origin. 34 C.F.R. § 100.3; *Powell v. Ridge*, 189 F.3d 387, 396 (3d Cir. 1999), *cert. denied*, 1999 WL 783927 (Dec. 6, 1999); *Elston*, 997 F.2d at 1406. The language of the regulation clearly suggests that a disparate impact analysis is appropriate under this regulation, and courts have applied it in that manner.[10] *See Quarles v. Oxford Mun. Separate Sch. Dist.*, 868 F.2d 750, 754 n.3 (5th Cir. 1989); *City of Chicago v. Lindley*, 66 F.3d 819, 827 (7th Cir. 1995); *see also Cureton*, 37 F. Supp.2d at 697 (gathering cases). Similarly, courts have held that plaintiffs bringing lawsuits pursuant to 34 C.F.R. § 100.3 have a private right of action. *Powell*, 189 F.3d at 398; *Cureton*, 37 F. Supp.2d at 689. This Court concurs in that conclusion.

A disparate impact theory of racial discrimination permits a court to overturn facially neutral acts and policies that have "significant adverse effects on protected groups . . . without proof that the [actor] adopted those practices with a discriminatory intent." *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 986-87 (1988). To delineate a standard for evaluating this disparate impact claim, the Court has looked to employment law under Title VII of the Civil Rights Act of 1964, which allows a disparate impact cause of action. *See, e.g., Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989); *Watson*, 487 U.S. 977; *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Thus, in determining whether a prima facie case of disparate impact has been established,

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[10]As noted elsewhere, the TEA has suggested that this regulation has been limited to its constitutional dimensions (i.e., to a requirement that a plaintiff show discriminatory intent) by the United States Supreme Court, in *United States v. Fordice*, 505 U.S. 717 (1992). The Court acknowledges the dicta to which the TEA refers. *See Fordice*, 505 U.S. at 732. However, the Court notes that other courts have not held that the disparate impact analysis under 34 C.F.R. § 100.3 has been abrogated. *See Cureton*, 37 F. Supp.2d at 697 (collecting cases); *Graham v. Tennessee Secondary Sch. Athletic Assoc.*, No. 1:95-cv-044, 1995 WL 115890, at *12 (E.D. Tenn. Feb. 20, 1995) (joining other courts in maintaining disparate impact claim after *Fordice*). It is this Court's duty to *apply* the law, as near as it is able, and only to *predict* what the law will be when absolutely necessary. *See Charles J. Cooper, Stare Decisis: Precedent & Principal in Constitutional Adjudication*, 73 CORNELL L. REV. 401 at n.6 (1988).

this Court will apply the burden-shifting analysis established in Title VII cases. Under that analysis, the plaintiff must initially demonstrate that the application of a facially neutral practice has caused a disproportionate adverse effect. *Wards Cove*, 490 U.S. at 656-57. If a plaintiff makes such a showing, a burden of production shifts to the defendant. Under that burden, the defendant must produce evidence that the practice is justified by an educational necessity. *Id.* The plaintiff may then ultimately prevail by demonstrating that an equally effective alternative practice could result in less racial disproportionality while still serving the articulated need. *Watson*, 487 U.S. at 998.

I. Disparate Impact

In determining whether an adverse impact exists in this case, the Court has considered and applied the Equal Employment Opportunity Commission's Four-Fifths Rule. *See* 29 C.F.R. § 1607.4(d). The Court disagrees with the TEA's argument that this test is not suited for identifying the presence of adverse impact in this context. *See Cureton*, 37 F. Supp.2d at 700 (applying Four-Fifths Rule). In addition, the Court notes that the TEA did not offer in its briefing or at trial a satisfactory substitute for determining a statistical disparity, choosing instead to rely on its arguments that a disparate impact theory should not be applied in a Title VI case or, alternatively, that the Court should consider only the practical effect of remediation.

