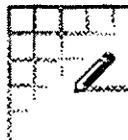


NLWJC - Kagan

DPC - Box 018 - Folder 001

Education - Civil Rights Issues [1]

 Sylvia M. Mathews
06/13/98 03:37:33 PM

Record Type: Record

To: Edward W. Correia/WHO/EOP
cc: See the distribution list at the bottom of this message
bcc:
Subject: Re: Self-assessment guide 

I agree with the recommendation. Let's pull the plug.
Edward W. Correia

Edward W. Correia

06/11/98 01:52:01 PM

Record Type: Record

To: Charles F. Ruff/WHO/EOP, Sylvia M. Mathews/WHO/EOP, Maria Echaveste/WHO/EOP
cc: Peter Rundlet/WHO/EOP, Tanya E. Martin/OPD/EOP, Robert M. Shireman/OPD/EOP, Scott R. Palmer/PIR/EOP
Subject: Self-assessment guide

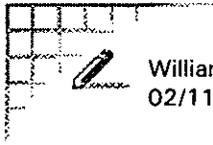
We met with the civil rights groups this morning to discuss the draft guide on affirmative action for higher education. Representatives of DOJ and OCR were there as well.

There have always been some underlying difficulties in drafting this document. Unlike other areas, e.g., benchmarking, federal hiring, and DOT rulemaking, this has not been an exercise in our "mending" our own affirmative action policies. Instead, the idea has been to state the law as it now stands in order to provide guidance to universities.

However, as the groups argued, it is impossible to state the law clearly and completely, given that there are so many unanswered questions. The more specific the document, the more we have to put our own interpretation on the Court's cryptic statements in this area, and the more we make it difficult for others to argue their interpretations. On the other hand, if we issue a highly general statement, the document is not really useful, and it certainly does not provide a "mend it, don't end it" message.

As a result, there is a consensus among White House and agency staff that, for the time being at least, we should abandon the effort to issue a document that purports to set out the law of affirmative action in this area. We should continue doing what we have already been doing, which is providing technical assistance to universities at conferences and in other informal settings. This decision was somewhat painful given that DOJ and OCR staff have spent hundreds of hours in drafting. However, they agree with this approach, too. In addition, we believe that we should look for an opportunity to get out this basic message: the administration believes that affirmative action in higher education is constitutional and strongly supports it. That message can be conveyed in other ways, for example, in a statement by the POTUS this fall.

Consequently, our advice is not to issue this document and to tell the civil rights groups informally of our decision. I will wait to hear from you before I contact them.



William R. Kincaid
02/11/98 07:28:36 PM

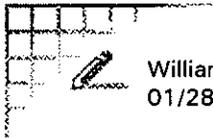
Record Type: Record

To: Elena Kagan/OPD/EOP, Michael Cohen/OPD/EOP
cc: Julie A. Fernandes/OPD/EOP, Tanya E. Martin/OPD/EOP, Laura Emmett/WHO/EOP
bcc:
Subject: Re: Admissions standards/Magnet schools grant applications 

FYI: This application, which we cleared, is scheduled for Federal Register publication on Friday.

-- Bill

William R. Kincaid



William R. Kincaid
01/28/98 06:30:10 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Michael Cohen/OPD/EOP
cc: Julie A. Fernandes/OPD/EOP, Tanya E. Martin/OPD/EOP, Laura Emmett/WHO/EOP
bcc: Records Management
Subject: Re: Admissions standards/Magnet schools grant applications 

Mike and Elena--

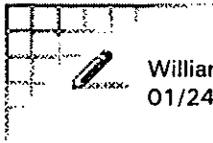
I spoke with Dawn about this again today. She is satisfied that the analysis of ED and DOJ that the reducing/preventing/eliminating racial isolation aspect of the program meets the compelling interests test under Adarand is consistent with the way the Administration has approached similar issues, in light of the Magnet Schools program's statutory grounding and history. Therefore, she will be clearing this notice to go forward.

The issue of how this applies in the 5th Circuit is not directly addressed by the notice and Dawn feels it isn't necessary to resolve that prior to allowing the notice to go out. She wants to let ED and DOJ sort this out some more before we weigh in.

Thanks.

-- Bill

William R. Kincaid



William R. Kincaid
01/24/98 01:18:19 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Michael Cohen/OPD/EOP
cc: Julie A. Fernandes/OPD/EOP, Tanya E. Martin/OPD/EOP, Laura Emmett/WHO/EOP
Subject: Admissions standards/Magnet schools grant applications

Art Coleman in OCR called the other night to give us a heads-up about this, which involves breaking some new legal ground. Dawn Chirwa left me a message Friday that she was reviewing the application. Do you have any gut reactions/concerns on this issue? Art's summary of the issues and status follows. Thanks.

----- Forwarded by William R. Kincaid/OPD/EOP on 01/24/98 01:11 PM -----



William R. Kincaid
01/22/98 10:12:02 PM

Record Type: Record

To: William R. Kincaid/OPD/EOP
cc:
Subject: Magnet schools grant applications

----- Forwarded by William R. Kincaid/OPD/EOP on 01/22/98 10:12 PM -----



Arthur_Coleman @ ed.gov
01/22/98 09:07:00 AM

Record Type: Record

To: William R. Kincaid
cc:
Subject: Magnet schools grant applications

Bill, it was good to talk with you last night, and as we discussed, I'm forwarding a recap of the overview of where the Department is re the magnet school application process.

WHAT'S NEW

The federal register notice announcing this cycle of grant applications (which occurs every three years) will for the first time include a discussion of strict scrutiny (compelling interest/narrow

tailoring) standards that must be satisfied in the event that race is a factor in the admissions of the proposed grantees. This requirement stems from the Adarand case. The last such notice, three years ago, pre-dated Adarand.

In addition to the remedial and diversity interests that are identified as compelling, we are setting forth the interest of "reducing, preventing, or eliminating" minority group isolation as a compelling interest. Based on desegregation law as well as specific language from the authorizing legislation, this represents a new position by the federal government.

PROCESS

We have been in conversations with the Department of Justice for months regarding these issues, and have complete agreement regarding the standards and application of those standards with Civil Rights Division, OLC, and the Associate Atty General's office. We are awaiting a final word from the SG before proceeding with the publication of the notice. Our best read at this point is that the basics outlined above will be approved, with the question of whether this comprehensive standard will apply in the Hopwood states. (Although the notice doesn't address this level of specificity, it's important that we see this the same way. Thus far, there is agreement in ED and DoJ that Hopwood, for a host of reasons, is distinguishable and would not control our analysis here.) Also, the Department has discussed this, in general terms, with legal counsel in the WH--Dawn and Rob. Dawn has a copy of the draft notice. (If you want the paper on this, let me know.)

There is real urgency in getting closure around these issues, as we need to get the notices out so that the reviews and awards can be made by mid-summer. The Department has been criticized in the past regarding delays here, and all are working earnestly to ensure that we build in enough time for the (increasingly) complex legal reviews of the applications that will be required.

At the briefing with the Secretary yesterday, he underscored his support for the positions we are taking, and urged expedition in our move forward.

REACTION

We can expect some critics to complain that any use of race in this context is unwarranted/uncalled for--in the post-Adarand/Hopwood world. We can certainly expect some reaction on the new point regarding the compelling interest of eliminating racial isolation. Some may also question the "new" strict scrutiny requirements.

Don't hesitate to call any of the usual suspects if you have additional questions or need more information.

Thanks.

National Tests and Civil Rights Issues

Q. We are very concerned that your proposed national tests will be used for “high stakes” purposes, such as retaining students in grade, when the test will not be validated for those purposes. Why haven’t you been willing to simply prohibit the use of these tests for high stakes purposes?

A I believe strongly that when we set academic standards for students, we should require students to meet the standards before passing them on to the next grade. That’s why I’m opposed to social promotions; we don’t do any student a favor when we pass them along even if they haven’t learned what they are supposed to. That is why I don’t want to prohibit the use of national tests for high stakes purposes--if these tests are good measures of the standards required by a state or city, then it should be able to use the tests as one way to determine if a student should be promoted. However, just as I don’t want to prohibit the use of these tests for high stakes purposes, I also don’t want to require that they be used this way.

Let me also say that under our civil rights laws, it is clear that tests used to make promotion, tracking, or other important decisions about individuals must be validated for those purposes, and the school must be able to show that it is giving students a fair opportunity to learn the material. Any state or school district that wants to use these tests for high stakes purposes must assume the responsibility of demonstrating that the tests are valid. And the Education Department’s Office of Civil Rights will be prepared to enforce the civil rights laws to make sure this happens properly.

