.

Since the start of the 2000-2001 school year, school districts have been required to notify their students' parents or guardians annually about the CAHSEE diploma requirement. (§ 48980, subds. (a), (e); see Stats. 1999, 1st Ex. Sess. 1999-2000, ch. 1, § 3 [amending § 48980, subd. (e), to require notification regarding CAHSEE diploma requirement].) Accordingly, at least since July 2003, it has been a matter of public record that students scheduled **[*1459]** to graduate from high school in the spring of 2006 (the class of 2006) would be required to pass the CAHSEE in order to receive their diplomas. DUE PROCESS

In May 2000--shortly after the legislation creating the CAHSEE went into effect--the same law firm that represents plaintiffs in this action filed a class action on behalf of public school **[***7]** students against **[**152]** the State of California (the *Williams* litigation), charging the state with "failing to meet its constitutional obligation to provide students with fundamentally equal educational opportunity, focusing on dramatic inequalities in access to instructional materials, adequate learning facilities, and qualified teachers." In August 2004, the state agreed to settle the *Williams* litigation, and as part of that agreement, passed several pieces of legislation providing for improvements in the provision of teaching materials, clean and safe facilities, and qualified teachers to all California students. It was not until March 2005, however, that the superior court judge who presided over the *Williams* settlement entered a final order approving its terms, and it is undisputed that the improvements in educational equality required under the *Williams* settlement had not yet been fully implemented by the time the CAHSEE diploma requirement became effective.

The skills tested on the CAHSEE are neither esoteric nor highly advanced. To pass, a student need only be able to achieve a 60 percent score on a test of up to 10th grade English language skills, and a 55 percent **[***8]** score on a test of math skills at up to a 7th grade level, plus algebra. Nonetheless, only 69 percent of the students in the class of 2006 were able to pass both sections of the CAHSEE when they first took it in February 2004, while they were in the 10^{th} grade. By January 2006, the aggregate pass rate for the class of 2006 had improved to 89 percent. 3 Significant differences remained, however,

between the overall pass rate and the pass rates for Hispanics (82 percent), African-Americans (80 percent), economically disadvantaged students (82 percent), and English learners (69 percent).

3 Plaintiffs contend that this figure, and other pass rates reported by defendants, is inflated, because they are computed against a denominator that excludes students who dropped out of high school. Nonetheless, it does not appear to be disputed that the CAHSEE pass rate for the class of 2006 rose significantly over time.

In the fall of 2005, with the implementation of the CAHSEE diploma requirement scheduled to occur at the **[***9]** end of the current school year, the Legislature appropriated $ 20 million in supplemental funding (the supplemental funding) for school districts with the highest percentage of students in the class of 2006 who had not yet passed the CAHSEE. The statute appropriating the money specified that it was to be distributed by ranking schools on the basis of the percent

of their students in the class of 2006 who had not yet passed the CAHSEE, and then distributing $ 600 per pupil to the **[*1460]** school districts in which those schools were located, in the order determined by defendant Superintendent of Public Instruction, until the funds were exhausted. (Former § 37254.) The result of this legislative directive was that all of the supplemental funding went to school districts containing schools in which 28 percent or more of the class of 2006 had not yet passed the CAHSEE. School districts in which none of the schools had a CAHSEE failure rate of at least 28 percent did not receive any of the supplemental funding, no matter how many students in those districts had not passed.

The legislation creating the CAHSEE required defendant State Board of Education, in consultation with defendant Superintendent of **[***10]** Public Instruction, to "study the appropriateness of other criteria by which high school pupils who are regarded as highly proficient but unable to pass the [CAHSEE] may demonstrate their competency and receive a high school diploma." (§ 60856.) The parties disagree as to whether a study complying with this mandate was performed, but it is not disputed **[**153]** that no "other criteria" for receiving a diploma were adopted before the class of 2006 was to graduate.

By the time the results of the February 2006 4 administration of the CAHSEE were released, the percentage of the class of 2006 that had passed both sections had increased slightly, to 89.3 percent. Nonetheless, at that point there remained almost 47,000 members of the class of 2006--about 10 percent--who had yet to pass at least one section of the CAHSEE, and who therefore were at risk of not receiving their diplomas at the expected time, if they did not succeed in passing it at the March or May administration. 5

4 All further references to dates are to the year 2006 unless otherwise noted.

5 At defendants' request, we have taken judicial notice of the results of the March and May CAHSEE administrations, which were released after the trial court issued the injunction under review. By the March administration, 90 percent of all students in the class of 2006 had passed. Nearly 42,000 students, however, remained at risk of failing to graduate because of the CAHSEE diploma requirement. On July 21,defendants

announced that an additional 1,759 members of the class of 2006 had passed the CAHSEE in May, and defendants' counsel indicated at oral argument that students in this group who have met all the other requirements for graduation will receive their diplomas in due course. Nonetheless, as of July 21, over 40,000 members of the class of 2006--a little more than 9 percent--still had not passed the CAHSEE. Moreover, the pass rates for certain categories of students remained considerably lower than the overall rate: about 85 percent for Hispanics, 83 percent for African-Americans, 86 percent for economically disadvantaged students, and 77 percent for English learners.

[*11]** On February 8, plaintiffs initiated this litigation by filing, in the San Francisco Superior Court, a verified petition for writ of mandate and complaint for declaratory and injunctive relief. The complaint was framed as a class action on behalf of "those high school students in California public schools who are scheduled to graduate with the [c]lass of 2006 and who have satisfied all of their requirements for graduation except for passing the **[*1461]** [CAHSEE]." 6 The complaint alleged that defendants had (1) deprived plaintiffs of their fundamental right to a public education by denying plaintiffs their high school diplomas; (2) violated the eqaul protection clause **[**154]** of the California Constitution by failing to provide plaintiffs with an equal opportunity to pass the CAHSEE, unfairly allocating the supplemental funding, and disadvantaging English learners; (3) violated their statutory duty to conduct a good faith study of alternatives to the CAHSEE; and (4) deprived plaintiffs of their property interest in obtaining their high school diplomas without due process. The complaint also included a prayer for declaratory relief, framed as a separate cause of action.

6 No plaintiff class has yet been certified. Nonetheless, purely for convenience, we will use the term "plaintiff class members" to refer to students in the class of 2006 who completed all the requirements to graduate from high school on schedule, except for passing either or both sections of the CAHSEE.

In plaintiffs' complaint, the proposed class was defined to exclude students who were members of the plaintiff class in a separate, pending action on behalf of students with disabilities, *Kidd v. California Department of Education* (Super. Ct. Alameda County, No. 2002049636) (the *Kidd* action). By the time plaintiffs filed the instant litigation, urgency legislation had been passed deferring application of the CAHSEE diploma requirement to students with disabilities for one year, and permitting such students in the class of 2006 to graduate and receive a diploma even if they did not pass the CAHSEE or obtain a waiver. (§ 60852.3, eff. Jan. 30, 2006, repealed eff. Dec. 31, 2006; see Stats. 2006, ch. 3, § 2.) The *Kidd* action remains pending in the Alameda County Superior Court, and is one of the actions with which this litigation has been coordinated.

Even though the definition of the proposed plaintiff class in the present action excluded members of the plaintiff class in the *Kidd* action, the trial court's injunction in the present case did not contain any exception for those students. In light of the Supreme Court's stay of the injunction, any issue arising from that omission may be moot, and in any event, in light of our disposition of the merits, we need not address the issue. Moreover, it goes without saying that nothing in this opinion is intended to affect either the cited legislation, or any relief granted or other order entered in the *Kidd* action.

[*12]** On March 17, defendants demurred to the complaint. On March 23, plaintiffs filed a motion for preliminary injunction, supported by voluminous declarations and exhibits. The motion sought an injunction "preventing [d]efendants from requiring students in California's [c]lass of 2006 to pass the [CAHSEE] as a condition of graduation."

On March 30, while the demurrer and the motion for preliminary injunction were still pending, Judge Ronald Sabraw of the Alameda County Superior Court entered an order coordinating this case with the *Kidd* action, and recommending Alameda County as the venue for the coordinated case. This case was then transferred to the Alameda County Superior Court, and assigned to Judge Robert Freedman as coordination trial judge. **[*1462]**

On April 19, the trial court overruled defendants' demurrer in all respects except as to the State of California's demurrer to the cause of action for mandamus relief. Defendants filed their opposition to the motion for preliminary injunction on April 27, and their answer to the complaint on May 1.

On May 9, the trial court heard oral argument on the motion for preliminary injunction. After receiving supplemental briefs from both **[***13]** parties, on May 12, the court filed an order granting plaintiffs' motion for a preliminary injunction (the May 12 order). 7

7 The May 12 order also included a case management order setting a case management conference and requiring counsel to take specified steps to prepare for that conference. That portion of the order is not before us, and nothing in this opinion should be construed to affect it in any way.

The May 12 order provided that defendants were "enjoined and restrained ... from denying any high school senior who is a member of a 2006 graduating class and who is otherwise eligible to graduate and receive a diploma from participating in graduation exercises and receipt of such diploma solely on the ground that such student has not passed all parts of the CAHSEE." The court noted that its order did not prevent anyone from annotating a diploma to indicate that the recipient had passed the CAHSEE, or from reporting a student's status as having passed or not passed the CAHSEE to the extent that information **[***14]** was subject to disclosure under existing law. The court also emphasized that its order was directed only at the class of 2006, and it did not stay continued administration of the CAHSEE or continued efforts to assist students to prepare for it. Later in the day on May 12, the court denied defendants' motion for a temporary stay of the May 12 order pending their anticipated appeal.

On May 19, defendants filed with the California Supreme Court a petition for a writ of certiorari, mandate, or other appropriate relief, together with a request for an immediate stay of the preliminary injunction granted by the trial court's May 12 order. On May 22, plaintiffs filed an opposition to the request for immediate stay. Defendants filed a reply later the same day.

[155]** On May 24, the Supreme Court issued an order providing that "Respondent and real parties in interest are ordered to show cause before the Court of Appeal, First

Appellate District, why the relief sought in the petition for writ of mandate should not issue. Because at this juncture this court is not persuaded that the relief granted by the trial court's preliminary injunction--which would require school districts to grant high school **[***15]** diplomas to students despite

the students' failure to pass the [CAHSEE]--would be an appropriate remedy even if plaintiffs were to prevail in their underlying claims, the injunction issued by the trial court in its order of May 12, 2006, is **[*1463]** stayed pending the Court of Appeal's determination of this writ proceeding. This stay does not preclude the trial court from conducting further proceedings in the underlying matter during the pendency of the writ proceeding in the Court of Appeal. [¶]

Upon receipt of this writ proceeding, the Court of Appeal is directed to establish a schedule for expedited briefing and argument."

In compliance with the Supreme Court's order, we set an expedited schedule for the parties and amici curiae to file briefs and responses thereto. Briefing was complete on July 5, and we heard oral argument on July 25.

III.

Discussion

A.

Standard of Review

(2) "In deciding whether to issue a preliminary injunction, a court must weigh two 'interrelated' factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction. [Citation.] **[***16]** Appellate review is limited to whether the trial court's decision was an abuse of discretion. [Citation.] [¶] The trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction. [Citation.] Of course, '[t]he scope of available preliminary relief is necessarily limited by the scope of the relief likely to be obtained at trial on the merits.' [Citation.] A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim. [Citation.] Unless potential merit is conceded, an appellate court must therefore address that issue when reviewing an order granting a preliminary injunction." (*Butt v. State of California* (1992) 4 Cal.4th 668, 677-678 [15 Cal. Rptr. 2d 480, 842 P.2d 1240] (*Butt*).) To the extent that the trial court's assessment of likelihood of success on the merits depends on legal rather than factual questions, our review is de novo. (*Citizens for*

Better Streets v. Board of Supervisors (2004) 117 Cal.App.4th 1, 6 [11 Cal. Rptr. 3d 349] **[***17]** [construction of statute]; *San Diego Unified Port Dist. v. U.S. Citizens Patrol* (1998) 63 Cal.App.4th 964, 969 [74 Cal. Rptr. 2d 364] [constitutional issue].)

[*1464] (3) In reviewing the injunction issued in this case, we must also bear in mind the extent to which separation of powers principles may affect the propriety of injunctive relief against state officials. In that context, our Supreme Court has emphasized that "principles of comity and separation of powers place significant restraints on courts' authority to order or ratify acts normally committed to the discretion of other branches or officials. [Citations.] In particular, the separation of powers doctrine (Cal. Const., art. III, § 3) obligates the judiciary to respect the separate constitutional **[**156]** roles of the Executive and the Legislature." (*Butt*, *supra*, 4 Cal.4th at p. 695.) In the same context, the Supreme Court has stressed that "a judicial remedy must be tailored to the harm at issue [citations]," and that "[a] court should always strive for the least disruptive remedy adequate to its legitimate task." (*Id.* at pp. 695-696.)

B.

Probability of Success on the Merits

When **[***18]** the trial court assessed plaintiffs' likelihood of success on the merits in its May 12 order, it gave little or no weight to plaintiffs' statutory and due process arguments, but found their eqaul protection argument "far more compelling." The court concluded that plaintiffs had shown a likelihood of success both as to their general claim of deprivation of equal access to education (equal protection claim), and as to their specific claim that the "arbitrary" allocation of the supplemental funding violated equal protection. Because the trial court based its decision to issue the challenged injunction on a finding of likely success on the merits only as to those two claims, we will focus our review on those issues.

1. *Equal Protection*

The gravamen of plaintiffs' primary eqaul protection claim is narrow, and quite specific. The focus of their claim is that it is a violation of the eqaul protection clause of the California Constitution to apply the CAHSEE diploma requirement to students who, they allege, have passed all of the course requirements for graduation, but who have not been provided with the educational resources necessary to enable them to pass the CAHSEE. It **[***19]** is important to note that plaintiffs have not made a facial challenge either to the CAHSEE itself or to the

CAHSEE diploma requirement. As the trial court explained, "[p]laintiffs are not challenging the CAHSEE itself, and are not seeking to enjoin the continued administration of the tests, or efforts to prepare students state wide [*sic*] to be able to pass it. They seek only to delay the implementation of the diploma condition, and only as it affects this year's graduating class."

[*1465] In other words, plaintiffs do not dispute that the state has the authority to determine, or to authorize local agencies to determine, what the requirements for high school graduation shall be, and whether a given student has satisfied them. In California, the Legislature has determined that, effective with the class of 2006, those requirements shall include passage of the CAHSEE, in addition to satisfaction of all locally imposed criteria for high school graduation. Plaintiffs do not question the Legislature's

constitutional prerogative to impose that requirement. Nor have plaintiffs argued that the CAHSEE imposes unfair or academically invalid standards for high school graduation. (Cf. *GI Forum Image de Tejas v. Texas Educ. Agency* (W.D.Tex. 2000) 87 F. Supp. 2d 667, 682-683 **[***20]** [Texas high school exit exam that conformed to accepted academic norms did not violate students' substantive due process rights].) Finally, plaintiffs do not contend that the CAHSEE, as designed, is an invalid test of the skills it was designed to measure.

(4) As the trial court correctly noted in its May 12 order, established California case law holds that there is a fundamental right of equal access to public education, warranting strict scrutiny of legislative and executive action that is alleged to infringe on that right. (*Butt, supra*, 4 Cal.4th at pp. 685-686, 692; **[**157]** *Serrano v. Priest* (1976) 18 Cal.3d 728, 768 [135 Cal. Rptr. 345, 557 P.2d 929] (*Serrano II*).) The trial court also concluded, at least implicitly, that the right of equal access to education includes the right to receive equal and adequate instruction regarding all specific high school graduation requirements imposed by the state, including passing both portions of the CAHSEE. For purposes of this opinion, we assume this conclusion was correct. (Cf. *Debra P. v. Turlington* (5th Cir. 1981) 644 F.2d 397, 406, 408 [state violated eqaul protection by withholding diplomas from high **[***21]** school seniors based on failure to pass test that included material not actually taught in classrooms].)

Turning to the facts of the present case, the trial court credited plaintiffs' evidence regarding the "disparate effect of ...scarcity of resources on schools serving economically challenged neighborhoods and communities," and found that "students in economically challenged communities have not had an equal opportunity to learn the materials tested" on the CAHSEE. The court also found that some schools had not yet fully aligned their curriculum to the test, and that lack of adequate preparation and resources had a disproportionate effect on English learners.

Defendants have disputed these findings on appeal, but our review of the record indicates that they are supported by substantial, albeit not uncontroverted, evidence. Given the standard of review and our normal deference to trial court findings of fact, we accept the trial court's conclusion that plaintiffs established a likelihood of success on the merits as to the denial of their fundamental right to equal educational opportunity.

[*1466] 2. *Allocation of Supplemental Funding*

The trial court's May 12 order also **[***22]** found that plaintiffs proved a likelihood that they would succeed on the merits on their second claim, namely, that the manner in which supplemental funding for remedial instruction for the class of 2006 had been distributed also violated equal protection.

The legislative formula for the distribution of the supplemental funding, as set forth in former section 37254, was designed to give priority to the school districts with the highest percentage of students who had not yet passed the CAHSEE. The statute defined "eligible pupils" as those who have failed one or both parts of the CAHSEE (former § 37254, subd. (a)), and directed as follows: "(b) The Superintendent [of Public Instruction] shall rank schools on the basis of the percentage of eligible pupils. The Superintendent

may give priority to schools with the highest percentage of eligible pupils who have failed both parts of the examination. [¶] (c) From the funds appropriated for purposes of this section, the Superintendent shall apportion six hundred dollars ($ 600) per eligible pupil to school districts on behalf of schools identified pursuant to subdivision (b) in the order determined by the Superintendent until the funds are exhausted. **[***23]** ..." (Former § 37254, subds. (b), (c).)

It is undisputed that in distributing the supplemental funding for the 2005-2006 school year, defendants adopted an allocation formula that complied with the statutory requirements. Unfortunately, the $ 20 million appropriated for that purpose was not nearly enough to provide $ 600 for each eligible pupil. As a result, under the allocation formula, school districts with CAHSEE failure rates of less than 28 percent received no supplemental funding.

Accepting plaintiffs' characterization of defendants' allocation of the supplemental funding as "arbitrary," the court concluded that plaintiffs could support their eqaul protection claim on that basis as well. We **[**158]** disagree with the trial court's analysis of this issue. We see nothing "arbitrary" in this formula. It did not violate eqaul protection principles for the Legislature and the executive branch to decide to allocate a limited sum of money in such a way as to benefit those school districts that evidently had the greatest need for additional assistance in order to raise the CAHSEE pass rates of their students.

(5) " 'The basic principle that must govern an assessment of any constitutional challenge **[***24]** to a law providing for governmental payments of monetary benefits is well established. Governmental decisions to spend money to improve the general public welfare in one way and not another are "not confided to the courts. The discretion belongs to [the legislative branch], **[*1467]** unless the choice is clearly wrong, a display of arbitrary power, not an exercise of

judgment." ... In enacting legislation of this kind a government does not deny eqaul protection "merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " [Citation.]' [Citation.]" (*Cleland v. National College of Business* (1978) 435 U.S. 213, 221 [55 L. Ed. 2d 225, 98 S. Ct. 1024] [upholding restrictions on federal educational assistance for veterans, and rejecting eqaul protection claim based on lack of similar restrictions in other federal educational assistance programs].)

As the foregoing discussion makes clear, if there was any constitutional infirmity with the supplemental funding, it was not **[***25]** that the amount appropriated was improperly distributed, but that it was apparently inadequate to provide all of the plaintiff class members with sufficient remedial instruction to prepare them to pass the CAHSEE prior to their scheduled graduation dates. Indeed, far from being "arbitrary," the pedagogical triage performed by defendants, so as to ensure that the available funds were allocated to those districts most in need, was to be commended.

As to the funding shortfall, we note further only that plaintiffs did not ask the trial court to order defendants to provide additional funds to pay for the necessary instruction. Thus, the question whether such relief would have been constitutionally appropriate, legally justified, or practically feasible is not before us. (See generally *Butt, supra*, 4 Cal.4th at pp. 695-703; *Mandel v. Myers* (1981) 29 Cal.3d 531, 539-540 [174 Cal. Rptr. 841, 629 P.2d 935].) 8

8 Defendants' request for judicial notice, filed on June 23 and granted on June 28, included a copy of then-pending legislation (Assem. Bill No. 1801 (2005-2006 Reg. Sess.)) appropriating additional funds for supplemental education needed by students at risk of failing the CAHSEE during the 2006-2007 fiscal year. On our own motion, we take judicial notice that this legislation was subsequently passed, and was signed by the Governor on June 30. As enacted, the legislation appropriates over $ 100 million "for allocation by the Superintendent of Public Instruction ... to school districts to increase the number of pupils that pass the [CAHSEE]." (Budget Act of 2006, Stats. 2006, ch. 47 [at line item 6110-204-0001].) EQUAL PROTECTION

[*26] C.**

Relative Interim Harm

As we have already noted, in determining whether to issue an injunction, a court must weigh and balance both the likelihood the moving party will succeed in the litigation on the merits of its claim, and also the relative interim harm to the parties if the injunction is granted, or not granted. (*Butt*, **[*1468]** *supra*, 4 Cal.4th at **[**159]** pp. 677-678.) " 'The ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause. [Citation.]' [Citation.]" (*White v. Davis* (2003) 30 Cal.4th 528, 554 [133 Cal. Rptr. 2d 648, 68 P.3d 74], italics omitted.)

