

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED

JAN 7 2000

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____
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GI FORUM, IMAGE DE TEJAS,
RHONDA BOOZER, MELISSA MARIE
CRUZ, MICHELLE MARIE CRUZ,
LETICIA ANN FAZ, ELIZABETH
GARZA, MARK GARZA,
ALFRED LEE HICKS, BRANDYE
R. JOHNSON, JOCQULYN RUSSELL,

Plaintiffs,

VS.

TEXAS EDUCATION AGENCY,
DR. MIKE MOSES, MEMBERS,
AND THE TEXAS STATE BOARD
OF EDUCATION, in their official
capacities,

Defendants.

Civil Action No. SA-97-CA-1278-EP

ORDER

The issue before the Court is whether the use of the Texas Assessment of Academic Skills (TAAS) examination as a requirement for high school graduation unfairly discriminates against Texas minority students or violates their right to due process. The Plaintiffs challenge the use of the TAAS test under the Due Process Clause of the United States Constitution and 34 C.F.R. § 100.3, an implementing regulation to Title VI of the Civil Rights Act of 1964, asking this Court to issue an injunction preventing the Texas Education Agency (TEA) from using failure of the exit-

level TAAS test as a basis for denying high school diplomas.¹ The Court has considered the testimony and evidence presented during five weeks of trial before the bench, as well as the relevant case law. After such consideration, and much reflection, the Court has determined that the use of the TAAS examination does not have an impermissible adverse impact on Texas's minority students 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.

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 (1990); in the educational context, such deference is even more warranted, *see San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (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.

This case requires the application of law from a number of diverse areas—employment law, desegregation law, and testing law in areas such as bar examinations or teacher certification examinations. Only one case cited by any party or this Court is both controlling and directly on

¹This 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 Jocquelyn Russell—are dismissed from the case for failure to prosecute.

point—*Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981). In *Debra P.*, the United States Court of Appeals for the Fifth Circuit found that a state could overstep its bounds in implementing standardized tests as graduation requirements. Specifically, the court found that a test that did not measure what students were actually learning could be fundamentally unfair. The court also found that a test that perpetuated the effects of prior discrimination was unconstitutional. This Court finds these ideas to be in step with the United States Supreme Court's suggestion in *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (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 (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.*, No. 99-1222, 1999 WL1241077, at *5 (3d Cir. Dec. 22, 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.²

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

²The 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.

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.³ To some degree, as discussed below, the Court must accept these claims. But that finding, alone, is an insufficient basis for invalidating this examination. There must be some link between the TAAS test 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.

³Of course, these are generalizations. The Court recognizes that students in districts with relatively greater resources have failed the TAAS examination.

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 that whether a given test item disadvantages minority students is a factor that an item reviewer may ultimately *reject* in determining whether an otherwise valid item should be placed on the test. This is so because, as TEA's experts overwhelmingly testified, what is fundamentally important to these psychometricians is that the test objectively measure the material that it purports to measure and that it measure content that students have been exposed to.⁴ *See Report of Dr. Susan Phillips*, Defendants' expert, at 16 (a plausible explanation for differential performance is

⁴The 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.

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?

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 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 FACT⁵

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.⁶ In addition, the Board moved forward with its plans to implement an objective standardized test that would measure mastery of the state-mandated curriculum. In 1987, Texas instituted the TEAMS high school graduation exit test, given to eleventh-graders.

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 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

⁵Any finding of fact more appropriately characterized as a conclusion of law may be considered as such.

⁶In 1998-1999, the Texas Essential Knowledge and Skills (TEKS) replaced the Essential Elements.

whom are not in the State of Texas, there is a great deal of input from state educators in the design of the TAAS test. Decisions as to which portions of the state-mandated curriculum should be measured by the TAAS test are made by Texas teachers and educational professionals. The Texas Education Agency has ensured that the educators comprise an ethnically diverse group of individuals from across the state. In addition, proposed TAAS questions are reviewed by subject-matter content experts, review committees of teachers and educators, test-construction experts, and measurement experts.