Finally, let me point out that the agreement I reached with Congress that enabled our work on developing these tests to move forward placed responsibility for policy decisions regarding the test -- including the purposes for which the test can be used -- in the hands of the National Assessment Governing Board (NAGB). I know they will be looking at this issue carefully.

Q. You have proposed giving the 4th grade reading test only in English. This will be unfair to Limited English-Proficient (LEP) students, who may have good reading comprehension skills but may lack English language proficiency. LEP students will therefore either do poorly on the test, or will be stigmatized by being excluded from taking the test. Your own Title 1 program requires that students be tested in a language that best enables them to demonstrate competency in the subject being tested -- a requirement that your own testing proposal doesn’t meet.

Would you be willing to reconsider your position, and provide a Spanish-language version of the test? Would you be willing to consider an arrangement in which LEP students take the test in both English and in Spanish?

A. In order to succeed in school, students must be able to read well and independently by the

4th grade. In order to succeed both in school and in life, students must be able to read well in English. That is why I believe our national standard for reading ought to require students to demonstrate they can read well in English, and that is why our proposed test is in English. I do not believe we should create a version of the test in Spanish or in the 100 other languages students in some school districts speak, because that would be counter to the fundamental purpose of the test.

TO : All OCR Staff

FROM : Norma V. Cantú
Assistant Secretary for Civil Rights

SUBJECT : Fairness in Testing

FAIRNESS IN TESTING: AN OVERVIEW

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

President Bill Clinton, October 21, 1994

An invalid test cannot measure merit.

Walls v. Mississippi State Dept. of Public Welfare, 542 F. Supp. 281, 311 (N.D. Miss. 1982), aff'd in relevant part, 730 F. 2d 306 (5th Cir. 1984).

BACKGROUND

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

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

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

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

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

SCOPE OF THE GUIDANCE

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

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

The Guidance applies to norm-referenced and criterion-referenced tests¹ as well as to professionally designed alternative forms of assessment, which are used for making "high stakes" educational decisions. The Guidance does not cover teacher-created classroom tests nor does it apply to modifications of tests and/or testing conditions required for the purpose of accommodating individuals with disabilities under Section 504 of the Rehabilitation Act or the Americans with Disabilities Act (ADA). Although the legal theories of discrimination discussed in this Guidance are generally applicable to OCR investigations involving compliance with Section 504 and the ADA, an additional analysis regarding testing accommodations provided to individuals with disabilities is also required. This analysis is beyond the scope of this Guidance.

BASES OF THE GUIDANCE

Professional Standards

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

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

comments have helped to ensure that the Guidance is consistent with professional standards and that it is educationally sound.

Legal Standards

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

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

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

QUESTIONS NOT ADDRESSED BY THE GUIDANCE

What questions are not answered by this guidance? First and foremost, the investigative guidance, like other guidance issued by OCR, see 59 Fed. Reg. 11448 (March 10, 1993) (addressing Racial Incidents and Harassment), does not purport to define the kinds of cases that may be targeted for compliance reviews on this issue. Targeting decisions, made preliminarily by the enforcement offices, are based on a wide range of criteria: the degree of disparities in the provision of educational services, complaints received, information about the progress (or lack of progress) which a recipient has attempted or made over time to address a particular civil rights issue, information received from recipients or interest groups, and reasoned judgment that an array of factors merits the use of resources in a proactive review of a recipient's compliance with civil rights obligations.

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

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

CONCLUSION

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

INVESTIGATIVE GUIDANCE

I. Introduction

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

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

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

II. Jurisdiction

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

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

III. Disparate Impact Analysis

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

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

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

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

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

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

A. Establishing Disparate Impact

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

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

B. Establishing Educational Necessity

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

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

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

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

1. Validation Standards³

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

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

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

³ The inclusion in the Guidance of a discussion of validation standards is intended to guide investigators in gathering information about available validation studies. Again, the discussion is not intended to establish new standards for determining validity, but to reflect existing professional standards. However, it should be noted that the Standards for Educational and Psychological Testing, which was published in 1985, is currently being revised.

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

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

There are various types of test validity evidence, including (among others) content validity, criterion validity (including concurrent validity and predictive validity), and construct validity.⁶ The types of validity evidence required for a particular test should be appropriate to the nature and purpose of the test. Generally, a recipient is required to demonstrate only the types of validity for a particular test that are appropriate to the nature and purpose of the test.

Content-related validity is required when a recipient is using a test to measure the acquisition of specific knowledge or academic skills. For example, a statewide proficiency test designed to demonstrate acquisition of educational information and/or skills and used as a condition for a diploma would be subject to an assessment of its content validity. Content validity is determined by the degree to which empirical evidence, produced in conformity with accepted professional standards⁷, indicates that the questions, tasks, or items on the test or assessment procedure do reflect and are representative of the knowledge and/or skills appropriate to the subject area being tested.

In determining a test's content validity, it may be appropriate to also determine the instructional validity related to the test. Instructional validity determines the degree to which a school provides instruction in the knowledge and skills measured by the test. For example, a statewide proficiency test could be subject to an assessment of whether the test items reflect and are representative of the content areas tested (content validation) and also an analysis of the degree to which the schools in the State provide adequate instruction in those content areas (instructional validation).

Criterion-related validity is demonstrated when scores on a test or assessment procedure are related to the examinee's performance on some other measure, which is known as a criterion. In educational settings, the two forms of criterion validity most frequently encountered are predictive validity and concurrent validity.

Predictive validity should be empirically demonstrated, consistent with accepted professional standards, when a recipient is using test scores to predict students' future performance in a particular program, school, or curriculum. For example, a test

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

⁷ It is important to note that accepted professional standards have two major components: 1) professionally accepted research designs, and 2) professionally accepted statistical evaluations and demonstrations.

which was designed to predict applicants' ability to earn a degree in mechanical engineering and used by a recipient to accept or reject applicants to its mechanical engineering program, would be subject to a predictive validity evaluation. This evaluation might involve, for example, the demonstration that the test scores correlate significantly with success in the mechanical engineering program.

Concurrent validity is a form of criterion validity which demonstrates a relationship between test scores and current performance on another relevant criterion. For example, concurrent validity evidence supportive of a test would consist of empirical evidence demonstrating that current scores on the test are significantly related to some other relevant current performance criterion, which can include other tests and assessments, grades, portfolio exhibits, or any other relevant indicator of current performance. The demonstrations of concurrent validity should also conform to accepted professional standards.

Construct validity is both the most general type of validity and also the most complex form of validity. Construct validity is an assessment of the extent to which a test is a measure of a particular construct or psychological concept (a characteristic, property, skill, ability, capacity, achievement, or behavior), that the test is supposed to measure, and also, of the extent that the empirical results obtained from the test conform to existing theoretical formulations concerning the construct. Usually, the relationship of the construct to relevant theoretical formulations is quite complex. Thus, the construct validation of a test is not, in most instances, completely or adequately demonstrated by any single study.

Rather, the construct validation of a test usually involves a series of studies, using a variety of research methodologies. It is also usually the case that the evaluation of a test's construct validity will include evidence regarding the other forms of validity discussed above.

2. Establishing Validity

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

procedure at issue. All decisions as to whether a test or procedure has met professionally accepted standards will be made by experts.

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

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

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

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

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

procedures.

3. Establishing Reliability

Along with evidence of a test's validity, OCR will consider evidence of a test's reliability over time. Evidence of reliability must conform to accepted professional standards. Reliability may be affected by the type of assessment procedure at issue, e.g., a standardized test versus a performance-based assessment.⁸

4. Alternative Testing and Assessment Procedures

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

In evaluating the suitability of any alternatives, OCR should compare the validity and reliability of those alternatives with the validity and reliability of the challenged test or procedure. Where the use of a test or procedure offers only minor improvements in validity and reliability over available alternatives, OCR should closely examine the test or procedure for evidence that it is necessary to achieve the recipient's purpose.⁹

⁸ Performance-based assessment requires students to generate rather than choose a response. Students are required to actively accomplish complex and significant tasks, while bringing to bear prior knowledge, recent learning, and relevant skills to solve problems. Demonstrations, written or oral responses, journals and portfolios are examples of performance-based assessment. Herman, J.L., Aschbacher, P.R., & Winters, L. (1992). A Practical Guide to Alternative Assessment. Alexandria, VA: Association for Supervision and Curriculum Development.

⁹ It is good educational practice for recipients using tests or procedures that have disparate impact to inquire into alternative testing instruments or assessment procedures that would provide students with equal access to the recipient's programs and benefits.

C. Use of Educationally Necessary Tests or Procedures

1. Cutoff Scores.

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

2. Affirmative Action

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

D. Remedies Under A Disparate Impact Analysis

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

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

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

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

- 3) a specific timetable for submission of documentation.