In addition to the Four-Fifths Rule, the Court has considered the statistical significance of the observed differences in pass rates. The methodology for such consideration, referred to by these parties as the *Shoben* formula, is to find a "z-score," or a number representing the differences between independent proportions—here the pass rates of minority students and the pass rates of majority students. *See Report of Mark Fassold*, Plaintiff's expert, at 4-6; *Preliminary Report of Dr. Walter Haney*, Plaintiff's expert, at 13.

The evidence regarding whether Plaintiffs have established the existence of a significant

adverse impact on minority students is mixed. Plaintiffs' statistical analysis, while somewhat flawed, demonstrates a significant impact on first-time administration of the exam. This impact, which clearly satisfies the Four-Fifths Rule, is conceded by at least one TEA expert. *See Report of Dr. Susan Phillips*, Defendants' expert, at 13. However, cumulative pass rates do not demonstrate so severe an impact and, at least for the classes of 1996, 1997, and 1998, are not statistically significant under the EEOC's Four-Fifths Rule. *See id.* at 14.

In considering how to handle the dilemma of choosing between cumulative and single-test administration, the Court has taken into account the immediate impact of initial and subsequent in-school failure of the exam—largely successful educational remediation. In addition, the Court has considered the evidence that minority scores have shown dramatic improvement. These facts would seem to support the TEA's position that cumulative pass rates are the relevant consideration here.

The Plaintiffs argue that successful remediation and pass-rate improvement should not be considered in determining whether an adverse impact exists. To support their argument, the Plaintiffs point to case law holding that a "bottom line" defense is insufficient to combat a showing of adverse impact. *See Connecticut v. Teal*, 457 U.S. 440, 455 (1982). The Court is not convinced that this argument is applicable to the case before it.

In *Connecticut v. Teal*, the United States Supreme Court held that an employer charged with a Title VII violation could not justify discrimination against one individual by pointing to its favorable treatment of other members of the same racial group. *Id.* at 454. According to the Court, Title VII requires an employer to provide "an equal opportunity for each applicant regardless of race." *Id.* In that case, however, the employer was trying to compensate for a discriminatory selection test by arguing that subsequent affirmative action practices allowed the employer to reach a non-discriminatory "bottom-line." *Id.* at 452-53. As another court has stated, *Teal* stands for the

proposition that "the disparate exclusion of minority candidates at the first stage of the selection process was not ameliorated by the favorable end result because excluded candidates were deprived individually of the opportunity for promotion." *Lindley*, 66 F.3d at 829.

The Court will assume that *Teal's* analysis applies in Title VI cases. *Id.* However, the Court is not sure that *Teal* is relevant here. Failure to pass the first administration of the TAAS test does not deny an individual a competitive opportunity. It is only after at least *eight* tries that there is a real negative impact. This is not a case where there are several distinct steps through a selection system. *See Newark Branch, NAACP v. Town of Harrison, N.J.*, 940 F.2d 792, 801 (3d Cir. 1991). Nor is it the TEA's argument that the test is legal because, while some individuals fail and do not receive diplomas, others *do* and so the disparate effect is ameliorated. Rather, the TEA is arguing that each individual student is given at least eight tries to pass the exam and that many students who fail on the first attempt eventually succeed. The Court believes that these facts distinguish this case from *Teal*, and the Court will reject the *Teal* analysis. Thus, the Court has considered, and found relevant, the distinction between pass rates after a single administration and pass rates after eight attempts.

Having said all that, however, the Court finds that, whether one looks at cumulative or single-administration results, the disparity between minority and majority pass rates on the TAAS test must give pause to anyone looking at the numbers. The variances are not only large and disconcerting, they also apparently cut across such factors as socioeconomics. Further, the data presented by the Plaintiffs regarding the statistical significance of the disparities buttress the view that legally meaningful differences do exist between the pass rates of minority and majority students. Disparate impact is suspected if the statistical significance test yields a result, or z-score, of more than two or three standard deviations. *Castenada v. Partida*, 430 U.S. 482, 496 n.17 (1977). In all cases here,

on single and cumulative administrations, there are significant statistical differences under this standard. Given the sobering differences in pass rates and their demonstrated statistical significance, the Court finds that the Plaintiffs have made a prima facie showing of significant adverse impact. *See Supplemental Report of Dr. Walter Haney*, Plaintiff's Expert, at 4-5 (discussing practical adverse impact); *Cureton*, 37 F. Supp.2d at 697 ("no rigid mathematical threshold of disproportionality . . . must be met to demonstrate a sufficiently adverse impact").

