Articles

Leave No Child Behind: Normative Proposals to Link Educational Adequacy Claims and High Stakes Assessment Due Process Challenges

By Maurice R. Dyson*

> If you ask the children to attend school in conditions where plaster is crumbling, the roof is leaking and classes are being held in unlikely places because of overcrowded conditions, that says something to the child about how you diminish the value of the activity and of the child's participation in it and perhaps of the child himself. If, on the other hand, you send a child to a school in well-appointed or [adequate facilities] that sends the opposite message. That says this counts. You count. Do well.[1]

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1. *Campaign For Fiscal Equity,* Index No. 111070/93 (2001) [hereinafter Campaign For Fiscal Equity II] (Judge DeGrasse quoting court testimony of CFE expert witness, former New York State Education Commissioner Thomas Sobol, on the impact of inadequate funding on educational achievement). The quote powerfully signifies some of the very same concerns of placing a "badge of inferiority" on African-American children that became the underlying premise of the Supreme Court's analysis in Brown v. Board of Education nearly half a century ago. *See generally* 347 U.S. 483 (1954). These deplorable conditions are of course not uncommon in large urban school districts as Jonathon

This past September, states began their struggle to transform the lofty ambitions of the new No Child Left Behind Act of 2001 into concrete reality for millions of students. The Act is regarded as the most sweeping federal reform of public education in decades. With more than six million students in American middle and high schools in danger of being "left behind," the newly passed legislation would appear to be direly needed.[2] Today, less than 75% of eighth graders nationwide graduate from high school in five years, and graduation rates are less than 50% in urban areas.[3] Moreover, we now know that the dramatic national achievement gap takes firm root as early as pre-kindergarten.[4] The lowest income five-year-old children begin their formal schooling in consistently lower quality schools, no matter how school quality may be defined, whether in terms of higher student achievement, more school resources, more qualified teachers, more positive teacher attitudes, better neighborhood or school conditions, or private vs. public schools. Indeed, the lowest income five-year-olds score 60% and 56% lower in math and reading respectively as compared to their higher income counterparts.[5] Undoubtedly, these revelations seriously call into question notions of meritocracy in our society and education itself as the great equalizer.

However, the nation's call to leave no child behind has only become further complicated by reshuffled legislative priorities in a post 9/11 era. Indeed, fiscal assumptions by state legislatures have been radically altered since the inception of the Act. In fact, state leaders in the last year alone have cut real funding for elementary and secondary education by $11.3

Kozol so powerfully chronicles in detail in his *Savage Inequalities.* He writes: "[B]lackboards . . . are so badly cracked that teachers are afraid to let students write on them for fear they'll cut themselves. Some mornings, fallen chips of paint cover classrooms like snow. . . . Teachers and students have come to see humor in the waterfall that courses down six flights of stairs after a heavy rain." One classroom, we are told, has been sealed off "because of a gaping hole in the floor." In the band room, "chairs are positioned where acoustic tiles don't fall quite so often." In many places, "plaster and ceramic tile have peeled off" the walls, leaving the external brick wall of the school exposed. . . . I am somewhat stunned to see a huge hole in the ceiling of the stairwell on the school's fourth floor. The plaster is gone, exposing rusted metal bars embedded in the outside wall. It will cost as much as $50 million to restore the school to an acceptable condition . . . ." *See* JONATHON KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* 99-101 (1992).

2. *See* Alliance for Excellent Education, *Every Child a Graduate: A Framework for an Excellent Education for all Middle and High School Students* (2002) at http://www.all4ed.org/policymakers/Every/index.html (last visited Oct. 9, 2002).

3. *Id.*

4. *See generally* Valerie Lee, David T. Burkham, INEQUALITY AT THE STARTING GATE (2002). The authors note that before even entering kindergarten, the average cognitive score of children in the highest socioeconomic status (SES) group are 60% above the scores of the lowest SES group. Low SES children begin school at kindergarten in systematically lower-qualilty elementary schools than their more advantaged counterparts. Moreover, average math achievement is 21% lower for black than for whites, and 19% lower for Hispanics. Race and ethnicity are associated with SES insofar as 34% of black children and 29% of Hispanic children are in the lowest quintile of SES, compared with only 9% of white children.

5 *Id.* The report indicates that children who attend center-based child care before kindergarten show higher achievement, but only 20% of children in the lowest quintile were likely to have attended, compared to 65% of children in the highest quintile.

billion according to a recent Congressional survey of forty-eight state education budget officers.[6] According to the report and the National Conference of State Legislatures, states are preparing to write fiscal year 2003 budgets under the harshest fiscal conditions in a decade.[7] Already state legislatures have called special sessions to address their budget crises.[8] The demands on our nation's schools are growing, even as their budgets are cut. For example, due to the economic slowdown, the number of children living in poverty is expected to increase by 650,000 next year. Furthermore, according to the Title I cost of education index published by the National Center of Educational Statistics (NCES), state spending would have to grow to $193 billion just to keep pace with inflation. Moreover, the Act's requirement that schools receive students from low performing schools places new challenges on states since the new Act mandates their acceptance regardless of whether a school has the capacity to accommodate them.[9] These new demands raise important implications for school finance litigants and assessment challenges alike.

More than ever, states have come dangerously close to the edge of violating the Act's requirement that they supplant, rather than supplement, the new influx of federal dollars allotted to them under the Act. Even more discouraging is the fact that several states continue to struggle to fulfill unmet accountability mandates under the Act's predecessor, the Improving America's Schools Act previously enacted during the Clinton Administration.[10] In the backdrop of already fiscally challenged budgets and under-resourced school districts, dilapidated school buildings and outdated textbooks, the national movement to create rigorous standards has led to the mushrooming in high stakes assessments for students and teachers, as well as the emergence of comprehensive school accountability systems. States are ratcheting up the bar. Moreover, recent Supreme Court precedent has severely curtailed legal recourse to challenge any discriminatory funding or testing policies that will have devastating effects for students of color, English language learners and economically disadvantaged students. This, however, has not stopped litigants from

6. *See* U.S. Senate Committee on Health, Education, Labor and Pensions and the U.S. House of Representatives Committee on Education and the Workforce, *Education In Crisis: The State Budget Crunch & Our Nation's Schools* (2002) *at* http://labor.senate.gov/stateproject.pdf (visited Mar. 4, 2002). *See also* John Gehring, *Gov. Kitzhaber, Lawmakers At Odds Over School Funds,* 21 EDUC. WK. 16, February 20, 2002, No. 23, *at* http://www.educationweek.org/ew/newstory.cfm?slug=23oregon.h21 (visited Mar. 4, 2002).

7. *Education In Crisis, supra* note 7. The report found that state budgets deficits already total $25.5 billion for the current fiscal year.

8. *Id.*

9. 20 U.S.C. 6316(b)(8) § 200.44 3(d)

10. *See generally* Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994).

attempting to bring suits alleging that students are being punished for a still-failing system.[11]

As well meaning as these accountability mechanisms may be, perhaps no greater threat exists to the standards-based reform movement than much of what is being perpetrated in its own name. In fact, if one looks closely, the standards-based movement is not truly a single movement but twin movements, one good and one evil, but both bearing the same label.[12] The "evil" twin, to borrow the metaphor of its critics, is "high stakes, standardized, test-based reform" and its more benevolent sibling is "authentic, standards-based reform." As one commentator astutely put it, if giving twins the same name is a recipe for confusion, consider the havoc that gets unleashed when one of them proves to be an "evil twin."[13] Of course, these are rather over-simplistic characterizations, but the divergence in these approaches should not be understated. The identifying distinction is their respective influence on the instructional core of education and its resulting impact upon equity issues.[14] In the case of the standards movement, the evil twin, high stakes testing reform, is the more visible and controversial of the siblings, and so its true namesake is in an increasingly perilous scenario where the two are inextricably linked.[15] But are they really? Perhaps their perception by the public at large and the media bears their connection out on only the most superficial

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11. In an effort to throw out the Massachusetts Comprehensive Assessment System (MCAS) tests as exit exams for high-school seniors, new plaintiffs have just filed *Student v. Driscoll*, a class-action lawsuit on September 19, 2002. Student plaintiffs are six Latinos and African-Americans attending Holyoke and Springfield area schools and some students with learning disabilities. All have failed at least one section of the MCAS. Plaintiffs allege that MCAS violates the State and Federal Constitutions' Due Process and Equal Protection clauses and Title VII, as well as § 504 of the Rehabilitation Act, which pertains to students with disabilities. Beginning with the class of 2003, every Massachusetts high-school student must pass the English Language Arts (ELA) and Mathematics exams as a prerequisite for graduation. Students have five chances to pass the two sections between the tenth and twelfth grades, but after three attempts, half of Latino seniors and 44% of African-Americans have not passed, compared to an overall failure rate of 19%. The suit alleges that the test discriminates against African-Americans and Latinos, as well Limited-English-Proficient students, students with disabilities, those who attend vocational-technical schools, and those who live in the Holyoke school district. The complaint further states that the MCAS has a disproportionately negative effect on those students that the Massachusetts Education Reform Act of 1993 (MERA) was intended to help. Deferring to the state court, on December 2, 2002, the U.S. District Court judge declined to hear portions of the suit alleging discrimination on the MCAS against minority, limited English proficient, vocational, and special education students. However, the court did retain jurisdiction over the alleged violations of federal law. The plaintiffs intend to follow up with their dismissed claims in state court. *See* Complaint at 57, *Student v. Driscoll*.

12. *See* Scott Thompson, *The Authentic Standards Movement and Its Evil Twin*, 82 DELTA PHI KAPPAN 5 (2001) (June 26, 2002) *at* http://www.pdkintl.org/kappan/ktho0101.htm.

13. *See id.* Thompson makes use of the evil twin notion from Professor Richard Elmore who has observed, "We will get standards-based reform. But what kind is in doubt. Will it be the version that proponents envision or a corrupted and poorly-thought-out evil twin?" See Richard F. Elmore, *Building a New Structure for School Leadership*, AM. EDUCATOR, Winter, 8 (1999-2000).

14. *See id.*

15. *Id.* Thompson observes that public discourse has effectively obscured the distinction between the two movements and that elected officials have added to this confusion by appropriating the language of accountability while expounding the virtues of high standards.

understanding that serves to reinforce perceptions that these movements are the same. As a result of this confusion, it is becoming more evident that the high stakes testing reform is effectively sabotaging the authentic standards movement by unleashing an intensifying backlash. Not only are minority communities concerned about the fairness and potential adverse consequences of high stakes testing, but suburban elites and middle class families speak out against standards and testing that is mobilizing through grassroots opposition.[16] Each year more affluent suburbs grow increasingly concerned that the quality of classroom instruction will suffer as a result of constant testing each year. Essentially, concerns arise when communities perceive that testing comes at the expense of higher substantive learning and critical thinking in the classroom. Consequently, communities like those in Scarsdale, New York have taken to the streets to protest mandatory testing as contrary to high quality, personalized instruction. Most of the demonstrations around the nation have, for now, only drawn relatively small crowds—seventy protesters in Detroit, one hundred in Northampton, Mass., three hundred in Los Angeles—but the largest, at the state Capitol in Albany, N.Y., saw more than 1,500 march against the regents' exams. Moreover, there is the concern that little value and insight may be gathered from such testing. Since testing does not follow the child, there is no longitudinal information generated through customized educational services to an individual child's needs. Other concerns stem from the possible detrimental effect that a poor showing in published states assessments or school rankings may have on real estate values of local communities.

Serious concerns also arise about the accuracy of high stakes accountability systems when it departs from sound educational principles of testing validity and alignment.[17] These concerns are further exacerbated

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16 *See* Thompson, *supra* note 7. In fact, growing evidence suggests that affluent suburbanites are concerned that the quality of classroom instruction will suffer as a result of a barrage of annual testing. In addition, concerns arise from the perception that test drilling may come at the expense of higher substantive learning and critical thinking in the classroom.

17. For instance, the high stakes testing program in Texas has received much of this attention in part because of the extraordinarily large gains students have made on its statewide achievement tests, the Texas Assessment of Academic Skills (TAAS). In fact, the gains in TAAS reading and math scores for both majority and minority students have been so dramatic that they have been dubbed the "Texas miracle." However, there are concerns that these gains were inflated or biased as an indirect consequence of the rewards and sanctions that are attached to the results. Thus, although there is general agreement that the gains on the TAAS are attributable to Texas' high stakes accountability system, there is some question about what these gains mean in terms of whether they reflect a real improvement in student achievement or something else. To investigate whether the dramatic math and reading gains on the TAAS represent actual academic progress, RAND compared these gains to score changes in Texas on another test, the National Assessment of Educational Progress (NAEP). Texas students did improve significantly more on a fourth-grade NAEP math test than their counterparts nationally. But the size of this gain was smaller than their gains on TAAS and was not present on the eighth-grade math test. The stark differences between the stories told by NAEP and TAAS are especially striking when it comes to the gap in average scores between whites and students of color. According to the NAEP results, that gap in Texas is not only very large but increasing slightly.

in the face of inadequate funding, particularly when educational spending in turn may reinforce a racially discriminatory outcome. In light of disadvantageous socioeconomic indicators, current accountability implementation becomes a profoundly nefarious policy; one which ominously points, indeed compels our most vulnerable public school children to follow a road not marked by promise, but rather one with a dead end sign.

Although there is a broad consensus that targeted educational resources have an enormous positive impact on achievement, especially for disadvantaged students, there still appears to be a distinct legal disconnect in our jurisprudence between educational adequacy lawsuits and high stakes testing challenges. Aside from test use and design challenges, courts seem to do little in addressing alarming equal educational opportunity issues specifically in the high stakes testing context. In light of the resistance of the courts to provide meaningful intervention and remedy and given further the lingering questions regarding its competency to settle such disputes, advocacy organizations need to rethink not only their litigation strategy. They must also consider placing greater reliance on legislative advocacy, grassroots organizing, and civil disobedience if necessary, to procure the desired equitable educational outcomes sought. However, these options are best explored elsewhere and regretfully fall outside the scope of the present inquiry. Instead, I will explore what other limited legal strategies might exist in the current possibilities of legitimate precedent. As suggested herein, new testing challenges could utilize legal victories in state adequacy suits as a stepping stone to strike down new high stakes exams only when there is compelling evidence of inadequate state funding to afford educational opportunity required under state constitutions. Moreover, this article will discuss how potential due process challenges to high stakes assessments may strategically leverage successful educational adequacy verdicts, Title VI resource comparability enforcement actions and poor showings of adequate yearly progress as evidence that children have not been given a fair opportunity to learn. The article sets forth that if standard based reform and high stakes testing are to survive in the face of unequalizing factors and increasing middle class grassroots opposition, policy makers must begin to soundly integrate the two reform movements in more a coherent system that is both compatible

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According to TAAS scores, the gap is much smaller and decreasing greatly. Many schools are devoting a great deal of class time to highly specific TAAS preparation. While this preparation may improve TAAS scores, it may not help students develop necessary reading and math skills. Schools with relatively large percentages of minority and poor students may be doing this more than other schools. *See generally* Stephen P. Klein et al., *What Do Test Scores In Texas Tell Us?* RAND Institute (2000) *available at* http://epaa.asu.edu/epaa/v8n49/ (last visited Oct. 20, 2002); David Grissimer, *Improving Student Achievement: What State NAEP Test Scores Tell Us?* RAND Institute (2001).

and mutually reinforcing. Failing to do so may ultimately come at the expense of the accountability system.

CONNECTING THE DOTS: DUE PROCESS IMPLICATIONS OF SYSTEM CAPACITY

Assuming that we have the test data assembled and collected, what do we do with it, before denying a student a diploma? Is accountability justly served without ever using tests in a diagnostic fashion to determine what teachers are doing right or wrong? If the foregoing question is answered in the negative, as it must be, then another question arises as to what is the real purpose of our current approach to accountability where test results are often untimely received and perhaps never taken into adequate consideration in future pedagogy. Without such consideration then, how are we to avoid the inevitable conclusion that our current implementation of high stakes testing has the practical effect of further punishing students for the failures of an under-resourced public school system? Indeed, concern arises when an accountability system is put into place with a curriculum that reflects little coherence with the very generalized state learning standards particularly where system capacity continues to remain woefully inadequate to support the new accountability schemes. Capacity is the ability of the education system to help all students meet more challenging standards which may be increased by improving the performance of teachers, adding resources as personnel, materials or technology and by restructuring how work is organized.[18] Capacity building may entail a number of specific approaches including the development of a public-private infrastructure for professional development and technical assistance, changing the standards for professional development, providing greater flexibility in the entry criteria for certifying teachers, conducting school improvement planning and developing curriculum frameworks that articulate how the new standards can be applied in the classroom. However, where capacity is insufficient as measured against educational outcomes, increasing the improvement of teachers may require more than a carrot-stick approach to testing. Under an increasingly prevalent scenario, teachers today remain ill-equipped to "connect the dots." That is, they presently lack the ability to meaningfully interpret data from state test results in order to effectively translate it into concrete classroom learning.[19] Intensive but targeted teacher professional development, more informed use of common lesson planning periods through block scheduling, greater time on classroom tasks as well as data

18. *See* Jennifer O'Day, Margaret Goertz et al., CPRE Report, *Building Capacity For Education Reform*, December 1995, *available at* http://www.cpre.org/Publications/rb18.pdf (last visited Oct. 20, 2002).

19. *Id.* at 2-6.

coordination is needed to accomplish this objective which in turn implicates the need for additional resources in our public schools, both fiscal and human.[20] Further, test data must not only be collected, but analyzed and interpreted and then implemented through sound pedagogical techniques that reflect the needs and challenges of specific learners. Children cannot be called on to learn what the teacher does not know. Therefore, if it remains the task of the classroom educator to identify and rectify processing difficulties in students' learning, and the corresponding role of the state to provide the necessary conditions that welcome and make possible such learning interventions. The state must assist the classroom educator with the necessary diagnostic tools and resources to implement effective learning strategies. However, without earmarking additional resources to address this national crisis in public education, the ability to improve system capacity, specifically, data coordination and strategic intervention, will likely suffer. Accountability on these grounds will hold little meaning other than the sole purpose of marketing and steering middle-class students to safe "recognized" blue ribbon enclaves rather than truly improving the overall state of public education. Critics have argued that some determination about the need to change a school must exist before change can occur. As Professor Elmore puts it: "[I]nternal accountability precedes external accountability. That is, school personnel must share a coherent, explicit set of norms and expectations about what a good school looks like before they can use signals from the outside to improve student learning. . . . Low-performing schools, and the people who work in them, don't know what to do. If they did, they would be doing it already."[22] Elmore's observation would presumably still hold true notwithstanding any lack of cultural pre-existing conditions that make fertile ground for effective reform if accountability mandates require institutional change and educators believe and know that they have the tools to meet state mandates. Diagnostic assessment may therefore take on heightened significance. However, it is also not entirely clear that federal mandates like the NCLB Act will, alone, provide the necessary catalyst for change. As with every other area of educational reform, the devil is in the details. As discussed herein, the implementation of accountability systems employing high stakes accountability systems may vary widely in the commitments from one state to another notwithstanding efforts for uniformity. However, concerns about system capacity and implementation

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20. *Id.*

21. *See generally* Richard Elmore, Unwarranted Intrusion, Harvard Mag. (2002); *See also* David K. Cohen & Susan L. Moffitt, Title I: Politics, Poverty, and Knowledge, in The Future of the Federal Role in Elementary and Secondary Education 78, 87-88 (2001).

22 *See generally* Richard Elmore, Unwarranted Intrusion, Harvard Mag. (2002); *See also* David K. Cohen & Susan L. Moffitt, Title I: Politics, Poverty, and Knowledge, in The Future of the Federal Role in Elementary and Secondary Education 78, 87-88 (2001).

only further exacerbate inequities and show the complex intersectionalities between standard based reform, high stakes testing and local fiscal resources. Indeed, I suggest that the very legitimacy and longevity of the high stakes movement may ultimately be distilled into two very fundamentally critical issues—that of system capacity and equitable implementation. System capacity of under-funded schools could, in turn, conceivably implicate valid due process concerns under state and federal constitutions. For example, in states like Texas, where the accountability system has been extended to assess the efficacy of capacity building mechanisms such as teacher professional development and teacher training and certification courses, due process challenges may be supported by resorting directly to the state accountability apparatus and its resulting assessment or alternatively, upon educational adequacy verdicts and private Title VI resource comparability complaints that implicate that there has been an insufficient opportunity to learn state mandated curricula. Not surprisingly, plaintiffs in a recently filed suit in Massachusetts specifically asserted that the state not only failed to announce exam results to schools in a timely manner, which limited the usefulness of the state exam results for improving teaching and learning, but that the state also lacked the capacity to provide adequate support for assisting local educators to interpret the MCAS exam results and alter their instructional strategies to help students learn.[23] What is occurring in Massachusetts appears to be playing out across the entire nation despite the no child left behind mandate. At the heart of system capacity lies the issue of additional inputs, including funding.

The challenge we face as a society is altogether different, however, when educational funding is sought to meet the new demands of high stakes tests.[24] An essential part of that challenge is recognizing that funding, though not by itself, still has important implications for student achievement. Critics of additional funding already decry that the U.S. spends more money on education than any industrialized nation although recent evidence suggest this claim is false. Simply spending more money on public education is not a reliable way to improve student achievement, as demonstrated by the research of social scientist James Coleman. Professor Coleman's research collectively purported to demonstrate that the amount of money spent on schools made little difference in student

23. *See* Complaint Brief at 56-57, Student v. Driscoll, (Mass. Dist. Ct. filed Sept. 19, 2002).

24. The New York State Appellate Division, in a recent 4-1 ruling by Judge Alfred Lerner in Campaign for Fiscal Equity III, declined to apply the higher standard of educational adequacy of the trial court in Campaign for Fiscal Equity II, and in so doing appeared to widen the disconnect between public discourse and rhetoric of "high educational standards" and the legal formulations of what standard of education the state is required to provide. The decision could demonstrate a disturbing trend that, faced with the demand to have resources fit higher educational standards and mandates, states may ratchet down academic standards rather than be held accountable for raising fiscal support of its public education system.

outcomes given their family background.[25] On the other hand, sophisticated and carefully conceived analyses, have found critical methodological flaws in the Coleman report.[26] Notwithstanding these

25. Of course the relationship between monetary inputs and educational outcomes remains the source of much contention ever since the Coleman report was published over thirty years ago. In 1966, Coleman and colleagues found that a child's socioeconomic background was far more significant in predicting a student's performance on a standardized test than were factors such as school budgets and teacher expertise; *see generally* JAMES C. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY (Dept. of Health, Education and Welfare 1966). A witness for the defendants in CFE case was Eric Hanushek, a school finance scholar who argued that public school performance would not improve with higher funding because of significant inherent inefficiencies in the way schools are run. ERIC HANUSHEK, OUTCOMES, COSTS, AND INCENTIVES IN SCHOOLS (W. Becker and W. Baumol, eds.), ASSESSING EDUCATION PRACTICES: THE CONTRIBUTIONS OF ECONOMICS, MIT Press, 29, 30 (1994); *see also* Erik Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423 (1991); ERIK HANUSHEK, SCHOOL RESOURCES AND STUDENT PERFORMANCE, in DOES MONEY MATTER 93-96 (Gary Burtless ed., 1996). Murnane asserts that the evidence is simply not conclusive to support either theory with certainty. Richard Murnane, *Interpreting the Evidence on "Does Money Matter?"* 28 HARV. J. ON LEGIS. 457 (1991). In keeping with this line of thought, four state courts have rejected the conclusion that school funding affects educational outcomes and the Supreme Court has not explicitly decided the issue. Unified School Dist. No. 229 v. State, 256 Kan. 232, 263, 885 P.2d 1170, 1190 (Kan. 1994) ("Dollar for dollar spending does not result in equal educational opportunities."); Gould v. Orr, 506 N.W.2d 349, 353 (Neb. 1993) (dismissing plaintiff's petition without leave to amend because "no reasonable possibility exists that plaintiff will, by amendment, be able to state a cause of action" that unequal funding equals inadequate education); Hoke City Bd. of Educ. v. State, 2000 WL 1639686, at * 56 (N.C. Super. 2000) (citing with approval Eric Hanushek's testimony that "throwing money at an educational problem without having goals in place for the spending and a system of accountability to measure the effectiveness of the spending is wasteful and not likely to result in improving student performance"); City of Pawtucket v. Sundlun, 662 A.2d 40, 61 (R.I. 1995) ("Money alone may never be sufficient to bring about 'learner outcomes' in all students."); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 23 (1973) (describing the question of whether money matters as "unsettled and disputed," but dismissing plaintiffs' claim).

