

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILES 8672

2876 SCOMM 125: HOUSE SPECIAL COMMITTEE ON EDUCATION 2001-02

Initiatives and State Education Policy, 4 Stan. L. & Pol'y Rev. 99, 99 (1992-93).

n23 Elul, *supra* note 22, at 499; Kirst & Odden, *supra* note 22, at 99-100.

n24 Commission on Behav. & Soc. Sci. & Educ., Nat'l Res. Council, High Stakes: Testing for Tracking, Promotion, and Graduation 14 (Jay P. Heubert & Robert M. Hauser eds. 1999).

n25 President Clinton's Message to Congress on the State of the Union N.Y. Times, Feb. 5, 1997, at A20; see also Commission on Behav. & Soc. Sci. & Educ., *supra* note 24, at 13.

n26 Commission on Behav. & Soc. Sci. & Educ., *supra* note 24, at 14.

n27 Department of Education Appropriations Act of 1998, Pub. L. No. 105-277, <section> 447, 112 Stat. 2681 (1998).

n28 Ravitch, *supra* note 13, at 70-71.

n29 Commission on Behav. & Soc. Sci. & Educ., *supra* note 24, at 15; Elul, *supra* note 22, at 500; Kirst & Odden, *supra* note 22, at 104; Arthur L. Coleman, Excellence and Equity in Education: High Standards for High-Stakes Tests, 6 Va. J. Soc. Pol'y & L. 81, 89 (1998).

n30 Lois Salisbury, et al., One Simple Standard: Every Child Can Learn, 4 Stan. L. & Pol'y Rev. 87, 92-94 (1992-93); David Cohen, What Standards for National Standards?, 76 Phi Delta Kappan 751, 753 (1995). For a general account of the tensions among federal, state, and local governments over standards testing, see Ravitch, *supra* note 13, at 150-53, 158-60.

n31 John Gehring, 'High Stakes' Exams Seen as Test for Voc. Ed., 19 Educ. Week on the Web 1 (February 2, 2000) <<http://www.edweek.org/ew/ewstory.cfm>>.

n32 Linda Jacobson, State Graduation Tests Raise Questions, Stakes, 17 Educ. Week on the Web 22 (June 24, 1998) <<http://www.edweek.org/ew/1998/41gradof17.cfm>>.

n33 Julie Blair, Wisconsin Committee Votes to Kill State Graduation Test, 18 Educ. Week on the Web 22 (June 23, 1999) Jacobson, *supra* note 32.

n34 See Coleman, *supra* note 29, at 90.

n35 Commission on Behav. & Soc. Sci. & Educ., *supra* note 24, at 30-31.

n36 Id. at 261. But see Robert A. Davis, Public School Test Policy Hit; Too Much Rides on Scores, Critics Say, Chicago Sun-Times, Jan. 28, 1999, at 12 (noting that the publisher of the ITBS defended Chicago's decision to use it as a factor in grade promotions).

n37 Commission on Behav. & Soc. Sci. & Educ., *supra* note 24, at 31; Rosalind Rossi, 'Too Many Tests,' Students Complain, Chicago Sun-Times, Jan. 12, 2000, at 20; Michael Martinez, Exam Protest Taken to School Board Office, Chicago Tribune, Jan. 12, 2000, at 2.

n38 See Anne C. Lewis, An Overview of the Standards Movement, 76 Phi Delta Kappan 744, 749-50 (1995). A notable exception is an experimental program in California that was designed to allow local school districts to play a central role in developing their own standards. The program operates on the premise that "meaningful change must begin with introspection by the educators charged with daily responsibility for the school's organizational culture and extend outward to all those affected by change - including students, teachers, parents, administrators, and the community." Salisbury, et al., *supra* note 30, at 91.

n39 Linda McNeil & Angela Valenzuela, The Harmful Impact of the TAAS System of Testing in Texas: Beneath the Accountability Rhetoric 9-28 (n.d.) (unpublished manuscript on file with author); William P. Moore, The Devaluation of Standardized Testing: One District's Response to a Mandated Assessment, 7 Applied Measurement in Education 343, 352-59 (1994); M. Gail Jones, et al., The Impact of High-Stakes Testing on Teachers and Students in North Carolina, 81 Phi

Delta Kappan 199, 200-02 (1999); Ann Cook, et al., Unmasking the Low Standards of HighStakes Tests, 19 Educ. Week on the Web (Mar. 8, 2000) <<http://www.edweek.org/ew/ewstory.cfm>>; Robert C. Johnston, In Texas, the Arrival of Spring Means the Focus Is on Testing, Educ. Week on the Web (Apr. 29, 1998). But see Ulrich Boser, Teaching to the Test? Educ. Week, June 7, 2000, at 1 (reporting on a forthcoming University of Wisconsin study that finds that "there may be little overlap between what state assessments test and what teachers teach.").

n40 Charles M. Reigeluth, Educational Standards: To Standardize or to Customize Learning?, 78 Phi Delta Kappan 202, 204 (1997).

n41 Linda Darling-Hammond, Creating Standards of Practice and Delivery for LearnerCentered Schools, 4 Stan. L. & Pol'y Rev. 37, 39-40 (1992-93); Debra Viadero, Testing System in Texas Yet to Get Final Grade, Educ. Week, May 31, 2000, at 1; Gary Orfield & Johanna Wald, The High-Stakes Testing Mania Hurts Poor and Minority Students the Most: Testing, Testing, The Nation, June 5, 2000, at 38; Lorrie A. Shepard, Will National Tests Improve Student Learning?, 73 Phi Delta Kappan 232, 234 (1991).

n42 David J. Hoff, As Stakes Rise, Definition of Cheating Blurs, Educ. Week, June 21, 2000, at 1.

n43 *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (Edgewood I); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991) (Edgewood II); *CarrolltonFarmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489 (Tex. 1992) (Edgewood III); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995) (Edgewood IV). For a description of the lengthy battle over school finance reform in Texas, see J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 Yale L. & Pol'y Rev. 607 (1999).

n44 Ellen Williams, Annual Survey of Texas Law-Education, 49 SMU L. Rev. 901, 902-03 (1996); Brian Gong & Edward F. Reidy, Assessment and Accountability in Kentucky's School Reform, in *I Performance-Based Student Assessment: Challenges and Possibilities* 215, 216-18 (Joan Boykoff Baron & Dennie Palmer Wolf eds., 1996); C. Scott Trimble & Andrew C. Forsaith, Achieving Equity and Excellence in Kentucky Education, 28 U. Mich. J.L. Reform 599, 599-600 (1995); Charles J. Russo, School-Based Decisionmaking in Kentucky: Dawn of a New Era or Nothing New Under the Sun?, 83 Ky. L.J. 123, 123-25 (1994-95).

n45 Richard Whitmire, 'Pushback' Movement, Which Resists Education Reforms, Gaining Ground, Gannett News Service, Dec. 6, 1999; Marjorie Coeyman, Urban Parents Protest "Unrealistic" Standards, Christian Science Monitor, Oct. 19, 1999, at 17.

n46 Sean F. Reardon, Eighth-Grade Minority Competency Testing and Early High School Dropout Patterns 4-5 (Apr. 1996) (paper presented at the annual meeting of the American Educational Research Association).

n47 Coleman, *supra* note 29, at 91.

n48 Peter Sacks, Standardized Testing: Meritocracy's Crooked Yardstick, 29 Change 24, 31 (Mar./Apr. 1997).

n49 See Angela Valenzuela, Subtractive Schooling: U.S.-Mexican Youth and the Politics of Caring 172-73 (Christine E. Sleeter ed., 1999).

n50 See *supra* note 41.

n51 See Richard J. Stiggins, Assessment, Student Confidence, and School Success, 81 Phi Delta Kappan 191, 192-93 (1999); Linda Darling-Hammond, The Implications of Testing Policy for Quality and Equality, 73 Phi Delta Kappan 220, 223 (1991); Jones, et al., *supra* note 39, at 202; Martin L. Maehr & Jane M. Maehr, "Schools Aren't As Good As They Used to Be"; They Never Were, 25 Educ. Researcher 21, 22-23 (1996); Milbrey W. McLaughlin, Test-Based Accountability As a Reform Strategy, 73 Phi Delta Kappan 248, 250 (1991); Kenneth A. Sirotnik &

Kathy Kimball, Standards for Standards-Based Accountability Systems, 81 Phi Delta Kappan 202, 211 (1999).

n52 President's Advisory Commission on Educational Excellence for Hispanic Americans, A Report to the Nation: Policies and Issues on Testing Hispanic Students in the United States (1999)
<<http://www.ed.gov/offices/oiaa/hispanic/PAC/September99.html>>; Mary Ann Zehr, Hispanic Students "Left Out" By High-Stakes Tests, Panel Concludes, 19 Educ. Week on the Web 5 (Sept. 22, 1999) The Office for Civil Rights responded cautiously to the request for an investigation. See Richard T. Cooper, Inquiry Into English-Only Tests Ordered, L.A. Times, Sept. 16, 1999, at A3.

n53 Julie Blair, OCR Issues Revised Guidance on High-Stakes Testing, 19 Educ. Week on the Web 25 (Jan. 12, 2000)

n54 Ben Wildavsky, Achievement Testing Gets Its Day in Court, U.S. News and World Report, Sept. 27, 1999, at 30, 32; Gail Russell Chaddock, Adverse Impact, Christian Science Monitor, Nov. 30, 1999, at 14; Rosalind Rossi, Complaints Hit School Promotion Rule, Chicago Sun-Times, Oct. 22, 1999, at 34.

n55 S. 2348, 106th Cong. <section> 1(b) (2000); see also H.R. 4333, 106th Cong. <section> 1(b) (2000).

n56 S. 2348, at <section> 1 (b); H.R. 4333, at <section> 1(b).

n57 Rob Hotakainen, Calling Graduation Tests Harsh, Wellstone Offers Alternative Plan, Minneapolis-St. Paul Star Tribune, Apr. 4, 2000, at 1A.

n58 Paul D. Wellstone, Even a Senator Could Fail This School Test, USA Today, Jan. 13, 2000, at 18A.

n59 Hotakainen, *supra* note 57.

n60 Whitmire, *supra* note 45; Coeyman, *supra* note 45.

n61 Anand Vaishnav & Doreen Iudica Vigue, Hundreds of Parents, Teachers, Students Rally Against MCAS, Boston Globe, May 16, 2000, at B3; Erica Thesing, Teens Tell Governor He Is Failing Them; MCAS Foes Deliver 800 Letters of Protest, Boston Globe, June 6, 2000, at B2.

n62 John Gehring, Students Boycott Tests in Mass. To Protest Emphasis on Exams, 19 Education Week on the Web 8 (Apr. 19, 2000)
<<http://www.edweek.org/ew/ewstory.cfm>>; Doreen Iudica Vigue & Tara Yaekel, Hundreds of Students Boycott MCAS Test Sanctions Are Issued in Scattered Protests, Boston Globe, Apr. 13, 2000, at A1.

n63 Kelly Pearce, Court Unmasks AIMS; State Ordered to Disclose Questions, Ariz. Republic, Apr. 22, 2000, at A1; Robbie Sherwood & Kelly Pearce, Students Organize Protests Demanding Better Schools, Ariz. Republic, Apr. 6, 2000, at A1; Sophia Lezin Jones, Gwinnett Parents Protest Gateway; All-or-Nothing Test Draws Fire From Those Who Say It Should Not Be Only Criterion for Promotion, Atlanta Journal and Constitution, Oct. 23, 1999, at 3B; Jacques Steinberg, Blue Books Closed, Students Protest State Tests, N.Y. Times, Apr. 13, 2000, at A28.

n64 *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D. Fla. 1979), vacated and remanded, 644 F.2d 397 (5th Cir. 1981), on remand, 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (5th Cir. 1984).

n65 *Debra P.*, 474 F. Supp. at 247-48.

n66 *Id.* at 248.

n67 *Id.* at 249.

n68 *Id.* at 248-49.

n69 *Id.* at 246-47. There were three classes of plaintiffs: one composed of all students who had failed or would fail the test, and two composed of black students in this situation. One class of black students was statewide, and one was limited to Hillsborough County, Florida. *Debra P.*, 474 F. Supp. at 246.

n70 *Id.* at 246-47, 250-51, 267-68.

n71 *Id.* at 254, 260-62.

n72 *Id.* at 250-52.

n73 *Id.* at 255-57.

n74 *Id.* at 268.

n75 *Debra P.*, 474 F. Supp. at 266.

n76 *Id.* at 267.

n77 *Debra P. v. Turlington*, 644 F.2d 397, 404-07.

n78 *Debra P. v. Turlington*, 564 F. Supp. at 177, 179-82.

n79 *Id.* at 185-86, *aff'd*, 730 F.2d at 1411.

n80 *Id.* at 183-84, *aff'd*, 730 F.2d at 1409.

n81 *GI Forum v. Texas Educ. Agency*, 87 F. Supp. 2d 667 (W.D. Tex. 2000).

n82 *Id.* at 671, 673.

n83 Plaintiffs' Response and Brief in Opposition to Defendants' Motion for Summary Judgment, at 7, 17-18, 25-26, *GI Forum v. Texas Educ. Agency*, 87 F. Supp. 2d 667 (W.D. Tex. June 22, 1999) (No. SA-97-CA-1278 EP).

n84 Defendants' Motion for Summary Judgment and Brief in Support, at 10-14, *GI Forum v. Texas Education Agency*, 87 F. Supp. 2d 667 (W.D. Tex. June 4, 1999) (No. SA-97-CA-1278 EP).

n85 *GI Forum*, 87 F. Supp. 2d at 670.

n86 Defendants' Motion for Summary Judgment and Brief in Support, *supra* note 84, at 20-28.

n87 *GI Forum*, 87 F. Supp. 2d at 669.

n88 Plaintiffs' Response and Brief in Opposition to Defendants' Motion for Summary Judgment, *supra* note 83, at 12-14.

n89 Defendants' Motion for Summary Judgment and Brief in Support, *supra* note 84, at 24-25; Reply Brief in Further Support of Defendants' Motion for Summary Judgment, at 5, *GI Forum v. Texas Educ. Agency*, 87 F. Supp. 2d 667 (W.D. Tex. July 2, 1999) (No. SA-97-CA-1278 EP).

n90 Defendants' Motion for Summary Judgment and Brief in Support, *supra* note 84, at 22-25.

n91 87 F. Supp. 2d at 677-79.

n92 *Id.* at 679-81.