II. Educational Necessity

Having found that the Plaintiffs have established a prima facie showing of significant adverse impact, the Court must consider whether the TEA has met its burden of production on the question of whether the TAAS test is an educational "necessity." The word "necessity," as an initial matter, is somewhat misleading; the law does not place so stringent a burden on the defendant as that word's common usage might suggest. Instead, an educational necessity exists where the challenged practice serves the *legitimate* educational goals of the institution. *Wards Cove*, 490 U.S. at 659. In other words, the TEA must merely produce evidence that there is a manifest relationship between the TAAS test and a legitimate educational goal. *Teal*, 457 U.S. at 446. The Court finds that the TEA has met its burden.

The articulated goals of the implementation of the TAAS requirement are to hold schools, students, and teachers accountable for education and to ensure that all Texas students receive the same, adequate learning opportunities. These goals are certainly within the legitimate exercise of the State's power over public education. To determine whether the TAAS test bears a manifest relationship to these legitimate goals, the Court has considered carefully each of the test's alleged deficiencies—the overall effectiveness of the test, the cut score of the test, the use of the test as a requirement for graduation, the Plaintiffs' allegation that the test has resulted in inferior educational

opportunities for minorities, and the alleged relationship between the test and student drop out scores.

A. Effectiveness

The Court finds that the TAAS test effectively measures students' mastery of the skills and knowledge the State of Texas has deemed graduating high school seniors must possess. The Plaintiffs provided evidence that, in many cases, success or failure in relevant subject-matter classes does not predict success or failure in that same area on the TAAS test. *See Supplemental Report of Dr. Walter Haney*, Plaintiff's expert, at 29-32. In other words, a student may perform reasonably well in a ninth-grade English class, for example, and still fail the English portion of the exit-level TAAS exam. The evidence suggests that the disparities are sharper for ethnic minorities. *Id.* at 33. However, the TEA has argued that a student's classroom grade cannot be equated to TAAS performance, as grades can measure a variety of factors, ranging from effort and improvement to objective mastery. The TAAS test is a solely objective measurement of mastery. The Court finds that, based on the evidence presented at trial, the test accomplishes what it sets out to accomplish, which is to provide an objective assessment of whether students have mastered a discrete set of skills and knowledge.

B. Cut Score

The Court has paid close attention to testimony in this case regarding the setting of the 70-percent passing standard for the TAAS test. In addition, the Court has carefully considered the scope of its own authority to address that issue. Ultimately, the Court concludes that the passing standard does bear a manifest relation to a legitimate goal.

Whether the use of a given cut score, or any cut score, is proper depends on whether the use of the score is justified. In *Cureton*, a case relied upon heavily by the Plaintiffs in this case, the

court found that the use of an SAT cut score *as a selection practice for* the NCAA must be justified by some independent basis for choosing the cut score. *Cureton*, 37 F. Supp.2d at 708. In addition, the court noted that the NCAA had not validated the use of the SAT as a predictor for graduation rates. *Id.*

Here, the test use being challenged is the assessment of legislatively established minimum skills as a requisite for graduation. This is a conceptually different exercise from that of predicting graduation rates or success in employment or college. In addition, the Court finds that it is an exercise well within the State's power and authority. The State of Texas has determined that, to graduate, a senior must have mastered 70 percent of the tested minimal essentials.

