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The Texas Assessment of Academic Skills Exit Test—"Driver of Equity" or "Ticket to Nowhere?"

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ARTICLE

THE TEXAS ASSESSMENT OF ACADEMIC SKILLS EXIT TEST—“DRIVER OF EQUITY” OR “TICKET TO NOWHERE?”

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WITH EPILOGUE BY MR. AL KAUFFMAN****

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In Texas, assessment tests dominate education. Under current law, a score of 70 on the Texas Assessment of Academic Skills Test (TAAS) is

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required for high school graduation.¹ Beginning in 2003, third grade students will not be promoted to the fourth grade unless they receive a “passing score” to be determined by the Texas Education Agency (TEA) on the third-grade TAAS. Beginning in 2005, fifth graders must “pass” the TAAS to be promoted to the sixth grade, and in 2008, eighth graders will have to “pass” the TAAS to enter ninth grade.² Moreover, the evaluation of schools and school personnel, including principals, teachers, and staff are directly tied to their students’ success on the TAAS.³ In Texas, assessment tests define educational success.

Is this good for the children of Texas? Is TAAS a good tool with which to evaluate the success of schools, principals, and teachers? Should it also be used to evaluate the performance of individual students? What are the educational, social, and political consequences of this policy? These questions were raised but not resolved in the recent case of *GI Forum v. Texas Education Agency*.⁴ Two Mexican-American civil rights organizations, the G.I. Forum and Image de Tejas,⁵ and nine individual women and men, who had been denied high school degrees merely because they had not scored 70 on the exit-examination, sued the Texas Education Agency and its members, alleging that the use of TAAS as a high school graduation requirement violates the Constitutional guarantees of equal protection and due process and violates Title VI of the Civil Rights Act of

1. See TEX. EDUC. CODE ANN. §§ 28.025, 39.023, 39.025 (Vernon Supp. 2000). The only exemptions to this requirement are for some students with disabilities and for some students with limited English proficiency. See TEX. EDUC. CODE ANN §§ 39.023(c), 39.025, 39.027 (Vernon Supp. 2000).

2. See TEX. EDUC. CODE ANN. § 28.0211 (Vernon Supp. 2000).

3. See generally TEX. EDUC. CODE ANN. § 39.051 (Vernon Supp. 2000)

4. *GI Forum v. Texas Educ. Agency*, No. Civ.A. SA-97-CA1278-EP, 2000 WL 222268 (W.D. Tex. Jan. 7, 2000).

5. The G.I. Forum was founded in 1948 in Corpus Christi, Texas, by 700 returning Latino veterans. The organization protested the failure of the veterans administration to deliver benefits earned under the GI Bill of Rights to Mexican American veterans. In 1949, the Forum organized a wide-spread protest when a “white” funeral home refused to allow its chapel to be used for Private Felix Longoria who had been killed in the Pacific, in World War II. See American GI Forum of Washington (visited Apr. 18, 2000) <<http://www.giforumwa.org/html>>; Tony Perez, *Dr. Hector Perez Garcia: Founder of the American GI Forum* (visited Apr. 18, 2000) <<http://www.neta.com/~firstbooks/forum2.htm>>. In the 1950's, Forum lawyers, together with attorneys for the League of United Latin American Citizens (LULAC), brought cases that established that Mexican Americans are entitled to the protection of the Fourteenth Amendment. See *Hernandez v. Texas*, 347 U.S. 667 (1954). The organization also helped establish segregation of Mexican American children in Texas schools is unconstitutional. See *Cisneros v. Corpus Christi Independent School District*, 324 F. Supp. 599 (S.D. Tex. 1970); *aff'd in part, rem'd in part*, 467 F.2d 142 (5th Cir. 1972), *cert denied*, 413 U.S. 922 (1973).

1964.⁶ Plaintiffs were represented by the Mexican-American Defense and Education Fund (MALDEF).

During five weeks of trial, Plaintiffs established that the TAAS exit-examination prevents many otherwise qualified students from graduating, including many who have successfully completed all other requirements for graduation with adequate or even outstanding grades. In 1997, for example, 7,000 otherwise qualified high-school seniors were prevented from graduating because of the exit-examination. Of these students, 85% were Hispanic or African-American.⁷ Plaintiffs also presented evidence that the TAAS examination has led schools to increase the number of minority students who are denied promotion to tenth grade (when the exit-examination is first administered) and that many of these students drop out of school, demoralized and uneducated.⁸

Nevertheless, after the lengthy trial and extensive press coverage, Judge Prado ruled that the Plaintiffs had not proved that the TAAS exit-examination was unconstitutional or that it violated Title VI. Judge Prado found that TAAS exit-examination does have a disparate impact on minority students, but that Plaintiffs had not established that the test was constitutionally invalid or that other non-discriminatory alternatives were available:

Judge Prado observed:

[T]he 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 edu-

6. Plaintiffs alleged that the exit-examination violated a Department of Education regulation implementing Title VI, 34 C.F.R. § 100.3. See *GI Forum*, 2000 WL 222268, at *1 (construing 34 C.F.R. § 100.3 (1999)). Section 100.3 prohibits activity in federally funded programs that has the effect of subjecting individuals to discrimination because of their race, color, or national origin. 34 C.F.R. § 100.3(b)(2) (1999); *Powell v. Ridge*, 189 F.3d 387, 396 (3rd Cir. 1999), *cert denied*, 120 S. Ct. 579 (1999); *Elston v. Talldega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993).

7. See Michelle Melendez, *Area Residents Want to Join Suit Against State Graduation: Test Plaintiff's Attorneys Say They'll Ask for Diplomas for All Who Finished School*, FORT WORTH STAR-TELEGRAM, Sept. 30, 1999, at 4.

8. See *GI Forum*, 2000 WL 222268, at *10.

cational 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.⁹

As Judge Prado suggests in this passage, the legal tests for unconstitutionality or invalidity of an educational policy are very difficult to meet. In effect, a state's educational choices are presumed to be valid, even if they have the effect of disadvantaging a significant group of students.

As Judge Prado observes, however, the determination that federal law allows Texas to implement TAAS does not mean that this is a wise or just choice.¹⁰ The controversy over TAAS, the bar examination, and numerous other high stakes test rages on both the local and national levels. In the summer of 1999, the Office of Civil Rights of the Department of Education issued proposed Guidelines that sharply limited the use of high stakes tests.¹¹ After outcries from the testing industry, the Guidelines were amended to be cautionary, rather than prohibitory.¹² On March 2, 2000, Parents for Educational Justice filed a lawsuit in the U.S. District Court in New Orleans, seeking to stop the state from holding back fourth- and eighth-grade students who fail the Louisiana Education Assessment Program (LEAP) test.¹³ Throughout the United States, parents, teachers, students, and education experts are protesting against the increasing importance being placed on standardized tests in public education.¹⁴

9. *Id.* at *18.

10. *See id.* at *4, *18.

11. *See* Kenneth Weiss, *Education Guidelines on Standardized Tests and Civil Rights Get Reworked*, L.A. TIMES, Dec. 2, 1999, at B2; NATIONAL RESEARCH COUNCIL, HIGH STAKES TESTING FOR TRACKING PROMOTION, AND GRADUATION (1999).

12. *See* Weiss, *supra* note 11, at B2 (asserting that guidelines require tests to be "educationally justified").

13. *See* Chris Gray, *Parents Group Files Suit Against Leap 'Do or Die' Policy*, NEW ORLEANS TIMES-PICAYUNE, Mar. 2, 2000, available in 2000 WL 6543068.

14. *See, e.g.*, Lona O'Connor, *'A-plus' Uproar Gaining Volume Students, Teachers Fueling Protests over Use of FCAT Testing*, SUN-SENTINEL, Mar. 11, 2000, at 1A. The article states:

Student protesters at Chicago's Whitney Young Magnet High School persuaded 200 students to flunk—deliberately—a pilot test for a new Illinois state standardized test. Students say school has become less about learning and more about preparing to take and pass standardized tests.

In the trial before Judge Prado, important expert testimony about the TAAS and other "high stakes" test strategies was presented. As the debate now shifts to the Texas legislature and to other courts, this information should be carefully considered. The continuing debate centers on whether schools should use "high stakes" tests that disparately impact minority students, and if so, whether these tests should be used merely to evaluate the schools and school personnel or whether they should be further employed, as in Texas, to determine educational decisions about individual students.

In the TAAS litigation, expert witnesses agreed on many significant points, yet disagreed on the overall wisdom of the test: one described the TAAS test as a "driver of equity" and a "startlingly powerful statement of equity given the backdrop of Texas's history" of discrimination against racial/ethnic minorities¹⁵ and another decried it as a "ticket to nowhere."¹⁶

Three issues emerge as most important in this debate. The first focuses on the indirect impact of TAAS on school curriculum, retention rates, and drop-out rates. The second focuses on the connection between the content of the TAAS test and its stated goals of testing academic achievement. The third focuses on the metronomic aspects of the test and whether the process used to select items for the examination systematically disadvantages minority test-takers.

These issues underlie the larger question of how public education should be conducted in a society that inherits the deep wounds, economic and political disparities, and continuing practices of injustice that is the legacy of racial domination in the United States. Representatives of the TEA express their sincere desire to improve the quality of education for Latino and African-American children in Texas. Teachers, school administrators, and parents work tirelessly and passionately to educate both the individual students for whom they are responsible and to comply with the requirements set by the State. Students work hard to learn and to grow

"We think education is about understanding and learning to establish your own opinions—and you can't measure that on a standardized test," said Will Tanzman, 18, a senior at Whitney Young. Tanzman helped form a protest group last year, when he and nine other juniors voluntarily flunked another Illinois standardized test.

The Illinois students were not the first to revolt against state tests. In 1997, juniors in Birmingham, Mich., refused to take the 11-hour state High School Proficiency Test. Protests have hit Massachusetts, where 50 students skipped the state test; and Marin County, Calif., where 40 students did the same. . . . [A]nd some Virginia students even wrote a play about the issue.

Id.

15. Uri Treisman, *supra* note xv.

16. Report of Dr. Linda McNeil, Plaintiff's Exhibit P3.

up in a world of vicious contradiction and deprivation. What is the role of a standardized test, particularly a standardized test that is designed in part to find differences between students, in our public educational programs?

The following are excerpts from the expert reports filed in *G.I. Forum v. T.E.A.*. Professor Amilcar Shabazz, Professor Jose A. Cardenas, Dr. Walter M. Haney, Dr. Linda McNeil, Professor Ernesto Bernal, and Dr. Angela Valenzuela were presented by the Plaintiffs. Dr. Susan Phillips and Professor Philip Uri Triesman were called by the Defendants. We have excerpted portions of the expert reports that illuminate the central question whether the TAAS test should be used as a graduation requirement. We have omitted, without notation, most footnotes and textual citations contained in the experts reports. Remaining original footnotes are marked with asterisks. We have altered punctuation and paragraph structure only as it was necessary to restore continuity and coherence to the excerpted portions. We have not added any signs of emphasis but have left bolded or italicized text as it appears in the original reports. Copies of the reports and exhibits can be obtained from *The Scholar: St. Mary's Law Review on Minority Issues*. Any errors of grammar or organization are ours.

THE EXPERTS

Professor Amilcar Shabazz is a Professor of American Studies and head of the African American Studies Program at the University of Alabama. He is an accomplished scholar and teacher of American history, with an emphasis on the history and culture of African Americans and Texans. He has written extensively on the history of desegregation in Texas.

Dr. Jose Cardenas is Director Emeritus of the Intercultural Development Research Association, a retired teacher and University professor, and author of several books and numerous publications on education. Dr. Cardenas has served as an expert witness in numerous education cases and was Co-Master in *Edgewood v. Meno*, 917 S.W. 2d 717 (Tex. 1995).

Dr. Susan E. Phillips is a professor of education at Michigan State University. She earned a PhD in educational measurement and statistics from the University of Iowa in 1981 and a law degree in 1990. Dr. Phillips has authored a handbook on high-stakes testing for policymakers and has published over thirty papers in measurement, policy, and education law journals. She has served as a consultant and expert witness in numerous cases involving testing accommodations, testing English language learners, test tampering, evaluating teachers, test security, and teacher licensure testing.

Professor Philip Uri Treisman is a professor of mathematics at the University of Texas at Austin and is Director of the Charles A. Dana Center, a research unit of the College of Natural Sciences at the University of Texas at Austin. Professor Treisman has received awards and other recognition for over 25 years of work in designing innovative programs to increase minority participation in mathematics and mathematics-dependent professions.

Dr. Walter M. Haney is a professor of education at Boston College. He is author of numerous books and articles on education. His specialties include psychometrics, testing policy, and the effects of standardized tests in schools.

Dr. Linda M. McNeil is a professor of education at Rice University and is Co-Director of the Rice University Center for Education, a leading organization for teacher development, research, school reform and policy analysis. Dr. McNeil is author of a book analyzing the effect of school organization on children's access to knowledge in schools and another on the educational effects of standardized reforms.

Professor Ernesto Bernal is a Professor of Educational Psychology at the University of Texas-Pan American. His teaching and scholarship focus on education, psychometrics, minority education issues, and bilingual education. Professor Bernal has worked as a high school teacher, an assistant principal, as a university professor, an educational R&D specialist in bilingual education, a field representative for ETS, a director of bilingual and other special programs for minority gifted students, and an educational consultant.

Dr. Angela Valenzuela is a professor of sociology and a scholar at the Center for Mexican-American Studies at the University of Houston. Her areas of expertise are race and ethnic relations, minorities in schools, multicultural education, and urban education. During the last seven years, Dr. Valenzuela has conducted quantitative and field research on immigrant and Mexican American youth in Houston inner-city schools, including a major study of a Houston Independent School District (HISD) high school.

I. Report of Professor Amilcar Shabazz¹⁷

. . . My professional work as a historian permits me to offer a view of the Texas Assessment of Academic Skills (TA[A]S) exit test in its relationship to a continuing pattern of failure in Texas education that is rooted in non-academic variables which have and continue to affect African American educational achievement.

17. Report of Professor Amilcar Shabazz, Plaintiff's Exhibit P56.

An Overview of African American Educational History. In the first half of the nineteenth century, just as formal, publicly-subsidized systems of schooling extended education to more European Americans than ever before, the educational opportunity structure for African Americans became more restricted. After the insurrection Nat Turner led in Virginia, many states made it a crime or toughened the punishment for an African American to learn how to read and write. Literacy, it was widely believed, was directly at odds with keeping blacks in the condition of chattel slavery. Texas which became a state in 1845, more than a decade after the insurrection, did not include any provision regarding the education of Africans, but enslavement as chattel property was the constitutionally-protected status for all persons of African descent. Only a very small class of free blacks were allowed in the state under special arrangements of white sponsorship and appeal to the state legislature. After the defeat of the Confederate States of America, of which Texas became a part in 1862, new state constitutions were written and passed. The Texas state constitutions in this Reconstruction period created and funded new systems of public education which had as a characteristic feature the general classification of the population by race, white and black, and provisions that mandated the education of the races in separate schools.

The 1876 Constitution declared that the separate school systems should be provisioned on an "impartial" basis, but this article was never followed. Elementary, secondary, and post-secondary educational institutions classified for white youth received greater per capita funding than those classified for Negro or colored youth. Historians have documented the gross history of racial discrimination in education the state practiced against African Americans. Ironically, the factual evidence that inform their histories comes largely from data collected by the state itself. Until the 1930s, when the state began to face legal challenges to its racist practices, most state officials chose to ignore the disparities between black and white educational resources or they regarded this unequal distribution as logical and even fair given their white supremacist belief in the inferiority of African Americans.

The professor of History of Education at the University of Texas, Frederick H. Eby, in the first half of the twentieth century was perhaps the most knowledgeable person in the state about the history of education in Texas. His most important work *The Development of Education in Texas*, published in 1925, became the definitive statement on the subject for almost three decades. Eby proved that "there were a group of people in the constitutional convention of 1875 who feared the domination in many counties of the Negro people. They were not in sympathy with the education of the Negro and so they bound up the constitutional article on education with many clauses." It was governors Oran M. Roberts and James Ferguson, stated Eby, who "unshackled," financially and administratively,

"the public school systems" of Texas from the most blatantly racist maneuvers of Texas politicians hostile to the education of African Americans. Under their administrations public education in Texas improved, but the racially separate school system continued to favor European-American school children. Roberts and Ferguson launch[ed] a process of trickle-down development in the realm of black education. That is to say, as Texas grew more prosperous it would allow a share of that prosperity [to] trickle down to African American communities in the form of modest improvements of "Jim Crow" schools.

. . . .

. . . The *Survey* of 1925 and other studies since then indicate the great extent to which racial discrimination existed in Texas, but does not begin to reveal what this governmentally-sanctioned injustice meant in the lives of Texans of color, nor of the legacies of ignorance, bitterness, distrust of the state and of schools, and the sense of struggle and resistance to oppression such an experience bequeaths to the present day generation. What is clear is that the state of Texas has *never* made amends for what it did in maintaining not simply the segregation of the races, but the educational oppression of non-white, non-Anglo Texans.

. . . .

Educational Testing and Racial Discrimination in Texas. The historical evidence reveals several important points of the connection between educational testing and the historic pattern of gross racial discrimination in public education. Education officials and policy makers did use intelligence testing, which came into vogue during the 1920s, in an abusive manner such as to classify Mexican and African American youth as *slow learners* . . . State officials also used testing data in ironic ways to undergird the system of racially segregated schooling. In 1924, for example, Texas Governor Pat Neff announced the completion of a comprehensive "survey" of the state's system of public education published the next year in eight separate volumes. The Texas Educational Survey Commission findings, in accord with the spirit of segregation, had separate subsections on "Negro education" in various volumes. Using data from intelligence tests the survey commission put forward the rather radical argument that "the mental ability of the negro . . . indicate on the whole, that they would be able to profit by increased educational opportunity."

. . . .

In my research, I have identified other important examples of the close connection between educational testing and racial discrimination in Texas in the 1950s. The University of Texas at Austin adopted a standardized entrance exam at the same time as it faced the prospect of admitting African Americans as undergraduates. New mandatory entrance exam policies became a key weapon in the arsenal school administrators used to

guard the gates of the flagship campus from too large an influx of black students. Of course, in principle, entrance to the University has never been based on test scores alone. In reality, however, over the past four decades the University of Texas involved itself on an ever-increasing basis with standardized tests as a critical factor in who would be admitted to its undergraduate, graduate, and professional degree programs. Under the recent *Hopwood* ruling this has resulted in serious consequences in terms of the numbers of the state's African American and Mexican American residents and taxpayers whose children can gain entry to the University.

The bottom line . . . shows that educational tests are not politically neutral. They cannot be divorced from the existing social structures and racial ideologies. Thus, the use of such tests should never be allowed to become the "high-stakes" arbiter of the fate of thousands upon thousands of Texas children.

A Comment on the Declarations of Other Expert Witnesses in the Case. The TAAS test is a racist recipe for conformity and uniformity, but not at all in the direction of educational excellence. I do not offer evidence of "a past history of racial discrimination against Mexican-American and African-American children" as defendant's expert Rosalie Porter projects, as a justification for holding these students to lower standards." I hold that the schools where our children are educated ought to maintain rigorous standards, set high expectations, and periodically assess each student's progress in the form of report cards to the student and her/his parents or guardians. The addition of a single, "uniform measure of student achievement . . . closely based on the material taught in the schools" potentially offers insights that could be of value to schools in determining best educational practices for students. To make a student's score on such a test "a prerequisite for high school graduation," however, is not the hallmark of "a flexible, responsive educational system," but its death.

. . . .

Other expert witnesses have brought in personal experience to their declarations. I will take a moment to add my own. As a teacher at a state university no one wants better entering students than I do. I face hundreds of first-year students every year and I encounter the level of "minimal knowledge and skills" they graduated from high school with-in the form of the essays they write for course examinations, book reviews, research papers, and in discussions with them both inside and outside of the classroom. I do not lower my standards: the student must keep their verbs and nouns in agreement, form paragraphs, and otherwise communicate effectively in the English language. If they cannot, I direct them to services at the University where they may find help or advise them how to drop my class. Were I to be convinced that high-stakes tests like the TAAS would assure me [that] students in my classrooms who possess a

minimal knowledge of English grammar and American history, *and* that such tests are the only way to protect the value of a high school diploma, my opinion might be different. Experience has, however, shown me otherwise. I have known students who perform well on standardized tests, who do poorly in my classes. I have known students who do poorly on such tests, who do well in my class. My own score on the SAT, which I took twice, was so low that I should *never* have been able to attend the University of Texas and take 17 hours my first semester . . . and make the Dean's list *magna cum laude*. The SAT did not accurately predict my performance . . . I graduated from a Texas high school in 1977, and wonder if there was a high-stakes TAAS test in place then if I would have ever passed it. How different might my life be had such a test cause[d] me to become discouraged and not complete high school . . .

. . . Teachers, principals, parents, and students, the individuals essential to student achievement, should not be stripped of the power to make the final evaluation of whether the student knows enough to graduate high school. The TAAS should be a means to an end, but not the ultimate determinant of who is or is not fit to graduate high school

II. Report of Dr. Jose A. Cardenas¹⁸

There is a long, continuous history of discrimination against Mexican Americans in the Texas educational system . . . Mexican Americans were discriminated against by placement in segregated schools. Schools were segregated between school districts and within school districts. Inter-district segregation came about by the establishment of district boundaries by the Texas Legislature upon request by communities requesting removal from county systems and status as independent school districts. An excellent example of inter-district segregation is the creation of highly segregated districts in Bexar County. Similar segregation occurred in urban centers throughout the state.

. . . .

Mexican American students were also segregated within school districts. Many districts maintained a "Mexican school" for the assignment of Mexican American students. In some urban school districts with large numbers of Mexican American students, the district was subdivided for administrative and reporting purposes into the "White District" and the "Mexican District."

Mexican American children also experienced total exclusion from school. For example, in the Crystal City district, no Mexican American children were enrolled in the high school until after World War II . . .

18. Report of Dr. Jose A. Cardenas, Plaintiff's Exhibit P7.

Discrimination against Mexican American children also existed through the denial of educational opportunity. Grouping of students into differentiated tracks, automatic retention, inferior programs, materials and staff were common educational practices.

Schools in Texas discriminated against Mexican Americans by the failure to provide for the language needs of limited English proficient students . . . Prior to 1950 little, if any, attention was given to unique language characteristics of students. There was no specialized instruction in English as a second language. The common educational response was to retain the students in grade until such time as the student informally acquired sufficient mastery of the English language, basic skills in the English language and content material in all subjects for them to be promoted to a higher grade. As a result, most Mexican American students who started school with limited proficiency in the English language were several years overaged by the completion of the elementary grades.

During the middle 1950s several schools initiated special English as a Second Language (ESL) programs. Although such an educational approach may have been better than no program, there was extensive educational retardation as cognitive development, skills acquisition and content learning were interrupted and delayed while English language skills were being developed. . . The use of the native language for instructional purposes was prohibited by state law, and the use of the native language for communication and social purposes was frowned upon by the schools, often prohibited, and its use commonly resulted in punishment.

In the late 1960s, there was a state and national movement toward bilingual education for limited English proficient children as a way to provide continued cognitive and academic development while English was being learned as a second language. . . There has never been a serious attempt by the Texas Education Agency to enforce either the court order for bilingual education or the provisions of S.B. 477 [The Bilingual Act of 1981]. Although there has been extensive monitoring, and as many as 86 percent of school districts reviewed have been found in non-compliance, I know of no case in which loss of accreditation, or other administrative or financial sanctions have been imposed upon a school district because of its failure to address the needs of limited English proficient children as required by federal and state law.

. . . .

There has been virtually no attempt to adapt mainstream educational programs [to] the needs of economically disadvantaged students. Such students have been placed in programs designed for typical students with a minimum of enrichment activities to compensate for socio-economic conditions in the home. When the inadequacy of the programs results in

academic retardation, the student is then placed in slow-paced, repetitious, boring and low expectancy remedial programs. Participation in remedial programs is followed by placement in low track secondary school programs resulting in a perpetuation of the poverty characteristic.

....

There have been few attempts to address the unique continuity and sequence issues of migrant students. These are students with high mobility as the need for agricultural related jobs forces the family to move from one locality to another in search of employment. . . What few efforts have been attempted often proved to be counter productive. These include the denial of academic credit due to not being in school at the beginning or end of the school year, and the placement of such students in highly segregated "Migrant" programs.

Immigrant students from Third World countries have been discriminated against by the failure of the Texas educational system to provide for the language, cultural, socio-economic and educational needs.

The failure of the Texas educational system to provide for the needs of minority students is indicated by poor school performance and an extensive number of Mexican Americans dropping out of school. As of 1998, the number of students lost between the 9th and 12th grades in Texas schools is 42 percent of 9th grade enrollees. The rate for White, non-Hispanics is 31 percent. The rate for Mexican Americans is 53 percent. . . .

Not only has Texas done little to address the extensive problem of minority school dropouts, the state has made an extensive attempt to deny that the problem exists. Extremely conservative self-reports b[y] school districts that contradict enrollment figures are readily accepted by TEA. . . A 1996 report by the Texas Office of the State Auditor severely criticized the methodology used by school districts and the Texas Education Agency for the collection of dropout information. The audit report indicates that dropout report are . . . lacking in controls to prevent or detect school district errors. The auditors further maintain that an accurate number of school dropouts would be more than twice as high as that reported by the Texas Education Agency.*

Texas discriminates against Mexican Americans in its system of school finance. This discrimination has been the subject of extensive litigation. . . Mexican Americans still receive disproportionate low state resources in support of their schools.

The educational system of Texas discriminates against Mexican Americans by the widespread use of retention in grade as a remedial measure.

* Office of the State Auditor, *Performing & Measures at 20 State Agencies and 1 Educational Institution*, July 1996.

Although there may be public acceptance of retention, and its threat, as a popular and effective educational response, there is an overwhelming body of evidence that retention is an expensive response that does not work. . . . Mexican Americans are retained in grade more frequently than any other ethnic group. This retention is the main factor for Mexican Americans being overaged in grade and may be the leading factor for more than half of them quitting school prior to graduation.

Most school testing discriminates against Mexican Americans. . . Intelligence tests administered to minority, economically disadvantaged and limited English proficient students have been the subject of extensive litigation. In such litigation, it has been determined that there is extensive discrimination against such populations. . . Achievement tests have limited validity and produce erroneous and discriminatory results when used with atypical children. The use of such tests is so prevalent and the test industry is so entrenched that little effort has been made to seek alternative ways of accessing student progress.

. . . .

Up to the 1970s, discrimination against Mexican Americans in the public schools of Texas was easy to document. There was extensive overt discrimination, and school systems explicitly presented discriminatory policies and actions. Since the advent of the Civil Rights Movement, the enactment of federal and state civil rights legislation and the intervention of federal and state courts, there has been a diminishing of overt discrimination in the schools. This does not imply that discrimination against minority groups has disappeared, or even lessened, it implies that discriminatory practices that were manifested overtly are now manifested covertly.

Mexican American students are no longer segregated because the[y] are of Mexican origin. They are segregated because of language, performance, district and school boundaries. Minority students may comprise 99 percent of the enrollment of a specific school district. The state may argue that there is no intent to segregate minority students, they just happen to reside within the historical boundaries of a school district. The facts that the original boundaries may have been established for the purpose of segregation and that school boundaries are set at the discretion of the Legislature and can be altered at will have little impact upon the root-and[-]branch elimination of segregation.