N93 *Id.* at 681-82.

n94 Plaintiffs' Response and Brief in Opposition to Defendants' Motion for Summary Judgment, *supra* note 83, at 39-42.

n95 *GI Forum*, 87 F. Supp. 2d at 670; Defendants' Motion for Summary Judgment and Brief in Support, *supra* note 84, at 28-29; Reply Brief in Further Support of Defendants' Motion for Summary Judgment, *supra* note 89, at 12.

n96 Defendants' Motion for Summary Judgment and Brief in Support, *supra* note 84, at 29 n.6.

n97 *GI Forum*, 87 F. Supp. 2d at 682; Plaintiffs' Response and Brief in Opposition to Defendants' Motion for Summary Judgment, *supra* note 83, at 35-37; Defendants' Motion for Summary Judgment and Brief in Support, *supra* note 84, at 1417; Reply Brief in Further Support of Defendants' Motion for Summary Judgment, *supra* note 89, at 9-11.

n98 *GI Forum*, 87 F. Supp. 2d at 682; Defendants' Motion for Summary Judgment and Brief in Support, *supra* note 84, at 17-18; Plaintiffs' Response and Brief in Opposition to Defendants' Motion for Summary Judgment, *supra* note 83, at 3738.

n99 *GI Forum*, 87 F. Supp. 2d at 682; Plaintiffs' Response and Brief in Opposition to Defendants' Motion for Summary Judgment, *supra* note 83, at 38-39; Defendants' Motion for Summary Judgment and Brief in Support, *supra* note 84, at 1820.

n100 Dr. S.E. Phillips, *The Texas Assessment of Academic Skills Exit Level Test*, Defendant's Exhibit D316, at 10-11, *GI Forum v. Texas Educ. Agency*, 87 F. Supp. 2d 667 (W.D. Tex. Jan. 1999) (No. SA-97-CA-1278 EP); Professor Philip Uri Treisman, *Preliminary Expert Witness Report*, at 14-15, *GI Forum v. Texas Educ. Agency*, Defendant's Exhibit D33, 87 F. Supp. 2d 667 (W.D. Tex. Feb. 25, 1999) (No. SA-97-CA-1278 EP).

n101 *GI Forum*, 87 F. Supp. 2d at 682-83.

n102 See Dr. Walter M. Haney, *Preliminary Report on Texas Assessment of Academic Skills Exit Test (TAAS X)*, Plaintiff's Exhibit P 36, *GI Forum v. Texas Educ. Agency*, 87 F. Supp. 2d 667 (W.D. Tex. Dec. 11, 1998) (No. SA-97-CA-1236 EP); Dr. Walter M. Haney, *Supplementary Report on Texas Assessment of Academic Skills Exit Test (TAAS-X)*, Plaintiff's Exhibit, *GI Forum v. Texas Educ. Agency*, 87 F. Supp. 2d 667 (W.D. Tex. July 30, 1999; editorial revisions Aug. 5, 1999) (No. SA-97-CA-1278 EP).

n103 *GI Forum*, 87 F. Supp. 2d at 681.

n104 Phillips, *supra* note 100, at 13-15; Treisman, *supra* note 100, at 21-33.

n105 *GI Forum*, 87 F. Supp. 2d at 671.

n106 *GI Forum*, 87 F. Supp. 2d at 683.

n107 Cecilia Balli, *MALDEF Won't Appeal Ruling; Group will Eye Texas' New Test*, *San Antonio Express-News*, Feb. 8, 2000, at 1B. In the wake of the state's successful defense of TAAS testing, the Board of Regents has proposed standardized testing for college students at the University of Texas. Chris Vaughn, *UT Regents Consider Standardized Tests; Faculty Reaction "Anger and Disbelief"*, *Fort Worth StarTelegram*, Sept. 20, 2000, at 5; Linda K. Wertheimer, *UT Schools Weigh Systemwide Testing; Faculty Question TAAS-Like Accountability Plan*, *Dallas Morning News*, Sept. 19, 2000, at 1A.

n108 *Eric V. v. Causby*, 977 F. Supp. 384 (E.D.N.C. 1997).

n109 *Id.* at 386-87; see also Elul, *supra* note 22, at 501-02.

n110 *Eric V.*, 977 F. Supp. at 388.

n111 Elul, *supra* note 22, at 503.

n112 Anand Vaishnav, *Parents Cannot Get Copies of LEAP Test; State District Judge Calls Request "Nonsensical"*, *New Orleans Times-Picayune*, Feb. 10, 2000, at A5.

n113 *Parents for Educ. Justice v. Picard*, No. 00-633, 2000 U.S. Dist. LEXIS 6382 (E.D. La. Apr. 20, 2000); Randy McClain, *Suit Attacks LEAP Use in Promotions*, *Baton Rouge Advocate*, Mar. 2, 2000, at 11A; *Sensible Decision on LEAP*, *New Orleans Times-Picayune*, Apr. 26, 2000, at B6.

n114 Will Sentell, *BESE Changes Rule on Holding Back 4th-Graders*, *Baton Rouge Advocate*, May 1, 2000, at 1A.

n115 See *Rene v. Reed*, 726 N.E. 2d 808 (Ind. App. 2000) (class certification); Lynn Olson, *Indiana Case Focuses on Special Ed.: Suit Challenges High-Stakes Tests*, *Educ. Week*, May 31, 2000, at 1.

n116 Rachel F. Moran, *Milo's Miracle*, 29 Conn. L. Rev. 1079, 1084-87 (1997).

n117 *Id.* at 1087-90.

n118 See *supra* notes 43-44 and accompanying text.

n119 Trimble & Forsaith, *supra* note 44, at 601.

n120 Robert Reinhold, *Smile When You Say "School Reform,"* *Pardner*, N.Y. Times, Jan. 4, 1987, <section> 12, at 60; J. Michael Kennedy, *Doomsday Budget Shows Texas the Cost of Not Raising Taxes*, L.A. Times, May 22, 1991, at A5; Jennifer Bradley, *Tex-Mix*, *New Republic*, Mar. 25, 1996, at 27.

n121 Farr & Trachtenberg, *supra* note 43, at 615.

n122 *Id.* at 642-43.

n123 Tyce Palmaffy, *The Gold Star State*, 3/1/98 *Pol'y Rev.* 30, 30 (1998).

n124 Bob Banta, *Courses Prepare Students to Fill Teacher Gap*, *Austin AmericanStatesman*, May 25, 2000, at 1.

n125 Sirotnik & Kimball, *supra* note 51, at 214; George F. Madaus, *The Effects of Important Tests on Students*, 73 *Phi Delta Kappan* 226, 230 (1991); Eisner, *supra* note 12, at 764; Reigeluth, *supra* note 40, at 206; Linda Darling-Hammond & Beverly Falk, *Using Standards and Assessments to Support Student Learning*, 79 *Phi Delta Kappan* 190, 196-97 (1997); Rhona S. Weinstein, *High Standards in a Tracked System of Schooling: For Which Students and with What Educational Supports?*, 25 *Educ. Researcher* 16, 16-17 (1996).

n126 Orfield & Wald, *supra* note 41 (describing the popular perception that highstakes tests are "a necessary form of tough love for struggling schools").

n127 See, e.g., Melanie Markley, *Regardless of Where They Live, Parents Ask the Same Question: How Good Are the Schools?*, *Houston Chronicle*, Oct. 13, 1996, at 2 (focusing on minimum standards diverts Texas public schools from "taking bright, privileged students to a higher level of learning"); Reinhold, *supra* note 120 (TAAS tests do little to benefit affluent schools and simply add "a layer of restrictions on creativity"); Richard Lee Colvin, *Crusader Argues School Reforms Hinder Learning*, L.A. Times, Feb. 22, 2000, at A1 (a suburban parent complained that test preparation displaced her daughter's writing workshop).

n128 McLaughlin, *supra* note 51, at 248.

n129 Daniel H. Weinberg, *Census Bureau, Current Population Reports, Household Economic Studies 60-191, A Brief Look at Postwar U.S. Income Inequality 3-4* (1996) (economic stratification has grown steadily beginning in 1968 and continuing through the 1990s); Teresa A. Sullivan, et al., *The Fragile Middle Class: Americans in Debt* (2000) (documenting that the middle class is now more vulnerable than ever to going bankrupt as a result of divorce, job loss, injury, and illness).

n130 See Lemann, *supra* note 17, at 343-45.

n131 See Gerald W. Bracey, *The Forgotten 42%*, 80 *Phi Delta Kappan* 711 (1999) (noting that in 1996, half of high school dropouts lived below the poverty line compared to 24% of high school graduates, 16% of those with some college, and 2.5% of college graduates); Gerald W. Bracey, *The Eighth Bracey Report on the Condition of Public Education*, 80 *Phi Delta Kappan* 112 (1998) (noting economic stratification in a robust economy and a widespread and overstated belief that schools are tightly linked to the economy).

n132 See John A. Powell & Marguerite L. Spencer, *Remaking the Urban University for the Urban Student: Talking About Race*, 30 *Conn. L. Rev.* 1247, 1248 (1998) (describing how the use of standards testing abated to some degree in the postBrown era but reemerged in the late 1970s); Note, *Teaching Inequality: The Problem of Public School Tracking*, 102 *Harv. L. Rev.* 1318, 1318 (1989) (noting the short period in the late 1960s and 1970s when courts struck down tracking based on standardized test scores as racially discriminatory); David Kirp, *Intelligent Policy*, 2 *Psych. Pub. Pol'y & L.* 603, 610 (1996) (describing campus protests in 1969 when Professor Arthur Jensen published an article on racial differences in intelligence).

n133 See Powell & Spencer, *supra* note 132, at 1286-90 (describing increased reliance on standardized testing in college and university admissions in the push for formally colorblind decision-making).

n134 See Rachel F. Moran, Bilingual Education, Immigration, and the Culture of Disinvestment, 2 J. Gender, Race & Just. 163, 205-06 (1999).

BILL ANALYSIS -- HB 94
1st Hearing February 14, 2001

Sponsor: House Rules by Request of the Governor
Bill Title: Pupil Competency Test; Annual Education Report

Synopsis:

- Section 1:** Amends uncodified law of the State of Alaska by adding a new section on the purpose of the state's Quality Schools Initiative and Explains the purpose of changing the effective date of the Competency Test
- Section 2:** Requires the Department to provide an annual report to the Legislature on the progress of each school toward high academic performance for all pupils. Didn't SB 36 address this?
- Section 3:** Notwithstanding the current Competency Test statute, the State School Board shall determine the requirements to receive a diploma for a pupil with a disability who is receiving educational services through an I.E.P.
- Section 4:** Changes the effective date of the Competency Test to January 1, 2006.
- Section 5:** Allows the State Board of Education to recommend a further delay of the effective date later than 2006 if, based on the report provided for under Section 2, it would be reasonable, fair, and in the best interest of pupils.
- Section 6:** Until January 1, 2006, and at the direction of the State Board of Education, school districts will be required to give the Competency Test at least twice per year and reflect students' test results on their transcripts.
- Section 7:** Defines "school district".
- Section 8:** Immediate effective date.

Fiscal Note: \$0 "This bill delays the effective date of the high school competency examination graduation requirement until 2006. There is no additional cost related to this delay." — *what about test prep costs?*

Question: What is the estimated cost of producing the annual report *X* called for in Section 2?

Question: What is the anticipated cost associated with Section 1 (a) (2) of the *X* bill -- "allowing the Department of Education and Early Development to continue to develop and perfect the testing method"?

Available to Testify:

Bruce Johnson, Deputy Commission of DEED
Greg Maloney Special Education Director, DEED
Phil Reeves Lawyer for DEED

Jerry DeMientiff Lower Kuskokwim School Board (offnet)

May be on the Offnet:

Rich De Lorenzo Superintendant of Chugach School District
Students Chugach School District

Teleconference Sites: Mat-Su, Sitka, Tok, Petersburg, Nome, Valdez, Fairbanks

The National Education Association (NEA) offered Representative Bunde the opportunity to poll their members regarding the High School Competency Test. The following question was asked of those who subscribe to NEA's listserve:

In the Legislature, some legislative leaders have called for a delay in the High School Competency Test, fearing that there will be students who are denied a high school diploma because they do not pass one or more sections of the test. Other legislative leaders oppose a delay of the Competency Test, fearing that some districts will abandon efforts to improve. Which option do you support?

NEA received 76 responses between February 5 and February 13, 2001. Those responses are attached.

>Which option do you support?

I support delaying the High School Competency Test

>

>

>Please briefly describe you position.

I feel that the test is a good tool, but there needs to be more time to prepare students for a pass or fail system. There needs to be a state wide teaching standard from elementary thru high school (that is followed). I feel that the way it is set up now, many students that are struggling (I am the step parent of one) will just quit school.
More time, more money, more teachers, more help

Neither!

I think they should begin at the lower levels and work their way up.

You can put me down for a do it now, don't delay

Another question, how about all the military kids that have passed a state exam in another state--when they come here, they must take AK's test. Doesn't seem right for those. One Florida kid said the math here was much more difficult, English & writing easier. This is the problem: in FL they can pass with a 65%. Just food for thought

I support delaying the compulsory HSQE because students may be denied a diploma. Schools that are working to ammend curricula and provide remedial instruction, have not had enough time to help these students. I do not believe that schools will discontinue efforts to improve if testing is delayed. Also, with the benchmarks exams in place, those students in lower grades will have the prerequisite skills when they enter high school therefore alleviating much of the remediation difficulty we are currently experiencing. Thank you for the opportunity to respond to this situation.

I believe that there should be no delay in the competency test unless the legislature is willing to put \$\$\$ into intervention programs for students who are not meeting the benchmarks / exit exam. I know we would be holding our students hostage for funding, but when 1/3 of the seniors in the state aren't receiving diplomas, the legislature will be forced to do something proactive.

Vernon Marshall, My name is [REDACTED], I work at [REDACTED] High School in the counseling office and see the results of the testing on the students transcripts that I place the stickers. I also have a 15 year old granddaughter here at [REDACTED] HS in the 9th grade. She is behind in math and english. Just because of her, I hope that help will be available to students like her who do not fall in the top of the class. Junior High schools need to work harder to prepare these students for high school. I don't know how to go about this and throwing more money at education may not be the answer. If a student continues to get F's in core subjects in Jr. H.S. should not the problem be handled there. Change the format of team teaching, work with students that have core problems such as reading. Meet the challenge these young people present us with. I feel strongly that the need for K-8 should be better challenged, changes made and if needed money. Let's do something to make these students understand that coming into a high school you have to have command of certain skills to meet the need of this facility. Thanks for listening. [REDACTED]
Records, [REDACTED] High School, [REDACTED] AK

⑥ I would like to see the HSGQE continued, but without the diploma being at stake. Students who pass the tests would receive a special seal to place on their diplomas

⑦ I support delaying the dramatic consequences of the HSGQE - however, I believe that the test should continue to be given, and results noted on student transcripts. Schools and districts need to provide programs to support students who are not currently meeting the test standard. Legislators cannot delay the test and also not give additional monies to support activities to improve student achievement.

⑧ Which option do you support? Do not delay.

⑨
> Which option do you support? I support the move to delay the HSCT.
>
> Please briefly describe your position. I am a fifth grade teacher.
>

⑩ In the matter of whether or not to delay the competency test I am somewhat ambivalent. Is it fair to suddenly spring this on these students who have been taking the low road? No. However, it is needed and students, and parents, need to wake up to the fact that many students are not ready to move on to college or any gainful employment. They must start taking steps now. They have heard this before but chosen to ignore it. Therefore, we are forced to make them pay attention. To delay is to indicate once again that there will always be a way around any obstacle, and that we are a society of mediocrity. We pay mediocre wages, to attract mediocre people into an honorable profession, so they can churn out mediocre students.

So we either reinvent the wheel and apply this test to those students entering kindergarten when it was first mandated, or we stick with what we have. These students do have 2 years beyond high school to actually pass any given part, or so I am told.

If the public wants outstanding students, they must have outstanding teachers, or teachers willing to sacrifice themselves and families even further than they already are. This in my mind requires just compensation, and proactive planning at the regional level. Face it, you will not find an NFL football player, even a 3rd stringer, moving to the XFL for \$50,000 / year.

⑪
> Which option do you support? Delay the test until schools are ready for
> students to take it!!
>
> Please briefly describe your position. The test was started before schools
> had time to prepare students for it. It's not fair to penalize those
> students. Also, something needs to be done about accommodations for
> learning disabled students!!

12 Which option do you support? The test should be phased in. 2002 could be reading, 2004 the second section and 2006 all including the math. We should support a high school qualifying exam, we just need time to align the curriculum and above all adequate financial resources. While the state has cut education funding 30% (through inflation) they are now asking districts to have all students pass a qualifying exam. As the front page article in today's Anchorage Daily News states, Alaska is falling way behind in funding education.