In *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), the United States Court of Appeals for the Fifth Circuit noted two criteria for determining whether a standardized test is rationally supportable. *Tyler*, 517 F.2d at 1101. The relevant criterion here is whether the cut score is related to the quality the test purports to measure. *Id.* The court noted that a 70-percent cut score for bar passage "has no significance standing alone" but that it "represents the examiners' considered judgments as to minimal competence required to practice law." *Id.* The Court finds that the 70-percent cut score for the TAAS test reflects similar judgments. *See Report of the State Board of Education Committee of the Whole, Work Session Minutes,* July 12, 1990. The Court does not mean to suggest that a state could arrive at *any* cut score without running afoul of the law. However, Texas relied on field test data and input from educators to determine where to set its cut score. It set initial cut scores 10 percentage points lower, and phased in the 70-percent score. *See State Board of Education Minutes,* July 14, 1990. While field test results suggested that a large number of students would not pass at the 70-percent cut score, officials had reason to believe that those numbers were inflated. *See Work Session Minutes,* July 12, 1990. Officials contemplated the

possible consequences and determined that the risk should be taken. The Court cannot say, based on the record, that the State's chosen cut score was arbitrary or unjustified. Moreover, the Court finds that the score bears a manifest relationship to the State's legitimate goals.

C. Use as a Graduation Requirement

The Court finds that the TEA has shown that the high-stakes use of the TAAS test as a graduation requirement guarantees that students will be motivated to learn the curriculum tested. While there was testimony that the test would be useful even if it were not offered as a requisite to graduation, the Court finds that there was no, or insufficient, evidence to refute the TEA's assertion that the use as a graduation requirement boosted student motivation and encouraged learning. In addition, the evidence was unrefuted that the State had an interest in setting standards as a basis for the awarding of diplomas. The use of a standardized test to determine whether those standards are met and as a basis for the awarding of a diploma has a manifest relationship to that goal.

D. Inferior Educational Opportunities

The Plaintiffs introduced evidence that, in attempting to ensure that minority students passed the TAAS test, the TEA was limiting their education to the barest elements. The Court finds that the question of whether the education of minority students is being limited by TAAS-directed instruction is not a proper subject for its review.[11] The State of Texas has determined that a set of knowledge and skills must be taught and learned in State schools. The State mandates no more than these "essential" items. Test-driven instruction undeniably helps to accomplish this goal. It is not within the Court's power to alter or broaden the curricular decisions made by the State.

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[11]Of course, upon a showing of intentional discrimination, such a claim would implicate the Equal Protection Clause of the Fourteenth Amendment. However, the Court has already held that Plaintiffs have offered no proof of intent in this case.

E. Drop-Out and Retention Rates

As discussed above, the Plaintiffs have presented credible evidence that the drop-out and retention rates among minority students in Texas give cause for concern. However, there is no credible evidence linking State drop-out and retention rates to the administration of the exit-level TAAS test. Expert Walter Haney's hypothesis that schools are retaining students in the ninth grade in order to inflate tenth-grade TAAS results was not supported with legally sufficient evidence demonstrating the link between retention and TAAS.

III. Equally Effective Alternatives

In considering whether the Plaintiffs have shown that there are equally effective alternatives to the current use of the TAAS test, the Court must begin with the State's articulated, legitimate goals in instituting the examination. Those goals are to hold students, teachers, and schools accountable for learning and for teaching, to ensure that all students have the opportunity to learn minimal skills and knowledge, and to make the Texas high school diploma uniformly meaningful. Further, as discussed more fully above, the State has set a standard for mastery of 70 percent of the items tested, and the Court has held that this standard is legitimate.

Plaintiffs did offer evidence that different approaches would aid the State in measuring the acquisition of essential skills. Among these approaches was a sliding-scale system that would allow educators to compensate a student's low test performance with high academic grades or to compensate lower grades with outstanding test scores. However, Plaintiffs failed to present evidence that this, or other, alternatives could sufficiently motivate students to perform to their highest ability. In addition, and perhaps more importantly, the present use of the TAAS test motivates schools and teachers to provide an adequate and fair education, at least of the minimum skills required by the

State, to all students. *See Debra P. II*, 730 F.2d at 1416. The Plaintiffs produced no alternative that adequately addressed the goal of systemic accountability.