26. Professors William Koski and Henry Levin have noted, for example, that Coleman found that pupil-teacher ratios of schools did not seem to be related to student achievement. They note that this finding was interpreted to mean that reducing class size would not make a difference in achievement despite the fact that the two measures are not the same. *See* William S. Koski & Henry Levin, *Twenty-Five Years After* Rodriguez*: What Have We Learned*? 102 TCHRS. C. REC. 3, 480-513 (2000). They assert four factors that militate against Coleman's conclusion: [1] schools that provide teachers with more preparation periods vs. class periods that may result in some schools having higher teacher-student ratios; [2] the placement of teachers in special assignments outside the classroom; [3] the high concentrations of special education students who generally are placed in small classes, reducing the per-pupil ratio, but not benefiting the regular students that are evaluated in research surveys; and [4] large urban districts have considerable numbers of teachers who are hired full-time and placed in substitute pools to cover teacher absences. In some school districts, teachers are hired on a day-to-day basis. Koski & Levin note that in both cases, teacher-pupil ratio will not be a good indicator of class size. "Given that inner city schools tend to have larger substitute pools, more special education students, and more teachers on special assignment, . . . low pupil-teacher ratios particularly understate class size for those schools." *Id.* at 8. Further, Princeton economist Alan Krueger argues that Hanushek failed to detect the significant relationship between student achievement and school resources because he narrowly limited his data to a class of seventeen-year olds and concurrently widened the scale of the aggregate NAEP data. Alan Krueger, *Reassessing the View that American Schools are Broken*, 4 ECON. POL'Y REV., Fed. Res. Bank of New York 31-33 (1998). Krueger and Grissmer's analyses find prima facie evidence exists to suggest a relationship. *Id.* (citing David Grissmer et al., *Exploring the Rapid Rise in Black Achievement Scores in the United States (1970-1990)* (unpublished paper on file with the RAND Institute on Education and Training, (1997). Some analysts believe the relationship is uncertain at best, but argue that school finance reform must still occur because the policy reasons for education equity extend beyond causation. *Id.*; William Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721, 735

research-based insights, finding no correlation between funding and student achievement appears to ignore the fact that educational spending itself has been directly proportionate to family income, or, in the suburbs, proportionately linked to property values. In fact, recent evidence does suggest that targeted intervention strategies supported by specific educational spending practices in particular do make a difference.[27]

(1992).

27. Targeted expenditures may make a difference as evidenced with preschool interventions, (Barnett & Boocock, 1998), enriched curricula (Means, Chelemen, & Knapp, 1991), whole-school reform (Hopfenberg, Levin, et al., 1993), and higher salaries for a selective teaching force (Murnane, Singer, Willett, & Kemple, 1991; Odden & Kelley, 1996), *see* William S. Koski & Henry Levin, *Twenty-Five Years After* Rodriguez: *What Have We Learned?* 102 TCHRS. C. REC. 3 at 508 (2000). Further, Ferguson and Ladd contend that more sophisticated studies the Coleman report are finding evidence of a positive connection between money and test outcomes. *See* Ronald Ferguson & Helen Ladd, *How and Why Money Matters: An Analysis of Alabama Schools,* in HOLDING SCHOOLS ACCOUNTABLE: PERFORMANCE-BASED REFORM IN EDUCATION, 265 (Helen Ladd ed., 1996). Ferguson and Ladd found in their study of the Alabama schools in 1990-91 that a 10% increase in per-pupil expenditures was associated with a .36 standard deviation increase among districts, or an average rise among districts from the 50th percentile to the 64th percentile. Using adult earnings rather than student achievement, Card and Kruger (1992) also found that school expenditures and school resources were consistently related to adult earnings. To the extent increased expenditures help to reduce class size, money appears to positively impact student achievement. For example, the State of Tennessee sponsored a large scale experiment in which randomly selected elementary school classes were reduced from an average of about 23 students to about 15 students, *see* William S. Koski et al., at 488. Student academic achievement in smaller classes was compared over several years with students in larger classes and with larger classes assigned classroom aides. *Id.* According to the study, the results consistently showed better achievement for the small classes of almost a quarter standard deviation on average and about twice the effect for low socioeconomic students as for high ones. *Id.* Koski and Levin note that what is so significant about the study is that class size was manipulated directly rather than using the usual statistical manipulations of teacher-pupil ratio and the results were reviewed and validated by a distinguished statistician (Mosteller, 1995). Krueger analyzes the class size research done by Hanushek, who has disputed the value of class size reduction based on his own class-size reviews in several states, including California, New York, Maryland and Alabama. Krueger finds, however, that Hanushek's research assigns more weight to some research estimates than to others, giving an inaccurate picture that underestimates the value of class size. After correcting the weighting problem in Hanushek's studies, Krueger finds that class size is very much related to student performance. There is also additional support for the proposition that small class size results in better student outcomes from recent research on brain development. Learning is achieved when neural pathways are laid down in cooperation among several areas of the brain. These areas include those that control emotional regulation, attachment, and arousal, as well as those that control cognition and language. All of these areas are necessary in the creation and stabilizing of neural pathways, M.N. McCain, & J.F. Mustard, *Reversing The Real Brain Drain: Early Years Study, Final Report* (1999). Funding, however, helps not only raise student achievement by making possible smaller class sizes but smaller schools as well. Research on the relationships of school size, poverty, and student achievement has shown that small schools are better for students from poorer communities. Now, a new report questions conventional wisdom about economies of scale, proving that smaller schools can be cost-effective, as well, see Barbara Kent Lawrence, Ed.D et al., *Dollars and Sense: The Cost Effectiveness of Small Schools,* (September 2002), *available at* http://www.kwfdn.org/ProgramAreas/Facilities/dollars_sense.pdf. This is a collaborative effort of the Knowledge Works Foundation, the Rural School and Community Trust, and Concordia, Inc. The report concluded that while large schools may appear to have a lower per-student cost, they have a much higher per-graduate cost, since most of the problems that tend to accompany large schools, such as alienation, student and teacher apathy, and violence are obstacles to graduation. The study further concludes that it makes more sense to measure cost per-graduate than per-student because the long-term cost to society of dropouts is even higher, as those who do not graduate have lower earning power and higher arrest rates than their counterparts who have finished high school. The Rural Trust's study

Only in recent years with the emergence of high stakes tests has the substantive nexus between accountability, achievement and funding become increasingly apparent to policy makers, but mostly out of the sheer necessity of mounting budget deficits.[28] For the first time in this nation's recent history, however, some congressional leaders appear willing to tackle schools' lack of resources and capacity. As this article goes to print, Senator Christopher Dodd (Connecticut) and Representative Chaka Fattah (Philadelphia) are introducing the Student Bill of Rights Act in both houses of Congress.[29] The proposed legislation would compel states to ensure that all schools have the resources necessary to provide meaningful educational opportunities to their students and to comply with court decisions concerning educational adequacy. The required resources, referred to as "fundamentals of educational opportunity," include highly qualified teachers and principles, small class sizes, libraries and materials, appropriate curricula, technology, guidance counselors, and safe facilities.

What are the real high stakes of our current approach to educational reform? It is nothing less than the very forfeiture of the accountability system itself. Following the present course, state and federal legislators will soon suffer the fate that their larger efforts to hold public school systems accountable will eventually fall into disrepute. The key question constituents must address is whether the ultimate goal should be the delegitimization of public schools or the goal to have better public schools. Notwithstanding privatization efforts and the recently declared constitutionality of publicly funded school vouchers, the vast majority of school-age students will still find themselves attending public schools. But if this is so, the corresponding need to sort, sift, rank, and differentiate

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is the first that has examined the true cost of small schools in rural areas, and the three groups commissioned it in the face of increased rates of school consolidation in rural America in recent years. Research showing higher benefits and lower overall costs from urban small schools, by contrast, is not new. Barbara Kent Lawrence, Ed.D., Steven Bingler, Barbara M. Diamond, J.D., Bobbie Hill, Jerry L. Hoffman, Craig B. Howley, Ed.D., Stacy Mitchell, David Rudolph, Ed.D. Elliot Washor, *Dollars and Sense. The Cost Effectiveness of Small Schools* 8, 11 (2002).

28. Pursuant to a proposal by Gov. Scott McCallum, Wisconsin's hotly debated high school graduation exam, scheduled to be pilot-tested in April, will be delayed for two years because of a lack of funding given its $1.2 billion deficit under a proposal submitted to lawmakers. If the plan is approved by the legislature this spring, students would take a pilot assessment in major subjects in 2004. Passing scores on the test would become one of a battery of requirements for graduation beginning with the class of 2006, unless parents chose to keep their children out of the test. "We've got a $1.2 billion deficit" in the current biennial budget, said Tim Roby, a spokesman for the Republican governor. "While the high school graduation test is important," he said, "we've got bigger fish to fry," *see* Julie Blair, *Citing Deficit, Wisconsin No Proposed Delay Exam*, EDUC. WK. February 27, 2002, 23 *available at* http://www.educationweek.org/ew/newstory.cfm?slug=22wisconsin.h21.

29. *See* S.2912 (Dodd with co-sponsors Kennedy, Wellstone & Reed) 9/5/2002; *See also* H.R.5346 (Fattah w/ 120 co-sponsors), 9/9/2002. The proposed legislation directs the Secretary of Education to make annual determinations as to whether each state's public school system provides all its students with educational resources to succeed academically and in life. H.R. 5346 requires such education to enable students to: (1) acquire knowledge and skills necessary for responsible citizenship; (2) meet challenging academic achievement standards; and (3) compete and succeed in a global economy.

becomes all the more important for families and students that cannot exit public schools or choose not to for other reasons. Authentic, standards-based reform today represents a drastic departure from the tracking and sorting functions carried out by the traditional nineteenth century factory-style school model, which all but pre-destined students to remain within their socioeconomic class.[30] Arguably, some may well conclude that little has changed in this regard as the nation's public schools today offer little hope for the social mobility and economic promise that the court in *Brown v. Board of Education* recognized as so vital nearly fifty years ago.[31] To some extent, punitive high stakes accountability may represent a further return to this model of education if not met with adequate resources to make its promise realistically achievable. Is it oversimplifying the complex relationship between standards, accountability and fiscal resources to say that by solely adopting higher standards and holding schools accountable, disadvantaged children can perform as well as middle class children? Perhaps it is no more oversimplifying the matter than merely concluding that additional funding, by itself, will improve student achievement. However, the common school movement of the mid-nineteenth century saw the proliferation of state constitutional provisions that called for the establishment of a system of free common schools which later became the basis for school finance lawsuits geared to force open the right to an adequate education to all. By redefining the very nature of what is adequate, these suits were premised on the very idea of creating individuals competent enough to serve as informed jury members and voters, two civic functions which also strike at the very heart of a healthy democracy.[32] Standards based reform establishes high expectations and provides high levels of support for all students, teachers, and educational leaders. Within the framework of the high stakes movement's interpretation of standards and accountability;[33] however, students are retained in grade because of a single test score, and we typically see a corresponding increase in dropout rates where such *worst* practice is in

30. *Id.* For more about the history surrounding this traditional model of education, see generally, LINDA DARLING-HAMMOND, THE RIGHT TO LEARN: A BLUEPRINT FOR CREATING SCHOOLS THAT WORK (1997).

31. *See generally* 347 U.S. 483 (1954).

32. Several state courts have conceptualized the right to an adequate education as one that would produce individuals capable of serving on juries and voting as larger framework for advancing citizenship, see Campaign for Fiscal Equity II, 2001 N.Y. Misc. Lexis 1, at * 25-26 (acknowledging serving on a jury requires a convoluted understanding of convoluted financial fraud, DNA evidence and statistical analyses); *see also* Pauley v. Kelley, 255 S.E.2d 850 (1979); Rose v. Council for Better Educ., 790 S.W.2d 186, 212 (Ky. 1989); Abbott v. Burke, 575 A.2d 359, 408-09 (1990).

33. Systems that seek to hold schools, teachers, and students responsible for student learning are undoubtedly increasing with fervent rapidity. Further, the consequences tied to high stakes student assessments are broadening such that at present most states rely on the results of such tests to determine a wide range of critical events, including whether or not to award recognition to a school, reconstitute the staffing in a school, or provide bonuses to individual teachers or graduate students.

place.[34] In fact, while the results of high stakes tests are increasingly aimed at the well intentioned objective of ending social promotion, it is significant that substantial evidence has found that retention policies, as a practical matter, have not provided the motivational incentives once thought likely and have proved widely ineffective for students of color.[35] Equity, quite

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34. *Id See* Sean Cavanagh, *Exit-Exam Trend Prompts Scrutiny of Consequneces.* EDUC. WK. September 4, 2002 at 18-19 *available at* http://www.edweek.org/ew/ewstory.cfm?slug=01ged.h22; Marguerite Clarke, Walter Haney, and George Madaus, *High stakes Testing and High School Completion*, Harvard Civil Rights Project *at* http://www.law.harvard.edu/civilrights/publications/dropouts/dropout.html (last visited Jan. 13, 2001). The report from the National Board on Educational Testing and Public Policy concludes that high stakes testing programs are "linked to decreased rates of high school completion." Data from the 1988 and 1990 National Educational Longitudinal Surveys were examined to determine whether students who had to pass one or more minimum competency tests in eighth grade were more likely to have dropped out of school by tenth grade than students who did not. Results show that in schools with proportionately more students of low socio-economic status that used high stakes minimum competency tests, early dropout rates between the eighth and tenth grades were 4 to 6 percentage points higher than in schools that were similar but for the high stakes test requirement. This piece of evidence suggests a more complex relationship between high stakes testing and dropout rates. In this study, based on records for grades 10, 11, and 12 in Florida, researchers sought to control for other factors associated with dropping out of high school, such as gender, grade point average, English language proficiency, and whether students were enrolled in dropout prevention programs. Results show that students who performed poorly on the Florida high school graduation test were more likely to leave school, but that this relationship was affected by students' grades. For students with lower grades, there was no apparent relationship between failing the graduation test and the probability of dropping out. Only for students with moderately good grades (in the range of 1.5 to 2.5 on a 4-point scale) was failure on the test associated with a significant increase in likelihood of dropping out of school. Moreover, this study found that after controlling for grades, failing on the high stakes test did not increase the likelihood of minority students' dropping out of high school any more than it did that of non-minority students. Another line of evidence raised by Walter Haney, an author of the report, concerns the evolution of high stakes testing in Texas and patterns of high school completion in that state over the last twenty years. Texas has had a statewide high school graduation test since the mid 1980s, first the Texas Educational Assessment of Minimum Skills (TEAMS), and then the Texas Assessment of Academic Skills (TAAS). The TAAS measures the Texas statewide curriculum in reading, writing and mathematics at various grades between 3 through 8; at grade 10 students take the exit level tests. Since 1991, a high school diploma requires satisfactory performance on the TAAS exit tests. Research findings suggest that because of this requirement some 40,000 of Texas' 1993 sophomores dropped out of school. The dropout rates for African-American, Hispanic, and white students were about 25%, 23%, and 13% respectively. In addition, it was found that the average black and Hispanic student was three times more likely to drop out, even controlling for socio-economic status, academic track, language program participation, and school quality. While these data concern just one cohort of Texas high school students, they fit well with Texas enrollment patterns over a 20-year period that Haney has observed in connection with research for a lawsuit challenging the graduation test in Texas. For further discussion of the factors contributing to dropout and intervention, see *Dropouts in America: How Severe Is The Problem? What Do We Know About Intervention and Prevention* Harvard Civil Rights Project *at* http://www.law.harvard.edu/civilrights/publications/dropouts/dropout.html (last visited Jan. 13, 2001).

35. Professors Jay Heubert and Robert Hauser find that test-based promotion policies are likely to raise the costs of schooling without a corresponding educational benefit. Professor Hauser's research demonstrates that retention rates are already high, especially for male students and African-Americans. At the same time, retention is ineffective. Evidence shows that students who are retained ultimately learn less than students with similar test scores who are promoted. Research also confirms that being retained in grade also greatly increases the risk of students dropping out of school. Although rates of age-grade retardation are very similar among whites, African-Americans, and Hispanics at ages 6 to 8, by ages 9 to 11, 5 to 10% more African-Americans and Hispanics than whites are enrolled below the modal grade level. The differentials continue to increase as students grow older. For example, at ages 15 to 17, rates of age-grade retardation range from 40% to 50% among African-Americans and Hispanics, and they have gradually drifted up from 25% to 35% among whites. Gender and race/ethnic

noticeably, has become the casualty rather than the consequence of some major reforms, and the health of our nation's democracy appears to correspondingly fail, leading to an increasing balkanization and racial isolation of American society. Therefore, the true challenge for public schools to survive in the new millennium will ultimately lie in their ability to help students across the socioeconomic spectrum achieve high-quality educational results.[36] But, as the Supreme Court's recent decision in *Zelman v. Simmons-Harris* indicates, the patience in public schools has worn very thin.[37] In response to the public school crisis, proponents of high stakes testing point out that minority students are among those who are most often educated poorly, and who therefore have the most to gain from a movement whose central objective is to hold *all* schools, teachers, and students to high standards of teaching and learning.[38] Nonetheless, there

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differentials in recent years result mainly from retention, not differences in age at school entry. By age 9, sharp social differentials in age-grade retardation may be observed favoring whites and girls relative to African-Americans or Hispanics and boys. By ages 15 to 17, close to 50% of African-American males have fallen behind 30 percentage points more than at ages 6 to 8, but age-grade retardation has never exceeded 30% among 15- to 17-year-old white girls. Jay Heubert and Robert Hauser, *Promotion and Retention*, *in* HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION, 114-123 (Jay Heubert & Robert Hauser eds., 1999). Further, a test that is used as a placement device makes the critical assumption that the assigned grade (or intervention, such as summer school) will benefit the student more than the alternative placement. This may not always be the case and may lead to poorer learning environments, *see e.g.*, Larry P. v. Riles, 793 F.2d 969, 980 (9th Cir. 1984).

36. *Id.* An organizing principle of modern magnet schools and income desegregation schemes recognizes that the quality of education may dramatically attract diverse students from all ethnic and social backgrounds to an open enrollment institution of public learning.

37. *Simmons-Harris*, 122 S. Ct. 2460 (2002). Although the Court was faced with a constitutional challenge under the Establishment Clause, the court in its opening paragraph of the opinion chronicled in detail the plaguing Ohio public school system to support its conclusion that the choice program was enacted for a secular purpose. The Court noted that "[f]or more than a generation, Cleveland's public schools have been among the worst performing public schools in the Nation." *Id.* at 2463. It noted that in 1995, a federal district court declared a crisis of magnitude and placed the entire Cleveland school district under state control. Justice Rehnquist, speaking for the Court, also noted that the state auditor found that Cleveland's public schools were in the midst of a crisis that is perhaps unprecedented in the history of American education and that the district had failed to meet any of the 18 state standards for minimal acceptable performance. The Court also noted that only 1 in 10 ninth graders could pass a basic proficiency examination, and students at all levels performed at a dismal rate compared with students in other Ohio public schools. Indeed, more than two-thirds of high school students either dropped or failed out before graduation. Of those students who managed to reach their senior year, one of every four failed to graduate. Of those students who did graduate, few could read, write, or compute at levels comparable to their counterparts in other cities.

38. That all children can learn when held to high expectations is reflected in congressional findings supporting the 1994 Title I amendments, wherein Congress noted that all children can master challenging content and complex problem solving skills. Congress explicitly acknowledged that "research clearly shows that children, including low-achieving children can succeed when expectations are high and all children are given an opportunity to learn challenging material." 20 U.S.C.A.§ 6301(c)(1) (West Supp. 1997). In addition, based upon persuasive evidence before it, the North Carolina Superior Court concluded this past April that "at-risk children can learn with effective, individualized and differentiated instruction delivered by a certified, well-trained, competent teacher with high expectations" and that "at-risk children require more resources, time and focused intervention in order to learn." *See* Hoke County Bd. of Educ. v. State, 95 U.S. 1158 (2002). The court also faulted the state for following a discredited educational policy of tracking poor and minority students into low tier placements plagued with poorly trained teachers and low academic expectations.

are those who suggest there are also significant negative consequences for students in schools that do not have adequate resources to expose them to the knowledge and skills that students critically need to pass the tests.[39] Recent research at Harvard University, for example, confirms the intuitive conclusion that a student's performance on a high stakes exam is significantly tied to the level of their teacher's experience and that minority and low-income students tend to have teachers with the least experience.[40] According to the research, these children are more likely to perform worse on high stakes tests than their white counterparts. These results may be explained in part by the National Research Council, which has warned that, "group differences in test performance do not necessarily indicate problems in a test, [since] test scores may reflect real differences in achievement [which] may be due to a lack of access to a high-quality curriculum and instruction."[41] Some of the most troubling concerns then center not simply around the test itself, but more often with the use of such tests and its negative consequences for students.[42] These revelations significantly call into question the programmatic approach of the moral and legal mandate of educational policymakers to leave no child behind.

These alarming results are only exacerbated when inadequate educational funding is taken into consideration. Lawsuits which have sought enforcement of the right to a minimally adequate education under state constitutions have increasingly sought adequate funding for their public school systems. Further, educational adequacy suits have in most instances appeared less threatening to high income districts than wealth

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39. *See* Jay P. Heubert, *Graduation and promotion testing: Potential benefits and risks for minority students, English-language learners, and students with disabilities*, 9 POVERTY AND RACE 5 1-2, 5-7 (2000).

40. *See generally* LINDA DARLING HAMMOND, THE RIGHT TO LEARN: A BLUEPRINT FOR CREATING SCHOOLS THAT WORK 1 (1997).