In their motion for preliminary injunction, plaintiffs argued strenuously that denying diplomas to members of the class of 2006 who had not passed the CAHSEE prior to their scheduled graduation dates would cause them severe and irreparable injury. In support of this contention, they introduced considerable evidence regarding the impact of failure to receive a high school diploma on a student's prospects for success in later life.

In the May 12 order, the trial court found that the threatened harm to plaintiff **[***27]** class members included the "practical realities attendant to life without a high school diploma"; and the "emotional toll attendant to the resulting disadvantages and stigma." Accordingly, the court concluded that "[i]n toto, ... the evidence of potential harm weigh[ed] heavily in favor of plaintiffs."

While we accept the trial court's findings relating to the threatened harm to plaintiffs, we disagree with the court's conclusion from those findings for several reasons. First, the trial court gave virtually no weight to defendants' proof that at least in some cases, plaintiffs' failure to pass the CAHSEE would only result in a *delay* in their receipt of their high school diplomas, rather than a permanent denial of them. 9 The record makes clear

that members of the plaintiff class have nine options available to them by which they can continue their educations and obtain either a high school diploma or a similar certificate:

9 For example, as already noted, defendants represented to the court at oral argument that the 1,759 students who learned in July that they had passed the CAHSEE at the May administration will receive their diplomas, albeit belatedly, if they are otherwise eligible to graduate.

[*28]** 1. Receive, or continue receiving, supplemental remedial instruction for at least an additional year following completion of the 12th grade (see § 37252, subds. (c), (h));

2. Enroll for an additional year in a public high school or alternative education program in the school district;

3. Enroll in a public school independent study program until they succeed in passing the CAHSEE;

4. Enroll in a public charter school;

[*1469] 5. Attend adult school secondary education classes offered by a local school district;

6. Obtain a diploma through an adult education program at a community college--an option that may not require passing the CAHSEE;

7. Obtain a diploma through a county office of education program for dependent or delinquent youth, if permitted by court order;

8. Pass the California High School Proficiency Exam and obtain a Certificate of Proficiency (§ 48412); or

9. Pass the national General Education Development (GED) test and obtain a California High School Equivalency Certificate.

Plaintiffs point out, perhaps correctly, that as a practical matter, not all of these alternatives are available to every student, and that the last two do not culminate in the award of a high **[***29]** school diploma, but rather in certificates that plaintiffs contend **[**160]** have less value. Plaintiffs also complain that even if practical alternatives are available, delaying the pursuit of other educational or employment opportunities while the plaintiff class members pursue these remedial avenues will cause appreciable harm in itself, particularly for students from low-income households. 10

10 Plaintiffs also premised their claim of irreparable injury on the harm to members of the plaintiff class caused by not being able to participate in graduation ceremonies along with their classmates. We do not view the trial court as having given much weight to this harm, nor do we. It appears from the record that students in many school districts were permitted to "walk" with their classmates despite failing to pass the CAHSEE. In any event, the emotional harm caused by exclusion from one's high school graduation

ceremony, while undoubtedly distressing, is not of sufficient weight to support the relief granted by the trial court.

[*30]** These contentions are not supported by any specific factual findings of the trial court, however. Rather, the trial court gave only a partial, and fleeting, response to these alternatives, opining that "[r]emaining for a fifth or subsequent year in an already stressed district or attending community college when the student might otherwise be accepted to a four year [*sic*] institution 11 all demonstrate significant risk of harm." This finding is plainly **[*1470]** an inadequate response to defendants' assertion that plaintiffs had considerably overstated the irreparability and seriousness of the harm with which they were threatened.

11 Apparently, one of the named plaintiffs had been accepted to a campus of the California State University despite his failure to pass the CAHSEE. This circumstance is manifestly inadequate to justify the issuance of a statewide injunction applicable to *all* members of the plaintiff class, or to conclude that plaintiffs as a group have been harmed irreparably. Moreover, since the lawsuit was filed, three of the original named plaintiffs have passed the CAHSEE. One of these passed even before the May 12 order was issued, and the other two passed while this appeal was pending. A fourth came within two points of passing the March administration.

[*31]** Based on its preliminary findings, the trial court then concluded that there was "no persuasive credible evidence of harm flowing to any one [*sic*] from granting the requested relief." But, in reaching this conclusion, the court failed to consider important record evidence establishing that granting the relief plaintiffs sought would cause substantial harm to others and--more significantly--to the public interest, and failed to balance that harm against that which plaintiffs would suffer without the relief. It was also based on the false premise that the harm to plaintiffs is not the loss of educational opportunity, but the denial of a diploma. 12

12 See Discussion, part III.D.2, *post.*

(6) It is undisputed that the CAHSEE requirement was legislatively enacted to accomplish two goals. The first was to ensure that students graduating from California high schools actually possessed the minimum proficiency in core academic skills needed to thrive in an economically competitive society. (Stats. 1999, 1st **[***32]** Ex. Sess. 1999-2000, ch. 1, § 1(b) [legislative finding in support of adoption of CAHSEE that "to ensure that pupils who graduate from high

school can demonstrate grade level competency in reading, writing, and mathematics, the state must set higher standards for high school graduation"].) Thus, the CAHSEE provided a way to demonstrate to those outside the academic world that California graduates could compete equally with students from other states whose schools enjoyed higher ranking and esteem than California's. (See Stats. 2002, ch. 1028, § 1(f) [legislative finding in support of High School Pupil Success Act that "the implementation of the **[**161]** [CAHSEE] ha[s] raised expectations of pupil performance"].)

Within the borders of California, until our schools can achieve the academic parity envisioned by the *Williams* litigation and settlement, the CAHSEE also provides students who attend economically disadvantaged schools, but who pass the exit exam, with the ability to proclaim empirically that they possess the same academic proficiency as students from higher performing, and economically more advantaged, schools. Granting diplomas to students who have not proven **[***33]** this proficiency debases the value of the diplomas earned by the overwhelming majority of disadvantaged students who have passed the exit exam. **[*1471]**

Plaintiffs' answer to this point is to argue that students can simply refer prospective employers to the fact that their diplomas contain an annotation attesting to their passage of the CAHSEE, as a way to dissipate any inference that they might have been granted their diplomas without passing the exit exam. This response underscores one of the pernicious effects of the trial court's injunction, by emphasizing that students who obtain their diplomas by court order, without passing the CAHSEE, will remain in a distinct disadvantaged group, stigmatized forever by their own unannotated diplomas.

As important as the CAHSEE may be to socially disadvantaged students who pass the exit exam, it is of equal importance to plaintiffs who have not passed. The second goal of the CAHSEE is to identify those students who lack the education needed to achieve even the minimal level of proficiency demanded by the exit exam, and to target them for remedial instruction. (See Stats. 1999, 1st Ex. Sess. 1999-2000, ch. 1, § 2 [amending § 37252, subd. (a), in **[***34]** conjunction with adoption of CAHSEE, to provide that summer school instructional programs are to be offered to pupils "who do not demonstrate sufficient progress toward passing the [CAHSEE] ... ."].) Only in this way can they be assured of gaining the equal educational opportunity for which the instant lawsuit was brought. Therefore, the trial court's injunction mandating that these students receive diplomas, rather than additional remediation, works a cruel irony by depriving plaintiffs of the very education to which they have a fundamental constitutional right.

In addition, in determining that no harm would result from granting plaintiffs the requested relief, the trial court failed to consider countervailing public policy interests. "It is well established that when injunctive relief is sought, consideration of public policy is not only permissible but mandatory. [Citation.]" (*Teamsters Agricultural Workers Union v. International Brotherhood of Teamsters* (1983) 140 Cal. App. 3d 547, 555 [189 Cal. Rptr. 627], citing *Loma Portal Civic Club v. American Airlines, Inc.* (1964) 61 Cal.2d 582, 588 [39 Cal. Rptr. 708, 394 P.2d 548] [affirming denial of injunction **[***35]** against flight operations at public airport].) "Where, as here, the plaintiff seeks to enjoin public officers and agencies in the performance of their duties[,] the public interest *must* be considered. [Citation.]" (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1472-1473 [28 Cal. Rptr. 2d 734], italics added [affirming denial of preliminary injunction against collection of pollution mitigation fee].) In the present case, therefore, the trial court also erred in failing to take into account the public interest in enforcing the CAHSEE diploma requirement as an integral part of the statutory scheme adopted by the Legislature in an effort to raise academic standards in California public schools. **[*1472] [**162]**

Finally, the ostensibly interim relief of forcing the "social promotion" 13 of plaintiffs, by ordering that they be given diplomas, in fact does not maintain the status quo of the litigation, but ends it. Surely the trial court did not expect that if defendants ultimately prevailed in the litigation, plaintiffs would give back the diplomas they had received under the mandate of the court's preliminary injunction. (Cf. *White v. Davis*, *supra*, 30 Cal.3d at pp. 554, 561 **[***36]** [because ultimate goal in deciding whether to issue preliminary injunction is to minimize harm that may be caused by erroneous interim decision, court considering issuance of preliminary injunction cannot ignore possibility that its initial assessment of merits may turn out to be in error].) Indeed, plaintiffs' counsel conceded at oral argument before us that this eventuality was highly unlikely. In failing to consider the effect of its interim relief on the status quo of the litigation, the trial court ignored the foundational legal principle that the general purpose of a preliminary injunction is to preserve the status quo pending a final adjudication of the claims on the merits. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528 [67 Cal. Rptr. 761, 439 P.2d 889]; see also *King v. Meese* (1987) 43 Cal.3d 1217, 1227 [240 Cal. Rptr. 829, 743 P.2d 889].)

13 See *Debra P. v. Turlington* (5th Cir. 1981) 654 F.2d 1079, per curiam opinion on denial of rehearing ("To suggest that the panel opinion has somehow found a constitutional right to a diploma in the absence of an education is to play word games which we feel are both inappropriate and unfounded. Apparently our dissenting brothers would approve of 'social promotions' coupled with a denial of a diploma ascomplying with the legal requirements of equal educational opportunities within a unitary school system."). (Italics omitted.)

[*37]** Nevertheless, plaintiffs argue that the May 12 order did preserve the status quo, premised on their definition of the status quo as the historical practice of granting students diplomas based on their completion of local school district requirements, without requiring them to pass any statewide test. This argument fails to acknowledge that long before this litigation was filed, this historical practice had ceased to be the *current* status quo. Once it was determined, in 2003, that the CAHSEE diploma requirement would be implemented starting with the class of 2006, it was no longer reasonable for students to expect that any such "historical practice" would continue. Moreover, the status quo at the time this lawsuit was filed was, by definition, that none of the plaintiff class members would receive a high school diploma. Thus, far from preserving the status quo, the trial court's injunction disrupted it to a point where, had the Supreme Court not issued a stay, it would have been extremely difficult, if not impossible, to return to the status quo if defendants ultimately prevail in the litigation.

The failure to consider and balance the harm from granting the injunction, and the **[***38]** failure to give due consideration to the obligation to preserve the **[*1473]** status quo, are sufficient error to require us to vacate the trial court's May 12 order.

D.

Appropriate Nature and Scope of Relief

1. *The Trial Court's Injunction Exceeds the Limits of Judicial Power*

The trial court's preliminary injunction was statewide, and barred the denial of diplomas to *any* members of the class of 2006 on the basis of the CAHSEE **[**163]** diploma requirement. 14 In deciding to issue the preliminary injunction that plaintiffs requested, the trial court relied on the Supreme Court's affirmance of orders granting injunctive relief in two cases involving the fundamental right of access to education: *Butt, supra*, 4 Cal.4th 668, and *Serrano II, supra*, 18 Cal.3d 728. (See also *Serrano v. Priest* (1971) 5 Cal.3d 584, 608-610 [96 Cal. Rptr. 601, 487 P.2d 1241] (*Serrano I*) [establishing education as fundamental right for eqaul protection purposes].) The relief issued in those cases was, however, fundamentally different from the relief granted by the trial court here, and an analysis of those differences will serve to highlight one of **[***39]** the reasons for our conclusion that the issuance of the injunction in the present case was an abuse of the trial court's discretion.

14 Because of our disposition of this proceeding, we need not reach the issue whether it was proper to grant an injunction requiring the issuance of diplomas without joining as defendants the local school districts that issue those diplomas. We note, however, that under *Butt, supra*, 4 Cal.4th 668, school districts act as agents of the state, and that in another context, our Supreme Court has held that an injunction requiring the provision of benefits to individuals, due to the invalidation of a state regulation under which those benefits were improperly withheld, binds local officials who act as agents of the state in administering those benefits, even if the local officials were not parties to the underlying action. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 905-909 [141 Cal. Rptr. 133, 569 P.2d 727].)

In *Serrano II*, the **[***40]** trial court found that despite legislative changes in California's public school financing that had been enacted in response to *Serrano I, supra*, 5 Cal.3d 584, "substantial disparities in expenditures per pupil resulting from differences in local taxable wealth ... continue[d] to exist," and that those "[s]ubstantial disparities ...[would] cause and perpetuate substantial disparities in the quality and extent of availability of educational opportunities." (*Serrano II, supra*, 18 Cal.3d at pp. 746-747.) Accordingly, the trial court concluded that "the system before it was violative of our state constitutional standard" of equal protection, ordered that this violation be remedied, and "set a period of six years from the date of entry of **[*1474]** judgment as a reasonable time for bringing the system into constitutional compliance." (*Id.* at p. 749, fn. omitted.) The trial court in *Serrano II* specifically noted that its judgment "was not to be construed to require the adoption of any particular system of school finance, but only to require that the plan adopted comport with the requirements of state eqaul protection provisions." **[***41]** (*Id.* at p. 750.) To ensure that its order was carried out, the court retained jurisdiction to issue further relief in the event of "a failure by the legislative and executive branches of the state government to take the necessary steps ... within a reasonable time" to design and implement a public school financing system that would comply with state eqaul protection requirements.

(*Ibid.*)

(7) In upholding the trial court's order, the majority of the California Supreme Court pronounced itself in agreement with the dissenting justices that " 'the ultimate solutions

[to the problem of educational inequality] must come from the lawmakers and from the democratic pressures of those who elect them.' " (*Serrano II*, *supra*, 18 Cal.3d at 775, fn. 54.) Thus, in upholding the trial court's injunction, the majority explicitly declined--as had the trial **[**164]** court--"to address ourselves to the constitutional merits of the various financing alternatives ... developed in the scholarly literature ... ." (*Ibid.*) Instead, the court restricted itself to expressing "confiden[ce] that the Legislature, aided by what we have said today ... , will be able to **[***42]** devise a public school financing system which achieves constitutional conformity from the standpoint of educational opportunity ... ." (*Ibid.*)

In *Butt*, the trial court was confronted with the prospect that a particular school district would close its schools six weeks before the end of the scheduled school term because it had run out of funds. It issued an order directing the state and the relevant executive branch officials, including the Superintendent of Public Instruction (SPI), "to ensure 'by whatever means they deem appropriate' that ... students [in the affected district] would receive their educational rights," but "made clear that '[h]ow these defendants accomplish this is up to the discretion of defendants. ...' " (*Butt, supra*, 4 Cal.4th at p. 694.) The SPI and the State Controller (Controller) then proposed a loan arrangement to keep the schools open for the remainder of the school year, conditioned on the court's willingness to order that the SPI could temporarily assume control of the school district and appoint a trustee. The trial court issued the requested order, and also authorized the Controller to obtain the funds needed **[***43]** for the loan from funds that the Legislature had previously appropriated for other specific purposes, but which remained unspent. (*Id.* at pp. 694, 697.) **[*1475]**

The Supreme Court affirmed the trial court's decision that "the State has a constitutional duty ... to prevent the budgetary problems of a particular school district from depriving its students of 'basic' educational equality," and that preliminary injunctive relief was warranted. (*Butt*, *supra*, 4 Cal.4th at pp. 674, 693-694.) It also held that, "in light of the 'unique emergency financial conditions' presented by the case," the court did not err in approving the loan conditions proposed by the SPI, including the SPI's temporary takeover of the school district. (*Id.* at pp. 695-697.) The one aspect of the injunction granted by the trial court in *Butt* of which the Supreme Court disapproved was its provision authorizing the Controller to fund the loan by diverting unspent funds from money that the Legislature had previously appropriated for specific purposes. The Supreme Court overturned this part of the injunction on separation of powers grounds, holding that "[b]y diverting **[***44]** the funds from their earmarked destinations and purposes, the court invaded the Legislature's constitutional authority." (*Id.* at p. 698.) The court reaffirmed that the courts have the power to order the executive branch to pay specified obligations out of general operating budgets, but held that this power does not extend to the diversion of funds that the Legislature has allocated for specific purposes. (*Id.* at pp. 697-703.)

Similarly, in *Crawford v. Board of Education* (1976) 17 Cal.3d 280 [130 Cal. Rptr. 724, 551 P.2d 28], the Supreme Court affirmed a trial court's injunction requiring a school district's board to "prepare and implement a reasonably feasible desegregation plan" (*id.* at p. 285; see also *id.* at pp. 307-308), but cautioned that once a plan promising

meaningful progress had been implemented, "the court should defer to the school board's program and should decline to intervene in the school desegregation process **[**165]** so long as such meaningful progress does in fact follow." (*Id.* At p. 286; see also *id.* at pp. 305-306.)

As the foregoing discussion demonstrates, in both **[***45]** *Serrano II* and *Butt*, as well as in *Crawford,* the injunctive relief issued by the trial courts, and upheld by the Supreme Court, was limited to directing the legislative and executive branches to find a way to redress the particular constitutional violation identified by the judicial branch, by providing the affected students with the funding needed to ensure their equal access to educational opportunity. Indeed, the oneaspect of the trial court's order that the Supreme Court reversed in *Butt* was the one respect in which the order went beyond that limitation, and would have directly countermanded a specific legislative directive.

The injunction issued by the trial court in the present case stands in sharp contrast to the relief granted and upheld in *Serrano II* and *Butt*. Rather than requiring the defendants to develop a plan to remedy an infringement of **[*1476]** educational equality, as the trial courts did in *Serrano II* and *Butt*, the trial court here imposed its own remedy by enjoining the enforcement of the statute imposing the CAHSEE diploma requirement. This approach hardly comports with our Supreme Court's directive in *Butt* that equitable relief against **[***46]** other branches of government must be restrained by "principles of comity and separation of powers," and that "[a] court should always strive for the least disruptive remedy adequate to its legitimate task." (*Butt, supra*, 4 Cal.4th at pp. 695, 696; see also *Wolfe v. State Farm Fire & Casualty Ins. Co.* (1996) 46 Cal.App.4th 554, 568 [53 Cal. Rptr. 2d 878] [where Legislature has enacted statutes expressly intended to address issues of public policy raised in litigation, judicial restraint is called for, and courts should "decline the invitation to undo what the Legislature has done" by issuing injunctive relief].)

In seeking judicial intervention, plaintiffs rely in part on the fact that the statutory scheme creating the CAHSEE requires that the school curriculum be aligned to the test, and that remediation be provided to students who have difficulty passing it. (§§ 60850, subd. (f)(3), (4), 60851, subd. (f), 60853.) Plaintiffs may be correct that the state's failure to provide a properly aligned curriculum and adequate remediation amounts to a violation of plaintiffs' statutory rights, and perhaps of their constitutional rights as well. The appropriate **[***47]** judicial remedy for any such violations, however, would be to order the state to provide the mandated curriculum alignment and remediation. 15 It is not to mandate that all students meeting district requirements be given high school diplomas, regardless of the reason for their failure to pass the CAHSEE. (Cf. *Brookhart v. Illinois State Bd. of Educ.* (7th Cir. 1983) 697 F.2d 179, 188 [appropriate remedy for due process violation arising from lack of adequate notice of exit exam requirement would be to require school district to provide free remedial education affording students reasonable opportunity to learn tested material; where passage of time had rendered that relief unrealistic, however, court ordered issuance of diplomas to 11 individual plaintiffs, all suffering from disabilities].)

15 Plaintiffs concede that "[i]f the CAHSEE program actually made equal educational opportunities and adequate remediation available toall students who need it, there might be no violation." We agree, though we would say "would" rather than "might."

[166]**

[*48]** Similarly, plaintiffs argue, and the trial court found, that the changes mandated by the *Williams* settlement did not occur soon enough to allow the class of 2006 a fair chance to pass the CAHSEE. This may well be true, and it may be that those changes will not be sufficient to provide that opportunity for some years to come. Even accepting the trial court's finding, however, at **[*1477]** most it justified ordering defendants to provide additional assistance to give students--including those in the class of 2006--a full and fair opportunity to learn the skills needed to pass the CAHSEE.