DUE PROCESS

In order for a court to find a due process violation, it must first find that a plaintiff has a protected interest—either property or liberty—in what the State seeks to limit or deny. *See Michael H. v. Gerald D.*, 491 U.S. 110, 121 (1989) (substantive due process, liberty interest); *Ewing*, 474 U.S. at 222 (substantive due process, property interest); *Ewing*, 474 U.S. at 229 (procedural due process, property interest). The Court has previously found, and reiterates here, that the State of Texas has created a protected interest in the receipt of a high school diploma. *See* TEX. EDUC. CODE § 25.085(b); *id.* at § 4.002; *id.* at § 28.025(a)(1); *Debra P.*, 644 F.2d at 403-404.

The Due Process Clause has two aspects—procedural and substantive. *Ewing*, 474 U.S. at 229. On the procedural side, the law demands that a state provide, at a minimum, notice and an opportunity to be heard before it deprives citizens of certain state-created protected interests. *Frazier v. Garrison I.S.D.*, 980 F.2d 1514, 1529 (5th Cir. 1993). On the substantive side, the law holds that some rights are so profoundly inherent in the American system of justice that they cannot be limited or deprived arbitrarily, even if the procedures afforded an individual are fair. *Ewing*, 474 U.S. at 229; *Robertson v. Plano City*, 70 F.3d 21, 24 (5th Cir. 1995). The use of a standardized test as a graduation requirement can implicate both procedural due process concerns and substantive due process concerns. *Debra P.*, 644 F.2d at 404.

The United States Court of Appeals for the Fifth Circuit has held that a state cannot impose a standardized test as a graduation requirement without giving its students the procedural protection of adequate notice that such will be the use of the test. *Id.* at 404. In addition, the Fifth Circuit has suggested a *substantive* component to a student's rights where a state attempts to condition a diploma

on standardized test scores: a state may not impose an examination where such imposition is arbitrary and capricious or frustrates a legitimate state interest or is fundamentally unfair, in that it encroaches upon concepts of justice lying at the basis of our civil and political institutions. *Id.* The United States Supreme Court has suggested that a state's educational determinations may be invalid under a substantive due process analysis where they reflect a "substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Ewing*, 474 U.S. at 225. The Court has evaluated the use of the TAAS examination under each of these formulations and finds that it does not violate the due process rights of Texas students, minority or majority.

A test that covers matters not taught in the schools is fundamentally unfair. *Debra P.*, 644 F.2d at 404. The Court finds, however, that the TAAS exit-level test meets currently accepted standards for curricular validity. In other words, the test measures what it purports to measure, and it does so with a sufficient degree of reliability. In addition, all students in Texas have had a reasonable opportunity to learn the subject matters covered by the exam. The State's efforts at remediation and the fact that students are given eight opportunities to pass the examination before leaving school support this conclusion. *Debra P. II,* 730 F.2d at 1411.

The Court also finds that the Plaintiffs have not demonstrated that the TAAS test is a substantial departure from accepted academic norms or is based on a failure to exercise professional judgment. Certainly, there was conflicting evidence at trial regarding whether the test, as used, is appropriate. However, there was no testimony demonstrating that Texas has rejected current academic standards in designing its educational system. Educators and test-designers testified that the design and the use of the test was within accepted norms.

The Court, in reaching this conclusion, has considered carefully the testimony of Plaintiffs'

expert, Dr. Martin Shapiro, demonstrating that the item-selection system chosen by TEA often results in the favoring of items on which minorities will perform poorly, while disfavoring items where discrepancies are less wide. The Court cannot quarrel with this evidence. However, the Court finds that the Plaintiffs have not been able to demonstrate that the test, as validated and equated, does not best serve the State's goals of identifying and remediating educational problems. Because one of the goals of the TAAS test is to identify and remedy problems in the State's educational system, no matter their source, then it would be reasonable for the State to validate and equate test items on some basis other than their disparate impact on certain groups. In addition, the State need not equate its test on the basis of standards it rejects, such as subjective teacher evaluations.