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

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

IV. DIFFERENT TREATMENT ANALYSIS

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

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

A different treatment analysis can be pursued on a class-wide or individual basis. A class-wide pattern and practice approach will be more effective than an individual approach in identifying systemic problems. The pattern and practice case begins with a statistical demonstration similar to the one that begins a disparate impact case. However, if this disproportion is not the result of the application of a neutral policy, procedure, or

practice, OCR will also consider whether there is evidence of a pattern and practice of different treatment and the analysis discussed below should be followed.

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

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

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

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

V. ANALYSIS WHERE PRIOR DUAL SYSTEM

The use of any educational test or assessment procedure may be a violation of Title VI if its use is a vestige of the previously segregated system -- i.e., it is a policy and practice traceable to the prior system. Additionally, the use of any test or procedure that, in reality, perpetuates the effects of previous discrimination may violate Title VI. Recipients that have operated dual systems and have not been declared unitary have an obligation to dismantle their prior de jure segregated systems. Such recipients have an obligation to identify, consider and implement less discriminatory criteria consistent with sound educational policy, to the extent practicable. Once it is

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established that a test or procedure is traceable to prior de jure segregation, the recipient must demonstrate either (1) that the test or procedure has no current segregative effects, or (2) that there are no less segregative alternatives to the test or procedure that are practicable and educationally sound.

COMPENDIUM OF LEGAL AND TECHNICAL RESOURCES

This compendium provides an outline of key legal and technical resources to serve as a reference to OCR staff when investigating discrimination in the use of educational test or assessment procedures.

The investigation and analysis of disparate impact cases under Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d, and Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681, rely, to a large extent, on case law developed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, which prohibits discrimination on the basis of race, color, national origin, gender, and religion in employment. See Dillon County District No. 1 and South Carolina State Department of Education, No. 84-VI-16 (Civil Rights Reviewing Authority 1987); United States v. LULAC, 793 F.2d 636, 648-49 (5th Cir. 1986); Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985); NAACP v. Medical Center, Inc., 657 F.2d 1322 (3rd Cir. 1981). In addition, this guidance relies on the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 et seq., regulations published by the Equal Employment Opportunity Commission in 1978, which implement Title VII as it relates to employee selection, including the use of employment test or assessment procedures.

I. JURISDICTION

OCR must first decide whether it has jurisdiction over a claim involving the discriminatory use of an educational test or assessment procedure. OCR has jurisdiction if a test or assessment procedure is created or administered by an elementary, secondary, or postsecondary school or institution, or other entity that is a recipient of Federal funds, or if test or assessment procedure scores are being used by such an entity.

A. Title VI and Title IX Prohibit Discrimination in Federally Funded Programs and Activities

Title VI prohibits race and national origin discrimination in programs and activities that receive Federal financial assistance. Title IX prohibits gender discrimination in education programs that receive Federal financial assistance. See also 34 C.F.R. Part 100 (regulations implementing provisions of Title VI) and 34 C.F.R. Part 106 (regulations implementing provisions of Title IX).

B. OCR Has Institution-Wide Jurisdiction

Under the Civil Rights Restoration Act of 1987, OCR generally has institution-wide jurisdiction over a recipient of Federal funds. See 42 U.S.C. § 2000d-4 (1989).

C. Specific Discriminatory Actions Prohibited

The regulations implementing Title VI do not specifically address the use of tests and assessment procedures, but do include a general provision prohibiting race discrimination. 34 C.F.R. § 100.3(b)(5).

The regulations implementing Title IX specifically prohibit the discriminatory use of tests or assessment procedures in admissions, 34 C.F.R. § 106.21, employment, 34 C.F.R. § 106.52, and counseling, 34 C.F.R. § 106.36. Title IX further prohibits discrimination in areas in which test or assessment procedure results are often used to allocate benefits and opportunities. See 34 C.F.R. § 106.37(a) (prohibition against discrimination in financial aid awards and against assisting any entity which provides financial aid to students in a manner which discriminates based on gender); 34 C.F.R. § 106.31(b)(6) (prohibition against providing "significant assistance" to entities which discriminate on the basis of gender in providing any aid, benefit or service to students or employees).

See also 34 C.F.R. § 100, Appendix B, part K (Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Gender, and Handicap in Vocational Education Programs) ("if a recipient can demonstrate that . . . criteria [that disproportionately exclude persons of a particular race, color, national origin, gender, or disability] have been validated as essential to participation in a given program and that alternative equally valid criteria that do not have such a disproportionate adverse effect are unavailable, the criteria will be judged nondiscriminatory. Examples of admission criteria that must meet this test or assessment procedure are . . . interest inventories . . . and standardized test or assessment procedures").

II. DISPARATE IMPACT ANALYSIS

Because the regulations that implement Title VI and Title IX incorporate an effects standard, a recipient's use of facially neutral policies that have a disparate impact on the basis of race, national origin, or gender may constitute a violation of Title VI or Title IX. Guardians Ass'n. v. City Service Commission of City of N.Y., 463 U.S. 582 (1983) Lau v. Nichols, 414 U.S. 563 (1974); See also Memorandum from the Attorney General for Heads of Department and Agencies that Provide Federal Financial Assistance, "Use of the Disparate Impact Standard in Administrative Regulations under Title VI of the Civil Rights Act," July 14, 1994.

A. Establishing Disparate Impact

There is no rigid mathematical threshold that must be met to demonstrate a disparate impact. Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 994-95 (1988) ("statistical disparities must be sufficiently substantial to raise ... an inference of causation," i.e., "show that the practice in question caused the exclusion of applicants for jobs or promotions because of their membership in a protected group").

Groves v. Alabama State Board of Education, 776 F.Supp. 1518, 1523-1529 (M.D. Ala. 1991) (discussion on establishing a statistical prima facie case of disparate impact).

Georgia State Conference of Branches of NAACP, supra at 1421 ("Generally, to establish a prima facie case of disparate impact based on race the plaintiffs must show that the defendants' racially neutral practice detrimentally affects persons of a particular race to a greater extent than other races. . . ").

EEOC Guidelines, 29 C.F.R. § 1607.4(D) (discussion of statistical evidence of disparate impact).

B. Establishing Educational Necessity

The use of an educational test or assessment procedure which has a disparate impact on members of any race, national origin, or gender group is discriminatory, and a violation of Title VI or Title IX, unless the recipient justifies the use as educationally necessary.¹¹ See Board of Education v. Harris, 444 U.S. 130, 151 (1979) (in disparate impact cases in the education context defendants are required to show an educational necessity instead of a business necessity); Griggs v. Duke Power Company, 401 U.S. 424 (1971) (sets similar standard for disparate impact of an employment test or assessment procedure); Branches of NAACP v. State of Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985); and Sharif v. New York State Education Department, 709 F.Supp. 345 (S.D. N.Y. 1989) (standard for disparate impact of an

¹¹ There are certain types of test misuse where a recipient will not be able to meet the standard of educational necessity. For example, OCR may find a violation of Title VI or Title IX if a test or other assessment procedure has a disparate impact and is clearly not being used for the purpose(s) for which it was designed. Such misuse includes the situation where a test is being used as the sole or principal criterion for making educational decisions and it was clearly not designed to be used as such. In such cases, no further analysis is required.

educational test or assessment procedure is educational necessity).

See also Memorandum from then Acting Assistant Secretary for Civil Rights, Alicia Coro, to then Acting Regional Civil Rights Director, Region V, Linda A. McGovern (PCD # 70 October 22, 1986) (standard in case involving alleged disparate impact of LSAT scores as an admissions criterion at DePaul University College of Law and Illinois Institute of Technology/Chicago/Kent College of Law, is educational necessity).

Whether a test or assessment procedure is educationally necessary depends on whether 1) the test or assessment procedure is valid for the purpose for which it is being used and 2) the test or assessment procedure is the least discriminatory alternative for allocating the benefit or opportunity. Sharif, supra; State of Georgia, supra; cf. Final Order of the Civil Rights Reviewing Authority, Dillon County School District No. 1, Docket No.84-IV-16.

The Guidance is consistent with professional standards - See APA Standards; Code of Fair Testing Practices in Education; and EEOC Guidelines.

1. Validity

Memorandum from Harry M. Singleton to John E. Palomino (PCD # 57 April 4, 1985) (valid test or assessment procedures "successfully measure what they claim to measure; are used only for the specific purpose(s) for which they were developed; and, are administered in conformance with the instructions provided by the publisher").

See APA Standards at p. 11 (defining criterion-related evidence) and standard 1.11, 1.12, 1.18 (describing criterion-related validation studies).