41. *Testing: Needs and Dangers,* Release (Harvard Civil Rts Project, Cambridge, Mass.) August 16, 1999, *at* http://www.law.harvard.edu/groups/civilrights/alerts/testing.html (last visited Mar. 10, 2001). *See, e.g.*, Larry P. v. Riles, 793 F.2d 969, 980 (9th Cir. 1984) (holding that because an I.Q. test is not designed as a classification tool for special education students, using it as such is inappropriate); Cureton v. Nat'l Collegiate Athletic Ass'n, 37 F. Supp. 2d 687, 712 (E.D. Pa.), *rev'd on other grounds*, 198 F.3d 107 (3d Cir. 1999) (rejecting the use of the SAT as a term of eligibility for participation in intercollegiate sports); Sharif v. N.Y. State Educ. Dep't, 709 F. Supp. 345, 354-55 (S.D.N.Y. 1989) (finding that the SAT is designed to predict performance in college and should not be used to measure achievement in high school). Therefore, the SAT should not be used to award scholarships based on merit and achievement in high school. *Id.* at 355. Under increasingly heavy pressure from critics, the College Board, which owns the SAT, has revamped its test in order to make it more useful to colleges. Not coincidentally, the proposal comes on the heels of a threat by a large and prominent customer of the SAT, the University of California system, to quit using the storied exam for freshman admissions. *See* Peter Sacks, *On Changing the SAT*, EDUC.WK. June 5, 2002, at 40, *available at* http://www.edweek.org/ew/newstory.cfm?slug=39sacks.h21&keywords=%22SAT%22.

42. *See, e.g.*, Larry P. v. Riles, 793 F.2d 969, 980 (9th Cir. 1984). However, low income and minority students are not the only groups up in arms over testing policies. Much of middle-income suburbia have taken to the streets over the impact of testing on the quality of classroom teaching. *See* Manzo, Kathleen Kennedy, *Protest Over State Testing Widespread*, EDUC. WK. May 16, 2001, *available at* http://www.edweek.org/ew/ewstory.cfm?slug=36backlash.h20>.

equalization approaches to school finance primarily because educational adequacy does not stand in the way of providing their children with more than the high-minimum education sought for all.[43] Whereas the inequality thought implicit in this approach is an accepted reality for litigants, it remains a glaring reminder of unfairness to those who cling to the principle of equality.[44] While educational adequacy suits raise concerns both as a legal theory and as a principle for guiding educational policy, they do, however, expose the shortcomings between what students now receive and what they truly need. The educational adequacy suit can still expose the widening achievement gap that states must close if they are to have a real chance to match reality with their own rhetoric that all or most children can genuinely be taught to the high standards needed for success in the new millennium.

A NEW FOURTH WAVE WANES: THE RISE AND FALL OF TITLE VI IN SCHOOL FINANCE

"No child left behind" is an important goal that will be difficult to realize when educational funding policies of a state lead to the distribution of financial and educational resources in an inequitable or even in a racially

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43. *See* Peter Enrich, *Leaving Equality Behind: New Directions In School Finance Reform*, 48 VAND. L. REV. 101, 180 (1995).

44. Jonathon Kozol, for example, has questioned the underlying objective of adequacy suits that appear to sacrifice equality in educational funding for the minimally adequate standards of educational quality sought to be enforced in adequacy suits. However, it is well accepted that strict parity in spending does not adequately take into account the fact that the purchasing power of the educational dollar varies across districts and labor market regions, and, therefore, equal funding per pupil actually discriminates against urban districts, where prices are higher, and significantly advantages non-metropolitan districts, where prices are often much lower. Consequently, school finance consultant Professor Allan Odden, at the University of Wisconsin-Madison has suggested that states modify all dollar allocations by some regional price index that adjusts for the varying purchasing power of the educational dollar, see Allan Odden, CPRE Report, *Including School Finance in Systemic Reform Strategies: A Commentary*, May 1994, *at* http://www.cpre.org/ Publications/fb04.pdf (last visited Mar. 4, 2002). Although the technical adjustments are thought to be relatively straightforward, Professor Odden aptly notes that the politics of getting them enacted into formulas admittedly are difficult as the political resistance to the recent New York educational adequacy suit demonstrates. In *Campaign for Fiscal Equity II*, for example, Justice Leland DeGrasse similarly noted that the New York state educational funding formula does not take into account the regional cost variations in providing services in metropolitan New York City public schools as compared to the relatively lower costs of the suburban school districts within the state. Specifically, the court placed significant weight on the state's usage of the Combined Wealth Ratio, which gauges a district's income and property wealth. Using this ratio, the State assesses which districts are less affluent for purposes of determining where the bulk of state aid should be given. Justice DeGrasse found that this measure, however, fails to take into account regional costs, and therefore distorts the measure of wealth for school districts such as that of New York City which has the highest costs related to teacher recruitment and educating a high proportion of at-risk students. The remedy ordered by the court to rectify the adverse effects of the state funding formula was stayed and the case now remains fiercely challenged on appeal and blocked in the state legislature, and it is thought that it will remain deadlocked with the advent of the coming gubernatorial election.

discriminatory fashion. After more than twenty years of unsuccessful school finance litigation,[45] *Campaign for Fiscal Equity (CFE) v. State of New York* found that the state legislature's funding formula created funding inequities to the detriment of minority public school students in New York City.[46] The court's decision in *CFE* was based on both state constitutional claims and Title VI's implementing regulations promulgated by the United States Department of Education. Justice Leland DeGrasse found that the funding scheme not only failed to adequately provide a constitutional minimum level of education secured under Article 11, § 1 of the New York Constitution,[47] but that the state's arcane funding formula had an impermissibly disproportionate adverse effect on its minority children. In a recent 4-1 decision authored by Judge Alfred Lerner, however, the state appellate division overruled Justice DeGrasse's holding that the state was required to provide a sound basic education. According to the appellate division, the trial court incorrectly applied too high a standard in interpreting that the New York State Constitution required a sound basic education standards rather a more minimally adequate level of education. Nonetheless, Title VI of the Civil Rights Act of 1964, which prohibits

45. In Levittown v. Nyquist, 439 N.E.2d 359 (N.Y. 1982), twenty-seven school districts, boards of education of four of New York's five largest cities (including New York City), and various student and parent groups joined a legal challenge to the state's school finance system rooted in an equity theory. The plaintiffs argued that per-pupil spending variations violated state and federal constitutional guarantees. The trial court agreed with the plaintiffs' claim and held that the state's school finance system violated not only the state's education clause but also the state and federal equal protection clauses. An appellate court concurred, except as to the claim involving the federal equal protection clause. However, in a 6-1 decision, New York's highest court essentially reversed the lower courts by declaring New York's school finance system constitutional. Although acknowledging per-pupil spending discrepancies, the court concluded that such discrepancies alone did not rise to a constitutional violation. The New York court held open, however, the possibility of a constitutional violation if "gross and glaring" inadequacy could be shown. *Id.* at 369. A subsequent lawsuit, Reform Educational Financing Inequities Today [REFIT] v. Cuomo, 631 N.Y.S.2d 551, 655; N.E.2d 647 (N.Y. 1995) resurrected the equity-based theory that failed in the earlier *Levittown* litigation. The *REFIT* case closely resembled *Levittown*, with the magnitude of the inter-district per-pupil spending discrepancies as the salient distinguishing factor. Despite increasing per-pupil spending discrepancies, however, the New York court again rejected the equity-based challenge.

46. No. 111070/93 (N.Y. Sup. Ct. Jan. 10, 2001). The formulas have been found to operate to deprive school districts of funds to which they might otherwise have been entitled. For example, the New York State Supreme Court in the CFE decision found that the operation of transition adjustments that provide maximum levels (caps) and certain minimums (hold harmless guarantees) for state aid amounts awarded to districts contributed to funding inequities. Specifically, the Court found that only 12.8% of the districts in the state received the aid that they would have been entitled to under the formulas in the absence of the transition adjustments. Another factor in the court's analysis involved a state operating ratio and the total aidable pupil units (TAPU). TAPU is an attendance-based student count (rather than enrollment based) that is mathematically weighted according to additional student characteristics such as "pupils with special education needs," "secondary school pupils" and "pupils in summer school." In finding that a Title VI violation existed, Justice asserted that the TAPU formula did not bear any relationship to actual need given that districts with large numbers of at-risk students often have higher absentee rates. Consequently, TAPU often harms schools that contain high concentrations of poor and minority students.

47. N.Y. Const. art. XI, § 1. The Clause provides, in pertinent part, "[t]he legislature shall provide for the maintenance and support of a system of free common-schools, wherein all the children of this state may be educated."

federal fund recipients from discriminating on the basis of race, color, or national origin, by virtue of the *CFE* decision promised to become the source of what I would identify as nothing less than a "fourth wave" of school finance litigation; because it is one of the first initially successful claims of its kind in such lawsuits throughout the nation. The regulations implementing Title VI prohibit discrimination that is the result of different treatment, as well as that resulting from facially neutral policies and practices that have an impermissible disparate impact.[48] The Education Department's regulations follow case law under Title VI, and as appropriate, under Title VII and the Equal Protection Clause, in applying these regulations.

The first wave of school finance litigation that relied on the Equal Protection Clause began in 1971 with *Serrano v. Priest* and ended in 1973 with the United States Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*.[49] The second wave, which began in 1973 with *Robinson v. Cahill*, [50] and ended in 1989, was based almost entirely on the equal protection clauses of the state constitutions.[51] The more successful third wave, instead of focusing solely on the equal protection clauses, alternatively relied upon securing school funding through the educational articles contained in the various state constitutions providing for an adequate education. This third wave has enjoyed only moderate success in practical terms since its inception in 1989. More recent decisions, for example by the supreme courts of Massachusetts (*McDuffy v. Sec'y of the Executive Office of Education*, 1993),[52] New Hampshire (*Claremont School District v. Governor*, 1997),[53] Ohio (*DeRolph v. State of Ohio*, 1997),[54] and South Carolina (*Abbeville County School District v. State of South Carolina*, 1999),[55] have also focused on the inadequacy of educational opportunities instead of relying solely on inequitable funding patterns as a basis for overturning school finance systems.[56] In April of this year, North Carolina joined the list of adequacy cases where the highest state court found that the educational system

48. Title VI at 34 C.F.R. § 100 (2000).

49. 411 U.S. 1 (1973).

50. 303 A.2d 273 (1973).

51. *See id.* (holding school funding system unconstitutional because it relied heavily on local taxes which lead to a large disparity in dollar input per pupil).

52. 615 N.E.2d 516 (Mass. 1993).

53. 474, 703 A2d 1353 (N.H. 1997).

54. 677 N.E.2d 733 (Ohio 1997).

55. 515 S.E.2d 535 (S.C. 1999).

56. *See, e.g.*, Sch. Admin. Dist. No. 1 v. Commissioner, 659 A.2d 854, 857 (Me. 1995); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994); Skeen v. State, 505 N.W.2d 299, 303 (Minn. 1993). In recent years, educational adequacy considerations were prominently disputed in South Carolina, Vermont, New Hampshire, Ohio, North Carolina, Wyoming, New York, Arizona, Tennessee, Massachusetts, Idaho, Alabama, and Kentucky. Where states suits have failed, courts have nonetheless suggested that an adequacy approach might be more fruitful.

violated the constitution in *Hoke v. State*.[57]

The Title VI ruling in the *CFE* case once suggested more hope for improving school resources in its potential to fuel an expansion of the federal role in traditionally state school finance matters. Though current political considerations would mean that role would be even more measured and limited in scope, it was, for example, once plausible that a Title VI ruling could galvanize state legislators to take more prompt action than they might otherwise, based on the threat of federal intervention or the withdrawal of federal funds. Of course, the opposite might also be true depending upon the recalcitrance or allegiance of state legislators to politically expedient goals and their respective constituencies.[58]

While different legal theories are employed between state constitutional provisions regarding the provision of an adequate education and Title VI challenges, however, the latter could substantially draw from the former by taking judicial notice of well documented facts in an educational adequacy suit to help determine whether a state's finance system encompasses a disparate impact upon students of a particular race, color or national origin. Although Title VI may focus on differential spending of traditional inputs, such as funds for textbooks, teachers, and facilities, the use of the adequacy standard may in certain factual circumstances significantly inform and identify funding disparities in high minority population school districts receiving inferior instructional services and dilapidated facilities. In this fashion, Title VI challenges could draw upon the already extensive public record developed during the course of ongoing educational adequacy litigation.

While CFE is one of the first cases in the nation to find at the trial level that Title VI violation exist in a state's educational financing scheme, it is certainly not alone in raising a Title VI challenge. In *Powell v. Ridge*,[59] the Third Circuit held that the state system of funding public education could be challenged under Title VI. In *Powell*, the plaintiffs alleged that Pennsylvania's educational funding formula gives less Commonwealth and total revenue per child to students in school districts with high proportions of minority students than to students in similarly situated, predominantly white school districts in violation, in part, of Title VI and its implementing regulations. The Third Circuit allowed the Title VI disparate impact claim to go forward noting that the plaintiffs will have to prove:

> (1) that less educational funding is provided by the

57. 95 U.S. 1158 (2002).

58. School finance is often regarded as the "third rail" of politics given the inevitable deliberation of raising revenue to support public schools usually in the form of unpopular property tax levies. Consequently, there is a strong incentive to forestall or prolong such controversial issues, particularly as election day approaches.

59. 189 F.3d 387 (3rd Cir.), *cert denied*, 528 U.S. 1046 (1999).

> Commonwealth to school districts attended by most non-white students in Pennsylvania than to school districts attended by most white students, (2) that the school districts attended by most non-white students in Pennsylvania receive less total educational funding than do the school districts attended by most white students, (3) that these disparities in funding are produced by the Commonwealth's funding formula, and (4) that the funding disparities injure non-white students by limiting their educational opportunities.[60]

What is also significant is that the court also noted that, depending on what evidence is discovered, plaintiffs may state a valid Title VI differential treatment claim as well as disparate impact.[61]

Other cases have also begun to steadily raise Title VI issues in school finance litigation. For instance, *Robinson v. State of Kansas*,[62] raises the specter of racial discrimination in its Title VI challenge to the state educational finance scheme. There the court held that plaintiffs had alleged a disparate impact claim under Title VI's regulations "by stating that minority students are disproportionately enrolled in districts which receive less funding per student due to provisions for low enrollment weighting and local option budgets."[63]

Likewise, the New York Civil Liberties Union (NYCLU) that once received the approval from a federal judge to proceed with a separate lawsuit, *Ceaser v. Pataki*,[64] where plaintiffs accused Governor George Pataki, State Education Commissioner Richard Mills, and other high-ranking officials of violating Title VI by failing to enforce mandates regarding educational resources in a nondiscriminatory manner. The suit specifically alleges that high minority schools have fewer educational resources than low minority schools, including fewer certified teachers, inadequate remedial instruction, and inadequate facilities and libraries.

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60. *Id.*, at 395.

61. *See Powell*, 189 F.3d at 393, n.1. Differential treatment analysis essentially has three parts: (1) Are there differences in the treatment of minority and non-minority students who are similarly situated?; (2) Can the recipient justify these differences?; and (3) Are the recipient's reasons legitimate or a pretext for unlawful discrimination? Differential treatment cases involve proof of intentional discrimination such that acts or omissions are on the basis of race, color, or national origin. In assessing whether actions are race based, intent may be inferred through consideration of a variety of factors, such as whether the burdens of the decision are greater for students of particular races or national origins, a history of discriminatory official actions, departure from the recipient's norms in procedural and substantive matters, and evidence of discrimination in statements made during the history of the action. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977). A different treatment violation does not require proof of bad faith or racial motive by school officials. In these cases, evidence of foreseeable consequences is relevant, but not necessarily conclusive, in assessing intent.

62. No. 99-1193-MLB (D. Kan. Sept. 14, 2000).

63. Memorandum and Order of the United States District Court of Kansas, at 28.

64 No. 98 Civ. 8532 (LMM), 2000 U.S. Dist. LEXIS *11532 (S.D.N.Y. Aug 14, 2000).

Originally filed in December 1998, and despite vigorous efforts by the state to have the case dismissed, the court denied the defendants' motion to dismiss the complaint on the grounds that Title VI did create a private right of action for disparate impact claims. After the *Sandoval* decision, discussed *infra*, the case was recently dismissed.

In *Williams v. State of California*,[65] California public school students filed a class action suit against the state alleging that California is depriving many pubic school children of basic educational materials and supplies as well as facilities necessary to meet basic minimal educational standards. Nearly all of the plaintiffs are African-American, Latino or Asian Pacific American that attended schools where non-white students constitute far more than half of the student population.

In *Kasayulie v. State*, plaintiffs in Alaska filed an "adequacy" and "equity" suit against the state of Alaska, claiming that the state's method of funding capital projects for education violates the Education Clause and the Equal Protection Clause of the Alaska Constitution and Title VI of the Civil Rights Act of 1964. The Superior Court granted plaintiffs' motion for partial summary judgment, holding that the system for funding facilities is unconstitutional under the education clause and violates the implementing regulations of Title VI.[66] It also held that education in Alaska is a fundamental right under the Alaska State Constitution. In March 2001, the Alaska Superior Court rejected a motion from the state to reopen the *Kasayulie* decision, concluding that the new information submitted by the state reinforces its prior findings. The state, apparently for the first time, allocated significant funds for construction and renovation of rural schools for the 2000-2001 fiscal year, but did not then change the flawed, dual system of facilities financing.[67]

Such Title VI claims could conceptually succeed because most instances of poor funding to public school systems in the nation typically have a disproportionate adverse effect on students of color, students with disabilities, and English language learners (ELLs). These instances collectively constitute a serious breach of the constitutional command inherent in third wave cases.[68] However, these favorable Title VI rulings have been significantly called into question by the U.S. Supreme Court's decision in *Alexander v. Sandoval*.[69] The Court has made evident, for example, that plaintiffs may lack standing on appeal to defend their Title VI victories as their standing was premised on the Court's holding that

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65. No. 312 236 (Superior Court of California, County of San Francisco, *filed* Nov. 14, 2000).

66. 3AN-97-3782 CIV (Sept. 1, 1999).

67. This summary comes from the Access Network *available at* http://www.accessednetwork.org/litigation/lit_ak.htm.

68. *See* Kate Zernike, *What New York Schools Get In Aid Often Has Little Connection To Needs*, N.Y. TIMES, Feb. 14, 2001 (discussing the needs of high poverty school students with special needs in relation to other districts throughout New York State).

69. 197 F.3d 484 (2001).

Title VI conferred a private right of action in disparate impact litigation, which the *Sandoval* ruling now clearly negates.

Alexander v. Sandoval

In *Alexander v. Sandoval*,[70] the U.S. Supreme Court, in breaking from clear precedent of the federal circuit courts, held that there is no private right of action to enforce disparate-impact regulations promulgated under Title VI.[71] The State of Alabama amended its Constitution in 1990 to declare English the official language of the state of Alabama. Pursuant to this provision and to advance public safety, Alabama decided to administer state drivers license examinations only in English. Respondent Martha Sandoval brought suit in the United States District Court for the Middle District of Alabama to enjoin the English-only policy, arguing that it violated the Title VI regulation because it had the effect of subjecting non-English speakers to discrimination based on their national origin. The district court agreed. It enjoined the policy and ordered the Department to accommodate non-English speakers.[72] Petitioners appealed to the Court of Appeals for the Eleventh Circuit, which affirmed.[73] Both courts rejected the state's argument that Title VI did not provide respondents a cause of action to enforce the regulation.

The Court acknowledged that, under Title VI, since § 602 authorizes federal agencies to effectuate § 601 by issuing regulations, the Department of Justice (DOJ), in an exercise of this administrative authority, promulgated a regulation forbidding fund recipients to utilize criteria or administrative methods which discriminate on the prohibited grounds.[74] In its analysis, however, the Court asserted three aspects of Title VI which in its view were well settled. First, it reiterated that private individuals may sue to enforce § 601. Second, the Court confirmed that § 601 prohibits only intentional discrimination. Third, the Court assumed for purposes of deciding the case that regulations promulgated under § 602 may validly

70. 532 U.S. 275, 281 (2001).

71. *Id.* These implications are far reaching for civil rights groups as well as private litigants. Since the rights and remedies under the implementing regulations of Title II of the Americans With Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973 (at C.F.R. § 104) and Title IX of the Higher Education Amendments of 1972 (at C.F.R. § 106) are the same as those under Title VI, the decision may have implications for disability and other civil rights litigants as well.

72. Sandoval v. Hagan, 7 F.Supp.2d 1234 (M.D. Ala. 1998).

73. Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999).

74. 28 CFR § 42.104(b)(2) (1999). Section 602 authorizes federal agencies "to effectuate the provisions of [§ 601] by issuing rules, regulations, or orders of general applicability," 42 U.S.C. § 2000dC(1), and the DOJ in an exercise of this authority promulgated a regulation forbidding funding recipients to "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." *See also* 49 CFR § 21.5(b)(2) (2000) (providing similar DOT regulation).

proscribe activities that have a disparate impact on racial groups, even though such activities might be permissible under § 601.[75]

However, these three premises of Title VI do not yield the conclusion that Congress intended to create a private right of action to sue for violation of § 602 regulations. The Court has since firmly stated that the disparate-impact regulations do not simply apply to § 601 and the private right of action to enforce § 601 does not extend to authorize a private right to enforce these regulations. That right must come, if at all, from the independent force of § 602. The Court asserted that the search for congressional intent in this case began and ended with Title VI's text and structure. In *Cannon v. University of Chicago*,[76] the Court held that a private right of action existed to enforce Title IX of the Education Amendments of 1972.[77] However, the Court noted that the "rights-creating" language critical to *Cannon*'s § 601 analysis, was completely absent from § 602. Whereas § 601 decrees that "[n]o person shall be subjected to discrimination,"[78] both § 601 and § 602 direct civil rights federal enforcement agencies to effectuate rights created by § 601. This language, the Court pointed out, neither focuses on the individuals protected nor on the funding recipients being regulated, but rather is addressed solely to the regulating agencies. Hence, the Court concluded that there is no reason to infer a private remedy in favor of individual persons from § 602.

Moreover, according to the Court, the methods of enforcement § 602 expressly provides for place elaborate restrictions on the agencies and thereby suggest a congressional intent not to create the alternative enforcement mechanism of a private remedy for violation of § 602 regulations. While private parties may sue for intentional violations under § 601, civil rights enforcement agencies, such as the Department of Justice, remain entities capable of bringing actions to enforce the disparate impact regulations promulgated under § 602. However, the majority reserved the question of whether § 1983 also covers agency regulations such as implementing regulations of the Department of Education's Title VI implementation regulations. However, one limitation to using § 1983 is that, while Title VI applies to private entities that receive federal funds, § 1983 cases must involve state action. Because the *Sandoval* decision was premised on statutory rather than constitutional interpretation, the case

75. By treating this point as an "assumption" warranted by the procedural posture of the case and supported by some authority, the court seemed to invite an open ended assault on the disparate impact regulations themselves.

76. 441 U.S. 677 (1979).

77. 86 Stat. 373, as amended, 20 U.S.C. § 1681 (1972).

78. Section 601 of that Title provides that no person shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by Title VI 42 U.S.C.§ 2000d (1999).

raises the possibility that Congress is free to overturn this decision, though the likelihood of this in the near future remains dubious.[79]

The Court's ruling may place private Title VI disparate impact challenges against states' educational funding systems in nearly the same procedural posture as school finance challenges under the Equal Protection Clause of the United States Constitution after *Rodriguez*. The *Sandoval* majority would also have a low tolerance for such Title VI funding challenges as it might see these resource equity based-suits as a second bite at the *Rodriguez* apple. Despite this setback, some have recently revived the hope that the high court could revisit the *Rodriguez* issue and recognize education as a fundamental right.[80] What is certain, however, is that if there is any potential for a new "fourth wave" of Title VI school finance litigation, the move will have to be initiated either directly by the federal apparatus or through a new litigation strategy. However, here too the political will of federal enforcement will necessarily be important and therefore may be of little hope to plaintiffs if it is also captured by the same or similar constituent forces. Given that the sleeping giant of Title VI, briefly awakened by the *CFE* victory and rendered comatose by the implications of the *Sandoval* ruling, private advocacy organizations will now need to rethink not only their litigation strategy, but also be justified in placing greater reliance on legislative advocacy, grassroots organizing, and civil disobedience if necessary. However, as noted earlier, these options fall outside the scope of the present inquiry. Instead, I will explore what other limited legal strategies might exist in the current precedential landscape.