A school district may construct two schools at the extreme ends of a residentially segregated district, thereby ensuring that enrollment at both schools will be segregated. The district could have opted for constructing the two schools along the racial dividing line, thus insuring that both schools will be highly integrated. The selection of the former option is common, with the district then pleading that there is no intentional segre-

gation; pupils of different races just happen to reside in the residential areas served by the two schools. . . Similar covert discriminatory practices abound in the operation of the school.

Evaluation, Accountability and the Texas Assessment of Academic Skills (TAAS)

In order to assess the performance of the schools, the first question that must be addressed is, "What constitutes good performance in school?" The obvious answer is "meeting the purposes and goals of the school." Though this may sound simplistic, the sequential question, "What are the purposes and goals of the school?" is much more complicated.

. . .

. . . Good performance is success in meeting the goals of education. What are the goals of education? I believe that there is general consensus that the general goal of education is to bring the student to "maximum self-realization". . . Maximum self-realization is bringing the student to the apex of his potential in physical, intellectual, social, emotional and spiritual development.

. . . .

In educational measurement there is little relationship between the determination of a student's potential and the extent that it has been realized as a result of schooling. . . For the most part, educational evaluation has focused on the acquisition of skills and knowledge that is only indirectly related to the intellectual development of the child. . . For a significant portion of the students, the goals of education have been modified for social purposes into a substitute goal of having the student adhere to social conventions of behavior, be able to do simple academic tasks such as reading, writing and arithmetic, and be able to follow orders. Not an impressive list of objectives in a democratic society.

Regardless of the limited idealistic or realistic goals of education being used, measurement of the attainment of these goals is grossly inadequate. In 1982, Texas legislated determinations of teacher pay on the basis of performance. . . At best, satisfactory teacher performance was based on providing, a quiet, orderly environment in which it is assumed maximum learning can take place.

Achievement Measures

There has been considerable shifting on emphasis on what constitutes good effort on the part of the system. During my own tenure as an educator, I have seen the emphasis shift among input (the resources provided), process (the use of resources) and output (the results of the process).

Input evaluation focuses on the provision of adequate resources for the instructional program. As a teacher and administrator, I participated in the accreditation process where the determination of appropriate instruction was indicated by an analysis of school inputs. The number of teaching hours, teaching subjects, library books, teacher credentials, and other preinstruction factors were the determinants of adequacy.

Even then, the determinants of input adequacy were not applied as absolutes since the accrediting agency, usually the Texas Education Agency (TEA), made a generous allowance in consideration for the great variance in resources available to different school districts in keeping with the inequitable system of school finance

In time, the focus in evaluation shifted from input to process. This transition was exacerbated by the emerging educational, social and legal questions being raised about the gross disparities in input. It is embarrassing to hold school systems responsible for realistic inputs when the state system of school finance makes no pretense of providing equitable or equal resources for acquiring these inputs.

Process evaluation based on an analysis of teacher/pupil interaction turned out to be no better than the input evaluation. Observation of instruction could not lead to valid evaluation if there was a large disparity in opinions as to what constitutes desirable and adequate instruction. Is the very well prepared lecture of a loquacious teacher adequate if the students in the class did not have an inkling of what the teacher was talking about? In many cases observations in the classroom shifted from the teacher and student interaction, to the environment of the interactions. Were the bulletin boards attractive? Were the students orderly? How high was the noise level in the classroom? [O]n more than one occasion I participated in evaluation training aimed at learning to distinguish between "productive" noise and "non-productive" noise in the classroom.

Determination of quality of instruction was so blurred that when legislation resulting from the Perot Task Force established pay incentives for "master" teachers, many school districts augmented the state incentive pay for master teachers with local incentive pay for the rest of the staff, so that the school systems reverted back to a single salary pay schedule. Process evaluation reverted back to input evaluation with the determination of master status being determined by teacher training, advanced degrees, years of experience or seniority without even a pretense of objective observation of the teaching-learning process.

The emphasis in evaluation then shifted from process to output. The basic tenet of the current system is that input and process are relatively meaningless. What is important is the amount that the student learns. This is grossly unfair to the student. The student may have some impact

on what is learned, but the student has no impact on input (the adequacy of resources) nor on process (the quality of instruction).

Determining a measure of output or educational results, proved difficult since standardized achievement tests were based on a national assumption of what students are supposed to be taught in school. This [led] to the development of an achievement test in Texas based on what students are supposed to be taught in Texas schools. The initial state examination was based on solely reading, writing and arithmetic, possibly assuming that this were the only subjects worth teaching, but more probably that these were the only subjects in which learning could be measured. Over the years learning areas in the state test have been expanded, most noticeably the inclusion of science and social studies in the current TAAS, but no attempt has been made to determine the parameters of education, let alone how success in all fields is to be measured.

Conducting evaluation solely on the basis of output measures in a limited number of fields led to the development of a test-driven curriculum. As the results of student performance in the limited fields were presented in the local and state media, educational instruction focused on the material expected to be tested by the state. The new slogan for Texas schools seemed to be, "If its not on the TAAS, it is not worth teaching." Schools striving to improve in the limited areas measured by the TAAS gave small consideration to music, art, physical education, socialization, civic responsibility or any other area not included in the state test. Concepts of maximum realization in physical, emotional, social and spiritual development may still be a part of the school goals, but they are seldom formally addressed in instruction.

Even intellectual development appears to have suffered under the current output evaluation. The early state tests addressed the lower forms of learning, so that the higher forms of learning were sacrificed for factual knowledge sure to be found in the state exam. Teachers focused on "who discovered what in what year," rather than addressing the application of the social sciences to the solution of present social problems. Recent revisions in the state test have attempted to include the measurement of higher forms of learning, although an extensive attempt to do so is difficult, not only because the measurement of factual information is still around, but because the measurement of the higher orders of learning is difficult to accomplish in a multiple choice test item.

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Accountability

Determinations of system, teacher and student performance serve little purpose if inadequate performance is not to be addressed. Accountabil-

ity is the determination of who is responsible for performance and what is to be done about it . . . The determination of accountability in education has always been and continues to be a difficult concept . . . The current focus on output (student performance) with little concern for input and process makes the question of accountability even more complex.

The present focus on output evaluation makes accountability a growing issue, particularly since education has become more of an imperative and the number of different, atypical and hard to teach students continues to grow. School systems and professional organizations have developed a line of defense that assumes that resources are adequate, everything done by the school is proper, and-if a student fails to learn, the student, and only the student must be held accountable. This may not be too different than the position taken in other fields such as medicine, except that the field of medicine has a scientific set of inputs and procedures to validate medical performance. Not only does education not have such a set of validating inputs and procedures, the shift of emphasis to outputs will preclude their development . . . Educators are not prone to give attention to educational inputs and processes when it has been so easy to use the students as the scapegoat for educational failure.

. . . .

The use of the TA[A]S as a state administered achievement test as a measure of performance has led to the onus for unsuccessful performance being placed on the student. This was not unexpected. [M]inority groups and advocates for atypical studies fought hard against the implementation of such a test. A few bought the concept that once the test was implemented it would be simple to determine unproductive school personnel and either retrain or replace them. This has seldom been the case . . . Individual accountability has seldom occurred, and when it has, the penalty has consisted of teacher and administrator transfers, rather than dismissal. Transfers of poorly performing staff is a dysfunctional educational response. At best it is hoped that the incompetence of a large number of staff can be hidden by placement in other school settings so that the collective incompetence is not so visible.

If anything, TAAS accountability has led to the better performing schools becoming even better. In too few instances have the poor performing schools made a drastic improvement. Even in the few school districts where this has happened, it has been at the expense of outstanding administrators under severe harassment for "moving too fast," "upsetting school staff," "making drastic changes" and "traumatizing the community."

III. Report of Dr. Susan E. Phillips¹⁹

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Differential Performance

Differential performance occurs when passing rates for African-American and Hispanic students (minority groups) are lower than the passing rates for white students (majority group). When the differential performance between minority and majority groups becomes too great, it is labeled adverse impact. An important issue in this context is determining when differential performance becomes large enough to qualify as adverse impact.

In employment testing, two types of significant differences are commonly used to assess adverse impact: practical significance and statistical significance. Statistical significance is important when the group differences being used to evaluate potential adverse impact represent samples from their respective populations. In such cases, the relevant question is whether the sample differences are the result of random error or true population differences. Statistical tests can be used to evaluate whether the differential performance among the samples is large enough to justify the conclusion that there is differential performance among the respective minority and majority populations.

Once differential performance has been established for a minority population, one must decide if it is large enough to justify labeling it adverse impact. This requires a judgmental evaluation of the practical significance of the population differences. The *Uniform Guidelines* for employment testing label differential performance as adverse impact when the passing rate for the minority group is less than 80% of the passing rate for the majority group.*

For large-scale, statewide graduation tests such as the TAAS exit level tests, statistical tests for evaluating adverse impact are unnecessary because the reported passing rates are based on the entire population of students tested in each ethnic group. Using statistical tests designed for samples is inappropriate when population values are known.

TAAS Passing Rates

The initial passing rates for the TAAS exit level tests for the African-American, Hispanic and white student populations of first-time test-takers are presented graphically in Chart 4, by year and subject area. No statistical tests are needed to determine that the white initial passing rates

19. Report of Dr. Susan E. Phillips, Plaintiff's Exhibit 316.

* *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607 (1985).

exceed those for African-American and Hispanic students for all years and subjects. There are three important questions to be considered in evaluating the differential performance among these populations:

1. Is the differential performance between the minority and majority populations of sufficient practical significance to warrant the label "adverse impact"?
2. Is a different conclusion warranted when cumulative passing rates are compared?
3. Do the trends in minority student performance indicate that the education of minority students has improved in Texas?

The TAAS exit level test data support a "yes" answer to each of the three questions. The specifics are presented in the next three sections.

1. Practical Significance of Differential Initial Passing Rates

TAAS exit level initial passing rates for all tests taken by year and ethnic group are presented in Chart 5. The 80% level for the white group is indicated by a line on the bar for the white group. As indicated in the chart, the overall *initial* passing rates for the first attempt in 10th grade for African-Americans and Hispanics are below the 80% white passing rates for all years. This suggests that the differential performance between the minority and majority groups is of sufficient magnitude to be labeled adverse impact.

Note, however, that the passing rates for all three groups increased over the period 1994 to 1998 and that the largest gains were made by African-American and Hispanic students. Relative comparisons of percent increases in TAAS exit level passing rates from 1994 to 1997 by subject area and ethnic group are presented in Chart 6. The percent increase in passing rates was greatest in mathematics where African-American and Hispanic passing rates increased 85% and 63%, respectively, compared to only a 26% increase for whites over the five-year period.

From 1994 to 1998, both minority groups also closed the gap between their passing rates and the 80% standard. African-Americans moved from 25 points below the 80% standard in 1994 to 13 points below in 1998. The Hispanic group closed the gap from 19 points below the 80% standard in 1994 to 9 points below the standard in 1998. Overall, the African-American initial passing rate rose 26 points during this four-year period while the Hispanic initial passing rate rose a total of 24 points.

2. Cumulative Differential Passing Rates

As indicated previously, according to state law, Texas students who do not pass the TAAS exit level test on the first attempt are entitled to intensive remediation provided by the district. These students have a total of

eight attempts to pass the TAAS exit level test prior to their scheduled graduation. **Therefore, with respect to adverse impact, the focus should be on the cumulative passing rates across all attempts prior to graduation.**

Cumulative passing rates for all TAAS exit level tests in the spring of the year of expected graduation are presented in Chart 7 by class and ethnic group. The 80% white passing rate for each year is also indicated in Chart 7.

The data . . . clearly indicate that the overall cumulative TAAS passing rates for African-Americans and Hispanics exceeded the 80% standard for the Class of 1996, the Class of 1997 and the Class of 1998. Although the initial passing rates for minority students met the 80% standard for adverse impact, the cumulative TAAS passing rates for those same minority groups did not. *Over time, despite their initial disadvantage in skill level, significant number of minority students have overcome their academic weaknesses and succeeded on TAAS.*

3. Educational Improvement of Minority Students: Benefits for the Class of 1997

For the Texas 12th grade students in 1997, 790 out of every 1000 Hispanic students had passed the TAAS tests required for graduation. The initial passing rate for these Hispanic students when they were 10th graders in 1995 was 370 out of every 1000 students.

The combined dropout rate for Hispanic students in 1996 and 1997, the two years between their initial TAAS attempt in 1995 and their expected graduation in the spring of 1997, was 52 out of every 1000 students. Some of these Hispanic students may have dropped out due to academic difficulties while others dropped out due to nonacademic reasons (e.g., family illness, employment, military). We do not know what percent of the Hispanic students who chose to drop out had not yet passed TAAS.

For purposes of illustration, assume that 50% of the dropouts had not yet passed the TAAS exit level test. Then approximately $(370-26)/(1000-52) \times 1000 = 363$ per 1000 remaining Hispanic students passed TAAS on the first attempt. Since 790 out of every 1000 Hispanic students had passed TAAS after 8 administrations, approximately $790 - 363 = 427$ out of 1000 received sufficient remediation to pass TAAS on a subsequent attempt. . . .

Given the 1997 12th grade enrollment of $(195.075) (.374) = 72.958$ Hispanic students, approximately 31.153 Hispanic students statewide who had not attained the state objectives in 10th grade had received sufficient remediation to do so by the time of their expected graduation in the spring of 1997. Similar calculations for African-American students yield an estimate of 13,362 remediated students. **Altogether, about 44,515 mi-**

nority students in the Class of 1997 were successfully remediated after having failed their first attempt to pass the TAAS exit level test in the spring of 1995. Had these 44,515 minority students not taken TAAS in 10th grade, it is unlikely that their skill deficiencies would have been identified and remediated.*

Cost Benefit Analysis

In this scenario, the ratio of students remediated to nonpassing drop-outs is 21:1 for Hispanic students and 16:1 for African-American students. That is, for every Hispanic student who may have dropped out of school due to academic problems identified by the TAAS exit level test, 21 were successfully remediated; for every African-American student who did so, 16 were successfully remediated. In a cost/benefit sense, the number of minority students benefitting from the TAAS exit level test clearly outweighs the few who may have given up in discouragement after a poor performance on their initial TAAS attempt.

It should also be noted that schools have difficulty remediating students who choose to drop out and that dropping out is a legal option for students after age 16 (approximately 10th grade). While eliminating the TAAS graduation requirement might induce some students to remain in school, it would decrease the value of the high school diploma as an indicator of skill attainment, especially for minority students. Moreover, or those students who drop out of school due to nonacademic reasons, elimination of the TAAS graduation test would have no effect. A more efficient and direct solution for keeping all students in school through the 12th grade would be a statutory change increasing the legal age for leaving school to age 18.

Fairness

For the Class of 1998, the cumulative passing rates for African-Americans and Hispanics were 82% and 83%, respectively. Based on statewide information for all grades tested, an additional 6-10% of these minority students may have been exempted from passing TAAS based on their individualized educational plans. That leaves only about 8-11% of the minority students unaccounted for. Some may not have completed all courses required for graduation in their districts and some may have passed TAAS at a subsequent summer or fall administration.

* In May, 1998 TEA reported that 96.7% of the class of 1998 had passed the TAAS exit level test *Growing Number of Seniors Pass TAAS Test*, TEA Press Release. May 27, 1998. www.tea.state.tx.us.12/23/98.

When the TAAS exit level tests identify students who have not attained the state mandated objectives and schools successfully remediate those students, the result is high school graduates with higher skill levels than they would have attained had their deficiencies not been identified. *Would it be fair to the 82-83% of African-American and Hispanic students from the Class of 1998, who worked hard to attain the skills needed to pass the TAAS exit level test, to allow the 8-11% of minority students who were not successful on TAAS to also receive a high school diploma?* A judge in the *Debra P.* case put it this way: "It is undoubtedly true that the appearance of having been educated may be accomplished by the conferring of a diploma. Nevertheless, if [the student has not learned the tested skills], even the most emphatic judgment and order of the most diligent court cannot supply [the missing achievement]."*

If those minority students who were unable to pass the TAAS exit level test were awarded a high school diploma by court order, these students would be erroneously certified as having satisfactory educational attainment. It is likely that the benefits for these students would only be temporary; an employer relying on the diploma would certainly discover the lack of skills during the probationary period and discontinue the employment.

In the interim, these students would have been given false hopes of a better job and would face a losing battle to retain jobs for which they were not fully qualified. Further, for those minority students with high school diplomas who were qualified, employers might use their experiences with unskilled diploma holders to discount the credentials of all minority applicants in a return to the stigmatizing assumption that minority students are incapable of achieving at the same level as white students. Consequently, minority students who passed the TAAS exit level test *and* those who did not would both be hurt by a court-ordered reversion back to a system of awarding high school diplomas based on seat time and social promotion.

Multiple Measures

It is important to note that passing the TAAS exit level test is not the only requirement for receiving a high school diploma in Texas. Students must also pass all of their required courses and meet any additional requirements imposed by their school districts. Students are required to meet both testing and course requirements because each represents a different kind of accomplishment that is valued in a high school graduate.

* *Debra P. v. Turlington*, 654 F.2d 1079, 1088 (5th Cir. 1981).

Moreover, students who fail a single course may be unable to graduate on time just as those who do not pass the TAAS exit level test may have to delay graduation. And in both cases, students have multiple opportunities to complete the failed course or retake the failed TAAS subtest. Furthermore, a student who is not awarded a high school diploma due to not having passed one or more TAAS subtests has not been denied a diploma based on a single piece of data. Rather, the denial is based on at least 8 scores from 8 forms of TAAS administered on 8 different occasions.

Compensatory Measures

There are some advocates who argue that course grades should be considered for those students who are unable to pass TAAS after several attempts. Doing so would create a compensatory model in which passing grades in courses with low level or unrelated content could offset a student's failure to achieve the state objectives.

Alternatively, the grade the student earned in a particular content course might have been based in part on factors other than achievement (e.g., attitude, effort, improvement). If so, it would not be appropriate to allow success on those factors to compensate for lack of achievement of the state objectives. **In sum, grades are not equivalent measures of the state objectives measured by the TAAS exit level test and may reflect lower standards and rewards for seat time. Therefore, grades should not be allowed to compensate for a student's inability to pass the TAAS exit level test.**

Other Indicators of Improving Minority Achievement

In addition to improved passing rates on the TAAS exit level tests, there are several other indicators of improved educational attainment for African-American and Hispanic students in Texas. [There has been] substantial improvement in the percent [of minority students] mastering all TAAS exit level objectives and in average SAT scores for African-American and Hispanic students in Texas.*

[There have been] significant increases in the percent of students passing all TAAS tests in three Texas secondary schools with substantial minority and economically disadvantaged students. These schools were identified in a research study conducted by the Dana Center at the University of Texas at Austin which commended them for high levels of aca-

* Data from 1998 indicate that average SAT I scores for African-American and Hispanic students remained stable or slightly increased, despite a record increase in the number of students taking the test. *Number of Texas Students Taking SAT and AP exams rises substantially*, TEA Press Release, Sept. 1, 1998, www.tea.state.tx.us, 12/23/98.

demic success in poor communities.* Schools selected for the study had at least 60% economically disadvantaged students and at least 70% of students passing the TAAS reading and mathematics subtests.

A follow[-]up study of 11 elementary schools, located primarily in the Rio Grande Valley, is being conducted to determine whether their academic success with high poverty limited English proficient (LEP) students can be replicated in other schools. Schools selected for this study have the following characteristics: at least 40% LEP students, at least 50% economically disadvantaged students, no LEP TAAS exemptions, and a recognized or exemplary rating.*

Differential Item Performance

When minority and majority students exhibit differential levels of performance on an achievement test, some observers want to believe that the test items are biased against members of the lower-scoring minority group. However, an equally plausible explanation for the differential performance is a true difference in average achievement levels for the two groups.

To investigate the possibility that differential item performance is the result of item characteristics that unfairly disadvantage a specific minority group, two analyses are completed for each TAAS test item. **First, a statistic is calculated which quantifies differential item performance for minority and majority groups of equal ability.**

Basing these item comparisons on minority and majority groups of equal ability eliminates the possibility that any observed differences are due to achievement differences between the two groups.

Second, the differential item performance statistics are reviewed by panels of content experts with proportional minority membership. Particular attention is given to the items with the largest differential performance statistics because they are least likely to have been caused by random errors in the statistical procedure. Great deference is given to the views of committee members from the minority group exhibiting the differential performance. An item that exhibits statistically significant differential performance between minority and majority students can be retained for use on a TAAS test only if, in the professional judgment of the item review committee, the item is a fair measure of its corresponding state objective *for all students*, and is free of offensive language or concepts that may differentially disadvantage minority students.

* *Successful Texas Schoolwide Programs: Research Study Results (February 1997)*. www.starcenter.org. 12/23/98.

* *Eleven High-Achieving, High Poverty Schools Asked to Participate in Successful Schools Study*, TEA Press Release, May 13, 1998. www.tea.state.tx.us. 12/23/98.

IV. Report of Dr. Phillip Uri Treisman²⁰

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The Exit TAAS examinations are an essential component of a coherent and effective assessment system explicitly designed to improve the academic achievement of all students in Texas, especially that of African American, Hispanic, and low-income children. This assessment system is the lynchpin of an accountability system designed to ensure that schools and school systems create environments in which all students are able to master a body of knowledge specified by state policy and law.

The use of standardized tests in American education has a complex history. On the one hand, it is a well documented fact that they have served as principal instruments of discrimination and disenfranchisement. However, it is equally true and well documented that such tests have been used to create more equitable access to higher education and career opportunities for immigrant and minority populations. For example, in *Testing in America's Schools*, the Office of Technology Assessment states that while "everyone may agree that testing can be a wedge, . . . some see the wedge forcing open the gates of opportunity while others see it as the doorstop keeping the gates tightly shut."

The most egregious uses of standardized tests in education have included situations where data generated from them were used solely to determine the opportunities available to individuals but not to shape the systems responsible for educating them. However, when used within an overall systemic reform effort that includes an accountability system, high-stakes testing can "send the same (signals about what is important to teach and learn) to all schools and students, thus countering trends toward a dual curriculum with high expectations for advantaged youth, and much lower ones for everyone else."

Unlike any other state assessment system, the Texas assessment system is embedded within an accountability system that explicitly holds schools and school systems responsible for their performance in educating *all subpopulations of students*. Specifically, as stated in the Texas Accountability Manual (TEA 1998), every school and district in Texas is rated as "Exemplary," "Recognized," "Acceptable," or "Low-Performing" according to the following criteria:

the percentage of all students not in special education who pass the reading and mathematics subtests of TAAS for grades three through eight and for grade ten;

20. Report of Dr. Phillip Uri Treisman, Defense Exhibit D330.

the percentage of all students not in special education who pass the reading, writing, and mathematics subtests of TAAS for grades four, eight, and ten;

the percentage of students from each of four subpopulations (African American, Hispanic, white, and economically disadvantaged) who pass the reading and mathematics subtests of TAAS for grades three through eight and for grade ten;

the percentage of students from each of four subpopulations (African American, Hispanic, white, and economically disadvantaged) who pass the reading, writing, and mathematics subtests of TAAS for grades four, eight, and ten;

the attendance rate for all students within each of the four subpopulations for grades one through twelve;

the drop-out rate for all students and for students in each of the four subpopulations for grades seven through twelve.

Moreover, and critical to its use as a driver of equity, the standard that schools must meet with respect to TAAS passing rates has become progressively stringent over time. For example, the percentage of students passing each of the subtests of TAAS had to be at least 25 percent for the school to be rated as acceptable in 1995; but that percentage has increased by 5 percentage points per year since 1995, and now stands at 45 percent for the 1998-99 academic year (and will increase to 50 percent for the 1999-2000 academic year). Thus, the state requires schools to ensure that an increasing number and percentage of students *from each subpopulation* be educated to the academic standards set forth by the state. This reflects the guiding philosophy of the Texas accountability system as stated in the Texas Education Agency's 1998 Accountability Manual—i.e., to improve student academic performance in ways that are fair to all students and that recognize diversity. This is a startlingly powerful statement of equity given the backdrop of Texas's history of discrimination against racial/ethnic minorities.

. . . [T]his state action has stimulated a dramatic increase in the number and percentage of all Texas students who meet the minimum expectations of achievement set forth by the state. This is especially true for those students from racial/ethnic minority and economically disadvantaged subpopulations.

It is important to note that the current Texas accountability system is the product of extensive public deliberation and legislative action, with roots in the Select Committee on Public Education headed by Ross Perot in 1983. Moreover, any alterations or additions to the accountability system include extensive public input from a diverse group of education

stakeholders. . . . Thus, the development and refinement of the Texas accountability system results from the efforts of thousands of Texans from diverse backgrounds and geographic areas.

The principal driver of the Texas accountability system are the publicly sanctioned curricular standards, which define what all children “must know and be able to do.” These curricular standards serve as the basis for the incentives and accountability requirements for students, educators, schools, and school systems. At every stage of Texas state-level assessment, the TEA has demonstrated its strongly commitment to aligning the state examination with the state curriculum. In the days of the Texas Assessment of Basic Skills (TABS) examination, the TABS was aligned with the state’s optional curriculum guidelines. Later, the Texas Educational Assessment of Minimum Skills (TEAMS) was aligned with the mandatory Essential Elements (EEs); and, more recently, the TAAS was aligned with the revised essential elements. Currently, the TAAS is being aligned to address the Texas Essential Knowledge and Skills (TEKS). This commitment to align the state assessments tightly with the state’s curriculum was based on the strongly held belief that students should not be tested on material that they have not had an opportunity to learn.

By grounding the assessment and accountability systems in clear and public statements of what is required for academic success, the Texas education system sends children, parents, educators, and communities the clear message that schools and school systems must educate all children to an established, high standard sanctioned by a publicly elected body—i.e., the State Board of Education. Put another way, no school or school system may set lower standards for any particular racial or ethnic subpopulation.

Furthermore, it is important to note that the Texas accountability system is widely considered by researchers representing a broad range of research and political orientations to be one of the most effective examples of a system of equity-focused school reform.

. . . [H]olding districts, schools, teachers, and students accountable for their performance is an essential feature of the Texas accountability system . . . [T]he dramatic gains in Texas student achievement over the last five years clearly demonstrate the efficacy of this system.

Of special interest in this case are the reasons for holding high school students individually accountable for their performance on Exit TAAS. Below I put forth four compelling reasons for doing so. The first reason comes from the world of educational practice and addresses the special role of the Exit TAAS in motivating students to actively engage in the learning process. While the United States has made an unparalleled commitment to schooling all of its children, U.S. society has also provided “relatively weak incentives to learn and relatively strong disincentives not

to.”* For example, the relatively easy access to post-secondary schooling in the United States (in contrast to most other countries) provides little incentive to the vast majority of students who have no desire to attend a selective college or university. In Texas, all but a handful of universities and colleges can fairly be considered open-enrollment schools. In fact, even Texas students who do not graduate from high school may attend a community college and, if successful, then enter a four-year university. The availability of diverse opportunities to attend institutions of higher education is a tremendous strength of the Texas and American K-16 education system. It does, however, present problems for highschool educators in motivating their students to achieve at high levels, especially for those educators with high numbers of students not planning to attend an institution of higher education.

Second, one of the primary missions of secondary schooling is to effectively prepare young adults for their post-high school lives. Once students leave high school, regardless of whether they enter an institution of higher education, the military, or the workforce, they will be held accountable for their own performance. Holding students accountable for their performance on exit-level examinations (Exit TAAS or End-of-Course tests) socializes them to take responsibility for their own actions and choices, and thus prepares them for productive citizenship after high school. An exit-level examination system motivates students to master a core body of knowledge and skills, regardless of whether they plan to attend an institution of higher education.

Third, current research and practice indicates that an effective accountability system must appropriately distribute responsibility for student performance among school systems, schools, educators, and students. Indeed, “(a)s schools become the primary agents of performance accountability, the aggregate effort of schools principals, teachers, and *students* (italics added) comprises the range of agent actions that must be motivated.”* Since students must play a key role in their own learning . . . policymakers have a choice in developing an accountability system. One option is to adjust the expectations of (and sanctions for) schools to the demographics of the students enrolled in the school. This choice is problematic, however, because it holds schools with different student populations to different standards of achievement. Results from accountability systems that operate in this manner clearly suggest that they do

* Powell, A.G. 1996 “Motivating Students to Learn: An American Dilemma.” *Rewards and Reform: Creating Educational Incentives that Work*. San Francisco: Jossey-Bass Inc., p. 21.

* Adams, J.E. & M.W. Kirst, *New Demands for Educational Accountability: Striving for Results in an Era of Excellence*, in American Educational Research Association, *THE HANDBOOK OF RESEARCH ON EDUCATIONAL ADMINISTRATION* at 25.

not support the goal of equity in student achievement. A second option is for policymakers to hold all schools to the same standard, but also to include in the accountability system incentives that promote student compliance—namely, active engagement in the learning process. Policymakers in Texas have chose [sic] this second option; and . . . the results suggest that this choice has supported equitable improvements in student performance.

Fourth, except for a relatively small number of students with mental or physical disabilities that inhibit their ability to learn at even a minimum level, the state has a legitimate interest in ensuring that *each and every student* acquire the core set of knowledge and skills that the state has deemed necessary for productive citizenship. This core set of knowledge and skills is embodied in the Texas Essential Knowledge and Skills (TEKS) documents . . . that are the legal basis for the TAAS. Importantly, the development of the TEKS involved tens of thousands of comments from parents, educators, and experts who, thus, helped shape the final version of the TEKS (TEA 1997). I assert that without the exit-level assessment component (the Exit TAAS and End-of-Course tests) of the Texas graduation requirement, the state would have no mechanism by which it could assure Texans that every high-school graduate had acquired the desired set of knowledge and skills.

While the plaintiffs' experts witnesses imply that successful completion of the required coursework can achieve this same goal, an extensive body of research extending over the last 80 years has consistently shown that grades are highly unreliable indicators of student mastery of a core body of knowledge and skills. These studies have found that there exists significant variability in the criteria used by teachers to assign grades. Thus, a grade of "A" in Algebra I from a middle-school teacher in plain view may mean something rather different than a grade of "A" in Algebra I from a high-school teacher in Houston. With tens of thousands of Texas high school teachers dispersed throughout more than 1,500 schools, course grades are highly unlikely to convey more than a minimal amount of useful information about a student's knowledge and skills. Hence, practically speaking, the inconsistency of grading policies and academic standards across tens of thousands of classrooms necessitates that the state utilize some form of exit-level examination system as an assurance to the public that its high-school graduates possess a well-defined core body of knowledge and skills.

In addition to holding districts, schools, and students accountable for their performance, the Texas accountability system also holds teachers accountable for their performance. Every teacher's formal evaluation now includes an assessment of how well that teacher supports the school's goal of improved student performance on the TAAS.

V. Report of Dr. Walter M. Haney²¹

....

II. HISTORICAL USE OF TESTS AND ADVERSE IMPACT ON MINORITIES

Standardized tests have been used widely in U.S. schools for almost a century. In order to understand the current use, it is vital to appreciate that throughout the century standardized tests have been used frequently to the disadvantage of racial, ethnic, and language minorities in the United States.

After Alfred Binet's 1905 invention of a standardized scale for measuring "intelligence", standardized tests came into common use in US schools . . . From almost the beginning of the story . . . there are examples of standardized testing programs being used to limit the opportunities and standing of minorities in the United States . . . [A]s early as 1913, so-called intelligence tests were used to demonstrate the supposed mental inferiority of blacks

Standardized tests were commonly used in U.S. schools throughout the first half of the twentieth century. However, after 1950 tests came to receive even more emphasis in U.S. schools for a variety of reasons, including increased use of tests in southern states following desegregation, new national testing programs as in the National Merit Scholarship Program, and the mandated use of standardized tests in the evaluation of programs funded under Title I of the Elementary and Secondary Education Act of 1965.

Increased use of standardized tests in southern states was clearly linked to school desegregation. The increased use of the National Teacher Examination (NTE) in the South in the 1950s, for example, was clearly related to efforts to desegregate schools in that region

In the 1970s and 80s, numerous states started to implement new assessment and competency testing programs. Southern states were among the early states to adopt minimum competency testing (MCT) programs, with Florida enacting legislation mandating passing of minimum competency tests as a requirement for high school graduation in 1976, Georgia, Maryland and North Carolina in 1977 and Virginia in 1978. Though scores on minimum competency tests tended to rise sharply after initial administration of the new tests, research in the 1980s showed that states implementing MCT programs tended to have higher dropout rates than states without such programs

21. Report of Dr. Walter M. Haney, Plaintiff's Exhibit P36.

As standardized tests came to be used more prominently after 1950, there were numerous specific cases in which tests were clearly used to discriminate against ethnic minorities or to stigmatize them as inferior to whites. In the *Hobson v. Hansen* 1967 case, for example, it was charged that the use of IQ tests and the ability tracking in public schools of the District of Columbia resulted in the disproportionate placement of black students in lower ability tracks. The federal court in this case ruled that the procedure constituted illegal segregation and banned the use of IQ tests, in part because the tests had been standardized largely on white and middle class groups of students. Hence in the view of the court, the test produced inaccurate and misleading results when used with black and disadvantaged students.

In 1969 Arthur Jensen published an article in *the Harvard Educational Review* that was widely interpreted as implying the blacks are genetically inferior to whites . . . [H]e argued that the gap in test scores between blacks and whites probably had a substantial genetic component

In a widely publicized book published in 1994, *The Bell Curve*, Richard Herrnstein and Charles Murray argued that the gap in IQ-test scores between blacks and whites was largely determined not by socioeconomic factors but by genetic differences. They implied that efforts to boost the educational opportunities of ethnic minorities are doomed to disappointment, because ethnic minorities are genetically inferior to whites in the realm of academic achievement.

In citing this historical and legal evidence concerning the negative import of standardized tests on the standing and educational opportunities of minorities in the United States, I wish to emphasize two points. First is that although data from standardized tests have regularly been used to characterize ethnic minorities as genetically inferior to whites, my own view and those of other scholars is that social, economic and educational factors are the main determinants of the relative standing of ethnic groups on test results . . . [T]here is simply no credible evidence of genetic causes for differences [on test scores] between racial or ethnic groups.

A second point is that, though standardized tests have frequently been used to the disadvantage of ethnic and language minorities, they have not *always* been used in this manner. For example, there have been a number of instances in which standardized test results have been used to help document the inferior education frequently received by ethnic and racial minorities in the U.S. resulting from what Jonathan Kozol calls “the savage inequalities” that persist in the United States system of schooling.

III. Disparate Impact of the TASS Exit Test

From virtually the beginning of the TAAS-X testing in Texas, there has been clear evidence of disparate impact of the TAAS-X test on the pass rates of both black and Hispanic students. In virtually all of the data I have examined, evidence of this negative impact has been apparent. Before discussing some of this evidence, let me summarize briefly what is meant by disparate or adverse impact.

In both previous research and law, two standards for determining disparate or adverse impact have been widely recognized; namely, the 80 percent rule and the statistical and practical significance of differences. The "80 percent" or four-fifths rule refers to a provision of the 1978 Uniform Guidelines on Employee Selection Procedures . . . As a result of its standing in federal regulations, the 80 percent rule as an indication of adverse impact has been widely recognized . . . [However] most observers now hold that in assessing disparate impact, it is important not just to apply the 80% or four-fifths rule but also to consider the practical and statistical significance of differences in selection or pass rates . . . By any of these standards, however, there is clear evidence of disparate impact of the TAAS-X test on pass rates of both black and Hispanic students . . .

. . . .

. . . In sum, regardless of whether adverse impact is defined in terms of the 80% rule or tests of statistical significance, available data from 1995, 1996 and 1997 reveal that the TAAS-X has been having a clear adverse impact on black and Hispanic high school students in Texas.

IV. Disparate Impact of TASS-X on Retention and Completion of High School

In addition to the obvious and direct impact of TAAS-X on whether or not students pass the exit examination, this test also appears to be having two indirect effects on students. These effects are on the likelihood of students being retained in grade 9 and on the likelihood that they drop out of high school before receiving their high school diplomas.

. . . The 1996 Comprehensive Biennial report on Texas Public schools recounts that the "highest percentage of students retained was in the ninth grade and this trend showed little variation over the three year period [1992-93 through 1994-95]" . . . approximately 9% of white students were retained in grade 9 in each of these academic years, as compared with 24-25% of black and Hispanic students. These grade 9 retention rates are far in excess of national trends. A recent national study showed that among young adults aged 16-24, only 2.4 percent had been retained in grade in grades 9-12. A recent report of the National Research Council also shows Texas to have among the highest grade 8 reten-

tion rates for 1992 to 1996 among the states for which such data are available

. . . .

The extremely large adverse racial impact of grade 9 retention rates reported by TEA is obvious. What is less clear is why this disparate impact appears to be an effect of TAAS-X. In this preliminary report, I should make clear that this is a proposition that needs to be tested further with additional investigation and analysis, but the reasoning that leads me at present to conclude that disparate retention rates are likely a result of TAAS-X is as follows. The grade 9 retention rates for blacks and Hispanics for 1992-95 are extraordinary and surely cannot have arisen by chance. As a result of the state law, the TEA provides recognition, rewards and sanctions to Texas schools through an accountability system that labels school districts and campuses as exemplary, recognized acceptable, or low performing. A key indicator leading to such designations is the percentage of students in each cohort passing the TAAS-X that students are eligible to begin taking in grade 10. One of the most obvious ways a school or district can make this percentage rise is to retain students in grade 9 who are likely to score poorly on TAAS-X . . . Finally, quite apart from the specifics of what has been happening with regard to TAAS-X in Texas, we have evidence that high rates of grade 9 retention are associated with high school graduation tests . . . [T]he few states whose grade 9 retention rates approach those of Texas include Florida, Georgia, and North Carolina - all states with high school graduation tests. (Also, there is historical precedent to show that when high stakes for schools and teachers are attached to exit test results, one of the strategies employed is to retain students in the grade before they are eligible to take the exit test).

. . . .

. . . Even the TEA has acknowledged that Aresearch has consistently shown that being overage for grade is one of the primary predictors of dropping out of school in later years . . . Being overage for grade is a better predictor of dropping out than underachievement.*

Dropout rate is one of the indicators used in the TEA accountability system for rating Texas districts and campuses. Also, according to at least some TEA reports, annual dropout rates for Texas did not increase during the 1990s' and indeed according to TEA data the estimated longitudinal dropout rate apparently fell dramatically between 1987 and 1995.

These results may be affected however by the incentives that Texas schools have to report lower dropout rates to the TEA and also by the

21. 1996 Comprehensive Biennial Report on Texas Public Education, pp. 35, 36.

specifics of how TEA calculates dropout rates. At least one independent organization in Texas has previously challenged TEA's "dropout calculation methodology." In contrast, two independent sources report substantially higher rates of dropouts, or attrition, or conversely lower rates of high school completion than would be implied by TEA dropout data. Therefore one line of investigation that I am pursuing is whether the TAAS-X has been contributing to increased rates of dropping out of school among black and Hispanic students in Texas. I return to the issue of dropout briefly in the conclusion to this report, to cite evidence that unlike most other states Texas has had an overall decline in the rate of high school completion since the early 1990s when the TAAS-X was introduced.

V. Use of the TAAS-X in Isolation is Contrary to Professional Standards and Sound Practice

Another area of my investigation relates to my view that the use of TAAS-X scores in isolation to control award of high school diplomas (or for that matter use of any test results alone to make high stakes decisions about individuals or institutions) is contrary both to professional standards regarding testing and to sound professional practice.

....

It is clear that the practice in Texas of controlling award of high school diplomas on the basis of TAAS-X scores in isolation without weighing other relevant information such as students' grades in high school (HSGPA) is contrary to . . . the 1985 *Standards for Educational and Psychological Testing*.

The policy in Texas of controlling award of high school diplomas on the basis of TAAS-X scores in isolation is also contrary to the advice of the Board on Testing and Assessment of the National Research Council, which recommended:

High stakes decisions such as tracking promotion, and graduation should not automatically be made on the basis of a single test score but should be buttressed by other relevant information about students' knowledge and skills such as grades, teacher recommendations and extenuating circumstances.

The use of TAAS-X scores in isolation to control award of high school diplomas is also contrary to sound practice regarding use of test scores. In college admissions, for example, admissions decisions are typically based not on admissions test scores alone, but on a consideration of test scores in combination with other relevant information such as HSGPA and letters of recommendation . . . Ironically enough, reliance on TAAS-X scores alone to control award of high school diplomas in Texas is even

contrary to the following passage from the TEA's own Texas Student Assessment Program Technical Digest:

All test result uses regarding individual students or groups should incorporate as much data as possible. Student test scores should also be used in conjunction with other performance indicators to assist in making placement decisions, such as whether a student should take a reading improvement course, be placed in a gifted and talented program or exit a bilingual program.

In sum, it seems clear that the state of Texas's use of TAAS-X scores in isolation, without regard to students' high school grades, to control award of high school diplomas, is contrary not only to both professional standards regarding test use and sound practices of test use, but also to the TEA's own advice on the need to use test results in conjunction with other performance indicators.