In reviewing test items, educators are instructed to consider the following issues: relevancy of the item, difficulty range, clarity of the item, correctness of the keyed answer choice, and the plausibility of distractors. Reviewers are also asked to consider the more global issues of passage appropriateness, passage difficulty, and interactions between items within and between passages as well as work, graphs, or figures. Reviewers are asked to assess whether or not each item on the TAAS exam covers information that was sufficiently taught in the classroom by the time of the test administration. After this initial review, a second review is conducted by staff members of the Student Assessment and Curriculum divisions of the TEA and by developmental and scoring contractors.

Selected questions are then field tested. The results of those field tests are reviewed by a Data Review Committee. Committee members are permitted to remove items they consider to be questionable, including questions that a disproportionate number of minority students fail to answer correctly. Reviewing members are given "great deference" in this process and are not required to eliminate a question that reflects that any ethnic group had particular difficulty with the question. *See Report of Dr. Susan Phillips, Defendants' expert, at 17.* If the reviewer finds that an item with a predicted adverse effect on minorities is a "fair measure of its corresponding state objectives for

all students, and is free of offensive language or concepts that may differentially disadvantage minority students," the item may be retained, even if a significantly larger number of minority students do not answer it correctly. *Id.* (emphasis in original).

Test Validity

Several concepts are key to understanding the arguments raised by the parties regarding the validity of the TAAS examination. The "validity" of a given standardized test refers to the "weight of the accumulated evidence supporting the particular use of the test scores." *Report of Dr. Susan Phillips*, Defendants' expert, at 3. "Content validity" measures the degree to which the test measures the knowledge and skills sought to be measured, in this case the legislatively mandated minimum essentials. *Id.* "Curricular validity" refers to the issue of whether students have an adequate opportunity to learn the material covered on a given standardized test. *Id.* at 10. "Test reliability" is "an indicator of the consistency of measurement." *Id.* at 4. Reliability may be tested by repeat testing or by various measures based on a single-test measurement. *Id.*

Each form of a standardized test must be valid and reliable. Validity and reliability across different forms of the test are ensured by "equating" test forms, or adjusting for any minor variations in difficulty between the forms. *Id.* at 7. The TAAS test is "equated" under what is called the Rasch Model. *Id.* This model focuses narrowly on item-difficulty parameters and does not provide for "item weighing," as do more complex equating models. *Id.* In other words, part of equating test forms involves using a fairly simple formula, the Rasch Model, to determine how well a student's response on a given question predicts that student's success on the exam as a whole. "Point biserials" measure the degree to which persons who answer an item correctly tend to also have high total test scores and vice versa. *Id.* at 21.

Test Administration

Texas public school students begin taking the TAAS test in the third grade. In the tenth grade, Texas public school students are given what is called the "exit-level" TAAS exam, or the examination they must pass in order to graduate. Students must pass each of three portions of the TAAS test—a reading, mathematics, and writing portion—in order to graduate. Texas public school students who do not pass the test on their first attempt are then given at least seven additional opportunities to take and pass the TAAS exam before their scheduled graduation date.

THE PASSING STANDARD

The initial passing standard, or cut score, on the TAAS test was set at 60 percent, and a 70-percent passing standard was phased in after the first year. In setting the passing standard, the State Board of Education looked at the passing standard for the TEAMS test, which was also 70 percent, and also considered input from educator committees. In addition, the selection of the score reflected a general sense that 70 percent of the required essential elements was sufficient "mastery" for the purposes of graduation. *See TEA Board of Education Minutes, June 1990.*

The TEA understood the consequences of setting the cut score at 70 percent. When it implemented the TAAS test, the TEA projected that, with a 70-percent cut score, at least 73 percent of African Americans and 67 percent of Hispanics would fail the math portion of the test; at least 55 percent of African Americans and 54 percent of Hispanics would fail the reading section; and at least 62 percent of African Americans and 45 percent of Hispanics would fail the writing section. The predictions for white students were 50 percent, 29 percent, and 36 percent, respectively. However, TEA representatives had reason to believe that those projections were inflated. Experts informed TEA representatives that there is a measurable difference in the motivation between students taking a field examination and students taking a test with actual consequences. While the

passing numbers were somewhat better than projected, they were nonetheless alarming. On the October 1991 administration of the exam to tenth graders, 67 percent of African Americans and 59 percent of Hispanics failed to meet the passing cut score. For whites, the number was 31 percent.