In short, the Court finds, on the basis of the evidence presented at trial, that the disparities in test scores do not result from flaws in the test or in the way it is administered. Instead, as the Plaintiffs themselves have argued, some minority students have, for a myriad of reasons, failed to keep up (or catch up) with their majority counterparts. It may be, as the TEA argues, that the TAAS test is one weapon in the fight to remedy this problem. At any rate, the State is within its power to choose this remedy.

As the Court has stated in prior orders, it would be fundamentally unfair to punish minority students for receiving an unequal, state-funded education.[12] In other words, it would violate due

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[12]In *Debra P. II*, the United States Court of Appeals for the Fifth Circuit articulated this concern in equal protection terms, reiterating the proposition that an educational system still suffering from the effects of prior discrimination cannot classify students based on race unless that classification can be shown either not be a result of prior discrimination or that it will remedy such discrimination. *See Debra P. II*, 730 F.2d at 1411. This Court has dismissed the Plaintiff's equal protection claim. Nonetheless, the Court has stated, and emphasizes again here, that it would be a due process violation to impose standards on minority students whose failure to meet those standards is directly attributable to state action.

process if the TAAS test were used as a vehicle for holding students accountable for an educational system that failed them. The Court concludes, however, that the TAAS test is not used in such a manner.

The Court has considered this question carefully. Texas's difficulties in providing an equal education to all its students are well-documented. It is only in the recent past that efforts have been made to provide equal funding to Texas public schools. Several schools in the state remain under desegregation orders. These facts cannot be ignored.

The Court finds, however, after listening to the evidence at trial, that the TEA would agree with the proposition that unequal education is a matter of great concern and must be eradicated. The Court has determined that the use and implementation of the TAAS test does identify educational inequalities and attempts to address them. *See Debra P. II*, 730 F.2d at 1415 (remedial efforts help dispel link between past discrimination and poor performance on standardized test). While lack of effort and creativity at the local level sometimes frustrate those attempts, local policy is not an issue before the Court. The results of the TAAS test are used, in many cases quite effectively, to motivate not only students but schools and teachers to raise and meet educational standards.

CONCLUSION

ACCORDINGLY, the Court finds that the TAAS exit-level examination does not violate regulations enacted pursuant to Title VI of the Civil Rights Act of 1964. While the TAAS test does adversely affect minority students in significant numbers, the TEA has demonstrated an educational necessity for the test, and the Plaintiffs have failed to identify equally effective alternatives. In addition, the Court concludes that the TAAS test violates neither the procedural nor the substantive due process rights of the Plaintiffs. The TEA has provided adequate notice of the consequences of the exam and has ensured that the exam is strongly correlated to material actually taught in the

classroom. In addition, the test is valid and in keeping with current educational norms. Finally, the test does not perpetuate prior educational discrimination or unfairly hold Texas minority students accountable for the failures of the State's educational system. Instead, the test seeks to identify inequities and to address them. It is not for this Court to determine whether Texas has chosen the best of all possible means for achieving these goals. The system is not perfect, but the Court cannot say that it is unconstitutional. Judgment is GRANTED in favor of the Defendants, and this case is DISMISSED.

SIGNED and ENTERED this 7th day of January, 2000.

Edward C. Prado

EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF 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, JOCQULYN RUSSELL, Plaintiffs,	)	
VS.	)	Civil Action No. SA-97-CA-1278-EP
TEXAS EDUCATION AGENCY, DR. MIKE MOSES, MEMBERS, AND THE TEXAS STATE BOARD OF EDUCATION, in their official capacities, Defendants.	)	

JUDGMENT

In accordance with this Court's opinion of this same date, it is hereby ORDERED, ADJUDGED, and DECREED that judgment is entered in favor of the Defendants and against the Plaintiffs. All costs are to be borne by the parties incurring them. It is further ORDERED that all pending motions be STRICKEN from the docket as moot and that this case is DISMISSED.

SIGNED and ENTERED this 7th day of January 2000.

Edward C. Prado

EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE