

The Legal Issues Surrounding the TAAS Case

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*This article provides an overview of the legal claims made by plaintiffs challenging the State's required passage of the Texas Assessment of Academic Skills (TAAS) exit-level test for graduation in *GI Forum et al. v. Texas Education Agency et al.* The plaintiffs filed their case alleging that the State's graduation requirement violated minority students' equal protection and due process rights as well as Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunity Act. Part 1 of the article summarizes the plaintiffs' initial complaint and the effect of the court's pretrial orders on the plaintiffs' ability to introduce crucial expert evidence to support a pattern of discriminatory State educational policies. Part 2 of the article describes the role of the expert testimony provided at trial for the plaintiffs' claims and also provides lessons for future litigation.*

On September 20, 1999, the Mexican American Legal Defense and Educational Fund (MALDEF) began its trial of *GI Forum et al. v. Texas Education Agency et al.* (2000)—otherwise referred to as the “TAAS trial”—in federal court in the Western District of Texas. Representing nine individual and two organizational plaintiffs, MALDEF produced evidence over a 5-week period challenging as discriminatory the State of Texas's use of the Texas Assessment of Academic Skills (TAAS) exit exam as a graduation requirement for high school students. After the trial—which included the testimony of dozens of lay and expert witnesses and the introduction of hundreds of exhibits—the court issued an opinion allowing the State to continue using the TAAS exit exam as a graduation requirement even though it found that the test resulted in a significant disparate impact on Latino and African American students.

Although it has been more than a year since the TAAS trial was litigated, the issues arising out of the case are still hotly debated throughout the country as states, school districts, teachers, and parents continue to struggle over the effects of standardized testing on their children and the effectiveness of such



tests for measuring educational reform (Weisman, 2000a). The current presidential campaign places the Texas educational system in the spotlight as Governor George W. Bush has highlighted the standardized test as part of the “Texas miracle” in education that he promises to implement as president of the United States (Schrag, 2000; Weisman, 2000b; see Haney’s [2000] paper, “The Myth of the Texas Miracle in Education,” for a critique of Texas’s school reform efforts). Ironically, although not MALDEF’s purpose, the TAAS case created the opportunity for the media and policy makers to assess for themselves the success of Texas’s educational system. For MALDEF and the witnesses involved in the trial, the issues introduced in this case reflect not only the ongoing public debates about how far states should go in pursuing accountability goals in public education but also the very real civil rights violations for thousands of African American and Mexican American (and other Latino) students who could not graduate after failing the TAAS exit-level exam administered in the 10th grade.

MALDEF has long fought against the negative effects of Texas educational policies on minorities (see, e.g., *Edgewood v. Kirby*, 1989, 1991; *U.S. v. Texas*, 1971). With the TAAS exit-level exam, the effects were evident in the huge gap in test scores among Latinos, African Americans, and Whites taking the exam and in the relation between the implementation of the test and increasing retention and dropout rates among minority students throughout the state (see Haney, 1999, 2000). These effects, coupled with MALDEF’s understanding of the State’s past discriminatory practices, became the impetus for litigation challenging the test.

In this article, I provide an overview in Part 1 of the legal claims made by the plaintiffs in *GI Forum et al. v. Texas Education Agency et al.* (2000) as well as the effect of the court’s pretrial orders on the plaintiffs’ ability to introduce crucial expert evidence to support a pattern of discriminatory State educational policies. Part 2 of this article describes the role of the expert testimony provided at trial for the plaintiffs’ claims and what lessons can be learned for future litigation.

Part 1

The Plaintiffs’ Complaint: Setting the Stage for the Arguments at Trial

In 1997, MALDEF filed the TAAS case on behalf of several organizations and individual minority plaintiffs who were affected by the State’s TAAS exit exam graduation requirement. The plaintiffs made several claims based on

constitutional and statutory grounds. Specifically, the plaintiffs claimed that (a) the State of Texas violated its duties under a desegregation order filed in *U.S. v. Texas* (1970) to ensure that school districts provide equal educational opportunities in all schools; (b) the State of Texas violated the Equal Protection and Due Process Clauses of the 14th Amendment of the U.S. Constitution by denying African American and Latino students an equal opportunity to learn the materials tested on the TAAS exit exam; (c) the State of Texas violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, which prohibits discrimination in the distribution of federal funds; (d) the State of Texas violated the implementing regulations of Title VI by implementing an exit exam that discriminates against African Americans and Latinos in its effects; and (e) the State of Texas failed to take appropriate steps to overcome language barriers that impede equal participation by its students in instructional programs, in violation of the Equal Educational Opportunity Act.

MALDEF based its equal protection and due process claims on the fact that the Texas Education Agency implemented the TAAS exit test as a graduation requirement with the full knowledge and expectation that the results of the test would show a gap in scores between White and minority students. Moreover, the test itself is fundamentally unfair in that it is either significantly flawed in its design and use or it contains material not covered in some of the historically multitracked classrooms of Texas schools or both. These are not novel concepts in the law. MALDEF's legal case was based on the seminal Fifth Circuit case striking down the use of standardized tests in public schools (*Debra P. v. Turlington*, 1981). In *Debra P.*, the appellate court held that students who had been subject to past discrimination in schools could not be forced to pass a standardized test for graduation unless the State of Florida could demonstrate that its schools had overcome inequalities in education. The judge presiding in that case held that it would be fundamentally unfair to impose a test on students without a showing of instructional or curricular validity. In other words, an invalid test violated the Due Process Clause, which requires fundamental fairness in a state's dealings with its citizens. *Debra P.* and its progeny of cases striking down standardized tests on validity grounds became the basis on which MALDEF built its case in court.¹

Based on MALDEF's initial analysis of the comparative pass rates on the TAAS exit exam, the plaintiffs alleged that the State's use of the exam as a graduation requirement violated Title VI and its implementing regulations. The plaintiffs alleged that the TAAS exit test has an adverse impact on Latinos and African Americans, that the TAAS exit test is not educationally necessary for the maintenance of the State's accountability system, and that there are less restrictive alternatives for meeting the State's desire to maintain an effective accountability system than its requirement that students pass the

TAAS exit test. Together, these allegations make up a traditional Title VI regulation discrimination claim. In other words, the plaintiffs must show that a specific practice—in this case, the implementation of the TAAS exit exam—has a disparate impact on Latinos and African Americans. This is traditionally done through analyses that show that the differences in performance between minority and White groups are statistically and practically significant. The burden then shifts to the defendant, who must show that the practice is “educationally necessary.” In other words, is the practice manifestly related to a legitimate educational goal of the State? The plaintiffs can rebut the defendant’s showing of educational necessity by introducing evidence to show that the test is too flawed or too unreliable to meet the State’s goal or with evidence that the test, even if valid, is not necessary to meet the defendant’s stated goals. The plaintiffs must then show that there are less discriminatory and equally effective alternatives to the challenged practice. This can be done through evidence of practices used elsewhere or of less discriminatory practices that the defendant considered and discarded (see, e.g., *Cureton v. NCAA*, 1999).

The plaintiffs’ Equal Educational Opportunity Act (EEOA) claim was based on the effects of the TAAS exit-level exam on limited-English-proficient (LEP) students. The EEOA requires that the state ensure that LEP students not be hindered in their advancement in instructional programs by practices that create language barriers. Because the TAAS exit exam is offered only in English, it does not assess a student’s substantive knowledge but rather the student’s grasp of the English language. The exam, therefore, creates a barrier to advancement based on language, in violation of the act.

*Surviving Summary Judgment: The Judge Dispenses
With the Plaintiffs’ Intentional Discrimination Claims*

Approximately 2 months before trial, the State filed a motion for summary judgment asking the court to dismiss the plaintiffs’ case. Upon a motion for summary judgment, the plaintiffs must produce evidence of the facts to support their legal claims in accordance with Federal Rule of Civil Procedure 56(c). The judge must then decide whether a “fair minded jury could return a verdict in favor of the plaintiff on the evidence presented” (*Anderson v. Liberty Lobby, Inc.*, 1986). Only two of the plaintiffs’ claims in the TAAS case survived summary judgment review. The judge dismissed the plaintiffs’ Equal Protection claims as well as the plaintiffs’ claims under the Title VI statute, reasoning that even though the State had historically discriminated against minorities in education, the plaintiffs could not show that there was a present intent to discriminate or that the TAAS exit-level test requirement