See APA Standards at p. 10 (defining content-related evidence) and standard 1.6 and 1.7 (describing content-related validation studies).

a. No assumption of validity

See EEOC Guidelines, 29 C.F.R. § 1607.9(A) (describing unacceptable substitutes for evidence of validity). This is a change from past OCR practice because it requires the recipient to

demonstrate a test's or assessment procedure's validity.

b. Acceptable types of validity evidence

Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979), aff'd, 793 F.2d 969 (9th Cir. 1984) (State of California, requesting approval from the court to use standardized IQ test or assessment procedures for the purpose of placing black children in EMR classes, required to, among other things, provide statistics showing the mean scores of blacks and whites on the test or assessment procedure and information supporting the validity of the test or assessment procedure for the purpose of identifying and placing students in EMR classes).

Debra P. v. Turlington, 730 F.2d 1405 (11th Cir. 1984) (court approved content-related validity study which consisted of a number of surveys and site visits that analyzed whether the students had received the instruction necessary for them to have mastered the skills that were being tested).

See also Code of Fair Testing Practices in Education at A-1 and A-7 (encouraging test developers to describe the population for which the test is appropriate and encouraging test users to select tests appropriate for the testing purpose and population of test takers).

See also Uniform Guidelines on Employee Selection Procedures (EEOC Guidelines), 29 C.F.R. § 1607.7 (B)(1) (describing conditions under which employers could support the use of selection procedures by validity studies conducted by someone other than the employer); § 1607.14 (B)(8) (requiring evaluations of fairness of the test instrument by race, national origin, or gender, where "technically feasible;" and, where test is less predictive for one group than for another, requiring the employer to revise or replace the selection instrument to conform to the guidelines).

American Psychological Association Standards for Educational and Psychological Testing (1985) (APA Standards) at standard 1.16 (permitting criterion-related validation inferences to be drawn from a set of prior studies, where "local validation evidence" is not available, depending on the

degree of similarity between the test or assessment procedure use and validation sample); and at pp. 12-13 (describing the concept of differential prediction).

c. Statistical relationships

See Uniform Guidelines, 29 C.F.R. § 1607.14 (B)(5) (a test is generally considered valid when the relationship between test performance and the performance measured is statistically significant at the .05 level).

2. Reliability

EEOC Guidelines, 29 C.F.R. § 1607.14(C)(5) (discussing reliability).

APA Standards at pp. 19-20 (discussing reliability and error of measurement).

3. Alternative Testing And Assessment Procedures

Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (in Title VII case challenging use of employment test that had a disparate impact, employee can still prevail, even if test is valid, if other tests or selection devices with less disparate impact would serve the employer's interests).

NAACP v. State of Georgia, 775 F.2d. 1403 (11th Cir. 1985) (considering less discriminatory alternatives in Title VI education context).

Sharif v. New York State Education Department, 709 F.Supp. 345 (S.D.N.Y. 1989) (court considered evidence of less discriminatory alternatives).

EEOC Guidelines, 29 C.F.R § 1607.3(B) (requiring that less discriminatory alternatives be considered as part of any validation study, and that test users investigate alternative selection procedures which have "evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances").

FairTest v. College Entrance Examination Board and Educational Testing Service, OCR Case No. 02-94-2048 (where use of the PSAT had disparate impact based on gender in selecting National Merit Scholarship semi-finalists, recipients agreed to modify the test to

include a writing skills component and to study whether academic records could also be considered).

C. Use of Educationally Necessary Tests or Procedures

Even if a recipient has justified the use of a test or assessment procedure as educationally necessary, issues may arise which implicate Title VI and Title IX.

1. Cutoff scores

Evans v. City of Evanston, 881 F.2d 382 (7th Cir. 1989) (while test was valid for the job, cutoff score was set one standard deviation above the mean; the court rejected this because there was no attempt to connect the score to level of performance: "...the ability to perform firefighting tasks adequately depends not on relative but on absolute test performance.").

Richardson v. Lamar County Bd. of Education, 729 F. Supp. 806 (M.D. Ala. 1989) (passing score rejected because of the lack of any relationship to actually measuring competence; instead, based on what was "politically acceptable").

APA Standards at standard 6.9 (when a specific cut-off score is used to select, classify or certify test takers, the method and rationale for setting that cut score, including any technical analyses, should be presented in a manual or report).

2. Affirmative Action

When a recipient has previously been found to have discriminated against persons on the basis of race, national origin, or gender or when the recipient is attempting to overcome the effects of conditions which resulted in limiting participation on those bases (e.g., attempting to enroll a more diverse student body), permissible affirmative action may include using test procedure results in a different manner for members of a particular race, national origin, or gender. 34 C.F.R. 100.3(b)(6)(i) and (ii); 34 C.F.R. 106.3(a) and (b). Regents of the University of California v. Bakke, 438 U.S. 265 (1978). However, in the Fifth Circuit, OCR will consider the effect of the Hopwood decision on this issue. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

III. DIFFERENT TREATMENT ANALYSIS

As with other claims of race, national origin, or gender discrimination under Title VI and Title IX, OCR may apply a disparate treatment analysis to determine whether a neutral policy or practice regarding testing or assessment is being applied differently by a recipient to different groups of students of a particular race, national origin, or gender, without a legitimate, nondiscriminatory reason. This is the touchstone of what is a classic violation of Title VI and Title IX and their implementing regulations.

The basic elements of a different treatment case were set out by the U.S. Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a Title VII employment case. See also United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Note that there need not be direct proof of intentional discrimination in order to make a disparate treatment case. "In most disparate treatment cases, intent to discriminate is established inferentially, through circumstantial evidence." Equal Employment Opportunity Commission's "Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory," July 14, 1992, Number N 915.002. at 2.

A. Establishing Initial or Prima Facie Case of Different Treatment

1. Identify the race, national origin, or gender group to which the students who are allegedly being treated differently belong.
2. Determine whether the students were treated differently than similarly situated members of other race or gender groups with regard to a service, benefit, privilege, etc., from the recipient. See Montgomery Public Schools, OCR Case No. 04-94-5005 (where state requirements stipulated that students classified as mentally retarded must have a total or full-scale intelligence quotient (IQ) of 70 or below, OCR's review of student files showed that 28 percent of African American students classified as mentally retarded had an IQ above 70 and only 5.5 percent of white students classified as mentally retarded had an IQ above 70).

B. Establishing a Legitimate Nondiscriminatory Reason for Treatment

After a different treatment case of race, national origin, or gender discrimination has been established against the

recipient, the recipient must produce evidence that it had a legitimate, nondiscriminatory reason for its action(s) which would rebut the prima facie case against it (e.g., test or assessment procedure scores for black students given less weight in admissions decision than those of white students as affirmative action measure) (see above section II.C.2.).

C. Showing Pretext

If the different treatment case is rebutted, OCR must next determine whether the recipient's asserted reason for its action(s) is a mere pretext for discrimination. See, St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

IV. ANALYSIS WHERE PRIOR DUAL SYSTEM

United States v. Fordice, 112 S.Ct. 2727 (1992) (Mississippi's admission policy which required higher ACT scores for historically white public universities than for historically black public universities was constitutionally suspect as it was originally enacted by historically white universities to maintain prior dual system of higher education. Schools that have operated a dual system have an obligation to dismantle its prior de jure segregated system.).

Knight v. Alabama, 14 F.3d 1534, 1540-42 (11th Cir.1994) (a recipient's "burden of proving that [less discriminatory] alternatives are impractical or educationally unsound is a heavy one.").

Debra P. v. Turlington, 644 F.2d 397, 407 (5th Cir. 1981) (in considering equal protection attack on requirement that students pass a functional literacy test or assessment procedure to receive high school diploma, trial court instructed to consider whether disproportionate failures of black students could be attributed, in part, to unequal education received during period of dual school system).

TAB A

STEPS FOR ESTABLISHING DISPARATE IMPACT

In some cases, OCR will rely on a statistician to determine if a recipient's use of a test or assessment procedure has a disparate impact. Where OCR staff will make this determination, staff will undertake the following analysis:

1. Determine whether there is a statistically significant difference (disparity) in the granting or denial of educational benefits or opportunities.
2. In situations where a test or assessment procedure is the sole or principal criterion, or one of several criteria used in making an educational decision, determine whether the test or assessment procedure caused or contributed to the statistical disparity in the denial of educational benefits or opportunities.

STEP 1 evaluates whether there is a difference in the denial of educational benefits or opportunities based on race, national origin, or gender. This step requires a statistical comparison (using a "z" test¹²) of the proportion of members of the relevant race, national origin, or gender group in the "pool of candidates" with the proportion of members of that group that receive the benefit or opportunity. OCR staff performing STEP 1 should use the floppy disk which contains the formula for the "z" test. If the disk is not available, enforcement staff should contact the Program Legal Component.