16 It did not justify the issuance of an injunction requiring defendants to grant diplomas to all otherwise eligible students, despite their failure to pass the CAHSEE. 16 In that connection, we note that while plaintiffs contend that the options put forward by defendants for plaintiffs to continue studying for the CAHSEE after their fourth year of high school are not realistic as a practical matter, plaintiffs did not seek an injunction requiring defendants to provide options that *were* practical and realistic. Such options are not impossible to imagine. For example, undisputed evidence in the record discloses that the Los Angeles Unified School District planned to offer a "Learn and Earn" program in the summer of 2006 that would enable a limited number of high school juniors and seniors who had not yet passed the CAHSEE, but were on track to graduate, to receive intensive CAHSEE instruction during part of the day, and work at part-time jobs during the remainder.

[*49]** Plaintiffs deny that the trial court's injunction infringed on the separation of powers, pointing to cases in which preliminary injunctions enjoining enforcement of a statute were deemed appropriate. However, as plaintiffs themselves acknowledge, these cases all stand for the relatively unremarkable legal proposition that the enforcement of a law found to be unconstitutional can be enjoined.

For example, in *Conover v. Hall* (1974) 11 Cal.3d 842 [114 Cal. Rptr. 642, 523 P.2d 682], the principal case on which plaintiffs rely, the Supreme Court upheld the issuance of a preliminary injunction preventing state officials from enforcing a state law setting a maximum welfare work-expense allowance that was incompatible with a governing federal statute. (*Id.* at pp. 845-846.) The court noted that "[a] host of cases interpreting these sections [Civil Code provisions limiting the court's jurisdiction] ... do not apply to an unconstitutional or invalid statute or ordinance and that courts have full authority to enjoin the execution of such enactments. [Citations.]" (*Id.* at p. 850; see also *Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 299 [138 Cal. Rptr. 53, 562 P.2d 1302] **[***50]** [trial court erred in refusing to grant preliminary injunction as to portion of ordinance that was unconstitutional on its face].)

As already noted *ante*, however, while plaintiffs raise eqaul protection and due process claims relating to the denial of their fundamental right to a public education, they do not allege that the statute imposing the CAHSEE diploma requirement (§ 60851) is itself

unconstitutional. Plaintiffs only sought to enjoin the enforcement of that statute as applied to them, because they were unconstitutionally denied the ability to learn the skills needed to pass the CAHSEE. Therefore, cases upholding preliminary injunctions restraining enforcement of facially unconstitutional laws are inapplicable here, and do not undercut the limitations discussed in *Butt* and *Serrano II* on the use of **[*1478]** judicial power to control the acts of the executive or legislative branches of state government in the area of public education.

[167] 2. *The Relief Granted by the Injunction, Requiring That Diplomas Not Be Withheld, Was Not Tailored to the Fundamental Right Allegedly Infringed***

In directing defendants not to withhold diplomas from all students who failed to **[***51]** pass the CAHSEE, the trial court relied in part on the assumption that for the purpose of plaintiffs' eqaul protection claim, access to education includes access to a diploma, which the trial court characterized as the "final fruits" of that education. On this point—a legal rather than a factual one--we again part company with the trial court. We believe the trial court's May 12 order erred by focusing its remedy on equal access to *diplomas* rather than on equal access to *education* (and the funding necessary to provide it). In so doing, the trial court failed to heed *Butt*'s caution that "a judicial remedy must be tailored to the harm at issue. [Citations.]" (*Butt*, *supra*, 4 Cal.4th at p. 695.)

The purpose of education is not to endow students with diplomas, but to equip them with the substantive knowledge and skills they need to succeed in life. A high school diploma is not an education, any more than a birth certificate is a baby. Its purpose is to symbolize the holder's acquisition of a certain level of knowledge and skills. Students who successfully completed their high school educations, but who did not receive diplomas for some reason (for example, **[***52]** because their school records were destroyed in a natural disaster), would still in fact possess the same level of education as persons with high school diplomas. As we have observed earlier, on the other hand, students who did not successfully complete high school, but who were awarded their diplomas anyway, would not, in fact, have acquired a high school education.

In short, we see a distinction, where the trial court did not, between an eqaul protection claim based on the well-established fundamental right to an *education*, and an eqaul protection claim based on the asserted fundamental right to a *high school diploma.* In our view, the cases holding that education is a fundamental right for eqaul protection purposes under California law do not necessarily support the entirely different proposition that there is a fundamental right to be awarded a high school diploma--a proposition for which plaintiffs have not cited any persuasive authority. 17

17 Plaintiffs and amici curiae have cited some cases holding that for due process purposes, there is a property interest in the right to receive a high school diploma upon completing all stated requirements. (E.g., *GI Forum Image de Tejas v. Texas Educ. Agency*, *supra*, 87 F.Supp.2d 667; *Brookhart v. Illinois State Bd. of Educ.*, *supra*, 697 F.2d 179; *Debra P. v. Turlington*, *supra*, 644 F.2d 397; *Board of Educ. v. Ambach* (N.Y.Sup.Ct. 1981) 107 Misc. 2d 830 [436 N.Y.S.2d 564], revd. in part and mod. *sub nom. MTR Board of Educ. v. Amback* (N.Y.App.Div.

1982) 90 A.D.2d 227 [458 N.Y.S.2d 680]; cf. *Anderson v. Banks* (S.D.Ga. 1981) 520 F.Supp. 472, 505.) As we have noted, the trial court here rejected plaintiffs' claim that their due process rights had been violated in connection with the adoption of the CAHSEE diploma requirement, and we concur.

Some amici curiae have also cited *Anderson v. Banks*, *supra*, 520 F.Supp. 472, in support of plaintiffs' eqaul protection claims. That case, however, involved a school system that had long been racially segregated by law, and an exit exam requirement that was imposed on shortnotice, along with a discriminatory tracking system, shortly after the schools were forced to integrate. Thus, the relief granted in that case, to the extent it rested on an eqaul protection theory, was based not on the alleged denial of a fundamental right, but on racial discrimination.

(*Id.* at pp. 498-503, 512.) Plaintiffs do not contend that the present case involves any history, much less recent history, of de jure segregation. Therefore, *Anderson*, like the due process cases cited, is clearly inapposite.

[*53] [*1479]**

For the foregoing reason, we disagree with the trial court's conclusion that directing **[**168]** defendants to give plaintiffs diplomas was an appropriate remedy to further the equality in education that plaintiffs seek by their lawsuit. Instead, as we have already observed, doing so would have ensured that the state would never live up to its pedagogical responsibility to these students, and would inadvertently have perpetuated a bitter hoax: that the diplomas plaintiffs would have obtained under the court's May 12 order somehow would have equipped them to compete successfully in life, even though they had not actually acquired the basic academic skills measured by the CAHSEE.
EDUCATIONAL AGENCY PREVAILED

3. *The Scope of the Trial Court's Injunction Is Overbroad*

Even were we to assume the trial court had both the authority and the justification to grant the requested relief, the scope of the injunction was still impermissibly overbroad. Indeed, the trial court acknowledged as much in the May 12 order when it noted that plaintiffs' showing did not allow the court to identify which plaintiff class members could trace their failure to pass the CAHSEE either to inadequate school resources or to lack of access **[***54]** to the supplemental

funding, and commented that "no suggestion has been made of a workable mechanism for doing so." Thus, the court conceded that issuing the injunctive relief plaintiffs were requesting might result in a windfall for students whose failure to pass the CAHSEE did not result from any of the adverse conditions that constituted the factual basis for plaintiffs' claims. The court deemed this result preferable, however, to denying diplomas to students who had suffered from disparities in their opportunities to learn.

In light of the strictures on judicial power emphasized in *Butt*, we believe the trial court erred in this regard. As we have pointed out earlier, the Supreme Court in *Butt* has cautioned courts that in fashioning injunctive relief to remedy unequal educational

opportunities on an interim basis, "[a] **[*1480]** court should always strive for the least disruptive remedy adequate to its legitimate task." (*Butt, supra*, 4 Cal.4th at p. 696.) This the trial court plainly did not do. The scope of the relief granted affected every high school in the state regardless of circumstances, and would have required the granting of diplomas to 47,000 **[***55]** high school students regardless of how many of that number were actually educationally disadvantaged.

Plaintiffs seek to defend the trial court's statewide injunction by arguing that when a test is found to be discriminatory, a court may prohibit reliance on it even as to persons not affected by the underlying discrimination. The federal cases on which plaintiffs rely, however, are all distinguishable.

In *Gaston County v. United States* (1969) 395 U.S. 285 [23 L. Ed. 2d 309, 89 S. Ct. 1720], the United States Supreme Court upheld a decision under the Voting Rights Act of 1965 (42 U.S.C. § 1973b) precluding the reinstatement of a literacy test as a condition of the right to register to vote in a jurisdiction where segregated schools had resulted in a low literacy rate among black voters. In *Griggs v. Duke Power Co.* (1971) 401 U.S. 424 [28 L. Ed. 2d 158, 91 S. Ct. 849], the Supreme Court held that under title VII of the Civil Rights Act of 1964, an employer could not base hiring and promotion decisions on a high school completion requirement and an intelligence test that had a disparate impact on black job applicants and workers, and that had not been shown **[***56]** to be job **[**169]** related. 18 In *Castaneda v.Pickard* (5th Cir. 1981) 648 F.2d 989, 1013-1015, the Fifth Circuit held that if the plaintiffs could prove that a Texas school district's ability grouping (tracking) scheme was a vestige of past unlawful discrimination against Mexican-American students, it would be improper for the school district to use tests administered in English to determine Spanish-speaking students' placement into ability groups in subjects other than English.

18 Plaintiffs' reliance on *Griggs v. Duke Power Co.* is somewhat ironic, given that opinion's emphasis on the importance of focusing on workers' actual skills rather than on whether they have a high school diploma. As the *Griggs* court put it, "Diplomas ... are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality." (*Griggs v. Duke Power Co., supra*, 401 U.S. at p. 433.)

In all of these cases, precluding use of the challenged test afforded relief to the members of the affected **[***57]** class in a very direct way, by giving them access to the specific right they alleged they had been denied: voter registration, a job or promotion, or an appropriate educational placement. Thus, enjoining use of the test was an appropriate remedy for the cause of action alleged. In the present case, by contrast, the right that plaintiffs allege they have been denied is 2006 Cal. App. LEXIS 1236, ***53; 2006 Cal. Daily Op. Service 7460 the right to equal and adequate educational resources. Enjoining the CAHSEE diploma requirement does nothing to enhance plaintiffs' access to that right. If anything, it undercuts it by eliminating the need for defendants to support plaintiffs in learning the skills tested on the CAHSEE. **[*1481]**

Plaintiffs virtually concede the overbreadth of the trial court's injunction in their argument that some students in their putative plaintiff class "actually know the material,

but do not pass the exit exam due to test anxiety." But plaintiffs have not argued, much less established, that there is any *constitutional* violation involved in depriving a student of a diploma when he or she has in fact received the educational resources required to pass the CAHSEE, but has not been able to do so because of "test anxiety."

Plaintiffs alternatively **[***58]** complain that defendants have not suggested any other remedy. Unlike the trial court in *Butt*, however, the trial court here did not frame its May 12 order in a way that permitted defendants to do so. In any event, the burden was on plaintiffs, as the parties seeking injunctive relief, to show all elements necessary to support issuance of a preliminary injunction. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) 9:632.1, p. 9(II)-30 (rev. # 1, 2005); cf. *Anderson v. Souza* (1952) 38 Cal.2d 825, 840-845 [243 P.2d 497] [where plaintiffs sought injunction entirely prohibiting use of private airfield for aviation, burden was on plaintiffs to prove that airfield could not be operated at all without constituting a nuisance].) As plaintiffs' counsel acknowledged at oral argument, it was plaintiffs' burden, not defendants', to formulate the nature of the remedy they were seeking. Having failed to offer the trial court any alternative to a statewide, across-the-board ban on enforcement of the CAHSEE diploma requirement, plaintiffs cannot be heard to complain on appeal that defendants somehow had the legal obligation to suggest a different form **[***59]** of injunction.

Moreover, the urgency with which the trial court was forced to decide plaintiffs' motion may have been, to some extent,of plaintiffs' own making--a fact that the trial court, as a court of equity, should have taken into account in determining what weight to give plaintiffs' claim of imminent irreparable injury. (*Lusk v. Krejci* (1960) **[**170]** 187 Cal. App. 2d 553, 556 [9 Cal. Rptr. 703] ["Long delays in assertion of rights can be the basis of denial of mandatory injunctive relief."]; *Fay Securities Co. v. Mortgage G. Co.* (1940) 37 Cal. App. 2d 637, 642 [100 P.2d 344] [same]; *Dolske v.Gormley* (1962) 58 Cal.2d 513, 520-521 [25 Cal. Rptr. 270, 375 P.2d 174] [delay in seeking injunction against encroachments is factor to be considered in determining whether relief is warranted]; but cf. *Youngblood v. Wilcox* (1989) 207 Cal. App. 3d 1368, 1376 [255 Cal. Rptr. 527] [trial court did not abuse discretion in finding preliminary injunction not barred by laches, where plaintiff delayed bringing suit for eight months after expulsion from country club in hope of resolving dispute informally].) Plaintiffs, and their counsel, were well aware by the **[***60]** beginning of the 2005-2006 school year that thousands of **[*1482]** members of the class of 2006 were at risk of being denied their diplomas because of the low pass rate on the CAHSEE experienced by various disadvantaged groups. 19 Had this litigation been initiated at that time, rather than in February 2006--only three or four months before the end of the school year--there would have been more time to try to devise a way to provide meaningful remediation to the plaintiff class members *before* their scheduled graduation dates.

19 On October 11, 2005, plaintiffs' counsel wrote to the Governor, the president of defendant State Board of Education, and defendant Superintendent of Public Instruction, averring that "nearly 100,000 seniors have not passed one or both" portions of the CAHSEE, and that "the exam is having a disproportionate impact on Latinos, African Americans, and limited English proficient students." The letter was referenced in

plaintiffs' complaint in this action, and a copy was attached as an exhibit. The purpose of the letter was to urge defendants to adopt alternatives to the CAHSEE, as permitted by section 60856. At oral argument in this court, plaintiffs' counsel explained the timing of the lawsuit by noting that it was not until early 2006 that defendants finally decided that no alternatives to the CAHSEE would be offered. Plaintiffs' counsel's efforts to resolve the issue through administrative action before filing suit are commendable, but the fact remains that the timing of the lawsuit made the trial court's task much more difficult.

[*61] IV.**

CONCLUSION

There is no controversy about the fundamental issues of public policy implicated in the case now before us. The parties and amici curiae unanimously agree--as do we--that all California children should have equal access to a public education system that will teach them the skills they need to succeed as productive members of modern society. Nor is there any genuine disagreement that California's public education system has fallen short of achieving that goal in recent decades, as the Legislature 20 and the Governor 21 have both recognized.

20 In a 2003 report entitled "The California Master Plan for Education," a joint legislative committee acknowledged that "The sobering reality of California's education system is that too few schools can now provide the conditions in which the State can fairly ask students to learn to the highest standards, let alone prepare themselves to meet their future learning needs."

21 During a press conference regarding the *Williams* settlement, Governor Schwarzenegger stated that it had been " 'a huge mistake' " and " 'outrageous' " for the state to contest the lawsuit, and that in his opinion, it was preferable for the state to " 'come clean' " and admit that " 'we have not provided equal education for many children.'

[*62]** In 1999, the Legislature decided that one way to address the inadequacy of California's education system was to create the CAHSEE, and to require students to pass it in order to receive their high school diplomas, while providing remedial education **[**171]** for those students not yet having the skills to pass. The Legislature also conferred discretion on the executive branch to **[*1483]** determine that the CAHSEE diploma requirement would apply to the high school class of 2006, and that no alternatives would be adopted. Those actions are entitled to substantial deference by the judicial branch, which is constitutionally obligated to refrain from usurping the role of the other two branches in formulating and implementing public policy. (See *Butt*, *supra*, 4 Cal.4th at pp. 694-703.)

(8) We have concluded that the trial court erred in granting a statewide preliminary injunction enjoining defendants from enforcing the statute mandating the CAHSEE diploma requirement, because in so doing, the trial court gave undue weight to plaintiffs' claim of irreparable injury and insufficient weight to defendants' countervailing concerns, and because the relief was legally impermissible, misdirected **[***63]** in character, and overbroad in scope. 22 While we reverse the trial court's order, our action should not be

viewed as reflecting indifference to the plight of those students in the class of 2006 whose diplomas were withheld solely because they had not passed the CAHSEE. We have been pleased to note that several of the original named plaintiffs have succeeded in passing the CAHSEE during the pendency of this litigation, and we encourage the remaining plaintiff class members to endeavor to do the same.

22 In light of this disposition, we deem it unnecessary to address defendants' other grounds for challenging the propriety of the May 12 order, including their assertion that the named plaintiffs are not proper class representatives for the putative plaintiff class.

We are also aware that the record in this case raises considerable doubt as to whether the improvements in California schools required by the *Williams* settlement will be sufficient, at least in the immediate future, to give all students currently **[***64]** enrolled in high school an adequate opportunity to prepare properly for the CAHSEE. If not, a practical solution should be found, and quickly, in order to avoid a repeat of this litigation next year and thereafter, with the attendant confusion and hardship involved for all concerned. With this in mind, we urge the parties, with the active assistance of the trial court, to step outside their "fog of war" and cooperatively find the pathways necessary to provide equal and adequate access to meaningful remedial assistance to students in the class of 2007 and beyond who enter their senior year of high school with the CAHSEE hurdle still before them. In order for that process to result in any practical benefit to the remaining plaintiff class members, who had hoped to graduate in 2006, it obviously must begin immediately.

[*1484] V.

DISPOSITION

Let a peremptory writ of mandate issue compelling respondent Alameda County Superior Court to vacate its May 12 order, insofar as that order granted a preliminary injunction. In the interests of justice, this decision shall be final immediately as to this court. (Cal. Rules of Court, rule 24(b)(3).)

Reardon, **[***65]** J., and Sepulveda, J., concurred.

CALIFORNIANS FOR JUSTICE EDUCATION FUND, Plaintiff and Appellant, v. STATE BOARD OF EDUCATION et al., Defendants and Respondents.

A114190

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

2006 Cal. App. Unpub. LEXIS 8832

September 29, 2006, Filed

PRIOR HISTORY: Alameda County Super. Ct. No. JCCP 4468.

CORE TERMS: diploma, high school, deadline, recommendation, ambiguity, exit,writ of mandate, statutory construction, ministerial, mandamus, time limit, proficiency, probation, pupils, disabilities, peremptory writ, time limitation, statute requiring, statutory scheme, judicial notice, implemented, espondents,mootness, omission, absurd, defer, exam, high school, final report, oral argument

JUDGES: Ruvolo, P.J.; Reardon, J., Sepulveda, J. concurred.

OPINION BY: Ruvolo

OPINION

I. Introduction

Appellant Californians for Justice Education Fund (CJEF) 1 appeals from the denial of its petition for writ of mandate and motion for a peremptory writ. CJEF contends that respondents were required by state law to complete their study of alternatives to the California high school exit exam (CAHSEE), pursuant to Education Code section 60856, 2 in sufficient time to enable the Legislature to consider that study prior to the initial enforcement of the statute ALTERNATE ASSESSMENT precluding the issuance of high school diplomas to students failing either portion of the CAHSEE. (§ 60851.) We disagree, and affirm the trial court judgment.

II. Facts and Procedural Background

In 1999, the California Legislature adopted legislation requiring that all public high school students in California pass an exit examination (the CAHSEE) in order to receive a high school diploma (the CAHSEE diploma requirement). (Ed. Code, § 60851; see Stats. 1999-2000, 1st Ex. Sess., ch. 1, § 5.) The CAHSEE diploma requirement was to be implemented starting with the graduating class of 2004. Later, as authorized by statute, respondent State Board of Education (the Board) decided that the CAHSEE diploma requirement would be applied for the first time to the graduating class of 2006. (§ 60859.)

When the CAHSEE statutory scheme was adopted, the Legislature also enacted section 60856, which reads as follows: "After adoption and the initial administrations of the high school exit examination[,] the [Board], in consultation with the Superintendent of Public Instruction [SPI], shall study the appropriateness of other criteria by which high school [*3] pupils who are regarded as highly proficient but unable to pass the high school exit examination may demonstrate their competency and receive a high school diploma. SOLE CRITERION This [sic] criteria shall include, but is [sic] not limited to, an exemplary academic record as evidenced by transcripts and alternative tests of equal rigor in the academic areas covered by the high school exit examination. If the [Board] determines that other criteria are appropriate and do not undermine the intent of this chapter that all high school graduates demonstrate satisfactory academic proficiency, the board shall forward its recommendations to the Legislature for enactment." We will refer to the study required by this statute as a section 60856 study, or study of alternatives.

