

*Testing Guidance
(from OCR)*

**Office for Civil Rights****Fax Transmittal****To:** *Bill Kincaid***Organization:****Phone Number:****Fax Number:***7028
456-2857***Number of Pages (excluding cover page):***(19)***From:****Art Coleman****Deputy Assistant Secretary****Phone Number:****202-205-5557****Fax Number:****202-205-5381****Message:**

*Bill - I've omitted appendices & compendium of
legal authorities - call 205-5557 if you want that
addtl 20-pp also. See you today.*

*Art***If there are transmission problems, please call Millie Palmer at 202-205-5557.**

TO : Senior Officers
U.S. Department of Education

JUL 28 1997

CC : Jessica Levin
Steve Winnick
Susan Craig
Joe Conaty

FROM : Norma V. Cantú
Assistant Secretary
for Civil Rights

Norma V. Cantú

Arthur L. Coleman
Deputy Assistant Secretary
for Civil Rights

Arthur L. Coleman

SUBJECT : OCR's Investigative Guidance on Fairness in Testing/Deadline of August 15

Attached for your review is a final draft of OCR's Investigative Guidance on Fairness in Testing. The Guidance is designed to provide OCR's attorneys and investigators with an explanation of the legal and conceptual framework needed for understanding the issues raised by challenges under Title VI of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1972 to testing and assessment practices. (Notably, OCR has applied the principles set forth in this Guidance in a manner fully consistent with the Department of Education's emphasis on high standards.) It also may be used as a point of reference by others who seek to understand the principles that guide any determination about uses of particular tests under Title VI and Title IX.

Since your previous review of the draft Guidance many months ago, the Guidance has been reviewed by the Board on Testing and Assessment (BOTA) of the National Academy of Sciences. The Guidance has been revised in response to comments from BOTA and in response to additional refining comments from OCR, the Office of the General Counsel, the Office of the Deputy Secretary, and the Office of Educational Research and Improvement. We are grateful for the collaboration that has led to this statement of principles that govern our work.

The substantive changes that have been made to the Guidance since its earlier circulation are technical in nature. These changes do not alter the basic principles or standards about which we achieved agreement many months ago; the changes are, for the most part, minor. For example, there is further explanation of concepts related to test validation and reliability.

Specifically, a definition of construct validity has been added and the discussion of reliability is now in a separate section. Two paragraphs have been added to the discussion regarding cutoff scores. Similarly minor changes have been made to the discussion regarding statistical analyses necessary to establish disparate impact. Also, a glossary on concepts fundamental to test validation has been added (Tab C).

Thank you for your review of the Guidance. Because we would like to issue the Guidance in final in late August, we would appreciate receiving comments by August 15, 1997. Please send your comments to Jeanette Lim of OCR. Ms. Lim can be contacted by e-mail, by telephone at 205-8635, or by fax at 260-3040.

Attachment

512197

TO : All OCR Staff

FROM : Norma V. Cantú
Assistant Secretary for Civil Rights

SUBJECT : Fairness in Testing

FAIRNESS IN TESTING: AN OVERVIEW

I disagree with the proposition that there are inherent racially based differences in the capacity of the American people to reach their full potential.

President Bill Clinton, October 21, 1994

An invalid test cannot measure merit.

Walls v. Mississippi State Dept. of Public Welfare, 542 F. Supp. 281, 311 (N.D. Miss. 1982), aff'd in relevant part, 730 F. 2d 306 (1984).

BACKGROUND

The issue of fairness in testing and other assessment practices is, at its core, a critical access to education issue. It was established as an OCR strategic plan high priority in 1993 following consultation both within and outside the Department. OCR investigators have encountered testing and assessment issues when they have addressed complaints on the subject of: the disproportionate representation of minorities in special education, the access of limited-English-proficient (LEP) children to equal educational opportunities, and desegregation, to name a few. This agency in the past has been guided on this issue by court decisions and principles established through OCR case-specific findings. There is no single document that has synthesized these decisions and findings.

OCR has developed this guidance in order to provide our attorneys and investigators with practical guidance on testing and assessment principles that lie at the core of Title VI of the Civil Rights Act of 1964 (Title VI) and Title IX of the Education Amendments of 1972 (Title IX) case law. This guidance also can be helpful in explaining to recipients the standards by which their compliance with Title VI and Title IX may be evaluated. This will better encourage voluntary compliance as well as a greater understanding of the testing and assessment parameters that guide OCR investigations.

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The centrality of the issue of fairness in testing and assessment is properly viewed as consistent with, rather than contrary to, the push for high standards -- the cornerstone of many of the Department's initiatives. OCR's focus on fairness in testing and assessment helps to challenge the assumption that minority students perform poorly because they lack the ability or motivation to reach their full potential. All students need an educational system which both expects high performance and offers real and meaningful educational opportunities. Furthermore, the fact that a recipient's use of a test is violative of Title VI or Title IX does not mean that the automatic response to remedy the problem is to eliminate the test. Depending on the facts of a given case, there are many permissible responses to correcting a violation, which include: supplementing the use of the test with other assessment measures; revising the test instrument within a reasonable period of time to address compliance concerns; substituting the test with another available instrument that more appropriately measures what is intended to be measured; increasing remedial support; and enhancing learning opportunities for students to perform well on the test.

Significantly, OCR's focus on fairness in testing and assessment does not purport to mandate in any way the content of school curriculum. OCR's authority under Title VI and Title IX does not involve setting curricula or levels of instruction for schools. OCR's role, when necessary, is to ensure that students of all races and both sexes have equal access to the curricula and quality teaching that is offered to all.

It also is not OCR's intent or mandate to ensure equal outcomes by race, national origin, or gender. Rather, the focus of OCR, as reflected in the attached Guidance developed for OCR attorneys and investigators, is on principles of fairness in testing and assessment that are designed to ensure that all students have equal educational opportunities. Fairness in testing and assessment is essential to assuring that equal opportunities to educational excellence are provided regardless of race, national origin or gender so that all students may attain high standards.

SCOPE OF THE GUIDANCE

The attached Guidance provides an overview of the use, and misuse, of tests for making high stakes educational decisions, such as those that involve: school admissions; scholarship awards; evaluation for placement in gifted and talented programs, programs for LEP students; special education programs; vocational education counseling; and diploma awards. A glossary on a number of concepts fundamental to test validation is found at Tab C. In addition, more specific guidance is available on the placement of

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minority students in special education. See Memorandum to All OCR Staff (July 6, 1995) (addressing Minority Students and Special Education).

The Guidance applies to norm-referenced and criterion-referenced tests¹ as well as professionally designed alternative forms of assessment, all of which are used for making "high stakes" educational decisions. The Guidance does not cover teacher-created classroom tests nor does it apply to modifications of tests and/or testing conditions required for the purpose of accommodating students with disabilities under Section 504 of the Rehabilitation Act or the Americans with Disabilities Act.

BASES OF THE GUIDANCE

Professional Standards

As reflected in the Guidance, OCR adheres to generally accepted professional standards for evaluating standardized tests, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education; the Code of Fair Testing Practices in Education prepared by the Joint Committee on Testing Practices; and the EEOC Guidelines on Employee Selection Procedures. At OCR's request, the Board on Testing and Assessment of the National Academy of Sciences reviewed an earlier draft of the Guidance and provided comments in writing and during several discussions. Many of the comments have been incorporated into the Guidance, including further clarification of the scope of the Guidance, explanation of concepts relating to test validation and reliability, and the discussion of cutoff scores. Their comments have helped to ensure that the Guidance is consistent with professional standards and educationally sound.

¹ Norm-referenced tests are tests used to identify an individual's performance in relation to the performance of other people in a specified group on the same test. American Psychological Association Standards for Educational and Psychological Testing (1985) (APA Standards) at p. 92. Criterion-referenced tests allow users to make score interpretations in relation to a functional performance level. APA Standards at p. 90. In other words, criterion-referenced tests are designed to measure to what degree a learner has mastered a certain skill.

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Legal Standards

The Guidance provides that when OCR investigates allegations involving discriminatory test use by a recipient, OCR may look at evidence under two separate legal theories of discrimination: disparate treatment and disparate impact. Each theory is based on settled legal principles and neither breaks any new legal ground.

A disparate treatment analysis is used by OCR to determine whether a policy or practice regarding testing is being applied differently by a recipient to an individual student or group of students of a particular race, national origin, or gender, without a legitimate, nondiscriminatory reason. Under this analysis OCR would determine, for example, whether black students and white students are being tested under different conditions or whether students with the same test scores are being treated differently by a recipient. If this is established, a recipient would have the opportunity to provide a legitimate, nondiscriminatory reason for the difference in treatment. If OCR determines that the reason is not a pretext for discrimination, the difference in treatment would be permissible under Title VI and Title IX.

Under a disparate impact analysis, OCR's focus would not be on the treatment of students, but rather on the effects of the application of a facially neutral policy regardless of whether the adverse consequences for a particular race, national origin, or gender were intended. Under a disparate impact analysis, further investigation will be triggered when the use of a test creates a significant difference in the granting or denial of benefits or opportunities on the basis of race, national origin or sex. Tests that have a disparate impact on the basis of race, national origin, or gender must be educationally necessary; otherwise, they are not permissible under Title VI or Title IX. Educational necessity requires a showing that a test is valid and reliable for the purpose for which it is being used and that there is no alternative available with less disparate impact that still serves the recipient's educational purpose. If validity and reliability have been demonstrated by the recipient, OCR has the burden of showing that an alternative is available that has less disparate impact and that would serve the recipient's educational purpose. The recipient's failure to use such an alternative would violate the civil rights statute(s) and should be remedied.

QUESTIONS NOT ADDRESSED BY THE GUIDANCE

What questions are not answered by this guidance? First and foremost, the investigative guidance, like other guidance issued by OCR, see 59 Fed. Reg. 11448 (March 10, 1993) (addressing Racial Incidents and Harassment), does not purport to define the

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kinds of cases that may be targeted for compliance reviews on this issue. Targeting decisions, made preliminarily by the enforcement offices, are based on a wide range of criteria: the degree of disparities in the provision of educational services, complaints received, information about the progress (or lack of progress) which a recipient has attempted or made over time to address a particular civil rights issue, information received from recipients or interest groups, and reasoned judgment that an array of factors merits the use of resources in a proactive review of a recipient's compliance with civil rights obligations.

Secondly, this guidance is not intended to serve as a "cookie cutter" model for all testing decisions that are made in the field. There are many types of tests -- and this guidance is limited to "high stakes" tests, as defined in the guidance. It is not intended to apply to tests, for instance, that are used to measure student or institutional advancement but for which no high stakes consequences for individual students are tied. Moreover, as with other investigative guidance, it should be read as guidance for OCR lawyers and investigators -- nothing more, and nothing less. This means the Guidance should be read as an explanation of the legal and conceptual framework needed for understanding the issues raised by challenges to testing and assessment practices. As such, the model (and pragmatic) investigative questions should be viewed as a starting point for assisting our employees with questions of great complexity. They do not define the "floor" of what must be asked any more than they define the "ceiling" of what may be asked. Those decisions, fundamentally, are best left to the OCR investigators and lawyers who are dealing with the specific cases and who know the recipients best.

Finally, and importantly, this guidance is not intended to represent any intention on the part of OCR to hold itself out as "the expert" on testing issues. Far from it, and as the Guidance explicitly recognizes, the expert judgments regarding complex determinations, e.g., validity, must be left to the educational experts on that subject.

CONCLUSION

Guidance in this area should have immediate application for OCR investigations and have a positive impact on removing artificial barriers -- based upon race, national origin, or gender -- to educational opportunities and benefits.

INVESTIGATIVE GUIDANCE

I. Introduction

When tests are used to make educational decisions, they should be used to measure students' abilities, knowledge, or qualifications, regardless of race, national origin, or gender. Civil rights concerns arise when test uses do not satisfy this standard; the result is that equal opportunity may not be a reality for many students. This guidance outlines the requirements of Federal law prohibiting misuse of tests and other assessment procedures that result in discrimination based on race, national origin, or gender. It is designed to provide a general analytical framework under Title VI and Title IX for determining the proper use of tests in the educational context.

OCR staff are encouraged to use this guidance, along with the attached Compendium of Legal and Technical Resources, as a basis for framing investigations in which test scores are used as a basis for educational decisions. Materials located at Tab A outline the statistical framework for establishing disparate impact. Materials at Tab B provide a sample approach to the collection of information on the issue of educational necessity. Tab C provides a glossary of terms relating to test validity.

In evaluating a test or other assessment procedure, it is important to consider how the test is being used. In some cases, it may be used to make a certification or selection decision (e.g., admission to a school, awarding of a scholarship, or teacher certification). In other cases, it may be used to classify students (e.g., to identify students as needing special education or special language services or as gifted and talented). In both cases, the test may be designed and/or used as just one part of a multi-component assessment process. If so, its use should be evaluated in that context.

II. Jurisdiction

In all cases, OCR must first decide whether it has jurisdiction over claims involving discriminatory use of educational tests. Under the Civil Rights Restoration Act of 1987, OCR generally has institution-wide jurisdiction over a recipient of Federal funds.

If an institution receives Federal funds, requirements of Title VI and Title IX apply to all of the academic, athletic, and extracurricular programs of the institution, whether conducted in facilities of the recipient or elsewhere. Title VI and Title IX cover the uses of property that the recipient owns and the activities that the recipient sponsors. Title VI and Title IX cover these operations, whether the individuals involved in a given activity are students, faculty, employees, or other participants and outsiders.

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~~III. Disparate Impact Analysis~~

OCR may apply a disparate impact analysis to allegations involving discriminatory test use by recipients. Under this analysis the use of any educational test which has a significant disparate impact on members of any race, national origin, or gender group is discriminatory, and a violation of Title VI and/or Title IX, respectively, unless it is educationally necessary.

In applying a disparate impact analysis, OCR staff should address the following questions:

A. Does the recipient's use of an educational test result in the significantly disproportionate denial of an educational benefit or opportunity to members of a particular race, national origin, or gender?

B. If so, does the recipient have evidence that the test is valid and reliable under professionally accepted standards for the purpose for which the recipient has chosen to use it?

C. If so, do there exist alternative forms of assessment which would substantially serve the recipient's stated purpose and are valid and reliable for that purpose, but which have less of a disparate impact on members of the race, national origin, or gender group?

Each question is discussed in more detail below. Where, based on the evidence obtained in an investigation, OCR finds that the use of a test or assessment procedure caused or contributed to a disparate impact on members of a particular race, national origin, or gender (the first question), and the test or procedure does not meet the legal standard of educational necessity (the second and/or third question(s)), OCR should conclude that there was discrimination in violation of Title VI or Title IX under this disparate impact analysis.

A. Establishing Disparate Impact

Under a disparate impact analysis, a recipient's use of an educational test that causes or contributes to a disproportionate denial of an educational benefit or opportunity to members of a particular race, national origin, or gender is sufficient information to indicate a possible failure of compliance which should be investigated further.

Addressing whether there is disparate impact requires a three-step statistical analysis. (Tab A.) OCR staff have access to statistical references, including a computer disk containing the "z" test. OCR staff also have access to published, commercially available statistical packages, such as SPSS.

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B. Establishing Educational Necessity

Once OCR has determined that there exists a possible failure of compliance through a disparate impact theory of discrimination, OCR will determine whether the recipient can establish/prove that the use of the test or assessment procedure is educationally necessary.² The use of a test or procedure which has a disparate impact on members of any race, national origin, or gender is discriminatory, and may be a violation of Title VI or Title IX, unless it is educationally necessary, *i.e.*, it is valid and reliable, and there is no alternative with less disparate impact that still meets the recipient's educational needs.

In evaluating the validity and reliability of a test or assessment procedure, OCR will rely upon generally accepted professional standards such as those described in the Standards for Educational and Psychological Testing prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education; the Code of Fair Testing Practices in Education prepared by the Joint Committee on Testing Practices; and the EEOC Guidelines on Employee Selection Procedures. All decisions as to whether a test or procedure has met professionally accepted standards will be made by experts.

A proper determination of educational necessity requires OCR to request information from the recipient concerning the testing and assessment procedure under review and the availability of suitable alternatives that have less disparate effect. During an administrative enforcement proceeding, the recipient has the burden of showing that the assessment process is valid and reliable, while OCR has the burden of showing that there are suitable assessment alternatives that have less disparate impact but still meet the recipient's educational needs.

² There are certain types of test misuse where a recipient will not be able to meet the standard of educational necessity. For example, OCR may find a violation of Title VI or Title IX if a test or other assessment procedure has a disparate impact and is clearly not being used for the purpose(s) for which it was designed. Such misuse includes the situation where a test is being used as the sole or principal criterion for making educational decisions and it was clearly not designed to be used as such. In such cases, no further analysis is required. If a recipient can show that a test or assessment procedure with a disparate impact is being used correctly, OCR must proceed with the educational necessity inquiry -- requesting additional information from the recipient about the validity and reliability of the test and, if necessary, exploring possible alternatives.

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1. Validation Standards³

Validation, generally, is a process of evaluating the degree to which a test: measures what it claims to measure; is administered in the correct manner; and leads to legitimate inferences. More specifically, a test or assessment procedure will be valid when:

- * it measures the construct (characteristic, property, skill, ability, capacity, or behavior) it was intended to measure;
- * it is administered in a correct and appropriate manner, with regard to: testing setting, testing procedure (including the qualifications of the test-giver and the manner in which the test is given), and tested sample of people (e.g., using a test validated for adults to assess children would be improper)⁴; and
- * the inferences drawn from the resulting data are correct and appropriate.⁵

A test may be valid for one educational purpose or population of students, but not valid for another. Thus, a decision by OCR regarding whether a test is valid under the circumstances of a particular case is an inherently fact- and case-specific decision.

³ The inclusion in the Guidance of a discussion of validation standards is intended to guide investigators in gathering information about available validation studies. Again, the discussion is not intended to establish new standards for determining validity, but to reflect existing professional standards. However, it should be noted that the Standards for Educational and Psychological Testing, which was published in 1985, is currently being revised. Also, the discussion does not address whether validity evidence is required for each race, national origin, and gender group that constitutes a significant portion or number of the recipient's test-taking population. This issue, when it arises, will be addressed on a case-by-case basis.

⁴ Improper test administration can also be an issue in disparate treatment, as discussed below.

⁵ Indeed, it may not be technically correct to refer to a test or assessment procedure as being valid. Rather, it is the inferences and interpretations drawn from the responses to the test or procedure that must be valid. However, for simplicity's sake, this guidance will use the more common approach of referring to the test or procedure as being valid for the purpose for which it is being used.

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There are various types of test validity evidence, including (among others) content validity, criterion validity (including concurrent validity and predictive validity), and construct validity.⁶

Criterion-related validity, the predictive form, is appropriate when a recipient is using test scores to predict students' future performance on a particular criterion or performance measure. Content validity and the concurrent validity form of criterion validity are relevant and appropriate when the educational concern is the assessment of current performance on a particular criterion or performance measure. Construct validity is an assessment of the extent to which the test is a measure of the particular construct or psychological concept (a characteristic, property, skill, ability, capacity or behavior) that the test is supposed to measure, and also, of the extent that the empirical results regarding the test are in conformity with existing theory concerning the construct.

To establish the criterion-related validity (predictive or concurrent) of a test the recipient should establish, through the use of empirical evidence, which is consistent with accepted professional standards, that the test scores are related to performance on the relevant criteria to a statistically significant degree, e.g., significant correlations. For example, a test which was designed to predict applicants' ability to earn a degree in mechanical engineering and used by a recipient to measure applicants' chances for success in a college mechanical engineering program, would be subject to predictive validity standards.

Content-related validity is implicated when a recipient is using a test to measure the acquisition of specific knowledge or academic skills. For example, a statewide proficiency test designed to demonstrate acquisition of educational information and/or skills and used as a condition for a diploma would be subject to an assessment of its content validity. To establish content validity a recipient should produce empirical evidence, consistent with accepted professional standards, of the degree to which the samples of items, tasks, or questions on a test are representative of the knowledge and skills being measured.

After determination of a test's content validity, it may be appropriate to inquire into the instructional validity related to the test. Instructional validity determines the degree to which a school provides instruction in the knowledge and skills measured by the test. A statewide proficiency test could also be subject to an instructional validity analysis.

⁶ Other types of validity are described in the Glossary at Tab C.

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Construct validity, which is the most general type of validity, is not determined in a single way or by one investigation. Rather it involves a series of studies and other procedures designed to determine whether an assessment instrument that purportedly measures a certain construct or variable is actually doing its job.

2. Establishing Validity

In appropriate cases, OCR staff will gather information relating to validation issues. Tab B provides guidance on the types of questions to ask and information to obtain regarding validity and the other aspects of educational necessity. Given the fact-specific nature of OCR's case work, these sample questions should be considered as starting points for appropriate inquiry. In most cases, these questions should be refined, modified, and supplemented based on the advice of testing and/or other education experts. Prior to requesting any validity evidence from a recipient, OCR staff should first find out if OCR already has any relevant documentation on the test or assessment procedure at issue. All decisions as to whether a test or procedure has met professionally accepted standards will be made by experts.

In evaluating the adequacy of the empirical evidence proffered by a recipient to establish that the use of a test or assessment procedure is educationally necessary, OCR will use the professionally accepted standards cited in this guidance and will additionally rely upon the recommendations of experts from within and outside the Department. The following guidelines should be considered when evaluating evidence of validity:

a. No assumption of validity. The general reputation of a test, its author, or its publisher, or casual reports of its validity are not evidence of a test's validity. OCR will not assume that a test is valid based on a test's name or descriptive labels; promotional literature about the test; data regarding the frequency of a test's use; or testimonial statements and credentials of test publishers, consultants, or recipients which have previously used the test.

A recipient may rely upon portions of a publisher's test manual as evidence of validity; however, a test manual is not presumptive evidence of validity. During the course of an investigation, there should be evidence of specific studies cited in the manual which show that the test is valid according to professionally accepted standards. These studies may be obtained

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by the recipient as a response to an OCR request for evidence of validation and need not be routinely maintained by the recipient.

b. Acceptable types of validity evidence.

Recipients may support the use of a test through validity studies of the same test conducted by the recipient, other schools, test publishers or distributors, or professional researchers. Such validity studies must show that the use of the test by the recipient is the professionally accepted equivalent to the use for which the test was validated.

c. Statistical relationships. As one part of the process of showing that a test or procedure is valid, the degree of relationship between test scores and performance criteria should be evaluated and determined. This may be done by recipients (or other researchers) using professionally accepted research and statistical procedures.

3. Establishing Reliability

Along with evidence of a test's validity, there should be evidence of a test's reliability over time. Evidence of reliability must conform to accepted professional standards. For example, where there are theoretical or empirical reasons for expecting reliabilities or standard errors of measurement to differ substantially for different populations, it is professionally accepted that the studies will include estimates for each major population for which the test is recommended. Moreover, reliability may be affected by the type of assessment procedure at issue, e.g., a standardized test versus a performance-based assessment.⁷

⁷ Performance-based assessment requires students to generate rather than choose a response. Students are required to actively accomplish complex and significant tasks, while bringing to bear prior knowledge, recent learning, and relevant skills to solve problems. Demonstrations, written or oral responses, journals and portfolios are examples of performance-based assessment. Herman, J.L., Aschbacher, P.R., & Winters, L. (1992). A Practical Guide to Alternative Assessment. Alexandria, VA: Association for Supervision and Curriculum Development.

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4. Alternative Testing and Assessment Procedures

Even if a recipient can show that a test or assessment procedure is valid and reliable, OCR may consider the recipient's continued use of the test or procedure in violation of OCR regulations if one or more testing instruments or procedures are available as an alternative to the challenged test or procedure, and if any alternative 1) substantially serves the educational purposes for which the test or procedure is used, 2) is valid and reliable for those purposes, and 3) would have a lesser disparate impact.

In evaluating the suitability of any alternatives, where the relevant method of validation is criterion-related, OCR should compare the predictive validity of those alternatives with the predictive validity of the challenged test or procedure. Where the use of a test or procedure offers only minor improvements in predictive validity over available alternatives, OCR should closely examine the test or procedure for evidence that it is necessary to achieve the recipient's purpose.⁸

C. Use of Educationally Necessary Tests or Procedures

1. Cutoff Scores.

In determining whether a test or procedure with a disparate impact is educationally necessary, OCR will look to how the test or procedure is actually used by the recipient. In some cases, a test or assessment procedure may be used without a specific passing or cutoff score. In other cases, a score may be set, either by the test developer or the test user. Standard 6.9 of the 1985 Standards for Educational and Psychological Tests states that "[w]hen a specific cut score is used to select, classify or certify test takers, the method and rationale for setting that cut score, including any technical analyses, should be presented in a manual or report." OCR will consider this information in determining whether a test or procedure is valid and reliable when used with that score.

In some cases, a recipient may use a higher score than that specified or recommended by the test developer. In such a case, it is critical to obtain the recipient's rationale for changing the score, particularly where a recipient's use of a higher score results in a greater disparate impact than would the lower score. It is not self-evident that a score of 75 will relate to better

⁸ It is good educational practice for recipients using tests or procedures that have disparate impact to inquire into alternative testing instruments or assessment procedures that would provide students with equal access to the recipient's programs and benefits.

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criterion performance⁹ than a score of 65 or 70. Because tests are often used to estimate criterion performance based on test performance, the recipient will have to show that incremental improvement in performance on the test above the cutoff score recommended by the test developer actually does translate into or predict better performance in school or on the job (e.g., if the test is used to predict success in a college mechanical engineering program, that the incremental improvement in test performance will actually translate into better performance in that program).

2. Affirmative Action

When a recipient has previously been found to have discriminated against persons on the basis of race, national origin, or gender or when the recipient is attempting to overcome the effects of conditions which resulted in limiting participation on those bases (e.g., attempting to enroll a more diverse student body), permissible affirmative action may include using test or assessment results in a different manner for members of a particular race, national origin, or gender.¹⁰

D. Remedies Under A Disparate Impact Analysis

Should a violation be identified, OCR will utilize a range of remedies to assist recipients in complying with Title VI and Title IX -- remedies which ensure equal access and promote educational excellence.

In any agreement with a recipient to remedy the effects of discriminatory test use, OCR should identify:

- 1) specific acts or steps the recipient will take to bring the recipient into compliance with the law;
- 2) the timetable for implementing each act or step; and
- 3) a specific timetable for submission of documentation.

⁹ Criterion performance is a measure of performance on some criterion, such as successful performance on the job or in an academic program.

¹⁰ Also see discussion of disparate treatment below, as to how affirmative action can be a legitimate nondiscriminatory reason for using a test or procedure differently based on race, gender, or national origin.

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All agreements should be crafted with a view toward effective monitoring, and permit flexibility to assist recipients in both complying with civil rights statutes and meeting their educational goals.

Examples of remedial efforts may include, but are not limited to, the following provisions. In an agreement for corrective action, OCR may wish to require further evidence of a test's or procedure's validity for a particular race, national origin, or gender, if the use of the test or procedure causes a disparate impact and is not, at the time of the investigation, fully supported by the required evidence of validity. Where appropriate, a corrective action agreement may include the continued use of the test or procedure in conjunction with other criteria. OCR may require a recipient that has not previously considered using additional testing instruments or assessment procedures as an alternative to the test or procedure that has been found to violate Title VI or Title IX to implement alternatives that 1) substantially serve the educational purposes for which the challenged test or procedure is used, 2) are valid and reliable for those purposes, and 3) have a lesser disparate impact. Additionally, there may be cases where OCR may also require complete suspension of the use of a test if a less discriminatory alternative is available, or if a recipient has shown bad faith in the use, or justification of the use, of a test. Also, where appropriate, a corrective action agreement may include providing students with learning opportunities to permit them to master material covered by a test.