SANDOVAL, § 1983 AND THE RIGHT TO ENFORCE TITLE VI'S § 602 REGULATIONS

Despite the *Sandoval* ruling, there may still be hope yet for this new wave of Title VI school finance litigation. To find a workable solution around the *Sandoval* ruling for education stakeholders and private litigants, of recent environmental litigation serves as a helpful comparison. In his May 10, 2001, supplemental opinion in *South Camden Citizens in Action v.*

79. Of course, it should be noted that in the early 1990s, Congress did in fact see fit to overturn, through the Civil Rights Restoration Act, several Supreme Court rulings that narrowed the scope of civil rights laws.

80. *See e.g.*, Kristen Safier, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993 (2001) (arguing a federal constitutional right to a minimally adequate education may exist under concepts of liberty and based upon state reform litigation); William S. Koski, *Educational Opportunity and Accountability in an Era of Standards-Based School Reform*, 12 STAN. L. & POL'Y REV. 301 (2001)(arguing that standards-based reform schemes may have changed the legal and constitutional landscape since Rodriguez to support the high court in finding that education is a fundamental right).

New Jersey Department of Environmental Protection II (SCCIA II), Judge Orlofsky concluded that the *Sandoval* decision did not bar the plaintiffs from using § 1983 to enforce the federal rights in EPA's Title VI § 602 disparate impact regulations.[81] In this environmental justice suit, neighborhood groups challenged the placement of a cement plant in a minority neighborhood in South Camden, New Jersey, calling the *Sandoval* ruling's impact on § 1983 claims into question. The *SCCI II* court correctly noted that the *Sandoval* plaintiffs' disparate impact discrimination claim was based exclusively on a direct private right of action under § 602 of Title VI and did not raise a § 1983 suit.[82] Furthermore, as noted above, the Supreme Court majority in *Sandoval* never reached the issue of whether § 602 disparate impact regulations are enforceable rights under § 1983; nor did the *Sandoval* Court also failed to address the fundamental issue of whether § 602 confers authority for federal agencies to issue disparate impact regulations.[83] The Court also based in holding on *Wright v. City of Roanoke Redevelopment and Housing Authority.*[84] There, the Supreme Court held that tenants of rent-controlled apartments had a right to sue under § 1983 for violations of a federal housing statute imposing a rent ceiling and the statute's implementing regulations, which required that the housing authorities include in the rent a reasonable amount for the use of utilities.[85] After first concluding that the statute did not contain sufficient remedial mechanisms to preclude a § 1983 suit,[86] the Court concluded that the statute and the regulations give the tenants specific and definite rights within the meaning of § 1983.[87] Accordingly, SCCIA II court concluded that "Sandoval does not foreclose plaintiffs from seeking to vindicate the rights they allege § 602 and its implementing regulations create through § 1983."[88] To sue under § 1983, a court first examines whether the complaint asserts the "violation of a federal right, not merely a violation of federal law."[89] To determine whether a federal statute creates an individual

81. *See generally SCCIA II*, 145 F. Supp. 2d 505, 532-35 (D.N.J. 2001) (arguing *Sandoval* did not overrule precedent establishing authority of agencies to issue and enforce regulations prohibiting disparate impact discrimination). In Alexander v. Sandoval, Justice Scalia stated: "[W]e must assume for purposes of deciding this case that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601." *See Sandoval*, 532 U.S. at 281.

82. *SCCIA II* 145 F. Supp. at 514.

83. *Id.*

84. Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987).

85. 479 U.S. at 423-29. Section 1983 provides, in relevant part, as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

86. *Id.* at 424-28.

87. *Id.* at 430-32.

88. *Id.*

89. *See generally* Blessing v. Freestone, 520 U.S. 329, 340 (1997); Bradford Mank, *Using*

enforceable federal right, the Supreme Court in *Blessing v. Freestone* used a three-part test: First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right purportedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States.[90] In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

If a federal statutory right meets the three-part test, there is a strong presumption that a plaintiff may use § 1983 to enforce that right.[91] Even when the plaintiff has asserted a federal right, however, the Supreme Court in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n* held that a defendant may show that Congress "specifically foreclosed a remedy under 1983," either expressly or impliedly, by providing a "comprehensive enforcement mechanis[m] for protection of a federal right."[92] As Bradford Mank has recently observed, however, there is a heavy burden on the defendant to prove that a statute's enforcement scheme is so comprehensive that a court must presume that Congress could not have intended to allow a separate remedy through a § 1983 suit.[93] This interpretation also seems to find support from *Livadas v. Bradshaw*, where the Court asserted that "apart from [some] exceptional cases, § 1983 remains a generally and presumptively available remedy for claimed violations of federal law."[94]

As the *Sandoval* minority opinion suggests, it is possible to enforce a federal statutory right through § 1983 even if that right cannot be enforced as a direct private right of action.[95] Notably, the *Blessing* test is significant for assessing whether a federal right may be enforced under § 1983 stands apart from whether there is a private right of action in accordance with the four-part test established in *Cort v. Ash*.[96] As Mank observes, the most

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Section 1983 to Enforce Title VI's § 602 Regulations, 49 U. KAN. L. REV. 321, 332 (2001) (arguing Title VI disparate impact regulations may be enforced through § 1983).

90. *See generally* Mank, *Using Section 1983 to Enforce Title VI's § 602 Regulations*, *supra* note 53 at 332; Mank, *South Camden Citizens In Action v. New Jersey Department of Environmental Protection: Will Section 1983 Save Title VI Disparate Impact Suits?* 32 ELR 10454 (2002).

91. *Blessing*, 520 U.S. at 346; Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 520 (1990) (courts "do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right") (internal citations omitted); Mank, *Using Section 1983 to Enforce Title VI's § 602 Regulations*, *supra* note 82 at 334.

92. 453 U.S. 1(1981); Mank, South Camden Citizens In Action v. New Jersey Dept. of Envtl. Protection: *Will Section 1983 Save Title VI Disparate Impact Suits?* 32 E.L.R. 10454 (2002). *See also* Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989) (citations omitted); National Sea Clammers, 453 U.S. at 20; Mank, Using Section 1983 to Enforce Title VI's § 602 Regulations, *supra* note 53, at 334-36.

93. Mank, supra note 92.

94. 512 U.S. at 132.

95. 197 F.3d at 484.

96. 422 U.S. 66 (1975).

important part of the *Cort* test for determining whether a plaintiff may directly enforce a statute through a private suit is whether Congress intended, either expressly or by implication, to create a private right of action,[97] whereas the three-part *Blessing* test used by the Supreme Court in § 1983 cases is essentially premised on a mandatory federal right in favor of the plaintiff exists.[98] Whether the underlying substantive statute establishing a federal right in favor of the plaintiff provides a remedy is not determinative because § 1983 itself provides the remedy.[99] Thus, the Supreme Court has "recognize[d] an exception to the general rule that § 1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy."[100] This interpretation is not, however, inconsistent with Mank's assertion that courts have allowed suits under §1983 to vindicate federal statutory rights even when the underlying statute creating the right is not enforceable as a private right of action.[101]

However, because all of the Supreme Court's decisions, including *Sandoval*, have assumed that these implementing regulations are valid, and

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97. Suter v. Artist M., 503 U.S. 347, 363 (1992) (stating that *Cort* places the burden on the plaintiff to demonstrate Congress' intent to make a private right of action available); Touche Ross & Co. v. Reddington, 442 U.S. 560, 575 (1979); *See* Mank, *supra* note 89 at 356-57 n.268 (citing Supreme Court cases making congressional intent the central inquiry in deciding whether a private right of action exists).

98. *See Blessing*, 520 U.S. at 340-41.

99. *See generally*, Mank, *supra* note 89 at 10454. Because § 1983 provides an "alternative source of express congressional authorization of private suits," the separation of powers concerns that require congressional intent to authorize a private cause of action are not present in a § 1983 case. The rationale follows that because § 1983 provides an "alternative source of express congressional authorization of private suits, " the separation of powers concerns that require congressional intent to authorize a private cause of action are not present in a § 1983 case, *see* Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 n.9 (1990).

100. *Wilder*, 496 U.S. at 508 n.9

101. *See* Mank, *South Camden Citizens In Action v. New Jersey Department of Environmental Protection: Will Section 1983 Save Title VI Disparate Impact Suits?* 32 ELR 10454 (2002) at n.245 (citing Wilder, 496 U.S. at 508 n.9 (observing that whether a § 1983 suit is available presents a "different inquiry" than whether an implied right of action exists)); Chan v. City of New York, 1 F.3d 96, 102-06 (2d Cir. 1993) (concluding under the Court analysis that the Housing and Community Development Act did not create a private right of action, but did, based on the Blessing/Wilder analysis, create substantive rights that could be enforced through a § 1983 action); Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 246-47 (1991); *see also* Mallett v. Wisconsin Div. of Vocational Rehab., 130 F.3d 1245, 1248-57 (7th Cir. 1997) (determining that a plaintiff could bring a § 1983 claim based on the Rehabilitation Act because it created an enforceable right and did not foreclose such relief, but that there was no private right of action under the Act because its language and legislative history suggested that the statute's administrative remedy was a more appropriate enforcement mechanism); Keaukaha Panaewa Comm. Ass'n v. Hawaiian Homes Comm'n, 739 F.2d 1467, 1470-71 (9th Cir. 1984) (concluding that plaintiffs could bring a § 1983 action because the statute at issue clearly mandated that the trust at issue be established for benefit of Hawaiians such as plaintiffs and did not foreclose a § 1983 remedy, but also concluding that no private right of action existed under the statute); *but see* Michael A. Mazzuchi, *Section 1983 and Implied Rights of Action: Rights, Remedies, and Realism*, 90 MICH L. REV. 1062, 1064, 1093 (1992) (arguing that statutory rights under § 1983 should be limited in the future to cases in which rights could be enforced through an implied or explicit private right of action, but acknowledging that prior cases have applied more lenient standard in § 1983 suits).

given further the numerous Supreme Court and lower court decisions upholding the validity of § 602 disparate impact regulations, § 1983 education litigants may therefore have a basis to conclude, as the *SCCIA II* court had concluded, that these implementing regulations establish clear federal rights that may be enforced through a § 1983 suit. Under the three-part *Blessing* test for enforcing federal rights through § 1983, the first issue is whether the Department of Education's implementing regulations were intended to benefit a class that includes the plaintiffs.[102] The *SCCIA II* court concluded unequivocally that the EPA's § 602 regulations are intended to protect persons of color such as the plaintiffs.[103] Furthermore, the Court found that specific language in EPA's implementing regulations, especially the mandate that "no person suffers discrimination from a program or activity receiving Agency assistance, demonstrated an intent to benefit individuals such as the plaintiffs." Likewise, the Department of Education regulations also provide for similar language that confers special recognition upon individual persons. More specifically, Title VI and DOE's implementing regulations provide that "*no individual* may be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination on the ground of race, color or national origin under any program or activity that receives federal funds."[104] Section 1983 educational litigants may justifiably conclude as the *SCCIA II* court concluded that EPA's § 602 implementing regulations establish individual rights that may be enforced by persons such as the plaintiffs.[105]

Under the second prong of the *Blessing* test, § 1983 educational plaintiffs must demonstrate that the right purportedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence.[106] The *SCCIA II* court found that EPA's § 602 implementing regulations clearly and specifically prohibit disparate impact discrimination by using a well-established three-part burden shifting framework.[107] Numerous court decisions have interpreted and applied Title VI disparate impact discrimination regulations.[108] The *SCCIA II* court found persuasive that the ability of courts to enforce Title VI disparate

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102. *Blessing*, 520 U.S. at 346

103. *Id.* at 536, 31 E.L.R. at 20686; *See generally,* Mank, *South Camden Citizens In Action v. New Jersey Department of Environmental Protection: Will Section 1983 Save Title VI Disparate Impact Suits?* 32 E.L.R. 10454 (2002).

104. *See* Title VI of the Civil Rights Act of 1964, U.S.C. 2000d *et seq.* (1999)(Title VI) and its implementing regulations at 34 C.F.R. § 100 (1999) (emphasis added).

105. *SCCIA II,* at 536-39.

106 *Blessing*, 520 U.S. at 340.

107. *SCCIA II,* 145 F. Supp. 2d at 539-40.

108. *See, e.g.*, Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999), *cert. denied,* 528 U.S. 1046 (1999), New York Urban League v. New York, 71 F.3d 1031 (2d Cir. 1995); Ferguson v. Charleston, 186 F.3d 469 (4th Cir. 1999), *rev'd on other grounds,* 121 S. Ct. 1281 (2001); David K. v. Lane, 839 F.2d 1265, 1274 (7th Cir. 1988); City of Chicago v. Lindley, 66 F.3d 819 (7th Cir. 1995); Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984); Villanueva v. Carere, 85 F.3d 481 (10th Cir. 1996); Elston v. Talledaga Bd. of Educ., 997 F.2d 1394 (11th Cir. 1993).

impact regulations. First, a plaintiff must establish a prima facie case of disparate impact discrimination. Second, a defendant may offer a substantial and legitimate justification in rebuttal. Finally, if a defendant has offered a proper rebuttal, a plaintiff may establish that the defendant ignored an equally effective alternative with less discriminatory impact.[109] DOE's § 602 framework also applies a similar three part test as EPA's § 602 analysis, and so it may be reasonable to conclude that enforcing DOE's Title VI regulations are not beyond judicial competence under *Blessing*'s second prong.[110]

Under the final prong in the *Blessing* analysis a court must determine whether the federal statute establishes mandatory rights for the benefit of an identifiable class of plaintiffs.[111] Section 1983 educational plaintiffs may also find encouraging the *SCCIA II* court's conclusion that EPA's § 602 implementing regulations use mandatory language directing recipients not to discriminate and, therefore, are enforceable under § 1983.[112] In this way, educational litigants and stakeholders may be able to successfully withstand all three prongs of the *Blessing* test.

Whether Congress had expressly or impliedly foreclosed the educational plaintiffs' ability to enforce DOE's § 602 implementing regulations under § 1983, it is possible that neither Title VI nor its regulations expressly restrict the availability of relief under § 1983.[113] As such, the burden remains on the defendant states to establish that allowing a remedy under § 1983 would be inconsistent with Title VI's enforcement scheme or, more specifically, the administrative remedies in DOE's § 602 implementing regulations. Two primary considerations exist for plaintiffs. First, the defendants have a heavy burden to prove that a statute's enforcement scheme is so comprehensive that a court must presume that Congress could not have intended to allow a separate remedy through a § 1983 suit.[114] Secondly, in *Blessing,* the Supreme Court emphasized that the mere existence of administrative remedies is not enough to defeat the availability of relief under § 1983.[115] Further, DOE's § 602 regulations for termination of funding are limited remedies and do not provide any

109. *See generally* New York Urban League, 71 F.3d at 1036; Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985); *SCCIA II,* 145 F. Supp. 2d at 540-41.; *See generally* Mank, *South Camden Citizens In Action v. New Jersey Department of Environmental Protection: Will Section 1983 Save Title VI Disparate Impact Suits?* 32 ELR 10454 (2002); Mank, *South Camden Citizens In Action v. New Jersey Department of Environmental Protection: Will Section 1983 Save Title VI Disparate Impact Suits? supra* note 105.

110. *SCCIA II,* 145 F. Supp. 2d at 541.

111. *Blessing,* 520 U.S. at 341.

112. *SCCIA II,* 145 F. Supp. 2d at 541-42.

113. Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999), *cert denied,* 528 U.S. 1046 (1999).

114. *See generally* Mank, *South Camden Citizens In Action v. New Jersey Department of Environmental Protection: Will Section 1983 Save Title VI Disparate Impact Suits?, supra* note 105.

115. *Id.*

individual remedies for those harmed by the adverse disparate impact of a facially neutral state educational funding policy.

THE LIMITS OF SECTION 1983: SOUTH CAMDEN REVISITED & CEASER V. PATAKI

The *SCCIA II* decision, however, was recently revisited and reversed by the court of appeals.[116] The court of appeals took issue with the district court's holding that *Wright* stands for the proposition that valid federal regulations may create rights enforceable under § 1983 to which the *Blessing* analysis applies. The appeals court noted that the U.S. Supreme Court's primary concern in considering enforceability of federal claims under § 1983 has been to ensure that Congress intended to create the federal right being advanced. Accordingly, it held that a federal regulation alone may not create a right enforceable through § 1983 not already found in the enforcing statute.[117] Similarly, the court reject the argument that enforceable rights may be found in any valid administrative implementation of a statute that in itself creates some enforceable right. Applying these rules in light of *Sandoval*, the Court held that Congress did not intend to create a federal right under Title VI to be free from disparate impact discrimination. While the EPA's regulations on the point may be valid, the Court nevertheless found the disparate impact does not create rights enforceable under § 1983. It held that the district court erred as a matter of law and therefore also erred in finding that plaintiffs were likely to succeed on the merits of their claim. Consequently, the appellate court

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116. 274 F.3d 771 C.A.3 (N.J.) 2001 [*hereinafter SCCIA III*]. Shortly after *SCCIA II*, the intervenor-appellant, St. Lawrence Cement Co., L.L.C. ("St. Lawrence") unsuccessfully moved in the district court for a stay of the preliminary injunction pending appeal. St. Lawrence, on May 15, 2001, filed a motion to suspend or, in the alternative, to modify the preliminary injunction pending appeal, in addition to the request for expedited review of the appeal. On May 29, 2001, NJDEP requested a stay of the remand process from the district court, but on June 4, 2001, the district court denied that request. NJDEP then made the same application to the court of appeals on June 6, 2001, but was later denied its motion on June 11, 2001. On June 12, 2001, however, the court of appeals granted St. Lawrence's request for expedited review, and on June 15, 2001, the court of appeals granted St. Lawrence's request to suspend the preliminary injunction pending appeal.

117. The court of appeals distinguished *Wright* noting that the district court's holding was erroneous because *Wright* merely defined the specific right that Congress already had conferred through the statute, *see Wright* at 430 n. 11 and 431. The court differentiated *SCCIA III* from *Wright* because in *Wright* it found the statute and its implementing regulations created a right enforceable through § 1983 by noting that Congress'-intent with regard to the statute to benefit tenants was "undeniable." *Id.* at 430. The Wright court afforded this deference, *after* having found that Congress had conferred upon plaintiffs that right by statute. As such, the Court of Appeals held that *Wright* does not hold that a regulation alone—*i.e.*, where the alleged right does not appear explicitly in the statute, but only appears in the regulation—may create an enforceable federal right under § 1983. Therefore, inasmuch as the disparate impact regulations went far beyond the intentional discrimination interdiction in § 601, it held that the district court's reliance on *Wright* was misplaced.

reversed and remanded the district court's order to grant preliminary injunctive relief.

However, in late March 2002, the federal district court for the Southern District of New York dismissed the plaintiffs' Title VI claims in *Ceaser v. Pataki.*[118] Following the Supreme Court's decision in *Sandoval*, the plaintiffs pursued their disparate impact claims under § 1983. Plaintiffs requested that the Court not adopt the defendants' approach in light of the Supreme Court's 1987 decision in *Wright.* The plaintiffs maintained Wright stood for the proposition that "regulations are enforceable if the regulations are valid and meet the traditional § 1983 doctrinal standards . . . ."[119] For the reasons articulated in *SCCIA III*, the Caesar court held that plaintiffs have no right to sue under § 1983 for alleged violations of the disparate impact regulation in this case. The court then concluded that since the disparate impact regulations under Title VI go beyond what Congress proscribed in the actual statute, they are not enforceable under § 1983. Consequently, the very legitimacy, then, of disparate impact litigation is called into question which the *Sandoval* ruling itself appeared to invite by merely assuming, rather than reaffirming, the validity of such disparate claims. Thus, plaintiffs must now seek a new strategy in jurisdictions that follow this narrower interpretation in the short term, and look to new bases for support in the long term.

NEW CHALLENGES FOR HIGH STAKES ASSESSMENTS: LEVERAGING THE RIGHT TO AN ADEQUATE EDUCATION IN DUE PROCESS CHALLENGES

Another possibility for private litigants to bring about a more effective fourth wave in school resource funding may be to file a "hybrid" school finance/high stakes lawsuit under state educational adequacy provisions and the Due Process Clause. Alternatively, where feasible, litigants may use existing victories in educational adequacy lawsuits as leverage in due process challenges against instructional and curricular non-aligned high stakes assessment systems.

A. EDUCATION AS A PROPERTY ENTITLEMENT

118. 2002 WL 472271 (S.D.N.Y.)
119. (Pls'. Mem. in Opp'n at 20.)

To overcome *Rodriguez's* declaration that education is not a fundamental right, litigants have treated education as a property right.[120] The result is a novel approach arising from the tension that exist between declaring that education is not a fundamental right and yet holding still that it is nonetheless an entitlement.

Traditional procedural due process provides "an opportunity to be heard . . . at a meaningful time and a meaningful place," often to promote fairness in dispute resolution.[121] This approach, however, is not without its limitations. For instance, the procedural due process seeks to guarantee the right to be heard, and not the right to prevail. By the terms of Fifth and Fourteenth Amendments, deprivation of life, liberty, or property activates due process guarantees when there are cognizable liberty interests such as "those privileges long recognized as essential to the orderly pursuit of happiness by free men,"[122] or property interests grounded in "a legitimate claim of entitlement" to a benefit.[123]

With regard to property interest, entitlement doctrine serves three purposes. First, the doctrine provides a means for determining which interests warrant protection safeguards. Second, it protects parties who change their position in justified reliance on official action. Finally, the entitlement doctrine maximizes state control over the creation of protected

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120. Substantive due process doctrine states that the Due Process Clauses of the Fifth and Fourteenth Amendments guarantee not only that appropriate and just procedures (or "processes") be used whenever the government is punishing a person or otherwise taking away a person's life, freedom or property, but that these clauses also guarantee that a person's life, freedom and property cannot be taken without appropriate governmental justification, *regardless* of the procedures used to do the taking. Substantive due process articulates a substantive right that is protected and the extent to which that right receives protection through the use of the incorporation doctrine applying substantive rights to the states and fundamental rights theory. Critics of substantive due process claim that it is not the laws it strikes down, but rather the theory itself which is "unconstitutional." They claim that it is a pure usurpation of power by the Court since it cannot use judicial review to strike down a state law unless the law is really contrary to the Constitution. In the original U.S. Constitution itself, there are not many express restrictions on the power of the states. Most are in Art I § 10 and in Art. VI. The Bill of Rights contains both substantive and procedural rights designed to limit the power of the federal government. After the adoption of the Fourteenth Amendment in 1868, the Supreme Court determined that many of the *procedural* provisions of the Bill of Rights (like the Fourth and Fifth Amendments) would also be protected by the 14th Amendment's Due Process Clause, which was directed at the states. However, the Court also used the theory of Substantive Due Process to apply ("incorporate") many of the *substantive* provisions of the Bill of Rights (like the First Amendment to the states as well. *E.g. Gitlow v. New York*, 268 U.S. 652 (1925). Although the Supreme Court began to use substantive due process to establish various substantive rights not actually articulated in the Constitution under the "Fundamental Rights" theory; *see* Lochner v. New York, 198 U.S. 45 (1905), it would come to repudiate the "fundamental rights" version of substantive due process as an infringement on the authority of state legislatures. *See* West Coast Hotel v. Parrish, 300 U.S. 379 (1937); Ferguson v. Skrupa, 372 U.S. 726 (1963). In Griswold v. Connecticut, 381 U.S. 479 (1965), at least four of the seven votes that affirmed the right to privacy were based on the fundamental rights theory. This reliance continued in *Roe* and *Casey* Even while different constitutional theories were advanced in *Griswold, Roe and Casey* to support the right to privacy all of them, directly or indirectly, rely on Substantive Due Process.