was linked to the State's past history of discrimination. The court held that the Equal Protection Clause of the 14th Amendment, and Title VI of the Civil Rights Act of 1964 require plaintiffs to prove that any alleged discrimination is intentional; see *Washington v. Davis* (1976) (the Equal Protection Clause of the 14th Amendment requires a showing of intentional discrimination); *Guardians Ass'n v. Civil Service Comm'n of New York City* (1983) (Title VI requires the same evidentiary elements as the Equal Protection Clause). The court found that the plaintiffs had neither direct nor circumstantial evidence of discrimination sufficient to support an intent to discriminate. It dismissed the plaintiffs' claims even though the plaintiffs in fact produced evidence that (a) the Texas Education Agency knowingly recommended a cut score for the test at a point where minorities would overwhelmingly fail the test, (b) the State Board of Education was shown studies documenting the test score gap before it arbitrarily set the cut score for passing the test at 70, and (c) the State Board of Education knew that the material on the test was not uniformly covered in Texas's classrooms. These are all elements of a claim of intentional discrimination based on circumstantial evidence—see *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.* (1977) (plaintiffs can show circumstantial evidence of intentional discrimination even if no direct evidence is available). The court also dismissed the plaintiffs' EEOA claims, reasoning that the TAAS exit test did not impede minorities' equal participation in instructional programs.

The court allowed the plaintiffs to go forward with their claims that the TAAS exit test adversely affected Latino and African American high school students in violation of the Department of Education Title VI implementing regulations, which prohibit the provision of educational services that have a discriminatory effect. The court also allowed the plaintiffs to prove at trial that the TAAS exit test infringed upon the plaintiffs' property interests in a diploma and therefore violated the Due Process Clause of the 14th Amendment of the Constitution. The judge ruled that the plaintiffs could introduce evidence at trial demonstrating the test's invalidity at a number of levels as well as evidence of students' unequal opportunities to learn the material on the test.

*The Clarification Order: The Court
Further Curtails the Plaintiffs' Case*

At the request of the State, the court issued a motion clarifying the summary judgment order that effectively limited the plaintiffs' ability to introduce evidence of the State's past history of discrimination at trial. The judge's order stated,

The admissibility of [historical discrimination] evidence does not mean that the entire lengthy history of Texas's failures and success at educating minority students is admissible. Rather, Plaintiffs will be allowed to attempt to show that educational inequalities existed at the time the TAAS test was implemented and that those inequalities render the test unfair. Such a showing would be more a "snapshot" than of a historical narrative, however. In other words, the state of affairs at the time of the test's implementation need not be explained at length; it is enough to show that it existed and, perhaps, that the State was aware of it (order granting in part and denying in part defendant's motion for clarification at 4; order is on file with author).

The order severely curtailed the plaintiffs' ability to portray the effects of the TAAS exit test in light of the State's past use of standardized tests to discriminate against minorities and the resulting unequal educational opportunities for students. It became evident during the trial that the court was not inclined to relate the history of discrimination in the public schools in Texas to the disparity in TAAS exit test scores between minority and White students. This ruling strengthened the State's arguments that the past was the past, that there was no connection between the TAAS exit test and past discrimination in Texas public schools, and that the TAAS exit test was actually a mechanism for bridging the educational differences between the races throughout the state of Texas.

Part 2

The Legal and Factual Issues Remaining at Trial: The Role of the Experts in Presenting the Issues

Although the plaintiffs presented anecdotal evidence by students and teachers regarding the effect of failing one or more sections of the TAAS exit test, it was—and usually is in a case such as this—the statistical evidence presented by the plaintiffs' experts that ultimately convinced the judge of the test's adverse impact. Because the court had not ruled on what types of statistical evidence sufficed to make a showing of adverse impact, the plaintiffs had to present several different types of statistical evidence to show the test's adverse effects. As Mark Fassold (2000 [this issue]) explains in his article (and as he explained at trial), in virtually every type of statistical test accepted by the courts, including the four-fifths rule and the Shoben differences between independent proportions analysis, the average differences in performance between Whites and minorities on the test were statistically significant. This observation held true whether the statistics were based on an analysis of first-time takers of the test, a cumulative analysis of each time students took the

test, or the final time students took the test before scheduled graduation. Ultimately, the judge credited Fassold's testimony and found in favor of the plaintiffs on the issue of the TAAS exit exam's adverse impact on Latino and African American students.