If the results of the "z" test indicate no significant difference in these proportions, no disparity is present. If the results of the "z" test indicate a significant difference in proportions, there is a disparity disfavoring of members of the race, national origin, or gender which is disproportionately underrepresented among students who receive the benefit or opportunity. OCR staff should then perform either STEP 2 or STEP 3 to determine whether the test or assessment procedure caused or contributed to the disparity.

STEP 2 applies if a test or assessment procedure is being used as the sole or principal criterion in some decision process. In those cases where the test or assessment procedure has been commercially designed and normed, the

¹² The "z" test is used when a comparison of two different proportions is required. It is used in order to determine whether or not the proportions are statistically the same or different. Other tests could also be used for this purpose, such as the chi square.

publisher should report the average (mean) scores on the test or assessment procedure for all relevant populations (race, national origin, gender). If these mean scores are significantly different for the groups and the difference is "in the same direction" as the disparity established in STEP 1, e.g., mean test or assessment procedure scores of African Americans are lower than that of whites and African Americans receive disproportionately less benefits than whites, it indicates that the test or assessment procedure is contributing to the disparity.

In situations where this information is not available from the test or assessment procedure publisher, or where the test or assessment procedure was not commercially designed, OCR staff should determine whether the test or assessment procedure causes or contributes to the disparity by computing and comparing the mean scores of the relevant candidate groups. If these comparisons (performed either with a "t" test¹³ or an analysis of variance) indicate significant group differences, and the difference is in the same direction as the disparity established in STEP 1, OCR may conclude that the test or assessment procedure is contributing to the disparity. OCR should next consider whether the recipient can justify the test or assessment procedure as educationally necessary (see Tab B).

STEP 3 applies if a test or assessment procedure is being used as one of several criteria in a decision process. OCR staff should do the following:

- a. Determine the criteria used in the educational decision process, e.g., test scores, grades, or teacher recommendation.
- b. Determine the weights assigned to each criterion.
- c. Determine whether there are statistically significant differences in the mean test scores of the relevant candidate populations.
- d. Determine whether there are statistically significant differences in the mean scores of candidates on each of the other criteria used in the decision process. This is done by comparing members of each race, national origin, or gender with regard to their performance on each criterion.

¹³ The "t" test is used when a comparison of two different means is required. It is used in order to determine whether or not the two means are statistically the same or different. There are other non-parametric tests that could be used to make a similar comparison, but few are as easily applied.

Next, an overall mean criteria comparison can be made by using a "z" score (not to be confused with a "z" test or assessment procedure) for each applicant on each criterion. A "z" score is a simple calculation which allows OCR to compare performance on several different criteria which do not otherwise have the same scoring scale. A specific candidate's "z" scores should be calculated by:

1. calculating the overall candidate mean score and standard deviation for a particular criterion, and
 2. subtracting the mean score of the criterion from each candidate's score on the criterion, and
 3. dividing the difference by the standard deviation of the criterion.
- e. Calculate the mean "z" score for each candidate.
- f. Calculate the mean "z" score for each of the decisional groups, *i.e.*, accepted versus rejected candidates of each race, national origin, or gender. The mean score for each decisional group is the mean of the individual means of the candidates in each group.
- g. By use of a "t" test, compare the means for each of the decisional groups, *i.e.*, compare the mean scores of rejected females to the mean scores of rejected males, and the mean scores of accepted females to the mean scores of accepted males. Staff performing a "t" test or a multiple regression analysis, explained in h. below, should refer to the SPSS computer software package and accompanying manual. If the SPSS software is unavailable, contact Program Legal staff.

If there are no significant differences among decisional groups in these other criteria, OCR may conclude that the test or assessment procedure is contributing to the disparity established in STEP 1 above. OCR will next consider whether the recipient can justify the test or assessment procedure as educationally necessary (see Tab B).

If there are significant differences among decisional groups in the mean scores of candidates on the other criteria, determine whether these differences are in the same direction as the disparity established in STEP 1. If the differences are not in the same direction as the disparity established in STEP 1, *e.g.*, females have higher overall mean criteria scores than do men, but females receive disproportionately less benefits than do men, OCR will conclude that the test or assessment procedure is

contributing to the disparity. OCR will next consider whether the recipient can justify the test or assessment procedure as educationally necessary (see Tab B).

If the differences are in the same direction as the disparity established in STEP 1, e.g., females have lower overall mean criteria scores and receive disproportionately less benefits, further analysis is necessary. OCR staff should proceed to h. below.

h. Where it appears that more than one criterion are contributing to the impact, determine, by use of multiple regression techniques,¹⁴ the degree of contribution of each criterion to the decision. Multiple regression analysis statistically manipulates the data so that significant factors emerge as significant with all other factors remaining constant. Multiple regression uses the relevant decision, i.e. accept/reject, as the dependent variable and uses each of the other decisional criteria as the independent variables. The output of the multiple regression will specify which independent variable significantly contributed to the decision and the weight that each significant criterion carries toward the final decision.

OCR should also perform a regression analysis with race, national origin, or gender added as an additional independent variable. The output from this analysis will indicate whether race, gender, or national origin is a significant factor in the decision process.

If the output of the multiple regression analysis indicates that the test or assessment procedure significantly contributes to the final decision, and does so in the presence of the other criteria, then OCR will conclude that the test or assessment procedure is contributing to the disparity established in STEP 1. OCR will next consider whether the recipient can justify the test or assessment procedure as educationally necessary (see Tab B).

In determining whether a particular variable is a sufficiently significant factor to create a prima facie case of discrimination, it may be necessary to consult a statistician.

¹⁴ Other statistical techniques may be used as appropriate under the circumstances. For example, analysis of variance could be used in some situations.

TAB B

**SAMPLE INVESTIGATIVE QUESTIONS FOR
EVALUATING EVIDENCE OF EDUCATIONAL NECESSITY**

Once OCR has determined that a test or assessment procedure has a disparate impact on students of a particular race, national origin, or gender, there should be specific evidence of the test or assessment procedure's educational necessity available to OCR. Educational necessity, for the purpose of the investigative guidance, means that: (1) the challenged test or assessment procedure is valid and reliable for the purpose for which it is being used, and 2) there are no alternatives to the test or assessment procedure, which would (i) substantially serve the educational purpose identified by the recipient, (ii) be valid and reliable for that purpose, and (iii) have a lesser disparate impact.

As stated in the Guidance, evidence of the general reputation of a test or assessment procedure is not sufficient to establish validity. Nor is submission of a manual developed by the test or assessment procedure publisher. Studies or reports upon which the recipient is relying to justify the use of a test or assessment procedure which has a discriminatory impact should be available for review.

The following questions are designed to assist OCR staff in evaluating evidence of educational necessity:

1. What test or assessment procedure is the recipient administering?
2. For what purpose does the recipient say the test or assessment procedure is being administered (purpose should be stated in specific terms, *i.e.*, predicting grades in algebra, rather than in general terms, *i.e.*, measuring intelligence of seventh-graders)?
3. For what purpose was the test or assessment procedure developed (if it is clear from preliminary evidence)? Is the recipient using the test or assessment procedure for this purpose? If not, the use of the test or assessment procedure cannot be justified as educationally necessary and will be in violation of Title VI or Title IX, as appropriate.
4. Is the test or assessment procedure being used as the sole criterion for making an educational decision? If so, was the test or assessment procedure designed to be used this way? If not, the test or assessment procedure used cannot be justified as educationally necessary and OCR will find a violation.
5. What is the racial, ethnic, and/or gender composition of the test or assessment procedure-taking population?

6. Has the recipient presented empirical evidence that it has developed or that has been developed by the test or assessment procedure publisher that the test or assessment procedure is valid and reliable for the purpose for which it is being used?

a. What is the form of the evidence, i.e., study or report? Raw data or very general information is not acceptable evidence of validity for the purposes of an OCR investigation.

b. Who conducted the study, i.e., the recipient, another school, the test or assessment procedure developer, an independent researcher?

c. How long ago was the study conducted?

d. Is there evidence under professionally accepted standards that the test or assessment procedure is valid and reliable?

e. For what use was the test or assessment procedure validated? Is this use identical to, or the professionally accepted equivalent of, the purpose for which the recipient is using the test or assessment procedure?

f. Was the test or assessment procedure administered and scored properly?

i. Were all the students treated the same way as to how the test or procedure was administered or scored?

ii. Did the recipient clearly articulate to school personnel who administered, scored, or interpreted the results the construct(s) or variable(s) the procedure was designed to measure?

iii. Did those who administered, scored, or interpreted the results have the appropriate skills to perform these functions adequately? For example, are those who interpret the scores able to understand and interpret commonly reported scores, such as percentile ranks, standard scores, stanines, normed curve equivalents, and grade equivalents (as appropriate to the particular test)? Are they able to understand and interpret commonly reported summary indexes such as central tendency measures, estimates of reliabilities, and standard errors of measurement (again, as appropriate to the particular test)?