121. Fuentes v. Shevin, 407 U.S. 67 (1972).

122. Meyer v. State of Nebraska, 262 U.S. 390 (1923)

123. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972)

interests. Therefore, no hearing is necessary unless a person can legitimately claim entitlement to a benefit. There is also a distinction between termination of benefits and denial of initial application that significantly limits the usefulness of this approach. For example, whereas an applicant for admission to a state university will be unable to show entitlement under the doctrine as applied, an enrolled student will in fact be able to demonstrate entitlement to due process.[124] Likewise even though a state statute might authorize suspension, a student will be entitled to a hearing for suspension.[125]

B. DUE PROCESS, HIGH STAKES TESTS & EDUCATIONAL ADEQUACY

As previously noted, due process rights are triggered when a school denies a diploma to a student because state compulsory education statutes create an entitlement.[126] Further, a state has a legitimate interest in attempting to insure the value of its diplomas and to improve upon the quality of education by using competency testing to effectuate goals underlying those interests.[127] The federal district court in *Debra P. v. Turlington* outlined the due process standard in the context of high stakes testing.[128] As a general matter, a state may only condition the receipt of a

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124. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.1961).

125. Goss v. Lopez, 419 U.S. 565.

126. Heubert and Hauser, eds. "Legal Frameworks." *High stakes: Testing for Tracking, Promotion, and Graduation.* Wash., DC: Nat'l Academy Press (1999), p. 63-65.

127. *See* Bd. of Educ. v. Ambach, 436 N.Y.S.2d 564, 572 (1981), *modified by* 458 N.Y.S.2d 680 (1982) (stating that "a standard that would make a high school diploma . . . a meaningful credential ... is clearly within the authority and power of [the board]"); *see generally* Jeffrey J. Horner, *Commentary, A Review of the Development of and Legal Challenges to Student Competency Testing Programs*, 23 EDUC. L. REP. 1, 4 (1985) (discussing the establishment of a cognizable property right in a high school diploma under Debra P. v. Turlington).

128. Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd, in part, vacated in part,* 644 F.2d 397 (5th Cir. Unit B 1981). *Debra P.* was initially brought in Florida district court to challenge the constitutional and statutory validity of student assessment exam implemented as a graduation requirement. Id. at 246-47. The district court found that the diploma aspect of the exam violated the Due Process Clause of the Constitution due to the state's failure to provide adequate notice to the students of the enhanced requirements for graduation and by failure to demonstrate that the material on the test was actually taught in the classroom. Id. at 269. On appeal, the Fifth Circuit affirmed the lower court's ruling that the exam's implementation schedule violated the notice requirement of the Due Process Clause and that the immediate application of the diploma sanction violated the plaintiffs' equal protection rights because it furthered the inequities created by a former dual school system. Debra P. v. Turlington, 644 F.2d 397, 404-07 (5th Cir. 1981). As well, the circuit court remanded the case to determine whether the information on the test was part of the actual applied school curriculum as required by due process, equal protection, and Title VI of the Civil Rights Act. Id. at 402, 407-08. On remand, the district court found for the state on both issues. Debra P. v. Turlington, 564 F. Supp. 177, 186-188 (M.D. Fla. 1983), *aff'd,* 730 F.2d 1405 (11th Cir. 1984) (holding that the state proved by a preponderance of the evidence that the assessment exam did reflect the classroom curriculum and that there was no demonstrable link between the present effects of past educational discrimination and the disparate failure rate of minority test takers). On appeal, the

public school diploma on the passing of a test so long as such high stakes tests represent a fair measure of that which was taught.[129] High stakes exams in this due process context may also be struck down if they are implemented without adequate prior notice.[130] Although a precise definition of proper notice is not entirely clear, the court suggested that perhaps more than four years should pass between the proclamation of new testing objectives and the application of actual diploma sanctions based on those testing objectives.[131] This period would allow students and teachers time to acclimate to the new expectations while also providing students, who may have been subject to a dual education system in the past, an opportunity to adjust and reap the benefits of the new, unitary educational system.[132]

However, notwithstanding new unitary educational systems, the many state legal victories won around the nation under existing state constitutional provisions should by itself give us pause about the long term credibility and viability of the high stakes movement, particularly for students of color who are the children primarily left behind. In addition to meeting the mandates of procedural due process, a state's action must also comply with substantive due process safeguards. Although substantive due process jurisprudence remains unsettled, the Fifth Circuit has established that a "fundamentally unfair" high stakes test violates this constitutional guarantee.[133] To comply with constitutional guidelines in this area, a state's high stakes test must prove demonstrably valid and reliable.[134] In addition,

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Eleventh Circuit affirmed the district court's decision. *See* Debra P. v. Turlington, 730 F.2d 1405 (11th Cir. 1984).

129. *See generally* Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979) *aff'd in part rev'd in part,* 644 F.2d 397 (5th Cir. 1981) *rem'd,* 564 F. Supp. 177 (M.D. Fla. 1983) *aff'd,* 730 F.2d 1405 (11th Cir. 1984).

130. Debra P., 644 F.2d at 404 (finding that a high stakes assessment instituted "at the eleventh hour and with virtually no warning" provided insufficient notice, but not stating exactly what would constitute sufficient notice). The district issued a four-year injunction on the diploma sanction which was upheld by the Eleventh Circuit as establishing an appropriate notice period. Debra P. v. Turlington, 730 F.2d 1405, 1407 (11th Cir. 1984); *See also* Debra P. v. Turlington, 474 F. Supp. 244, 267 (M.D. Fla. 1979), *aff'd in part, vacated in part,* 644 F.2d 397 (5th Cir. Unit B 1981) (reviewing the standards pronounced during expert testimony regarding the amount of time necessary to provide adequate notice in high stakes testing situations). Other courts have similarly found a violation of the Due Process Clause where school districts or states failed to provide adequate notice or an opportunity to learn the material tested on a high stakes test. Brookhart, 697 F.2d at 186; Crump, 797 F. Supp. at 552. *But see* Williams v. Austin Indep. Sch. Dist , 796 F. Supp. 251, 254 (W.D. Tex. 1992) (finding that the district "presented substantial evidence that [the high school] provided, and [the plaintiff] took, courses which adequately prepared him to take and pass the [minimum competency exam]"); Anderson v. Banks, 540 F. Supp. 761, 765 (S.D. Ga. 1982) (finding Georgia's minimum competency test valid); Ambach, 458 N.Y.S.2d at 684 (finding that students have a property interest in their diplomas, but holding that three years was sufficient notice to students prior to giving the competency exam).

131. 730 F.2d at 1405.

132. *Turlington,* 474 F. Supp. at 267 (proclaiming that the plaintiffs in the case "have been the victims of segregation, social promotion and various other educational ills but have persisted and remained in school and should not now, at this late date, be denied the diplomas they have earned").

133. *Debra P.,* 644 F.2d at 404.

134. *Id.* at 404-05 (proclaiming that a competency examination which was not scientifically valid

Debra P provides that a state may not enact a test that is arbitrary, capricious, fundamentally unfair, or that frustrates a legitimate government interest.[135] Finally, a test which exhibits a substantial deviation from accepted academic norms also may violate substantive due process.[136]

One manner in which putative plaintiffs can demonstrate fundamental unfairness is when a particular assessment system holds students accountable for an inadequate education system. In *G.I. Forum v. Texas Education Agency*[137] the court recognized the long history of inequality in the Texas education system and noted that the effects from such inequality continue today.[138] The court concluded, however, that the state did not use the state's high stakes test in such a way as to hold students responsible for the failure of the school system because the test represents the state's plan to address and eradicate such inequalities.[139] Relying solely on the intent of the test usage, the court trumped the purpose of the exam over any de-facto penalization of students resulting from a deficient educational system not of their own making. Put another way, the court's argument operates "by weighing more heavily the State's interest in pursuing its chosen program for remeditating inequalities than the student's interest in not being penalized as a result of the same inequalities."[140]

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was fundamentally unfair).

135. *Id.* at 404; *see also* St. Ann v. Palisi, 495 F.2d 423, 425 (5th Cir. 1974) (establishing that it would be fundamentally unfair for the state to interfere with a student's right to an education in a public education system by suspending a student based on her mother's conduct which was beyond the student's control).

136. *Debra P.*, 474 F. Supp. at 261 (commenting that the constitutional requirement is only that the test bear a rational relationship to the state's goal, not that the test be "state of the art" or the best instrument available).

137. GI Forum v. Tex. Educ. Agency, 87 F. Supp. 2d 667, 674 (W.D. Tex. 2000). A substantive due process challenge might succeed when the state's educational determinations reflect a "substantial departure from accepted academic norms." Such a departure is demonstrated when, for example, the cut-score is selected in an arbitrary and unscientific method or, a departure may be evidenced by using a test as a sole criterion for an important decision. The most troubling departure in the context of the Texas Assessment of Academic Skills, (TAAS) test, for example, is in the test item selection system used in the design of the exam. The item selection system used in the creation of the TAAS examination often results in the favoring of items on which minorities will perform poorly, while disfavoring items where discrepancies are not as wide, *see* Blakely Latham Fernandez, *TAAS and GI Forum v. Texas Education Agency: A Critical Analysis and Proposal For Redressing Problems With The Standardized Testing in Texas*, 33 ST. MARY'S L. J. 143, 192-93 (2001); *See also* U.S. Department of Education Office for Civil Rights, *The Use of Tests as Part of High stakes Decisionmaking for Students: A Resource Guide for Educators and Policymakers* (Dec. 2000) Chapter 1:6, *at* http://oeri4.ed.gov/offices/OCR/testing/.

138. *GI Forum*, 87 F. Supp. 2d at 674 (recognizing the substantial evidence that "Texas minority students have been, and to some extent continue to be, the victims of education inequality," but still concluding that under the present system minority students have a reasonable opportunity to learn the material tested on the exit exam).

139. *Id* (admitting that while the TAAS does disadvantage minority students, the intent of the examination is to identify and eradicate disparities).

140. Blakely Latham Fernandez, *TAAS and GI Forum v. Texas Education Agency: A Critical Analysis and Proposal For Redressing Problems With The Standardized Testing in Texas*, 33 ST. MARY'S L. J. 143, 192-93 (2001).

The dire consequences of this narrow analysis for poorly resourced school systems around the nation quickly become clear. In the New York educational adequacy lawsuit, for example, it should indeed shock the moral conscience that a student will be denied a diploma when, in the year 2000, 59,500 New York City students were taught high school Biology by uncertified teachers, 19,500 high school Chemistry students and another 54,375 high school Math students were taught by uncertified teachers.[141] Moreover, it should also raise significant due process concerns that students are called to account when the educational system itself is plagued by poor funding and management; when nearly half of city educators currently teaching failed the Math Content Specialty Test (CST); when about have failed the Physics CST; and given that the resulting acceleration of the dropout rate anticipated because such high stakes policies will fall primarily upon students of color.[142] By simultaneously ratcheting up academic standards and high stakes consequences on competency exams while doing nothing to raise the level of resources to meet such challenges, failure becomes not merely coincidental, but positively ensured. The proposition that the intent of an exam should override these overarching educational adequacy concerns is tantamount to consigning students to the fate of dropouts.

As discussed herein, a dynamic legal reinterpretation of due process is needed that includes essential components of opportunity learn standards and systemic notions of educational adequacy. The *GI Court* acknowledged the persistent inequalities in public schooling in concluding the intent of the state exam was to remedy those same inequalities, it cannot be said that educational adequacy considerations there were meaningfully incorporated into constitutional test assessment analysis. In fact, in negating the debilitating consequences to minority and poor students of existing inequalities in the state educational system while attaching high stakes consequences to students is to effectively de-link inputs from outputs. Specifically, Texas claims that its high stakes test helps "ensure that all Texas students receive the same, adequate learning opportunities."[143] Research, however, demonstrates that schools across the state have replaced time that was previously devoted to non-tested subjects, such as science and social studies, with test preparation.[144]

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141 *Campaign For Fiscal Equity II.*

142. *See First-Ever Comprehensive Analysis of City Teaching Takes Center Stage in Landmark Education Lawsuit: Examination of Certification Exam Failures Shows City Teachers Near the Bottom of the Class,* Release (Campaign for Fiscal Equity, New York, N.Y.), Nov. 16, 1999 available at http://www.cfequity.org/prteach.html.

143. *GI Forum,* 87 F. Supp. 2d at 679.

144. *See* Angela Valenzuela, *When It Comes to Education, Has State Government Become Its Own Worst Enemy?,* TEXAS ALCALDE, Sept./Oct. 2000, at 31, 44 (stressing that "the study of science, social studies, art, and other subjects that are not examined by the TAAS are all undermined by the TAAS system"). Science and social studies were added to the exit-level assessment by the 76th

Critical in the due process analysis is the reality that preparing students for a high stakes test can impact the State's ability to ensure that all students receive the same adequate learning in traditionally low performing schools, where the standard curriculum is more likely to be replaced with a test preparation curriculum.[145] Typically with high minority and low-income student populations, inner city public schools also have a pervasive history of being under-resourced.[146] Too often, while "middle-class children in white, middle-class schools are reading literature, learning a variety of forms of writing, and studying mathematics aimed at problem-solving and conceptual understanding[,] . . . poor and minority children are devoting class time to practice test materials whose purpose is to help children pass the TAAS."[147] A modified due process analysis would identify a test scheme as fundamentally unfair not only if the test covers matters not taught in the classroom, but if the general quality of the enacted curriculum in a school system was woefully deficient in relation to a minimal constitutional standard of adequacy.

Specific elements of an adequate education were framed by the West Virginia Supreme Court in 1979 in the *Pauley v. Kelley* decision,[148] and refined later in 1989 by the Kentucky Supreme Court in *Rose* v. *County For Better Education.*[149] These decisions identified seven general elements encompassing the following areas: (1) oral and written communication skills; (2) knowledge of economic, social and political systems; (3) understanding of governmental processes; (4) self-knowledge; (5) grounding in the arts; (6) training or preparation for advanced training in either academic or vocational fields to enable students to choose and pursue life work; (7) academic and vocational skills to enable students to compete favorably with counterparts in other states, in academics, or in the job market.[150]

Texas Legislature. TEX. EDUC. CODE ANN. 39.023(c) (Vernon Supp. 2001).

145. Dr. Valenzuela reports that "many science teachers in schools with poor and minority children are required by their principals to suspend the teaching of science for weeks, and in some cases for months, to devote science class time to drill and practice on the math sections of the TAAS." She summarizes the losses based on this practice: "The first loss, of course, is the chance to learn science. The second is the chance to learn to become highly knowledgeable in mathematics." Angela Valenzuela, *When It Comes to Education, Has State Government Become Its Own Worst Enemy?*, TEXAS ALCALDE, Sept/Oct. 2000, at 31.

146. *Id*

147. *Id. See also* Walt Haney, *The Myth of the Texas Miracle in Education,* 8 Educ. Pol'y Analysis Archives 41, pt. 6, p 13 (Aug. 19, 2000), available at http://epaa.asu.edu/epaa/v8n41 (referring to an independent study in which the authors claim that "'drill and kill' coaching and preparation for TAAS are taking a 'toll on teachers and students alike'"). The survey of Texas teachers cited by Haney was conducted by Stephen P. Gordon and Mariane Reese. See Stephen P. Gordon & Mariane Reese, *High stakes Testing: Worth the Price?,* 7 J. Sch. Leadership 345, 357 & 360 (1997) (describing students as demoralized and teachers as frustrated).

148. 255 S.E.2d 859 (1979).

149. 790 S.W2d 186, 213 (Ky. 1989).

150. *Id. at* 790 S.W.2d 186, 215-16.

Notwithstanding the recent appellate division 4-1 ruling in the landmark *CFE* case in New York, filtered through the context of the nation's largest public school system, the *Rose* formula took on a more practical tenor under Justice Leland DeGrasse's analysis. His Supreme Court ruling in the *CFE* case held that an adequate education required: (1) sufficient numbers of qualified teachers, principals and other personnel; (2) appropriate class sizes; (3) adequate and accessible school buildings with sufficient space to ensure appropriate class size and implementation of a sound curriculum; (4) sufficient and up to date books, supplies, libraries, educational technology and laboratories; (5) suitable curricula, including an expanded platform of programs to help at risk students by giving them "more time on task"; (6) adequate resources for students with extraordinary needs, and; (7) a safe orderly environment.[151] Because several jurisdictions borrowed from the *Rose* formula, if only nominally, many jurisdictions have nonetheless found that previous constitutional notions of educational adequacy were in fact inadequate, and therefore, the trial court formulation remains significant. The many state legal victories won around the nation under existing state constitutional provisions should, by itself, give us pause about the long term credibility and viability of the standards movement, particularly for students of color who are the children primarily left behind. For this reason, popular high stakes examinations buttressed by the rhetoric of the national standards movement, may remain vulnerable to legal challenge despite the fact that they may not be deemed to be racially discriminatory under the intent standard that is now the hurdle for private litigants. The lack of access to a high-quality curriculum and instruction is also a pivotal issue to a successful constitutional challenge to high stakes assessments. Indeed, where the nexus between school finance lawsuits and high stakes testing challenges becomes clear is in the due process context.

However, the legal problems that might arise in attempting to place fundamental fairness considerations of due process within the framework of educational adequacy claims becomes apparent in adequacy cases like that in New York where not all high stakes exams test minimal competency skills. Because in some states educational adequacy provisions are judicially defined to require the provision of only a minimally adequate education,[152] poor performance on aspirational or world-class tests (exams

151. *Campaign For Fiscal Equity II.*

152. Not every state has provided for the same level of educational adequacy, and indeed, some states have refused to overturn their funding schemes. Scott v. Commonwealth, 443 S.E.2d 138 (1994); Sch. Admin. Dist. No. 1 v. Comm'r, 659 A.2d 854 (1994); Withers v. State, 891 P.2d 675 (1995) and Withers v. State, 987 P.2d 1247 (1999) (Withers II). Others have found that it is non-justiciable. The Pennsylvania Supreme Court, for example, has consistently found that challenges to the state's public school funding system are non-justiciable. For example, in the 1970s and again in the 1990s, plaintiffs in three separate lawsuits claimed that the state's then-current education finance system violated the state constitution. In Danson v. Casey, 399 A.2d 360 (1979), the state supreme

with high benchmarks) may not be dispositive in proving an educational adequacy violation.[153] However, failure or poor performance on minimal competency skills, combined with persuasive evidence of poor funding and teacher competency may reasonably implicate notions of fundamental fairness, and a lack of a meaningful opportunity to learn. Similar to analysis in educational adequacy suits, the *Debra P* court's reliance on various inputs (teacher & student surveys) as well as outcome evidence (exam passage rate and score increases) in the due process context is consistent with the very nature of educational adequacy, although it is often thought solely in terms of outputs. Where there are grossly deficient outcomes in test scores and literacy at present, such outcomes may be taken, in part, as evidence of inadequate inputs. Therefore, ineffective instructional validity may result, in part due to teacher quality. This in turn may reflect the lack of competitive teacher compensation rates sufficient to draw competent, talented teachers into less desirable working conditions than those that might exist in private schools. Critical to a reviewing court's analysis must always be whether there is a fair opportunity to learn those skills actually taught and tested on statewide assessments. Such strategic cross-forum evaluation of verdicts, data and other evidence may help to reduce the seemingly contradictory scenario that exist between a judicial finding that a state has not provided a minimally adequate education in one forum and yet where another judicial finding in another forum may lead to upholding the imposition of high stakes exams principally because it has found there exist an adequate opportunity to learn essential skills which are evaluated. However, collateral estoppel and *res judicata* may not be available in such instances given the limits of their strict doctrinal applications and nothing here suggests that such verdicts or findings in another forum would be precluded. Such verdicts may, however, carry persuasive weight to be strategically leveraged in another

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court held that plaintiffs failed to state a justiciable cause of action, and in 1998, Commonwealth Court held that two additional challenges to the funding system were also non-justiciable: in Marrero v. Commonwealth, 709 A2d 956, the court dismissed an "adequacy" claim, and in Pennsylvania Ass'n of Rural and Small Sch. v. Ridge, 737 A.2d 246, the state supreme court affirmed Commonwealth Court's dismissal of plaintiffs' "equity" claim. Further, state constitutional provisions addressing education employ different language, and a pure textual reading of the language of educational articles does not necessarily translate into the implied level of protection the provisions suggest when judicially defined. *See generally*, William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & Educ. 219 (1990); William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C.L. Rev. 597, 605-08 (1994).

153. The admonition by the New York Court of Appeals 1995 decision that the Regents exam (New York's high stake test) may "exceed notions of a minimally adequate or sound basic education prudence should govern utilization of the Regents standard as a benchmark of educational adequacy." *See Campaign for Fiscal Equity I*, 655 N.E.2d at 666. Similarly, the Texas Assessment of Academic Skills (TAAS) is said to embody world class standards that exceed notions of minimal adequate education.

forum by educational litigants where the precedential landscape of a given jurisdiction is more amenable to such an approach.

THE OPPORTUNITY TO LEARN

Although it is unclear what evidence will support a finding that a test is in fact a fair measure remains unsettled,[154] a successful claim under this second prong of the Due Process Clause may be based on a persuasive showing that students have been denied a *fair opportunity to learn* ("OTL").[155] The educational concept of an opportunity to learn standard was introduced by the National Council on Education Standards and Testing (NCEST) to determine whether a state's curriculum frameworks and assessments were adequately supported by school improvement and equity. Within the educational arena, *opportunity to learn* refers to equitable conditions or circumstances within the school or classroom that promote learning for all students. The term includes the provision of curricula, learning materials, facilities, teachers, and instructional experiences that enable students to achieve high standards. This term also relates to the absence of barriers that prevent learning. Conceptual standards as to what constitutes a sufficient OTL relies primarily upon resources allocated through state educational finance systems which are the subject of educational adequacy lawsuits. Some examples of normative OTL standards include the following:

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154. *See* Heubert and Hauser, eds., *supra* note 113 at 64. For instance, while some commentators believe that mere mention of required knowledge and skills in the formal written curriculum suffices (*curricular validity*), there is another distinct school of thought that believes actual curricular instruction in the classroom (*instructional validity*) is a more accurate yardstick to assess such high stakes exams. Wells v. Banks, 266 S.E.2d 270 (Ga. App. 1980), *rev'd sub nom.* Anderson v. Banks, 520 F. Supp. 472 (S.D. Ga. 1981), *rev'd in part on reh'g*, 540 F. Supp. 761 (S.D. Ga. 1982), *appeal dismissed sub nom.* Johnson v. Sikes, 730 F.2d 644 (11th Cir. 1984). Plaintiffs asked the court to enjoin a county board of education requirement that they pass an exit examination testing mastery of ninth grade math and reading skills before being awarded a diploma. *Wells*, 266 S.E.2d at 271. The court declined to grant relief, finding no conflict between the county requirement and standards set forth by the State Board of Education and holding that the county had authority to impose graduation requirements in addition to those created by the state. *Id.* at 271-72. The court also rejected plaintiffs' contention that implementation of the diploma sanction violated Fourteenth Amendment due process and equal protection. *Id.* The court found that plaintiffs had not been denied their right to a public education and had been given adequate notice of the new graduation requirement. *Id.* The court also declined to find that plaintiffs had been denied equal protection although students in other counties throughout the state were not required to take and pass an exit examination in order to receive their diplomas; it was constitutionally sufficient that the exam was uniformly applied within the county. *Id.* at 272-73. Anderson v. Banks was pending in federal court at the time Wells v. Banks was decided. The federal court reached the opposite conclusion, holding that the diploma sanction did not in itself violate the Fourteenth Amendment but that it could not be constitutionally imposed on students who had attended school during *de jure* segregation. The diploma requirement, as imposed, was held to violate Title VI and the EEOA, and although notice of the sanction was constitutionally adequate, the exam still violated substantive due process in the absence of a showing that materials tested were actually taught in school.