Please briefly describe your position. Regardless of what the state decides on the exit exam, teachers will bear the criticism for students not passing. It is a staggering thought that the state can cut funding (through not inflation proofing) and then have teachers and districts shoulder the burden for new standards. Many of my colleagues are already documenting every assignment with the corresponding state standard to show that they covered the material in case they are later sued by parents (Recently I have had eight of my colleagues leave the state for jobs with better working conditions and better pay). The threat of lawsuits can hardly be conducive to good teaching.

The disparity between schools is nowhere addressed. I have taught at small schools where I believe there is a chance that no graduates might pass the test as it is now. At my present school I believe that perhaps 75% would pass and in two years 85% success. Sure there are outstanding teachers at my present school but the caliber was just as high at the smaller one where I taught. There are many other factors and low test scores at small remote schools cannot be blamed on teachers, which it will be.

Therefore I favor a phase in of standards starting in 2002 with reading. Further the funding formula should be increased 30% to cover 10 years of funding cuts. Only then will Alaska be on the verge of once again being competitive.

>

>Please briefly describe your position.

13 This test has definitely gotten everyone's attention. I don't think district's will abandon efforts to improve. If anything, districts are desperately scrambling to align their curriculums and direction with the state performance standards. I also believe that the time period from inception to implementation of this exam was very short. There are still many "bugs" that need to be worked out in the test itself as well as the process. In the meantime, it would be unjust to deny students a diploma during the "debugging" process. Further, the term "competency test" does not accurately reflect the content of this exam, particularly in the math section. I understand that committees are currently reviewing such content, and making recommendation to the state board of education. If there are questions of such magnitude, then implementation of this exam and its requirement for graduation should most definitely be delayed until appropriate adjustments can be made by the test makers and the districts.

>

14 I support delaying the test until the curriculums are closer aligned to the test. This is not the same as teaching to the test, it is teaching the material that the tests covers.

15 I support a temporary stay before the full implementation of the HSQE. I think that schools should continue to give the exam. However the high schools need to have remedial support services on paper in a year so that DEED can advise the legislature what the supplementary summer budget for remedial support will be and that program in place by 2002. With the exam in place for students graduating in 2004. I believe that if there is ever going to be progress with standards we need to create the need for expanded remedial services and there has to be a commitment to fund the options. Some kids need more time to learn. Other kids do not. Some kids and there families need more motivation. Others are already doing fine. It is not one size fits all any more than they all wear the same size shoe. And more time is going to cost more money. And that money needs to go to where the rubber meets the road. There needs to be SIGNIFICANT teacher input into remedial programs so that the state doesn't waste its money and the kids don't waste their time. If you are not paying for real teachers and a real program that corrolates to the needs to the student, don't bother.

I am a high school librarian, which means I have a broader perspective in some ways than a classroom teacher as I see all the students, and not just a select few.

I would hate to have the HSGQE delayed for the following reasons:

1. With the advent of the exam, students and families have begun to take responsibility for their own education. A much-needed change.
- 16 2. Our school has made some needed curriculum changes, not so much in teaching to the test as in modifying the sequence of math classes (again a good move as far as I can tell--especially since our math staff was not happy with a recent change in district graduation requirements and the addition of a bonehead math class).
3. Because of the test, our school has instituted a silent reading period and after school math and writing labs. A boon to the good students, a necessity to the lower/ average students.
4. We currently have around 30 students that probably will not get a certified diploma next year--most of them special education students--mainly because of the holes in their math education. Changing the date of requiring passing this test would allow these students to graduate, but once again it would be back to the old process of graduating unqualified students, the sooner we implement this requirement, the sooner the public can begin to have faith in our diplomas. Even with postponing the deadline, there will probably still be many special education students who will not get the certified diploma--because on innate ability--not because of lack of educational opportunity.

If a delay must be implemented, a two-year delay would suffice for those students capable of passing all levels of the exams.

Thanks for listening.

17 I favor the delay for a year or so. It is important that all students have some basic skills. If not they should not get the certificate of completion and not a diploma.

18 Which option do you support? I have concerns about the whole thing, but since I have to choose one or the other, it would be the delay. Maybe then enough time will have passed for people to understand that the US Educational system is not set up for this. I feel that if we want to set higher standards, it needs to start long before a child enters school. In addition, we need honor each other enough to expect that all teachers to do their jobs and quit protecting the ones that make us all look bad. Finally, if we are doing this because of how "ALL" of our kids scores compare with Europe/Asian scores....European/Asians only test their "Best" at high school level! So then let's just put the Benchmarks at eighth or ninth grade, and set the ones that fail on a skills track like they do!

19 >Which option do you support? I SUPPORT DELAYING THE HIGH SCHOOL >QUALIFYING EXAM.

>

20 >Please briefly describe you position. I FEEL THAT STUDENTS SHOULD BE >GIVEN THE TIME TO GO THROUGH ALL BENCHMARK LEVELS BEFORE TAKING THE EXAM. >THIS ALLOWS TIME TO IDENTIFY STUDENTS WHO HAVE DEFICIENCIES AND TIME TO >HELP THEM IMPROVE IN THOSE AREAS. IT WOULD ALSO APPEAR THAT THE CUT >SCORES AND CONTENT NEED TO BE LOOKED AT TO MAKE SURE THEY ARE FAIR TO >STUDENTS. CHANGE TAKES TIME AND IN THIS CASE THE LEGISLATURE MAY HAVE >GIVEN TOO SHORT OF A TIME FRAME FOR IMPLEMENTATION. HOPEFULLY THEY WILL >LISTEN TO THE PEOPLE THAT DELIVER THE SERVICES.

21 I support keeping the test dates as they are at this point. Educators and students have been working hard to meet the standards and I fear (as a 9th grade English teacher and in the THICK of it) that student momentum, in particular, will be lost in a delay of grad. requirements. I DO have mixed emotions about this, however. Many issues surround this topic and no EASY resolution is on the horizon. My colleagues and I are on the same page with these comments.

22 SURVEY ANSWER: I feel that the time line for completion of the Exit Exam should be moved to 2006. Two years is not enough time for some students to prepare for the exam. I am concerned about a student who, say, can read and write on an above average level, but has been in special education for math during all of his/her years in school. This student will not pass the math part of the exam, but this does not mean that he/she cannot go on to college and be a productive member of society. Some provision needs to be made for Special Education students.

23 I think we should have an exit exam that allows students with differences to use any method possible to show us they can pass the exam. If this is the standard we are wanting to set then lets stick too it. If the standards are too high for the average person then reset the cut off scores. If we cancel the test now we lose a lot of momentum. But I would rather postpone it than have only 20% graduate with a diploma.

>
>Which option do you support?
Which option do you support? I support delaying the test.

24
>
>Please briefly describe you position.

I believe that many students, if required to pass in 2002, will not have the acquired skills by this time. I'd rather see the HSQE implemented along with the Benchmark scores. Students and teachers have not had sufficient time to allow for proficiency.

If we (educators) were aware of what skills would be necessary for high school students and could prepare the child from elementary school, I believe that this would be more responsible. I do understand that if the HSQE is to continue, that there will be growing pains. Some students will not receive a diploma, but to intact it without more training for teachers and a more solid foundation for students would be grievous.

>

This note is in response to the legislatures request to hear the opinion of NEA members.

When a person decides to lose weight how do they go about it? Do they weigh themselves more often with more accurate scales? Or do they change their exercise and eating habits?

25
The qualifying exam is merely a more accurate scale not a change in fitness habits. The answer to reforming education does not lie in increased testing. It lies in professional development. Teachers need to have the opportunity to watch their talented colleagues teach. They need to be allowed the opportunity to attend conferences and classes that will improve their work within the classroom.

Having a salary that is competitive with other states would increase the number of good teachers being drawn to Alaska. Allowing teachers a voice in forming public education policy is crucial. After all who better to decide what would improve the quality of the education in our schools than the professionals that do the teaching.

If pushed I would support delaying the test for a few years to allow our students to be better prepared. I disagree with the test for many reasons.

Not the least of which is that it is absurd that after 12 years of attendance, hard work, and a,b,c,d,f grades we have decided to put the measurement of our children's education in one pass/fail test. How many colleges are going to look at this test without looking at the students transcripts, recommendations, ACT/SAT scores, personal essays, etc..... How do we know if this test is a measure of employability? I do not understand what purpose this test serves.

Andy McQueen

26
I am in favor of delay, but there are several overarching issues, regardless of when the test consequences go into effect: funds for remediation, accommodations for those on IEPs, and use of differentiated diplomas -- rather than denial of diplomas -- based on student proficiency.

I believe the competency tests should be delayed. (following is a quick reason why:)

1. There are no provisions for adaptations or modifications to meet the unique needs of children with disabilities.
2. Too many reasons for taking the test are wrapped up into ONE test.

27

I don't think competencies are related to a district's efforts to improve (improve what?), but rather: are the competencies related to what the test is testing for, i.e. is the test to find out if the kids can pass college courses, or is the test to find out if the kid can fill out a job application and hold down a warehouse job or drive a bus, or answer a telephone?

I think that for those kids who are college bound, they should take the SATs and if they score adequately, would receive a diploma. Passing this test indicates whether teachers have been teaching the right things to those kids and would hold those teachers accountable for that course work.

All of the other students who do not intend to attend college should be given a minimum competency test (at about 6th grade level, which I think is the national norm for reading ability) and be granted a diploma if they pass. Not all kids need to take the same exam to get a diploma, in my opinion.

Good luck.

28

The Board of Directors of the Fairbanks Education Association and our Policy Assembly have taken a position supporting a delay in the implementation date of the HSGQE, probably until 2006. We did this in November for a variety of reasons, and FEA has gained even more concerns since then. Our concerns include appropriateness of the cut scores and the test items (especially in the math section), unresolved issues such as special needs students and transient (including military) students, and more. Our district is moving full steam ahead on analysis of the benchmark results and implementing the Cox model—but this won't result in a coordinated change in our curricula to reflect the benchmark results until next year at the earliest. These are just some of the reasons. . . .

I don't think we're averse to continuing to administer the HSGQE during any interim period and recognizing students who have passed it on their diploma or transcripts.

29

In reply to the questionnaire concerning the HSGQE. I'm not convinced that any advantage that may be gained by getting tough with high school students will serve any purpose other than encourage them to quit or allow them to exit the Alaska state school system with no diploma (after 13 years of effort and investment). I believe that those young people will be at a great disadvantage in nationwide job search. Ultimately the chances of those dropouts will more than likely COST this state in increased social services and loss of revenue due to impacted taxable income.

Within the profession of teaching I would be hard pressed to identify any system or individual that would abandon efforts to improve public education simply because the "test" is delayed. Additionally, it is not up to the teachers to abandon efforts to improve. It is local board direction and leadership that is responsible to coordinate educational improvement through the wishes and desires of those that they represent.

Teachers have and will continue to embrace legislative leadership toward continued educational growth.

I oppose a delay of the testing for I have seen some very positive results such as administrators becoming involved with what is actually going on in the classroom and supportive of the classroom teacher whereas prior to the testing their attention seemed to be focus in other areas. I think it has helped redirect our priorities which delaying the test will not help continue this process. I do think that NEA must stand up to the DOE and legislature and insist that more help is given. This year we do not have practice tests for the benchmarks 4,6,8 and so our students again (last year we, the school, got the practice tests one week before the actual test!) are going into the testing situation "cold."

30 Familiarizing the students with the type of test they will be taking is an essential step in readying students to do their best. The DOE is too quiet and in a reserved mode as far as specific help to the school districts. They should provide us with research and data on schools who perform well in various parts of the state. Systems which are successful in helping their students should be encouraged to share their methods and techniques with other schools. Data gathering should be on-going in all parts of our state to find out what is working to teach students reading, writing or math in Alaska (rural and urban). The DOE should be our active partners in helping the students and the legislature should encourage DOE to participate actively.

Do not delay the Qualifying Exam.

31 Districts and Students alike have and are continuing to gear up for the exam. I agree that if the exam is delayed then so will all the efforts. Right now I believe that students are rising to the occasion and taking the exam seriously. I feel that it is important to stay the course.

32 I support the delay. I feel that without the results from the earlier benchmarks, districts have not had the time to adequately prepare for the change.

33 I am in favor of delaying implementation of the high stakes HSQE. I feel it is potentially unfair to students who have not had the benefit of benchmark testing throughout their academic career. I also fear that the test was put together too quickly, as a result of the legislative mandate establishing it. Furthermore, I am opposed to the all-or-nothing approach of the HSQE. While I agree that a certified diploma is a good idea, I don't think Sp.Ed. students and others should receive only a certificate of completion. I like Lyda Green's suggestion that we have more than one kind of diploma. One shoe will never fit all sizes!

34 Which option do you support? I feel that not enough time has been given to implement the proper programs to get students up to the level that is expected for the minimums of this test. I also have to wonder if the difficulty of each section of the test is equal and a true representation of what people feel is a base minimum, not a grandiose expectation from schools not given adequate funding to support this endeavour.

35 Putting the competency test into effect now would only serve one purpose: to prove how many Alaskan students can not pass its minimum requirements. It seems like we (in education) are already well aware of this fact. I do believe that our education system needs a lot of reform and money, but the test just doesn't seem to actually do anything positive for education. If the system is broken, setting higher standards is pointless.

36 I support having state standards and the Exit Exam. The problem is how this was implemented. Ideally, the standards would be implemented from grade one on through the students' education career. A compromise would have been to start at sixth grade. As it is now, we are doing a disservice to those students who are in the upper grades that do not have the skills and knowledge to pass the exit exam.

37
I believe that the competency test is a good thing as long as it is testing the basics needed to fulfill a decent work ethic. I have heard from instructors of math that the math portion is not at all basic and that it relates to higher level skills that not all children can attain or need to attain. It seems that the testing should have been conducted and then decisions made based on how the children generally fared compared to their grades in school. That would show to some extent whether or not the test was fair. I also don't believe that issues relating to special ed students have been solved and that students with dyslexia will suffer when taking this test. So to make this long story short, I would consider waiting before this testing was used to determine whether or not a student received a proper diploma. Having said this, I firmly believe that students are graduating with less than adequate skills and something must be done.

38
I support the test but prefer a delay of the "teeth" in it, especially for the math. Maybe they should postpone the math requirement and keep the reading and writing? I feel the test serves a purpose--I have a reason when they ask, "Why do we need to know this?" and it holds the students accountable beyond us. I have at least one student whom I don't feel can read well enough, but it is no longer a requirement of my class. If the state holds its ground, we'll be forced to make sure they read whether they pass all of our classes or not.

39
I believe that testing should go forward. However, I strongly disagree that students be denied a diploma when they have not been exposed to a standards based education. This is unfair especially for students having transferred into our state or district from outside. The testing process should not be interrupted. Students will gain additional test taking skills, hopefully districts will see that the process is here to stay and will not abandon improvement efforts. A continuation of the testing program will also provide more NEEDED data to "tweak" the cut-off points. I have not seen enough intermediary steps put in place to support those students falling below the proficient level.
Thank you for the opportunity to speak my voice...

40
I support a delay, but with specific requirements for districts to put improvement plans in place. There cannot be failure on the part of the state in monitoring progress toward competency for our students. The delay will help us have time to implement plans we have already begun to use. It is unfair to expect students to pass this test in such a short amount of preparation time. By delaying there will be time to work out the probable problems expected with special ed students and others.

41
I do not favor delaying the graduation requirement. It is only delaying the inevitable.
Better to face the facts now, determine the solutions, and implement them.

- > Which option do you support?
- > DELAY or eliminate....
- > Please briefly describe you position. Students have not been "prepared" for this type of exit exam. Many students "freeze" at taking such "all or nothing" exams. Many students excel in one area or another...natural talents in math but not English. Natural or developed writing skills but struggle with math.
- > I work with many learning disabled students; they should not be stressed out and penalized and only receive a certificate of attendance because of some "cut off" score for passing a test. More opinions and thoughts but my ride is here!! It's after 4 pm.