7. What type of statistical test was used in the validation study upon which the recipient relies?

8. If the recipient has presented empirical evidence that the test or assessment procedure is valid and reliable for the purpose for which it is being used, has the recipient looked at whether there are alternatives to the test or assessment procedure with less impact that would substantially serve the recipient's stated purpose and that are valid and reliable for that purpose?

a. How great was the disparate impact caused by the challenged test or assessment procedure?

b. What alternatives has the recipient looked at?

c. Did the criteria or criterion have less impact than the challenged test or assessment procedure?

d. If the recipient did not look at alternatives, what is the reason for this decision?

e. If the recipient did look at alternatives, but chose not to use them, what is the reason for this decision?

9. Is OCR aware of one or more criteria which, either alone, or in combination with other criteria, would have less impact, serve the recipient's educational purpose, and be valid and reliable for that purpose?

10. Does the recipient use a "cutoff score" on the test or assessment procedure which determines whether a student receives an educational benefit or opportunity? If so:

a. Does the cutoff score have a disparate impact on students of a particular race, national origin, or gender?

b. Is the cutoff score being used as the sole criterion for making an educational decision? If so, was the cutoff score designed to be used in this way? If not, the use of the cutoff score cannot be justified as educationally necessary and OCR will find a violation.

c. Did the recipient provide evidence regarding the method and rationale for setting the cutoff score?

d. Does the evidence provided under c. reflect a systematic process that evidences the good faith exercise of professional judgment?

TAB C

VALIDITY, A GLOSSARY

A review of the literature indicates that the basic term "validity" has three interrelated, but distinct, components to its meaning, and a valid test or assessment procedure conforms with each component.

In general, the inference that a test or assessment procedure is valid is justified when the research evidence indicates the following is true:

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

Forms of evidence regarding the validity of a test or assessment procedure fall into the following types:

- A. Evidence concerning the correctness, and/or appropriateness of the test's or assessment procedure's composition, make-up, and content - face validity and content validity.
- B. Evidence gathered by use of particular research designs, and/or research methodologies - such as the forms of criterion validity, including concurrent validity and predictive validity.
- C. Evidence gathered by use of particular statistical techniques - correlation with other tests, factor analysis validity, discriminant validity, convergent validity.
- D. Conclusions concerning a test or assessment procedure that are based on the use of judgment, inference, and expertise, in evaluating the evidence from many types of validation studies, regarding the test's or assessment procedure's performance in conformity with theoretical expectations - construct validity.

A. Evidence concerning the correctness, and/or appropriateness of the test's or assessment procedure's composition, make-up, and content - face validity and content validity

Face Validity

Face validity pertains to whether the test or assessment procedure "looks valid" to the examinees who take it, the administrative personnel who decide on its use, and other technically trained observers (Anastasi).

Face validity is concerned with the physical appearance of a test or assessment procedure with regard to its particular purposes. (Aiken).

A test or assessment procedure has face validity if it looks valid to test users, examiners, and especially examinees (Gregory).

Content Validity

Content validity is determined by the degree to which the questions, tasks, or items on the test or assessment procedure are representative of the universe of behavior the test or assessment procedure was designed to sample (Gregory).

Content validity is concerned with whether the content of the test or assessment procedure elicits a range of responses representing the entire domain or universe of skills, understandings, or other behaviors that the test or assessment procedure was supposed to measure (Aiken).

Content-related validation involves the systematic examination of the test or assessment procedure content to determine whether it covers a representative sample of the behavior domain to be measured (Anastasi).

B. Evidence gathered by use of particular research designs, and/or research methodologies - criterion validity, concurrent validity, and predictive validity

Criterion Validity

Criterion-related validity is demonstrated when a test or assessment procedure is shown to be effective in estimating an examinee's performance on some outcome measure called a criterion (Gregory).

Criterion-related validity is performed by relating scores on the test or assessment procedure to performance criterion measures, standards or variables. Traditionally, the term "criterion-related validity" has been restricted to validation procedures in

which the test scores of a group of examinees are compared with ratings, classifications, or other behavioral or mental measurements (Aiken).

Criterion-related procedures indicate the effectiveness of the test or assessment procedure where performance on the test or assessment procedure is checked against a criterion, that is a direct and independent measure of that which the test or assessment procedure is designed to predict (Anastasi).

Concurrent validity and predictive validity are two different forms of criterion validity.

Concurrent Validity

Criterion-related validity is most frequently divided into either concurrent or predictive validity. Concurrent validity refers to measurements (criterion) taken at the same, or approximately the same, time as the test or assessment procedure (Groth-Marnat).

Tests are validated by relating test scores on the tests to performance on criterion measures; whenever a criterion measure is available at the time of testing, the concurrent validity of the test is being determined (Aiken).

With respect to concurrent validity, the criterion measures are obtained at approximately the same time as the test scores (Gregory).

Predictive Validity

With respect to predictive validity, the criterion measures are obtained in the future, usually months or years after the test scores are obtained (Gregory).

Predictive validity is used to refer to outside measurements that were taken some time after the test scores were derived. Thus, predictive validity might be evaluated by correlating intelligence test scores with measures of academic achievement a year after initial testing (Groth-Marnat).

Predictive validity is concerned with how accurately test scores predict criterion measures, as indicated by the correlation between the test or assessment procedure (predictor) and a criterion of future performance (Aiken).

C. Evidence gathered by use of particular statistical techniques
- correlation with other tests, factor analysis validity,
convergent validity, and discriminant validity.

Correlation with Other Tests

Correlations between a new test and similar earlier tests are sometimes cited as evidence that the new test measures approximately the same general area of behavior as other tests designated with the same name (Anastasi).

Factor Analysis Validity

Essentially, factor analysis is a refined statistical technique for analyzing the interrelationships of behavior data. "... [T]he first step is to compute the correlations of each test with every other [test, of a large number of tests]" (Anastasi).

Convergent Validity

"... that a test [or assessment procedure] correlated highly with other variables (including other tests) with which it should theoretically correlate" (Anastasi).

"... instrument [test or assessment procedure] should have high correlations with other measures of [or methods of measuring] the same construct ..." (Aiken).

"... is for a test [or assessment procedure] to converge or correlate highly with variables [including other tests or assessment procedures] that are theoretically similar to it" (Groth-Marnat).

Discriminant Validity

"... in which it [the test or assessment procedure in question] would demonstrate low or negative correlations with variables that are dissimilar to it" (Groth-Marnat).

"An ... assessment instrument should have ... low correlations with measures [variables and/or other tests] of different constructs" (Aiken).

"We must show ... that a test [or assessment procedure] ... does not correlate significantly with variables [including other tests or assessment procedures] from which it should differ" (Anastasi).

D. Conclusions concerning a test or assessment procedure that are based on the use of judgment, inference, and expertise, using evidence from many types of validation studies, regarding the test's or assessment procedure's performance in conformity with theoretical expectations - construct validity.

Construct-Related Validity¹⁵

The construct-related validity of a test or assessment procedure is the extent to which the test or assessment procedure may be said to measure a theoretical construct or trait. Any data throwing light on the nature of the trait under consideration and the conditions affecting its development and manifestations represents appropriate evidence for this validation (Anastasi).

The basic approach of construct validity is to assess the extent to which the test or assessment procedure measures a theoretical construct or trait (Groth-Marnat).

There is no single, best approach for determining construct validity; rather a variety of different possibilities exist (Groth-Marnat).

The construct validity of a psychological assessment instrument refers to the extent to which the instrument is a measure of a particular construct, or psychological concept (Aiken).

Construct validity, which is the most general type of validity, is not determined in a single way or by one investigation. Rather it involves a network of investigations and other

¹⁵ As indicated throughout the Guidance, OCR relies upon generally accepted existing professional standards when evaluating the validity and reliability of a test or assessment procedure. However, it should be noted that there is a trend among measurement theorists to consider construct validity to be the fundamental, unifying framework for conceptualizing validity evaluations (see, e.g., Shepard, 1993, and Wainer and Braun, 1988). In their view, under this framework, since all validation is subsumed under construct validation, there are not different types of validity. Also, in their view, as part of this framework, various sources of evidence, including, but not necessarily limited to, content-related evidence, criterion-related evidence, and prediction-related evidence, can be, and usually are, used to evaluate the degree to which score-based inferences and actions are supported. Some testing and assessment experts include such additional evidence as the consequences of test use on individuals and groups in society as part of the construct validity framework (Messick, 1989).

Tab C -- 6

procedures designed to determine whether an assessment instrument that purportedly measures a certain variable is actually doing its job (Aiken).