The CAHSEE was administered for the first time in the spring of 2001, at which members of the graduating class of 2004, who were then in the ninth grade, were given two opportunities to take it, but were not required to do so. It was administered two more times in the spring of 2002, and then six more times during the 2002-2003 school year. MULTIPLE OPPORTUNITIES REMEDIATION

In May 2003, the Board's CAHSEE consultant (the Human Resources Research Organization, [*4] or HumRRO) released a report setting forth the results ofits legislatively mandated 3 study of the validity and appropriateness of the CAHSEE. The HumRRO report concluded that the CAHSEE satisfied all professional standards for implementation as a high school graduation requirement, but also expressed some concerns about the fairness of imposing the CAHSEE diploma requirement on students who could legitimately claim that the public school system had not adequately prepared them to pass the exam. Based on these concerns, HumRRO identified a number of concerns for the Board to consider in deciding whether or not to defer implementation of the CAHSEE diploma requirement. The HumRRO report also briefly discussed several other measures that the Board could adopt, including: lowering the passing standards; reducing the scope of the subject matter covered by the test; allowing high scores on one section to compensate for non-passing scores on another section; permitting waivers based on high grades in relevant courses; or allowing students to present portfolios of their work.

[*5] At its meetings in May and July 2003, the Board considered and discussed the recommendations and suggestions discussed in the HumRRO report. Ultimately, at its

July 2003 meeting, the Board decided to exercise the discretion conferred on it by the Legislature (§ 60859) to defer implementation of the CAHSEE diploma requirement until the scheduled graduation of the class of 2006. The Board also modified the "blueprint" for the CAHSEE in a number of ways, which included reducing its scope by eliminating one of the essay questions from the English language skills portion. The Board did not, however, adopt any of the other measures, such as a compensatory scoring system, that were described in the HumRRO report.

In October 2003, the Legislature directed the SPI and the Board to commission a study regarding alternatives to the CAHSEE specifically for "pupils with disabilities."(§ 60852.5, added by Stats. 2003, ch. 803, § 1.) In compliance with this mandate, respondents retained an independent consultant, WestEd, which released its report (the WestEd report) on April 28, 2005. During the interval between July 2003 and April 2005, respondents did not conduct or commission any further [*6] study of alternatives to the CAHSEE other than that conducted by WestEd.

The WestEd report noted on its face that its assignment precluded it from "making recommendations for assessment policies directly pertaining to . . .populations" other than pupils with disabilities. Nonetheless, WestEd's nationwide review of exit exam alternatives analyzed and discussed performance assessment formats that had been applied in other states to pupils without disabilities, and the WestEd report noted that "[m]any of our recommendations are, in fact, applicable to other student populations" other than students with disabilities.

The Board considered and discussed the WestEd report at its May 2005 meeting, but took no action on it. At the same meeting, the Board also took note that legislation (AB 1531) had been introduced that would have authorized local school district superintendents to approve alternative performance assessments which students in their districts could substitute for one or both parts of the CAHSEE. The California Department of Education (CDE) recommended to the Board that it take an official position opposing AB 1531, and the Board agreed to do so. AB 1531 passed in both houses [*7] of the Legislature, but was vetoed by the Governor on October 7, 2005.

In August 2005, several CDE staff members met to consider various alternative assessment methods discussed in the WestEd report and in other sources, as those alternatives might apply to non-disabled as well as disabled students. These discussions did not, however, result in any recommendation to the SPI and the Board, and thus did not prompt any consideration of CAHSEE alternatives by respondents themselves, as opposed to their staff.

In September 2005, HumRRO issued another in an ongoing series of reports regarding its study of the CAHSEE's validity and impact. This report mentioned the possibility of alternatives to the CAHSEE, such as senior-year portfolios, but ultimately recommended that the CAHSEE diploma requirement be implemented as scheduled, starting with the class of 2006.

In October and November 2005, the law firm that represents CJEF in this litigation, as well as other attorneys representing the plaintiff class in litigation seeking to improve the

quality of California public schools (the Williams litigation), each wrote separately to respondents, asserting that they had violated section 60856 [*8] by failing to conduct a study of alternatives, and urging them to do so. On November 30, 2005, the SPI issued a "Letter to All Interested Persons" which invited the public to participate in an open meeting on alternatives to the CAHSEE, to be held on December 15, 2005.

Written comments submitted by two education scholars in connection with the meeting on December 15, 2005, urged the SPI to consider adopting alternative assessment measures, particularly but not exclusively for English learners and pupils with disabilities, including alternative tests, coursework that reflected state learning standards, and local or statewide performance assessments. The comments noted, however, that it would be difficult to implement any of those alternatives in time to benefit students scheduled to graduate from high school

in 2006. Some of the speakers at the meeting supported the CAHSEE and opposed the adoption of alternatives.

On March 2, 2006, a deputy superintendent in the Department of Education sent a memo to the members of respondent Board in anticipation of their meeting to be held on March 8, 2006. The memo summarized the proceedings at the December 15, 2005 meeting, and noted that many [*9] of the members of the public who had appeared at the meeting advocating the adoption of alternatives "did not provide sufficient evidence that their proposed options . . . were of equivalent rigor to the CAHSEE." The report indicated that "[a]fter reviewing all the options available," respondent SPI had "concluded that there is no practical alternative available which would ensure a student awarded a high school diploma has met the minimal requirements contained in the CAHSEE."

The March 2, 2006 memo attached a letter from respondent SPI, dated January 6,2006, setting forth the basis for his conclusion in more detail, and specifying reasons why he had rejected each suggested alternative. With respect to the possibility of a state-developed alternative test, the SPI commented that, although this alternative would address his concerns regarding statewide consistency, "it would be very costly to develop," would still involve difficulties in guaranteeing equivalence "given the need for local scoring," and in any event "could not be implemented for the class of 2006 as any reasonable implementation would be two to three years out." The SPI emphasized that the absence of alternatives [*10] to the CAHSEE "does not mean, as some have said, those students who have been unable to pass the exam will be denied a diploma indefinitely. It simply means that their basic education is not complete and they must continue on through our [public school] system, adult education, or community colleges to obtain the necessary skills to warrant receipt of a diploma."

At its meeting on March 8, 2006, respondent Board considered an agenda item entitled "California High School Exit Examination: Examination of Alternatives Under California Education Code Section 60856." (Italics omitted.) The Board voted unanimously, with one abstention, in support of a resolution finding that "at this time, . . . there are no other criteria [i.e., alternatives to the CAHSEE] that are appropriate and that do not undermine the Legislature's intent that all high school graduates demonstrate satisfactory academic

proficiency, as set forth in [section] 60856," and that the Board therefore would not recommend that the Legislature enact any alternatives to the CAHSEE.

On April 17, 2006, CJEF filed a verified petition for writ of mandate in the Alameda County Superior Court, together [*11] with a motion for issuance of a peremptory writ. The resulting proceeding was coordinated into Judicial Council Coordinated Proceeding No. 4468, along with two other pending actions involving the CAHSEE, Valenzuela v. O'Connell (Super. Ct. Alameda County, No. CPF06506050) (the Valenzuela litigation 4 and Kidd v. California Department of Education (Super. Ct. Alameda County, No. 2002049636), and the coordinated proceeding was assigned to Judge Robert Freedman.

[*12] On May 16, 2006, following briefing and oral argument on CJEF's motion for a peremptory writ, Judge Freedman issued an order denying the motion and dismissing the writ petition. In his order, Judge Freedman rejected respondents' contention that their consideration of the WestEd report amounted to a section 60856 study, and agreed with CJEF that "the evidentiary record shows that [r]espondents did not engage in a 'study' of alternatives until very late in the process." Thus, Judge Freedman understood "the pivotal issue" in the case to be "whether a showing of 'late' compliance with the statutory requirement is enough to warrant the relief requested," including a temporary delay of the CAHSEE diploma requirement.

Judge Freedman went on to note that section 60856 does not include any language expressly requiring the study of alternatives to be completed within a specified . Rejecting CJEF's "creative attempt to characterize the statute as inclusive of a mandatory timing provision," he concluded that "without [that]key element[,] [CJEF's] argument fails." Accordingly, Judge Freedman held that CJEF had not established that respondents had failed to discharge a mandatory duty [*13] to complete a section 60856 study within any specific time limit, and therefore denied their petition. This timely appeal followed. 5

III. Discussion

As the trial court noted, and as CJEF's counsel acknowledged at oral argument in this court, CJEF "does not argue that [r]espondents did not conduct a [section 60856] study at all, but rather that [they] did not do so in a timely manner." Thus, the issues in this case are whether section 60856 mandated that respondents complete the required study within [*14] any specific time period, and if so, what remedy would be appropriate for their failure to comply with that requirement. As the trial court succinctly summarized it, CJEF's "position is that the delay in conducting the [section 60856] study constitutes a violation of [r]espondents' ministerial duty, and that the only way to cure the continuing effect of this violation is to delay the 'diploma denial' [i.e., the CAHSEE diploma requirement] until the Legislature has had the opportunity toconsider, enact, and implement any alternatives raised in a study by [r]espondents."

A. Mootness

As a threshold issue, respondents argue that this case is moot, because the section 60856 study has now occurred, and respondents are therefore no longer under a duty to perform it. 6 This case certainly is not moot in any traditional sense. Many of the students in the

class of 2006 who were denied their diplomas because they did not pass the CAHSEE still do not have those diplomas. 7 Thus, if we were to find for CJEF on the merits of its substantive claim, and if we determined that granting diplomas to those students would be an appropriate remedy, we could hardly affirm the trial court's order [*15] denying relief on the ground of mootness. [*16] In short, respondents' mootness argument cannot be separated from their contention that the remedy sought by CJEF - delay of the CAHSEE diploma requirement - is inappropriate. In our view, therefore, this issue is better addressed as part of our review of the merits, rather than as a threshold issue of mootness.

B. Standard of Review

CJEF's sole basis for seeking relief in this proceeding is a petition for writ of mandate under Code of Civil Procedure section 1085. "A traditional writ of mandate brought under Code of Civil Procedure section 1085 lies 'to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station.' Under this section, mandate will lie to compel performance of a clear, present, and usually ministerial duty in cases where a petitioner has a clear, present and beneficial right to performance of that duty. [Citations.] Mandamus has long been recognized as the appropriate means by which to challenge a government official's refusal to implement a duly enacted legislative measure. [Citation.]" (Morris v. Harper (2001) 94 Cal.App.4th 52, 58.) [*17]

However, "mandamus will not lie to control an exercise of discretion, i.e., tocompel an official to exercise discretion in a particular manner. [Citation.] Generally, mandamus may only be employed to compel the performance of a duty that is purely ministerial in character. [Citation.] [P] A ministerial act has been described as 'an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his [or her] own judgment or opinion concerning such act's propriety or impropriety, when a given set of facts exists.' [Citation.] On the other hand, discretion is the power conferred on public functionaries to act officially according to the dictates of their own judgment. [Citations.] [P] However, . . . [a] refusal to exercise discretion is itself an abuse of discretion. Accordingly, although mandamus is not available to compel the exercise of the discretion in a particular manner or to reach a particular result, it does lie to command the exercise of discretion - to compel some action upon the subject involved under a proper interpretation of the applicable law. [Citations.] 'Where a statute [*18] requires an officer to do a prescribed act upon a prescribed contingency, his functions are ministerial. Where a statute or ordinance clearly defines the specific duties or course of conduct a governing body must take, that course of conduct becomes mandatory and eliminates any element of discretion. [Citation.]' [Citation.]" (Morris v. Harper, supra, 94 Cal.App.4th at pp. 62-63.) " ' "In reviewing the trial court's ruling on a writ of mandate [under Code of Civil Procedure section 1085], the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. [Citation.] However, the appellate court may make its own determination when the case involves resolution of questions of law where the facts are undisputed. [Citation.]" [Citation.]' [Citations.]" (Morris v. Harper, supra, 94 Cal.App.4th at pp. 58-59.)

In the present case, the underlying historical facts are not in dispute. 8 Rather, the principal issue is whether section 60856 imposed a duty on respondents to complete a study of alternatives to the CAHSEE, [*19] and to make an appropriate recommendation to the Legislature, in time for the Legislature to act on that recommendation prior to the implementation of the CAHSEE diploma requirement. This is essentially a question of statutory interpretation, and "[i]t is well settled that the interpretation and application of a statutory scheme presents a pure question of law and is subject to independent review by the courts of appeal. [Citation.] Under this standard, we undertake our own interpretation of the determinative statute and assess any claims raised by the parties completely anew." (Robertson v. Health Net of California, Inc. (2005) 132 Cal.App.4th 1419, 1425.)

[*20] C. Statutory Interpretation of Section 60856

Section 60856 provides that respondents are to begin their study of alternatives after the initial administrations of the CAHSEE, but does not include any language explicitly setting a time limit within which respondents must complete that study. This undeniable fact poses a formidable obstacle to CJEF's argument that the statute should be construed to include an implied time limit within which the required study of alternatives was to be completed. First, the primary rule of statutory construction is that "[i]f the words of a statute are reasonably free of ambiguity and uncertainty, we look no further than those words to determine the meaning of that language. [Citation.]" (Lazar v. Hertz Corp. (1999) 69 Cal.App.4th 1494, 1503; see also Halbert's Lumber, Inc. v. Lucky Stores, Inc. (1992) 6 Cal.App.4th 1233, 1238 [key to statutory construction is applying rules in proper sequence, starting with examination of actual language of statute].) We do not perceive any ambiguity in the language of section 60856. In our view the lack of an explicit time limitation is not an ambiguity, but rather a perfectly [*21] clear indication that respondents' duty to conduct a study of alternatives was (and remains) unconstrained by alegislatively imposed deadline.

CJEF contends, however, that despite the absence of an explicit deadline in the statute itself, examining the statute in the context of the overall statutory scheme and the circumstances that led to its enactment reveals a latent ambiguity which the courts must address. (See generally Whaley v. Sony Computer Entertainment America, Inc. (2004) 121 Cal.App.4th 479, 487 [language appearing unambiguous on its face may have latent ambiguity as shown by extrinsic evidence of a necessity for interpretation or choice between possible meanings].) In this regard, CJEF argues that in ordering respondents to conduct the study ofalternatives "[a]fter adoption and the initial administrations of the [CAHSEE]" (§ 60856, italics added), the Legislature intended that while respondents should defer commencing the study until after the CAHSEE had been given once or twice, once that milestone had been passed they were to begin the study at the earliest possible time. In other words, CJEF argues that a latent ambiguity [*22] arises from the statute's use of the word "after," because it could mean either "at any time after" or "immediately after."

We are not convinced that this chimeric ambiguity actually exists, but even if we were, we would still be required to examine CJEF's proposed reading of the in the light of other applicable principles of statutory construction. (Whaley v. Sony Computer Entertainment

America, Inc., supra, 121 Cal.App.4th at p. 487.) In doing so, we are similarly convinced that no deadline for the studyof alternatives was intended by the Legislature when it enacted section 60856.

One of these additional statutory construction tenets is that " 'where a statute, with reference to one subject contains a given provision, the omission such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference the different statutes.' [Citation.]" (In re Jennings (2004) 34 Cal.4th 254, 273 (Jennings).) As respondents point out, the statutory scheme encompassing implementation of the CAHSEE includes four statutes requiring respondents to undertake further [*23] study of issues pertaining to the proficiency testing of California high school students. Each of the other three statutes requiring respondents to perform studies in connection with the CAHSEE contains an explicit time limit. (§§ 60852.5 [final report on study of alternatives for disabled students to be completed by May 1, 2005]; 60855, subd. (d) [initial report on multiyear independent evaluation of CAHSEE to be submitted on July 1, 2000, with reports to follow every two years beginning February 1, 2002]; 60857, subd. (a) [final report on study of CAHSEE diploma requirement due by May 1, 2003].) Only the study of alternatives statute, section 60856, does not include a deadline. Thus, to paraphrase the Supreme Court's reasoning in Jennings, "[b]ecause the wording of [the other CAHSEE study] statutes shows the Legislature, if it wishes, knows how to express its intent that [a study be completed by a given deadline], the absence of such a requirement in section [60856] indicates it intended no such requirement. [Citation.]" (Jennings, supra,34 Cal.4th at p. 273.)

Recognizing this impediment to its proposed construction of section 60856, CJEF [*24] attempts to distinguish the other CAHSEE study statutes by pointing out that they relate to studies to be performed by independent consultants, whereas the study of alternatives was to be undertaken by respondents themselves. We do not agree that this distinction justifies that we read into section 60856 a time deadline that the Legislature apparently deliberately omitted. Indeed, to do sowould require us to violate other well-recognized tenets of statutoryconstruction.

Foremost among these is that, as the Supreme Court also noted in Jennings, when construing a statute, courts "must be careful not to add requirements to those already supplied by the Legislature. [Citation.]" (Jennings, supra, 34 Cal.4th at p. 265; see also Code Civ. Proc., § 1858 ["In the construction of a statute . . ., the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted . . .."].) Thus, " '[w]here the words of a statute are clear, we may not add to oralter them to accomplish a purpose that does not appear on the face of the statute or from its legislative [*25] history.' [Citation.]" (Jennings, supra, 34 Cal.4th at p. 265.) In other words, " '[w]e may not, under the guise ofconstruction, rewrite the law or give the words an effect different from the plain and direct import of the terms used.' [Citations.] More specifically, we may not 'insert qualifying provisions not included in the statute.' [Citation.]" (Whaley v. Sony Computer Entertainment America, Inc., supra, 121 Cal.App.4th at p. 486.) Our own division has put it thusly: "We may not speculate that the Legislature meant something other than what it said, nor may we rewrite a statute to make express an intention that did not find itself expressed in the language of that

provision. [Citation.]" (Lazar v. Hertz Corporation, supra, 69 Cal.App.4th at p. 1503; see also Comite de Padres de Familia v. Honig (1987) 192 Cal. App. 3d 528, 533, 237 Cal. Rptr. 517 [rejecting contention that a statute requiring state agencies to "assist" local school districts in developing programs for affirmative action in employment should be construed to include a duty to "monitor" or "enforce" compliance with such programs]. [*26])

%In the present case, CJEF acknowledges that there is no legislative history supporting the view that the Legislature intended to impose a time limitation on the study of alternatives, but simply failed to express that intent in the statute's language. Instead, CJEF argues that such an intent should be inferred because imposing a deadline is consistent with the purpose of the statute, and is necessary to accomplish that purpose. Our Supreme Court recently rejected a similar argument in People v. Guzman (2005) 35 Cal.4th 577 (Guzman).

In Guzman, the defendant committed a nonviolent drug possession offense while on probation following his conviction for violent offenses. The defendant argued that he was entitled to probation under a statute mandating probation and diversion for nonviolent drug crimes. He conceded that the statute's language did not extend its coverage to persons on probation for violent offenses, but argued that the omission was the product of a drafting error and that to construe the statute to exclude him would be inconsistent with the statute's purpose and would lead to an absurd result. (Guzman, supra, 35 Cal.4th at pp.

584-586.) [*27] The Supreme Court rejected this argument, noting that " 'insert[ing]' additional language into a statute 'violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes.[Citations.] . . . .' [Citation.]" (Id. at p. 587, first three brackets in original.) In the absence of " 'firm evidence' " that the omission of persons on probation for violent offenses was an oversight inconsistent with the drafters' intent (id. at p. 588), the court declined to adopt a proposed revision of the statute that was a major expansion of its scope rather than a " 'relatively minor rewriting of' the [statute]. [Citation.]" (Id. at p. 587.)

For the same reasons articulated in Guzman, supra, 35 Cal.4th at pp. 587-588, we are not persuaded that a time limitation on respondents' duty to study alternatives to the CAHSEE must be inferred where that intention is neither evident on the face of section 60856 nor supported by firm evidence that its omission was a mere oversight on the part of the Legislature.

Nor are we persuaded by CJEF's argument that declining to impose such a time limitation [*28] would lead to an absurd result. It might have been preferable for respondents to complete their study of alternatives in time for the Legislature to act on their recommendations prior to the effective date of the CAHSEE diploma requirement, but not necessarily so. Certainly, respondents' failure to do so did not deprive the Legislature of the power to enact such alternatives if it chose to do so, 9 or to defer the effective date of the CAHSEE diploma requirement until respondents had complied with their statutory duty. Also, the efficacy of CAHSEE as the preeminent means to evaluate student

proficiency in the tested materials is evolutional. The value of that form of testing, and the prospect that other equally reliable evaluative protocols can be developed, will no doubt be better tested in the crucible of actual experience with the CAHSEE over time. Thus, evaluation methodologies rejected today may yet, in time, prove to be efficacious. Thus, an argument can easily be made that imposing a deadline would have hampered the educational community's ability eventually to develop viable alternative means to test student proficiency. For this reason, contrary to CJEF's contention, imposition [*29] of a time limit on respondents' duty to comply with section 60856 is not necessary "to avoid an absurd result." (Halbert's Lumber, Inc. v. Lucky Stores, Inc., supra, 6 Cal.App.4th at p. 1239.) 10

For all of the foregoing reasons, we concur with the trial court's conclusion that section 60856 cannot [*30] properly be interpreted as requiring respondents to complete a study of alternatives within any particular time period after the initial administrations of the CAHSEE. Thus, because the statute did not impose a ministerial duty on respondents to complete the section60856 study within a particular time, mandamus relief is not available based on their delay in fulfilling that requirement. 11

[*31] IV. Disposition

The judgment is affirmed.

Ruvolo, P.J.

We concur:

Reardon, J.

Sepulveda, J.