VI. Lack of Validity Evidence to Justify use of TAAS-X to Control High School Graduation

A final area of my investigation deals with the technical qualities of the TAAS-X tests and, in particular, with the validity [sic] reliability and scaling of the TAAS-X tests. For example, I have questions about the extent to which the reliance on internal consistency estimates on reliability reported in the Technical Digest may overestimate the reliability of TAAS tests as compared with reliability estimated via test-retest correlations. Similarly, I have questions about reliance of Rasch scaling and whether the TAAS-X tests are uni-dimensional. Also, I have questions about the process used in setting the passing scores on the TAAS tests. However, in this preliminary report, let me summarize what I presently deem to be the most serious validity issue concerning the use of the TAAS-X tests to control high school graduations.

The 1985 Standards for Educational and Psychological Testing . . . state:

Standard 8.7 When a test is used to make decisions about student promotion or graduation, there should be evidence that the test covers only specific or generalized knowledge, skills, and abilities that students have had an opportunity to learn.

My concern here is that I have seen no indication that the state of Texas has produced any reasonable evidence to demonstrate that high school students statewide have had reasonable or equal opportunity to learn the "higher order thinking skills and problem solving ability" the TAAS tests are designed to assess . . . [T]his is obviously far more than a mere technical concern, and speaks to the fundamental fairness of the high school graduation sanction attached to the TAAS-X . . . [M]embers

of the Texas State Board of Education themselves have raised questions, as early as 1990, about the extent to which TAAS tests are in fact measuring what is taught in Texas classrooms

In light of this record, it seems remarkable that the state of Texas, at least insofar as I am aware, has still, eight years later, not yet adduced reasonable evidence to show that students in Texas have been afforded reasonable opportunity to learn the knowledge, skills, and abilities that are assessed on the TASS-X tests. Moreover, at least two studies undertaken by the TEA seem to me to provide quite tangible evidence that students have not had reasonable opportunity to learn material tested via TAAS . . . In one study, for example, it was reported that in one large urban district, 50% of the students who had received a grade of B in their math courses failed the TAAS math test . . . [M]y tentative judgment based on these summary findings is that the TAAS-X tests, or at least the math test, may represent a serious mismatch with what students have had an opportunity to learn.

VII. Conclusion

. . . [T]he TAAS-X evidences a severe adverse impact on black and Hispanic high school students in Texas . . . [S]evere adverse impact was also apparent in the rates of retention of black and Hispanic students in grade 9 . . . [T]he unusually high rates of grade 9 retention and high dropout rates . . . are very likely attributable to the TAAS-X graduation policy . . . In other words, the requirement that students pass the TAAS-X, coupled with the Texas system of holding schools accountable for TAAS-X pass rates, appears to be leading to widespread retention of students in grade 9, and this retention is certainly contributing to increases in students dropping out of high school before completion.

. . . .

. . . [W]hether or not young people graduate from high school has enormous consequences, for the future welfare of both them as individuals and for society. This makes [it] clear that the TAAS-X is an *extremely* high stakes test. Recognition of the enormous consequences attached to the TAAS-X tests . . . is vital because the higher the stakes attached to test use, the higher must be the burden of proof to show that test use is valid. In this regard the state of Texas has, in my preliminary judgment, failed to adhere to recognized standards regarding test use, legal standards for high school graduation tests and commonsense standards of fairness . . . [T]he use of TAAS-X in isolation to determine whether or not students graduate from high school is a clear violation of professional standards regarding test use . . . Before students are punished for failing to pass the TAAS-X tests they must be shown to have been taught, or

have been given reasonable opportunity to learn, what is tested on the TAAS-X tests

VI. Supplementary Report on Texas Assessment of Academic Skills Exit Test (TAAS-X)

By Dr. Walter M. Haney²²

. . . .

III. Setting of Passing Scores on TAAS-X

. . . [W]hen a pass or cut score is set on a test, the validity of the test depends not just on test content, administration and scoring, but also on the manner in which the passing score is set

. . . .

Hence I have sought to learn exactly how the passing scores were set on the TAAS in 1990 and to obtain copies of any data that were used in the process of setting passing scores on the TAAS exit test. The most complete account of the process by which the passing scores were set on the TAAS-X in 1990 of which I am aware is provided in Appendix 9 of the *Texas Student Assessment Program Technical Digest for the Academic Year 1996-1997*. Specifically contained in this appendix are 1) memo dated July 14, 1990 from Commissioner Kirby to members of the state Board of Education (including a summary of results from a field test of the TAAS) and 2) Minutes of the State Board of Education meeting in July 1990 at which the passing scores on the grade 10 TAAS were established. . . .

In his memo, Commissioner Kirby recommended a passing score of 70% correct for the exit level of TAAS, but also recommended that this standard be phased in over a period of three years, with the passing score of 60% proposed for the fall of 1990. After considerable discussion, the state board voted unanimously to adopt the recommendations of the commissioner regarding the Texas Assessment of Academic Skills, specifically that: "For the Academic Skills Level, a minimum standard of 70% of the test items must be answered correctly."

Following a statement by a Dr. Crawford about the importance that "notice regarding the standard required for graduation from high school be given to those students who will be taking the exit level test" . . . the Board also voted 11 to 3 in favor of an amendment to the original proposal to "give notice that the 1991-92 standard will be 70."

22. Supplemental Report of Dr. Walter M. Haney, Plaintiff's Exhibit P52.

What strikes me about this record of how the passing score on the TAAS exit test was set are the following:

- 1) The process was not based on any of the professionally recognized methods for setting passing standards on tests;
- 2) It appears to have failed completely to take the standard error of measurement into account; and,
- 3) As I will explain below, the process yielded a passing score that effectively maximized the adverse impact of the TAAS exit test on Black and Hispanic students.

Before I elaborate on the latter point, let me emphasize that from the available record I have done my utmost to understand the rationale that motivated the Board to set the passing score where it did, namely at 70% correct. As best I can tell from the record, the main reason for setting the passing score at 70 appears to have been that this level was suggested by the Texas Education Code. The minutes of the Board meeting report "the commissioner cited the portion of the Texas Education code that requires 70 percent as passing, explaining that there is a rationale for aiming at 70 percent of test items as the mastery standard."

In my judgment this is simply not a professionally responsible basis for setting a passing standard on an important test such as the TAAS exit test. Indeed from the available record it is not even clear that the Texas code cited by the Commissioner was actually even referring to anything more than the passing standard for course grades. Moreover, the minutes to the July 12, 1990 meeting also report the following remarks by Dr. Crawford: "Testing is driving a curricular program, which means that the curriculum is not at the place where you want it to be when you start out." She commented that "70 only has whatever value that is given to it, and in testing 70 is not the automatic passing standard on every test."

In sum, it is my professional judgment that the process used in setting the passing scores on the TAAS exit test in 1990 did not adhere to prevailing professional standards regarding the setting of passing score on standardized tests. For example, from the record available, it is clear that the process used to set the passing score on the TAAS exit test in 1990 failed to meet all six criteria of "technical adequacy" described in Berk's (1986) review of criteria for setting performance standards on criterion-referenced tests B a review published in a prominent educational research journal, and hence of which TEA officials surely should have been aware in 1990.

....

The reason the setting of passing scores on a high stakes test such as the TAAS is so important is that the passing score divides a continuum of scores into just two categories, pass and fail. Doing so is hazardous because all standardized test scores contain some degree of measurement

error. Hence, the 1985 *Standards for Educational and Psychological Testing* and other professional literature clearly indicate the importance of considering measurement error and consequent classification errors in the process of setting passing scores on tests . . . from the available record of the July 1990 meeting of the Board of Education, there is no indication that consideration of measurement error entered into the Board's deliberations.

. . . .

VII. Conclusion

The adverse impact of the TAAS-X on Black and Hispanic students in Texas is clear and undeniable. Adverse impact was shown in my December 1998 report in terms the results of TAAS-X administration in 1990, 1995, 1996, and 1997. Adverse impact continues to be apparent in 1998 results . . . in terms of the 80% rule, statistical significance tests and the practical significance of the 1998 TAAS-X results.

More alarming than the pass rates on grade 10 TAAS-X administrations, however is what is revealed by analysis of grade enrollment patterns in Texas over the last 25 years . . . The primary impact of the implementation of passing the TAAS-X as a requirement for high school graduation . . . has been a dramatic decrease in the progress of Black and Hispanic students from grade 9 to high school graduation three years later; from roughly 60% in the 1970s to 50% since 1992-93. Over the last six school years (1993-94 to 1998-99) each year there have been roughly 50,000 Black and 130,000 Hispanic students enrolled in grade 9 in Texas schools . . . Cumulatively this amounts to more than 1 million Black and Hispanic grade 9 students. If the rate of progression from grade nine to high school graduation apparent in the in the 1970's for Black and Hispanic students (roughly 60% . . .) existed in the 1990s, then approximately 600,000 would graduate from high school. If, however, the pattern since implementation of the TAAS-X as a requirement for high school graduation persists (namely only 50% of grade 9 Black and Hispanic students graduating three years later), only 500,000 will graduate from high school. In other words, the decrement in the grade 9 to high school graduation rate since 1992 means that 100,000 fewer Black and Hispanic students have graduated from high school B and of course if instead of decreasing, the rate had increased to parity with that for White students, another 100,000 would have graduated. Is it a matter of serious import . . . that 100,000 or 200,000 fewer Black and Hispanic students may graduate from high school as a result of TAAS-X, than would otherwise have been the case? The answer seems clear to me especially in light of the evidence cited in my December 1998 report, documenting that failure to graduate from high school has large consequences for young people's

economic and social prospects. Hence . . . the validity and educational necessity of such a test deserves close scrutiny.

Here, I should acknowledge a broad shift in my overall judgment . . . as to the cause of this adverse impact . . . [W]hen I wrote my preliminary report, I felt that the adverse impact of the TAAS-X was clear, but that this adverse impact likely resulted mainly from two factors, namely misuse of TAAS-X scores and the lack of opportunity to learn afforded to minority students in Texas (especially in light of the history of discrimination against Black and Hispanic students in the state of Texas) and misuse of TAAS-X scores. However, the more I have inquired into the validity of the TAAS-X tests, the more I doubt the validity of TAAS-X scores in general B even apart from the suspect "passing" score of 70% correct. Hence in closing, let me summarize my conclusions regarding three sources of adverse impact.

Misuse of test results. There are three ways in which the results of the TAAS tests are being misused in Texas. First . . . the practice in Texas of controlling award of high school diplomas on the basis of TAAS-X scores in isolation without weighing other relevant information such as students' grades in high school (HSGPA) is contrary to professional standards . . . Also . . . it would clearly result in more valid, and less discriminatory decision-making for Texas to use test score results, not in isolation, but on a sliding scale *in combination* with high school grades as a basis for informing high school graduation decisions. Such a practice would be in conformance not just with professional standards but also with the manner in which test scores are used in institutions of higher education (including those in Texas) to inform college admissions decisions.

Second . . . it is clearly a misuse of TAAS-X results for the state to have set arbitrary passing scores of 70% correct on the TAAS-X subtests. The state did not use any professionally recognized method for setting these scores. The scores of 70% on the reading and writing subtests effectively maximized the discriminatory impact of these TAAS-X tests. Moreover there is absolutely no evidence whatsoever in the ten year history of TAAS that passing scores of 70% correct on the TAAS-X reliably distinguish among students on any independent basis (such as success in college or the workplace, or even grades in school) other than race.

Third, the state of Texas has attempted since 1990 to use the TAAS-X for three broad, but contradictory purposes B namely to spur curricular reform in schools, to hold students accountable for learning and to hold schools and school districts accountable . . . [W]hat clearly seems to have happened in Texas since 1990 when TAAS-X test results were introduced as a means of evaluating high schools, teachers and districts and to control award of the high school diploma, is that the rate of student retention in grade 9, before they take the TAAS-X in grade 10 has increased mark-

edly. The requirement that students pass the TAAS-X, coupled with the Texas system of holding schools accountable for TAAS-X pass rates, has led to dramatic increases in retention of Black and Hispanic students in grade 9, and this retention is certainly contributing to increases in students dropping out of high school before completion. It should come as no surprise that when the same mechanism is used to hold students *and* adults and institutions accountable, the adults and institutions are in a better position to protect their interests than are the students

. . . .

In sum, considerable work, and several lines of evidence studied in the last six months, lead confirmation of the overall preliminary judgment expressed in my December 1998 report. The state of Texas, in failing to establish the instructional validity of the TAAS-X tests, and in using TAAS-X test results in isolation to deny high school graduation to students regardless of their high school records, is an obvious violation of relevant professional standards, the legal precedent . . . requiring instructional validity for high school graduation tests and common sense

. . . .

VII. Report of Dr. Linda McSpadden McNeil²³

The TAAS system of testing reduces the quality and quantity of the education of poor and minority youth.

** In many urban schools, whose students are overwhelmingly poor and African-American and Latino, the TAAS system of testing reduces the quality and quantity of subjects being tested by TAAS.*

The pressure to raise TAAS scores leads teachers to spend class time, often several hours each week, drilling students on practice exam materials. Much of this time is spent learning how to bubble in answers, how to weed out obviously wrong answers, and how to become accustomed to multiple choice, computer-scored formats. This TAAS drill takes time from real teaching and learning. In the name of "alignment" between course curricula and test, TAAS drills are becoming the curriculum in our poorest schools.

The pressure to raise TAAS scores leads teachers to substitute TAAS-prep materials for the substance of the curriculum. Principals, deans of instruction and other building or central office administrators, urge or even require teachers to set aside the course curriculum and to use the TAAS-prep materials in their place. This practice is more common in traditionally low-performing schools, the schools attended by low-income

23. McNeil, *supra* note xvi.

and non-anglo children. While middle class children in white, middle class schools are reading literature, learning a variety of forms of writing, studying mathematics aimed at problem-solving and conceptual understanding—in essence, receiving an education appropriate for their age and grade level, poor and minority children are devoting class time to practice test materials whose purpose is to help children pass the TAAS. The TAAS system of testing thus widens the gap between the public education provided for poor and minority children and that of children in traditionally higher scoring (that is, anglo and wealthier) schools.