OBJECTIVE MEASUREMENT

In spite of projected disparities in passing rates, the TEA determined that objective measures of mastery should be imposed in order to eliminate what it perceived to be inconsistent and possibly subjective teacher evaluations of students. The TEA offered evidence at trial that such inconsistency exists. The TEA also presented testimony that subjectivity can work to disadvantage minority students by allowing inflated grades to mask gaps in learning.

REMEDICATION

Failure to master any portion of the exam results in state-mandated remediation in the specific subject area where the student encountered difficulty. There is no state-mandated approach to remediation, however. Consequently, remedial efforts vary from district to district. The evidence at trial reflected varying degrees of success resulting from remedial efforts. The Court finds that, on balance, remedial efforts are largely successful. TEA's expert Dr. Susan Phillips estimates that 44,515 minority students in 1997 were successfully remediated after having failed their first attempt at the TAAS test in 1995. *Report of Dr. Susan Phillips, Defendants' expert, at 14.* The Court finds this evidence credible.

ACCOUNTABILITY

Administrators, schools, and teachers are held accountable, in varying degrees, for TAAS performance. The accountability system does not ignore the presence of ethnic minorities in the system or the difficulties minorities may have in passing the examination. Passing and failing scores are dis-aggregated, or broken down into subgroups, so that schools and districts are aware

of the degree of success or failure of African American, Hispanic, and white students. If one subgroup fails to meet minimum performance standards, a school or district will receive a low accountability rating.

HISTORY OF TESTING/DISCRIMINATION IN TEXAS

It is beyond dispute that standardized tests have been used in educational contexts to disadvantage minorities. *See Report of Dr. Uri Treisman, Defendants' expert*, at 3. However, the Plaintiffs have presented insufficient evidence to support a finding that the TAAS test, as developed, implemented, and used in Texas, is designed to or does impermissibly disadvantage minorities. While it is true that a number of minority students fail to pass the TAAS test and earn a diploma, there is no evidence that this was the design of the State in initiating the test. On the contrary, there is evidence that one of the goals of the test is to help identify and eradicate educational disparities. The receipt of an education that does not meet some minimal standards is an adverse impact just as surely as failure to receive a diploma.

The Court agrees with Plaintiffs that sufficient evidence, including evidence cited in other state and federal case law, exists to support the Plaintiffs' claim that Texas minority students have been, and to some extent continue to be, the victims of educational inequality. *See Report of Dr. Uri Treisman, Defendants' Expert*, at 7; *see also, e.g., United States v. Texas Educ. Agency*, 467 F.2d 848 (5th Cir. 1972), and its progeny; *United States v. Texas*, 330 F. Supp. 235 (E.D. Tex. 1971). Witnesses in this case were questioned by counsel and by the Court about the reasons for this inequality. The evidence was disturbing, but inconclusive. Socio-economics, family support, unequal funding, quality of teaching and educational materials, individual effort, and the residual effects of prior discriminatory practices were all implicated. The Court finds that each of these factors, to some degree, is to be blamed.

However, the Plaintiffs presented insufficient evidence to support a finding that minority students do not have a reasonable opportunity to learn the material covered on the TAAS examination, whether because of unequal education in the past or the current residual effects of an unequal system. The Plaintiffs presented evidence to show that, in a more general sense, minorities are not provided equal educational opportunities. In particular, Plaintiffs demonstrated that minorities are underrepresented in advanced placement courses and in gifted-and-talented programs. Minority students are also disproportionately taught by non-certified teachers. However, because of the rigid, state-mandated correlation between the Texas Essentials of Knowledge and Skills and the TAAS test, the Court finds that all Texas students have an equal opportunity to learn the items presented on the TAAS test, which is the issue before the Court. In fact, the evidence showed that the immediate effect of poor performance on the TAAS examination is more concentrated, targeted educational opportunities, in the form of remediation. Moreover, the TEA's evidence that the implementation of the TAAS test, together with school accountability and mandated remedial follow-up, helps address the effects of any prior discrimination and remaining inequities in the system is both credible and persuasive.