I do not support the test at all. I firmly believe we are on the wrong track in this attempt at reform. It's a misguided attempt which should be scrapped completely, not just delayed.

>Please briefly describe you position.

we don't need to have labels of failure placed on children as they enter adulthood;
having the resources available to students are not in place currently and would need to be available in order for the delay to be effective.

As to my opinion of the HSQE, my 16 year old son passed all sections with flying colors, and dropped out of school this year because he felt it was irrelevant. He has decided to get his GED and enroll in UAA in the fall. In the mean time, he is being a big slug (I took away his driver's license and car). This test did nothing to help him.

So-do I think the date should be delayed for those kids who do not pass? Yes. I think schools are doing a great job, but the parents of those kids who do not pass, need a wake up call. I also think that the state needs to do away with social promotion. That is a HUGE problem for kids who are not ready for the next grade, but get shoved forward without the necessary skills because their parents won't let them repeat a grade.

thanks for "listening"

I am in favor of holding the students to the standards in Reading and Writing for the class of 2002. The Math test probably needs to be reworked to better reflect a basic competency level, which is where the other two test currently are. The reading test, for which I sat on the Cut-Score Committee, should probably be stiffened a bit.

I taught in Barrow for 5 years, have been in the Mat-Su for the last ten, and was in Oregon for 17 years prior. Oregon has had competencies and standards since the '70s, so they are very familiar to me, but Alaska seems to be behind the curve. Having always been outcome and standards based, I cannot fathom how any school or district or teacher can function for the betterment of the students without such standards. I testified at the audio conference on January 27 to that effect. It's not just a problem in rural schools, as some people would like us to believe, but in individual buildings within districts, and within individual classrooms within buildings. I currently teach at ~~Barrow~~ High, which has fairly high percentages of students passing all three tests, but we run our building much differently than a previous school at which I taught which is only 7 miles away and has about the same number and composition of students. We were 10 percentage points higher in reading (no big deal), 20 percentage points higher in writing, and doubled their number of students passing the math portion. One of the reasons I transferred to ~~Barrow~~ 8 years ago was because of its willingness to focus on academic achievement and work towards standards. When Con Bunde's bill passed in 1997, we did not bitch or moan or ignore; we set out a plan of action by department which was implemented in the fall of 1997. We have been on track, are continually refining and researching, and have not received any extra state help to achieve this. At the same time, our class sizes have risen to the point where I teach two Social Studies classes with more than 40 students in each. It would be very nice to have increased state funding so we could lower some PTRs, but teaching basic skills to

47

I feel we should keep the deadline in place for 2002. If students do not pass, they still have multiple opportunities to take the test (until they are 22!) and should then receive a proper diploma. If they can't pass by then, maybe we need to accept that reality. It seems ridiculous to me that we should expect every student will pass. That is a laudable goal, but not a realistic one.

Keep me on your list. I feel quite strongly about keeping the test in place.

48

I don't particularly like either option. Frankly, I'm having a difficult time deciding whether or not the test is a "good" or "bad" thing. Since it's inception, I've seen a tremendous improvement in most of my students efforts in class. The mere threat that information may be needed for the HSGQE has prompted many who were apathetic to start taking an interest in classroom details rather than just getting by. On the other hand, I've seen as many students leave the state, go to the GED or simply give up and sit in class until they are old enough to drop out because they don't believe they have any chance. Granted, I work in an alternative ed program, so the population of students isn't necessarily the same as students in the mainstream, however, these two extremes are probably happening there as well.

The best choice I've heard so far was the proposal to make the HSGQE mandatory for a state issued diploma while allowing local districts to issue their own diplomas for individuals who do not pass it. Presumably, the state diploma is seen as higher quality.

49

My response: keep the testing on track but to delay it a few years to condense the test. We can still test basic skills with fewer test items. I am a third grade teacher and I find that the test is just too long and grueling for most of my students. Their attention spans aren't geared for that long of a test. Many of us on the testing committee agreed at the time of inception that it was too long on the average, test items (for example in the Math section) required too much reading. We need to have a benchmark to measure school success but I don't think that we have come to a consensus on where that mark should be. I am in favor of testing, keep it on track but refine the test

50

I support the delay. I feel the state needs to deal with the issue of Learning Disabled students who do not qualify for the alternative assessment, yet due to a severe discrepancy in Reading, Math and or Written Expression, may be in jeopardy of not passing the exit exam. Also, districts need time to examine test results and align instruction to meet areas of need at each level. Up until now we have not had this information.

51

> Which option do you support? I support a delay in the High School Competency Test until 2006.

> Please briefly describe you position. I do not believe that the State Board of Education or the legislature pre-programmed sufficient time to FUND and implement the curricula changes necessary to prepare for the standards. There were too many questions left unanswered and too much gray area. Now that the benchmarks have given us some idea of what we need to work on, and which districts or schools need the most change to meet the standards, we can put this additional time to good use. We just now have some statistical data that correlates a students percentile score on the CAT with a PROBABLE decile score on the exit exam. It is quite scary, particularly for math. With these tools we can finally make some "educated" changes instead of random stabs in the dark!

I support delaying.

(52) All the reasons are already out there. It seems to me that there are enough questions regarding the test itself that it is not fair to subject the class of 2002 to this high stakes exam. Once the bugs are worked out -- what is a passing score, what content is reasonable, how to address the testing needs of special-needs students, etc. -- then let's go with it.

There is another question, though, that challenges the legitimacy of the test as a whole. If teachers in the classroom continue to be told/instructed to develop and use alternative methods of assessment / authentic methods of assessment, why are we asking students to take another "fill-in-the-dot with a number two pencil" test? From that perspective the test, itself, is absolutely stupid.

(53) One delay with a specific timeline for passing would be a good thing. I don't believe that any more delays would be beneficial and I believe that school districts may not put forth the required effort if they did not believe that the exam would ever truly be instituted.

(54) I believe the state of Alaska is wasting its money on the high school competency test. I believe all districts already give CAT 5 tests or Iowa tests and there is a high degree of correlation of scores between these tests and the high school test. Wouldn't it be simpler to say students need to achieve a certain percentile in each subtest on these tests before they receive a high school diploma. Then the state could subsidize districts who need to target certain students. Instead of spending money to print an additional test, administer the additional tests and check these tests, this money could actually go to students who need help.

(55) I support a delay in the requirement of passing the competency exam to receive a HS diploma. I think the test itself should be evaluated to determine if it is a reasonable measure of competence, and I think the schools should have a chance and the resources provided to teach the students what they need to know to pass the tests.

(56) I would support a delay until the test writers, the scorers (that is those deciding the cutoffs), and those teaching were all on the same page. If I read correctly the data about those passing other standardized tests and the exit exams there was absolutely no correlation. That is disturbing. I think it is a good idea to hold kids accountable but not if we have a lousy test, poor cutoffs, and classes so big we can't meet student needs. I am a math teacher at ~~Calvary~~ High.

(57) My personal opinion on delaying the exit exam is that I don't feel it is a good idea. I do believe something should be done for those students that are identified as learning disabled and also that some compensation may need to be made for those students in the bush communities. By delaying the effective date of the test we risk the chance of students and districts not taking them seriously enough and feeling that when the next date comes along they will again delay it.

58

We support a delay in the competency test. We believe that teachers will not abandon efforts to improve our education system. How ridiculous! Every educator we know is always striving to improve the system.

"Delay the graduation requirement, but inforce the test and the standards."

59

1. National data tells us that it takes at least 5 years after new standards are implemented for them to take hold. We have only had the new standards in place for 2 years and we are already requiring the test for graduation.

2. Looks like a number of lawsuits are waiting to be filed.

3. Many students are rushing to private schools where the test is not required. We have two standards.

60

I am on the side of the legislators who want to delay the exam. I think that Alaska has rushed to put the exam in place and has not allowed students, teachers, or districts ample time to prepare. I have wondered how we can hold our students responsible for meeting certain criteria when those criteria have not been in place for the whole of their 12 years of education.

Vernon

I do not support the HQE test at any time. I see this as the wrong direction for the state; at best a waste of time and resources and at worst a racist agenda to disenfranchise minority students from the Alaska Education system.

Please cast my vote to implement never.

Thanks

>

>Which option do you support?

>

② I THINK THE WHOLE THING SHOULD BE SCRAPPED AS A POLITICAL BOONDOGGLE. IT IS NOTHING MORE THAN A CONSERVATIVE ATTEMPT AT "PROVING" PUBLIC EDUCATION DOESN'T WORK. FAILING THAT, IT SHOULD BE DELAYED AS LONG AS POSSIBLE. I HAVE A DAUGHTER WITH LEARNING DIFFICULTIES AND THE TEST DOES NOTHING FOR HER EXCEPT TO DENY HER RIGHT TO A DIPLOMA.

③ I agree with the postponment of the test for a few years, but I also believe we have a responsibility to the future students to monitor the school districts to make sure they are working now to enable the students will pass the test in a few years.

Which option do you support? Please briefly describe you position.

④ If funding is significantly increased, or there is a plan to increase funds, to address the remdial needs of Alaska's students, then I say delay the Competency Test. If Alaska's teachers are expected to just do the best they can with what they have, staus quo, then so be it.

⑤ I favor delaying the test.

My reasoning is that we are asking students to perform in a different manor than they have been taught. An example would be previously in Math the correct answer would assure you of total credit for a question. Now we want to look at the process they used to reach the answer and even if the answer is wrong, they may still get some credit if the process used was partially correct. In other words, students need to be able to explain their work in ways they have not been taught. A delay will allow students to be taught in the same manner as they will be tested.

I also believe there are some problems with the test itself, its directions, and the testing setting. We're just not ready to deny a student a diploma because there are too many problems that need to be addressed first.

6 I feel that the high school competency test deadline should be extended for up to four years. This will allow time for the test standards, questions, and cutoffs to be adjusted fairly and with equity. It will also give students time to know ahead of time the standards on which they will be judged and an opportunity to directly prepare for the exam with reasonable expectations made upon them and their achievement. The question of learning disabled and other special education students and an appropriate diploma need to be answered as well. Also, more appropriate and state subsidized methods of instruction need to be provided for the high risk students taking the high school exam.

7 I think the test should not be delayed, however passing the test and meeting credit requirements should result in a certified diploma, whereas failing the test but meeting the credit requirements would result in a standard diploma. Test results should also be printed on the transcripts.

8 I absolutely support delaying the test and realigning the math cutoff with reading and language expectations.

The graduating classes that will have not been through the benchmark exams are at a real disadvantage. There are very few remediation efforts in place for the class of 2002. These kids have had the rules changed on them at the last minute. This, I believe, is the educational child abuse.

Thanks for taking the time to compile this information. I would be interested in the results.

9 I support the continuation of preparation for the HSQE without delay

10 >Which option do you support?

DELAY THE EXAM

>

>Please briefly describe your position.

I DO NOT FEEL THAT THE CONCERN THAT DISTRICTS WILL ABANDON EFFORTS TO IMPROVE IS VALID.

>

11 Do not delay, but let's get supports in place for those that do not pass. That may mean money!

>Which option do you support?

>

Delay

>Please briefly describe you position.

>

(2) Lack of Planning by the State and lack of funding by the State and opportunity financially and implementation wise for Districts.

>We will tabulate the results and report them to you.

>

The State of Alaska should give up the idea and focus on works of Glasser and Grinder to create a real quality school system.

(13) I feel that the HSQE should be delayed. Until kids have taken more benchmark tests, we won't have data to compare to determine who is on target for passing the exit exams and who is not. Right now, especially in the lower grades, we only have one set of numbers to look at. Although you can see how the group did on CAT versus Benchmarks, the tests really are quite different and are difficult to compare.

(14) I support to delay the exam until the state does the following:

1)allows schools to implement a change in their curriculum/mandatory courses which should include algebra / geometry

2)funds schools to cover the cost of the exam

>Which option do you support?

>Delay

>Please briefly describe you position.

(15) >It's my belief that students should be held accountable for material they

>are taught. Until we are confident that the test represents material

>presented during a students instruction. It is unfair to withhold diplomas.

>We will tabulate the results and report them to you.

Thank you for the opportunity to offer some comment about the HSGQE. I am a counselor at Kenai Central High School, Kenai, AK and have spent what seems as my entire year looking at the HSGQE results and determining a suitable course of action in response to them.

The HSGQE is much like an avalanche coming down on the mountainside. Regardless of our personal feelings about the test, the first to be hit by this are the students planning to be in the class of 2002 and 2003.

(16)

If we are to have any intervention that will assist students in getting a diploma, we need at least the time that Gov. Knowles proposed.

Tim Peterson asked for a brief comment to be given to you. Brevity will not adequately detail the situation. At Kenai Central, we are able to see a one-to-one relationship to success on the HSGQE math being tied to Advanced Algebra and a strong B or A grade. This trend was found to be the case at the second administration of the HSGQE this fall.

40% of the class of 2002,
20% of the class of 2003 and
40% of the class of 2004

These percentages represent 111 students.

I have attached a letter that I wrote to various people in Juneau. I also believe that Tom Harvey has a letter that summarized my findings in October. Information in that letter was used for comment to the state school board.

Thank you,

Jon G. Lillevik

House Education Committee

February 14, 2001

Department of Education and Early Development

Assessment Overview



Teaching and Learning Support

SB281 Mission: The mission of the Division of Teaching and Learning Support is to improve student performance.

Key Performance Measures

Measure: Percentage of students who meet the proficiency level in benchmark assessments in grades 3, 6, and 8

(Developed jointly with Legislature in FY2001.)

Current Status:

Percent Proficient/Advanced in Reading, Writing and Mathematics on Benchmark Examinations, Spring 2000

Grade	Reading	Writing	Mathematics
3	72	49	64
6	70	73	63
8	83	68	41

Benchmark:

Benchmark examinations were administered for the first time in March of 2000. The State Board of Education and Early Development set the proficiency level for each grade. These proficiency levels are Advanced; Proficient; Below Proficient; and, Not Proficient. These data from the first administration in March 2000 will establish a baseline for measuring student performance. Proficiency is defined as the sum of students who scored at the Advanced and Proficient levels on the Benchmark exams.

Spring 2000 Benchmark Reading Exam Results

	Not Proficient	Below Proficient	Proficient	Advanced	Total #
Grade 3	100-257	258-309	310-432	433-600	
% in Level	12	16	59	13	72
Examinees					9,924
Grade 6	100-247	248-310	311-371	372-600	
% in Level	12	18	27	43	70
Examinees					9,924
Grade 8	100-232	233-270	271-324	325-600	
% in Level	10	7	17	66	83
Examinees					9,574

**Spring 2000
Benchmark Writing Exam Results**

	Not Proficient	Below Proficient	Proficient	Advanced	Total #
Grade 3	100-244	245-351	352-489	490-600	
% in Level	10	40	45	4	49 / 89
Examinees					9,901
Grade 6	100-195	196-299	300-415	416-600	
% in Level	4	22	50	23	73 / 95
Examinees					9,907
Grade 8	100-190	191-315	316-415	416-600	
% in Level	2	30	45	23	68 / 98
Examinees					9,569

**Spring 2000
Benchmark Math Exam Results**

	Not Proficient	Below Proficient	Proficient	Advanced	Total #
Grade 3	100-253	254-321	322-400	401-600	
% in Level	12	24	36	28	64 / 84
Examinees					9,894
Grade 6	100-290	291-328	329-398	399-600	
% in Level	23	13	35	28	63 / 76
Examinees					9,879
Grade 8	100-272	273-373	374-460	461-600	
% in Level	17	42	33	8	41 / 83
Examinees					9,508

Background and Strategies:

State law requires a comprehensive system of student assessments including a developmental profile for students entering kindergarten or first grade, benchmark assessments in reading, writing, and mathematics at grades 3, 6, and 8, and passage of the High School Graduation Qualifying Exam in order to receive a high school diploma beginning in 2002. The department has:

1. Provided school districts with state performance standards in reading, writing, and mathematics at the appropriate grade levels.
2. Developed the benchmark examinations in reading, writing, and mathematics for grades 3, 6, and 8.
3. Provided professional development opportunities for standards based instruction.
4. Provided technical assistance to school districts in aligning curriculum to state standards.