IV. DIFFERENT TREATMENT ANALYSIS

If warranted by the nature and scope of the allegations or evidence, OCR will undertake a different treatment analysis, as described below, to determine whether the recipient administered a test or assessment procedure differently or used scores differently for students of a particular race, national origin, or gender, without a legitimate, nondiscriminatory reason.

Tests and assessment procedures must be administered and scores used in the same manner regardless of race, national origin, or gender. Even if a test or procedure is supported by sufficient evidence of educational necessity, a recipient may still be in violation of Title VI and/or Title IX if the test or procedure is administered differently or the scores are used differently for students of a particular race, national origin, or gender without a legitimate, nondiscriminatory reason.

A different treatment analysis can be pursued on a class-wide or individual basis. A class-wide pattern and practice approach will be more effective than an individual approach in identifying systemic problems. The pattern and practice case begins with a statistical demonstration similar to the one that begins a

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disparate impact case. However, if this disproportion is not the result of the application of a neutral policy, procedure, or practice, it may be evidence of a pattern and practice of different treatment and the analysis discussed below should be followed.

In applying this different treatment analysis, OCR staff should address the following questions:

1. In the administration of a test or procedure or in the use of scores for the granting or denial of an educational benefit or opportunity, did a recipient treat an individual or group differently than another individual or group, where they are similarly situated except for their race, national origin, or gender?
2. Did the circumstances of the test/procedure use provide a legitimate, nondiscriminatory reason for the different treatment?
3. Was the reason given by the recipient actually a pretext for discrimination?

Where, based on the evidence obtained in the investigation, OCR finds that a recipient administered a test or assessment procedure or used scores differently based on the race, national origin, or gender of test-takers, without a nondiscriminatory, nonpretextual reason, OCR may conclude there was discrimination in violation of Title VI or Title IX under the different treatment analysis.

On the other hand, if OCR finds that the reason for the different treatment was, e.g., 1) the provision of testing accommodations or auxiliary aids to qualified individuals with disabilities as required by Section 504 of the Rehabilitation Act of 1973 or Title II of the Americans with Disabilities Act of 1991; or 2) voluntary or remedial affirmative action undertaken in accordance with this guidance and the regulations that implement Title VI and Title IX, OCR may find that the recipient had a legitimate nondiscriminatory reason for the different treatment and may find no violation under this theory.

V. ESTABLISHING A VIOLATION OF TITLE VI BASED UPON A RECIPIENT'S USE OF A TEST OR ASSESSMENT PROCEDURE AFTER A FINDING THAT A RECIPIENT OPERATED A DUAL SYSTEM

The use of any educational test or assessment procedure may be a violation of Title VI if its use is a vestige of the previously segregated system -- i.e., it is a policy and practice traceable to the prior system. Additionally, the use of any test or procedure that, in reality, perpetuates the effects of previous discrimination may violate Title VI. Recipients that have operated dual systems and have not been declared unitary have an

Page 12 - Investigative Guidance

obligation to ~~dismantle their prior de jure segregated systems~~. Such recipients have an obligation to identify, consider and implement less discriminatory criteria consistent with sound educational policy, to the extent practicable. Once it is established that a test or procedure is traceable to prior de jure segregation, the recipient must demonstrate either (1) that the test or procedure has no current segregative effects, or (2) that there are no less segregative alternatives to the test or procedure that are practicable and educationally sound.

Preliminary Injunction Denied in High Stakes Testing Case in North Carolina. On August 29, the United States District Court for the Eastern District of North Carolina refused to grant a preliminary injunction against a local school district policy which requires all students in grades 3 through 8 to achieve a specified score on the North Carolina state reading and math tests before they can be promoted to the next grade. Approximately 480 students have been retained as a result of the policy, which had been challenged on behalf of the NAACP Legal Defense Fund and parents of 14 of the students affected. In denying relief, the court found that the plaintiffs were "less than likely" to prevail on the merits of their claim. Department of Education staff understands that the school district is adding additional measures of student achievement for promotion purposes.

Please send a
copy FYI
me to Elena from
Thank.

✓ AB 9/8

Court backs Johnston's pupil-retention policy (8/30/97, The <http://search.nando.net/plweb-cgi/...2019960301%3C%3Ddate%3C%3D1997090>:

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THE NEWS & OBSERVER
Saturday
August 30, 1997

N.C. | NEXT STORY

Court backs Johnston's pupil-retention policy

Parents fail in their quest for a preliminary injunction that would have forced the system to promote students who failed end-of-grade tests.

By MARTHA QUILLIN, Staff Writer

In a preliminary ruling, a federal court has upheld a Johnston County school policy that held back about 480 students this year because they could not pass end-of-grade tests.

U.S. District Judge Terrence W. Boyle found no basis on which to keep the school system from enforcing the policy -- first used during the 1995-96 academic year -- until a suit challenging the rule is resolved. Boyle said that a group of parents and civil rights activists who filed the suit have a "less than likely" chance of winning their case.

The group had asked for a preliminary injunction against the policy, which they say discriminates against minority and disabled students and misuses a test meant to measure the performance of schools, not individual students.

"We're pleased," said Dr. Jim Causby, schools superintendent, after learning of the ruling Friday afternoon. "We were confident it would probably go that way, and we're pleased."

In denying the request for the preliminary injunction, Boyle doubted claims of irreparable harm made by the NAACP Legal Defense and Education Fund; Educate our Children, a parents' coalition; and the parents of 14 unidentified children who initially failed the tests.

The group had argued that students retained in grade because of the testing policy would suffer by being a year late in starting college, careers or family. In addition, they said, the students would develop low self-esteem and negative attitudes toward school and would be less likely to succeed academically.

The judge rejected the claims.

"Besides the highly speculative and distant nature of these arguments," Boyle wrote, "they suffer from the additional infirmity of ignoring that Policy 842 is designed to help the retained students: A student who is not promoted is given what is, in effect, a remedial year which should allow the student to catch up on the skills that he is lacking and perform better in the future."

On the other hand, the judge said, issuing an injunction in the case would force the scrambling of nearly 500 students who have just begun a new academic year. Doing so, Boyle said, would be disruptive to the school system and would cause teachers and administrators to lose credibility.

But the most severe consequence, the judge found, "would be the effect of having a carefully engineered promotion/retention policy superseded by a federal court, outweighing the policy

Court backs Johnston's pupil-retention policy (8/30/97, The <http://search.nando.net/plweb-cgi/...2019960301%3C%3Ddate%3C%3D1997090>:

decisions made by an elected school board in a public deliberative process."

However, Melinda Lawrence, an attorney for the parents involved, said part of the problem all along was that some parents felt left out of the process. While the school board discussed Policy 842 -- also called the Student Accountability Policy -- in open meetings, many parents said they were unaware of it until they found their children were in danger of failing.

The testing policy is Johnston County's response to new state requirements that all schools demonstrate they are teaching a set curriculum of basic skills.

Students who have difficulty with those skills are supposed to be identified early and given remedial help so they will be able to pass standardized tests at the end of the academic year. Those who don't pass are tutored and given the test a second time. If they fail then, they have the option of attending summer school and taking it a third time in the hope of passing or opting out of summer school and repeating a grade.

High school students take similar tests in five core classes.

Any student who fails the test a third time but received average or better grades during the school year can still be promoted if the principal and teacher agree the student has mastered the material.

Other school systems in the state have similar policies and are watching to see what happens in Johnston.

When the lawsuit was filed, parents noted that historically, students from other racial groups have not performed as well as white students on standardized tests. In addition, parents said, students with learning disabilities and other special needs were not always given the extra time or quiet accommodations they needed to perform well on standardized tests. As a result, students in both groups would be more likely to be held back under the policy, they argued.

The judge said he found no evidence of any discrimination.

However, as a result of the suit, both the parents and the school system say the policy has been clarified considerably, making it easier for teachers and principals to understand and uniformly apply. Especially important, both sides say, is the process of identifying at-risk students early, getting appropriate help for them, and notifying parents.

"We're disappointed," at being denied an injunction, Lawrence said. "But we're very happy with the changes that have been made in the policy in response to the lawsuit."

"There is still an over-reliance on the test and we are still particularly concerned that the policy is being arbitrarily and inconsistently applied. A lot of kids who are not going to be well served by being retained are being retained, even under the revised policy. But it is infinitely better than it was."

Also as a result of the lawsuit, and because of the stricter standards for advancement, parents have become more involved in the schools and students are working harder, Causby said. Johnston County has long struggled with the problem of how to keep students in school once they reach age 16 if they aren't performing well. In the past, those students knew they could find jobs in farming if they grew frustrated with school. Now, they may also be tempted by service and construction jobs in the fast-growing county.

The best way to lower the county's slightly higher-than-average

dropout rate, educators and parents say, is to help students perform at grade level from the start.

School officials and parents who have sued them agree they are all working toward that goal, and say they simply disagree over how to get there.

Joseph Avery, a member of the education committee of the Johnston County chapter of the NAACP, said the groups involved will go ahead with the lawsuit over the testing policy. In the coming months, attorneys will be taking depositions about how the policy is applied from one school to the next.

Staff writer Glenna B. Musante contributed to this report.

Martha Quillin can be reached at 829-8989 or marthaq@nando.com

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NEWS & OBSERVER**

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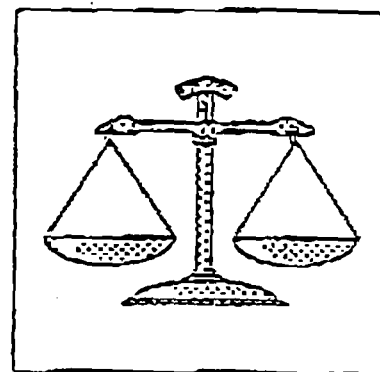
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:97-CV-587-BO(2)

ERIK V., et al.,
Plaintiffs,
v.
DR. JAMES P. CAUSBY, et al.,
Defendants.

ORDER

DAVID W. DANIEL, CLERK
U.S. DISTRICT COURT
EAST. NO. CAR.

AUG 29 1997

FILED

This motion is before the Court on Plaintiffs' motion for a preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure.

BACKGROUND

Plaintiffs, students in the Johnston County Schools and their parents, brought suit challenging the Johnston County Board of Education's implementation and application of Board Policy 842, the Johnston County Student Accountability Policy (hereinafter, "Policy 842"). Policy 842 provides that students in grades three through eight who do not attain a designated score on a state-developed standardized test will be retained in grade.¹ Plaintiffs contend that the use of end-of-grade tests to make promotion decisions violates various federal and state constitutional and statutory rights. Policy 842 was instituted in the 1996-97 school year and Plaintiffs now seek a preliminary injunction to prevent the

¹ Policy 842 also provides that high school students not scoring above specified cutoff scores be denied course credit in certain courses. Such students may receive credit for these courses by successfully completing a summer school course, however. Because the summer school program has already been completed, plaintiffs enrolled in high school would not benefit from the preliminary relief being sought in the present motion.

Johnston County Board of Education from applying the policy to prevent their promotion for the 1997-98 school year.

FACTS

The Johnston County Board of Education began developing Policy 842 in 1995 to address a perceived performance deficit on the part of the students of Johnston County Schools. The Board of Education considered the policy at its monthly public meetings in March through June of 1996, and adopted it in June 1996.

The policy provides that students in grades three through eight who fail to reach Achievement Level III during the end of year administration of the end-of-grade tests developed by the State of North Carolina will be retained. Students who do not score at Level III on the first administration of the test are provided with a brief remediation and retested. If a student scores only at Level I on the retesting, he is required to attend summer school, which is also optional for those students attaining Level II on the retest. All of those students are retested a third time and are promoted if they score at Level III.

If a student scores below Level III but has earned A, B, or C grades on grade-level work during the school year, the teacher and principal are required to review the student's work to determine whether he or she is performing at grade level notwithstanding the end-of-grade test scores. If they believe the student is performing at grade level, they must seek a waiver of the policy from a committee of other educators convened for this purpose. If the teacher and principal decide that a waiver would not be

appropriate, the parent may appeal to the principal for reconsideration. Teachers were required to notify parents by the end of the first semester if students were at risk, and to offer remediation. Administrators explained the new policy to the parents during five open meetings held in the Spring of 1997, and Superintendent James Causby published an explanation of the policy in local newspapers.

Plaintiffs brought the instant action on July 28, 1997, requesting the Court to enjoin application of Policy 842. Plaintiffs request relief on the basis of their asserted due process and equal protection rights under the Fourteenth Amendment of the United States Constitution; of their asserted rights under Title VI of the Civil Rights Act of 1964; and of various rights under the North Carolina Constitution and statutes. On August 1, 1997, Plaintiffs moved for a preliminary injunction pending disposition of the case on its merits. This Court heard the parties' arguments at a hearing on the motion on August 14 and 18, 1997.

DISCUSSION

"[A] preliminary injunction is an extraordinary remedy, to be granted only if the moving party clearly establishes entitlement to the relief sought." R Hughes Network Systems, Inc. v. Interdigital Communications Corp., 17 F.3d 691, 693 (4th Cir. 1994) (quoting Federal Leasing, Inc. v. Underwriters at Lloyd's, 650 F.2d 495, 499 (4th Cir. 1981)). The Fourth Circuit standard for awarding interim injunctive relief is the "balance-of-hardships" test. Blackwelder

Furniture Co., Etc. v. Seilig Mfg. Co., Inc., 550 F.2d 189, 196 (4th Cir. 1977); Direx Israel, Ltd. v. Breakthrough Medical Corp., 952 F.2d 802, 811 (4th Cir. 1991).