Subjects tested by TAAS (reading, writing and mathematics) are reduced, in the test and in the test prep materials, to isolated skills and fragments of fact. This artificial treatment of these isolated components may enable children to recognize those components on a multiple-choice test, but does not necessarily enable them to use these components in other contexts. For example . . . [m]iddle school teachers report that the TAAS emphasis on reading short passages, then selecting among answers given to questions based on those short passages, has made it very difficult for students to read a sustained reading assignment. After several years in classes where the "reading" assignments were increasingly TAAS practice materials, children were unable to read even a novel two years below grade level.

In writing, students are increasingly being asked to write repetitively in only the format of that year's TAAS writing objective . . . Writing as it relates to thinking, to language development and fluency, to understanding one's audience, to enriching one's vocabulary, to develop ideas all had been replaced by TAAS writing practice. "Writing" no longer bore any resemblance to what research shows to be a developmental activity in children's language competency

. . . .

It is a myth that TAAS sets the minimum standards and that teachers are encouraged to go beyond that. In many schools, it is the richest curriculum and the best prepared teachers who are required to scale back in order to make what is taught consistent with the sequence and format of the TAAS. In low-performing schools, even the most knowledgeable teachers are asked to set aside their lesson plans and materials to teach to the TAAS.

** The TAAS system of testing reduces the quality and quantity of course content in subjects not tested by TAAS because teachers are encouraged or required to substitute preparation for the TAAS test for the curriculum in those courses.*

Because science is not yet subject to TAAS testing, many science teachers in schools with poor and minority children are required by their prin-

cipals to suspend the teaching of science for weeks, and in some cases for months, in order to devote science class time to drill and practice on the math sections of the TAAS. The first loss, of course, is the chance to learn science. The second is the chance to learn to become highly knowledgeable in mathematics . . . The direct loss of both science and mathematics learning is clear. Less obvious but equally important is the way this practice widens the gap between the science learning in middle class, higher performing schools where children continue to study science while the poor and minority children are interrupting science class to drill for the math TAAS.

. . . Elective subjects are also often required to set aside the curriculum in order to devote time to TAAS prep. Art teachers report that they are required to drill on the grammar sections of TAAS. An ROTC instructor was assigning the five-paragraph essay each week, not to link writing to ROTC but to add another drill to the regimen, this time in a rote essay.

** The TAAS system of testing encourages, in low performing schools, the diversion of scarce school resources (including dollars for instructional materials) into TAAS-prep materials rather than the kinds of instructional resources available to teacher and children in middle-class and wealthy schools.*

One largely Hispanic, traditionally low-performing high school with virtually no library, a severe shortage of textbooks and little laboratory equipment for its students, spent almost \$20,000 for a set of commercial test-prep materials and required even its best teachers to set aside their high-quality lessons and replace them with the test-prep materials. Scores on some sections of the TAAS did go up, but teacher[s] report students' actual capacity to read, to handle high school level assignments, to engage in serious thought and be able to follow through on work actually declined. This school . . . is now searching for a way to counter what is seen by the faculty as a serious deficiency in the students' ability to read.

The press to spend instructional dollars on test-prep materials is widespread, especially among those schools with poor and minority children, where test scores have been low. These are typically the schools with a history of underfunding, with fewer instructional resources. While wealthier districts are spending money on high quality instructional materials which advance their children's education and place them in the national mainstream of what is considered to be a quality education, scarce instructional dollars are being spent in poor and minority children's schools on test prep materials or expensive "alignment" systems whose only value is to increase TAAS scores, not to produce educated children well prepared for college or future work.

This diversion of dollars away from children include diverting instructional dollars into expensive materials for "alignment" and "accountability" systems and consultants; it also includes diverting dollars from Texas classrooms to out-of-state vendors of tests, test-prep materials, consultants and related materials . . . this diversion of dollars in poorer and minority districts further widens the gap between the quality of education offered to these children and that provided to wealthier children.

** The TAAS system of testing goes against what is known in research on children's learning.*

Research on children's learning shows that learning is not linear, that it must build on what children already know and understand, that it must engage children's active thinking, that it must engage many senses. The TAAS reinforces one particular mode of learning . . . from discreet, randomly selected, brief pieces of information. The reading comprehension and grammatical sections of the writing TAAS, for example, teach isolated skills through very brief written passages. These written passages are not intended to build a cumulative knowledge base; they are not meant to connect with children's understanding. The isolated skills are presented in fragments . . . Learning fragments of fact and skill out of context is known to be counter productive to understanding and to building cumulative skills which can be applied in an unfamiliar setting or to unfamiliar information in the future.

Two features of the TAAS and TAAS-prep materials are especially damaging to learning. The first is that under the TAAS system, students are to choose among possible answers that are given to them; they rarely have to think on their own, puzzle out a problem, come up with a possible answer, articulate an idea. This engenders passivity and a dependent learning style that fails to develop many essential cognitive skills. In addition, it presents the child with choices, of which all but one are incorrect. To the extent that children, especially in poor and minority schools, are taught a curriculum and test drills that are in the TAAS format, they are spending three-quarters of their testing time considering erroneous, "wrong" material. There is no respectable learning theory that advocates children's continual exposure to incorrect material.

** The generic curriculum inherent in the TAAS system of testing is divorced from children's experiences, language and cultures.*

It is not respectful of, nor does it build on, children's personal experiences, the cultures of their families, nor the variations in learning style and interests that span any classroom. Yet the research literature is clear that learning of abstractions which have little connection to children's lives and cultures, or which present a monocultural, technical view of knowledge, yield little in long-term learning. These abstractions and

technical facts and formulas become “school knowledge” learned for the test but not incorporated into children’s long-term understandings.

** In many urban (poor, minority) schools, there are significant gaps between children’s performance on TA[A]S and their actual learning as measured by what they can do.*

The TAAS as a management system encourages administrators and teachers in traditionally low performing schools especially to aim school instruction at the lowest level of information and skills, to the neglect of complex assignments and content.

Again, in poorer schools this translates into expenditures of time, teacher energy, and instructional dollars, into staff conferences and materials production (even pep rallies) aimed at raising TAAS scores rather than at improving educational quality. Increasingly, expenditures for management and “alignmen[t]” systems are displacing instructional expenditures, and expenditures for management conferences and consulting around increasing compliance with TAAS are displacing programs of teacher learning and professional pedagogical development.

In those districts where schools’ TAAS scores are tied to incentive pay for teachers or principals, there is even greater tendency for school personnel to shift dollars away from instruction and into the expensive TAAS-prep and “alignment” materials and consultants. Again, frequently these incentives are applied in schools or districts whose populations are poor or minority or both.

** The TAAS system of testing, because of the increasing emphasis on preparing students for the tests, crowds out other forms of learning in many urban schools, particularly those whose children are poor and non-anglo.*

Teachers report that the pressure to drill for TAAS has caused them to o[m]it or severely decrease other forms of learning because of the lack of time or because their principals are urging them to devote time only to those activities which will be measured by TAAS. Library research, independent projects, science experiments, oral histories, long-term writing assignments, writing assignments different from those being tested in a particular year, longer-term reading assignments that include related writing and speaking activities are all being eliminated or reduced, even though they are highly motivating for children and engage them in higher-order problem solving and thinking, in those schools (poor, minority) where TAAS scores have been low.

This is despite the fact that preliminary research is showing that those schools that score higher on TAAS (usually wealthier, with fewer minority children) rarely teach directly to TAAS. They teach children; they teach science, math, social studies, literature, writing, the arts—they teach the subjects.

In summary, the TAAS is a ticket to nowhere. It is harmful to instruction by its rigid format, its artificial treatment of subject matter, its embodiment of discredited learning theories, its emphasis on the accounting of prescribed learning. The test itself, and the system of testing and test preparation, have in poor and minority schools come to supplant the opportunity for high quality, meaningful learning.

Successful performance on the TAAS in no way insures a quality education. An education aimed at TAAS scores does unequivocally reduce children's chances for a real education. The pressure to raise scores is greatest in our poorest, historically least-well-funded schools. To raise scores absent a major investment in teacher knowledge, school facilities and instructional materials in those schools means that educators in those schools are diverting time, energy and dollars away from the kind of instruction available in middle class schools and into materials whose only purpose is to raise TAAS scores. This is a pervasive problem, not an isolated one . . . What we are seeing is not the "misuse" of the TAAS testing system, but the playing out of its inherent logic at the expense of our poorest, minority children.

VIII. Report of Dr. Ernesto M. Bernal²⁴

. . . [T]he TAAS as a high-stakes test that alone can withhold a high school diploma from individual students is unjustified

Multiple cutoff scores (multiple critical scores) are not justifiable in the case of the TAAS, since no obvious internal criterion is cited and no external criterion has been empirically examined. Since the TAAS is admittedly not a minimal skills test, there is no inherent connection between the TLI pass score of 70 and any quintessential skill. In the absence of any external criterion to validate the cutscore, either, there is no justification for adopting multiple criteria, since these constitute a rigorous imposition that only serves to deny more children a high school diploma

Nor does any psychometric reason for using multiple cutoffs . . . seem to apply. There is no reason, in short, why a higher passing score on one part of the TAAS should not be allowed to compensate, at least in part, for a lower failing score on another part. In our common experience successful high school graduates use their areas of greater skill to compensate for areas of relative weakness. Why not on the TAAS? If a person who scores 70-70-70 on the three parts of the TAAS receives a pass, why not the person who scores 75-75-69? The TAAS does not appear to be robust enough to warrant such a rule, given that the three parts have not been validated against any real-world criteria, such as following written

24. Report of Dr. Ernesto M. Bernal, Plaintiff's Exhibit P1.

directions or understanding an item of interest in the newspaper, figuring out a budget in order to select an affordable car, finance it, insure it, and pay for fuel and maintenance; or to pen a clear message to the foreman of the day shift, explaining what needs to be done tomorrow morning to meet a deadline.

. . . The TAAS as the sole criterion to deny a diploma also cannot be sustained. Grades, the level of courses taken and passed, and actual products that reflect reading, writing, or mathematical ability also need to be taken into account. At the very least, these other items should be allowed in a formal appeal process. Right now, the only appeal is to re-take the test which augurs badly for all but the “near passers,” the “bubble kids”

. . . Some of the TAAS' items are irrelevant to any real work or world applications of mathematics, reading, and writing, because they have been made “tricky” to lower the proportion . . . of people who pass these items. Items that are artificially made difficult, for example, by introducing irrelevant information, are items that a disproportionately greater number of disadvantaged and language-minority students are likely to get wrong, precisely because they are more likely to interpret the problem in the direction of relevancy (and thereby select the “wrong” answer) or because the language used to make the problem more difficult is intended to confuse even some of the native speakers . . . These are not “normal” items. Consider:

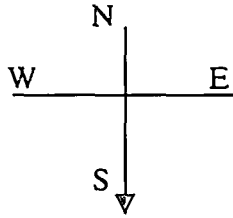
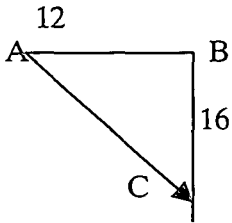
“On a cold night in February, four young musicians waited. They waited patiently backstage for their first performance in the United States.”

Now the correct choice is to blend these sentences into:

“On a cold night in February, four young musicians waited patiently backstage for their first performance in the United States.”

The initial passage is not wrong, it is just that the “correct choice” might be more stylistically desirable. But the first could be considered correct stylistically under certain circumstances, e.g., if this were the script for a radio announcer.

“On a map, A is shown 12 inches west of B and C is shown 16 inches south of B. If 2 inches on the map represent 5 miles, how many miles is it from B to C?”



Failing items such as these does not necessarily indicate a student's lack of writing ability or a failure to convert from one scale to another. In my experience in item design and selection, these items would not have passed muster. My surmise is that they have been kept in the item pool to show content coverage of an objective that is normally far too easy to attain. The result, however, is often that the language-minority and disadvantaged children pay for the test's content validity with their lowered scores.

....

... Instead of taking the more rigorous "recommended" or college preparatory curriculum, minority students are disproportionately relegated to [a] minimal program, where there is "room" to take the TAAS courses. This lower-level curriculum would doubtlessly reduce their chances of being selected at many colleges and universities . . . Some schools are "red shirting" 9th graders who are not doing well academically, failing them so that they do not take the 10th grade TAAS the following year. Ostensibly the hope or belief is that an extra year's practice will help them pass the TAAS. In fact, however, such practices have been shown to put these retained students at greater risk of dropping out, particularly in the higher grades. The TAAS test is starting to become a highstakes GAME on many campuses, whose principals are clearly willing to place their marginal students at risk in order for their schools to took a little better on the TAAS "report card." As has happened in the past, we have as yet little evidence outside of the TAAS itself that minority achievement has improved, but we have ample evidence that minority high school graduation rates have decreased.

....

... The TAAS may not "work" the same way with different populations as it does with the White majority. The statistical method of factor analysis may reveal different psychological dimensions for the test with different ethnic groups. If this is the case, then the TAAS may have different construct validity for different groups, even if other analyses of test items show no evidence of bias.

....

Item-factor Analysis of the 1997 TAAS Exit-level Tests

. . . The Math test is probably the best of the three TAAS tests in terms of factor structure; still . . . up to one-sixth of the math items (i.e., 10 out of 60) may work differently for different ethnic groups, more than enough to account for the differential scoring among the ethnic groups in the Math test. . . . Hispanic students respond to the Reading section of the TAAS in a way that is quite different from Blacks and Whites. It would appear that factor analysis was not one of the ways that the validity of the Reading section was established. The TEKS objectives that guided the design and selection of the items clearly do not measure the same psychological factors for Hispanics as they do for Blacks and Whites

. . . .