The department is in the process of:

1. Working with school districts to develop programs that provide students with opportunities to learn in order to reach the state standards at the appropriate age/grade levels.
2. Developing intervention strategies to assist students that fail to meet standards or are at risk of failing to meet standards at the appropriate age/grade levels.
3. Working with school districts to target staff development and teacher in-service opportunities to support standards-based instruction and assessments.

4. Targeting federal grant dollars to support increased student performance in reading, writing, and mathematics.
5. Identifying a new norm-reference assessment, linked to Alaska performance standards that will be potentially administered at grades 4, 5, 7, and 9.

Measure: Percentage of students performing above the national average on state adopted norm-referenced tests

(Developed jointly with Legislature in FY2001.)

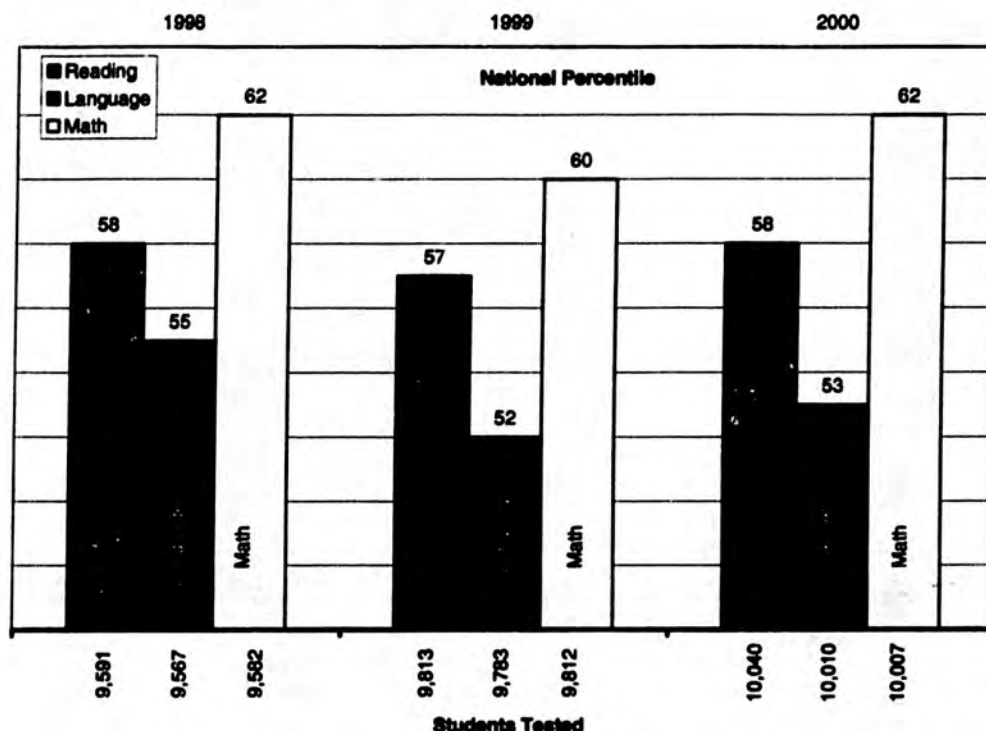
Current Status:

In school year 1999-00, 31.9% of Alaska's 4th graders scored in the top quartile in reading, 30.7% in the top quartile in language arts and 37.3% in the top quartile in mathematics.

Benchmark:

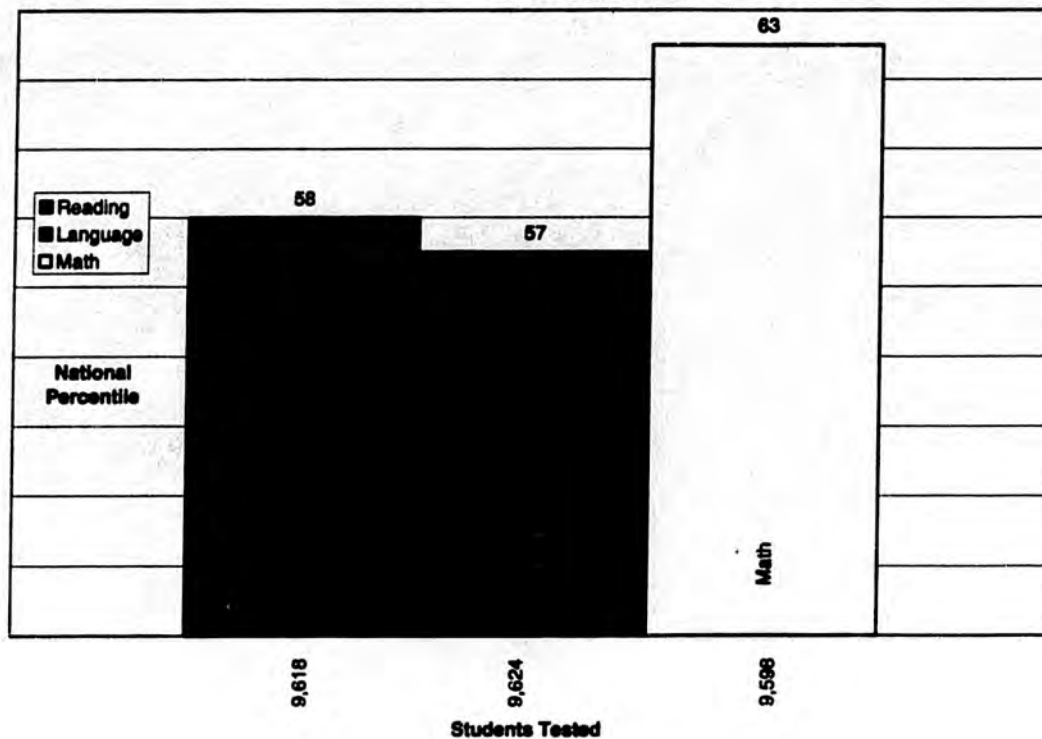
The chart below illustrates the performance of Alaska's 4th grade students on the norm-referenced test in school years 1998 through 2000.

CAT/5 - Grade 4



*In the 1999-2000 school year the department changed the CAT/5 from grade 8 to 7 because of the implementation of the Benchmark exam at grade 8. The following chart illustrates the 7th grade results.

CAT/5 - Grade 7 2000



Background and Strategies:

The department has used the CAT/5 norm-referenced test for the past 5 years. The current contract will expire in June of 2001 and the department will seek competitive proposals for a new norm-referenced test to be used for school year 2000-2001 and beyond. The new contract will solicit proposals for norm-referenced tests at grade 4, 5, 7 and 9. The addition of two new norm-referenced tests at grades 5 and 9 will provide a transition to an assessment system with capabilities not now available. Under the new system, students will be assessed each year from grades 4 to 10 using a combination of Benchmark, HSGQE and norm-referenced tests, which will allow for a measure of student academic growth from year-to-year. The ability to track student growth will allow the department to implement in 2002, a school rating system that will assign a designation of distinguished, successful, deficient or in-crisis to each public school in the state as required by AS 14.03.123.

Measure: Percentage of students who pass the state high school graduation-qualifying exam (Developed jointly with Legislature in FY2001.)

Current Status:

Percent of enrolled students passing the first or second administration of the high school graduation-qualifying exam:

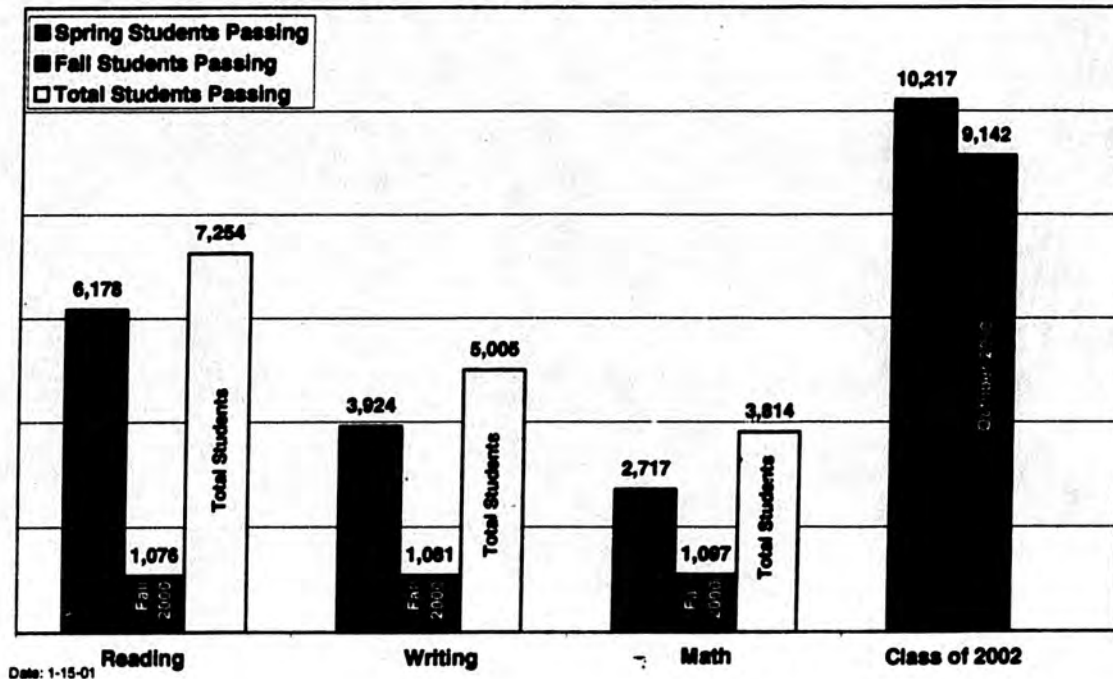
Reading - 79%
Writing - 55%
Mathematics - 42%

Benchmark:

The High School Graduation Qualifying Examination is completed and was administered for the first time in March of 2000 and again in October of 2000. The State Board of Education & Early Development set the proficiency level for the exam. These data from the first administration of the graduation-qualifying exam will establish the baseline for

measuring student performance for the class of 2002. The exam will be offered in October and March of each school year. Students are eligible to take the exam for the first time in the spring of their sophomore year.

High School Class of 2002 Number of Students Passing the HSGQE



Background and Strategies:

State law requires a comprehensive system of student assessments including a developmental profile for students entering kindergarten or first grade, benchmark assessments in reading, writing, and mathematics at grades 3, 6, and 8, and passage of the High School Graduation Qualifying Exam in order to receive a high school diploma beginning in 2002. The department has:

1. Provided school districts with state performance standards in reading, writing, and mathematics.
2. Developed the graduation qualifying examination in reading, writing, and mathematics.
3. Provided professional development opportunities for standards based instruction.
4. Provided technical assistance to school districts in aligning curriculum to state standards.

The following pages contain Year 2000 Alaska State Assessment Results for grades 3, 6, and 8, and the high school graduation qualifying examination by school district:

Year 2000 Alaska State Assessment Results - **READING**

District	Spring 2000						Spring+Fall 2000	Oct. 1, 2000
	Grade 3 % Prof./Adv.	Grade 3 Tested	Grade 6 % Prof./Adv.	Grade 6 Tested	Grade 8 % Prof./Adv.	Grade 8 Tested	High School % Passed	Grade 11 Enrollment
Alaska Gateway	71	44	48	40	68	40	81	32
Aleutian Region	57	7	60	5	71	7	75	4
Aleutians East	55	29	43	23	92	26	65	26
Alyeska Central	93	15	89	18	92	34	24	110
Anchorage	75	3807	74	3863	88	3539	85	3303
Annette Island	80	25	66	27	67	30	82	22
Bering Strait	33	127	25	143	41	113	45	84
Bristol Bay	69	16	81	21	95	20	100	18
Chatham	62	21	59	22	41	22	92	12
Chugach	75	12	77	9	85	14	50	10
Copper River	84	55	68	53	89	60	75	55
Cordova	86	35	90	42	92	36	96	24
Craig	74	35	76	30	85	20	55	38
Delta/Greely	70	41	79	77	86	64	49	59
Denali	92	24	76	29	97	30	100	27
Dillingham	67	42	50	48	82	39	84	37
Fairbanks	84	1254	77	1155	88	1203	93	943
Galena	80	194	85	197	95	176	74	186
Haines	87	23	82	32	79	29	74	35
Hoonah	64	11	45	20	50	10	83	24
Hydaburg	51	8	20	5	60	10	27	11
Iditarod Area	53	38	44	41	53	44	44	32
Juneau	79	408	73	409	90	457	87	437
Kake	64	11	66	12	76	21	67	9
Kashunamiut	45	22	24	21	50	22	31	16
Kenai Peninsula	78	725	78	793	89	774	81	875
Ketchikan	85	184	80	185	85	203	100	156
Klawock	61	23	31	13	92	13	50	16
Kodiak Island	64	237	75	221	80	184	77	213
Kuspuk	48	33	30	34	34	38	47	32
Lake & Peninsula	46	41	35	37	69	39	41	22
Lower Kuskokwim	37	246	27	255	45	225	47	176
Lower Yukon	29	171	24	149	36	117	35	74
Mat-Su	80	973	78	952	88	1033	73	1129
Mt. Edgecumbe	N/A	N/A	N/A	N/A	N/A	N/A	76	90
Nenana	86	57	82	44	83	47	40	78
Nome	55	71	55	47	78	52	77	39
North Slope	50	185	40	130	58	149	49	120
Northwest Arctic	41	197	25	191	42	144	32	108
Pelican	80	5	0	2	100	3	100	3
Petersburg	88	51	88	61	91	65	100	60
Pribilof	54	13	78	9	74	19	80	10
Saint Mary's	27	15	50	12	66	9	56	9
Sitka	81	115	75	131	88	108	76	120
Skagway	89	9	100	7	100	6	100	11
Southeast Island	89	17	70	20	78	18	85	27
Southwest Region	27	62	24	67	42	50	26	42
Tanana	75	8	29	7	66	3	88	8
Unalaska	95	19	73	26	91	23	100	20
Valdez	84	56	62	76	92	82	100	48
Wrangell	89	34	86	43	88	49	100	27
Yakutat	100	11	77	9	100	10	69	16
Yukon Flats	37	27	22	23	53	15	44	18
Yukon/Koyukuk	40	35	41	44	63	40	50	24
Yupik	11	36	3	29	19	22	12	26