Under this test, the court balances the harm or injury imposed upon the plaintiff if relief is denied against the harm to the defendant if the relief is granted. On the basis of this balancing the court then "determine[s] the degree by which a 'likelihood of success' on the merits must be established before relief may issue." Direx Israel, 952 F.2d at 811. Thus, a "substantial discrepancy in potential harms would have to be found to favor a party whose potential for success on the merits was no better than even," while a smaller discrepancy may suffice when that party has a strong probability of success on the merits. Faulkner v. Jones, 10 F.3d 226, 233 (4th Cir. 1993); Blackwelder, 550 F.2d at 195. Finally, the court must consider the public interest.

The Blackwelder court emphasized that the two more important factors in this four-part test are the probability of irreparable injury to the plaintiff and the likelihood of harm to the defendant. Fourth Circuit courts have consistently reaffirmed this principal. Rum Creek Coal Sales, Inc., v. Caperton, 926 F.2d 353, 359 (1991); Direx Israel, 952 F.2d at 812. The Fourth Circuit also imposes upon the plaintiff the burden of establishing that the four factors support granting the injunction. Direx Israel, 952 F.2d at 812. This burden is especially heavy where, as here, the plaintiff is praying for injunctive relief that would require this Court to recognize a novel constitutional right: here, the right to

promotion from one school grade to another.

This Court begins its analysis of whether Plaintiffs carry their Blackwelder burden by noting that the Fourth Circuit has specifically cautioned that federal courts have no business substituting their judgment for that of the local school board when it comes to qualitative achievement standards for promotion: "Decisions by educational authorities which turn on evaluation of the academic performance of a student as it relates to promotion are peculiarly within the expertise of educators and are particularly inappropriate for review in a judicial context." Sandlin v. Johnson, 643 F.2d 1027, 1029 (4th Cir. 1981) (citing Board of Curators of University of Missouri v. Horwitz, 435 U.S. 78, 90-91, 98 S. Ct. 948, 955, 55 L.Ed.2d 124 (1978)). The Sandlin court held that denying students promotion based on their failure to attain certain reading levels, as measured by a standardized reading test, did not implicate any constitutional rights.

At this stage of the instant litigation the Court need not reach the merits of Plaintiffs' complaint; it need only consider whether the Plaintiffs are entitled to the "extraordinary remedy" of a preliminary injunction. The Sandlin decision, however, implicates the "likelihood of success" prong of the Blackwelder test, reducing Plaintiffs' chances of succeeding on the merits to the "no better than even" level. Faulkner, 10 F.3d at 233. Plaintiffs are thus required to show a substantial imbalance of harms in their favor to prevail on this motion.

The "likelihood of irreparable harm to the plaintiff" is the

first factor in this analysis. This is the natural place to begin because, as the United States Supreme Court has acknowledged, "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." Sampson v. Murray, 415 U.S. 61, 88, 94 S. Ct. 937, 952, 39 L.Ed.2d 166 (1974) (quoting Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-07, 79 S. Ct. 948, 954-55, 3 L.Ed.2d 988 (1959)). Plaintiffs argue that they will be irreparably harmed because their constitutional rights are being violated and that all constitutional violations are irreparable. This argument is, of course, inextricably linked to the Plaintiffs' likelihood of success on the merits because if they do not succeed on the merits they will not suffer any violation of their rights at all. And, as discussed above, the Plaintiffs do not seek redress for a violation of a clearly defined constitutional right; instead, they seek to fashion a novel constitutional right to promotion.

Plaintiffs also attempt to argue that they will suffer irreparable harm if they are retained in grade because they will complete school a year later in the future and thus lose a year of opportunity to begin a career, to attend college, or to start a family. Additionally, Plaintiffs contend that retention is likely to affect them in a variety of other, unquantifiable ways, such as low self-esteem, a negative attitude about school, and a smaller chance of succeeding in school. Besides the highly speculative and distant nature of these arguments, they suffer from the additional infirmity of ignoring that Policy 842 is designed to help the

retained students: a student who is not promoted is given what is, in effect, a remedial year which should allow the student to catch up on the skills that he is lacking and perform better in the future. Furthermore, a student can only be retained once during his school years, and even then only after two successive attempts at remediation and retaking the test. Plaintiffs have not carried their burden of showing a high likelihood of harm to them should this preliminary injunction not issue.

The other side of the balance is the likelihood of harm to the defendant if the provisional relief is granted. Direx, 952 F.2d at 812; Blackwelder, 550 F.2d at 195. The harms that the Johnston County schools would suffer if this motion were granted are severe and legion. The most severe consequence would be the effect of having a carefully engineered promotion/retention policy superseded by a federal court, outweighing the policy decisions made by an elected school board in a public deliberative process. The administrators and teachers in the Johnston County schools would also suffer a lapse of credibility from the sudden overturning of a policy they have been enforcing in their classrooms, as well as from the disruptive effect of having students deemed unready for promotion being mixed in with others ready for the challenges of a new grade. Thus, the balance of harms here clearly favors not granting the requested provisional relief, making it incumbent on Plaintiffs to show a high likelihood of success on the merits.

As discussed above, however, Plaintiffs petition this Court to enforce heretofore unrecognized constitutional rights. This,

combined with the federal courts' traditional reluctance to replace their judgment for that of democratically elected state and local institutions, makes Plaintiffs' chances of success on the merits a less than likely outcome. Plaintiffs have failed to demonstrate the elements of a prima face case based on federal constitutional or statutory grounds.

To the extent that substantive due process rights exist and can be enforced, a plaintiff must establish that a governmental policy bears no rational relationship to the furtherance of a legitimate governmental interest where, as here, no grounds for strict or intermediate scrutiny exist. The inquiry is the same with regard to rights under the Equal Protection clause of the Fourteenth Amendment. Where individuals are classified, not according to race, ethnicity, nationality, or gender, but simply according to "characteristics relevant to interests the state has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 441-42, 105 S. Ct. 3249, 3255, 87 L.Ed.2d 313 (1985).

A county school board has an indisputable interest in implementing its own policy regarding promotion of students based on qualitative achievement standards. A "classification" based on

students' scores on standardized test is surely the paradigmatic situation for application of rational basis review. As the Fourth Circuit said, reviewing the promotion/retention policy of the school district in Sandlin: "Nor is public education a right which would trigger strict scrutiny of claims of denial of equal protection. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 35-40, 93 S. Ct. 1278, 1297-1300, 36 L.Ed.2d 16 (1973). Thus, in reviewing the equal protection claim, the only question . . . is whether the classification by the governmental entity which is at issue here is rationally related to a permissible governmental end."

And, just as surely, the Johnston County Board of Education has chosen a rational means, the end-of-grade test, to foster a legitimate end, encouragement of academic achievement. These conclusions are, of course, subject to being disproved on the facts, but Plaintiffs, at this stage, have failed to prove a high likelihood of success on such argument.

As for Plaintiffs' argument that their procedural due process rights have been violated, such a violation requires the deprivation of life, liberty, or property without due process of law. U.S. Const. Amend. XIV. In the instant case, Plaintiffs have failed to establish at this stage that there is any property right in promotion that triggers the requirements of due process. See Hester v. Tuscaloosa City Bd. of Ed., 722 F.2d 1514, 1516 (11th Cir. 1984) (citing Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972)), to support the proposition that

there is no property right in school promotion).

Plaintiffs similarly fail to establish their likelihood of success on their federal statutory claim. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, prohibits "discrimination under any program or activity receiving federal financial assistance" (1994). While litigants under Title VI need only show the disparate impact of the challenged policy, Guardians Ass'n. v. Civil Serv. Comm'n, 463 U.S. 582, 103 S. Ct. 3221, 77 L.Ed.2d 866 (1983), these Plaintiffs have failed to make a prima facie showing that minorities suffer more harshly than others under Policy 842. Thus, Plaintiffs have failed to show the high likelihood of success on the merits of their federal claims² required to counter their failure to establish that the balance of prospective harms favors granting a preliminary injunction.

Finally, consideration of the public interest prong of the Blackwelder inquiry militates against granting the requested relief. There is a strong democratic interest in our society in deferring to the policy decisions made by our duly elected public bodies. This is bolstered by the above-referenced principle of

² As for plaintiffs numerous claims based on the North Carolina Constitution and North Carolina statutes, the Court declines to address the probability of success on their merits. See Drabant Enterprises, Inc. v. Great Atlantic & Pacific Tea Co., Inc., 688 F.Supp. 1567, 1576 (D. Del. 1988) (declining to reach the probability of success of plaintiffs' state law claims in denying motion for preliminary injunction); Artamide v. Grandlite Design and Manufacturing Co., Ltd., (S.D.N.Y. 1987) (same). If plaintiffs are unable to establish their predicate federal claims, their state claims may be remanded to state courts. United Mine Workers v. Gibbs, 383 U.S. 715, 726-27 85 S. Ct. 1130, 1139, 16 L.Ed.2d 218 (1966).

federalism, under which federal courts are behooved to tread lightly upon the domain of state and local governments. As the Supreme Court cautioned in Epperson v. Arkansas: "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities." 393 U.S. 97, 104, 89 S. Ct. 266, 270, 21 L.Ed.2d 228 (1968).

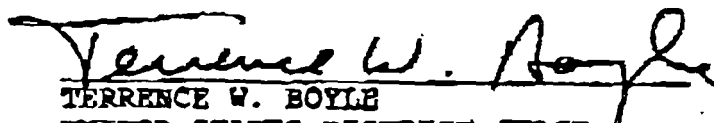
Plaintiffs have failed to satisfy any of the prongs of the Blackwelder inquiry, and have thus failed to convince the Court at this stage of the litigation that a preliminary injunction should issue.

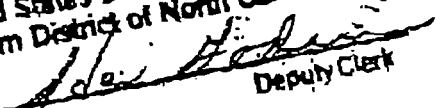
CONCLUSION

For the foregoing reasons, Plaintiffs' motion for preliminary injunction is DENIED.

SO ORDERED.

This 28th day of August, 1997.


TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

certify the foregoing to be a true and correct
copy of the original
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina
By  Deputy Clerk



Jennifer_Davis @ ed.gov

08/30/97 08:49:00 PM

Record Type: Record

To: Michael Cohen, William R. Kincaid

cc:

Subject: North Carolina

As Bill and Mike know I did get through to one of Governor Hunt's staff last week and basically found out that the Governor will not even be getting involved or even be commenting on the case--it is a local decision/issue.

I have other contact names and called Tom Houlihan who used to be the superintendent in the county involved in the case, but he did not return my call on Friday. I will call again on Tuesday.

Mike C. and I have agreed that it would be inappropriate to ask for a copy of the test at this time. Instead, I am asking for any public documents about the case that could shed light on the alignment issue and other issues.

I'll be back in the office on Thursday, but hope to have more materials by then.

Jennifer



Jennifer_Davis @ ed.gov

09/04/97 02:41:00 PM

Record Type: Record

To: Michael Cohen, William R. Kincaid

cc:

Subject: North Carolina Case

I finally reached Tom Houlihan from Governor Hunt's office and former Superintendent of Johnston County. Evidently two days ago the federal judge ruled that the County's policy was reasonable and he will not take the case up.

Unless the plaintiffs decide to take additional steps, the case may be over.

A few issues for you to know:

The County has taken steps to ensure that the test in the future is not the only measure of student achievement used for promotion purposes.

Tom does have concerns about how the test was used because of the State's original purpose of developing the test--which was more to measure school and school system performance.

Hope this helps. I assume we will not take next steps unless the case is pursued.

Jennifer



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

FAX: 202-401-5391

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Jennifer_Davis @ ed.gov

08/24/97 07:04:00 PM

Record Type: Record

To: Michael Cohen, William R. Kincaid

cc:

Subject: How to Reach Me Next Week

I can be reached next week in Massachusetts at (617)723-0331. I will be on vacation, but if you NEED to reach me feel free to call. (I actually have brought some work with me (booo)).

Have a good week and to my "testing" friends I'll expect you to have everything under control by the time I get back (smile)! Good luck!

Trish Brennan will be trying to stay on top of all my stuff so call her if you need help--205-8511.

Thanks.
Jennifer

**NAACP Challenge to Use of North Carolina Statewide
Test as a Local School District Promotion Gate**

August 6, 1997

The NAACP Legal Defense Fund has filed a lawsuit in federal District Court against the Johnston County School District in eastern North Carolina, challenging a year-old policy which requires all students in grades 3 through 8 to achieve a specified score on the North Carolina state reading and math tests before they can be promoted to the next grade. The case is considered one of the nation's first federal court challenges involving state education standards and high stakes testing.

Under the contested policy, if a student does not pass the reading and math tests the first time, the exam is given a second time a week later. If a student fails the second test, depending on the score, he or she may, and in some cases, must, attend summer school, which is followed by a third administration of the test. If a student fails the third round, the student must repeat the grade, unless he or she succeeds in an appeal. The policy also requires high school students to meet target scores on English, math and social studies exams in order to get course credit for those subjects.

On the first two rounds of the grades 3-8 test this year the passing rates were approximately as follows:

	ROUND 1	ROUND 2
READING	[75%]	80%
MATH	85%	89%

The third round is yet to be given. Approximately 2,000-3,000 of 6,600 students in grades 3-8 did not pass at least one of the tests the first time around.

The federal suit was brought on behalf of the parents of 14 black, Hispanic, and white students who failed the tests. The parents allege that the tests, which are given statewide, violate the equal protection rights of minority students, who disproportionately obtain low scores. The suit also alleges that the district's test procedure violates the equal protection rights of special education students by failing to provide accommodations, like extra time.

The plaintiffs challenge what they claim is the district's reliance on the test as the sole criterion for promotion, regardless of how well students perform in classes during the school year. The NAACP's challenge is based in part on the argument that the North Carolina state tests were designed to measure how well *schools and school systems* are teaching the state mandated curriculum, but are not a valid measure of *individual student performance*.

In its defense, the District states that it began early in the year trying to identify students at risk of failing the test and that it offered remedial programs, including before- and after-school tutoring and Saturday programs. The District also says that its policy allows students who earn a C or

better in a course during the school year to appeal a nonpromotion decision, with principals and teachers making a recommendation based on a review of the student's work for the year, and a final decision made by a district committee. Moreover, the district has recently indicated that the nonpromotion policy can be waived for children with disabilities who do not pass the test (although another complaint voiced by the NAACP and local groups is that appeals and waivers have been handled in a haphazard manner). Overall, the District claims, students have shown considerable improvement on proficiency exams, and minority students have made the most improvement on the second round of the tests.

As a part of the suit, the NAACP has sought a temporary restraining order against using the policy to prevent any student from advancing to the next grade when school starts later in August. The first hearing in the case has been scheduled for next week. Note that the Department of Education's Office for Civil Rights is not involved in this case.

Sources: 14 Children in North Carolina Sue a District Over Testing Policy, New York Times (8/6/97); Johnston Test Troubles Linked to Confusion, Raleigh News and Observer (8/5/97); Johnston Schools Sued Over Testing, Raleigh News and Observer (8/1/97); Office for Civil Rights, 8/6/97.



William R. Kincaid
08/11/97 06:44:13 PM

Record Type: Record

To: Laura Emmett/WHO/EOP

cc:

Subject: Tomorrow's meeting--expected attendees

Education

Office of the Secretary

~~Leslie Thornton -- Chief of Staff~~ *very Relish*

OCR

Art Coleman -- Deputy

Kellie Saunders -- Chief of Staff

General Counsel's Office

Felix Baxter -- Deputy

Susan Craig -- Equity

Phil Rosenfelt -- K-12 programs

Intergovernmental

-- possible -- Jennifer Davis -- Deputy (has worked extensively with Mike C. on standards)

Note: Mike Smith is on vacation, and nobody appropriate in his office is available.

Justice

David Ogden

Ian Gershengorn

Isabelle Pinzler

William Yeomans

White House

OPL

Bill White

Political Affairs

Minyon Moore

Counsel's Office

Dawn Chirwa

Bill Marshall

Rob Weiner

Fax to Bill Kincaid

3 pages

456-7028

From mizsy

1. Los Angeles Times

■ 08/11/97; Edition: Home Edition; Section: Foreign Desk; Page A-5

WASHINGTON OUTLOOK

Call for Academic Standards Could Face Test From Civil Rights Law

By RONALD BROWNSTEIN

WASHINGTON — President Clinton's education agenda revolves around a simple proposition: that all students should be held to uniform standards through stiff national tests. "We must demand high standards of every student," he insists.

Meanwhile, his Education Department seems to be moving toward an interpretation of civil rights law that could challenge the entire concept of objective academic standards as a threat to racial equity.

Even for a president accustomed to accommodating contradiction, that's a daunting chasm. The time may be coming when Clinton has to choose between common standards in education and a civil rights community uneasy about their implications. It's an either/or

question for a president who usually prefers multiple choice.

"This administration has never dwelled too long on philosophical clarity and consistency in anything it has done," said Chester Finn, an education expert at the conservative Hudson Institute. "But you would think one of these would eventually have to yield."

This conflict entangles the priorities of divergent decades. Education reformers are trying to extract higher performance from students by subjecting them to tests with teeth. About half the states now require students to pass standardized exams to graduate from high school. At the cutting edge, Chicago now requires students to pass tests for promotion from the third, sixth, eighth and ninth grades.

But this standards movement is approaching a collision with the spreading reach of the "disparate impact" doctrine—a cornerstone of early 1970s civil rights law. Disparate impact holds that seemingly race-neutral standards—like tests—can violate the federal civil rights statutes if they have a disproportionate effect on minorities or women.

Disparate impact analysis has been applied primarily to hiring decisions; typically, an employer might be compelled to drop a requirement for high school diplomas if that standard tends to exclude minorities and he can't demonstrate a clear business necessity for demanding it.

Now, however, the Education Department is hinting at widening the use of disparate impact analysis in education. Last month—in response to a petition from a coalition of civil rights groups—the department agreed to investigate the University of California's process for admitting students to its three law schools now that the state regents have banned the use of racial preferences.

With preferences barred, the UC law schools rely primarily on grades and test scores. Since minority acceptances have plunged at the most exclusive campuses this year, the civil rights groups argue that those traditional academic standards are having a "discriminatory effect" and thus violate the civil rights laws.

In a recent interview with David Savage of *The Times*, Judith Winston—until last week the Education Department's chief lawyer and now the director of Clinton's racial advisory panel—wouldn't comment directly on the California investigation. But, echoing the groups' complaint, she said the government could challenge universities basing admission on "race-neutral criteria" such as grades and test scores if the use of those measures reduces minority opportunities and cannot be justified as an educational necessity. In other words, holding all applicants to the same standard could still constitute discrimination if it produces racially unequal results.

That argument has enormous implications not only for higher education, but the very push for standards in primary and secondary education that Clinton has championed. If the Education Department rules that objective educational standards can violate civil rights law because they disadvantage minority students, the door would be flung open for racial challenges to the proliferating use of tests for graduation and promotion in lower grades.

Already, civil rights groups are watching with suspicion the higher failure rates for minority students—especially those from low-income areas—in many communities that have imposed high-stakes testing. Last week, the NAACP Legal Defense Fund sought an injunction against a North Carolina county that has required students to pass tests to advance to the next grade. More lawsuits are likely as more communities adopt tests with consequences.

So far, the Education Department has moved cautiously in this area. It hasn't prevented any states from imposing tests. But in 1994, it exhaustively investigated whether Ohio's new high school graduation exam had a "disparate impact" on minorities, before finally approving the test—amid sharp criticism of the probe from House Republicans. Last month, the department negotiated an agreement that allowed Texas to continue its testing program, but required greater monitoring to ensure that minority students were being taught the material on the exams.

Civil rights groups are justified in demanding such protection—and careful examination of the tests that states are imposing. All levels of education can rely too heavily on standardized tests; as more communities condition promotion or graduation on an exam, minority parents are unlikely to be the only ones with second thoughts. "These tests shouldn't be the sole determinant of whether a student has mastered a particular area," said Stephon Bowens, an attorney in the North Carolina case.

But the answer can't be to repudiate standards as a form of discrimination: To do so is to declare society incapable of effectively educating minority and poor children.

Ultimately, closing the racial gaps in educational performance will require a

reconstruction of social order, economic opportunity and family structure in America's most blighted neighborhoods. More immediately, it calls for aggressive school reform and greater efforts to reclaim the students drifting behind—like the \$50 million Chicago has poured into summer school this year for the nearly 44,000 kids who flunked its promotion tests.

But in graduate school admissions and grade school testing alike, attacking high academic standards amounts to shooting the messenger. The standards "put the spotlight on the problem," said Chris Pipher of the Education Commission of the States. "Now the question is, what are we going to do about it?" ■

THE WHITE HOUSE
WASHINGTON

August 11, 1997

100-111111-10000

8-17-97

MEMORANDUM TO: THE PRESIDENT
FROM: RAHM EMANUEL
SUBJECT: LOS ANGELES TIMES ARTICLE ON ACADEMIC
STANDARDS

This is the standards article I mentioned in my weekly report. I believe that Ronald Brownstein does an excellent job of framing the education standards debate. I thought that you would find the article interesting.

CC Sec. Riley
Thurman
BReed

Mike/Bill/Tanya
Tom/Mary/Tom

FYI.

Elena

(PS - only the underlining
on the 2nd page is
The President's)

National Perspective

Call for Academic Standards Could Face Test From Civil Rights Law

RONALD BROWNSTEIN

WASHINGTON OUTLOOK

WASHINGTON—President Clinton's education agenda revolves around a simple proposition: that all students should be held to uniform standards through stiff national tests. "We must demand high standards of every student," he insists.

Meanwhile, his Education Department seems to be moving toward an interpretation of civil rights law that could challenge the entire concept of objective academic standards as a threat to racial equity.

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"This administration has never dwelled too long on philosophical clarity and consistency in anything it has done," said Chester Finn, an education expert at the conservative Hudson Institute. "But you would think one of these would eventually have to yield."

This conflict entangles the priorities of divergent decades. Education reformers today are trying to extract higher performance from students by subjecting them to tests with teeth. About half the states now require students to pass standardized exams to graduate from high school. At the cutting edge, Chicago now requires students to pass tests for promotion from the third, sixth, eighth and ninth grades.

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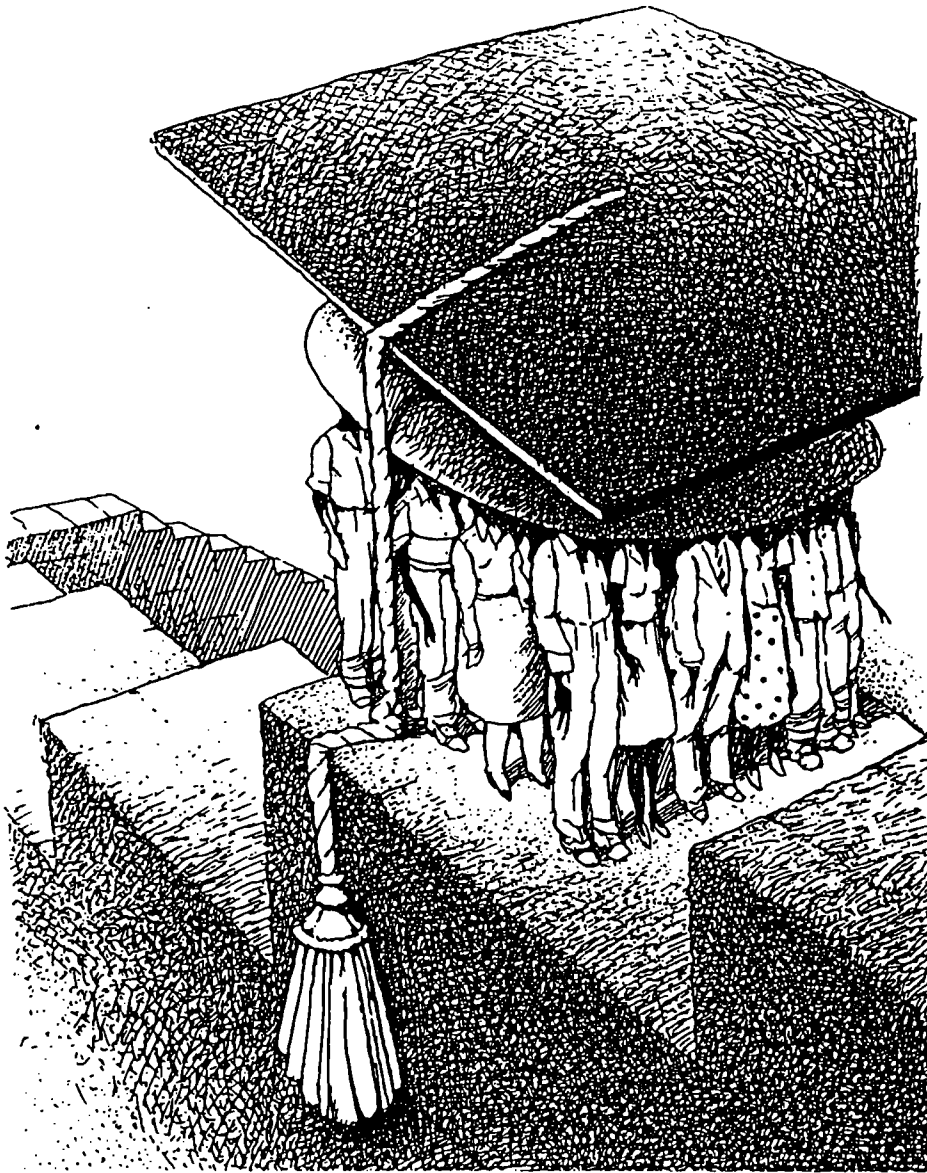
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WILLIAM BRAMHALL / For The Times

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✓ But the answer can't be to repudiate standards as a form of discrimination: To do so is to declare society incapable of effectively educating minority and poor children.

Ultimately, closing the racial gaps in educational performance will require a reconstruction of social order, economic opportunity and family structure in America's most blighted

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Ronald Brownstein's column appears in this space every Monday.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

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Author: Phil Rosenfelt at WDCE04
Date: 8/13/97 1:19 PM
Priority: Normal
TO: Jennifer Davis at WDCB02
CC: Terry Peterson at WDCB01
CC: Arthur Coleman at WDCF01
CC: Susan Craig
CC: Felix Baxter at WDCE05
CC: Steve Winnick at WDCE05
Subject: Notes on the Meeting on the North Carolina Testing Case

----- Message Contents -----

Jennifer: Attached are informal notes on the meeting we had yesterday on the North Carolina testing case. This should help you in your efforts to get more information on the issues related to the case. Of course, these are for internal use only; hopefully, you will find them helpful. Please let me know if you have any questions about them. Thanks for your cooperation.

Phil

Outline of August 12, 1997 Meeting on the North Carolina Testing Case

A Hearing on a Temporary Restraining Order was scheduled for Tuesday but is rescheduled for Thursday as part of a hearing for a Preliminary Injunction.

The suit is being brought on behalf of a class of all students in Johnston County that did not pass a State test. One subclass are minority students, and another is special education students.

The State designed the test to evaluate each school's ability to teach the State's curriculum. The county used the test at the end of the school year (as a "high stakes" test) to determine each student's mastery of the course work and promotion to the next grade in grades 3 through 8. In addition, at the secondary school level, the test is used to award credit for courses covered on the test.

The Plaintiff's allegations are--

- (1) The test is not valid for the way the county is using it.
- (2) The test has not been shown to test what students have learned (did the student have an opportunity to learn what they are tested on).
- (3) The American Psychology Association frowns on "high stakes" tests, where they are used as a single measure.
- (4) There is a high standard error rate of +or- 10 points, which may make the difference between pass or fail.
- (5) The test has had a disparate impact on minorities.
- (6) There were not individual accommodations for disabled students.
- (7) There was no effective notice to parents that the test would be used this way.
- (8) There is a seven fold increase in retention in the same grades.
- (9) There is only a waiver for students with A,B, or C in courses./ The teacher & principal can apply to waiver--only a 5% waiver rate (note: there is now authority for the principals to grant more waivers).

The legal issues are--

- (1) Equal protection - is there a rational basis-- substantive due process
- (2) Title VI of the Civil Rights Act (disparate impact on minorities)
- (3) IDEA (lack of accommodations for disabled students)
- (4) Other similar State laws

DOJ stated that the test would be permissible under Title VI if it is valid for the purpose for which it is being used (i.e. promotion and course credit), but thinks there are strong facts for plaintiffs, particularly because of the high standard error rate.

ED wonders why a test that measures whether the school is teaching the curriculum

would not also measure whether students are learning. DOD says it could, but it is not clear that the NC test is fact does that. Related issues are—

- Is there a real difference between measuring aggregate performance and individual performance (the standard error rate may be relevant to this issue)?
- Is the State curriculum being taught in the county?

To determine if this test is being misused

- Need to evaluate — test manual & materials

(1) What is the county and the State's (Governor Hunt, etc.) position on the plaintiffs' allegations (the State is not a party)

(2) What do testing experts think?

ED stressed the importance of such tests: Student who do well in achievement tests generally will do well in college.

-- Results do not have to be same for different types of students, the test could have some different impact but then the burden shifts to the user of the test to show validity of test

Related Issues

- Misuse of test? What are students learning / Is it covered by the actual test
- Is the test properly tied to State curriculum?
- Is it high stakes alone?

Need to get information on what test is about and figure out quality

ED indicated that in Texas - OCR resolved complaint on high standards test/ civil rights
This issue is arising in a broader framework

Legal Defense Fund is planning to file additional complaints

ED will request copy of the test, and the instructions and other relevant information including the State and county curriculum/ County and State positions on the issues in the suit

One issue is whether the "disparate impact" of the test is greater at "more segregated schools."

According to DOJ attorney, Judge Boyle, the judge assigned to the case is likely to be extremely unsympathetic to plaintiffs.
to plaintiffs.

Johnston schools enforce testing policy (8/23/97, The <http://search.nando.net/plweb-c...9960301%3C%3Ddate%3C%3D19970821>

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THE NEWS & OBSERVER
Saturday
August 23, 1997

TRIANGLE | NEXT
STORY

Johnston schools enforce testing policy

Despite a court challenge to controversial Policy 842, the system will hold back pupils who did not pass end-of-grade tests this spring.

By GLENNA B. MUSANTE, Staff Writer

SMITHFIELD — Johnston County schools will open Monday without a federal judge's decision about the policy that is holding back 493 students who have not passed end-of-grade tests.

The county's Policy 842 -- which pegs passing a grade to passing the state end-of-year reading and math tests -- was the subject of a federal court hearing in Elizabeth City on Monday. Parents opposed to it had asked for a preliminary injunction until a full hearing could be scheduled. If the injunction is granted, children who did well during the past school year but failed the tests would be allowed to move to the next grade -- but after the school year has already begun.

Twenty-three of 29 Johnston schools will be affected by the court's decision.

With the school system in limbo, legally, administrators told principals and teachers last week to plan classes as if the policy would remain in effect. Principals contacted said they had no backup plans.

"Our intentions are to move full speed ahead" to implement the policy, said Dr. James Causby, superintendent of schools. "If [U.S. District Judge Terrence Boyle] grants the injunction, we'll deal with it. But we anticipate the verdict being our way. We have made no plans to do anything otherwise."

Causby added that some principals have called him for guidance -- particularly those in schools where many children would be reshuffled to new classes if the injunction were granted. "We've told them very clearly to move ahead just [as if] the policy is in effect," he said.

In schools such as Clayton Elementary, where only a few children are being held back under the new policy, reassigning them to the next grade "wouldn't be a

Johnston schools enforce testing policy (8/23/97, The <http://search.nando.net/plweb-c...9960301%3C%3Ddate%3C%3D1997082>!

problem because none of our classes are at capacity," said Frank Knott, the school's assistant principal. "Johnston County has had a real push to keep class sizes low," he added.

Knott said an injunction would affect only about 15 students in the fourth and fifth grades. "We know who they are," he said. "It's manageable."

In some of the county's poor schools, and in schools where the population is growing rapidly, the number of children who might be reassigned to different classes -- even different schools -- after the beginning of classes is much higher. At Corinth-Holder Elementary, 54 children are scheduled to be held back because of Policy 842. At Benson Middle, there are 35; at Clayton Middle, 42; at East Clayton Elementary, 30; at Smithfield Middle, 47, and at Smithfield Elementary, 57.

But even in such schools as Smithfield Elementary, where more than 11 percent of the school's 500 students could be reshuffled, administrators sounded a note of calm.

Smithfield Elementary Principal Phil Lee firmly believes the policy serves children, particularly those from poor families, because it prevents them from being handed material they aren't ready to learn. More than 50 percent of Smithfield Elementary's students in third, fourth and fifth grades come from families with incomes below the federal poverty line.

"Do we have a plan? No," Lee said. "If an injunction were issued today, we would revisit the criteria. But will we take 57 kids and promote them? No."

He said children who consistently performed below grade level last year will be held back. At the same time, he said, a child in his school with a C average who performed at grade level last year will be moved up whether the child passed the state reading and math tests or not.

He said the point of the policy is "to catch the kids who aren't ready" and help them catch up to their grade level.

While school officials are confident that a preliminary injunction won't be ordered, some parents of children being held back are upset that no court decision was rendered this week.

"I just think the whole system is really messed up" said Belinda Palmer, the mother of a child scheduled to repeat a grade at Cleveland Elementary. "It uproots the kids [after school has already started] if they do decide to change them. And then they have to start all over

Johnston schools enforce testing policy (8/23/97, The <http://search.nando.net/plweb-c...9960301%3C%3Ddate%3C%3D1997082>!

again. And that puts them behind the grade they should be in. All of this should have been talked about way before this."

Glenna Musante can be reached at 829-4520 or gl4news@aol.com

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**THE
NEWS & OBSERVER**

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Rift over end-of-year tests likely to deepen (8/24/97, Thttp://search.nando.net/plweb-c...9960301%3C%3Ddate%3C%3D1997082!



THE NEWS & OBSERVER
Sunday
August 24, 1997

N.C. | NEXT STORY

Rift over end-of-year tests likely to deepen

Imposing tough standards helps many students but hurts others. Whose needs come first?

By TIM SIMMONS, Staff Writer

What do you think?

Should school districts suspend principals or hold back students based on year-end tests? Tell us what you think by calling The News & Observer's CityLine service at **549-5100** before noon and entering category number **1606**. This is a free call, except where long-distance fees apply. In Fuquay-Varina, Wake Forest and Clayton, the number is **836-2830**.

We will publish a selection of the responses in the Metro section soon.

Thousands of times a year, in every school in the state, students pull out their pencils and show teachers what they know. Pop quiz, chapter review, midterm, multiple-choice -- there seems no end to how children can be tested.

But ever so slowly, only one set of tests is beginning to matter in North Carolina's schools -- End-of-Grade exams.

For every grade school -- and for thousands of students -- End-of-Grade tests are now the final arbiter of a successful school year.

Having flunked the exam, hundreds of Johnston County students -- who will start school Monday -- are awaiting a judge's decision to see whether the district can force them to repeat a grade based on a test score.

In Wake County, lawyers are haggling in court about whether the test scores can be used to suspend the principal at Poe Elementary School and brand the school as low-performing.

But the rulings aren't going to settle the debate over the growing use of high-stakes, high-pressure testing.

Instead, educators warn, the cases are just the first in a growing national fight over whether children and schools should be judged on a single year-end exam.

"Your cases are just the tip of the iceberg in the controversy over student promotions," said Kathy Christie, who follows education trends for a Denver-based group called Education Commission of the States. The bipartisan group collects information for state and national policy makers.

"We're having this enormous push to increase standards throughout the country," she said. "And when each state finally finishes its fight over setting goals, the public is usually in no mood to give students a choice about whether they want to reach the standards."

Rift over end-of-year tests likely to deepen (8/24/97, Thttp://search.nando.net/plweb-c...9960301%3C%3Ddate%3C%3D1997082!

The result is often a focus on year-end exams that can overshadow almost everything else that happens in school.

"It's fairly natural to focus on these tests when your school is put under a magnifying glass like this," said Cathy Truitt, principal of Four Oaks Elementary in Johnston County. "Even when you don't intend to, you find you are just drilling the kids. You really have to fight that tendency."

The same holds true when the tests are used to judge schools as part of the state's new school improvement program, known as the ABCs of Public Education.

This year, for example, students at North Ridge Elementary in Wake County will go without the girls science club, without a program to reduce student conflicts and without many special events.

The reason is simple, Principal Marilyn Madrin said. The school barely missed the cutoff score it needed to show the state it was making adequate academic progress for all students.

"No one wants to be told they aren't doing what's expected of them," Madrin said. "The teachers here will do what they need to do to show improvement."

More tests to come

A majority of states now publish annual reports about the academic performance of their schools, according to research by the Education Commission of the States.

But North Carolina is among only five states that allow schools to flunk students beginning in third grade based on the results of mandated exams in reading, writing and math.

So far, only a few counties are using the tests for such purposes. Durham, for example, uses the exams to help decide whether eighth-graders must attend summer school before moving on to high school.

In Western North Carolina, Transylvania County has been using End-of Grade exams for three years to promote or hold back students. The testing has yet to prompt a lawsuit, and parents in the rural mountain district of 4,000 students have come to accept it, said Superintendent Richard Jones.

Other schools are content to make the grade a part of a student's test scores, similar to a final exam in college.

"This is pretty much a natural extension of where

Rift over end-of-year tests likely to deepen (8/24/97, Thttp://search.nando.net/plweb-c...9960301%3C%3Ddate%3C%3D1997082!

testing programs have been headed for the past decade," said Suzanne Triplett, the former head of testing for North Carolina.

"First, we held districts accountable, now we hold schools accountable, and soon you will find more and more schools using these tests to hold individual students accountable," said Triplett, who now works for Research Triangle Institute, where she helps schools analyze test results. "I don't know that we will ever take the pressure off."

What's fair?

When accountability meant judging an entire school system, few parents complained about North Carolina's school-improvement efforts. When it moved to judging schools, the loudest complaints came from principals and teachers.

But when Johnston County began to tell students they had failed the End-of-Grade tests and would have to repeat a school year, parents quickly took notice.

Fairness is at the heart of their complaint.

Few people argue with the fact that test scores go up when students are told bluntly that they must pass an end-of-year exam. But historically, schools have been better at identifying poor learners than in helping them.

That means some children aren't likely to ever pass the tests and others who hover near the exam's cutoff scores undoubtedly will be left behind when the rest of the class moves on.

"There is no single test that can accurately judge whether every student should be promoted or retained," said Richard Jaeger, director of the Center for Educational Research and Evaluation at the University of North Carolina at Greensboro. "This might work politically, but it is a dangerous trend that can hurt students far more than it helps."

Johnston County school officials have said that the test is only the first filter in deciding who fails there. Students get three chances to pass the exam, and waivers are granted when teachers and principals feel it would be a bad idea to retain a child.

But they don't shy away from the fact that it's a harsh program for schools, which are more commonly criticized for coddling children and promoting students regardless of how little they learn.

"There's no question that over the years we inflated grades to keep people happy," said James Causby, the Johnston County school superintendent. "I've finally come to believe that there have to be consequences for the kids -- and their parents -- if we want people to put faith in what we say."

If the result of such pressure is an emphasis on reading, writing and math to the detriment of history, science and traditional school activities, Causby said he can live with that problem.

"I suppose that's possible," he said. "But if it makes math and reading scores go up, that's OK."

Jaeger of UNCG, who testified in support of parents who want to see the policy dropped, disagrees. By using single tests to focus on reading, writing and math, schools can increase the scores of some students -- while prompting others to give up.

"An overwhelming body of research shows that retaining children does not increase their skills, but it does increase the chances they will drop out," Jaeger said. "It just isn't an effective learning tool."

Eventually, said Triplett of RTI, teachers will learn that it's possible to teach just about any subject and hold children's interests without losing the focus on basics. The trick is figuring out how to integrate lessons such as art, drama and geography into reading, writing and math.

"That doesn't mean it will be easy," Triplett said. "By raising the stakes with these tests, we have almost guaranteed some bumpy times on the road to improvement."

Tim Simmons can be reached at 829-4535 or tsimmons@nando.com

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THE
NEWS & OBSERVER

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Raleigh, North Carolina

Judge hints that he won't stop Johnston policy (8/19/97http://search.nando.net/plweb-c...9970815%3C%3Ddate%3C%3D19970815

Eloy's Dress Up Game

THE NEWS & OBSERVER
Tuesday
August 19, 1997

**TRIANGLE | NEXT
STORY**

Judge hints that he won't stop Johnston policy

By GLENNA B. MUSANTE, Staff Writer

ELIZABETH CITY — Whether Johnston County will hold hundreds of students back a grade when school starts next week remained uncertain Monday.

Final arguments were completed in a request by a group of parents for a preliminary injunction against the Johnston school board's new end-of-the-year testing policy.

But if comments made Monday by the presiding judge are any indication, Johnston educators may soon be jumping for joy.

Judge Terrence Boyle said he would "take the evidence presented under advisement" and review briefs submitted by the attorneys for each side before making a decision.

But in open court discussions with Melinda Lawrence, an attorney for Educate Our Children, the parents' coalition, Boyle said the parents' group had failed so far to demonstrate that Policy 842 discriminates against minorities -- one of the coalition's claims when it filed the suit in federal court.