To rebut the defendants' claims that the TAAS exit exam was key to the State's accountability and other goals, the plaintiffs showed the several ways that the test was invalid for its purpose, including testimony questioning the test's content, construct, instructional and curricular validity, and its reliability (see Bernal, 2000 [this issue]). It was part of the goal of the MALDEF attorneys to debunk the myth of the standardized test—and the TAAS exit-level test, in particular—as the objective, reliable, nonbiased, and superior indicator of a student's knowledge acquired over years of formal schooling. Much of the testimony presented at trial attacked the State witnesses' claim that the State had succeeded in developing an accurate, nonbiased set of questions that could better gauge what a student knows than could years of teacher evaluations and grades.² For example, Dr. Martin Shapiro (plaintiffs' expert) criticized the State's reliance on circular factors to eliminate nonbiased questions. He also described the inverse relation between minority performance on a test question and the likelihood of that question to appear on a test. Plaintiffs' expert Dr. Walter Haney questioned the defendants' use of internal consistency reliability measures to verify the reliability of the test. He also reviewed the information available on the setting of the cut score and concluded that the TAAS exit exam was not valid at the cut score according to professional standards. Plaintiffs' expert Dr. Ernesto Bernal questioned the construct validity of the TAAS exit test because it did not "hang together" as it should under a factor analysis, and it also failed to predict minority students' knowledge of given subjects (see Bernal, 2000). He also provided evidence that TAAS test scores correlate weakly with minority students' grades (see also Haney, 2000). Plaintiffs' experts Dr. Richard Valencia, Dr. Amilcar Shabazz, and Dr. Jose Cárdenas challenged the test's instructional/curricular validity, presenting evidence of minority students' unequal opportunities to learn due to inferior resources and to extensive tracking of minority students in schools. These experts sought to provide as much historical evidence as possible, within the limits of the court's clarification order, of past discrimination, particularly as it related to the State's inability to ensure that the test covered material actually taught throughout the State's schools (see Valencia, 2000 [this issue]). All such testimony supported the plaintiffs' argument that the test was invalid and thus both violated the plaintiffs' due process rights and was not educationally necessary.

As part of their case, the plaintiffs also had to demonstrate that there were less discriminatory alternatives to the State's TAAS exit-level test graduation

requirement. In addition to presenting several of the State's own documents listing the possible alternatives to the TAAS exit test requirement, the plaintiffs' experts offered opinions of equally effective alternatives. Dr. Haney testified that a sliding-scale formula applied to the TAAS exit exam and a student's grade would produce a less discriminatory effect. Drs. Bernal and Valencia opined that a compensatory instead of a conjunctive scoring system has a less negative impact on Latino and African American students and is compatible with proper standards of practice and test use (see Valencia & Bernal, 2000 [this issue]).

*The Court's Order and Opinion:
Lessons for Future Litigation*

On January 7, 2000, the judge issued an order and opinion allowing the State to continue its use of the TAAS exit test. Even though the court found that the TAAS exit-level exam had a substantial negative effect on minorities in the Texas schools, he upheld the State's use of the TAAS exit-level test as an absolute requirement for graduation from high school. The opinion stated that "the Plaintiffs failed to prove that the policies are unconstitutional, that the adverse impact is avoidable or more significant than the concomitant *positive* impact, or that other approaches would meet the State's articulated legitimate goals" [emphasis added] (*GI Forum et al. v. Texas Education Agency et al.*, 2000, p. 671).³

The court found that the State met its burden of showing that the test was educationally necessary, pointing out that the State's burden was not a stringent one, as the State merely had to articulate a manifest relationship between the test and its goal. In other words, as long as the State could offer a legitimate reason for requiring students to pass the test before graduation, the State met its burden of persuading the court that the test was educationally necessary. The court found that although the test had its flaws, as the plaintiffs' experts pointed out, it was still effective "to provide an objective assessment of whether students have mastered a discrete set of skills and knowledge" (*GI Forum et al. v. Texas Education Agency et al.*, 2000, p. 680). The court made it clear that the plaintiffs failed to debunk the myth that the TAAS exit exam was an objective one. Clearly, future litigation will need to establish stronger correlations between a test's invalidity or bias and its disparate impact on Latino and African American students.

The judge disagreed with the plaintiffs' contention that the State had equally effective and less discriminatory alternatives to the test. He opined that "the present use of the TAAS test motivates schools and teachers to provide an adequate and fair education, at least of the minimal skills required by

the State, to all students [citations omitted]. The plaintiffs produced no alternative that adequately addressed the goal of systemic accountability” (*GI Forum et al. v. Texas Education Agency et al.*, 2000, pp. 681-682). The court found that the plaintiffs had failed to provide evidence of any alternatives that could “sufficiently motivate students to perform to their highest ability” (*GI Forum et al. v. Texas Education Agency et al.*, 2000, p. 681). The plaintiffs, of course, had provided several alternatives to address the goals of systemic accountability, including the continued use of the test as an evaluation tool without the graduation sanction. The court’s assumption, of course, was that the hammer approach is the most effective tool for motivating students. Participants in future litigation should study and document the comparative pass rates in states that use a test for evaluation and those that require test passage for graduation. Such a study may strengthen the plaintiffs’ argument that data can still be collected to keep schools accountable for students’ progress without such a harsh sanction.