—*CURRICULUM:*

[ ] CURRICULUM SHOULD MEET THE CONTENT STANDARDS FOR THE SUBJECT;
[ ] BE LOGICALLY INTEGRATED WITH OTHER COURSEWORK;
[ ] REFLECT THE CHALLENGES OF REAL LIFE PROBLEMS;
[ ] PRESENT MATERIAL IN A CONTEXT RELEVANT TO STUDENTS; AND
[ ] BE AS FREE AS POSSIBLE FROM HIDDEN BIAS

—*TIME:*

[ ] TEACHERS SHOULD SPEND ADEQUATE TIME COVERING THE CONTENT IN CLASS.
[ ] STUDENTS SHOULD HAVE TIME TO LEARN CONTENT ON THEIR OWN.
[ ] SCHOOLS SHOULD EMPHASIZE MORE IMPORTANT CURRICULA BY ASSIGNING MORE CLASS TIME FOR IT.
[ ] SCHOOLS SHOULD PROVIDE STUDENTS WITH TIME TO DO GENERAL ACADEMIC WORK ON THE CAMPUS.

—*TEACHER COMPETENCE:*

[ ] PRE- AND IN-SERVICE TEACHER TRAINING SHOULD LEAD TO MASTERY OF COURSE CONTENT AND TECHNIQUES TO TEACH IT MEANINGFULLY, WITH PARTICULAR ATTENTION TO THE MATERIAL IN THE CONTENT STANDARDS, AND INCLUDE STRATEGIES FOR REACHING DIVERSE STUDENT POPULATIONS AND STUDENTS WITH DIFFERENT LEARNING STYLES.
[ ] SCHOOL ORGANIZATION.

—*RESOURCES:*

[ ] SCHOOLS SHOULD HAVE ENOUGH PHYSICAL SPACE TO ACCOMMODATE ALL THEIR STUDENTS SAFELY.
[ ] SCHOOLS SHOULD HAVE AN ADEQUATE NUMBER OF TEACHERS AND CLASSROOMS TO ENSURE OPTIMUM CLASS SIZE.
[ ] STUDENTS SHOULD HAVE ACCESS TO TEXTBOOKS AND EDUCATIONAL FACILITIES.
[ ] TEACHERS SHOULD HAVE THE MATERIALS, TIME, PRIVATE SPACE, AND SUPPORT STAFF THEY NEED FOR LESSON PREPARATION AND PROFESSIONAL DEVELOPMENT.
[ ] SCHOOLS SHOULD ESTABLISH CURRICULAR PRIORITIES, ENSURE APPROPRIATE TEACHER ASSIGNMENTS, AND PROVIDE STUDENTS WITH NEEDED SUPPORTS.

—*ENVIRONMENT AND CULTURE:*
- [ ] THE SCHOOL BUILDING SHOULD BE CLEAN, SAFE FROM HAZARDS, AND IN GOOD REPAIR.
- [ ] THE SCHOOL CULTURE SHOULD FOSTER LEARNING AND DEMONSTRATE CONCERN FOR STUDENTS' WELL-BEING.
- [ ] SCHOOLS SHOULD PROMOTE RESPECT FOR DIVERSITY AND PROTECT STUDENT POPULATIONS FROM DISCRIMINATION.
- [ ] STAFF AND STUDENTS SHOULD BE EXPECTED TO BEHAVE RESPECTFULLY TOWARD EACH OTHER, AND FEEL PROTECTED FROM POTENTIAL VIOLENCE.
- [ ] ANCILLARY SERVICES.

The willingness of policy makers to commit to OTL standards, however, has varied widely since its inception some ten years ago.[156] OTL supporters, for instance, consider the establishment of such standards to "represent a social contract between schools and the larger community" and argue that students should not be held to any performance standards at all unless their schools meet stringent OTL standards.[157] Critics, however, quite correctly point out that there are several practical impediments to instituting such standards that they ring the same familiar notes as arguments against reforming school finance.[158] The largest obstacle is the

156. Some believe that the school infrastructure should not be subject to Federal recommendations; a few even question whether it should be subject to state or local government policy. Still, some officials question the extent and effect of educational disadvantage experienced by urban and minority students.

157. Schwartz, Wendy, *Opportunity To Learn Standards: Their Impact on Urban Students.* ERIC/CUE Digest Number 110, *available at* http://ericae.net/edo/ED389816.htm (citing Elmore, R. F., & Fuhrman, S. H. (1995, Spring). *"Opportunity-to-learn standards and the state role in education."* Teachers College Record, 96 (3), 433-58). As the positive impact of well-designed OTL strategies on student achievement became clearer, they have been used to indicate overall educational quality, and, more specifically, the availability and use of education resources. Further, comparing the wide OTL differences among schools in the U.S. and resulting differences in student achievement can demonstrate educational inequity (Guiton & Oakes, 1995). Thus, the Hawkins-Stafford Education Amendments mandated the development of OTL indicators to measure the effectiveness of federally-funded educational programs. The resulting report by the Special Study Panel on Education Indicators (SSPEI, 1991) included a range of measurable indicators that covered both classroom experience and the overall school environment. Many education policy makers believe that setting OTL standards will help schools, particularly those in poor urban areas, appreciate their essentiality to the educational infrastructure and make developing them a priority. Therefore, drafters of the voluntary education standards included "school delivery" standards in their reports. In particular, the National Council on Education Standards and Testing (NCEST), commissioned by Congress to determine the feasibility of national standards and assessments, asserted that OTL standards are necessary to help close the achievement gap between advantaged and disadvantaged students. The following year, the Clinton Administration's Goals 2000: Educate America Act also called for the establishment of OTL standards.

158. Some commentators note that the knowledge regarding the nexus between the relationship between educational practices and processes and student performance is too tenuous to provide reliable OTL standards. For the time being, they say, no comprehensive set of OTL standards can ensure high performance for all students. *See* Lorraine M. McDonnell, *Opportunity to Learn as a Research Concept and a Policy Instrument,* 17 EDUC. EVAL. & POL. ANALYSIS 305, 314 (1995) (pointing out the

likely cost. Another concern is the threat of possible lawsuits arising alleging that a school has violated the OTL standards.[159] What many commentators do not adequately acknowledge is that despite any perceived ambiguities about defining OTL standards, they are implicitly an important component that defines the very essence of educational adequacy suits already.

THE ROLE OF OPPORTUNITY TO LEARN STANDARDS IN EDUCATIONAL ADEQUACY SUITS

To underscore the connection between educational adequacy claims and standards of opportunity to learn, it is instructive to note that the curriculum and resource considerations, as well as school environment, culture and the teacher competence components of the fair opportunity to learn standards listed above strikingly mirror the New York State Supreme Court ruling in the *CFE* case. That court articulated the same implicit premise for a fair opportunity to learn noted above when it held that an adequate education required: (1) sufficient numbers of qualified teachers, principals and other personnel; (2) appropriate class sizes; (3) adequate and accessible school buildings with sufficient space to ensure appropriate class size and implementation of a sound curriculum; (4) sufficient and up to date books, supplies, libraries educational technology and laboratories; (5) suitable curricula, including an expanded platform of programs to help at risk students by giving them "more time on task"; (6) adequate resources for students with extraordinary needs, and; (7) a safe orderly environment.[160]

The achievement of adequacy does not appear to be judged solely by actual educational outcomes as one commentator notes:

> It is still an opportunity concept, and as such, compliance with the adequacy requirement is ultimately still a matter of inputs,

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technical problems in fashioning a set of OTL standards); Andrew C. Porter, *The Uses and Misuses of Opportunity-to-Learn Standards*, EDUC. RESEARCHER, Jan.-Feb., 1995, at 21. This does not mean, however, that educational equity advocates should relieve the pressure on researchers and policymakers to design such standards. Nor does it mean that such standards should not be implemented in those areas where we are fairly confident about the link to student performance. Research has demonstrated, for instance, the positive effects on student achievement of experienced and qualified teachers, see Linda Darling-Hammond, *Teacher Quality and Student Achievement*, 8 EDUC. POL. ANALYSIS ARCHIVES 1 (2000), *available at* http://epaa.asu.edu/epaa/v8n1, and smaller class sizes. *See* Allan B. Krueger, *Experimental Estimates of Education Production Functions*, 114 Q. J. ECON. 497 (1999); Frederick Mosteller, *The Tennessee Study of Class Size in the Early School Grades*, 5 THE FUTURE OF CHILDREN 113 (1995).

159. Linda Darling Hammond, The Right To Learn: A Blueprint For Creating Schools That Work 1, 279-80 (1997).

160. *Campaign For Fiscal Equity II.*

> albeit now more broadly conceived. In other words, at the level of the moral claim, educational adequacy seems to be about what fairly ought to be provided, leaving it in the end to the student to take advantage of that offering.[161]

Educational adequacy litigation, therefore can be viewed as a fundamental attempt to obtain and hold open the right to learn by ensuring there is a real opportunity to learn.[162] For example, in 1993, the New Hampshire Supreme Court found that the state constitution required the state to create and maintain an adequate education system. According to the court, such an education "extends beyond mere reading, writing and arithmetic [and] includes broad *educational opportunities* needed in today's society to prepare citizens for their role as participants and as potential competitors in today's marketplace of ideas."[163]

This idea of ensuring a *fair opportunity to learn* can then be viewed in the legal landscape as a concept that states must provide adequate educational opportunities; a concept embraced by the educational adequacy movement that was again reiterated by the New Hampshire Supreme Court, which, in a December 1997 ruling, found that the state system of financing education was unconstitutional because it resulted in many school districts being unable to offer their children *adequate educational opportunities.*

Other decisions in the 1990s also have adopted broad conceptions of what is meant by educational adequacy. In 1993, the Tennessee Supreme Court found that the state constitution required the education system to provide districts with sufficient funds to permit the attainment of certain broadly defined educational outcomes: "The General Assembly shall maintain and support a system of free public schools that provides at least *the opportunity to acquire general knowledge*, develop the powers of reasoning and judgment, and generally prepare students intellectually for a mature life."[164] On October 8, 2002, the Tennessee Supreme Court ruled part of the state's school funding system unconstitutional. Specifically, the court held that the Teachers' Salary Equity Plan adopted by the State Legislature in 1995 violates "the state's constitutional obligation to formulate and maintain a system that affords a substantially equal

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161. Helen F. Ladd., et al.; Committee on Education Finance, National Research Council, *Educational Adequacy and the Courts.* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES, Nat'l Academy Press 188-96 (1999).

162. Since 1989, courts in New Hampshire, Alabama, and Massachusetts have declared their education systems to be constitutionally inadequate, relying specifically on the Kentucky Court's definition of an adequate education when providing guidance to the state legislatures as they craft remedies. Claremont Sch. Dist. v. Gregg, 635 A.2d 1375, N.H. 1997; McDuffy v. Sec'y of Educ., 615 N.E.2d 516, Mass. 1993; *Alabama Coalition for Equity v. Hunt*, published as Appendix to Opinion of Justices, 624 So.2d 107 (Ala. 1993).

163. Claremont Sch. Dist. v. Gregg, 635 A.2d 1375(N.H. 1997)(emphasis added).

164. Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 156 (Tenn. 1993) [hereinafter *Small Schools I*].

education opportunity for all students."[165] The original lawsuit began in 1988, and the court found for the plaintiffs in 1993. In 1992, while the case was pending, the legislature passed the Basic Education Program (BEP)[166] as the state's new education funding mechanism that is essentially cost-driven and takes into account forty-two components necessary for providing a basic education, including special education and capital expenditures. Although these cost components are reviewed annually, in 1998 plaintiffs returned to court alleging that the 1995 salary equity plan was unconstitutional because it had failed to reduce significantly the disparities in teacher salaries, and further that teacher salaries were not included as a component of the Basic Education Program. This fall, the court stated that it found no rational basis for excluding the "largest and most important component of all, the cost of providing teachers" from the cost-driven BEP and held that "the cost determination and annual cost review" are indispensable parts of the BEP.[167]. The court's ruling made clear that the constitutional sufficiency of the plan was that these indispensable provisions were not included in the salary equity plan under Tenn. Code Ann § 49-3-366. The court, however, did make clear that it was leaving the level of spending to the legislature to decide, but within reason. The court stated that notwithstanding factors that bear upon the quality and availability of educational opportunity [which] may not be subject to precise quantification in dollars[168] the critical issue was that the educational funding structure be geared toward achieving "substantially equal educational opportunities for students, not teachers."[169]

Similarly, in 1994, the Arizona Supreme Court ruled that the state's system for funding school facilities was unconstitutional because certain districts lacked the resources necessary to maintain adequate school buildings to foster an atmosphere conducive to ensuring a fair opportunity to learn.[170] That decision, while limited to capital funding, also suggested that similar principles of adequacy might apply to school districts' operating costs. Indeed, if there are grossly deficient outcomes at present, this may be taken as evidence of inadequate inputs. In these respects, however, the distinction between adequacy as an outcome standard and an input standard becomes blurred.[171]

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165. Tennessee Small Sch. Sys. v. McWherter, No. M2001-01957-SC-R3-CV (2002) at 15, [hereinafter *Small Schools III*].

166. Tenn. Code Ann. §§ 49-3-351, 360 (1996).

167. *Id.*

168. *Small Schools I*, at 156.

169. *Small Schools III* at 14.

170. Roosevelt Elementary Sch. Dist. v. Bishop, 877 P.2d 806, (Ariz. 1994).

171. Helen F. Ladd, Rosemary Chalk, et al; Committee on Education Finance, National Research Council. Educational Adequacy and the Courts. *Equity and Adequacy in Education Finance: Issues and Perspectives*, Nat'l Academy Press (1999) p. 188-96.

THE ROLE OF OPPORTUNITY TO LEARN STANDARDS IN HIGH STAKES TESTING

Significantly, the National Research Council, and the American Educational Research Association (AERA) have both stressed the need for curricular and instructional alignment before the imposition of high stakes exams.[172] Similarly, the *Standards for Educational and Psychological Testing,* issued jointly by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education, also recommends that promotion and graduation tests should cover only the content and skills that students have had an opportunity to learn:

Adequate Resources and Opportunity to Learn

> When content standards and associated tests are introduced as a reform to change and thereby improve current practice, opportunities to access appropriate materials and retraining consistent with the intended changes should be provided before schools, teachers, or students are sanctioned for failing to meet the new standards. In particular, when testing is used for individual student accountability or certification, students must have had a meaningful opportunity to learn the tested content and cognitive processes. Thus, it must be shown that the tested content has been incorporated into the curriculum, materials, and instruction students are provided before high stakes consequences are imposed for failing examination.[173]

Likewise, the congressionally mandated NRC study, *High stakes: Testing for Tracking, Promotion, and Graduation* reached a similar conclusion.[174]

Due Process claims may be viable given state court findings of liability in educational adequacy lawsuits. For instance, can it be said that the students within the New York City public school system have been given a fair opportunity to learn those skills and knowledge set forth in the newly adopted Regents learning standards? Further, are these new mandated high stakes exams a fair measure of what has been actually taught in city classrooms? It would appear that this is precisely where educational adequacy cases like *CFE v. State of New York* may still be

172. *See* Heubert, *supra* note 3.

173. AERA Position Statement Concerning High stakes Testing in PreK-12 Education, *available at* http://www.aera.net/about/policy/stakes.htm.

174. *Id.*

useful in shedding light on the matter. Indeed, the New York Court of Appeals in 1995 suggested as much when it charged the trial court to "evaluate whether the children [in New York City schools] are in fact being provided the opportunity to acquire the basic literacy, calculating and verbal skills necessary to enable them to function as civic participants...."[175] Further, if, as Justice Leland Degrasse determined that the state has not provided a fair opportunity to learn these minimum competencies, how then can it be legally or logically maintained that it has also provided a fair opportunity to learn the so called high aspirational Regents exam standards, the failure of which deprives the student a diploma?

Debra P. v. Turlington

In *Debra P.*, the Fifth Circuit held that students' due process rights were infringed when a minimum competency exam recently required for high school graduation was imposed without adequate notice and opportunity for students to learn the material covered by the exam.[176] Three years later in *Debra P v. Turlington*,[177] the Florida legislature approved an amendment to the Educational Accountability Act of 1976, requiring Florida public school students to pass a functional literacy examination, the SSAT-II, in order to receive a state high school diploma.[178] A group of twelfth grade students who had failed or would fail the test filed suit, challenging the constitutionality of using the test for diploma denials under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. They also challenged this use of the SSAT-II under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1976), and the Equal Educational Opportunities Act ("EEOA"), 20 U.S.C. § 1703 (1976). The Eleventh Circuit affirmed the decision of the lower court holding that use of the SSAT-II for diploma denials violated the Due Process and Equal Protection Clauses, Title VI, and the EEOA. The court enjoined the test's use as a diploma sanction until the 1982-83 school year, but allowed the state to use the test in the interim for remediation, which the court found violated neither the Constitution nor statutes. The district court found that the SSAT-II's content was valid, which would allow the state to use it as a diploma sanction after 1982.[179]

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175. *Campaign for Fiscal Equity I*

176. 644 F.2d at 404.

177. Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part and vacated and remanded in part*, 644 F.2d 397 (5th Cir. 1981), *reh'g en banc denied*, 654 F.2d 1079 (5th Cir. 1981), *aff'd*, 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (11th Cir. 1984).

178. FLA.STAT. § 232.246(1)(b) (1978).

179. 474 F. Supp. at 261.

The crux of their argument was essentially that the diploma sanction had an unconstitutionally disproportionate impact on blacks. At the time of the 1979 hearing, after three test administrations, the failure rate of black students was approximately ten times greater than that of white students. The district court issued the four-year injunction for two reasons. First, the court found that the examination violated the Equal Protection Clause, Title VI, and the EEOA by perpetuating past discrimination against black students who had attended segregated schools for the first four years of their education.[180] The students in the high school class of 1983 would be the first to have attended physically integrated schools for all twelve years of their educational careers; thus, they would be the first students against whom the diploma sanction could be applied. Second, the court held that the test's implementation schedule provided insufficient notice, in violation of the Due Process Clause.[181] The court determined that because instruction of the skills necessary to complete the SSAT-II is a cumulative and time consuming process,[182] four to six years should intervene between announcement of the test and implementation of the diploma sanction.[183] The class of 1983 would be the first with six years notice of the sanction and adequate instruction to take the test.

On appeal, the Fifth Circuit upheld the district court's injunction, but remanded for further findings on two issues that would affect use of the SSAT-II as a diploma sanction in 1983 and thereafter. First, the circuit court required the state to demonstrate on remand that the competency exam was "a fair test of that which is taught in [Florida's] classrooms."[184] The circuit court declared clearly erroneous the district court's holding that the test's content was valid; the record was "simply insufficient in proof that the test administered measures what was actually taught in the schools of Florida."[185] Without such proof, use of the test as a diploma sanction would violate the due process and equal protection clauses.[186] Second, the circuit court held that if the state was able to prove that the test tested what was "actually taught," the state would then have to demonstrate either that the test's racially discriminatory impact was not due to the present effects of past intentional discrimination, or that the test's use as a diploma sanction would remedy those effects.[187]

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180. *Id.* at 250-57.
181. *Id* at 267.
182. *Id.* at 264.
183. *Id* at 267.
184. Debra P. v. Turlington, 644 F.2d 397, 408 (5th Cir.1981).
185. *Id.* at 405.
186. *Id* at 404, 406.
187. *Id.* at 407-08. On remand, the district court tried the two issues separately. After trial on the first issue, the district court concluded that the state had met its burden of proving by a preponderance of the evidence that the competency examination is "instructionally valid," *i.e.*, a fair test of that which is taught in Florida's schools. Debra P. v. Turlington, 564 F. Supp. 177, 186 (M.D. Fla. 1983). After an evidentiary hearing on the second issue, the court found that although vestiges of past segregation

A. INSTRUCTIONAL VALIDITY & THE OPPORTUNITY TO LEARN

As one commentator notes, there is no clear consensus on exactly how educational institutions may prove that a high stakes exam is a fair test of that which has been taught.[188] For instance, is it sufficient for a state to show that the formal written curriculum mentions the knowledge and skills that the test is designed to measure (curricular validity), or should it reflect actual instruction in the classroom (instructional validity)? In *Crump v. Gilmer Independent School District*[189] the court held that two plaintiffs had been unconstitutionally denied a high school diploma after failure to pass the Texas Assessment of Academic Skills Examination (TAAS), but stipulated that even if the curriculum "theoretically" includes the material tested by the TAAS, the school district was still required to show that the material was actually taught.[190]

In evaluating what the *Debra P.* court referred to as instructional validity,[191] the Florida Department of Education commissioned IOX Assessment Associates, a private consulting firm, to design a study to determine whether Florida's school districts teach the skills tested by the competency examination. IOX designed a four-part study. The first part of the study consisted of a teacher survey, which was distributed to all of Florida's 65,000 teachers. Of these, 47,000 responded to the survey. The survey asked whether the teacher had provided instruction during the 1981-82 school year relating to the skills tested on the SSAT-II and if so, whether that instruction had been sufficient for a student to master the skills.

The second part of the study was a district survey completed by all of Florida's sixty-seven school districts and four university laboratory schools. The survey requested the districts (1) to estimate in which of grades 2-12 students were taught the test skills and in which grade a

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still exist to some extent, and although the test still has a racially discriminatory impact, there is no causal link between the disproportionate failure rate of black students and those present effects of past segregation. *Id.* at 188. The court found, moreover, that even if there were a causal connection, the defendants had carried their burden of showing that the diploma sanction would remedy those effects. *Id.* The propriety of these findings forms the basis for this appeal. The Eleventh Circuit affirmed the district court's finding that it did not abuse its discretion by relying upon the state's expert testimony presented at trial, *Debra P*, 730 F.2d 1405 (11th Cir. 1984).

188. Heubert and Hauser, eds. Legal Frameworks. *High stakes: Testing for Tracking, Promotion, and Graduation.* Wash., DC: Nat'l Academy Press (1999), p. 63-65.

189. 797 F. Supp. 552 (E.D. Tex. 1992).

190. *Id.* at 553.

191. 730 F.2d at 1423-24. Such evidence included evidence of inclusion of the skills in the curriculum, inclusion of the skills by individual teachers in their course of instruction, the existence of remedial efforts, and evidence from the student survey that students remembered receiving instruction in the skills.

majority of students would have mastered the skills, (2) to describe any major variations in instruction among schools in the district, (3) to describe any remedial programs specifically related to mastery of test skills, (4) to describe staff development activities related to teaching test skills, (5) to list instructional materials specifically to teach test skills, and (6) to identify any program designed specifically to help students pass the test. The district survey instructed respondents to consider only the 1981-82 school year.