EDUCATIONAL STANDARDS

Current prevailing standards for the proper use of educational testing recommend that high-stakes decisions, such as whether or not to promote or graduate a student, should not be made on the basis of a single test score. *See Supplemental Report of Dr. Walter Haney*, Plaintiff's expert, at 42 (citing *Standards for Educational and Psychological Testing* (1985)). There was little dispute at trial over whether this standard exists and applies to the TAAS exit-level examination. What was disputed was whether the TAAS test is actually the sole criterion for graduation. As the TEA points out, in addition to passing the TAAS test, Texas students must also pass each required course by 70

percent. See TEXAS ADMIN. CODE § 74.26(c). Graduation in Texas, in fact, hinges on three *separate and independent* criteria: the two objective criteria of attendance and success on the TAAS examination, and the arguably objective/subjective criterion of course success. However, as the Plaintiffs note, these factors are not weighed with and against each other; rather, failure to meet any single criterion results in failure to graduate. Thus, the failure to pass the exit-level exam does serve as a bar to graduation, and the exam is properly called a "high-stakes" test.

On the other hand, students are given at least eight opportunities to pass the examination prior to their scheduled graduation date. In this regard, a single TAAS score does *not* serve as the sole criterion for graduation. The TEA presented persuasive evidence that the number of testing opportunities severely limits the possibility of "false negative" results and actually increases the possibility of "false positives," a fact that arguably advantages all students whose scores hover near the borderline between passing and failing.

DISPARATE IMPACT

The Court finds as an inescapable conclusion that in every administration of the TAAS test since October 1990, Hispanic and African American students have performed significantly worse on all three sections of the exit exam than majority students. However, the Court also finds that it is highly significant that minority students have continued to narrow the passing rate gap at a rapid rate. In addition, minority students have made gains on other measures of academic progress, such as the National Assessment of Educational Progress test. The number of minority students taking college entrance examinations has also increased.

In determining whether a legally significant statistical disparity exists, the Court has had to consider two difficult issues. The first is whether to apply the EEOC's Four-Fifths Rule or some other recognized test for identifying statistical disparity, as the Plaintiffs have argued the Court must

do. The second is whether to consider cumulative pass rates or pass rates on a single administration of the examination at the tenth-grade level. The Court's resolution of these issues is discussed more fully in the Conclusions of Law, below.

Plaintiff's statistical expert, Mark Fassold, presented evidence that TAAS exit-level exam failure rates have a racially discriminatory effect under the Four-Fifths Rule⁷ and the *Shoben* formula.⁸ The TEA contends that Fassold's study is flawed in significant ways and must be rejected. The Court acknowledges that Fassold's data include students who did not sit for the exam in the category of students who "passed" the exam. However, the Court has considered this flaw in its proper context. As the Plaintiffs point out, Fassold's methodology almost certainly artificially *inflates* the minority pass rate by coding those who fail to take the examination as passing. *Report of Mark Fassold*, Plaintiff's expert, at 13 n.10. Because minorities fail to take the test at a higher rate than majority students, the minority pass rate is inflated at a higher rate than that of the majority pass rate. *Id.* Thus, the Court is inclined to agree with Plaintiffs that they have likely *over-estimated* the minority pass rate. In this context, then, the Court finds there is sufficient evidence that, on first-time administration of the exit-level test, a legally significant adverse impact exists. While an examination of cumulative pass scores in more recent years does not evince adverse impact under the Four-Fifths Rule, the disparity there, too, is sufficient to give rise to legitimate concern. *See Cureton v. National Collegiate Athletic Assoc.*, 37 F. Supp.2d, 687, 697 (E.D. Pa. 1999) ("no rigid mathematical threshold of disproportionality . . . must be met to demonstrate a sufficiently adverse

⁷The Four-Fifths Rule finds an adverse impact where the passing rate for the minority group is less than 80 percent of the passing rate for the majority group. 29 C.F.R. § 1607.