Year 2000 Alaska State Assessment Results - WRITING

District	Spring 2000						Spring+Fall 2000	Oct. 1, 2000
	Grade 3 % Prof./Adv.	Grade 3 Tested	Grade 6 % Prof./Adv.	Grade 6 Tested	Grade 8 % Prof./Adv.	Grade 8 Tested	High School % Passed	Grade 11 Enrollment
Alaska Gateway	44	45	48	40	43	40	34	32
Aleutian Region	0	7	40	5	43	7	25	4
Aleutians East	28	29	61	23	58	26	31	26
Alyeska Central	53	15	89	18	73	33	14	110
Anchorage	53	3809	76	3864	74	3542	58	3303
Annette Island	38	24	58	26	49	31	36	22
Bering Strait	28	126	39	145	26	113	26	84
Bristol Bay	19	16	71	21	90	20	83	18
Chatham	38	21	63	22	32	22	50	12
Chugach	75	12	66	9	71	14	50	10
Copper River	61	54	63	52	76	59	55	55
Cordova	75	35	88	41	69	36	67	24
Craig	40	35	80	30	65	20	47	38
Delta/Greely	52	42	73	75	74	64	31	59
Denali	46	24	79	29	75	31	63	27
Dillingham	33	42	46	48	56	40	54	37
Fairbanks	58	1228	81	1142	72	1189	61	943
Galena	49	195	79	196	75	177	42	186
Haines	78	23	84	32	48	29	54	35
Hoonah	27	11	40	20	40	10	54	24
Hydaburg	25	8	25	4	30	10	0	11
Iditarod Area	23	38	51	41	48	44	25	32
Juneau	52	408	73	409	71	460	62	437
Kake	27	11	75	12	43	21	33	9
Kashunamiut	40	25	43	21	17	23	6	16
Kenai Peninsula	51	723	79	794	70	772	54	875
Ketchikan	53	185	80	183	61	199	71	156
Klawock	34	23	23	13	78	14	25	16
Kodiak Island	45	236	77	223	63	182	53	213
Kuspuk	30	33	32	35	21	38	28	32
Lake & Peninsula	20	41	38	37	44	39	27	22
Lower Kuskokwim	23	249	35	255	33	227	34	176
Lower Yukon	21	172	33	149	24	121	15	74
Mat-Su	50	974	80	952	72	1029	50	1129
Mt. Edgecumbe	N/A	N/A	N/A	N/A	N/A	N/A	62	90
Nenana	51	61	87	47	68	47	28	78
Nome	28	70	58	48	56	53	26	39
North Slope	32	184	51	130	47	130	28	120
Northwest Arctic	29	192	32	186	29	144	13	108
Pelican	20	5	0	2	100	3	67	3
Petersburg	56	52	90	61	76	64	80	60
Pribilof	46	13	67	9	58	19	70	10
Saint Mary's	7	15	54	13	44	9	22	9
Sitka	55	115	77	130	75	109	55	120
Skagway	66	9	100	7	100	6	91	11
Southeast Island	59	17	70	20	61	18	59	27
Southwest Region	12	60	31	67	25	52	12	42
Tanana	25	8	29	7	33	3	50	8
Unalaska	37	19	82	27	82	22	100	20
Valdez	63	56	78	76	81	82	88	48
Wrangell	47	34	84	43	86	49	59	27
Yakutat	55	11	78	9	70	10	38	16
Yukon Flats	12	26	37	22	33	15	17	18
Yukon/Koyukuk	23	35	43	42	37	43	13	24
Yupit	9	34	11	28	14	22	15	26

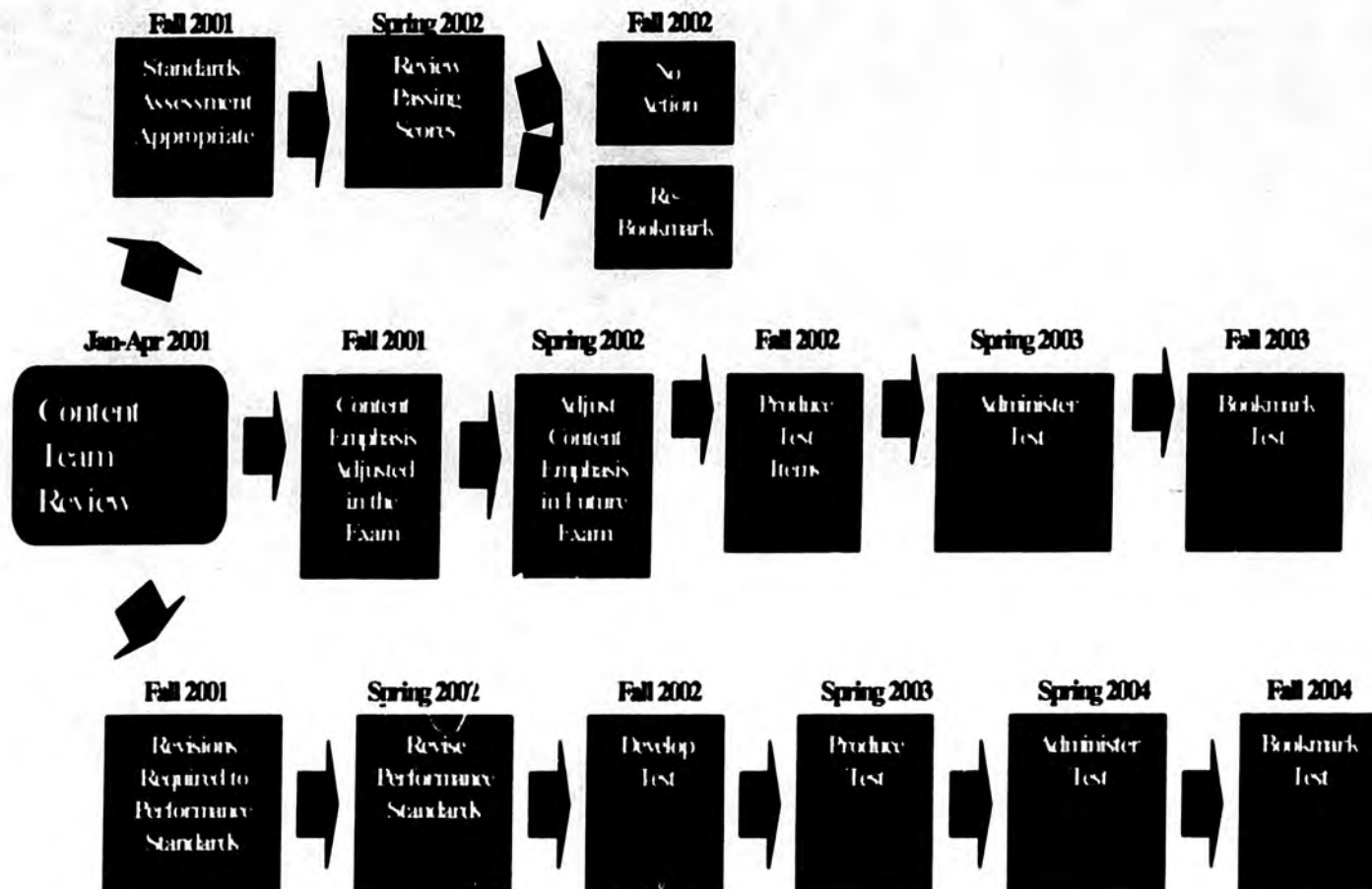
Year 2000 Alaska State Assessment Results - MATHEMATICS

District	Spring 2000						Spring+Fall 2000	Oct. 1, 2000
	Grade 3 % Prof./Adv.	Grade 3 Tested	Grade 6 % Prof./Adv.	Grade 6 Tested	Grade 8 % Prof./Adv.	Grade 8 Tested	High School % Passed	Grade 11 Enrollment
Alaska Gateway	57	46	43	38	28	40	31	32
Aleutian Region	28	7	67	3	29	7	25	4
Aleutians East	52	29	59	22	27	26	15	26
Alyeska Central	73	15	61	18	36	33	7	110
Anchorage	67	3813	67	3863	43	3531	45	3303
Annette Island	47	26	40	25	13	31	5	22
Bering Strait	33	123	20	143	6	110	24	84
Bristol Bay	50	16	67	21	55	20	50	18
Chatham	67	21	41	22	23	22	25	12
Chugach	84	12	77	9	36	14	30	10
Copper River	75	53	55	51	36	59	49	55
Cordova	83	35	81	41	53	36	46	24
Craig	63	35	74	31	35	20	26	38
Delta/Greely	54	41	62	76	50	60	25	59
Denali	62	24	71	28	55	31	67	27
Dillingham	57	42	37	48	43	40	19	37
Fairbanks	73	1222	65	1131	39	1171	46	943
Galena	66	192	63	195	38	173	29	186
Haines	95	23	84	32	52	29	46	35
Hoonah	54	11	45	20	40	10	38	24
Hydaburg	25	8	34	3	0	10	0	11
Iditarod Area	44	37	41	40	34	44	19	32
Juneau	79	409	70	407	52	456	58	437
Kake	27	11	25	12	38	21	22	9
Kashunamiut	36	22	33	21	4	23	0	16
Kenai Peninsula	69	727	70	792	46	768	45	875
Ketchikan	77	183	75	185	40	195	51	156
Klawock	65	23	15	13	35	14	13	16
Kodiak Island	55	236	63	223	27	182	34	213
Kuspuk	40	32	32	35	13	37	16	32
Lake & Peninsula	32	41	27	37	21	39	18	22
Lower Kuskokwim	42	248	28	256	11	226	19	176
Lower Yukon	25	171	17	147	7	123	16	74
Mat-Su	72	977	67	948	41	1027	39	1129
Mt. Edgecumbe	N/A	N/A	N/A	N/A	N/A	N/A	38	90
Nenana	61	62	69	47	38	47	15	78
Nome	38	68	40	45	19	52	23	39
North Slope	61	184	39	129	18	149	19	120
Northwest Arctic	34	194	30	190	10	136	-8	108
Pelican	60	5	0	2	66	3	33	3
Petersburg	86	52	76	62	48	65	65	60
Pribilof	28	14	44	9	21	9	40	10
Saint Mary's	33	15	46	13	33	9	22	9
Sitka	75	115	65	131	44	109	46	120
Skagway	100	9	72	7	67	6	64	11
Southeast Island	59	17	60	20	28	18	33	27
Southwest Region	31	62	33	68	22	51	5	42
Tanana	76	8	38	8	0	3	25	8
Unalaska	69	19	54	26	53	21	90	20
Valdez	75	56	74	76	52	82	69	48
Wrangell	91	34	89	43	63	49	59	27
Yakutat	91	11	67	9	40	10	38	16
Yukon Flats	31	26	30	20	0	15	6	18
Yukon/Koyukuk	54	35	31	40	14	44	8	24
Yupik	12	34	0	29	4	23	0	26

Math score drop-off
in 8th grade : beyond
a national problem.
I wonder if DOE
has any good ideas
about that & if
they've passed ideas
on to districts.

Alaska Standards-Based Assessment Initiative

FRAMEWORK FOR CONTINUOUS RENEWAL



History of Alaska School Reform Since 1991

June 1991

Governor Walter J. Hickel directs the newly appointed State Board of Education and Commissioner of Education Jerry Covey to develop a plan to improve Alaska's system of public schools.

November 1991

The Governor's Blue Ribbon Commission, composed of 21 prominent Alaskans appointed by Governor Hickel, meets for first time. The Commission identifies 10 broad areas of educational concerns and asks the Governor and State Board of Education to appoint more than 100 Alaskans from outside and inside the educational system to make recommendations in each of the areas. The reform movement becomes known as Alaska 2000 (AK2K).

January 1992

The 10 committees of Alaskans meet for the first time.

October 1992

The State Board of Education approves AK2K recommendations, including developing student academic standards. AK2K becomes Alaska's major school reform initiative.

December 1992

The State Board proposes a regulation that sets a goal for schools to provide students with "a working knowledge of English, mathematics, science, geography, history, skills for a healthy life, government and citizenship, fine arts, technology and world languages." The regulation takes effect June 24, 1993. (4 AAC 04.030)

February 1993

At the direction of the State Board, the Standards and Assessment Oversight Committee meets for first time to set direction for development of student standards. The State Board commits to developing content standards—broad statements of what our students should know and be able to do—in 10 core subject areas: English/Language Arts, Mathematics, Science, Geography, Government and Citizenship, History, Skills for a Healthy Life, Arts, World Languages and Technology.

October 1993

The State Board asks the public to comment on proposed voluntary content standards in math, science and English/language arts. Public hearings are held in 14 communities around Alaska. Public hearings are held over Legislative Teleconference Centers in dozens of additional communities. As a result of strong public comment, the state board holds a second round of public hearings. Standards are adopted in 1994 and take effect on January 4, 1995.

September 1994

The State Board asks public to comment on proposed standards in history, geography, government and health. Board holds hearings in six communities and teleconferenced hearings in dozens of other communities. State Board adopts standards on November 29, 1994. Regulations take effect July 26, 1995.

December 1994

Governor Knowles takes office, appoints a new State Board, which in turn appoints Commissioner Holloway, effective March 13, 1995.

June 1995

The State Board asks the public to comment on proposed content standards in world languages and technology. Board takes written testimony and adopts them on October 24, 1995. Regulations take effect March 28, 1996.

April-October 1996

Commissioner Holloway builds the Alaska Quality Schools Initiative (QSI), which ends up with four major strands: High Student Academic Standards and Assessments; Quality Professional Standards; Family, School, Business and Community Network; and School Excellence Standards. The QSI replaces AK2K as Alaska's major school reform initiative. QSI builds upon AK2K and takes school reform to a new level of accountability.

October 1996

Governor Knowles, ARCO President Ken Thompson and Commissioner of Education Holloway invite school and community leaders to Girdwood for the Knowles Administration's first Education Summit. At the conclusion of the summit, Commissioner Holloway commits to developing in Alaska a results-based system of education based on standards. This is her QSI plan.

Spring 1997

The Legislature passes, and Governor Knowles reluctantly signs, the secondary pupil competency testing law, which becomes AS 14.03.075. The new law requires all high school students to pass an exit exam in order to receive a diploma. Those who do not pass get a certificate of attendance. Effective date is January 1, 2002. The governor announces that a single exit exam at the

conclusion of 12 years of schooling is not a good idea and he will introduce legislation in 1998 that will implement a complete school system of accountability based on measurable student performance standards.

March 1998

The Department contracts with Council for Basic Education (CBE) to review Alaska's proposed reading, writing and math performance standards. Department makes changes to standards as recommended by CBE.

June 1998

The Governor signs into law Senate Bill 36, which becomes AS 14.07.020(b). The new law sets a requirement for the department to develop student performance standards in reading, writing and mathematics and to develop benchmark exams at designated grade levels. The QSI portion of SB 36 required the following:

- **Academic Standards**—Mandated the State Board of Education to adopt academic standards in reading, writing and math at four levels; ages 5-7; 8-10; 11-14 and 15-18. The high school and benchmark exam questions are to measure whether students have met the standards.
- **Alaska Benchmark Examinations**—Mandated the department to assess students at the 3rd, 6th and 8th grades beginning in March 2000, in order for schools to check whether students are meeting the reading, writing and math standards and are on course to pass the high school exam.
- **Developmental Profile**—Required schools to complete a developmental profile on all entering kindergarten and first grade students.
- **QSI Grant**—Gave school districts additional dollars through the Quality Schools Grant program if they establish plans to adopt standards, intervene with additional services for children who are not meeting the standards, and train educators how to teach students in a results-based system of public education. The QSI Grant program became part of the state's school funding program.
- **School Designators**—Requires the State Board to develop an annual system of rating schools, and designate each school by August 2002 in one of the four categories, *distinguished*, *successful*, *deficient*, and *in crisis*. The categories are to be based on a school's student test scores and other indicators of student performance.
- **School Report Cards**—Requires each school to annually report specific information about student performance to their communities and the State of Alaska beginning July 1, 2000. The information required includes school

Beth Nordland
told me in
January that
standards have
not changed
since 1993.

accreditation status, results of norm-referenced achievement tests, results of state standards-based assessments in reading, writing and mathematics, description of student, parent, community and business involvement in student learning, and rates of student attendance, K-8 retention, grade 7-12 dropout and graduation. The department is required to issue its first school-by-school report card on January 15, 2001.

June 1998

The Department of Education establishes the elements of the QSI law as the department's key priorities.

July 1998

The Education Commission of the States submits a partial review of Alaska's proposed performance standards in reading, writing and math. The review is favorable.

September 1998

The State Board adopts by motion (not as a regulation) the student employability standards as an eleventh content standard.