The third part of the study was implemented through a series of site visits to verify the accuracy of the district reports. Each district was visited by at least one visitation team. The visitation teams were composed of one program auditor from the Department of Education and two administrators from school districts other than the one visited. After two days of interviewing teachers and reviewing instructional materials, a team would prepare a report of findings and impressions about the accuracy of the district report.

The fourth portion of the study consisted of surveys given in a randomly selected school within each school district to students in an English or Social Studies class selected at random within the school by the visitation team. The survey asked the students whether they had been taught the skills tested by the competency exam at any point during their educational careers. A total of 3,200 students completed this survey. On the basis of the evidence presented at trial, particularly the evidence of remedial programs and efforts, the district court concluded that the competency exam is instructionally valid because "students are afforded an adequate opportunity to learn the skills tested on the SSAT-II before it is used as a diploma sanction."[192]

On appeal, plaintiffs had argued that the district court applied an improper legal standard in determining the validity of the test's content. Essentially, they asserted that the Fifth Circuit opinion required direct evidence that students were "actually taught" the subjects tested and therefore the district court erred by considering circumstantial evidence introduced through teacher and district surveys. However, the Eleventh Circuit took the stance that proving what was actually taught did not necessarily require direct evidence of classroom activities.[193] The court concluded that direct or circumstantial evidence may be considered if relevant.[194] Accordingly, it would appear that proving claims of instructional validity essentially boils down to complex analytical applications of data that often will require the use of judicial inference through circumstantial evidence.

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192. 564 F. Supp. at 186.
193. 730 F.2d at 1412-14.
194. *Id.*

STUDENT v. DRISCOLL & THE ROLE OF REMEDIATION IN DUE PROCESS ANALYSIS

The plaintiffs in *Student v. Driscoll*, recently filed in Massachusetts, allege that the "curriculum frameworks" and "academic standards" being tested on the MCAS were neither designed nor implemented in a timely manner, insofar as schools have not taught students what they are required to by law.[195] Plaintiffs also allege that the effective mechanism of measuring progress through the MCAS is illegal under the Massachusetts Educational Reform Act (MERA) because it punishes students, and particularly minority students, instead of the schools, teachers, and principals who have failed to educate them. In addition to dropping the MCAS as an exit exam, another remedy sought by the plaintiffs is better training for teachers "to meet the educational needs" of students who have failed the test. As part of its due process claim, plaintiffs specifically assert that the state failed to announce MCAS exam results to schools in a timely manner, thereby limiting the usefulness of the MCAS exam results for improving teaching and learning.[196] Timeliness of testing requirements imposed is likely to raise a graver concern under the *Debra P.* and *GI Forum* approaches because it limits the ability to effectively remediate.

However, what is also clear from *Debra P.* is that anecdotal evidence by students themselves, combined with an examination of student achievement outputs and the use of remedial measures, are the most persuasive evidence concerning whether there has been a fair opportunity to learn. Thus, notwithstanding the Eleventh Circuit's stated reservations about the inference concerning a cross-sectional study by the state's expert, like the district court below, the court placed considerable weight on the input from the student surveys, the state's use of remedial efforts for failing students, and the measure of success on high stakes exams in reaching the conclusion that the Florida exam was instructionally valid:

> The remedial efforts and the student survey, in addition to the evidence that most instruction is provided in the later school years persuade us that there was adequate evidence to support the district court's finding of instruction validity, notwithstanding our reservations about the inference concerning the pre-1977 instruction. We are also persuaded in this regard by the SSAT-II pass rate in the Class of 1983. After four of five test administrations, 99.84 percent of the

195. *See* Complaint Brief at 56-57, Student v. Driscoll, (Mass. Dist. Ct. filed Sept. 19, 2002).
196. *Id.*

> class had passed the communications portion of the test and 97.23 percent had passed the math portion.[197]

In examining what it perceived as extensive remedial efforts by the state, the Court concluded that students had many opportunities to master skills that were actually taught. Further, the court drew confidence from the fact that failing students could have the opportunity to be re-taught several times before sanctioning the final denial of a diploma.[198] Similarly, in *G.I. Forum v. Texas Education Agency*,[199] the court found defendants' remedial programs to address failure on the Texas Assessment of Academic Skills (TAAS) to be largely successful and accepted a defense expert's conclusion that over 44,000 students in Texas had been successfully remediated since implementation of the TAAS requirement. The court also found that instructors and administrators were held sufficiently accountable for their students' performance on the TAAS.

Piecemeal remediation as in *Debra P.* addresses failure on high stakes exams is not only pedagogically unsound, but is replete with false assumptions. For example, what the *Debra P.* court did not explicitly acknowledge is that successful remediation, high passage rates, and positive student surveys are contingent upon institutional capacity such as teacher competence and other resource considerations implicit in opportunity to learn standards. These institutional structures are often the centerpiece of educational adequacy challenges. Furthermore, the ability to provide extensive remediation and enjoy high exam passage rates presupposes that there already exists a political commitment of funds by a state legislature to make it feasible to provide such assistance.[200] Notwithstanding this, legislators might deem the costs associated with even targeted educational adequacy reform as prohibitive.[201] However, in this

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197. 730 F.2d at 1411. Incidentally, appellants' expert Dr. Calfee in fact conceded the instructional validity of the communication section of the test as did appellants' counsel at oral argument before the Eleventh Circuit court. 564 F. Supp. at 180.

198. 730 F.2d at 1411. Florida's remedial efforts are extensive. The state provides funds to each school district to be used solely for providing remedial instruction to students who need additional assistance in mastering basic skills. FLA.STAT.ANN. § 236.088 (West Supp. 1983). Students have five chances to pass the SSAT-II between tenth and twelfth grades, and if they fail, they are offered remedial help. Students may also elect to remain in school for an additional year on a full-time or part-time basis to receive, at the state's expense, "special instruction designed to remedy [their] identified deficiencies." FLA.STAT.ANN. § 232.246(4) (West Supp.1983). If they then pass the SSAT-II, they are awarded their diplomas.

199. 2000 U.S. Dist. LEXIS 153 (W.D. Tex. Jan. 7, 2000).

200. Of course it may be just the case that legislators are willing to fund on a case-by-case basis remediation for students failing high stakes exams than to fuel funds into the broader public educational system of a state as required by educational adequacy.

201. One prominent school finance consultant, John Augenblick of Augenblick and Associates identifies four options for converting adequacy to a funding formula: *historical-spending* (based on a district's actual expenditures in a prior year), *expert-design* (based on anticipated needs and prices for a model district), *econometric* (based on the spending/pupil-performance relationship), and *successful-schools approaches*. The last method may be preferable, since it is based on examining actual

revelation may lie the very reason why there remains a concerted disconnect between educational adequacy and high stakes performance assessments. In short, the latter may be deemed less costly than the former even though from a purely non-legal, policy standpoint, they would appear to be intertwined.[202] Moreover, educators and policymakers as well as concerned parents should question whether it is educationally sound to fund last minute remedial measures than it is to provide remediation through well planned reform that is meaningfully integrated into the early childhood curriculum and continuing throughout the twelve year school career. Contrary to the district court's assertion in *Debra P.* that the TAAS test does not constitute the sole criterion for high school graduation because students have multiple opportunities to pass, the touchstone for "multiple measures" is actually multiple types of measures, not multiple opportunities on the same measure.[203] Certainly this premise must also hold true since multiple opportunities to pass a high stakes exam in itself is not meaningful if, for example, teacher competence is significantly compromised by the failure of the state to hire and retain certified, quality teachers throughout a student's journey through the educational process. The measure of instructional validity, therefore, must be placed in context of opportunity to learn standards that are at the heart of educational adequacy claims.

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expenditures in several demographically "typical," but highly successful, districts. For Professor William Clune, implementing true adequacy would require each district to adopt a set of high minimum goals, identify needed resources for achieving them, and devise a long-range investment plan for deploying resources and developing instructional programs. The price tag would be $5,000 per disadvantaged pupil, or $25 billion nationwide. Allen Odden advocates a new structure that aligns school finance with proficiency-based policy system goals. There would be five elements: a base spending level considered "adequate" for the average child; an extra $1,000 for each child from a low-income background; an extra 130% for each disabled student; an (undetermined) extra amount for each English-as-a-Second-Language student; and a price adjustment ensuring comparable spending power. John Augenblick, John G.; et al. *Equity and Adequacy in School Funding.* FUTURE CHILD.: FIN.SCH., 63-78 (Winter 1997); Clune, William H. *The Shift From Equity to Adequacy in School Finance.* EDUCATIONAL POLICY 8:4, 376-94 (1994): *see generally* Allan Odden, *Improving State School Finance Systems. New Realities Create Need to Re-Engineer School Finance Structures.* CPRE Occasional Paper, Phiiadelphia: University of Pennsylvania (1999).

202. Recipients of remediation are more likely to come from the same demographical profile as the students raising educational adequacy challenges than come from historically disadvantaged, or from low-socioeconomic background who attend school in high poverty, minority, urban or predominantly white rural school districts. *See* William H. Clune, *The Shift From Equity to Adequacy in School Finance*, 8 Educ. Pol'y 376, 481 (1994). It stands to reason that both remediation recipients and educational adequacy litigants not only come from historically disadvantaged backgrounds, but often are to reside in high poverty districts that fail or are incapable, given existing resources, to address the educational needs of its students.

203. Eva Baker, Presentation at the National Center for Research on Evaluation Standards and Standard Testing (CRESST) 2000 National Conference: Educational Accountability in the 21st Century (Sept. 14, 2000). *See* Blakely Latham Fernandez, *TAAS and GI Forum v. Texas Education Agency. A Critical Analysis and Proposal For Redressing Problems With The Standardized Testing in Texas*, St. Mary's L. J. 143 (2001).

ESTABLISHING A RESOURCE VALIDITY COMPONENT IN DUE PROCESS CHALLENGES

A normative approach to high stakes assessments that are non-aligned or, in other words, which lack instructional and curricular alignment is to suggest that there should also be a third consideration—what I will call "*resource alignment*" or "*resource validity.*" This consideration advocates the alignment of resources with outcome expectations before precipitously attaching high stakes to those expectations.[204] In legal parlance, this position may be translated to, in effect, say that a high stakes exam is not legally valid unless and until there is also clear and convincing evidence of resource validity. To this end, government initiated Title VI resource comparability case and due process challenges collectively may help bring such reforms as improved recruitment, selection, and evaluation of quality teachers and administrators, needed textbooks, instructional aides in high poverty schools as well as meaningful system capacity to effectively use newly acquired resources. The underlying consideration would require a systemic collaboration and coordination between fiscal and human resources that enhance diagnostic and intervention capability of states and school districts.

Resource comparability actions also have much to lend due process challenges to high stakes assessment systems. A resource comparability case focuses on students' rights to access equal resources, a right protected by Title VI.[205] If resources are unequal based on race, it is not required to also prove that disparities in test scores, drop-out rates and other student outcomes are caused by disparities in specific resources. While Title VI does not guarantee equal student outcomes, student performance measures such as standardized tests scores, graduation rates, and performance on state/local proficiency tests are among the relevant factors useful for monitoring the effectiveness of remedial relief in such cases. When resource standards are plainly evident and readily measurable, evidence that minority students are not provided resources that meet state and/or local standards may be relevant to Title VI compliance when the same types of resources provided non-minority students meet or exceed those

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204. This proposal has been advanced by other policy researchers as well, *see generally*, Gary Orfield et al. *Raising Standards or Raising Barriers? Inequality and High stakes Testing in Public Education.* The Century Foundation Press (2001).

205. It should be noted that although comparative funding levels are relevant to school resource comparability challenges under Title VI, they are not completely dispositive of compliance and can be misleading. If, for example, district budgets include higher annual per pupil library expenditures for one school, such funding may reflect efforts to compensate for years of neglect of a library collection. The same would apply for facilities maintenance, textbooks, or court-ordered remedial funding in connection with applicable desegregation consent decrees.

same standards. Learning outcomes, however, do not constitute a standard for compliance under Title VI resource comparability cases. Such outcomes, however, may constitute a standard for compliance in some educational adequacy suits where non-aspirational state assessments are in place and in procedural due process challenges to high stakes testing. Therefore, to the extent that it may be demonstrated that insufficient resources, such as those examined in Title VI resource comparability cases, implicate and reflect the degree that an opportunity to learn in the classroom does or does not exist, procedural due process challenges to high stakes testing may find valuable evidentiary tools in recent state school finance verdicts, as well as Title VI resource comparability enforcement actions. Factor that are examined in Title VI resource comparability cases may include the following:

- Number of teacher vacancies;
- Turnover rate;
- Percentage of teachers teaching out of field one or more classes per day;
- Absentee rate for teaching staff;
- Percent and number of teachers with a college major or minor (or other equivalent formal training) in the field of work for which they are responsible for the major portion of the school day;
- Student/Teacher Ratio;
- Curriculum assessment and instructional alignment, i.e. how does the school ensure that there is an alignment of curriculum/course objectives, instruction and teacher assessment of students, and how often are alignment assessments conducted;
- Total expenditures on teacher training;
- Student/Teacher ratio;
- Average Class Size for core academic subjects;
- Academic support programs, e.g., homework online, supplemental tutorial services;
- Total daily instructional time;
- Special instructional methodologies, e.g., accelerated learning, curriculum compacting, and multi-grade grouping;
- Lab opportunities, e.g., computer, language, science, etc.;
- Extracurricular performance activities, including those that are curriculum supporting;
- Air conditioning / heating;
- Cleanliness of facility;

[ ] Total acreage of school site; and [ ] Condition and quality of facilities, school campus, classrooms, media center, hallways, etc.

All of these resource factors are evaluated under a Title VI resource comparability action and in some educational adequacy suits. These resource factors directly and indirectly impact learning and classroom instruction.[206] In the due process context where the validity of a high stakes assessment is at issue, the quality of actual classroom instruction is implicated, and as such persuasive evidence in Title VI resource comparability actions brought by the Department of Education or educational adequacy suits raised by private plaintiffs may be brought to bear. Due process challenges could also open the door to remedies that include refining existing structures that would introduce more effective instructional methods, materials, and curricula throughout the state's deficient schools. Funds must also be set aside for direct, targeted services to students, in particular for appropriate implementation of methods known to increase the achievement, health, and welfare of all students. In this fashion, educational adequacy remedies and Title VI enforcement actions can buttress and indeed complement meaningful accountability reform.

Assessments, for instance, can identify and isolate those areas in need of remediation and corresponding curriculum and institutional areas in need of targeted resource support far sooner than was available in the *Debra P.* case where circumstantial evidence of instructional validity during the earlier grades was questionable. In the short term, the remedy would look much like those remediation efforts employed in *Debra P.* Given that most states provide for education until the age of 21, that would appear feasible, though there would be a significant concern for increased dropouts.[207] In the long term, however, assessments can identify and isolate those areas in need of remediation and corresponding curriculum and institutional areas in need of targeted resource support far sooner than was available in the *Debra P.* case where circumstantial evidence of instructional validity during the earlier grades was questionable. Not only can assessments inform considerations of educational adequacy but, as noted earlier, educational adequacy notions can identify where and when curriculum and instruction are aligned with resources to ensure fair opportunities to learn. In this fashion, a more effective overhaul of an education system well in advance of high stakes being imposed to allow for sufficient alignment. All of this is to say that not only educational adequacy suits challenge the

206. *See generally*, JOHNATHON KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1992).

207. *See* Jay P. Heubert, *Graduation and promotion testing: Potential benefits and risks for minority students, English-language learners, and students with disabilities.* Poverty and Race 9 (5): 1-2, 5-7. Washington, DC: Poverty and Race Research Action Council (2000).

fairness of certain high stakes exams, but that goals established for minimum competency statewide assessments could and should inform whether a state's educational system is, in fact, adequate. The linkage between educational adequacy and assessments is a two way street with important ramifications in both domains. Additional resources into systemic reform cannot be effective without proper accountability. It is also true, however, that assessments become less a dependable measure of accountability when basic educational resources are grossly deficient, particularly so for historically disadvantaged children. One cannot be sacrificed at the expense of the other.

Texas, which is said to have one of the most egalitarian school finance systems in the country, presents a great example. Its most effective feature in achieving equity has also become its most conspicuous detractor. It is the state's "Robin Hood" model, requiring that any school district with property wealth per weighted pupil greater than $300,000 (the Equalized Wealth for 2001-02) reduce its wealth by choosing one of five options: (1) consolidation, (2) detachment by annexation, (3) purchase of attendance credits, (4) contract for education of non-residents and/or (5) tax base consolidation. Most property-wealthy school districts choose option 3 or option 4, which means that they share their tax revenues with other school districts or with the state. However, the "Robin Hood" approach only recaptures a school district's tax revenues for maintenance and operation (M&O). As such, it does not pertain to revenues for debt service, thereby permitting property-wealthy districts greater access to revenue for debt service than property-poor districts. Aside from adopting a partial recapture for maintenance and operation, or creating incentives to adopt a higher M&O, Texas will need to rethink its school finance system to not only respect equity principles, but also adequacy principles. As Justice Cornyn intimated in his Edgewood IV opinion, Texas' finance system may be in danger of being declared unconstitutional if the cost of providing a general diffusion of knowledge were to rise to the level that a school district could not meet its operational and facilities needs within the equalized program. As such, Texas will not only need to move from a simple equity model to one that promotes adequate funding, but it also must link what is adequate to what it demands of its students on its state mandated exam. Therefore, with the current debate in Texas of whether the "Robin Hood" system of funding should be scrapped, it seems fair that the dialogue would have to directly link high stakes testing schemes such as the TAAS (now referred to as the TAKS) with the fate of "Robin Hood." A proposal to conduct a comprehensive study on the costs of adequacy has recently been proposed in the Joint Select Committee on Public Finance. However, with rising rigorous requirements on the exam due to be phased in next year and successive years in the state, policymakers will need to ensure that performance goals of the exam will be reflected in the funding

formula and legislative appropriations if it hopes to retain and build upon whatever gains already made on the NAEP benchmark.

A comprehensive overhaul of the public education system also appears to be warranted and would seem to be more pedagogically sound than piecemeal ad-hoc remediation efforts in the upper grades. This normative approach would in essence use educational adequacy findings in challenging non-aligned high stakes assessments by asserting that a state may not attach high stakes consequences to non-aligned world class competency testing unless and until the state, at a minimum, provides an adequate education that ensures a basic opportunity to learn fundamental skills.[208] This does not mean, however, that such testing all together will need to cease, but only its high stakes consequences. Therefore, instead of finding that a high stakes exam is instructionally valid, in part by using as its baseline measure the period of time following notice of the exam, the relevant notice period would be triggered upon a final state court finding that its public educational system is deemed to be adequate by removing all vestiges of educational inadequacy.

Alternatively, another reasonable approach is to suggest that litigants identify existing vestiges of educational inadequacy that do affect performance on world class exams (notwithstanding those with high stakes consequences attached to them) in raising due process challenges. As Dr. Lerner testified in *Debra P.*, other factors such as the educational background of a student's parents, class size, attendance, and amounts of homework, more directly relate to student performance. Indeed, appropriate educational preparation (i.e. homework and presentation of class materials) and class size are not only measures of what may constitute an adequate education. These factors may also serve as a vital measure of the "enacted curriculum." It is the enacted curriculum which should define whether a standard is "instructionally valid" for purposes of due process analysis. Further, as Andrew Porter and other educational researchers have found, it is possible to collect instructional validity data through periodic surveys, classroom observations and case studies.[209] As noted earlier, the

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208. The author does not raise concerns with exams where ample longitudinal empirical and direct evidence support a finding that a high stakes exam does indeed satisfy instructional and curricular alignment for poor and minority students. Such a hypothetical exam, if it should exist, would theoretically fall outside the scope of this inquiry. The proposed litigation may be initiated against states and individual districts for the failure of individual schools. New Jersey's *Abbot v. Burke*, 119 N.J. 287 (N.J. 1990) was similarly brought on behalf of certain large urban school districts in Camden, East Orange, Jersey City, and Irvington to address funding disparities. Such suits are plausible rather than those premised on an entire state educational system. Evidence of higher performance in better resourced districts would militate against including the entire state in finding a violation. While accountability mechanisms for students may need to be appropriately revised, it should be cautioned that performance standards for teachers should not be removed altogether either.

209. *See* Allan Odden, CPRE Report, at 44 (citing Andrew Porter, *Defining and Measuring Opportunity to Learn: The Debate on Opportunity-to Learn Standards*, Washington, D.C.: National Governors' Association).

litigants in the *Debra P.* case also collected similar data case on the question of instructional validity.

Where instruction and curriculum are sufficiently aligned to state exams to meaningfully implicate issues of teacher effectiveness and trigger accountability, such assessments provide valuable insight and objective measures of student performance. However, this is less clear where the exam represents a substantially higher learning standard that is wholly incongruent with chronically poor instruction and dilapidated learning environments that characterize educational inadequacy. That all children can learn is an essential starting point for the modern school reform embraced by the Bush administration. But this should not ignore the fact that some students may need more resources or different approaches in order to attain high levels of achievement. Accordingly, this normative proposition to link adequacy claims to high stakes assessment challenges is one that proclaims the ideal that soaring onto world class standards while desirable, need not be done at the expense of school districts and the state to carry out their most rudimentary educational mandates so as to ensure that no child is left behind.

THE ROLE OF THE ESEA IN HIGH STAKES ASSESSEMENT CHALLENGES

As Title VI enters an indefinite period of sleep for private litigants, its potential for new federal involvement in state school finance remains an important issue. However, in addition, Title I of the Elementary and Secondary Schools Act (ESEA) also promises to further grow as a formidable force for federal intervention in traditionally state educational matters. On October 20, 1994, President Clinton signed into law the "Improving America's Schools Act." Title I, the largest primary and secondary federal education program (over $7 billion in FY 96), was reauthorized in this legislation, which among other things, rewrote the Elementary and Secondary Education Act. Although Title I was established in 1965 to provide "extra" educational services to the nation's poorest and lowest achieving students, history indicates that for over thirty years, the program has failed to meet its potential.[210] The 1994 revision was designed to change that conclusion dramatically. Title I aims to improve the fundamental quality of curriculum and instruction for students served through the program, whether Title I provides services to individual students or supports whole school reform. Using Title I to support

210. Pub. L. No. 103-382, 108 Stat. 3518 (1994). Title I went into effective July 1, 1995. Yet in many places, Title I programs still resemble the old Chapter 1 model, based on extensive pull-out programs in reading and math, low expectations for students, and few links to real school reform.

enriching curriculum and instruction requires that schools use effective strategies to improve children's achievement in basic skills and core academic areas to increase the amount and quality of learning time and emphasizing instruction by highly qualified professional staff. It also provides students who have trouble mastering established standards with additional assistance that is timely and effective.