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UNITED STATES DEPARTMENT OF EDUCATION
THE SECRETARY

September 11, 1997

Mr. Wade J. Henderson
Executive Director
Leadership Conference on Civil Rights
1629 K Street, NW, Suite 1010
Washington, DC 20006

Dear Mr. Henderson:

President Clinton has asked me to respond to your letter of September 4, 1997, regarding our proposal for national standards and national tests. Before turning to the specific issues you have raised, let me first share my view of the larger context in which the debate about national standards and tests is occurring.

President Clinton and I are firmly convinced that one of the biggest obstacles to improved educational opportunities and results for low-income and minority students has been the widespread and mistaken belief that students from these backgrounds cannot learn to the same high levels as other, more advantaged students can. This belief — the foundation of what I have called a tyranny of low expectations — has pervaded the schooling experience of our most disadvantaged youngsters, resulting all too often in watered down curricula, poorly prepared teachers and under investment by the public in their schooling.

Challenging national standards and tests are a fundamental tool for overcoming these obstacles. They will help raise expectations for all of our students in the basic skills. They will provide parents and communities with accurate, reliable information about student and school performance. They will make it impossible for schools to mask inadequate performance and to claim that students and schools are performing satisfactorily when in fact they are not. And they will help mobilize parents and community leaders in serious national, state and local efforts to raise student achievement in the basics, including through the commitment of additional, needed resources.

Student testing has often been a difficult and controversial issue. I know that tests have all too often been used to penalize rather than expand opportunities for minority students, and that there is great fear that these national tests may also do more harm than good. But they can, and I believe will, ultimately help lead to increased student achievement and greater opportunities for the students we all care about.

The President and I are aware that not everyone will do well on these tests the first time around and that some will need extra help to master the basic skills. But, difficult as this may be for students, teachers and schools, we believe that there is far greater risk for our most disadvantaged

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Our mission is to ensure equal access to education and to promote educational excellence throughout the Nation.

students in accepting the status quo. These tests will empower parents and communities, and challenge students to realize their full potential. Denying these tests to parents and students will simply perpetuate lower expectations, limited accountability, and continued poor results for the most vulnerable young people in our society.

Raising standards and measuring student and school progress toward meeting them works. Last week I was in Philadelphia when Superintendent Hornbeck announced the results of such efforts. One year after instituting a program of higher standards and tough tests, Philadelphia students made significant gains in reading, math and science at the 4th, 8th, and 11th grades. They were able to achieve these impressive gains at the same time that student participation in the tests also increased substantially, with some 40% of the increased participation brought about by increasing the number of students with disabilities, limited-English-proficient students, and low-income students taking the tests. This is a tribute to the parents, students and teachers in Philadelphia who were willing to make real, constructive reforms that made progress possible.

We have similar evidence from Milwaukee, where only 21% of the school district's eleventh grade students initially passed a rigorous mathematics proficiency examination required for high school graduation. The next year, students, staff, and the community, including business groups, worked together to help students pass the tests, by providing special classes before and after school, instituting Saturday academies, utilizing business volunteers, upgrading teaching, and increasing parental involvement. As a result, 98% of the seniors in the class of 1996 passed the test. This shows that high standards and rigorous tests can indeed mobilize whole communities to support student achievement.

In this context, let me address a number of the issues you have raised:

Safeguards against invalid and inappropriate use of test results: The President and I have strongly encouraged states and local school districts to institute policies that require students to demonstrate they have met challenging academic standards before moving from elementary school to middle school and middle school to high school, and in order to graduate from high school, and that require schools to provide students who need it extra help in order to meet the standards. Such policies would help make standards real in every school and classroom, underscore the seriousness of increased expectations, better focus and increase the efforts of both students and teachers, and strengthen each school's accountability for the success of every child.

Decisions about promotion and graduation policies are and must remain primarily state and local matters. We believe it would be a mistake to institute policies with respect to the national tests that would limit the ability of state and local policymakers to incorporate student performance on the national tests into sound, non-discriminatory promotion policies.

However, we believe just as strongly that promotion policies must be sound and fair, and that test results should not be used for high-stakes purposes -- such as for school-to-school promotion or graduation -- unless they have in fact been validated for those purposes. Because test validity for,

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high-stakes purposes depends heavily on the extent to which local curriculum prepares students for the test, it can only be demonstrated in the specific local or state context in which the tests will be used. Therefore, it is the responsibility of state and local school systems wishing to use the national tests for high-stakes purposes to first demonstrate their validity for these purposes, prior to implementation.

To support state and local school systems in making sound and appropriate decisions about the use of national tests, and to avoid the misuse of tests, the Education Department is developing a strategy designed to eliminate potential problems before they occur. Our approach will include the following steps:

o **Guidance from the Office for Civil Rights:** Within the next three months, the Office for Civil Rights at the Department of Education will issue final guidance for its regional enforcement offices to assist in the evaluation of cases surrounding the discriminatory use of tests, including but not limited to the national tests. The guidance will set forth well-established federal legal standards relating to the use and misuse of tests, and will clearly articulate the existing principles of law that should guide any decision regarding the use of tests under Title VI of the Civil Rights Act of 1964 or Title IX of the Education Amendments of 1972.

This guidance has been made available to the public in its draft form, and the settled legal principles set forth in the guidance have established the basis of OCR's test-related work. When the guidance is issued in final form, it will reflect extensive Department of Education review, as well as that of the National Academy of Sciences Board on Testing and Assessment. In addition, we plan to make it widely available to school systems and the public, so that educators, policymakers, parents and community groups can all be well-informed about the requirements a test must meet in order to be used for high-stakes purposes. I believe that this approach will go a long way toward helping state and local school systems make appropriate judgments about the use of tests, and ensure that they take the steps necessary to validate the tests as needed. The Department welcomes your continued input regarding this guidance prior to its issuance in final form.

o **Technical Assistance to State and Local School Systems:** The Office for Civil Rights will offer technical assistance to state and local school systems based on the guidance discussed above. OCR regional office staff will work with school systems to ensure they understand the practical implications of the legal principles set forth in its guidance, and can incorporate them into their own efforts. Moreover, relevant offices within the Department, including the Office of Educational Research and Improvement and the Office of Elementary and Secondary Education, along with OCR, will also work to identify and disseminate best or promising practices with regard to the validation and use of tests, and will offer information about "what works" in specific cases where feasible. Along with the guidance, this technical assistance strategy can help prevent potential misuse before it occurs. We welcome your thoughts and strategies for ensuring that the best information regarding model practices is widely available.

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o Enforcement: The Office for Civil Rights will continue to conduct compliance reviews and conduct investigations to ensure that the nondiscrimination requirements of the law are met. While we do not oppose use of the tests for high-stakes purposes, we will do everything within our power to ensure that such uses comply with all legal requirements.

As you know, we are working to ensure that the President's request for funding for OCR in FY 1998 -- a \$ 6.6 million increase -- is supported by Congress. Without adequate funding, much of the core work of OCR -- enforcement of antidiscrimination laws at our schools and colleges nationwide based on complaints of discrimination -- will be in jeopardy. If all students are to achieve to high standards, they must be able to learn in environments free of discrimination.

o National Tests -- Guidelines for Test Use: The Department plans that guidelines for test use -- which would acknowledge the need to validate the national tests if they are to be used for high-stakes purposes -- will be developed by the test contractor and approved by the National Assessment Governing Board. These guidelines will be used by school districts and states as part of their participation in 1999.

o National Tests -- Independent Evaluation: Our proposal includes an overall evaluation of the national tests to be conducted by the National Academy of Sciences. The Academy will report on how states, districts and schools are using the tests, along with how they have handled test administration and reporting. This evaluation will provide objective and independent information that will help determine if the tests are being used appropriately.

Public Reporting and School Accountability: I believe we are in complete agreement that the tests will accomplish their intended purpose only if they are reported to the public on a school-by-school and school-district-by-school-district basis, and only if these reports show the performance of racial, ethnic and socioeconomic subgroups and of males and females, as well. Such public reporting is at the heart of increased public accountability for results. I will urge NAGB to require testing contractors to provide states and school districts with aggregate results for districts and schools, and to provide disaggregated data by race, ethnicity, gender, and other populations. This will go a long way toward facilitating the provision of this information to the public.

Further, states and school districts throughout the country are already well on the way to reporting all test score results in this fashion. For example, according to a recent study by the Council of Chief State School Officers, 42 states already require or use school profiles or school performance reports to make public the results of student assessments, and 38 also require district level reports.

At present, some 17 states require the disaggregation of results at the school- or district-level for at least one demographic subgroup. While this is a good start, it is not enough, and we must do better if schools are to be held accountable for the performance of all students.