Policy 842 pegs passing for the school year to passing the state standardized end-of-school reading and math tests. Parents opposing the policy say the test was designed to test teachers and school systems -- not individual children. Their lawyers brought in expert witnesses who testified that the tests are not a reliable measure of a student's grade level mastery in reading or math. The parents also claimed that the test discriminates against minorities and children with learning disabilities.

Said Boyle: "There is no such thing as discrimination without intent." He added that from testimony provided about the implementation of the policy, "majority students are passing and failing, minority students are passing and failing ... there is no discriminatory intent."

Ann Majestic, the attorney for the Board of Education, offered evidence from the school system's testing director, Keith Beamon, that the tests not only do

not discriminate against minorities but resulted this year in higher scores by minority students than ever before. Charts supplied by Beamon indicate that by the time the test was administered a third time, 88.6 percent of the system's minority students had passed.

Educate Our Children, the parents' group opposed to Policy 842, has hoped an injunction would allow relief for the 200 to 500 students who did well during the school year but will be held back because they failed the test on the third try.

Teachers and principals are making class assignments this week in preparation for school to open on Monday. A delayed answer from Boyle in favor of the parents' group could cause as as many as 500 students to be reshuffled. It could also leave children held back under Policy 842 behind in class work if they are suddenly moved forward.

Boyle also said several times that it was not clear to him from evidence produced that he had jurisdiction in this case.

"You're asking me to set policy," the judge said after a discussion with Lawrence over the validity of the group's equal-protection claims. Policy-making, Boyle said, is "for the school board," and not the federal courts. "Federal court is not just a plenary authority that injects itself every time someone's got a problem," he added.

Boyle also said he had not yet heard evidence that Policy 842 had caused anyone irreparable harm -- another claim made by EOC in its suit.

Last Thursday, when the hearing began, one parent testified that his son had become depressed and was making suicidal remarks after finding out that he would be held back in the seventh grade.

In testimony Monday, Dr. John Hattie, director of the Educational Research and Methodology Department at UNC-Greensboro, described holding children back a grade as a punitive alternative that does more emotional harm than good.

EOC also brought in expert witnesses who claimed the tests' wide margins for error mean children capable of moving forward successfully might be pegged as failures if held back and might lose the motivation to work hard.

Attorneys from the NAACP Legal Defense Fund in New York City were present at the hearing. In a statement made when the EOC suit was filed, the NAACP said the outcome of this suit could have an impact on the new national testing program supported by

Judge hints that he won't stop Johnston policy (8/19/97http://search.nando.net/plweb-c...9970815%3C%3Ddate%3C%3D19970819

President Clinton.

Glenna B. Musante can be reached at 829-4520

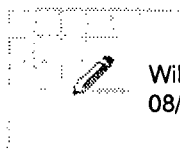
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**THE
NEWS & OBSERVER**

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William R. Kincaid
08/28/97 03:28:54 PM

Record Type: Record

To: Michael Cohen/OPD/EOP

cc:

Subject: Jennifer call

Mike--

Jennifer called this afternoon. She spoke with Linda McCullough in the Gov's office. Here's what she found out:

Gov has not and is not going to take a stand--has not even been asked by the NC press about this and won't be because they know he will simply say this is a local matter.

Gov fully stands by the education reform ABC proposal which put in place the new tests and the standards.

Johnston County folks feel very strongly that their curriculum is aligned to the tests. The local school board there is setting up a process to better communicate and work with parents. However, they will not be backing down on their policy regarding promotion.

Tom Hoolihan is only working part-time in the Gov's office now, but Jennifer does have his number. Important note: Hoolihan was the superintendent in this district (Johnston County) before joining the governor's office, so he should be in a good position to provide additional information, but would probably have to give him a more detailed sense of where we are on this.

She said the person to talk to about the details of the test would be Richard Thompson -- Deputy Superintendent for NC. She also was given his name and number of the local superintendent.

I told her about our conversation earlier this afternoon. However, Jennifer is very concerned about pushing further on this given the hands-off stance that Hunt is taking, and wanted to talk with you before she did so. Asking for the test and associated materials, she feels, won't be that helpful without requesting info on curriculum as well, and that is likely to raise concerns. **She asked for you to call her at 617-723-0331 regarding next steps.**

Thanks.

-- Bill



Kelly_Saunders @ ed.gov
08/11/97 01:30:00 PM

Record Type: Record

To: William R. Kincaid

cc:

Subject: Summary of Johnston County, N.C. Testing Case

Here's more info. I'll see you tomorrow.

Forward Header

Subject: Summary of Johnston County, N.C. Testing Case

Author: Lilian Dorka

Date: 8/11/97 11:43 AM

This is from Roger Mills in Atlanta, about the North Carolina testing case.

Howie

SUMMARY OF JOHNSTON COUNTY, N.C. TESTING CASE

I. What are the tests involved?

They are state-wide tests of the North Carolina Department of Public Instruction. There are two series. One is called "End-of-Grade Tests, Reading Comprehension and Mathematics." The other is "End-of-Course Tests, Algebra I, Biology, Economic, Legal & Political Systems, English I, U.S. History."

II. How are they implemented?

The Johnson County Board of Education Policy Code 842, "Student Accountability for Academic Achievement," adopted June 18, 1996, provides in part:

"Students in grades 3-8 who score at an Achievement Level of less than III during the end of year administration of the End-of-Grade tests in reading or math will be retained."

....

"Students enrolled in high school courses with state required End-of-Course multiple choice tests who meet all other requirements for receiving course credit, will receive credit only if they achieve a grade of 70 or better on the End-of-Course test as determined by the state's scoring program."

...

"Exceptional children enrolled in high school courses will

be held to the same standards as all other students who are enrolled for diploma course credit."

...

"Limited English Proficiency (LEP) students enrolled in high school courses will be held to the same standards as all other students who are enrolled for diploma course credit."

III. What is wrong with the application of this policy to students?

Plaintiffs' expert, Richard Jaeger, Director of the Center for Educational Research and Evaluation of the University of North Carolina at Greensboro, states in an affidavit:

1. There is no evidence the End-of-Grade Tests validly predict the ability of students to succeed the following school grade. The district improperly makes promotion decisions on the basis of a single test score.
2. The policy's implementation has a statistically significant adverse impact upon minority students. While about 72% of the county's white students pass End-of-Grade tests, only about 44% of its Hispanics and only about 40% of black students do. A similar adverse impact results from administration of the End-of-Course tests.
3. The procedures used to compute the cut off scores were not documented.
4. While the State estimated reliability using internal consistency, the use made of the test by the county requires alternate forms of reliability. Using an alternate form, he estimates that for 1 out of 3 students, the difference between the student's observed test score and his true test score is at least one standard error of measurement. The tests should not be used to retain individual students.
5. When students are retained, they do not succeed, compounding the problem.

IV. What is the legal basis for challenging the action?

A. Title VI

The practice violates the regulation implementing Title VI at 34 C.F.R. Section 100.3(b)(2) [criteria or methods of administration having a discriminatory effect] because neither the test content nor the cut off scores have been validated for individual assessment and because less discriminatory alternatives exist for deciding promotion.

B. Due Process Clause (Substantive)

Use of the test score in determining promotion is not rationally related to any legitimate or substantial governmental interest, including the board's purpose of "insuring student success." The use of the test score as the sole criterion is arbitrary and unreasonable in violation of the due process clause of the Fourteenth Amendment.

C. Due Process Clause (Procedural)

State law gives students a property interest in promotion when course performance is satisfactory, and while students have complied with these requirements, they have been denied this property interest without adequate notice, or adequate review procedure, and with a waiver process that is arbitrarily administered.

D. Equal Protection Clause

Students are classified by test score alone, making distinctions (pass/retain) that have no rational basis and are unrelated to any legitimate or substantial governmental interest.

E. Section 504

Students with disabilities are not provided reasonable modifications when the tests are administered.

--Roger



Kelly_Saunders @ ed.gov

08/08/97 01:40:00 PM

Record Type: Record

To: William R. Kincaid

cc:

Subject: North Carolina Testing complaints

Here's a follow-up to the information we provided to you on Wednesday.
Give me a call at 205-8162 if you have any quesitons.

Kelly

Forward Header

Subject: North Carolina Testing complaints

Author: Jean Peelen at META02

Date: 8/8/97 11:35 AM

Here is an update on the complaints I mentioned this morning MIGHT be related to the North Carolina tests and children with disabilities.

There is a recently received complaint that may indeed involve some the same issues that are in NAACP law suit. The complaint is against Lenoir County School District. The complainants allege a number of issues around the tests – such as that their daughter who has mental retardation (EMR) was kept out of EMR math and EMR reading classes because she had failed the state tests; and such as that all children with disabilities will automatically not be able to graduate because they will not be able to pass the State approved tests the District is imposing at the high school level.

The complaint is in the evaluation stage, and it is not yet clear how much has to do with the State complaints and State requirements, and how much has to do with the District's interpretation of the State requirements or the District's own standards.

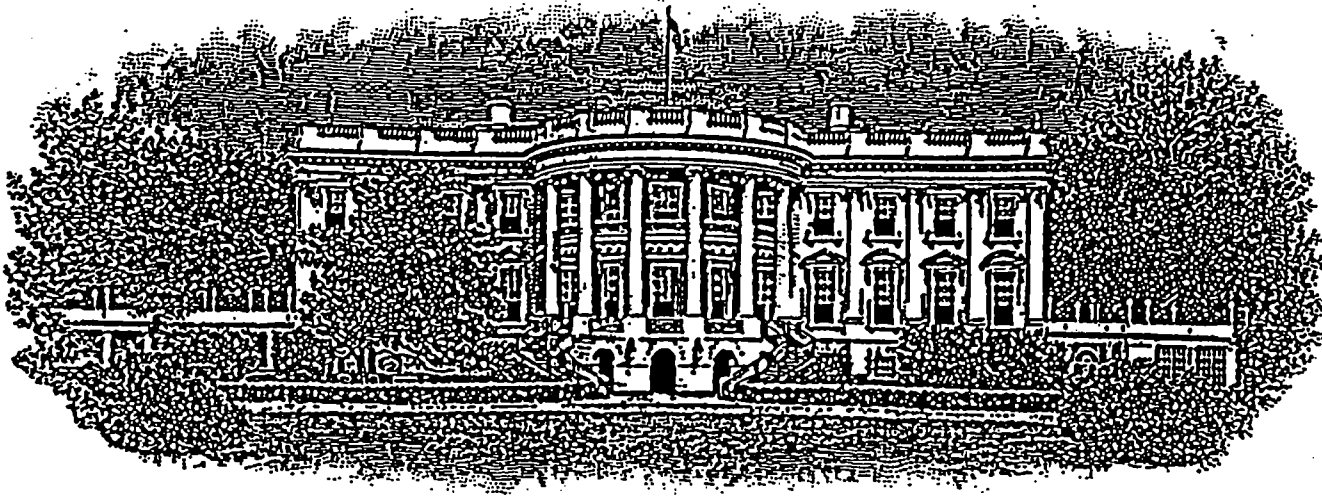
Please let me know if you need additional information.

Jean Peelen

Lawsuit on High Stakes Testing in North Carolina. This week the New York Times and other newspapers reported that the NAACP Legal Defense Fund has filed a federal lawsuit against the Johnston County School District in eastern North Carolina, challenging a year-old policy which requires all students in grades 3 through 8 to achieve a specified score on the North Carolina state reading and math tests before they can be promoted to the next grade. The case is one of the nation's first federal court challenges involving state education standards and high stakes testing.

The suit was brought on behalf of the parents of 14 black, Hispanic, and white students who failed the tests. The parents claim that the tests violate the equal protection rights of minority students, who disproportionately obtain low scores, and that the district's test procedure discriminates against special education students by failing to provide accommodations, such as extra time. The plaintiffs suggest that the North Carolina state tests were designed to measure how well schools and school systems are teaching the state mandated curriculum, but are not a valid measure of individual student performance. Domestic Policy Council staff has requested a meeting with the Department of Justice to discuss the case.

The White House



Domestic Policy Council
Old Executive Office Building, Room 220
Washington, DC 20502

Telephone Number: (202) 456-2857
Alternate: (202) 456-2216

FAX Number: (202) 456-7028
Alternate FAX: (202) 456-7431

FAX COVER SHEET

TO: Rahm Emanuel

FAX: 6-2530

FROM: BILL KINCAID

THIS FAX INCLUDES THE COVER SHEET PLUS 8 PAGES.

IF YOU DID NOT RECEIVE THE COMPLETE FAX, PLEASE CALL (202) 456-2857.

MESSAGE:

Bruce Reed asked me to send you these re:
North Carolina core on high stake tests

3RD STORY of Level 1 printed in FULL format.

Copyright 1997 The News and Observer
The News and Observer (Raleigh, NC)

August 5, 1997 Tuesday, FINAL EDITION

SECTION: NEWS; Pg. B1

LENGTH: 851 words

HEADLINE: Johnston test troubles linked to confusion

BYLINE: GLENNA B. MUSANTE, STAFF WRITER

BODY:

SELMA -- Ironing out the glitches in Johnston County's new testing policy - the subject of a federal lawsuit - is as difficult as reassuring a fretful teenager with a learning disability.

Natalie Allen, 14, has been diagnosed with a disability that makes it hard for her to grasp words on a page - like those on the reading test she is taking today for the third time along with hundreds of other students who completed summer school last week.

Although she made A's, B's and C's in seventh grade last year at North Johnston Middle School, Natalie is sure that unless she passes the test, she'll never make it to the eighth grade. Her mother, Billyn, says administrators at her school and at summer school have said that if she doesn't pass, she'll fail for the year.

"This test is just too much pressure on a 14-year-old," Billyn Allen said.

But school officials say the mother and daughter's fears could all be a misunderstanding.

"We've had a lot of people who don't understand the policy," said Dr. James Causby, Johnston schools superintendent. Causby said he asked principals last week to review the files of students who failed the state test but achieved C's or better in class. He said they have found many who are eligible for a waiver of the rule, which requires most students to pass the state's end-of-year math and reading tests to be promoted to the next grade.