With respect to the plaintiffs’ due process claim, the court found that because the state’s students had several opportunities to pass the test and because remediation was available after a student failed the test, the students’ due process rights were protected. The judge gave little credence to the plaintiffs’ evidence regarding the State’s practice of allowing tracking in schools and its spotty remediation programs. Equally unimpressive to the judge were the arguments that the State’s historical discrimination led to unequal learning opportunities for students (see Valencia, 2000). The court’s final opinion reiterated its earlier order: “This case is not directly about the history of minority education in the State” (*GI Forum et al. v. Texas Education Agency et al.*, 2000, p. 670). The judge found that the TAAS exit exam did not violate students’ due process rights because, as he stated,

There must be some link between the TAAS test and [educational] disparities. The Plaintiffs were required to prove, by a preponderance of the evidence, that the TAAS test was implemented in spite of the disparities or that the TAAS test has perpetuated the disparities, and that requiring passage of the test for graduation is therefore fundamentally unfair. (*GI Forum et al. v. Texas Education Agency et al.*, 2000, p. 671)

The court’s opinion itself sets out the blueprint for attorneys and their experts in future litigation. Experts will need either to document fully and precisely the causal connections between test disparity and past discrimination or to show that the challenged test perpetuates historical educational disparities. In this case, the judge’s earlier order made it difficult for the plaintiffs to present much more than a snapshot of existing disparities at the time the TAAS test was implemented. By contrast, development of specific

expert evidence showing either a causal connection or a perpetuation of the disparities before the summary judgment stage will strengthen plaintiffs' due process claims while avoiding the evidentiary limitations the plaintiffs faced at trial.

Conclusion

The TAAS case and cases like it are increasingly difficult to litigate because of the growing reluctance of the courts to identify race as a factor in a cause-and-effect analysis of discrimination. Courts are quicker than in years past to accept the argument that factors other than race discrimination are the cause for the different effects of state policy on Whites and minorities. In this case, the State successfully deflected arguments that the TAAS test discriminated on the basis of race by pointing to socioeconomic factors, single-parent families, the need to work while in school, teen pregnancy, and similar reasons to account for the differences in student performance. It behooves attorneys and experts to isolate and emphasize the correlations between race and test performance (see Fassold, 2000, and Valencia, 2000). This strategy will not only strengthen the plaintiffs' claims, but it will make for a much cleaner, less biased and stronger analysis—one less vulnerable to attack at trial. Historical experts must continue to study and document the patterns of discrimination in education; they must create analyses that more clearly show the causal connection between current practices and past discrimination in education. Experts should also play an active role in understanding how their testimony supports the plaintiffs' legal claims. Such an understanding will undoubtedly enhance the plaintiffs' development of an overall story for judge or jury.

This article sought to highlight the legal standards by which the court in the TAAS case determined that it could participate in the policy debates surrounding educational reform efforts. In light of the ongoing and increasingly heated controversy about the effectiveness and validity of standardized tests in public schools, good experts—such as the ones who testified for MALDEF in the TAAS trial—can help an attorney move the debate from the public policy realm to the legal arena whenever civil rights are at stake.

Notes

1. See, for example, *Debra P. v. Turlington* (1981), *Larry P. v. Riles* (1984) (test held invalid because it was not validated for different populations or for the purpose of placing students in special education classes), *Cureton v. NCAA* (1999) (defendant failed to show that its cut score was set so as to be reasonable and consistent with normal expectations of acceptable proficiency

of high school students on that particular test), *Groves v. Ala. Bd. of Educ.* (1991) (selection of a cut score that is arbitrary in the sense that it was randomly chosen from the universe of possible choices would be invalid and therefore not educationally necessary), *Sharif v. New York State Ed. Dep't.* (1989) (the use of the SAT as a sole criterion for making decisions about scholarships violated professional standards and was not related to the State's purpose to determine scholarship recipients), and *Richardson v. Lamar County Bd. of Educ.* (1989) (court rejected test as invalid because the passing score was based on what was "politically acceptable" and lacked any relationship to a measurement of competence).

2. This task is, of course, complicated by schools' increasing reliance on teaching to the test, which in turn further skews the results and reliability of the test (see McNeil, 2000 [this issue]).

3. This is an unprecedented legal standard that the plaintiffs were expected to meet. Neither the case law nor the statutory law governing Title VI and due process claims requires plaintiffs to show that the adverse impact of a challenged practice is either avoidable or comparatively larger than the positive impact that the practice may have.

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