January 1999

State Board adopts by motion (not as a regulation) student performance standards in reading, writing and mathematics.

March 1999

Benchmark exams for grades 3, 6, and 8 and high school exams are field tested statewide. State Board mandates all sophomores to take the exam.

September 1999

Public schools complete first developmental profiles of kindergarten and first grade students.

September 1999

State Board adopts in regulation performance standards in reading, writing and mathematics. The same regulation removes content standards from regulation and readopts them by reference in the publication *Alaska Standards: Content and Performance Standards for Alaska Students*. The board also adopts by reference the employability content standards.

February 2000

The School Designator Committee begins series of meetings to recommend elements of a system to rate schools as distinguished, successful, deficient and in crisis.

March 2000

State Board adopts Alternate Performance Standards and the Student Cultural Standards.

March 2000

The first administration of the high school and benchmark exams is conducted statewide. At the direction of the State Board, all 10th grade students are required to take the high school exam.

April 2000

Alaska content standards are measured in a group process against NAEP standards. Alaska's standards match well with NAEP standards.

June 2000

Commissioner Cross announces he will recommend to the State Board a two-stage "phased in" approach to the Alaska High School Graduation Qualifying Exam. Under the phase in, the Class of 2002 and Class of 2003 would be held to a lower passing score than Class of 2004 onward, when a higher passing score would take effect.

June 2000

Committees meet to recommend passing scores for high school exam.

August 2000

Committees meet to adopt proficiency scores for benchmark exams.

September 2000

State Board adopts passing scores for high school exam. Phase in idea dropped.

September 29-October 1

About 350 School board presidents, school administrators, some of the state's best teachers and business and community leaders convened at Girdwood for Education Summit 2000, the second education summit of the Knowles Administration. The purpose was to develop strategies to help more children meet the state's new higher standards in reading, writing and mathematics. Teams from school districts statewide examined the performance of their districts' students on state tests and learned how analyze score data and to improve schools to better meet the learning needs of students.

October 2000

The second administration of the high school exam commences statewide.

December 2000

The State Board adopts proficiency cut scores for the benchmark exams.

December 2000

The State Board adopts a resolution urging the Legislature to change the effective date for the high stakes portion of the High School Graduation Qualifying Examination, from January 1, 2002 to 2006. The Board's plan would continue the administration of the test.

December 2000

As the next step toward fulfilling the goals of the Quality Schools Initiative, Gov. Knowles appoints 11 Alaskans to an Education Funding Task Force. The task force will recommend to the governor and the State Board in February 2001 a five-year funding plan to fulfill the goals of the QSI and improve education in Alaska.

January 2001

Governor Knowles announces in his State of the State address that he supports the State Board's December 2000 resolution and that he urges the Legislature to amend the law for the high stakes portion of the high school exam to take effect 2006.

January 2001

By law, the first school-by-school Report Card to the Public is scheduled to be delivered to the Legislature and the public.

January 2001

Committees begin meeting to start a continuous renewal of Alaska's standards-based assessment system. Committees begin with a review of the high school standards and high school exam. The meetings are expected to conclude in April. The renewal process for benchmark exams will follow.

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United States District Court,
 W.D. Texas,
 San Antonio Division.

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, Jocquelyn Russell, Plaintiffs,

v.

TEXAS EDUCATION AGENCY, Dr. Mike Moses, Members, and the Texas State Board of Education, in their official capacities, Defendants.

No. Civ.A. SA-97-CA1278-EP.

Jan. 7, 2000.

Suit was brought challenging the use of the Texas Assessment of Academic Skills (TAAS) examination as a requirement for high school graduation. The District Court, Prado, J., held that: (1) use of TAAS examination did not violate of Title VI regulations, and (2) use of TAAS examination did not violate due process rights of Texas' minority students.

Judgment for defendants.

West Headnotes

[1] Civil Rights ⚙️126
 78k126

Disparate impact analysis is appropriate under Title VI regulation prohibiting 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.

[2] Civil Rights ⚙️200
 78k200

Plaintiffs bringing lawsuits pursuant to Title VI regulation prohibiting activity in federally funded programs that has the effect of subjecting individuals to discrimination because of their race, color, or national origin have a private right of action. 34 C.F.R. § 100.3.

[3] Civil Rights ⚙️111
 78k111

A disparate impact theory of racial discrimination permits a court to overturn facially neutral acts and policies that have significant adverse effects on

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protected groups without proof that the actor adopted those practices with a discriminatory intent.

[4] Civil Rights ☞240(1)

78k240(1)

Burden-shifting analysis established in Title VII cases would be applied in determining whether a prima facie case of disparate impact had been established in violation of Title VI regulation prohibiting 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.

[5] Civil Rights ☞127.1

78k127.1

Use of the Texas Assessment of Academic Skills (TAAS) examination as a requirement for high school graduation did not have an impermissible disparate impact on Texas' minority students in violation of Title VI regulation prohibiting activity in federally funded programs that has the effect of subjecting individuals to discrimination because of their race, color, or national origin; although there was a prima facie showing of significant adverse impact, Texas Education Agency (TEA) met its burden in showing that the TAAS test was an educational "necessity," and there was no showing that there were equally effective alternatives to the current use of the TAAS test. 34 C.F.R. § 100.3.

[6] Constitutional Law ☞278.5(5.1)

92k278.5(5.1)

[6] Constitutional Law ☞278.5(7)

92k278.5(7)

[6] Schools ☞178

945k178

Use of the Texas Assessment of Academic Skills (TAAS) examination as a requirement for high school graduation did not violate the procedural or the substantive due process rights of Texas's minority students; Texas Education Agency (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, and did not perpetuate prior educational discrimination or unfairly hold Texas minority students accountable for the failures of the State's educational system. U.S.C.A. Const.Amend. 14.

*668 Albert H. Kauffman, Javier N. Maldonado Cynthia M. Cano, Nina Perales, Mexican American Defense and Educational Fund, San Antonio, TX, for plaintiffs. Geoffrey Amsel and Deborah Verbil, Office of Atty. General, Austin, TX, for

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Defendants.

ORDER

PRADO, District Judge.

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 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. [FN1] 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 and does not violate their right to the due process of law. The bases for the Court's 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.

FN1. 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 Joculyn Russell--are dismissed from the case for failure to prosecute.

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. It is clear that the law requires courts to give deference to state legislative policy, see *Board of Educ. v. Mergens*, 496 U.S. 226, 251, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990); in the educational context, such deference is even more warranted, see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). Education is the particular responsibility of state governments. *Id.* Moreover, courts do not have the expertise, or the mandate of the electorate, that would justify unwarranted intrusion in curricular decisions. See *id.* On the other hand, these considerations cannot be used to tie a court's hands when a state uses its considerable power impermissibly to disadvantage minority students.

*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

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party or this Court is both controlling and directly on point--Debra P. v. Burlington, 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, 106 S.Ct. 507, 88 L.Ed.2d 523 (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. That regulation, in clear, unmistakable terms, prohibits a federally funded program from implementing policies that have a disparate impact on minorities. *Id.* While 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, 112 S.Ct. 2727, 120 L.Ed.2d 575 (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, 113 (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*, 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; *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 exists 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. 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's minority students, at least as demonstrated 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. [FN2]

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FN2. 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 could not--rule 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.

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 exit-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. [FN3] 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 and these disparities. In other words, the Plaintiffs were required to prove, by a preponderance 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 State's determination of what, or how much, knowledge must be acquired prior to high school graduation.

FN3. Of course, these are generalizations. The Court recognizes that students in districts with relatively greater resources have failed the TAAS examination.

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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 presented 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 are 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 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. [FN4] 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 Plaintiff's experts were able to prove that the test is not wise, have they been able to show that it actually crosses the line and is impermissible by some legal standard?

FN4. 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, Defendants' expert Dr. Susan Phillips noted that careful scrutiny is given to test items that are 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 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. The Plaintiffs were able to show that the policies are debated and

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debatable among learned people. The Plaintiffs demonstrated that the policies have had 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 FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT [FN5]

FN5. 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 adopted a curriculum of Essential Elements. [FN6] 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.

FN6. 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. However, 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 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.

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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

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16 Ed. Law Rep. 1120, 15 Fed. R. Evid. Serv. 1175

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H

United States Court of Appeals,
Eleventh Circuit.

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.

April 27, 1984.

High school students filed suit challenging constitutionality of competency examination they were required to pass in order to receive state high school diplomas. The District Court, 474 F.Supp. 244, enjoined use of the test until the 1982-83 school year. On appeal, the Former Fifth Circuit Court of Appeals, 644 F.2d 397, upheld District Court's injunction but remanded for further findings, and denied rehearing, 654 F.2d 1079. On remand, the United States District Court for the Middle District of Florida, George C. Carr, J., 564 F.Supp. 177, found that the test was instructionally valid and did not discriminate against blacks. On appeal, the Court of Appeals, R. Lanier Anderson, III, Circuit Judge, held that: (1) District Court was not clearly erroneous in finding that examination was instructionally valid, and (2) District Court was not clearly erroneous in finding vestiges of past intentional segregation did not cause test's disproportionate impact on blacks, and that use of test as diploma sanction would help remedy vestiges of past segregation. Affirmed.

West Headnotes

[1] Schools Ⓢ178
345k178

District court, in determining on remand whether competency examination taken by high school seniors was instructionally valid, properly considered circumstantial evidence, as remanding opinion gave no indication that in requiring that state prove that test covered things actually taught in classroom, panel meant to limit proof to direct evidence of classroom activities.

[2] Federal Courts Ⓢ853
170Bk853

District court's findings of fact and inferences drawn therefrom are clearly erroneous only when reviewing court on entire evidence is left with definite and

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firm conviction that mistake has been committed.

[3] Schools 178
345k178

Adequate evidence supported district court's finding that competency examination which, under an amendment to Educational Accountability Act, high school seniors were required to pass in order to receive high school diploma was instructionally valid. West's F.S.A. §§ 229.55 et seq., 232.246(1)(b).

[4] Schools 178
345k178

That state study on whether competency examination which public high school students were required to pass in order to receive state high school diploma was instructionally valid did not focus specifically on students who had failed test did not compel finding that such study did not prove examination was a fair test of that which was taught, where none of the experts at trial suggested that an instructional validity study must focus on students who have failed the test, but rather conceded that there are no accepted educational standards for determining whether a test is instructionally valid.

[5] Schools 178
345k178

District court, in determining whether competency examination taken by high school seniors was instructionally valid, was not clearly erroneous in inferring that skills tested were actually taught from circumstantial evidence presented at trial, such as evidence of inclusion of skills in curriculum, inclusion of skills by individual teachers in course of instruction, existence of remedial efforts and evidence from student survey that students remembered receiving instruction in the skills.

[6] Evidence 318(4)
157k318(4)

Results of private consulting firm's study of whether school districts had taught skills tested by competency examination, which high school seniors were required to pass in order to receive a high school diploma, were admissible under hearsay exception as having equivalent circumstantial guarantees of trustworthiness, notwithstanding that study respondents were aware of study's purpose and state commissioned firm to conduct study, as site visitors verified accuracy of district reports and site visitors were told that other visiting teams might audit the reports. Fed.Rules Evid.Rule 803(24), 28 U.S.C.A.

[7] Schools 178

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345k178

District court was not clearly erroneous in finding that disproportionate failure of blacks on competency examination high school seniors were required to pass in order to receive high school diploma was not caused by present effects of past intentional segregation, and that, even assuming there was a causal link between vestiges and disparate impact, use of test as diploma sanction would remedy vestiges of past intentional segregation, thereby supporting conclusion that test was not unconstitutional as discriminating against blacks. Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.; Equal Educational Opportunities Act of 1974, § 204, 20 U.S.C.A. § 1703; U.S.C.A. Const.Amend. 14; West's F.S.A. §§ 229.55, 232.246(1)(b).

*1406 Stephen F. Hanlon, Tampa, Fla., for plaintiffs-appellants.
William R. Dorsey, Jr., Deputy Gen. Counsel, State Bd. of Educ., Tallahassee, Fla., for defendants-appellees.
Appeal from the United States District Court for the Middle District of Florida.

Before JOHNSON and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER 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 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 twelfth 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). [FN1] 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. [FN2]

FN1. For a fuller discussion of this litigation, see Debra P. v. Turlington, 644 F.2d 397, 400-02 (5th Cir.1981) (Unit B).

FN2. 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

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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 past discrimination against black students who had attended segregated schools for the first four years of their education. 474 F.Supp. at 250-57. 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.

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 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," 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.

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 competency examination is

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"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). 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.

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 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 used 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 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

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appellants that the results constituted inadmissible hearsay. The state also presented three expert witnesses who concluded on the basis of the data from the 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. [FN3]

FN3. As discussed *infra* pp. 1410-1411, 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 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 twelfth 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

[1] 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 that the district court erred by considering circumstantial evidence. [FN4]

FN4. 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

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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. [FN5] 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.

FN5. 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.

B. Factual Findings

[2] 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 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 "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.

The testimony of Dr. Popham, the designer of the IOX study and expert witness

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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 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 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. [FN6] 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.

FN6. 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 our confidence in portions of the IOX study, such as the teacher survey and the Master Exposure Index relied on by Dr.

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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.

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 to remain in school for an additional year on a fulltime or parttime 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). [FN7] If they then pass the SSAT-II, they are awarded their diplomas.

FN7. 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 skills. 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. [FN8] All agreed that the efforts were substantial and bolstered a finding of 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.

FN8. 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). [FN9] 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. [FN10]

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FN9. Dr. Calfee thought the district reports were "too indirect" to prove instructional validity. 48 R. 897.

FN10. 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.

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. [FN11]

FN11. 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.

[3] 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 instructional 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.

2. Dr. Calfee's Correlation

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 where teachers reported teaching

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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. [FN12]

FN12. 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.

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.

[4] 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

[5] 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 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

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reasonably infer that the students were actually taught what was necessary to pass the exam.

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), [FN13] which provides in part:

FN13. 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.

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 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....

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 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.

[6] It is true that study respondents were aware of the study's purpose and that

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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 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 Marine Supply* *1414 (Cite as: 730 F.2d 1405, *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; "[i]f 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).

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 (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. [FN14]

FN14. *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

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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).

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, 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.

A. The Finding of No Causal Link

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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 of the impediments to learning faced by black students arise outside the classroom.

[7] 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. [FN15]

FN15. 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.

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

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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 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. [FN16]

FN16. 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.

B. The Finding that the Diploma Sanction Remedies Vestiges

The district court also found that, even assuming there was a causal link between 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 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

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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 in 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 the unfairness if discriminatory vestiges (albeit much attenuated) have in fact caused a student to fail the SSAT-II. [FN17] However, that apparent unfairness would be outweighed by the demonstrated effect of the diploma sanction in remedying the greater unfairness of functional illiteracy.

FN17. 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.

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 1983) who have not yet passed the SSAT-II.

AFFIRMED.

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United States Court of Appeals,
Fifth Circuit.

Unit B

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.

May 4, 1981.

Florida high school students brought class action challenging constitutional and statutory validity of Florida State Student Assessment Test, Part II, which is designed to measure functional literacy and passage of which is condition to receipt of high school diploma. The United States District Court for the Middle District of Florida, George G. Carr, J., 474 F.Supp. 244, found the diploma aspect unconstitutional, and appeal and cross appeal were taken. The Court of Appeals, Fay, Circuit Judge, held that: (1) students' expectation of a diploma if they satisfied attendance requirements and passed required courses was an implied property interest for constitutional purposes; (2) if test covered materials not taught it was unfair and violated equal protection and due process; (3) there was no due process or equal protection violation because test was given only in public schools; (4) immediate use of diploma sanction violated equal protection as punishing black students for vestiges of prior dual school system; and (5) there was neither a constitutional nor statutory violation in using test results as a mechanism for remediation only.