IBRAHIM MUMID, FADUMO MUSE, FAHMO AHMED, SAFIYA MOHAMED, IFTU JIBRIL, MAYMUNA MUKTAR OSMAN, MISBAH IBRAHIM, AMAL MOHAMED, SHAMSA ALI MOHAMED, YURUB SIYAD, MUNA MOHAMED, AMINA HARUN, and MOHAMUD A. MOHAMED, Plaintiffs, v. ABRAHAM LINCOLN HIGH SCHOOL, THE INSTITUTE FOR NEW AMERICANS, and SPECIAL SCHOOL DISTRICT NO. 1, Defendants, SPECIAL SCHOOL DISTRICT NO. 1, Third-Party Plaintiff, v. METROPOLITAN FEDERATION OF ALTERNATIVE SCHOOLS, INC., Third-Party Defendant.

Case No. 0:05-CV-2176 (PJS/JJG)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

2008 U.S. Dist. LEXIS 54346

July 16, 2008, Decided

July 16, 2008, Filed

SUBSEQUENT HISTORY: Request denied by Mumid v. Abraham Lincoln High Sch., 2008 U.S. Dist. LEXIS 57001 (D. Minn., July 22, 2008)

CORE TERMS: special-education, money damages, educational, summary judgment, restrictive, testing, teacher, foreign-born, nonrestrictive, school districts, equitable remedies, relative clause, transportation, usage, national origin, immigrant, intentional discrimination, reasonable jury, protected class, summary-judgment, discriminatory, discriminated, intentionally, substandard, animus, curriculum, discriminatory intent, compensatory, indirectly, injunctive.

COUNSEL: **[*1]** Daniel R. Shulman, GRAY PLANT MOOTY MOOTY & BENNETT, PA; Robert J. Kolstad; R. Travis Snider, SNIDER LAW FIRM, LTD.; David L. Shulman, LAW

OFFICE OF DAVID SHULMAN, PLLC, for plaintiffs.

Paula Weseman Theisen and Sarah R. Schmitz, MEAGHER & GEER, P.L.L.P., for defendants Abraham Lincoln High School and Institute for New Americans.

Sonya J. Guggemos, Margaret A. Skelton, and Kimberley K. Sobieck, RATWIK, ROSZAK& MALONEY, P.A., for defendant/third-party plaintiff Special School District No.1.

Susan M. Tindal and Jon K. Iverson, IVERSON REUVERS, LLC, for third-partydefendant Metropolitan Federation of Alternative Schools, Inc.

JUDGES: Patrick J. Schiltz, United States District Judge.

OPINION BY: Patrick J. Schiltz

OPINION

ORDER

Plaintiffs are a group of thirteen young men and women who were once students at defendant Abraham Lincoln High School ("Lincoln"). Lincoln, a public alternative high school in Minneapolis, was established to serve foreign-born students with limited English skills and little formal education. When plaintiffs attended Lincoln, it was run by defendant Institute for New Americans ("the Institute") under an arrangement between third-party defendant Metropolitan Federation of Alternative Schools ("MFAS") **[*2]** and defendant/third-party plaintiff Special School District No. 1 ("District 1"), the entity that runs the Minneapolis public schools.

Plaintiffs contend that they were badly educated and discriminated against at Lincoln in violation of two federal laws and one state law: the Equal Educational Opportunity Act of 1974 ("EEOA"), which requires schools and school districts to make efforts to overcome language barriers faced by students, 20 U.S.C. § 1703(f); Title VI of the Civil Rights Act of 1964, which prohibits recipients of federal funding from discriminating on the basis of, among other things, national origin, 42 U.S.C. § 2000d; and the Minnesota Human Rights Act ("MHRA"), which likewise bars national-origin discrimination, Minn. Stat. § 363A.13.

The Institute and District 1 move for summary judgment, as does MFAS. For the reasons that follow, the Court grants the Institute's and District 1's motions. As a result of this ruling, District 1's third-party complaint against MFAS, in which District 1 seeks recovery against MFAS if District 1 is held liable to plaintiffs, is now moot. The Court therefore denies MFAS's motion for summary judgment without addressing its merits.

I. **[*3]** BACKGROUND

The underlying facts are set forth in the Court's March 13, 2006 order on defendants' motions to dismiss [Docket No. 36]. Mumid v. Abraham Lincoln High Sch., Civ. No. 05-2176, 2006 U.S. Dist. LEXIS 9967, 2006 WL 640510 (D. Minn. Mar. 13, 2006). 1 The parties largely agree on the facts, but to the extent that the parties disagree, the Court recounts the facts in the light most favorable to plaintiffs.

Lincoln was established in the late 1990s by the Institute, a nonprofit corporation. Inst. Mem. Supp. Mot. S.J. ("Inst. SJ Mem.") at 6 [Docket No. 136]; Inst. Ex. 46 at 2 Req. 3 [Docket No. 119]. Lincoln itself is not a legal entity; rather, it is essentially a trade name of the Institute, which operates Lincoln. See Inst. SJ Mem. at 6; Giles Aff. P 6 [Docket No. 129]. The Court will therefore sometimes refer to Lincoln and the Institute collectively as "Lincoln."

The Institute is a member of another nonprofit entity, third-party defendant MFAS. Inst. Ex. 46 at 2 Req. 3. MFAS is an umbrella organization whose members operate public alternative **[*4]** schools. MFAS Mem. Supp. Mot. Partial S.J. ("MFAS SJ Mem.") at 3 [Docket No. 112]. From 1997 through 2003, District 1 contracted with the Institute indirectly, through MFAS. During that period, District 1 had an arrangement with MFAS

whereby MFAS's members (such as the Institute) would operate alternative schools (such as Lincoln) on behalf of District 1. Inst. Exs. 24-25. Beginning in mid-2003, District 1 contracted directly with the Institute for the education of students at Lincoln. Inst. Exs. 26-28. 2 Since mid-2007, when Lincoln became a public charter school funded by the State of Minnesota, District 1 has not had any authority, direct or indirect, over Lincoln. Giles Aff. P 7.

Plaintiffs are thirteen students who attended Lincoln between 1999 and 2006. 3 Nine plaintiffs were born in Somalia, and four in Ethiopia. All thirteen plaintiffs fled their native countries and lived for some **[*5]** time in Kenyan refugee camps before immigrating to the United States. Most plaintiffs were in their mid- to late teens when they immigrated, though one (Muna Mohamed) was as young as fourteen and another (Maymuna Muktar Osman) was as old as twenty. At the time of their enrollment at Lincoln, plaintiffs had varying, but generally low-to-nonexistent, levels of formal schooling and familiarity with the English language.

In Minnesota, students cannot graduate from high school unless they accumulate enough credits of course work and pass certain state-mandated tests. When plaintiffs attended Lincoln, the required tests were the Basic Skills Tests ("BSTs") in reading, writing, and mathematics. 4

Two plaintiffs passed the BSTs (Amal Mohamed and Yurub Siyad) after receiving disability-related accommodations from the state; two other plaintiffs (Amina Harun and Mohamud Mohamed) passed the BSTs without receiving any accommodations. All four of these plaintiffs graduated from Lincoln. One more plaintiff (Maymuna Muktar Osman) graduated from Lincoln; it is not clear from the parties' briefing whether she passed the BSTs or (as sometimes happens) was exempted from doing so. The remaining eight plaintiffs did not graduate from Lincoln; seven of these eight failed all portions of the BSTs, while one (Muna Mohamed) passed the mathematics portion of the tests but failed the reading and writing portions. Several of the plaintiffs were allowed to remain enrolled at Lincoln past their twenty-first birthdays, despite the fact that Lincoln received no public funding for students after they turned twenty-one. Mpls. Pub. Sch. Mem. Supp. Mot. S.J. ("Dist. 1 SJ Mem.") at 6, 11-25 [Docket No. 128].

Plaintiffs criticize Lincoln **[*7]** for its poor curriculum, its underqualified teachers, its failure to assess students' progress, its placement of students in a program (so-called Level 9B) that provided little educational benefit and effectively guaranteed that the students would not graduate, its failure to assess whether students needed special-education services, and its failure to provide such services when needed. Pl. Mem. Opp. Defs. Mots. S.J. ("Pl. SJ Opp.)" at 5-18, 21-31 [Docket No. 137]. According to plaintiffs, Lincoln's shortcomings amounted to intentional discrimination against them on the basis of their national origin. Id. at 1 ("The evidence of record in this case establishes that defendants collectively were responsible for the establishment and operation of a substandard high school that essentially warehoused immigrant students until they aged out of the school system without even the rudiments of an adequate education, solely because they were immigrants."). Plaintiffs also argue that because of the school's many

flaws, Lincoln failed to provide them an education designed to overcome language barriers as mandated by the EEOA. Id. EQUAL PROTECTION

With respect to the curriculum, plaintiffs deny that Lincoln had a **[*8]** coherent curriculum of any kind. Id. at 6-7. They further argue that if such a curriculum existed, it was unsound. Id. at 27-28. Specifically, plaintiffs allege that Lincoln's instruction was a form of "English immersion" and that immersion is not an effective approach for students like plaintiffs. Id. For its part, Lincoln counters that it did have an appropriate curriculum, which was based on a "sheltered English" model of instruction. Inst. Reply Mem. Supp. Mot. S.J. ("Inst. Reply") at 2-5 [Docket No. 145]. But plaintiffs' educational expert, Martha Bigelow, supports their contentions that Lincoln's curriculum was both insufficiently developed and poorly suited to Lincoln's student population. Inst. Ex. 21. 5

Plaintiffs also present evidence that teachers and the principal at Lincoln were underqualified because they lacked necessary credentials. Pl. SJ Opp. at 8-9; Inst. Ex. 21 at 16-18. The Institute counters by alleging that plaintiffs looked for licensing data in the wrong place and therefore erroneously concluded that some state-licensed teachers were unlicensed. Inst. Reply at 6-8. Thus there appears to be a dispute of fact over the credentials of Lincoln's teachers and its principal. For summary-judgment purposes, the Court assumes that at least some of the teachers at Lincoln lacked proper teaching credentials.

Plaintiffs' criticisms about special-education testing and services are borne out, in part, by a report issued in June 2005 by the Minnesota Department of Education ("MDE") after the department investigated a student's complaints **[*10]** about how Lincoln treated students with disabilities. Shulman Aff. Ex. A [Docket No. 138]. 6 The MDE found that under one percent of Lincoln's student population in 2004-2005 was receiving special-education services. Id. at 4. The MDE further found that students at Lincoln were required to wait at least one year after enrolling in Lincoln before Lincoln or District 1 would evaluate them for special-education services -- and that, in general, students were not evaluated until they had received at least three years of "English Language Learners" (or "ELL") instruction (i.e., instruction in the English language for non-native speakers). Id. at 8 Colo. 467, 9 P 15.

District 1 and Lincoln do not deny that it was their policy to defer assessing students at Lincoln for special-education services until the students had received three years of ELL instruction. The MDE report on which plaintiffs rely, however, says that this policy was based on District 1's belief that special-education assessments would not be reliable if they were done any earlier because some part of a student's assessment results might be attributable to English-language **[*11]** deficiencies rather than genuine special-education needs. Id. The MDE, however, found that District 1 and Lincoln's policy of delaying assessment for three years was impermissible under state and federal regulations. Id. at 11. The MDE also found that Lincoln and District 1 violated state regulations by not developing adequate remediation plans for students who failed the BSTs. Id.

II. ANALYSIS

A. Standard of Review

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute over a fact is "material" only if its resolution might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute over a fact is "genuine" only if the evidence is such that a reasonable jury could return a verdict for either party. Ohio Cas. Ins. Co. v. Union Pac. R.R., 469 F.3d 1158, 1162 (8th Cir. 2006). In considering a motion for summary judgment, a court "must view the evidence and the inferences that may be reasonably drawn **[*12]** from the evidence in the light most favorable to the non-moving party." Winthrop Res. Corp. v. Eaton Hydraulics, Inc., 361 F.3d 465, 468 (8th Cir. 2004).

B. Title VI and MHRA Claims

Title VI of the Civil Rights Act of 1964 forbids discrimination by recipients of federal funding. Specifically, § 2000d of Title 42 of the United States Code provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The MHRA contains an even broader prohibition on discrimination by educational institutions. 7 Minn. Stat. § 363A.13. Plaintiffs contend that Lincoln and District 1 violated 42 U.S.C. § 2000d and the MHRA by discriminating against them because they were not born in the United States.

District 1 and Lincoln concede that they are subject both to the MHRA and, because they received federal funding, to § 2000d. But they argue that plaintiffs have no evidence that either defendant intentionally discriminated against plaintiffs. **[*14]** At most, say defendants, plaintiffs have evidence that District 1's and Lincoln's actions had a disparate impact on plaintiffs because of their national origin. Dist. 1 Reply Mem. Supp. S.J. Mot. at 6 [Docket No. 150]; Inst. SJ Mem. at 45.

The Court agrees with District 1 and Lincoln. The facts, viewed in the light most favorable to plaintiffs, support, at most, a disparate-impact claim. It is settled law that disparate-impact claims cannot be brought under Title VI; rather, Title VI prohibits only intentional discrimination. Alexander v. Sandoval, 532 U.S. 275, 280, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). Thus, to establish a Title VI violation, a plaintiff must prove that a defendant's challenged actions were rooted in discriminatory animus -- in a subjective intent to discriminate.

In general, there are two different methods of proving intentional discrimination: the direct method and the indirect method. See Rogers v. City of Chicago, 320 F.3d 748, 753-54 (7th Cir. 2003); Haywood v. Lucent Techs., Inc., 323 F.3d 524, 529 (7th Cir. 2003); Darke v. Lurie Besikof Lapidus & Co., 550 F. Supp. 2d 1032, 1040-41 (D. Minn. 2008). Under the direct method, a plaintiff with strong evidence of a defendant's discriminatory intent, **[*15]** such as discriminatory statements by key decision makers, may rely on that strong evidence to directly establish intentional discrimination. See

Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004); Darke, 550 F. Supp. 2d at 1041 ("[T]he direct method applies when the plaintiff . . . has strong evidence of discrimination."). The indirect method, available to plaintiffs with weaker evidence of discriminatory intent, is based on the familiar three-step framework described in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Darke, 550 F. Supp. 2d at 1041 ("[W]hen the plaintiff's evidence is weaker, McDonnell Douglas gives the Court a framework for analyzing whether the evidence is nevertheless sufficient to support a verdict of discrimination.").

To the extent that plaintiffs have any evidence of intentional discrimination by either Lincoln or District 1, that evidence is quite weak. And, as explained below, that weak evidence is insufficient for a jury to find that either defendant intentionally discriminated. Although a reasonable jury could perhaps find that District 1's and Lincoln's actions produced a disparate impact on plaintiffs because plaintiffs received **[*16]** a substandard education compared to United States-born students, a reasonable jury could not find that either District 1 or Lincoln intentionally discriminated against plaintiffs -- that is, provided a poor education to them because of their national origin.

The Court therefore grants summary judgment to defendants on plaintiffs' Title VI and MHRA claims. Because the Court's analysis with respect to Lincoln differs slightly from its analysis with respect to District 1, the Court discusses each defendant separately. eqaul protection EDUCATIONAL AGENCY PREVAILED

1. Lincoln

Plaintiffs in this case do not have strong evidence of intentional discrimination by Lincoln. Indeed, the record contains only a single statement by a single teacher at Lincoln that could be interpreted as reflecting animus against plaintiffs based on their national origin: After some students circulated a petition criticizing a teacher at Lincoln, another teacher wrote, "I am certain that students would never dare try something like this in their home country, and it shouldn't be allowed here." Shulman Aff. Ex. KK. This single statement by a single teacher is not nearly enough for a jury to conclude that Lincoln, as an institution, intentionally discriminated against **[*17]** plaintiffs.

Indeed, although plaintiffs contend that there is direct evidence of discrimination, their argument is based almost entirely on evidence of the impact of Lincoln's educational system on plaintiffs. Pl. SJ Opp. at 63-67. Plaintiffs assert, correctly, that Lincoln was "intentionally created . . . to accommodate students who were not native-born." Id. at 64. Plaintiffs then appeal to the "axiomatic" proposition "that persons intend the consequences of their actions." Id. at 63. With that proposition in mind, plaintiffs contend:

> Since [the Institute] established and operated [Lincoln] only for immigrant students, but then failed to educate them, [Lincoln] by design knew and intended that its unlawful conduct would affect only immigrant, foreign-born students, and not American-born, non-immigrant students. It created and maintained a substandard facility and program for immigrants, something [the Institute] knew would never be permitted for mainstream, non-immigrant students. Because [the

> Institute] knew it was dealing with a non-English speaking immigrant population, the record clearly supports an inference that [the Institute] believed it could get away with doing less for this [*18] group of immigrants than for a non-immigrant population. This is the essence of discrimination.

Id. at 64-65.

As this passage makes clear, plaintiffs contend that they were badly educated at Lincoln. The Court assumes, for summary-judgment purposes, that this is true. But the substandard education that plaintiffs received is an effect of the educational policies and practices of Lincoln, and although that effect was felt only by foreign-born students, it does not follow that Lincoln intentionally discriminated against such students. Put simply, not every disparate impact reveals discriminatory intent; if it did, the distinction between disparate-impact claims and intentional-discrimination claims would evaporate.

In this case, it is theoretically possible that Lincoln deliberately set out to provide a poor education to foreign-born students as a way of harming them. There is no evidence of this, however, and it is at least equally possible that Lincoln educated its students badly as a result of incompetence, not animus. Incompetence that happens to burden only members of a protected class is not, by itself, evidence of discriminatory animus.

Suppose, for example, that a former professional **[*19]** baseball player volunteers to coach a Little League team made up entirely of African-American boys. And suppose further that the former player -- an African-American himself -- turns out to be a terrible coach. The impact of the terrible coaching would be felt only by African-Americans. But that does not mean that the former player provided terrible coaching because of animus toward African-Americans. He might have had positive feelings toward African-Americans and sincerely wanted to help them -- indeed, that may have been why he volunteered to coach a team of African-American boys -- but simply turned out to be an incompetent coach. Likewise Lincoln may have had positive feelings toward foreign-born students and sincerely wanted to help them, but simply turned out to be a substandard school.

Lacking strong evidence of discriminatory intent on Lincoln's part, plaintiffs could -- if this were an ordinary case -- rely upon the three-part McDonnell Douglas framework to attempt to establish that Lincoln intentionally discriminated against them. See McDonnell Douglas, 411 U.S. at 802-03; Elnashar v. Speedway SuperAmerica, LLC, 484 F.3d 1046, 1055 (8th Cir. 2007); Fuller v. Rayburn, 161 F.3d 516, 518 (8th Cir. 1998) **[*20]** (discussing applicability of McDonnell Douglas in Title VI cases). Under McDonnell Douglas, a plaintiff must first establish a prima facie case of discrimination. If the plaintiff does so, the defendant has the burden of coming forward with a legitimate, nondiscriminatory explanation for its challenged actions. The plaintiff must then put forward sufficient evidence for a jury to find that the defendant's proffered nondiscriminatory explanation is pretextual. See Elnashar, 484 F.3d at 1055; Darke, 550 F. Supp. 2d at 1042.

Plaintiffs cannot, however, establish a prima facie case against Lincoln because of the unusual facts of this case, as the Court observed in its March 13, 2006 order. Mumid,

2006 U.S. Dist. LEXIS 9967, 2006 WL 640510, at *4 ("In this case, it is not possible for similarly situated people to be treated differently because Plaintiffs allege that all students are members of the same protected class."). To establish a prima facie case of intentional discrimination, a plaintiff must show that (1) he belongs to a protected class; (2) he suffered adverse action; and (3) a similarly situated person (or persons) outside of the protected class -- called a "comparator" -- did not suffer the challenged adverse **[*21]** action. In this case, with respect to Lincoln, there are no comparators: Lincoln served only members of the protected class (foreign-born students); it did not serve any students outside of the protected class.

Given the absence of comparators in this case, the McDonnell Douglas framework cannot be applied. Indeed, plaintiffs implicitly acknowledge the inapplicability of the McDonnell Douglas framework by choosing not to rely on it in their brief opposing defendants' summary-judgment motion. Instead, they argue that a jury could infer discriminatory intent from the fact that Lincoln provided a substandard education to foreign-born students and no one else. Pl. SJ Opp. At 63-67. For the reasons already explained, the Court finds that no reasonable jury could find, based on the record, that discriminatory animus motivated Lincoln's actions.

2. District 1

Plaintiffs argue, as they do with respect to Lincoln, that a jury could infer discriminatory animus on District 1's part from the fact that Lincoln – under contract to District 1 -- provided a substandard education to a population made up entirely of foreign-born students. Pl. SJ Opp. at 67. This argument is no stronger with respect to **[*22]** District 1 than with respect to Lincoln. Thus, for the reasons given above, plaintiffs cannot establish District 1's discriminatory intent by the direct method of proof.

District 1, however, differs from Lincoln in that District 1 serves both native-born and foreign-born students. And plaintiffs have evidence that District 1's policy with respect to testing for special education differed for the two groups of students. Specifically, District 1 had a general policy of refusing to test foreign-born students for special-education services until they had been enrolled in ELL classes for three years. Shulman Aff. Ex. A at 9 P 15.