. . . The objective part of the TAAS Writing test is factorially quite diverse. This test does not appear to “hold together” psychologically in any meaningful way, since approximately one-third of the items in the test are scattered among unique or weak factors. A slavish commitment to the TEKS may be causing this dilemma, as well as the failure to use factor analysis in the selection of the final item pool.

. . . .

The Exit-level TAAS administered in the spring of 1997 has such a divergent factorial structure by ethnic group, especially in the Reading and objective Writing sections, that one can only conclude that the test generally measures different factors for the different ethnic groups.

. . . Just why the several ethnic groups “see” these items as different, however, is open to some speculation . . . [H]owever . . . the factor analyses indicate that the “skills” or whatever the TAAS test measures are different for the different ethnic groups, because these groups respond in different ways to the same items.

As it stands, failing or passing the TAAS tells us little about a student’s performance. At the very least, a factorially consistent test is necessary to determine the nature of the “essential” skills, and even then the validity of the derived factors would have to be established in terms of real-world outcomes and consequences. This factor analysis of the TAAS shows the folly of setting educational outcomes standards from an armchair, even from the combined armchairs of a number of educators or “experts” and their TEA leaders, who do not know enough to examine their handiwork against the realities of students’ learning.

The Exit-level TAAS, in its present form, should not be used to deny anyone a high school diploma.

IX. Report of Dr. Angela Valenzuela²⁵

I. Regardless of nativity, use of the TAAS test often discourages Latino students from completing high school or considering a college education.

The required exit-level TAAS test is one of a number of inflexible school structures that discourages immigrant and U.S.-born youth alike from pursuing higher educational opportunities. This point is well demonstrated in Romo and Falbo's (1996) ethnographic account of Austin Independent School District youth (both LEP and non-LEP). They provide case studies of youth who were sufficiently motivated and who aspired to someday work in skilled occupations but whose plans were thwarted by their not having passed the TAAS test.

My study in a Houston, inner-city school resonates with Romo and Falbo's findings. Regarding immigrant youth, observations from teachers allude to both a dropout problem and questions of equity surrounding the TAAS test itself

On the subject of equity, ESL and Spanish language teachers are unanimous in their view that if only the test were offered in Spanish, many more of their students would pass the test. Stories abound of talented students who prevail in school against all odds, but who cannot pass the TAAS test. More perniciously, immigrant students are among the least informed about what it takes to graduate from high school. I have spoken with teachers across the HISD who witness how the college-going aspirations of their limited English proficient students plummet upon learning either vicariously or through personal experience that the TAAS test constitutes an enormous barrier.

. . . .

1.a. Regarding Mexican American (non-LEP) youth, research documents strong feelings of alienation from the curriculum which includes standardized testing. Schools are notorious for treating Latino youth and their parents differently. A key factor across the nation is that minority youth are disproportionately tracked into lower-level, less challenging curricula . . . U.S.-born, minority youth are seen by schools and society as lacking the linguistic, cultural, moral, and intellectual traits that the assimilationist curriculum demands. Ostensibly "acculturated," English-monolingual Latino youth are perceived as requiring even more cultural assimilation and resocialization - as if the potency of initial treatments somehow systematically fades.

25. Report of Dr. Angela Valenzuela, Plaintiff's Exhibit P6

Conroy (1992) maintains that simply speaking English does not necessarily eliminate issues of bias. Linguistic minority youth who speak a dialect of standard English still face great difficulties because their language differences are construed as “incorrect” versions, rather than legitimate variants, of the English language. Hence, youth who speak Chicano English or Ebonics are not only subjected to undue scrutiny by school officials, they are also judged as cognitively deficient and lacking. These dynamics, which have been well documented, help explain much of the social and cultural distance that exists between schools and minority youth and families.

According to most regular-track youth I interviewed for my study, the school curriculum is one of their chief obstacles to high school graduation. The content of schooling is deemed by them to be boring, meaningless, unrewarding, and irrelevant to their lives. Since space constraints do not allow me to address the totality of the school curriculum, I address instead how the TAAS test is a primary obstacle to their high school graduation.

I recall a ninth-grade male telling me “How can I think about college if I can’t even pass the TAAS?” In a similar fashion, a tearful, reflective high school senior said the following: “It’s best not to think about the future when the present is so depressing.” These and other similar statements helped clarify for me why student upon student that I came across did not have plans to pursue a college education even when they spoke of teachers, parents, or other relatives who encouraged them to consider one. The word “career” was not part of their vocabulary. Students’ doubts about their futures make sense when the TAAS test looms over them as such a formidable challenge.

....

II. The TAAS exit test is particularly inappropriate for Limited English Proficient (LEP) students.

The TAAS exit test results in a gap in student achievement that may be directly attributed to the test and not to students’ abilities. As newcomers at the high school level, they are typically placed in the English as a Second Language curriculum (or “the ESL ghetto,” as one scholar refers to it) . . . In the ESL track, much of their day is spent in courses that focus on English vocabulary and English reading *without regard to their prior academic training* while their remaining subject matter courses are characteristically remedial and rarely, if ever, honors or college-bound

....

If lucky, LEP students are placed in ESL subject matter courses like “ESL-Math” and “ESL-Biology” that approximate courses offered in the regular, mainstream English only track. Teachers offering these courses

tend to be sensitive to issues that face language learners, particularly the sheer amount of time it takes to learn a second language as young adults (which researchers place at between 5 and 7 years to acquire native fluency). Consequently, teachers offer these subject matter courses to keep students from falling behind academically while they learn English Another motivation for teaching these courses that I have observed among ESL teachers is their recognition of ample academic talent among their immigrant population. They seek to capitalize on and nurture immigrant students' talents in and through ESL subject matter courses.

Theory would predict the prevalence of academic talent among many ESL youth, especially those schooled in their own country for many years prior to entering U.S. schools. That is, the more a student is schooled in one's first language, the greater their conceptual grasp of academic subject matter-like punctuation, how to summarize, arrive at conclusions, write papers, etc. - that often appears on standardized tests like the TAAS. The greater their grasp of academic subject matter, the easier it is to transfer this knowledge to the second language.

Unfortunately, the more common situation in high schools even throughout the Southwestern United States is a scarcity of ESL subject matter courses either because of a lack resources to offer such courses or because of philosophical opposition or both. This results in ESL-remedial course placements which in turn stalls their learning of the mainstream curriculum. This process masks how the intellectual abilities and potential of so many talented immigrant students gets compromised.

To appreciate and understand the magnitude of this waste in talent, one has to consider the characteristics of the immigrant population. Research shows that Mexican immigrants are a select group with average education levels that are higher than the national average for Mexico. They are risk-takers able to delay gratification by accumulating capital to effectuate their passage across the border. Studies, including my own, further show immigrants and their children possess a progressive orientation toward schools and U.S. society, generally. Moreover, since only 15 percent of the middle-school-aged population attends secondary school in Mexico, to come across as I did to a critical mass of such students at the high school level is to encounter a truly "elite" crowd that their ESL and Spanish language teachers readily recognize

What must be considered is that Mexico has a challenging national curriculum which is publicly subsidized and thus accessible to most through the sixth year. By the fourth grade, students know the anatomy of the human body. By the sixth grade, students take the equivalent of ninth-grade level geometry in the U.S.

Unfortunately, however, because most school personnel are not sensitive to these kinds of possibilities - either because they cannot read a

transcript from Mexico or because they simply assume that a good education is not possible there - youth get systematically channeled into the "ESL ghetto". Even in instances when they are allowed to enjoy subject matter courses, since none of these courses are offered at an honors' level, immigrant youth are systematically denied the opportunity to achieve at an advanced academic level. This structure helped me to understand immigrant youth who told me that they used to know math, or who told me that they used to be smarter. In a word, many were "de-skilled" as a result of having been schooled in the U.S.

Even if one considers that some amount of de-skilling is occurring, the quantitative part of my study arrived at three significant and interrelated findings. First, within the regular, non-honors, track, immigrant youth outperform their U.S.-born counterparts. In multi variate analysis, these differences were consistently statistically significant, suggesting that immigrant youth have an edge, academically speaking. A second finding from survey data corroborated in the ethnographic account is that immigrant youth experience school significantly more positively than their U.S.-born peers. That is, they see teachers as more caring and accessible than their U.S.-born counterparts, and they rate the school climate in more positive terms as well. They are also much less likely to evade school rules and policies. These students' attitudes contrast markedly with that of their second- and third-generation counterparts whose responses in turn are not significantly different from one another. Particularly striking is how generational status - and not gender or curriculum track placement - influences orientations toward schooling. These findings concur with research from numerous other large- and small- scale studies. Third, the level of schooling youth attain in Mexico or Latin America and students' grades are significantly correlated. For each year of schooling attained in Mexico or Latin America, achievement goes up.

These three pieces of evidence together suggest that immigrant youth should be passing the TAAS test at a higher rate than they do. Since their chances of passing the TAAS test are less than their English-dominant counterparts, it is logical to assume that their poor passing rates on the TAAS test suggest more their difficulties with the English language nature of the test, than their potential to achieve academically at a high level. Their teachers frequently refer to this barrier as a chief explanation. In short, children of Limited English proficiency are especially handicapped in their ability to exhibit their knowledge by the TAAS exit test.

III. The use of rigid cut-off scores on the TAAS is inappropriate.

Guardarrama and Valencia (1996) maintain that a rigid cut-off point is arbitrary and unfairly discriminates against limited English proficient stu-

dents. These issues became clear on May 30, 1994 when I discovered that a good number of students were not going to graduate because they were a few points shy of a passing the exit-level TAAS test.

. . . .

According to Ms. Jacoby [a high school teacher], one of her students who missed graduating by a narrow margin (4 points on the writing section) was a "great, great student." She then told me how there was going to be an awards ceremony that evening, saying that it's a very nice thing for all the graduating students and their parents to attend. "They are going to show pictures of the past year, give out awards, and people say good-bye." Ms. Jacoby asked her student, Margarita, if she would be going. Margarita said that she felt too sad and disappointed to attend. Her brother (who had passed all sections of the TAAS) also forfeited his opportunity to attend because he did not want his sister to feel too badly.

In the interest of comforting Margarita and her family, I accompanied Ms. Jacoby to Margarita's home. Her parents were extremely disappointed about the situation. A very humble family, they were already fantasizing about Margarita going to college and all the nice things that were going to come out of Margarita graduating. They came to the United States "*para que los hijos se superaran*" ("so that their children can succeed"). Now, their dream was shattered. Her parents expressed feelings of powerlessness and they felt like they could not go to the school and challenge this outcome because they understood that "the law is the law." Margarita seemed very shy and embarrassed about the whole situation.

They inform me that if Margarita were to decide to go to school in Mexico, it affects her mobility there as well because she cannot get into a higher education institution without a high school diploma. She planned to take a special TAAS course in the summer and then to take the TAAS test in July and hopefully pass it then. The bad thing, I thought to myself, is that she still might not pass it. I never heard from her since.

In frustration, I returned to the school later that afternoon to speak to the principal about the rigidity of the cut-off score and whether anything can be done to help these students. He said, "Angela, I have about 15 students in that situation! My phone has been ringing off the hook with very angry parents! They're putting phone calls in to the district superintendent and you know what, there's not a darn thing anyone can do about it. It's really terrible!" "Who are these kids?" I asked. "A lot of them are *immigrantes*," he said. "They had trouble with the writing or some small thing because they can't understand the test because it's in English."

A June 5, 1996 graduation ceremony, however, reminded me that even the U.S. born youth are not passing the TAAS. In the middle of the

ceremony after the class song was played, about eight students stood up to chant the words scrawled on a large banner they held in their hands: **"14 YEARS OF SCHOOL. MADE IT THIS FAR. WHY CAN'T WE WALK?"** After chanting these phrases several times, three police officers and six ushers approached the crowd to take away the banners from them. The audience booed the police officers, including all or most of the graduates sitting in their seats. The hundreds of boos that included parents brought the ceremony to a halt. I could clearly see how this state-level policy of linking the TAAS test to high school graduation was sensed by everyone as unjust. It was only too fitting to see how this policy was "policed" in a final show of force to the would-be-high school grads.

X. Epilogue by Al Kauffman

I commend *The Scholar* for undertaking the formidable task of writing about standardized testing's effects on elementary and secondary students in a lucid and informative way.

After twenty-five years of work involving Latino civil rights, I am convinced that the misuse of standardized tests is an overarching barrier to Latino progress in both education and employment. Texas' faulty development and use of the TAAS exit test exemplifies a pernicious transformation of a supposedly objective instrument from its touted purpose to improve education and confront the effects of racial discrimination into a barrier to minority graduation, promotion, and opportunity for exposure to rigorous pre-college work.

Texas's use of the TAAS exit test has prevented over a hundred thousand otherwise qualified students from obtaining a high school diploma, a necessary step to economic and social opportunity. The state's proffered reasons for its testing procedures are not related to the actual use of the tests. These negative effects will be exacerbated when the TAAS tests are even further misused as promotion barriers for 3rd, 5th and 8th graders. Hopefully, the TAAS record, as chronicled in this article, will lead to further understanding of and action against continued and further test misuse.

Our loss in the District Court will not discourage us from litigating other testing issues when they have such negative consequences. However, attorneys should be aware of the recent efforts to resist misuse through student and parent boycotts and basic community organization. We who represent our communities in court on these issues should be aware of alternative approaches to bringing the community's voice to bear on state and local decision-making as well as the developing research data documenting the failures of the overuse and misuse of standardized tests.

Notwithstanding our serious reservations about both the present and future use of the TAAS tests, we are not appealing the District Court's Judgment to the United States Court of Appeals for the Fifth Circuit. Although we identified several reversible errors in the opinion, we faced a risk of reversal of the District Court's correct holdings on adverse impact, the state's duty to prove both instructional and curricular validity and a student's property interest in a high school diploma. We did not convince the District Court that the state can meet our demands for high quality educational offerings and rich and rigorous assessments without resort to misuse of a standardized test.

We hope that this article will help the many communities interested in this issue both to learn from the record we produced and avoid our errors.