Affirmed in part, vacated in part and remanded.

West Headnotes

[1] Federal Courts 942
170Bk942

Since state of Florida did not make any effort to make certain whether functional literacy test required for high school diploma covered material actually studied in the classroom and since record was insufficient in proof on that issue, constitutional challenge to such requirement was remanded for further finding. West's F.S.A. § 232.246(1)(b), (4); U.S.C.A.Const. Amend. 14.

[2] States 4.4(3)
360k4.4(3)
(Formerly 360k4.6)

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State's plenary powers over education come from the powers reserved to the states through the Tenth Amendment. U.S.C.A.Const. Amend. 10.

[3] States 4.4(3)

360k4.4(3)

(Formerly 360k4.6)

As long as it does so in a manner consistent with the mandates of the Federal Constitution, a state may determine the length, manner and content of any education it provides. U.S.C.A.Const. Amends. 10, 14.

[4] Federal Courts 172

170Bk172

Federal courts interfere with state educational directives only when necessary to protect freedoms and privileges guaranteed by the United States Constitution. U.S.C.A.Const. Amends. 10, 14.

[5] Civil Rights 127.1

78k127.1

(Formerly 78k127, 78k9)

If a state provides an educational system, it must do so in a nondiscriminatory fashion. West's F.S.A.Const. Art. 9, §§ 1-5; U.S.C.A.Const. Amends. 10, 14.

[6] Constitutional Law 277(1)

92k277(1)

In establishing a system of free public education and in making school attendants mandatory, the state of Florida has created an expectation in students that if they attend during the required years and take and pass required courses they will receive a diploma, and such expectation constitutes "property interest" as that term is used constitutionally; although state constitutionally might not be obligated to establish and maintain a school system, its action in doing so, requiring attendance and creating a mutual expectation that a student who is successful will graduate with a diploma gives rise to an implied property right. West's F.S.A. Const. Art. 9, §§ 1- 5; U.S.C.A.Const. Amend. 14.

[7] Constitutional Law 242.2(5.1)

92k242.2(5.1)

(Formerly 92k242.2(5))

[7] Constitutional Law 278.5(5.1)

92k278.5(5.1)

(Formerly 92k278.5(5))

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Requirement for Florida high school diploma that a student pass a functional literary test would violate equal protection and due process clauses of Federal Constitution if the test covered material not taught the students. West's F.S.A. § 232.246(1)(b), (4); U.S.C.A.Const. Amend. 14.

[8] Constitutional Law ☞ 213.1(1)

92k213.1(1)

When the state encroaches on the concepts of justice lying at the basis of our civil and political institutions, it is obligated to avoid action which is arbitrary and capricious, does not achieve or even frustrate the legitimate state interests, or is fundamentally unfair. U.S.C.A.Const. Amends. 5, 14.

[9] Schools ☞ 178

345k178

A state may condition the receipt of a public school diploma on the passing of a test so long as it is a fair test of that which was taught. West's F.S.A. § 232.246(1)(b), (4); U.S.C.A.Const. Amends. 10, 14.

[10] Constitutional Law ☞ 242.2(5.1)

92k242.2(5.1)

(Formerly 92k242.2(5))

[10] Schools ☞ 178

345k178

Having a functional literacy examination as a requirement for a public high school diploma bars a rational relation to a valid state interest in public education; however, such a test must be a fair test of that which was in fact taught and if it is not fair, i. e., covers matter that was not taught in the classroom, it cannot be said to be rationally related to a state interest and its use violates equal protection. West's F.S.A. § 232.246(1)(b), (4); U.S.C.A.Const. Amend. 14.

[11] Constitutional Law ☞ 242.2(5.1)

92k242.2(5.1)

(Formerly 92k242.2(5))

[11] Constitutional Law ☞ 278.5(5.1)

92k278.5(5.1)

(Formerly 92k278.5(5))

Florida's state student assessment test, i. e., functional literacy test required to secure public high school diploma, does not violate due process or equal protection because it is given only in public schools; not only does a state

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need not correct all problems of education in one fell swoop but it has a stronger interest in those for which it pays the cost and the state presently exercises very limited control over private schools. West's F.S.A. §§ 232.021, 232.246(1)(b), (4); U.S.C.A.Const. Amend. 14.

[12] Constitutional Law Ⓢ242.2(5.1)

92k242.2(5.1)

(Formerly 92k242.2(5))

In considering equal protection attack on Florida requirement that students pass a functional literacy test to receive a high school diploma trial court was to consider impact of legislative action on the community, historical background and sequence of events leading up to such requirement, including fact that until 1967 Florida operated a dual school system and that from 1967 to 1971 segregation persisted and predominantly black schools remained inferior and that greater failure rate of blacks on the test could be attributed to unequal education they received during the "dual schools" period. West's F.S.A. § 232.246(1)(b), (4); U.S.C.A.Const. Amend. 14.

[13] Constitutional Law Ⓢ220(3)

92k220(3)

Absent failure to demonstrate either that disproportionate failure of black students on functional literacy test required for Florida public high school diploma was not due to present effects of past intentional segregation or, that as presently used, the diploma sanction was necessary to remedy those effects, immediate use of the diploma sanction was impermissible as punishing black students for deficiency created by prior dual school system. West's F.S.A. § 232.246(1)(b), (4); U.S.C.A.Const. Amend. 14.

[14] Civil Rights Ⓢ127.1

78k127.1

(Formerly 78k127, 78k9.5)

If Florida state student assessment test, which was designed to measure functional literacy, was a fair test of what was taught in the public schools, its use as a graduation requirement, i. e., condition for diploma, would not violate Title VI of Civil Rights Act, i. e., prohibition against exclusion from participation in or discrimination under federally assisted programs on ground of race, etc. West's F.S.A. § 232.246(1)(b), (4); Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d.

[15] Schools Ⓢ178

345k178

Since Florida state student assessment test, which was designed to measure

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functional literacy and passage of which was prerequisite to receipt of high school diploma, perpetuated past racial discrimination as to black students the diploma sanction violated Equal Educational Opportunities Act which requires an educational agency to take affirmative steps to remove the "vestiges" of dual school systems. West's F.S.A. § 232.246(1)(b), (4); Equal Educational Opportunities Act of 1974, § 204, 20 U.S.C.A. § 1703.

[16] Civil Rights ☞127.1

78k127.1

(Formerly 78k127, 78k9)

[16] Constitutional Law ☞242.2(5.1)

92k242.2(5.1)

(Formerly 92k242.2(5))

[16] Constitutional Law ☞278.5(5.1)

92k278.5(5.1)

(Formerly 92k278.5(5))

Using results of Florida state student assessment test, which is designed to measure functional literacy, a mechanism for remediation only, as opposed to diploma denial for failure to pass, violates neither federal constitutional guarantees of due process and equal protection or Title VI of Civil Rights Act of 1964 or Equal Educational Opportunities Act. West's F.S.A. § 232.246(1)(b), (4); Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d; Equal Educational Opportunities Act of 1974, § 204, 20 U.S.C.A. § 1703; U.S.C.A.Const. Amend. 14.

*400 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.

Appeal from the United States District Court for the Middle District of Florida.

Before FAY and VANCE, Circuit Judges and ALLGOOD [FN*], District Judge.

FN* District Judge of the Northern District of Alabama sitting by designation.

FAY, Circuit Judge:

The State of Florida, concerned about the quality of its public educational

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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. This class 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. 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.

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. s 229.55(2)(a) (West 1977). The legislature established three standards for graduation from Florida public schools. First, the students were required to complete 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.[FN1] *401 Each school district was directed to develop procedures for remediation, and a statewide testing program was outlined. Fla.Stat.Ann. s 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.

FN1. The requirements are set out in Fla.Stat.Ann. s 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 ss. 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 s. 232.245.

(2) The standards required in subsection (1), and any subsequent modifications thereto, shall be printed in the Florida Administrative Code

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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 s. 232.248.

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. [FN2]

FN2. Debra P. v. Turlington, 474 F.Supp. 244, 248-249 (M.D.Fla.1979).

Plaintiffs-appellees, Florida high school students, filed this class action in the United States District Court for the Middle District of Florida, challenging

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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. s 2000d (1976) and the Equal Educational Opportunities Act, 20 U.S.C. s 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 [FN3] designed and implemented a testing *402 program which is racially biased and violates the Equal Protection Clause of the Fourteenth Amendment. 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.

FN3. 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. s 2000d, and 20 U.S.C. s 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. s 232.246(1)(b) [FN4] 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.

FN4. See note 1 supra.

On appeal, the appellants contend that the court erred in finding that the use

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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. s 1701 and 42 U.S.C. s 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.

[1] 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.

[2] [3] 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 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. [FN5] 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. [FN6] 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.

FN5. 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).

FN6. Florida's original grant of educational authority appeared in the Constitution of 1868, Art. VIII, s 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, ss 1-5.

[4] 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

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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.[FN7] Public education was virtually unknown at the time of the adoption of the Constitution. In 1647 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):

FN7. 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 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.

[5] 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.Ed.2d 725, 734 (1975).

III.

[6] 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, [FN8] the state has

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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. 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 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).

FN8. Fla.Stat.Ann. s 232.01 (West Supp.1981) mandates that children between the ages of 6 and 16 attend school.

[7] 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 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.

[8] 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 423, 425 n.5 (5th Cir. 1974). [FN9] 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

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schools of the state.

FN9. 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.

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, [FN10] 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) [FN11] This record is simply insufficient in proof that the test administered measures what was actually taught in the schools of Florida.

FN10. 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).

FN11. 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

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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 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. [FN12] Appellants placed into evidence *406 some math books and communications teaching materials, but at least one teacher, Mr. Carihfield, testified that he did not cover the whole book in class. (Tr.3055).

FN12. 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

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the schools' essential material, then I'd say you're right. You know, there's let's turn now to construct validity.

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.

[9] 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 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.

[10] 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, 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.[FN13] 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

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United States District Court, M. D. Florida,
Tampa Division.

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.

No. 78-892 Civ. T-C.

July 12, 1979.

As Amended Aug. 7 and 8, 1979.

Plaintiffs brought action challenging constitutional and statutory validity of Florida state student assessment test, a functional literacy examination. The District Court, Carr, J., held that: (1) in view of history of segregation in Florida public schools, test unlawfully discriminated against black children in violation of equal protection clause; (2) test had adequate content and construct validity and bore rational relation to valid state interest; (3) plaintiffs failed to establish that test was racially or ethnically biased; (4) failure to apply test to private school was not unconstitutional; (5) inadequacy of notice provided prior to indication of diploma sanction, objectives, and test was a violation of due process clause; (6) use of test to classify students for remediation was constitutionally permissible, and (7) state would be enjoined from requiring passage of test as requirement for graduation for period of four years.

Ordered accordingly.

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West Headnotes

[1] Schools ⚙️13(5)
345k13(5)
(Formerly 78k9)

[1] Constitutional Law ⚙️220(3)
92k220(3)

Where de jure segregation existed in Florida public schools from 1885 to 1967, where racial discrimination existed from 1967 through 1971, where, by commencement of school term 1971-1972, actual physical integration of schools was generally completed but remediation with specifically delineated objectives and programs did not commence until 1977, where there existed intent to discriminate through 1971 and, although proof of present intent to discriminate was insufficient, past purposeful discrimination affecting black pupils was perpetuated by Florida state student assessment test, a functional literacy test, use of test as a requirement for receipt of high school diploma violated equal protection clause and federal statutes, U.S.C.A.Const. Amend. 14; Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d; 20 U.S.C.A. § 1703.

[2] Constitutional Law ⚙️215
92k215

Disproportionate impact is not sole touchstone of invidious racial discrimination forbidden by Constitution, but it is a relevant factor to be considered.
U.S.C.A.Const. Amend. 14.

[3] Schools ⚙️163
345k163

Florida state student assessment test, a functional literacy test, was a valid and reasonable measure for dividing students into classifications for purpose of high school graduation and reasonably evaluated objectives established by Florida State Board of Education, as test has both adequate content validity and adequate construct validity. U.S.C.A.Const. Amend. 14; West's F.S.A. § 229.57 et seq.

[4] Constitutional Law ⚙️220(3)
92k220(3)

Florida state student assessment test, a functional literacy test, was not unconstitutionally racially or ethnically biased against black students. West's F.S.A. § 229.57 et seq.; U.S.C.A.Const. Amend. 14.

[5] Constitutional Law ⚙️220(3)
92k220(3)

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Strict scrutiny test did not apply in determining constitutionality of Florida's failure to require private school students to pass functional literacy examination as a condition of receiving high school diplomas, where ability to attend private schools was clearly affected by student's or his parents' financial resources, even though blacks were, as a class, without substantial financial resources. U.S.C.A.Const. Amend. 14.

[6] Constitutional Law ☞209
92k209

Fact that decisions of legislative or administrative bodies affect certain groups disproportionately does not signal strict scrutiny analysis in determining whether decisions violated equal protection clause of Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

[7] Schools ☞163
345k163

Florida's legislative decision to apply state student assessment test, a functional literacy examination, only to public schools, over which state had significant curricular, instructional, and financial control, was both reasonable and constitutional, as state was not required to correct all problems of education in one clean sweep but could attack problems in a logical fashion. West's F.S.A. § 229.57 et seq.; U.S.C.A.Const. Amend. 14.

[8] Constitutional Law ☞278.5(5.1)
92k278.5(5.1)
(Formerly 92k278.5(5))

[8] Schools ☞178
345k178

Notice given by state of Florida prior to and since implementation of functional literacy testing program, as well as adequacy of time to prepare for examination after objectives were first established, was constitutionally inadequate and violated due process rights, where passage of examination was condition to receiving a diploma, as high school students had property right in graduation from high school with a standard diploma if they had fulfilled requirements for graduation other than passage of examination and students also had liberty interest in being free of adverse stigma associated with receiving certificate of completion which was given to students who failed examination but otherwise satisfied requirements for graduation. U.S.C.A.Const. Amend. 14; West's F.S.A. § 229.57 et seq.

[9] Constitutional Law ☞251.1
92k251.1

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Due process is a flexible standard dependent upon facts and circumstances of each individual case. U.S.C.A.Const. Amend. 14.

[10] Schools 13(2)

345k13(2)

(Formerly 78k9)

Utilization of Florida state student assessment test, a functional literacy examination, to classify and group students for remediation pursuant to Florida Compensatory Education Act of 1977 did not unlawfully discriminate against black students even though compensatory education program for those students who failed examination was disproportionately composed of black children because more black children failed examination than white children, where purpose of compensatory education program was to assist students and not to resegment them, where legislature had given program ample financial support, where pupil alignment in programs was not static, and where program constituted only at most two classes or hours per day. West's F.S.A. § 236.088; U.S.C.A.Const. Amend. 14; Civil Rights Act of 1964, § 601, 42 U.S.C.A. § 2000d; 20 U.S.C.A. § 1703.

[11] Schools 13(20)

345k13(20)

Where Florida statute requiring passage of functional literacy examination as a condition to receiving high school diploma unconstitutionally discriminated against black students due to history of past discrimination in Florida public schools, state would be enjoined from requiring passage of examination as a requirement for graduation for period of four years but would be allowed to utilize examination as a requirement for graduation in the school term 1982-1983; in the interim, the examination could be administered and directed by state to assist in the identification and remediation of examination's skill objectives and scores could be retained in a fashion consistent with manner in which state retained other achievement test scores. West's F.S.A. § 232.246(1)(a-c).

*246 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.

MEMORANDUM OPINION

CARR, District Judge.

I

THE CLAIMS AND CLASSES

The Plaintiffs in the instant action present a broad based constitutional and