Under the McDonnell Douglas framework, this policy supports a prima facie case of discrimination: Plaintiffs are members of a protected class (foreign-born students); that class was subject to adverse action because its members were denied special-education testing until they had taken three years of ELL classes; and non-class members (native-born students) did not suffer the adverse action but rather were offered special-education testing as needed.

District 1 is nonetheless entitled to summary judgment on plaintiffs' discrimination claim with respect to special-education **[*23]** testing for two reasons. First, eleven of thirteen plaintiffs have no evidence that they personally suffered any injury from District 1's testing policy. Second, plaintiffs' claim does not satisfy the McDonnell Douglas framework because District 1 has offered a legitimate, nondiscriminatory explanation for

its policy and plaintiffs have no evidence from which a jury could conclude that the explanation is pretextual.

There is no dispute that District 1 had a general policy of refusing to test foreign-born students for special-education services until the students had taken three years of ELL classes. But the only students who were injured by policy were those who were in need of testing for special education. Plaintiffs have offered two types of evidence to support their contention that all thirteen of them needed special-education testing, but a reasonable jury could conclude from that evidence that, at most, only two plaintiffs were in need of such testing.

First, plaintiffs point out that one teacher at Lincoln said that four plaintiffs needed special education. Pl. SJ Opp. at 68; Shulman Aff. Ex. TT. But the teacher did not identify the particular plaintiffs he had in mind, and in **[*24]** any event, there is no evidence that the teacher knew what he was talking about -- that is, there is no evidence that he was qualified to assess special-education needs generally or that he had enough information about the four (unnamed) plaintiffs to assess their particular needs. Second, plaintiffs point out that two of them -- Amal Mohamed and Yurub Siyad -- were granted accommodations under § 504 plans. Pl. SJ Opp. at 69. Such plans are developed for students with disabilities, and a reasonable jury could find, based on the existence of those plans, that District 1 should have assessed the needs of these two plaintiffs for special-education services earlier than it did. But a reasonable jury could not find that any of the other eleven plaintiffs was deprived of special-education testing that he or she should have received.

As to the two plaintiffs who may have been harmed, however, there is no evidence that District 1's explanation for its policy of delaying special-education testing is a pretext for discrimination. Accordingly, Amal Mohamed and Yurub Siyad, like the other eleven plaintiffs, cannot prevail on their Title VI claims against District 1.

The evidence shows that District **[*25]** 1 adopted its policy with respect to special-education testing because it did not believe that it could reliably assess whether a student needed special-education services until the student had been in the country long enough to learn English. Shulman Aff. Ex. A at 9 P 15. The wisdom of District 1's policy was doubtful, and the MDE required District 1 to abandon the policy because it violated state and federal regulations. Id. At 11-13. But for McDonnell Douglas purposes, the reasons for District 1's policy need not have been wise; they need only have been sincere (and nondiscriminatory). District 1's explanation is indeed nondiscriminatory, and plaintiffs have offered no evidence that it is pretextual. Plaintiffs have thus failed to create a question of fact as to District 1's discriminatory intent.

C. EEOA Claims

Section 1703 of Title 20 of the United States Code, a provision of the EEOA, forbids states to "deny equal educational opportunity to an individual on account of his or her . . . national origin" by engaging in various practices. 20 U.S.C. § 1703. Subsection (a) forbids "deliberate segregation" and subsection (c) forbids assigning students to schools outside their neighborhoods **[*26]** if doing so would increase the degree of segregation in

the school system. Id. §§ 1703(a), (c). Although Count 4 of plaintiffs' second amended complaint raises segregation-and assignment-based claims under §§ 1703(a) and (c), plaintiffs conceded at oral argument that the evidence does not support either type of claim. Rather, the evidence shows that each plaintiff chose to attend Lincoln; District 1 did not assign them there or otherwise segregate them. The Court therefore grants summary judgment to defendant District 1 on Count 4. 8

Plaintiffs bring their remaining EEOA claim, in Count 1 of the second amended complaint, under § 1703(f). Section 1703(f) identifies "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs" as a prohibited practice under the EEOA. 20 U.S.C. § 1703(f). Put another way, § 1703(f) imposes an affirmative obligation on state school systems to "take appropriate action to overcome language barriers . . . ." Id.

Whether District 1 took "appropriate action to overcome language barriers" facing students at Lincoln is, on the record before the Court, a disputed question of fact. Plaintiffs offer expert testimony that Lincoln used an "English immersion" curriculum that was pedagogically unsound in theory and badly implemented in practice. Inst. Ex. 21. District 1 responds by criticizing various aspects of plaintiffs' expert report. Dist. 1 SJ Mem. at 36-42. The Court recognizes **[*28]** the force of some of District 1's criticisms, but the Court nonetheless finds that plaintiffs' evidence suffices to create a jury question as to the appropriateness of District 1's efforts to overcome plaintiffs' language barriers.

District 1 is, however, entitled to summary judgment for a different reason: Plaintiffs' injuries, if any, are not redressable by this Court. Plaintiffs seek both injunctive and monetary relief. But, as is explained below, monetary relief is not available for violations of the EEOA, and the injunctive relief sought by plaintiffs would do nothing to redress their injuries. Redressability is an element of standing, which is a prerequisite to this Court's subject-matter jurisdiction. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); Hall v. LHACO, Inc., 140 F.3d 1190, 1195-96 (8th Cir. 1998). This Court therefore lacks subject-matter jurisdiction over plaintiffs' EEOA claims because plaintiffs lacks standing to bring them.

1. Injunctive Relief

Plaintiffs seek an injunction that would either (1) forbid Lincoln from engaging in any practices found to be unlawful or (2) shut Lincoln down entirely. Second Am. Compl. at 19-20 PP D, F [Docket No. 70]. But **[*29]** no plaintiff will ever again be a student at Lincoln. Five plaintiffs -- Maymuna Muktar Osman, Mohamed Amal, Yurub Siyad, Amina Harun, and Mohamud Mohamed -- have already graduated. The remaining eight plaintiffs are now too old to attend Lincoln or any other public high school.

Because no plaintiff will ever again attend Lincoln, any injunctive relief requiring Lincoln to change its practices or shut its doors will have no impact whatsoever on the plaintiffs. By definition, then, the injunctive relief sought by plaintiffs cannot redress their injuries, and thus plaintiffs do not have standing to seek that injunction. See City of Los Angeles v. Lyons, 461 U.S. 95, 106 n.7, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)

(holding that plaintiff lacked standing to seek an injunction against the Los Angeles police department's choke-hold policy because he could not "credibly allege that he faced a realistic threat from the future application" of the policy); see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 184-85, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (discussing Lyons). Plaintiffs therefore lack standing with respect to their claims for injunctive relief (as they effectively conceded at the summary-judgment hearing).

2. **[*30]** Money Damages

Section 1712 of Title 20 provides that "[i]n formulating a remedy for a denial of equal educational opportunity or a denial of the eqaul protection of the laws, a court . . . shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or eqaul protection of the laws." 20 U.S.C. § 1712. The plain language of this provision signals that Congress intended to limit the remedies that courts could impose for violations of the EEOA: Again, courts can impose "only such remedies as are essential to correct" a particular violation of the EEOA. Id. (emphasis added). But § 1712 provides no explicit guidance as to whether or when money damages can qualify as an "essential" remedy.

Plaintiffs appeal to the general principle that when Congress creates a cause of action (as it has in the EEOA), courts should presume that all remedies are available, including money damages. Pl. SJ Opp. at 70-71 (quoting Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 66, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992)). Because Congress did not forbid the award of money damages under the EEOA, argue plaintiffs, damages must be available in a case like this one, in which an injunction **[*31]** would not redress the plaintiffs' grievances.

Plaintiffs have not, however, cited a single case in which a court awarded money damages for an EEOA violation. It would be extraordinary if money damages were available under the EEOA, but, in the thirty-four-year history of the statute, no plaintiff had yet managed to be awarded such damages. Further, it would be extraordinary if Congress had authorized money damages under the EEOA given the potential for such awards to bankrupt school districts. In the absence of any authority for plaintiffs' position, and in light of the overall statutory scheme of the EEOA, the Court declines to become the first federal district court ever to allow a suit for money damages under the EEOA. 9

Awarding money damages under the EEOA would not only be unprecedented, but it would also be inconsistent with the tenor of the statute's remedy-related provisions. First, § 1712 itself authorizes only remedies that "are essential to correct" a particular violation of the EEOA. 20 U.S.C. § 1712 (emphasis added). Money damages can compensate a person for harm that she has suffered, but compensating for a wrong is different from "correcting" it. The word "correct" in § 1712 suggests that remedies under the EEOA are equitable in nature and are designed to change specific practices that violate the statute rather than to compensate victims. Indeed, commentators seem to assume that § 1712 authorizes only equitable remedies. See 6 Fed. Proc., L. Ed. § 11:407 (West 2008) ("The

scope of a trial court's equitable powers to remedy past wrongs in school-desegregation cases is broad, for breadth and flexibility are inherent in equitable remedies.").

Further, the EEOA's remedy provisions are directed explicitly at equitable remedies such as busing, not at money damages. Sections 1712 through 1718 of Title 20, enacted as §§ 213 to 219 of the EEOA, make **[*34]** up the entire "Remedies" subsection of the EEOA. See Equal Educational Opportunites Act of 1974, Subpart 4, Pub. L. No. 93-380, 88 Stat. 484, 516-18. Sections 1713 through 1718 give no hint that money damages are available under the EEOA; to the contrary, they focus on equitable remedies.

Section 1713, for example, entitled "Priority of remedies," requires courts to give preference to certain types of equitable remedies (e.g., assigning students to nearby schools, 20 U.S.C. § 1713(a)-(b)) over others (e.g., constructing magnet schools, 20 U.S.C. § 1713(f)). An award of money damages is not among the remedies listed in § 1713, which governs "formulating a remedy for a denial of equal educational opportunity or a denial of the eqaul protection of the laws, which may involve directly or indirectly the transportation of students . . . ." 20 U.S.C. § 1713.

Unfortunately, the reach of § 1713 is not entirely clear, and it likely applies only to certain remedies -- those that "may involve directly or indirectly the transportation of students . . . ." Id. The reach of § 1713 depends on whether the relative clause "which may involve directly or indirectly the transportation of students" is a restrictive **[*35]** or nonrestrictive modifier of the noun "remedy." 10 That is, does § 1713 govern only remedies that "may involve directly or indirectly the transportation of students," but not other kinds of remedies (i.e., is the phrase beginning "which may involve" restrictive)? Or does § 1713 govern any remedy under the EEOA, some of which may happen to involve the transportation of students (i.e., is the phrase beginning "which may nvolve" nonrestrictive)? Section 1713 is punctuated as if the phrase "which may involve" is nonrestrictive -- the phrase is preceded by a comma, and this is the conventional way of marking a "which" clause as nonrestrictive. 11 But the remedies listed in § 1713 all relate to the geographic distribution of students and schools, and it therefore makes sense that the listed remedies would relate only to remedies that (restrictive) may involve the transportation of students. 12

Nonetheless, even if § 1713 applies only to remedies that may involve the transportation of students and not to other remedies, the remaining remedy-related provisions of the EEOA focus exclusively on equitable remedies, not money damages. Section 1714 is entitled "Transportation of students" and governs just that. 20 U.S.C. § 1714. Section 1715, titled "District lines," specifies the circumstances under which the boundaries of school districts can be disregarded in formulating remedies for EEOA violations. 20 U.S.C. § 1715. Section 1716 provides that school districts can adopt voluntary desegregation plans. 20 U.S.C. § 1716. Section 1717 allows parents and school districts to challenge busing orders and desegregation plans if "the time or distance of travel" for a student is excessive. 20 U.S.C. § 1717. And § 1718 governs the termination of "[a]ny court order requiring, directly or indirectly, the transportation of students for the purpose of remedying a denial of the eqaul protection of the laws . . . ." 20 U.S.C. § 1718.

As noted above, money damages **[*39]** would not "correct" (but would merely compensate for) a violation of the EEOA, and therefore the plain text of § 1712 does not seem to authorize a remedy of money damages. This conclusion is reinforced by §§ 1713 through 1718, which -- taken with § 1712 -- indicate that Congress intended to authorize only equitable remedies under the EEOA. Because plaintiffs are entitled to neither money damages nor an injunction, the Court holds that plaintiffs lack standing to bring their EEOA claims because their injuries, if any, are not redressable.

D. MFAS's Third-Party Complaint

In its third-party complaint, District 1 brings claims of contribution and indemnification against MFAS, seeking recovery from MFAS for any damages District 1 may be ordered to pay plaintiffs. MFAS moves for partial summary judgment based on contracts that governed the relationship between MFAS and District 1. Because the Court grants summary judgment to Lincoln and District 1 on all of plaintiffs' claims, MFAS's claims are moot, and the Court therefore denies MFAS's summary-judgment motion.

ORDER

Based on the foregoing and on all of the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. The motion of defendants **[*40]** Abraham Lincoln High School and the Institute for New Americans for summary judgment [Docket No. 115] is GRANTED.

2. The motion of defendant/third-party plaintiff Special School District No. 1 for summary judgment [Docket No. 126] is GRANTED.

3. The motion of third-party defendant Metropolitan Federation of Alternative Schools for partial summary judgment [Docket No. 110] is DENIED AS MOOT.

4. Plaintiffs' second amended complaint [Docket No. 70] is DISMISSED WITH PREJUDICE AND ON THE MERITS.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 16, 2008

/s/ Patrick J. Schiltz

Patrick J. Schiltz

United States District Judge

CANDICE SOSSAMON, INDIVIDUALLY AND AS NEXT FRIEND OF KATELYN KIRKLAND, KATELYN KIRKLAND, AND JEFFREY S. DAVIS, Appellants v. CLEBURNE INDEPENDENT SCHOOL DISTRICT BOARD OF TRUSTEES AND JAMES WARLICK, INTERIM SUPERINTENDENT, Appellees

No. 10-08-00355-CV

COURT OF APPEALS OF TEXAS, TENTH DISTRICT, WACO

2010 Tex. App. LEXIS 520

January 20, 2010, Opinion Delivered

January 20, 2010, Opinion Filed

PRIOR HISTORY: **[*1]**

From the 413th District Court, Johnson County, Texas. Trial Court No.C200800320.

DISPOSITION: Reversed and rendered.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, a mother, her daughter, and their attorney, sought review of an order from the 413th District Court, Johnson County (Texas),which imposed sanctions under Tex. R. Civ. P. 13, Tex. Civ. Prac. & Rem. CodeAnn. § 10.004(a) (2002), and Tex. Educ. Code Ann. § 11.161 (2006) after determining that a suit against appellees, a school district and its superintendent, was frivolous.

OVERVIEW: When the daughter was a high school senior, she transferred to an accelerated learning program because she was failing a required English class.

After learning that the daughter would receive a diploma from the accelerated program and could not participate in the high school's graduation ceremony, the mother and daughter first pursued an administrative remedy and then sought injunctive relief, contending that the district had failed to provide notice of unsatisfactory performance under Tex. Educ. Code Ann. § 28.022(a), (b) (2006). The mother testified that she never received a notice to sign and return to the school, and there was no evidence to the contrary. The court held that the suit was not groundless because Tex. Educ. Code Ann. § 7.057 (2006) provided for an administrative remedy and the trial court could have granted injunctive relief. Under federal constitutional law, a student had a protected interest in a high school diploma. Moreover, the record contained no evidence of a local graduation policy with which the daughter had failed to comply, and neither Tex. Educ. Code Ann. § 28.025(c)(1) (Supp. 2009) nor 19 Tex. Admin. Code § 101.4001(a) (2009) required such compliance.

OUTCOME: The court reversed the trial court's sanctions order and rendered judgment denying the motion for sanctions.

CORE TERMS: graduation, ceremony, graduate, high school diploma, diploma, abused, notice, extracurricular activities, groundless, school district, bad faith, injunction, imposing sanctions, protected interest, property interest, curriculum, notice required, authority to grant, exam, semester, high school, exit-level, guardian's, grading, testing, senior, existing law, board of trustees, filing suit, good faith

JUDGES: Before Chief Justice Gray, Justice Reyna, and Justice Davis. (Chief Justice Gray dissenting with note) *

* (Chief Justice Gray dissents. A separate opinion will not issue. He notes, however, that both the parent and the adult student had signed a document that would allow the student to graduate from high school on time but would effectively prevent her from graduating from CHS because she was transferring to TEAM after the start of the final semester before graduation. Unless she can travel backwards in time, this foreclosed her ability to transfer to CHS for graduation in the same semester.)

OPINION BY: FELIPE REYNA

OPINION

MEMORANDUM OPINION

Candice Sossamon and her daughter Katelyn Kirkland filed suit against the Cleburne Independent School District Board of Trustees and Interim Superintendent James Warlick (collectively, "Cleburne ISD") after Sossamon was informed that Kirkland would not be receiving a high school diploma from Cleburne High School ("CHS") and would not be allowed to participate in the CHS graduation ceremony. The trial court denied Sossamon's and Kirkland's request for a temporary injunction **[*2]** and later granted a motion for sanctions filed by Cleburne ISD. The court ordered Sossamon and Kirkland to pay $ 7,500 in costs and attorney's fees under section 11.161 of the Education Code and ordered Sossamon, Kirkland and their attorney Jeffrey S. Davis to pay an additional $ 3,500 as sanctions under Rule of Civil Procedure 13 and section 10.004 of the Civil Practice and Remedies Code.

Appellants contend in three issues respectively that the court abused its discretion by imposing sanctions under Rule 13, section 10.004, and section 11.161. We will reverse and render.

Background

During the 2007-2008 school year, Kirkland was a senior at CHS on track to graduate, except that she was failing her English class. She hid several report cards from Sossamon and finally revealed her predicament by leaving a letter on Sossamon's pillow. School

officials advised Sossamon that the only way Kirkland would be able to graduate was to transfer to the TEAM School, an accelerated learning program. Sossamon and Kirkland completed the paperwork for the TEAM School. One document they signed concerned high school graduation and reads:

> We understand that all students from the Cleburne Independent School **[*3]** District who complete their credits from the TEAM School will be provided a graduation exercise and diploma from the TEAM School. We also understand that should it be our desire to graduate from Cleburne High School, we may transfer to that school at the beginning of the last semester of our senior year.

Kirkland finished her coursework promptly and sought to transfer back to CHS so she could graduate with her class. Cleburne ISD officials advised that she would not be permitted to do so and referred them to the document they had signed regarding the TEAM School graduation. Sossamon and Kirkland sought administrative review and ultimately filed a grievance which was to be heard by the school board. However, because the grievance was not filed until May 7, they were advised that it would not be included on the agenda for the board's May 12 meeting. During the public comment section of the meeting, Sossamon presented her complaint to the school board, which advised that they would confer with Superintendent Warlick on the matter.

By letter dated May 16, Warlick advised Sossamon that Kirkland would not be permitted to graduate from CHS. Sossamon filed a second grievance which the school **[*4]** board placed on its agenda for the June 9 meeting. However, graduation was scheduled for May 30.

Sossamon and Kirkland filed suit on the afternoon of May 29. They alleged that Cleburne ISD failed to provide the notice required by section 28.022 of the Education Code to be given to the parent or guardian of a student whose performance in a subject "is consistently unsatisfactory." See TEX. EDUC. CODE ANN. § 28.022(a)(3) (Vernon 2006). They sought a temporary injunction prohibiting the defendants from preventing Kirkland from participating in CHS graduation ceremonies the following day and an order directing that she be given a CHS diploma. The court held an emergency hearing on May 30 and, after hearing Sossamon's testimony, denied the requested injunction. DUE PROCESS/ADEQUATE NOTICE

The court granted Sossamon's and Kirkland's motion for non-suit on July 3. Cleburne ISD filed a motion for sanctions claiming that the "suit is groundless, brought in bad faith, misrepresented facts, and lacks basis in law and fact" because:

> Sossamon and Kirkland were aware before filing suit that Kirkland could not satisfy the local requirements necessary to receive a diploma from CHS and thus was not entitled to such a diploma; . **[*5]** state and federal law is "very clear" that students do not have a fundamental right to participate in high school graduation ceremonies; and their claim that Kirkland should be awarded a diploma from CHS and allowed to participate in the CHS graduation ceremonies because of the

> defendants' alleged violations of the Education Code "is without support in Texas law." GRADUATION CEREMONY

At the sanctions hearing, the court heard argument of counsel and admitted in evidence a transcription of the injunction hearing. At the conclusion of the hearing, the court took the matter under advisement and asked each side to submit a proposed order. The court signed its order granting sanctions about a month later.

The court ruled that the suit was groundless because: (1) "there is no remedy for a violation of Texas Education Code § 28.022"; and (2) the court was "without the authority to grant Plaintiffs their requested remedy." The court ruled that the suit was brought in bad faith for the purpose of harassing Cleburne ISD because Sossamon and Kirkman were aware before filing suit that: (1) Sossamon had received the notice required by section 28.022; and (2) they "were informed throughout their attempt to receive a **[*6]** diploma and graduate with [CHS] that Kirkland had not, could not, and did not meet all necessary requirements to so receive a diploma from and participate in graduation ceremonies with [CHS]."