⁸The *Shoben* formula seeks to assess the statistical significance of observed numerical disparities by determining differences between independent proportions. *See Frazier v. Consolidated Rail Corp.*, 851 F.2d 1447, 1450 n.5 (D.C. Cir. 1988).

impact"), *rev'd on other grounds*, No. 99-1222, 1999 WL 1241077 (3d Cir. Dec. 22, 1999). Moreover, as discussed below, there are significant statistical disparities in cumulative pass rates.

In addition to evaluating the statistical impact of the examination, the Court has, at the behest of both parties, considered the "practical consequences" or "practical impact" of the high failure rates of minorities. That consideration involves careful examination of the immediate and long-term effects of the statistically disparate failure rates. The TEA argues that, because of the presence of largely successful remediation, the practical significance benefits minorities. The Plaintiffs note that failure to graduate has serious economic, social, and emotional effects on students.

The Court finds that failure of the exit-level TAAS examination during the first seven administrations results in immediate remedial efforts. At the last administration, of course, failure of the exit-level TAAS examination results in a failure to receive a diploma. However, the Court finds, based on the evidence presented at trial, that the effect of remediation, which is usually eventual success in passing the examination and thus receipt of a high school diploma, is more profound than the steadily decreasing minority failure rate.

DROP-OUT/RETENTION RATES

Plaintiffs presented sufficient evidence to support a finding that Texas students, particularly minority students, drop out of school in significant numbers and are retained at their current grade level in numbers that give cause for concern. Moreover, the Plaintiffs presented evidence supporting their contention that drop-out and retention rates for minorities are peculiarly high at the ninth grade, just before the first administration of the exit-level TAAS. *See Supplemental Report of Dr. Walter Haney*, Plaintiff's expert, at 21-29. The evidence presented by Plaintiffs also shows that in the year 1991, as the present TAAS test was being phased in, there was a drop in the ratio of high school graduates to grade nine students three years before, and that this drop was most notable for minority

students. *See id.* at 25-26. However, Plaintiffs have failed to make a causal connection between the implementation of the TAAS test and these phenomena, beyond mere conjecture. In other words, Plaintiffs were only able to point to the problem and ask the Court to draw an inference that the problem exists because of the implementation of the TAAS test. That inference is not, in light of the evidence, inevitable. The Defendants hypothesize, just as plausibly, for example, that the ninth grade increase in drop outs is due to the cessation of automatic grade promotion at the beginning of high school in Texas.

CONCLUSIONS OF LAW⁹

This lawsuit is properly brought under two causes of action: the implementing regulations of Title VI of the Civil Rights Act of 1964 and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

TITLE VI REGULATIONS

Title VI of the Civil Rights Act of 1964 is a statute enacted "with the 'intent' to invoke the Fourteenth Amendment's congressional enforcement power." *Lesage v. State of Texas*, 158 F.3d 213, 218 (5th Cir. 1998), *cert. filed*, 67 USLW 3469 (Jan. 11, 1999). The TEA, as a state agency that administers and monitors compliance with educational programs required by state and federal laws and as the recipient of federal funds, is governed by Title VI and its regulations. 42 U.S.C. 2000d et seq.; *Castenada v. Pickard*, 648 F.2d 989, 992 (5th Cir. Unit A 1981). The Plaintiffs have brought this suit, in part, pursuant to 34 C.F.R. § 100.3, a regulation promulgated by the Department of Education to implement Title VI. That regulation prohibits activity in federally funded programs that has the effect of subjecting individuals to discrimination because of their race, color, or national

⁹Any conclusion of law more appropriately characterized as a finding of fact may be considered as such.