By requiring that Title I schools hold students served by the program to the high achievement standards approved by their state, the 1994 revision also presumes that Title I resources will help these students to acquire the full range of knowledge and skills expected of all students. But, Title I is no longer intended to operate solely as a remedial program focused on low-level skills development. Moreover, the changes in Title I student eligibility provisions have implications for instruction. Removing certain provisions governing participation by English language learners (ELLs) and students with disabilities was designed with the intent to widen the instructional strategies used in Title I to accommodate students who may not have been previously served.[211] It also explicitly links Title I to Head Start and other preschool education programs. Helping children make the transition from early childhood education programs into the elementary grades requires attention to language development as a foundation for success in reading and other subjects. For high-poverty schools, there was the option of using Title I funds to strengthen the entire school and make it a school-level decision. School-wide programs are intended to benefit all children in a school by upgrading the academic program for the whole school. By giving schools the flexibility to integrate their education programs, strategies, and resources, Title I can become the catalyst for comprehensive reform of the entire instructional program, rather than merely an add-on service. Although Title I specifically requires that programs use an accelerated curriculum, have high quality teachers, and provide extra assistance to students who need it, many fail still to comply. Instead of offering an accelerated curriculum to enable students to meet challenging standards, many Title I programs pull students out of class and teach them a watered-down-curriculum, virtually guaranteeing that they will never achieve the high standards set for all students.

THE ESEA AND DUE PROCESS CONSIDERATIONS

As part of the old reauthorization of the Elementary and Secondary Education Act (ESEA) of Title I, states were required to define, for the purposes of Title I accountability, a definition of adequate yearly school

progress based on student assessment results. But Title I has tremendous implications on whether students have had an opportunity to learn the essential skills and knowledge required before high stakes exams are phased in. Specifically, Title I requires that districts and states make adequate yearly progress for two consecutive years or take corrective action in chronically under-performing schools.[212] Adequate yearly progress (AYP) must be defined in a manner that results in *continuous* and *substantial, yearly* improvement of each Title I school and LEA sufficient to achieve the goals under Title I. In particular, this requirement holds true for minorities and English language learners (ELLs) in meeting the state's proficient and advanced levels of performance. Further, the definition of adequate yearly progress must be sufficiently rigorous to achieve academic goals within an appropriate time-frame. Although the definition of AYP links progress primarily to performance on the state's final assessments, it does not permit progress to be measured in part through the use of other measures, such as drop-out, retention, and attendance rates.[213] Moreover, AYP definitional reliance on student assessment systems has also found a place in the new 2001 reauthorization.[214] As in the 1994 reauthorization, when looking at adequate yearly progress, state education agencies (SEAs) must also develop or adopt a system of technically sound assessment

212. *See generally* 20 U.S.C 6317 (2000). Each State's definition of adequate progress must be based primarily on its final assessment system included in the State's plan. The concept of adequate yearly progress under the new Title I includes (1) an emphasis on accountability of *schools and LEAs* receiving Title I funds (i.e., whether they are making adequate progress toward enabling their children to meet the State's standards) rather than emphasizing the Title I program itself or even the yearly performance gains of participating children; and (2) a definition that holds LEAs and schools accountable for the *amount of improvement they make each year*. Section 111(b)(2) in pertinent part provides that;

> [e]ach State shall determine, based on the State's final assessment system, what constitutes adequate yearly progress of any school served under Title I toward enabling children to meet the State's student performance standards; and any LEA that receives funds under Title I toward enabling children in schools receiving assistance under Title I to meet the State's student performance standards.

213. Section 111(b)(2).

214. Each State plan must demonstrate, based on assessments, what constitutes adequate yearly progress of the State, schools, and local educational agencies in the State, toward enabling all students to meet the State's student performance standards. Adequate yearly progress shall be defined by the State in a manner that uses the same assessments to measure the performance of all children; is aligned with the State's challenging content and student performance standards and provide coherent information about student attainment of such standards; is used for purposes for which such assessments are valid and reliable; is consistent with relevant, nationally recognized professional and technical standards for such assessments; measures the proficiency of students in the academic subjects in which a State has adopted challenging content and student performance standards and be administered not less than 1 or more times during—grades three through five; grades six through nine; and grades ten through twelve; they must also involve multiple up-to-date measures of student performance, including measures that assess higher order thinking skills and understanding; state must also, beginning not later than school year 2005-06, measure the annual performance of students against the challenging State content and student performance standards in grades three through eight in at least mathematics and reading or language arts.

methods that are the same assessments used to measure the performance of all children. Virtually every state, except Iowa, has done so.

Likewise, SEAs are also required to align with the state's challenging content and student performance standards and provide coherent information about student attainment of such standards. It is this measure of adequate yearly progress that may be instructive when assessing whether students have had an opportunity to learn the skills that are tested on a high stakes exam. The measure of student attainment of the state's standards may provide powerful evidence of whether low income public school systems (which are typically the subject of educational adequacy litigation) allow for sufficient curricular and instructional alignment of content and student performance standards with high stakes exams in order to provide students with a meaningful opportunity to learn.

Thus, where putative plaintiffs may successfully demonstrate that there has not been proper alignment of content standards with high stakes assessments, due process concerns, as well as penalties invoked against the State under Title I for noncompliance, arise. States must attain academic proficiency, as defined by each state, for all students within twelve years. States must set a minimum performance threshold based on the lowest-achieving demographic subgroup, or the lowest-achieving schools in the state, whichever is higher.[215] Each state must raise the level of proficiency gradually, but in equal increments, eventually leading to one hundred percent proficiency.[216] The threshold must be raised at least once every three years. A "safe harbor" will be provided for schools that demonstrate that students in a particular subgroup are making significant progress toward proficiency, but have not technically made "adequate yearly progress."[217] In addition to reading and math assessments, the state must use one other academic indicator for high schools, graduation rates. If a school fails to make adequate progress for two consecutive years, the school will receive technical assistance from the district and must provide public school choice. The district is obligated to provide transportation for students who choose other district schools and must use up to five percent of its Title I funds to provide for that option.[218] After a third year of failure to make adequate progress, a school will also be required to offer supplemental educational services chosen by the students' parents, including private tutoring. Similarly, the district is required to use up to five percent of its Title I funds to provide for that option.[219] The district

215. This summary of key provisions of the Leave No Child Behind Act of 2001 may be found in legislative summaries by Erik Robolen, *An ESEA Primer,* Education Week, at 28-29, Jan. 9, 2002, *available at* http://www.edweek.org/ew/newstory.cfm?slug=16eseabox.h21.

216. No Child Left Behind Act of 2001, 107 Pub. L, No. 110, § 1111 (b)(2)(H)(i), (iii), 115 Stat. 1425, 1448 (2002).

217. *Id.* § 6161, 115 Stat. 1425, 1890 (2002).

218. *Id.* § 1116(b)(10)(A)(i), 115 Stat. 1425, 1486 (2002).

219. *Id.* at § 1116(b)(10)(A)(iii), 112 Stat. 1425, 1486 (2002).

may use an additional ten percent of its Title I aid to provide for public school transportation costs or supplemental services. If a school fails to make adequate progress for four consecutive years, the district must implement corrective actions, such as replacing certain staff members or adopting a new curriculum.[220] After five years of inadequate progress, a school would be identified for reconstitution and will be required to set up an alternative governance structure, such as re-opening as a charter school or turning operation of the school over to the state.[221] The consequences are to take effect the next fall for schools already identified for school improvement or corrective action. Also, much like the process involved with districts' oversight of schools identified for improvement, states are responsible for overseeing districts as a whole, identifying those needing improvement, and taking corrective actions when necessary.[222] Where corrective action has been taken or recommended by the state, litigants and educational experts may do well to reassess whether such corrective action is actually being carried out effectively by the state in satisfaction of due process rights.

However aligning content and performance standards with assessment systems must also be accompanied with adequately prepared educators, well-appointed facilities, and supplies if such assessment systems are to yield a meaningful measure of adequate yearly progress. Although adequate yearly progress refers to the progress of schools and LEAs, not students, it must, nonetheless, be based on the success of those schools and LEAs in increasing the number of students reaching proficient and advanced performance levels.[223] This is consistent with Title I's focus on the effectiveness of school programs and therefore has important implications on whether students are being presented with a fair opportunity to learn. The new reauthorization contains provisions for assessment and for LEA and school improvement to expand accountability requirements. The new reauthorization also sets forth several other mandates to improve on the 1994 reauthorization of the ESEA. To begin with, the Act requires a single, statewide accountability system to help guarantee that schools and districts make adequate yearly progress.[224] This is significant since more than half the states have two accountability

220. *Id.* at § 3122 (b)(4)(A), (B)(ii), 115 Stat. 1425, 1704 (2002).

221. *Id.* at § 1116 (b)(8)(B)(i), (iv), 115 Stat. 1425, 1485 (2002).

222. *Id.*

223. *Id.* Title I is clear that States are responsible for defining adequate yearly progress. States in turn are then responsible for identifying local education agencies (LEAs) which are not making adequate progress. LEAs are responsible for reviewing the progress of all their Title I schools, and identifying those not making adequate progress, and therefore in need of program improvement.

224. The Act provides that each State plan shall demonstrate that the State has developed and is implementing a single, statewide state accountability system that has been or will be effective in ensuring that all local educational agencies, elementary schools, and secondary schools make adequate yearly progress as defined under subparagraph (B). *See* 107 Pub. L. No. 110, § 1111(b)(2), 115 Stat. 1425, 1446-47 (2002).

systems in place—one system to identify low-performing schools under Title I and another accountability system that applies to all schools in the state. With this convergence of accountability systems, the picture of AYP could theoretically become a bit more clearer.[225] As a theoretical matter, it also helps paint a clearer picture as to whether students are receiving a fair opportunity to learn.

There are also other practical considerations with respect to the new reauthorization that could significantly limit the utility of this analysis. For instance, the Act includes a provision requiring the alignment of performance with state standards as benchmarked against the highly regarded National Association of Educational Progress (NAEP), a standard which provides a useful way of examining academic progress to analyze national trends. When Congress created the National Assessment Governing Board in 1988 to set policy for NAEP, it mandated that instead of simply measuring how students did on the test, it would also mandate score reporting that reflected how well students did against some defined standard for what students should know at a particular grade level. As a result, NAEP scores have been reported since the early 1990s by the percentage of students who perform at one of three achievement levels: "basic," "proficient," and "advanced," with proficient representing "solid academic performance" over "challenging subject matter." When Congress renewed the ESEA in 1994, it similarly required states to set at least three performance levels to describe how well children were mastering the material in state academic standards.[226] It mandated that states move all children toward proficiency over time. However, by January of 2000, only twenty-eight states had actually set performance standards approved by the federal Education Department. When Congress again reauthorized the ESEA, it required states to set at least three performance levels—basic, proficient, and advanced—and to adhere to a strict, twelve-year timetable for bringing all students up to the proficient level by 2014.[227] By the 2005-06 school year, states must begin administering annual, statewide assessments in reading and mathematics for grades 3-8.[228] However, states may select and design their own assessments, so long as the tests are aligned with state academic standards.[229] Nonetheless, it seems clear given the introductory discussion concerning system capacity that those standards

225. The law also carries forward the mandate that states begin to link their assessment models to the highly regarded National Association of Educational Progress benchmark. The Act provides that states will, beginning in school year 2002-03, participate in annual State assessments of fourth- and eighth-grade reading and mathematics under the National Assessment of Educational Progress carried out under Section 411(b)(2) of the National Education Statistics Act of 1994 if the Secretary pays the costs of administering such assessments. *Id.* § 1111 (c)(2), 115 Stat. 1425, 1454 (2002).

226. *See id.* § 1111 (b)(1)(D)(ii), 115 Stat. 1425, 1445 (2002).

227. *Id.*

228. Pub. L. No. 107-110, §. 1111 (b)(3)(C)(vii), 115 Stat. 1425, 1450 (2002).

229. *Id.* §. 1111 (b)(3)(C)(ii), 115 Stat. 1425, 1450 (2002).

must be adequately reflected in actual curriculum development in order to truly ensure there has been a fair opportunity for students to learn what is actually taught and tested. By 2007-08, states are required to implement science assessments to be administered once during each of the three levels of K-12 education. A sample of fourth and eighth graders in each state must participate in the National Assessment of Educational Progress in reading and math every other year to provide a point of comparison for the state's results on its own tests. Such a national benchmark assessment, however, does not measure what students are expected to learn in their own state standards, state assessments therefore may lack curricular as well as instructional validity with the NAEP.[230] The implications for success for at risk students, such as English language learners and students of color who typically suffer from inferior educational learning conditions are, therefore, no small matter.[231]

ARE STANDARDS UP TO STANDARD?

Another significant limitation implicated by the recent reauthorization is that states that have set very high standards may find it difficult to bring all students up to the proficient level by 2014 as required. Consequently, the threat of the termination of federal funds could encourage some states to race for the bottom in lowering performance standards. Recent research, for example, suggests that a race to the bottom is not entirely impossible, and may be attractive to states that are dealing with looming fiscal deficits. Consider North Carolina, where eighty-four percent of fourth graders scored at the proficient level on the state test, while only twenty-eight percent scored at that level on NAEP.[232] Likewise in Wyoming, the proportion of fourth graders scoring at the proficient level on both the state and national tests was closely matched, at twenty-seven percent and twenty-five percent, respectively.[233] Current research also indicates that only Idaho, Louisiana, Missouri, North Dakota, and Rhode

230. There are arguments that have raised concerns about the dangers of alignment in this regard. Proponents of this view suggest that by aligning state assessments directly with the NAEP, the NAEP loses its value as an objective measure of academic progress by encouraging school districts to teach specifically to the NAEP format. Some may recall that similar objections were noted by President Bush in his 2001 State of the Union address.

231. For a thoughtful discussion of the potential implications of assessment validity on English language learners and students of color, *see* Jay P. Heubert, *Graduation and Promotion Testing: Potential Benefits and Risks for Minority Students, English-Language Learners, and Students with Disabilities*, Poverty and Race 9 (5): 1-2, 5-7, Washington, DC: Poverty and Race Research Action Council (2000).

232. *See* Lynn Olson *A Proficient Score Depends on Geography*, Educ. Wk., at 14-15, February 20, 2002 *available at* http://www.edweek.org/ew/newstory.cfm?slug=23proficient.h21.

233. *See id.* (stating that research has found similar disparities depending upon varying state definitions of "proficient".)

Island had a smaller share of students scoring at the proficient level on their own tests than on NAEP at the fourth or eighth grade.[234]

Further, under the new reauthorization, states are free to revise their content and performance standards at any point. In the Texas Assessment of Academic Skills (TAAS) exam, the performance standard was initially set low and slowly raised over a period of time continuing even now where the state is phasing in a new, more rigorous battery of exams known as the TAKS and contemplating how high to set that standard. However, educational adequacy lawsuits also help to set an important "high minimum floor" in how low states may go in adjusting their standards to avoid federal funding termination. As states continue to ponder setting graduation standards based on what students need to succeed in college and in the workplace, some state adequacy verdicts may be helpful in shedding light on the issue where, as in New York's trial case, educational adequacy was defined in the specific context of functioning in the workplace and succeeding in higher education. While educational adequacy suits still provide an important minimum, content and performance standards should remain high to promote public confidence, and remain true to the high expectations philosophy of the national standards movement.

THE ESEA AND EDUCATIONAL ADEQUACY CONSIDERATIONS

The original funding authorization contained in the No Child Left Behind Act has been significantly curtailed in the wake of terrorism concerns and recent tax cut proposals. Some have advocated cutting nearly $1.3 billion on education and other social programs. The new budget proposal will result in the elimination of twenty-eight programs from the ESEA and dramatic cuts to dropout prevention, teacher quality, impact aid and rural education. Additionally, these funding reductions present significant challenges under the mandates of the new reauthorization and have the greatest implications for low-income minority parents from districts that are often the plaintiffs in educational adequacy suits. The funds authorized for teacher quality have been significantly reduced although the standards and expectation in the Act pertaining to teacher and principal quality remain primarily the same. For example, beginning this fall, all teachers hired under Title I must be "highly qualified." As a general matter, "highly qualified" means that a teacher has been certified (including alternative routes to certification) or licensed by a state and has demonstrated a high level of competence in the subjects that he or she

234. *Id.*

teaches. By the end of the 2005-06 school year, every public school teacher must be "highly qualified."

The Act, however, raises significant concerns regarding the recruitment and retention of quality educators when accountability mechanisms may possibly encourage an exodus of new and experienced teachers from predominantly minority schools stigmatized as low performing to more recognized or blue ribbon schools. When local merit pay, job promotion and demotion policies, as well as school recognition rankings, are combined with the staffing and school reconstitution requirements of the Act, there is a significant danger that low income and predominantly minority schools will be further deprived of the educational promise which the Act aspires to produce. Therefore, it behooves the U.S. Department of Education to promulgate revised regulations to account for these concerns. District superintendents and state education commissioners may also wish to enact local and state policies to safeguard and create disincentives to prevent this unfortunate consequence from occurring. This danger may only be adequately guarded against not only with a stick but with powerful carrots that will ensure that low performing school districts remain competitive in attracting the most talented and dedicated educators from the most selective teacher applicant pools. Further, within three years, all para-professionals hired with Title I money must have completed at least two years of college, obtained an associate's or higher degree, or met a rigorous quality standard established at the local level. These objectives are significantly undermined with the recent cuts, thereby exacerbating the disconnect between standards and resources as seen on the state level. One of the more glaring omissions from the Act is any authorization to appropriate adequate funding for school repair. Students in many urban locales will therefore continue to confront reprehensible schooling conditions which are rapidly deteriorating and unsafe as Johnathon Kozol, Thomas Sobol and others so powerfully illustrate.

The Act also mandates that states consider additional criteria beyond assessment results when they are determining school progress. Accordingly, states must consider school dropout rates and at least one other academic indicator in their reviews of school progress. These objectives are difficult to meet when drop out prevention funding is curtailed in the new Act. Gone are the days when states may exclude large numbers of students from schools for fear they will bring down the school performance review but which are precisely those who Title I is designed to assist. Educational adequacy litigation around the nation, such as the *CFE* case in New York, may therefore be a powerful evidentiary tool, revealing significant system failure, as demonstrated not only through poor test results, but through high dropout rates that now take on new significance in Title I accountability funding.

However, Title I may similarly serve as an important and useful tool

in examining both educational adequacy claims and high stakes assessment challenges. Beginning with the 2002-03 school year, states must provide annual report cards with a range of information, including statewide student-achievement data broken down by racial and income subgroup and information on the performance of school districts in making adequate yearly progress.[235] Under the Act, state education agencies have to provide individual student interpretive and descriptive reports, including scores or other information on the attainment of performance standards; allow for the disaggregation of results within each state, district, and school by gender, race, ethnicity, English proficiency, and migrant status, and enable comparisons between non-disabled/disabled students and economically disadvantaged/advantaged students.[236] Test results must include individual student scores and be reported by race, income, and other categories to measure not just overall trends, but also gaps between, and progress of, various subgroups.[237] This mandated report, including district wide and school-by-school data, can undoubtedly have a direct bearing in such legal challenges. At a minimum, state court jurisprudence should reflect a commitment to ensuring proper resources to meet new high stakes assessment systems. However, Title I's mandate to "supplement not supplant" state funding nonetheless means that educational adequacy verdicts must be enforced and brought to bear in the state judicial, legislative, and executive apparatus notwithstanding the advent of limited federal dollars through the new ESEA. Attempts by states to avoid their funding obligation may only spurn further educational adequacy lawsuits, and high stakes assessment challenges. As a general matter, a violation of the Title I "supplement not supplant" requirement does not necessarily constitute a violation of Title VI under resource comparability analysis. However, where a district may attempt to redirect Title I funds to supplementary services in the affected schools, without addressing the gaps caused by the removal of Title I funds from the services that had been supplanted, a new Title VI violation may arise if the services originally supplanted are not restored, and as a result, students receive non-comparable resources on the basis of race or national origin. In the face of increasing budget deficits, a temptation for state legislators to cut and not replace such funding may be increasingly hard to resist. However, where the reduction of resources allotted from Title I funds would result in resource disparities in violation of Title VI, districts must take the necessary steps to effect comparability without the use of Title I funds or be subject to potential enforcement actions or private lawsuits. The danger that accountability measures are likely to fall into disrepute or result in loss

235. Pub L. No. 107-110, § 1111(h)(1), 115 Stat. 1425, 1457 (2002).
236. *Id.* § 1111 (h)(1)(C)(i), 115 Stat. 1425, 1457 (2002).
237. *Id.* § 1111(h)(1)(C)(i)-(iv), 115 Stat. 1425, 1457-58 (2002).

of state autonomy if not met with adequate state cooperation should not be underestimated.

CONCLUSION

The moral, educational, and political future of the accountability mechanisms of the national standards movement embodied in the new and rigorous Regents high stakes exams is in danger of being significantly undermined. Indeed when high stakes testing is implemented against the backdrop of persistently inadequate school funding policies that may also operate in a racially discriminatory manner, it becomes a profoundly nefarious policy; one which ominously points, indeed compels our most vulnerable public school children to follow a road not marked by promise but rather one with a dead end sign. Issuing well-intentioned educational ultimatums implicit in a high stakes exam approach, without first fulfilling a constitutional commitment to provide an adequate education through necessary school resources, sets up a scenario in which politicians and pundits can proclaim that public education is, and always will be, a failure. But where evidence demonstrates that most private schools vouchers, such as those in Cleveland, support students already attending those schools, it would appear, at least for now, that the vast majority of remaining students must necessarily depend on the public school system to provide for their education.[238]

Yet, another ultimatum underlies our public discourse pertaining to educational accountability, which is just finding its voice; the legal victories around the nation addressing educational adequacy will soon have to translate into swift but thoughtful intervention by legislators to meet constitutional obligations to minority and special needs children. Legislators must do so or else suffer the fate that their larger efforts to hold public school systems accountable will fall into disrepute. Perhaps then, the recent impetus behind the support for vouchers may also be seen, in part, as a way for state legislators to evade these pressing legal concerns regarding public school funding. Ironically, what may result is accountability rhetoric accompanied with an exodus of students to institutions which are legally and educationally less accountable to special need students, English language learners and students of color. While the

238. Policy Matters Ohio, a non-profit research institute recently issued a report on the composition of voucher school students. Zach Schiller, Report, *Cleveland School Vouchers: Where the Students Come From*, available at http://www.policymattersohio.org/ClevelandVouchers.pdf (noting that 33% of the students receiving aid through the Cleveland voucher program previously had been attending private schools, while only 21% had gone to public schools in Cleveland. The remaining 46% enrolled as kindergartners or came from elsewhere). However, the Supreme Court decision in *Zelman v. Simmons-Harris*, could significantly change the number of current public school students who receive an education at private parochial schools.

voucher movement holds significant promise, state leaders would do well to acknowledge that the linkage between educational adequacy and assessments is a two way street with important ramifications for public and private schools. Adding resources to systemic reform cannot be effective without proper accountability, just as assessments become less a dependable tool of accountability when basic educational resources are grossly deficient, particularly so for disadvantaged children. Accordingly, the normative proposition to strategically link evidentiary findings in educational adequacy challenges, Title VI resource comparability claims, and Title I compliance issues with the high stakes assessment context is one that declares the ideal that states must carry out their most fundamental legal and moral mandate under their constitutions to provide an adequate education. If not, state leaders risk loosing their own political autonomy and credibility. What is more, they are also likely to jeopardize the credibility of the national standards movement itself and in so doing perpetuate the unilateral educational disarmament of a nation still at risk.[239]

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239. The terms "unilateral educational disarmament" and "a nation at risk" are derived from the landmark commissioned report, *A Nation At Risk*, published in 1983, which warned of a rising tide of mediocrity in the nation's public education system. The report is widely regarded as the primary impetus behind the national standards movement designed to hold public schools accountable. *See generally,* Maurice R. Dyson, *A Covenant Broken: The Crisis of Educational Remedy in New York City's Failing Schools,* 44 How. L. J. 107 (2000).