Standard of Review

We review an order imposing sanctions under an abuse-of-discretion standard. Low v. Henry, 221 S.W.3d 609, 614 (Tex. 2007); Loeffler v. Lytle Indep. Sch. Dist., 211 S.W.3d 331, 347 (Tex. App.--San Antonio 2006, no pet.).

> An appellate court may reverse the trial court's ruling only if the trial court acted without reference to any guiding rules and principles, such that its ruling was arbitrary or unreasonable. To determine if the sanctions were appropriate or just, the appellate court must ensure there is a direct nexus between the improper conduct and the sanction imposed. Generally, courts presume that pleadings and other papers are filed in good faith. The party seeking sanctions bears the burden of overcoming this presumption of good faith.

Low, 221 S.W.3d at 614 (citations omitted).

Rule 13 Sanctions

Appellants contend in their first issue that the court abused its discretion by imposing sanctions against them under Rule 13.

"The imposition of Rule 13 sanctions involves the satisfaction **[*7]** of a two-part test. First, the party moving for sanctions must demonstrate that the opposing party's filings are groundless, and second, it must be shown that the pleadings were filed either in bad faith or for the purposes of harassment."R.M. Dudley Constr. Co. v. Dawson, 258 S.W.3d 694, 707 (Tex. App.--Waco 2008, pet. denied) (quoting Estate of Davis v. Cook, 9 S.W.3d 288, 297 (Tex. App.—San Antonio 1999, no pet.)).

"'Groundless' for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law." TEX. R. CIV. P. 13. "The trial court uses an objective standard to determine if a pleading was groundless: did the party and counsel make a reasonable inquiry into the legal and factual basis of the claim?" R.M. Dudley Constr., 258 S.W.3d at 708. In doing so, "the trial court must examine the facts available to the litigant and the circumstances existing when the litigant filed the pleading." Id.

Here, the trial court ruled that the suit was groundless because: (1) "there is no remedy for a violation of Texas Education Code § 28.022"; and (2) the court was "without the authority to grant Plaintiffs **[*8]** their requested remedy."

Generally, a party whose claim concerns a violation of school laws must exhaust the statutorily provided administrative remedies with the Commissioner of Education before seeking judicial relief. Guerra v. Santa Rosa Indep. Sch. Dist., 241 S.W.3d 594, 599-600 (Tex. App.--Corpus Christi 2007, pet. denied); Dotson v. Grand Prairie Indep. Sch. Dist., 161 S.W.3d 289, 291(Tex. App.—Dallas 2005, no pet.); see TEX. EDUC. CODE ANN. § 7.057 (Vernon 2006) (providing for administrative appeal). One exception to this rule applies when the party will suffer irreparable harm and the Commissioner is unable to provide relief. Houston Fed'n of Teachers, Local 2415 v. Houston Indep. Sch. Dist., 730 S.W.2d 644, 646 (Tex. 1987); Dotson, 161 S.W.3d at 291; Harlandale Indep. Sch. Dist. v.Rodriguez, 121 S.W.3d 88, 92 (Tex. App.--San Antonio 2003, no pet.); see Guerra, 241 S.W.3d at 600.

Therefore, the court's conclusions are incorrect as a matter of law. See R.M. Dudley Constr., 258 S.W.3d at 708 (failure to analyze or apply law correctly is abuse of discretion). Here, Sossamon and Kirkland had a statutory right to pursue administrative relief for the alleged violation of section 28.022. **[*9]** See TEX. EDUC. CODE ANN. § 7.057. And because the Commissioner is not authorized to award injunctive relief and Kirkland would not otherwise have been able to receive a CHS diploma and participate in the CHS graduation ceremonies, it was within the trial court's authority to grant injunctive relief if Sossamon and Kirkland otherwise established their entitlement to it. See Houston Fed'n of Teachers, 730 S.W.2d at 646.

Accordingly, the court abused its discretion by finding and concluding that Sossamon's and Kirkland's suit was groundless. See R.M. Dudley Constr., 258 S.W.3d at 708. We sustain their first issue.

Section 10.004 Sanctions

Appellants contend in their second issue that the court abused its discretion by imposing sanctions under section 10.004 of the Civil Practice and Remedies Code.

According to section 10.004(a), "A court that determines that a person has signed a pleading or motion in violation of Section 10.001 may impose a sanction on the person, a

party represented by the person, or both." TEX. CIV. PRAC. & REM. CODE ANN. § 10.004(a) (Vernon 2002).

The court's determination that Sossamon's and Kirkland's claims were "groundless" was based on its understanding that "there **[*10]** was no basis in law or fact, nor was there a good faith argument for an extension, modification, or reversal of existing law" with respect to their claims. This conclusion led to the imposition of sanctions for violation of section 10.001(2). 1 See id. § 10.001(2) (Vernon 2002). But we have already determined that the court abused its discretion by finding and concluding that the suit was groundless. Thus, the court abused its discretion by imposing sanctions for violation of section 10.

The court also determined that their claims were brought in bad faith for the purpose of harassing Cleburne ISD because Sossamon and Kirkman were aware before filing suit that: (1) Sossamon had **[*11]** received the notice required by section 28.022; and (2) they "were informed throughout their attempt to receive a diploma and graduate with [CHS] that Kirkland had not, could not, and did not meet all necessary requirements to so receive a diploma from and participate in graduation ceremonies with [CHS]." This conclusion led to the imposition of sanctions for violation of section 10.001(1). 2 Id. § 10.001(1) (Vernon 2002). Section 28.022 Notice

The first component of the court's bad faith determination is grounded in its Finding of Fact No. 5:

> The sole basis of Plaintiffs' complaint against the District was that Plaintiffs were not provided with Notice, pursuant to Texas Education Code § 28.022, ("Notice") informing Sossamon that her daughter, Katelyn Kirkland ("Kirkland") was failing English. Plaintiffs were aware, prior **[*12]** to filing their Petition, that Sossamon received the Notice from the District made the sole basis of their complaint.

Cleburne ISD contends that this finding is supported by the following statement made by counsel for Sossamon and Kirkland during the sanctions hearing: "Yes, Katelyn was provided with a note to take home to her mother, but it wasn't the kind the Texas Education Code said."

Statements of counsel do not generally constitute evidence unless made under oath. Banda v. Garcia, 955 S.W.2d 270, 272 (Tex. 1997) (per curiam); Russ v. Titus Hosp. Dist., 128 S.W.3d 332, 338 (Tex. App.--Texarkana 2004, pet. denied). The oath requirement can be waived if the opposing party fails to object when he knows or should know that an objection is necessary. Id.

In Banda, the attorney "was clearly attempting to prove the existence and terms of the settlement agreement," stating, for example, "this agreement that I'm testifying to today before the court as an officer of the court, if Mr. Latham felt so strongly about it, he is not present." See Banda, 955 S.W.2d at 272. Here, however, counsel was not offering

evidence. Rather, counsel was presenting argument in response to Cleburne ISD's counsel **[*13]** with regard to the propriety of sanctions and, in particular, whether Cleburne ISD had violated section 28.022.

At the sanctions hearing, Cleburne ISD offered in evidence a transcription of the injunction hearing. 3 Aside from this transcription, the only other evidence arguably offered and admitted at the hearing was counsel's testimony regarding the amount of attorney's fees incurred. Sossamon and Kirkland claimed that Cleburne ISD failed to give the notice required by section 28.022, which provides in pertinent part:

> (a) The board of trustees of each school district shall adopt a policy that:
>
> (1) provides for a conference between parents and teachers;
>
> (2) requires the district, at least once every 12 weeks, to give written notice to a parent of a student's performance in each class or subject; and
>
> (3) requires the district, at least once every three weeks, or during the fourth week of each nine-week grading period, to give written notice to a parent or legal guardian of a student's performance in a subject included **[*14]** in the foundation curriculum under Section 28.002(a)(1) if the student's performance in the subject is consistently unsatisfactory, as determined by the district.
>
> (b) The notice required under Subsections (a)(2) and (a)(3) must:
>
> (1) provide for the signature of a student's parent; and
>
> (2) be returned to the district.

TEX. EDUC. CODE ANN. § 28.022(a), (b) (Vernon 2006).

Their claim focused on the notice required by subsection (a)(3). 4 According to the statute, written notice must: (1) be given to the parent or legal guardian; (2) provide for the parent's (or, presumably, the guardian's) signature; and (3) be returned to the district. Id.

The only evidence offered regarding whether a proper notice was given is Sossamon's testimony at the injunction hearing. She testified that Kirkland first received a failing grade in English during the third six-weeks' grading period in the fall of 2007. Kirkland had failing marks in the fourth and fifth grading periods as well but did not tell Sossamon until sometime during the fifth grading period that she was failing English. Sossamon testified that Kirkland received **[*15]** progress reports for each grading period but never showed them to Sossamon, instead making excuses for being unable to do so. She testified unequivocally that she "never received anything to sign and return back to the school."

There is no evidence in the record that the progress reports given to Kirkland either provided for a parent's or guardian's signature or indicated that they must be returned to CHS. Thus, the record contains no evidence that "Sossamon had received the notice required by section 28.022." The trial court abused its discretion in ruling otherwise. See Unifund CCR Partners v. Villa, 53 Tex. Sup. Ct. J. 57, 60, 2009 Tex. LEXIS 823, at *12 (Tex. Oct. 23, 2009) (per curiam) (trial court abuses its discretion in imposing sanctions "when its decision is contrary to the only permissible view of probative, properly-admitted evidence").

Compliance with Graduation Requirements

The second component of the court's bad faith determination is grounded in its Findings of Fact Nos. 6 through 9 in which the court found:

> 6. Kirkland did not meet the state and local requirements to graduate and receive a diploma from Cleburne High School.
>
> 7. Plaintiffs were aware, prior to filing their **[*16]** Petition, that Kirkland did not meet the state and local requirements in order to graduate and receive a diploma from Cleburne High School.
>
> 8. Plaintiffs were aware, as early as April 16, 2008, that Kirkland would not be awarded a diploma from nor be allowed to participate in graduation ceremonies at Cleburne High School.
>
> 9. By exhausting all administrative remedies before filing the Petition, Plaintiffs had numerous conversations with District personnel and were aware that they could not receive the remedy they requested.

From these findings, the court reached the conclusion that Sossamon and Kirkland "were informed throughout their attempt to receive a diploma and graduate with [CHS] that Kirkland had not, could not, and did not meet all necessary requirements to so receive a diploma from and participate in graduation ceremonies with [CHS]."

Cleburne ISD argued and the court ruled that a student must satisfy both state and local requirements to graduate from CHS. Cleburne ISD cited section 28.025 of the Education Code, section 101.4001(a) of title 19 of the Texas Administrative Code, and Cleburne ISD Board Policy EIF(LEGAL) to support this assertion. However, these provisions say nothing **[*17]** about compliance with "local requirements" as a prerequisite for graduation.

Section 28.025 provides in pertinent part that "a student may graduate and receive a diploma only if the student successfully completes the curriculum requirements identified by the State Board of Education under Subsection (a) and complies with Section 39.025." TEX. EDUC. CODE ANN. § 28.025(c)(1) (Vernon Supp. 2009). 5 Subsection (a) of this statute refers to the statewide curriculum requirements specified in section 28.002. See id.

§§ 28.002, 28.025(a) (Vernon Supp. 2009). Section 39.025 requires a satisfactory score in end-of-course assessments for "each subject in the foundation curriculum." 6 Id. § 39.025 (Vernon Supp. 2009).

Section 101.4001 of title 19 provides in pertinent part, "All students must pass exit-level **[*18]** assessments in English language arts, mathematics, science, and social studies to qualify for a high school diploma from a Texas public school." 19 TEX. ADMIN. Code § 101.4001(a) (2009) (Tex. Educ. Agency, Testing Requirements for Graduation); see also id. § 101.7(a) (2009) (Tex. Educ. Agency, Testing Requirements for Graduation) ("To be eligible to receive a high school diploma, a student must demonstrate satisfactory performance as determined by the State Board of Education (SBOE) on the assessments required for graduation as specified in the Texas Education Code (TEC), Chapter 39, Subchapter B."). 7

Cleburne ISD Board Policy 8 EIF(LEGAL) provides:

A student may **[*19]** graduate and receive a diploma only if the student successfully completes:

> 1. The curriculum requirements identified by the State Board of Education [see STATE GRADUATION REQUIREMENTS, below] and has performed satisfactorily on the exit-level assessments [see EKB]; or
>
> 2. An individualized education program (IEP) developed under Education Code 29.005.

This local policy appears to be nothing more than a local version of section 28.025(c) of the Education Code. Cf. TEX. EDUC. CODE ANN. § 28.025(c). And like section 28.025 and the cited provisions of the Texas Administrative Code, this local policy makes no reference to local graduation requirements. 9

The court found that Kirkland did not satisfy all state and local **[*20]** requirements to graduate and receive a diploma from CHS, that Sossamon and Kirkland were aware of this before they filed suit, and that they were aware as early as April 16, 2008 that Kirkland would not be permitted to graduate or receive a diploma from CHS. However, Cleburne ISD has not identified a single requirement which Kirkland did not satisfy. Cleburne ISD focuses on the fact that Kirkland earned her final English credit at the TEAM school rather than at CHS. The TEAM School Graduation document states that a TEAM student who wishes to graduate from CHS "may transfer to that school at the beginning of the last semester of our senior year." It does not provide for or prohibit transfers during the last semester of the senior year.

At the injunction hearing, Sossamon and Kirkland offered in evidence a May 16, 2008 letter from Superintendent Warlick denying their request for Kirkland to graduate with CHS. Warlick cited two reasons for his decision: (1) the above quoted TEAM School Graduation document "clearly states that Katelyn and you understood that Katelyn must

graduate from TEAM school and could not graduate from [CHS]"; and (2) page 3 of the TEAM School Handbook provides that **[*21]** a student in Kirkland's position must graduate from the TEAM School and cannot "go back to [CHS] for graduation." However, the quoted document does not "clearly state" this information and the TEAM School Handbook is not in the record.

During cross-examination of Sossamon at the injunction hearing, Cleburne ISD's counsel asked whether it was a district policy "that if a student goes in to TEAM School the last semester of their senior year, they must graduate from TEAM School." Sossamon replied that she did not know. Cleburne ISD did not introduce evidence of this alleged policy at the injunction hearing and none appears in the record.

Improper Motive

10

In Finding of Fact No. 9, the court found that Sossamon and Kirkland were aware before filing suit that they could not obtain the remedy sought. According to Cleburne ISD, it may be inferred that they harbored an "improper motive" in filing this suit because "[t]he relevant law available to Appellants before they filed the Petition was that: **[*22]** (i) in order to graduate from CHS, Kirkland must meet all state and local graduation requirements; and, (ii) a Texas court is without authority to grant Appellant's requested relief."

We have already discussed how the record contains no evidence of a local graduation policy with which Kirkland failed to comply. We now turn our attention to Cleburne ISD's contention that a Texas court is without authority to grant the relief sought, namely, to compel Cleburne ISD to permit Kirkland to participate in the CHS graduation ceremony and give her a CHS diploma. However, the law in this area is not as settled as Cleburne ISD contends, particularly with regard to the nature of a student's interest in receiving a high school diploma or participating in a graduation ceremony. The Fifth Circuit has concluded that a high school student has a constitutionally protected property interest in receiving a high school diploma.

> It is clear that in establishing a system of free public education and in making school attendance mandatory, the state has created an expectation in the students. From the students' point of view, the expectation is that if a student attends school during those required years, and **[*23]** indeed more, and if he takes and passes the required courses, he will receive a diploma. This is a property interest as that term is used constitutionally.

Debra P. v. Turlington, 644 F.2d 397, 403-04 (5th Cir. Unit B May 1981); see GI Forum v. Tex. Educ. Agency, 87 F. Supp. 2d 667, 682 (W.D. Tex. 2000) ("The Court has previously found, and reiterates here, that the State of Texas has created a protected interest in the receipt of a high school diploma.").

The late federal Judge William Wayne Justice applied Debra P. in the case of three students who failed the TAAS exam and were told they could not participate in their high school's graduation ceremony.

> It hardly needs emphasizing that high school graduation ceremonies are an occasion to celebrate profound personal achievement and hope for the future. A student's high school graduation is the source of fond memories and treasured mementos and photographs that cannot be replaced. Unquestionably, plaintiffs will suffer irreparable harm if they are denied the opportunity to participate in their graduation ceremony.

Crump v. Gilmer Indep. Sch. Dist., 797 F. Supp. 552, 554 (E.D. Tex. 1992). Judge Justice granted two of the students 11 injunctive **[*24]** relief, ordering the school district to permit them "to participate fully" in the graduation exercises. Id. at 557. Thus, Judge Justice at least implicitly concluded that the right to participate in a particular graduation ceremony is a constitutionally protected interest on the same level as the right to receive a diploma. 12

Eleven days after the Crump decision, Judge Sam Sparks of the Western District of Texas came to a different conclusion in a case involving another student who failed the TAAS exam.

While the Court recognizes that high school graduation **[*25]** is an important and memorable occasion in a young person's life, "walking across the stage" certainly does not rise to the level of a constitutionally protected property interest any more than attending one's high school prom, which most young people also expect to do after completing twelve years of public school. It is the actual high school diploma which is the property interest described in Debra P. v.Turlington. There is no accompanying constitutional right to receive that diploma at a specific graduation ceremony.

Williams v. Austin Indep. Sch. Dist., 796 F. Supp. 251, 255 (W.D. Tex. 1992) (citation omitted). Judge Sparks denied Williams's request for injunctive relief. Id. at 256. In the concluding paragraph of his opinion, he took the opportunity to express his difference of opinion with Judge Justice regarding the interests at issue.

> While the contentions and supporting evidence of these cases are obviously dissimilar, this Court is also in basic disagreement with Judge Justice. The right of a free public education in Texas is a Texas constitutional right, and the level of education and academic achievement necessary to obtain a diploma from a Texas high school is appropriately **[*26]** a judgment call for the persons elected for that state responsibility and those experienced persons responsible for educating and preparing students to achieve the established level of competence. Any interference in this process is simply destructive to the attempts by the state to salvage its educational system, and this includes interference by the federal judiciary.

Id.

Judge David Hittner of the Southern District has reached the same conclusion as Judge Sparks. See Khan v. Fort Bend Indep. Sch. Dist., 561 F. Supp. 2d 760, 767 (S.D. Tex. 2008) (Khan "has no legally protected property interest in attending or speaking at his high school graduation ceremony"). He held that "due process guarantees do not protect a student's interest in participating in extra-curricular activities, such as a graduation ceremony." Id. at 764.

> The San Antonio Court of Appeals has taken the same position. [T]he law does not preclude each school district's elected trustees and administrators from permitting their high school students to participate in graduation ceremonies despite the fact that they have failed to pass the TAAS test. The province and wisdom of such a decision rests squarely on the elected **[*27]** board of trustees and not on the courts of this state.

Edgewood Indep. Sch. Dist. v. Paiz, 856 S.W.2d 269, 271 (Tex. App.--San Antonio 1993, no writ); see also Castro v. Northside Indep. Sch. Dist., No. 04-04-00836-CV, 2005 Tex. App. LEXIS 9286, at *13 (Tex. App.--San Antonio Nov. 9, 2005, no pet.) (mem. op.) ("While high school graduation may be an important occasion in a student's academic career, participation in such a school function does not rise to a protected constitutional property interest.").

Both Judge Hittner and the San Antonio Court have equated graduation ceremonies with extracurricular activities in concluding that no constitutionally protected interest is at stake. Cleburne ISD takes this view as well. The Supreme Court of Texas has unequivocally held that a student has no constitutionally protected interest to participate in extracurricular activities. Spring Branch Indep. Sch. Dist. v. Stamos, 695 S.W.2d 556, 561 (Tex. 1985) ("the federal constitution's due process guarantees do not protect a student's interest in participating in extracurricular activities"). That Court has not, however, held that a graduation ceremony constitutes an "extracurricular activity."

The **[*28]** Commissioner of Education has defined "extracurricular activities" in the Texas Administrative Code.

(a) An extracurricular activity is an activity sponsored by the University Interscholastic League (UIL), the school district board of trustees, or an organization sanctioned by resolution of the board of trustees. The activity is not necessarily directly related to instruction of the essential knowledge and skills but may have an indirect relation to some areas of the curriculum. Extracurricular activities include, but are not limited to, public performances, contests, demonstrations, displays, and club activities, with the exception of public performances specified in paragraph (2) of this subsection.

> (1) In addition, an activity shall be subject to the provisions for an extracurricular activity if any one of the following criteria apply:

> (A) the activity is competitive;
>
> (B) the activity is held in conjunction with another activity that is considered to be extracurricular;
>
> (C) the activity is held off campus, except in a case in which adequate facilities do not exist on campus;
>
> (D) the general public is invited; or
>
> (E) an admission is charged.