Causby said Natalie may be among students who are eligible for a waiver of the requirement. If they fail the state test after two tries, they must go to summer school, and they have to take the test a third time. But students who are diagnosed as learning disabled don't need to pass that third time to move on.

"If she qualifies, the teachers and principals at her school should have asked for an appeal," he said.

Such conflicting signals are one of the factors that led a group of parents to file the suit challenging the testing policy last week in U.S. District Court. A hearing on the parents' request for temporary restraining order against the policy has not been set.

The News and Observer (Raleigh, NC) August 5, 1997 Tuesday.

Members of the parents' organization Educate Our Children, who support the suit, say that waivers and appeals are being handled in a haphazard fashion, and they say the test discriminates against minorities and children with learning disabilities.

While many parents applaud the schools' efforts to tighten standards by making it harder for teachers to promote students who haven't learned, the parents' group opposes using the test to determine what an individual child has learned over the course of a school year.

Their suit was filed with the aid of the NAACP Legal Defense Fund, which views the Johnston County situation as a clear example of misuse of the test.

"Tests need to be validated for the purpose intended," said Kimberly West-Faulcon, a staff attorney for the Legal Defense Fund. "And what we've learned about the North Carolina tests is that they were designed to evaluate schools and school systems, not students. And we feel students are being harmed by the policy."

The suit also claims that because minority students do poorly on the test, it may have inherent problems.

Causby agreed that minorities' performance on the test lags behind that of white students, but he said this is because the school system has been letting minorities down.

"We've known that for a long time," he said. "We don't want to keep accepting that [status quo]. We want them to improve. And if you look at the data [collected by the board after the second round of tests were conducted in June], the kids who had the most improvement in their test scores were the minority students."

But the suit is not solely about race, said Stephon Bowens, an attorney for Educate Our Children.

"Race is just one part of it," he said. "The [14 families] who filed the suit come from a wide spectrum," including people who are black, white, Hispanic, middle-class and poor - demographics as diverse as the county's.

"I think [the Legal Defense Fund] felt this was the right issue at the right time," Bowens said. The civil rights group is concerned that the growing national trend to use standardized tests can and has harmed students, such as those in Calhoun County, Ga., where poor test performers were grouped together into low-achievement classes.

Karen Price, one of the founders of Educate Our Children, said her group approached the county school board two times last spring with its concerns, delivered petitions with names of 2,100 parents opposed to the policy and asked school officials to wait a year before implementing it. But she said board members dismissed the parents and even laughed at them.

"These parents took these issues to the board very early on," West-Faulcon said, and the had to file suit "to get the board to pay attention to them as citizens and voters who have concerns about this issue."

The News and Observer (Raleigh, NC) August 5, 1997 Tuesday,

Causby, however, said the board paid close attention to the parents' concerns and made some modifications to the policy after Price's group spoke to the board. But it denied the request for a year's delay.

LANGUAGE: ENGLISH

LOAD-DATE: August 5, 1997

4TH STORY of Level 1 printed in FULL format.

Copyright 1997 The News and Observer
The News and Observer (Raleigh, NC)

August 1, 1997 Friday. FINAL EDITION

SECTION: NEWS; Pg. B1

LENGTH: 1367 words

HEADLINE: Johnston schools sued over testing

BYLINE: MARTHA QUILLIN AND MICHELE KURTZ, STAFF WRITERS

BODY:

A civil rights group has gone to federal court accusing Johnston County teachers and principals of illegally using standardized tests to hold back students.

A lawsuit, filed this week on behalf of 14 unidentified parents, said the practice affects a disproportionate number of minority students and discriminates against students with special needs. Attorneys also planned to ask for a temporary restraining order that would prevent school officials from using the scores to keep any student from rising to the next grade when school resumes this month.

Stephon Bowens, who was preparing that request for the N.C. Justice and Community Development Center in Raleigh, with help from the New York-based NAACP Legal Defense and Educational Fund, could not be reached late Thursday to say whether it had been filed.

The complaint stems from Johnston's efforts to meet new state requirements that all schools demonstrate that they are teaching students the basic skills they need. Beginning with the past academic year, Johnston County began giving standardized, end-of-year tests to measure the mastery of those skills in grades three through eight. Comparable, end-of-course tests are given to high school students in five core classes.

Although the suit does not cite problems in other counties, it may indicate some of the difficulties in trying to standardize public education in the state, and in relying on tests to determine whether goals are being achieved.

Johnston educators say they are pleased with the results of their Student Accountability Program. In fact, said Dr. James Causby, the superintendent, students made their best showing ever this year in grade-level proficiency.

The problem, according to the lawsuit, is that the county is using students' test scores the wrong way. While they may be a good measure of whether the school is covering the state's basic curriculum, Bowens said, they should not be used to decide whether an individual student passes or fails.

"The test should not be the threshold," Bowens said. "We're not sure the test indicates whether the student has learned the material."

###

The News and Observer (Raleigh, NC) August 1, 1997 Friday.

Unfair to minorities:

In addition, the suit contends, minority students in general did not perform as well on the tests as white students and will be held back at a higher rate. Also, it said, provisions were not made for students with handicaps that entitle them to such things as extra time for testing.

It isn't known how many of Johnston County's nearly 18,000 students will be held back based on their scores from the 1996-97 school year. Between 2,000 and 3,000 students did not pass their end-of-year or end-of-course tests the first time they took them, officials say, but about half of those passed after getting intense tutoring and taking them again two weeks later. Some of those who failed the second time were given the option of summer school; for the lowest scorers, summer school was required, after which the students will be tested again.

One session of summer school has been completed. A second session will wind up next week, with students taking the standardized test beginning Aug. 5.

Causby denied the lawsuit's claim that end-of-grade tests are the only factor in deciding whether a student moves to the next grade.

That question is an issue especially for students who made A's, B's and C's but bombed on the end-of-year or end-of-course tests. Parents have argued to the school board - and in the lawsuit - that a student could be held back simply because she doesn't perform well on a standardized test, or because he was having a bad day when he took it.

In fact, Causby said, students who have done well throughout the year but don't pass the test after the three tries can have their case reviewed by the principal, who consults with the student's teacher and looks over samples of the student's work. The principal then makes a recommendation to a committee, which decides whether the student moves on.

###

Program called a success:

The whole program, Causby said, has taken a great commitment on the part of administrators, teachers, parents and students, and is paying off. Early in the year, teachers tried to identify students who might have trouble passing the tests and offered remedial programs, including before- and after-school tutoring and Saturday programs.

As a result, Causby said, all students - especially minorities - have shown considerable improvement on proficiency exams.

Causby hopes that improvement will cut Johnston County's higher-than-average dropout rate.

"I firmly believe that the biggest reason most kids drop out is they're behind academically," he said. "They're frustrated and they become discipline problems, and they get out as soon as they can."

"This is not just a testing policy. The main focus of this effort is to get kids on grade level, starting early, and keep them there."

The News and Observer (Raleigh, NC) August 1, 1997 Friday.

Ann Majestic, a Raleigh lawyer who is representing the school system in the case, said county officials believe the tests, which were developed by the state, can be applied to individual students, but they are consulting with test designers to be sure. The county also is fine-tuning the review process for students who have made average or better grades but repeatedly failed the standardized tests, to make sure every school follows the same procedure.

Elsewhere in the Triangle, some school systems have implemented similar "get-tough" policies, but they are not absolute.

In Durham, for instance, eighth-graders who fail their end-of-grade tests are required to attend summer school or repeat the grade. After summer school, students take the high school competency test, the equivalent of the eighth-grade exam. If they fail again, the principal must decide whether students can move ahead.

This spring, the first year for the policy, an unprecedented number of eighth-graders passed the exams, and officials credited the new requirement for much of that success.

Harry Monds, president of the NAACP in Durham, said Thursday that he supports Durham's eighth-grade requirement. In fact, he said he'd like to see a similar policy for every grade.

"It's a step in the right direction," Monds said. "I feel that it's necessary to hold students accountable."

But Monds does have concerns. Schools should work harder at identifying low-performing students early and giving them extra help throughout the school year, he said. And teachers and principals should also be held responsible for students' success or failure, he said.

###

Students get more serious:

Orange County Schools, which adopted a strict retention policy last fall, saw some students take the end-of-grade tests seriously for the first time, officials said.

"You have some real wake-ups," said Nancy Farmer, Orange County's associate superintendent for curriculum and instruction.

But test results aren't the only criterion for promotion in Orange County. Students who fail end-of-grade tests are referred to a school committee that discusses the students' classroom performance and other factors that indicate whether they've mastered the skills outlined for that grade, Farmer said.

The committee makes a recommendation that could include several measures, such as summer school or retention. The principal has the final say.

"One test on one day is not an absolute certain indication of proficiency," Farmer said.

The News and Observer (Raleigh, NC) August 1, 1997 Friday.

Summer school is wrapping up this week in Durham and Orange. Officials said numbers on students who would be retained won't be ready for at least a couple of weeks.

Some officials said that school systems statewide are coming to rely too much on standardized tests to gauge student performance.

"We're using tests to make decisions, not [to] inform decisions. In my opinion, that's always a mistake," said David Holdzkom, assistant superintendent for research, development and accountability in Durham, where principals have the discretion to promote eighth-graders who fail the test but show progress in summer school.

"By relying solely on the test, we discount the value of teachers' observations and judgments," Holdzkom said.

No date for the hearing of the Johnston lawsuit has been set.

LANGUAGE: ENGLISH

LOAD-DATE: August 1, 1997

16TH STORY of Level 1 printed in FULL format.

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The News and Observer (Raleigh, NC)

May 15, 1997 Thursday, FINAL EDITION

SECTION: NEWS; Pg. B3

LENGTH: 266 words

HEADLINE: Johnston schools to try out end-of-year tests Some parents complain that policy is unfair

BYLINE: Glenna B. Musante, Staff Writer

BODY:

Smithfield -- Next week, Johnston County schools will test a new policy to use end-of-the-year proficiency tests to decide which students pass or fail, despite opposition from hundreds of parents.

Parents from a group called Educate Our Children, and Joseph Avery, speaking on behalf of the Johnston County NAACP, asked the school board this week to wait a year before implementing the policy.

"The board listened to their concerns," but planned to proceed, said Keith Beamon, assistant superintendent of accountability and technology for Johnston County schools. "The reason it's in place is that the community was concerned our graduates weren't performing well in reading, writing and math. This is an initiative we've seen work in other school systems" to pull up test scores, "and we want to give it a try."

Parents opposed to the policy say it will hold students responsible for teachers and schools that aren't performing well.

"You can have a student who has had A's, B's, C's all year who may be held back a grade if they don't do well on the test," said Karen Price of Educate Our Children. The group delivered 2,100 signatures on a petition opposing the policy at the April and May board meetings, "but that didn't seem to faze them," Price said.

The parents have contacted lawyers to look into legal options for halting the policy, she said.

"What if a good student has a bad day the day they take the test?" Price asked.

Beamon said "safety nets," such as summer school, have been built into the policy to help students who don't pass end-of-year proficiency tests.

LANGUAGE: ENGLISH

LOAD-DATE: May 15, 1997

Jennifer Davis

fax

215-387-7920

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IL OF MANAGEMENT AND URBAN POLICY

They asked that he make early "consistent, predictable, nurturing child care advocates who have be- stant push and pull."

14 Children in North Carolina Sue a District Over Testing Policy

By SOMINI SENGUPTA

In one of the nation's first court challenges involving the new wave of higher state education standards, 14 students and their parents have sued a North Carolina school district over its policy automatically denying students promotion unless they pass statewide reading and mathematics tests.

The lawsuit, filed last week in the Federal District Court in Raleigh, maintains that the Johnston County public schools violated the rights of students by using this single set of tests alone to determine whether they should move on to the next grade. The suit argues that the tests are a measure only of how well schools in North Carolina are teaching the state-mandated curriculum, not of individual performance.

The equal-protection complaint — brought by a mix of white, black and Hispanic students, all of whom had

failed the tests. — also charges that the exams, given to all North Carolina students in the third through eighth grade, violated the rights of minority children, who had disproportionately low scores, and special-education students, whom the district allowed no extraordinary accommodation in the test-taking.

Asked yesterday about the tests, the Johnston County Schools Superintendent, James F. Causby, said they were not only free of bias but also an appropriate measure of student performance.

"They are used to give us information about students," Dr. Causby said, "and about schools and how they are meeting the curriculum."

The suit is among the first to challenge "high stakes" tests, which state and local school officials increasingly use to decide on student promotion and to allocate school financing.

Should one set of test scores determine which students are promoted?

"I think probably there will be an increasing number of suits around the use of tests alone as a bar," said Vito Perrone, a Harvard University education professor who has cautioned against using a single test to assess schools and students alike. "I think discrimination issues are also going to be there."

Lawyers for the suing Johnston County families said the plaintiffs objected not to standardized testing in itself but instead to school officials' relying solely on one set of

tests in determining whether to promote students.

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William R. Kincaid
08/06/97 08:54:44 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP
cc: Elena Kagan/OPD/EOP, Michael Cohen/OPD/EOP
Subject: Re: NC Test 



NCTESTS.SUM

Here is a summary of what I was able to learn about the situation in North Carolina, mostly from news accounts. Reading between the lines, it sounds to me like the district is trying to do the right thing, but maybe didn't take some of the right steps in validating the use of the test and in thinking through how its policies (like test accommodations and appeals) were going to work on a practical basis and now is trying to play catch-up. One possible lesson is that we should be providing more by way of technical assistance to states and districts (like this one and Milwaukee) that want to establish high stakes tests and do it the right way. Maybe some model policies would help. There are also implications for the national tests.

I will fax over to you the news articles on this I pulled down from NEXIS

~~Forrest~~

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642

X Greenboro News & Record

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