19 TEX. ADMIN. CODE § 76.1001(a) (2009) (Tex. **[*29]** Educ. Agency, Extracurricular Activities).

A graduation ceremony might arguably fit within this definition, yet graduation ceremonies have been differentiated from extracurricular activities in some cases and in the Education Code. For example, in Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402 (5th Cir. 1995), the Fifth Circuit distinguished "extracurricular" basketball from a graduation ceremony, which the court characterized as "a significant, once-in-a-lifetime event." Id. at 406-07. And in Bundick v. Bay City Indep. Sch. Dist., 140 F. Supp. 2d 735 (S.D. Tex. 2001), a federal magistrate judge addressed separately the due process guarantees which attach to participation in extracurricular activities or in graduation. Id. At 739.

The Education Code arguably equates the receipt of a diploma, which Cleburne ISD agrees to be a constitutionally protected interest, with graduation. See TEX. EDUC. CODE ANN. § 28.025(c) ("a student may graduate and receive a diploma"). In addition, Chapter 28 of the Education Code, which addresses "Courses of Study; Advancement" (i.e., "academics"), even addresses the development of a "personal graduation plan" for struggling students. Id. § 28.0212 (Vernon **[*30]** Supp. 2009).

Federal district Judge Royal Furgeson summarized the state of the law best when he opined that "whether a student has a property interest in graduation ceremonies despite having failed to complete all academic requirements such as the [TAAS exam] is by no means settled." Riggan v. Midland Indep. Sch. Dist., 86 F. Supp. 2d 647, 654-55 (W.D. Tex. 2000).

Contrary to the trial court's unequivocal finding that "a Texas court is without authority to grant Appellant's requested relief," we agree with Judge Furgeson that the issue "is by no means settled." In other words, Sossamon's and Kirkland's claim that Cleburne ISD wrongfully denied Kirkland permission to participate in the CHS graduation ceremony is a claim with arguable merit because the law is unsettled regarding whether a student has a constitutionally protected interest in graduating from a particular high school during a particular ceremony (i.e., with her fellow 12th grade classmates).

Conversely, the law appears settled (and Cleburne ISD appears to agree) that a student has a constitutionally protected interest in a high school diploma. See Debra P., 644 F.2d at 403-04; GI Forum, 87 F. Supp. 2d at 682; Crump, 797 F. Supp. at 554; **[*31]** Williams, 796 F. Supp. at 255. Part of the relief Sossamon and Kirkland sought was an order directing that Kirkland be given a CHS diploma. As the Fifth Circuit stated in Debra P., "From the students' point of view, the expectation is that if a student attends school during those required years, and indeed more, and if he takes and passes the required courses, he will receive a diploma." 644 F.2d at 404. In Kirkland's case, it seems clear that, after attending the requisite years in Cleburne ISD schools, her expectation was to receive a CHS diploma rather than a TEAM School diploma.

In summary, we hold that the trial court abused its discretion by concluding that Sossamon and Kirkland brought their suit in bad faith for the purpose of harassing Cleburne ISD. See R.M. Dudley Constr., 258 S.W.3d at 708 (failure to analyze or apply law correctly is abuse of discretion). Thus, the court erred by imposing sanctions under section 10.004 of the Civil Practice and Remedies Code. We sustain their second issue.

Section 11.161 Sanctions

Appellants contend in their third issue that the court abused its discretion by imposing sanctions under section 11.161 of the Education Code.

Section 11.161 **[*32]** provides:

In a civil suit brought under state law, against an independent school district or an officer of an independent school district acting under color of office, the court may award costs and reasonable attorney's fees if:

(1) the court finds that the suit is frivolous, unreasonable, and without foundation; and

(2) the suit is dismissed or judgment is for the defendant.

TEX. EDUC. CODE ANN. § 11.161 (Vernon 2006).

We have determined that the trial court abused its discretion by concluding that Appellants' suit was groundless and brought in bad faith for purposes of harassment. For the same reasons, we hold that the court abused its discretion to the extent it concluded that the suit was "frivolous, unreasonable, and without foundation" under section 11.161. See Cavazos v. Edgewood Indep. Sch. Dist., 400 F. Supp. 2d 948, 966 (W.D. Tex. 2005), aff'd, 210 F. App'x 414 (5th Cir. 2006).

We sustain Appellants' third issue.

Conclusion

We reverse the trial court's sanctions order and render judgment denying the motion for sanctions filed by Cleburne ISD and Superintendent Warlick.

FELIPE REYNA

Justice

Before Chief Justice Gray,

Justice Reyna, and

Justice Davis

Chief Justice Gray dissenting with note) **[*33] ***

Reversed and rendered

Opinion delivered and filed January 20, 2010

SUPERIOR COURT OF CALIFORNIA COUNTY OF ALAMEDA

LILIANA VALENZUELA, and her parents, et al

individually and on behalf of plaintiffs and all others similarly situated

Case No. RG06288707

CLASS ACTION

Petitioners/Plaintiffs

v

JACK O'CONNELL

in his official capacity as Superintendent of Public Instruction in California, et. al

Respondents/Defendants

TO: (1) ALL PUBLIC SCHOOL STUDENTS AND THEIR PARENTS OR LEGAL GUARDIANS; AND (2) ALL FORMER STUDENTS FROM THE CLASSES OF 2006 AND 2007 WHO HAVE NOT GRADUATED AND RECEIVED A DIPLOMA BECAUSE THEY HAVE NOT PASSED THE CALIFORNIA HIGH SCHOOL EXIT EXAMINATION (CAHSEE)

PLEASE READ TIDS NOTICE CAREFULLY. IT MAY AFFECT YOUR LEGAL RIGHTS. Specifically, it may affect your ability to bring a lawsuit in the future regarding the adequacy of your public school education and the adequacy of options available to students who have not passed the California High School Exit Examination (CAHSEE).

IF YOU WISH TO COMMENT IN FAVOR OF THE SETTLEMENT, OBJECT TO THE SETTLEMENT, OR APPEAR AT THE AUGUST 13,2007 COURT HEARING REGARDING FINAL APPROVAL OF THE SETTLEMENT, YOU MUST FOLLOW THE DIRECTIONS IN TIDS NOTICE

Purpose of Notice

This notice sets forth the basic terms of the proposed settlement reached in *Valenzuela* v. 0 *'Connell* and advises class members of their procedural rights relating to the settlement. The class in this lawsuit has been defined as follows

All past, present, and future public high school students in the State of California who were, are, or will be unable to graduate, and/or who were, are, or will be denied diplomas, as a result of failing to pass one or both sections of the CAHSEE. However, the class shall exclude all past, present, and future members of the class certified in *Kidd* v. *California Department of Education*

Case No. JCCP 4468, pending in Alameda Superior Court

Description of the Case

This class action lawsuit was brought against Jack O'Connell, the Superintendent of Public Instruction, the State of California, the California Department of Education, and the California State Board of Education, in 2006. Petitioners/plaintiffs alleged that the State has failed to provide some or all of the members of the class with an equal and reasonable opportunity to pass the CAHSEE. Accordingly, petitioners/plaintiffs contended that denying a diploma to students who had not passed one or both sections of the CAHSEE would violate their constitutional rights to due process and equal protection. Respondents/defendants deny all of the allegations made by petitioners/plaintiffs. Detailed information regarding this case, including an court papers, may be found on the court's website,www.alameda.courts.ca.gov/courts

Terms of Settlement Agreement

After more than a year of intense litigation, the parties in the case reached a Settlement Agreement on July 18, 2007. On July 19,2007, Alameda Superior Court Judge Robert Freedman granted preliminary approval of the Settlement Agreement and approved this Notice

The parties' Settlement Agreement provides for a package of legislative proposals to ensure that all students who do not pass the CAHSEE as of their intended graduation date will be able to continue to study the material tested on the CAHSEE for up to two more years at no charge to them through their school district. This will be in addition to other options that may be available to such students who wish to continue their studies and/or obtain a high school diploma, which include enrolling in community colleges, or adult schools; being redesignated as a senior for an additional year of high school; and passing the GED in order to receive a diploma equivalent.

The proposed legislation, AB 347, is presently in bill form. Ifit is not enacted, then the Settlement Agreement will be considered nun and void. The full text of the bill, and legislative analysis regarding the bill, may be found at http://www.1eginfo.ca.gov. If enacted, the bill would require districts that receive specified state funding to prepare students for the CAHSEE to do the following:

Provide each pupil with the opportunity to receive intensive instruction and services regarding the CAHSEE, based on an appropriate diagnostic assessment and prior results on the exam, for up to two consecutive academic years after completion of grade 12 or until the pupil has passed both parts of the high school exit examination, whichever comes first.

Provide English learners who have not passed the CAHSEE by the end of grade 12 with the opportunity to receive intensive instruction and services to improve English proficiency as needed to pass both parts of the CAHSEE, for up to two consecutive academic years after completion of grade 12 or until the pupil has passed both parts of the high school exit examination, whichever comes first

Notify pupils of the availability of intensive instruction and services after grade 12 and their right to file a complaint if they are denied such services

Use the school district's uniform complaint process to help identify and resolve any deficienciesrelated to intensive instruction and services provided to pupils who have not passed one or both parts of the high school exit examination after the completion of grade 12.

Release

Districts participating in the Middle and High School Supplemental Counseling Program shall be required to provide information to pupils in grade 12 about the availability of intensive instruction and services for up to two consecutive academic years after completion of grade 12 or until the exit examination is passed, whichever comes first.

If the legislation is encted, and the court finally approves this Settlement Agreement, then the following claims will be deemed released on behalf of the class.

Any and all claims by any Class Member against any State Entity concerning the adequacy of options available to students who have not passed the CAHSEE as of their intended graduation date to continue to study and/or attend classes in order to learn the material tested by the CAHSEE.

Any and all claims by any Class Member, who is or formerly was a member of the Class of 2006, against any State Entity that was or could have been raised in the lawsuit including, but not limited to, that denial of a diploma and/or graduation as a result of the requirement that they pass the CAHSEE (currently codified in Education Code section 60851, subdivision (a)) violates the constitutional or statutory rights of students.

However, the Settlement Agreement does not limit the rights of any class member to bring any action directly against any school district based on its alleged failure to follow any applicable law.

Attorneys' Fees and Costs

The Settlement Agreement provides that there shall be no application for or actual award of attorneys' fees to be paid by any party . Respondents/defendants agree to pay plaintiffs' /petitioners' costs in an amount not to exceed $87,000, in accordance with standard State approval processes.

Final Approval Hearing and Comment/Objection Procedure

The hearing for final approval of the settlement has been scheduled for August 13,2007, at 1 :30 p.m. in front of Alameda Superior Court Judge Robert Freedman, Department 20, 1221 Oak Street, 4th floor, Oakland, California, 94612. It is not necessary for class members to appear at the hearing. Only class members who file a Notice of Intent to

Appear, as described below, will be allowed to appear and offer oral comments about the settlement at this hearing, subject to the court's discretion. Class members may enter an appearance through counsel. The hearing may be postponed without further notice to the Class. DO NOT TELEPHONE THE COURT.

Class members who wish to comment or object to the parties' Settlement Agreement may do so orily by (1) filing a written comment or objection, or (2) filing a Notice of Intent to Appear at the final approval hearing, on or before August 9, 2007. A parent or legal guardian may file these documents on behalf of any class member who is under 18 years of age. Comments, objections, and/or Notice(s) ofIntent to Appear must clearly identify the case and number*(Valenzuela* v. 0 *'Connell,* Case No. RG06288707), and must state the class member's full name and address; where the class member attends (or attended) public high school and the date(s) of the class member's attendance; whether the class member has received a high school diploma; the relationship of the person filing the objection, comment or Notice to Appear to the class member (e.g., parent, legal guardian, or counsel); and each specific reason in support of the comment or objection and any legal support for each comment or objection. Comments, objections and/or Notice(s) ofIntent to Appear must be submitted by mailing them to BOTH of the following addresses

Clerk of the Court

Superior Court of California, County of Alameda Rene C. Davidson Alameda County Courthouse 1225 Fallon Street

Oakland, CA 94612

Arturo J. Gonzalez

Valenzuela Class Action

Morrison & Foerster.

425 Market Street

San Francisco, California 94105-2482

To be considered and valid, the Court and Counsel must receive any comments or objections, and Notices of Intent to Appear, no later than August 9,2007.

A class member who fails to file and serve an objection in the manner described above and by the specific deadline will be deemed to have waived any objections and will be foreclosed from making any objection (whether by appeal or otherwise) to the settlement. A class member who fails to file a Notice ofIntent to Appear in the manner described above and by the specific deadline will be deemed to have waived any right to appear to comment or object at the hearing Getting More Information.

The above is a summary of the basic terms of the Settlement. For the precise terms and conditions ofthe Settlement, you are referred to the detailed Settlement Agreement, which will be on file with the Clerk of the Court. The pleadings and other records in this litigation including the Settlement Agreement, may be examined (a) online on the Alameda County Superior Court's website, www.alameda.courts.ca.gov/courts. or (b) in person at Room 109 at the Rene C. Davidson Courthouse at 1225 Fallon Street, Oakland, California 94612, between the hours of9:00 a.m. and 4:00 p.m., Monday through Friday, excluding Court holidays, or (c) you may contact Class Counsel, Arturo J. Gonzalez, Morrison & Foerster LLP, 415-268-7000, 425 Market Street, San Francisco, California 94105-2482.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

COURTNEY KIDD et. al., on behalf of themselves and all other similarly situated, Plaintiffs

v.

CALIFORNIA DEPARTMENT OF EDUCATION et. al, Defendants.

Case No. 2002049636

CLASS ACTION

NOTICE OF PROPOSED SETTLEMENT, PRELIMINARY COURT APPROVAL OF SETTLEMENT, AND HEARING DATE FOR FINAL COURT APPROVAL

TO: ALL PUBLIC HIGH SCHOOL STUDENTS FROM THE CLASSES OF 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, AND 2011 WHO ARE OR WERE ELIGIBLE FOR AN INDIVIDUALIZED EDUCATION PROGRAM ("IEP") AND/OR SECTION 504 EDUCATION PLAN ("504 PLAN") AND THEIR PARENTS OR LEGAL GUARDIANS.

PLEASE READ THIS NOTICE CAREFULLY. IT MAY AFFECT YOUR LEGAL RIGHTS. Specifically, it may affect your ability to bring a lawsuit in the future regarding the adequacy of your public school education and the adequacy of options available to students who have not passed the California High School Exit Examination ("CAHSEE").

IF YOU WISH TO COMMENT IN FAVOR OF THE SETTLEMENT, OBJECT TO THE SETTLEMENT, OR APPEAR AT THE MAY 30, 2008 COURT HEARING REGARDING FINAL APPROVAL OF THE SETTLEMENT, YOU MUST FOLLOW THE DIRECTIONS IN THIS NOTICE.

Purpose of Notice

This notice sets for the basic terms of the proposed settlement reached in *Kidd v. California Department of Education* and advises class members of their procedural rights relating to the settlement. The certified class in this lawsuit is defined as follows:

All students eligible for an Individualized Education Program ("IEP") pursuant to the Individuals with Disabilities in Education Act ("IDEA") or a Section 504 Education Plan ("504 Plan") pursuant to the Rehabilitation Act of 1973 who have taken or will be required to take the California High School Exit Exam.

Description of the Case

This class action lawsuit was brought in 2002 against the California Department of Education, the California State Board of Education, and Jack O'Connell, the Superintendent of Public Instruction in California. Plaintiffs allege that, for several reasons, the application of the CAHSEE graduation requirement to public high school students with disabilities constitutes a violation of California statutory and constitutional law. Defendants deny the allegations made by Plaintiffs. Detailed information regarding this case, including all court papers, may be found on the Court's website (Outside Source).

Terms of Settlement Agreement

After approximately seven years of litigation, the parties in the case reached a Settlement Agreement in March of 2008. On May 2, 2008, Alameda Superior Court Judge Robert Freedman granted preliminary approval of the Settlement Agreement and approved this Notice.

The parties' Settlement Agreement provides for the following:

- Defendants will commission an independent study on the CAHSEE, and will request and affirmatively seek up to $500,000 to retain and compensate an external consultant for that purpose.

- The study will examine twelfth graders (and possibly others) who have taken the CAHSEE with modifications and accommodations specified in their respective IEP or 504 plans, but who have not passed the CAHSEE, and who have satisfied or will satisfy all other requirements for graduation from high school. The study will examine why such students have not passed the CAHSEE. Among other things, the study shall determine whether some group of students have learned the material being tested, but are unable to demonstrate their mastery of that knowledge through the CAHSEE, despite the students' use of permissible modifications and/or accommodations.

- Based on the results of the study, the consultant will issue a report, setting forth the consultant's determinations for addressing any issues identified in the study.

- If the study determines that some students have learned the CAHSEE material but are unable to demonstrate that knowledge through the CAHSEE despite the students' use of permissible accommodations and/or modifications, the report shall set forth recommendations as to whether such students could demonstrate their knowledge of the CAHSEE standards through alternative means. If the final report makes such determinations, it shall also identify and set forth an analysis of such possible alternative means.

- The report will be disseminated to: the Superintendent of Public Instruction, the California Department of Education, the members of the California Board of Education, the Clerk of the Assembly, the Secretary of the Senate, Chairs of the Senate Education and Fiscal Committees, Chairs of the Assembly Education and Fiscal Committees, the Legislative Analyst's Office, the California Department of Finance, and Plaintiffs' counsel in the case.

- Within five months of the final report being delivered, Defendants will consider the report and make recommendations, if any, to the Legislature regarding the issues addressed in the report. Defendants may also independently implement policies responsive to the report that do not require legislation.

Release

If the Settlement Agreement receives final approval from the Court and the Court enters final judgment, then the claims raised by Plaintiffs in this case will be deemed released by all members of the certified class in the Classes of 2001 through 2011 against any state entity.

Attorneys' Fees and Costs

The Settlement Agreement provides that Plaintiffs and their attorneys may move the Court for reasonable attorneys fees and costs within 60 to 120 days after the Court grants final approval of the Settlement Agreement and enters final Judgment dismissing Plaintiffs' claims.

Final Approval Hearing and Comment/Objection Procedure

The hearing for final approval of the settlement has been scheduled for May 30, 2008, at 2:00 p.m., in front of Alameda Superior Court Judge Robert Freedman, Department 20, 1221 Oak Street, 4th Floor, Oakland, California, 94612. It is not necessary for class members to appear at the hearing. Only class members who file a Notice of Intent to Appear, as described below, will be allowed to appear and offer oral comments about the settlement at this hearing, subject to the Court's discretion. Class members may enter an appearance through counsel. The hearing may be postponed without further notice to the class. **DO NOT TELEPHONE THE COURT.**

Class members who wish to comment or object to the parties' Settlement Agreement may do so only by (1) filing a written comment or objection on or before May 23, 2008; or (2) filing a Notice of Intent to Appear at the final approval hearing on or before May 23, 2008. A parent or legal guardian may file these documents on behalf of any class member who is under 18 years of age. Comments, objections, and/or Notice(s) of Intent to Appear must clearly identify the case name and case number (*Kidd v. California Department of Education*, Case No. 2002049636), and must state the class member's full name and address; where the class member attends (or attended) public high school and the date(s) of the class member's attendance; whether the class member has received a high school

diploma; the relationship of the person filing the objection, comment or Notice of Intent to Appear to the class member (e.g., parent, legal guardian, or counsel); and each specific reason in support of the comment or objection and any legal support for each comment or objection. Comments, objections, and/or Notice(s) of Intent to Appear must be submitted by mailing them to **BOTH** of the following addresses:

Clerk of the Court
Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse
1225 Fallon Street
Oakland, CA 94612

Julia Pinover
Disability Rights Advocates
2001 Center Street, 3rd Floor
Berkeley, CA 94704

To be considered and valid, the above recipients must receive any comments, objections, and/or Notice(s) of Intent to Appear by no later than May 23, 2008.

A class member who fails to file and serve an objection in the manner described above and by the specific deadline will be deemed to have waived any objections and will be foreclosed from making any objection (whether by appeal or otherwise) to the settlement. A class member who fails to file a Notice of Intent to Appear in the manner described above and by the specific deadline will be deemed to have waived any right to appear to comment or object at the hearing.

Getting More Information

The above is a summary of the basic terms of the Settlement Agreement. For the precise terms and conditions of the Settlement, you are referred to the detailed Settlement Agreement, which will be on file with the Clerk of the Court. The pleadings and other records in this litigation, including the Settlement Agreement, may be examined: (a) online on theAlameda County Superior Court's website (Outside Source); (b) in person at Room 109 at the Rene C. Davidson Courthouse, 1225 Fallon Street, Oakland, California, 94612, between the hours of 9:00 a.m. and 4:00 p.m., Monday through Friday, excluding Court holidays; or (c) you may contact Julia Pinover, Disability Rights Advocates, 2001 Center Street, Third Floor, Berkeley, California 94704.

VITA

Lisa M. Winfield

Birthdate: August 7, 1964

Birthplace: Hill AFB, UT

Education:

2005-2013	The College of William and Mary Williamsburg, Virginia Doctor of Philosophy
1989-1990	The University of West Florida Pensacola, Florida Master of Education
1987-1988	The University of West Florida Pensacola, Florida Bachelor of Arts
1982-1986	Okaloosa Walton Community College Niceville, Florida Associate of Arts