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An important tool to improve the current situation is through the implementation of the Title I assessment and reporting requirements, which have historically had a powerful impact on state and local practice. Title I requires states to fully implement their assessment systems by school year 2000-2001. By that time, state assessment and reporting systems must enable the disaggregation of test data at the State, local school district and school levels, by gender, major racial and ethnic group, English proficiency status, migrant status, students with disabilities compared to students without disabilities, and economically disadvantaged students as compared to students who are not economically disadvantaged. In addition, each local school district is required to publicize and disseminate the results of the annual review of all schools in individual school performance profiles to parents, teachers and other school staff, administrators, students, and the broader community.

Because Title I funds are received by every state, nearly every local school district (and every school district serving significant numbers of low-income and minority students) and two thirds of all public schools, the Title I requirements in this area will affect the reporting of test results in virtually every school and school district in the Nation. And, with respect to the public reporting of test results, they will accomplish exactly what we agree is needed.

In order to accommodate and support state and local efforts to raise academic standards and implement assessments aligned with the standards, Title I appropriately provides states with ample time to implement the testing and reporting requirements. Once the implementation deadline is reached, this Department will vigorously enforce compliance with it.

Based on experience and on conversations with state and local officials around the country, I am convinced that jurisdictions that participate in the national tests will report the results in a fashion consistent with how they will report the results of other test scores. The Council of Great City Schools has recently indicated that the cities participating in the national tests have pledged to do precisely that. Indeed, enhanced public accountability for schools compared with national standards and international benchmarks is clearly one of the main reasons for state and local interest in the national test initiative. State and local school officials in jurisdictions participating in the tests would be hard-pressed to justify a more restrictive and less informative reporting policy for national tests than for state and local tests.

Appropriately reporting individual test results to parents is as important as reporting aggregate results to the public. The Department of Education will undertake an aggressive campaign to help parents understand the reading and math standards on which the tests will be based, so they can have a very clear understanding of the kind of work expected of their children. Test publishers that provide the tests to states and local school districts will be required to provide the results to parents in easily understandable formats, including providing the test results and other appropriate information to parents in languages they understand. And the Department of Education's Office of Bilingual Education and Minority Languages Affairs will work with a group of urban school districts that enroll large numbers of LEP students to develop strategies and materials to help inform parents about the purposes of the tests, and to help prepare students to meet the standards.

Title I requirements will reinforce these efforts. Under Title I parent involvement provisions, each school and local school district is required to provide assistance to parents in understanding assessments and monitoring their children's progress, and to provide appropriate interpretations of individual student assessment results.

Accommodations for students with disabilities: I must respectfully disagree with your assessment that large numbers of students with disabilities are likely to be excluded from the assessment. We are working hard to make precisely the opposite the case, and I am committed to seeing these tests as a model for inclusion of students with disabilities.

Under our proposal, final decisions on inclusion guidelines as well as on the type and format of accommodations will be made by the National Assessment Governing Board (NAGB), after broad public participation and input. Our intention is that the national tests be a model for how to best accommodate students with disabilities and to be as inclusive as possible. I will urge NAGB to act in accord with this intent. And test publishers that provide the tests will be required to incorporate the approved accommodations and inclusion criteria into the tests.

The test development contractor, in consultation with test advisory committees and others will develop draft guidelines for the inclusion of students with disabilities, as part of the development and field test process. Studies of accommodations for students with disabilities will be conducted by the test development contractor, and will be included in the evaluation by the National Academy of Sciences (NAS). These studies will include examinations of the validity of the test results for students with disabilities tested with accommodations, using data from the 1998 field test. The NAS evaluation will examine the actual accommodations offered, and adherence to the inclusion guidelines during test administration.

The development and refinement of accommodations will also be informed by National Assessment of Educational Progress (NAEP) research on the most effective types of accommodations. Accommodations that will be considered during the test development and field test process include extended time and/or multiple testing sessions; one-on-one testing or small group sessions; the use of a scribe or computer; assistance with test directions (though not with test items); an audiocassette version of the mathematics test; a sign language interpreter; a microphone worn by the test administrator; the use of magnifying instruments; or other appropriate accommodations. Students with disabilities will receive accommodations as specified in the student's Individualized Education Plan developed under IDEA. Under the IDEA Amendments of 1997, students with disabilities must be included in assessments and each student's IEP must state the accommodations the student needs to participate in assessments.

Accommodations for limited-English-proficient (LEP) students: Similarly, we will strongly encourage NAGB to develop appropriate accommodations and inclusion criteria for LEP students.

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Our proposal includes the development of a bilingual Spanish-English version of the mathematics test by 1999, and bilingual versions in languages other than Spanish in subsequent years. This will enable students to demonstrate their competency in mathematics regardless of their English language proficiency.

As you know, we have a difference of opinion regarding the language of testing for 4th grade reading. As I indicated in my September 3, 1997, letter to members of the Hispanic Caucus, in our proposal, the purpose of the 4th grade test is to test student proficiency in reading in English, not general reading comprehension. Therefore, we do not propose to develop the 4th grade national test in other languages.

As I also indicated in that same letter, we will work vigorously to assist states and local school districts in meeting the LEP-related assessment requirements of Title I, including assessing general reading comprehension in the language in which students can best demonstrate competency.

There are a number of high quality native language reading tests, and at least one that, according to its publisher, is by design based on the NAEP 4th grade reading framework and achievement levels and yields individual scores reported in terms of the NAEP achievement levels. Any district that, at its option, wishes to test LEP students in reading comprehension in terms that are consistent with NAEP, and would like to do so in coordination with its administration and reporting of the national reading test, already can do so.

In addition to these specific responses, let me also point out that President Clinton and I see these national standards and tests as an integral part of an overall strategy of improving education by raising standards and increasing our federal investments in education where they can do the most good. Since the beginning of this Administration, we have increased federal investments in elementary and secondary education by \$4.1 billion, some 30%.

For example, since the beginning of the Clinton Administration, we have increased Head Start funding by 55% including the increase secured in the Bipartisan Budget Agreement. Title I and IDEA have both increased by more than \$1 billion. We have initiated significant new funding for education reform in support of higher standards, with a total of \$1.3 billion for Goals 2000 since its enactment in 1994, and we will continue to urge Congress to fully fund the Safe and Drug-Free Schools Program. We have provided substantial new resources to help schools use computers in the classroom, with \$425 million secured this year toward a goal of \$2 billion over five years. In addition, the FCC has approved a plan that will provide discounts worth \$2.25 billion annually to help schools and libraries bring technology into the classroom and gain access to the Internet at a fraction of the full cost -- meaning a discount of up to 90% for our poorest schools. We are working to help ensure that these funds go to schools and classrooms most in need.

Page 8 - Mr. Wade J. Henderson

We have also made significant increases in higher education spending as well, including record increases in Pell Grant and work-study funding and \$35 billion in tax cuts to help families pay for college.

In addition, for the coming fiscal year, we fought to ensure that the Budget Agreement included an effort specifically targeted to children who need extra help in learning to read, as well as a 27% increase in funding for bilingual education, to nearly \$200 million, and a 50% increase, to \$150 million, for immigrant education. We will continue to propose increases in the federal investment to strengthen education, including new initiatives such as President Clinton's five-year, \$350 million initiative to attract and prepare nearly 35,000 talented people of all backgrounds for teaching at low-income urban and rural schools across the nation. The Administration will continue to push Congress to help address the serious need for renovating and building schools nationwide.

All of these investments are important, because they provide families and schools with resources to help all children achieve high standards. We need to challenge our students to reach high standards and challenge our schools to respond to their needs. At the same time that we press forward to raise standards for our nation's students, we will continue to fight for the necessary investments as well.

Yours sincerely,


Richard W. Riley



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, SOUTHERN DIVISION, DALLAS OFFICE
TEXAS, ARKANSAS, LOUISIANA, MISSISSIPPI, OKLAHOMA

Harwood Center Suite 2600 1999 Bryan Street Dallas, Texas 75201 214-880-2463

October 31, 1997

Ref: 06971345

Mr. Jerry R. Baird, Superintendent
DeSoto County School District
425 East Commerce Street
Hernando, Mississippi 38632

Dear Superintendent Baird:

On May 27, 1997, the United States Department of Education, Office for Civil Rights (OCR) received the above referenced complaint filed against the DeSoto County School District (DCSD). The complaint alleged that the DCSD discriminates on the basis of race and national origin in violation of Title VI of the Civil Rights Act of 1964 (Title VI) as amended, and its implementing regulation at 34 C.F.R. Part 100 in the following areas:

- 1) Separating students on the basis of their race for class elections and conducting student body elections for school sponsored activities on the basis of race/ethnicity (e.g. separate positions only for blacks or whites;
- 2) Requiring co-class officers, one white and one black, and no representational opportunities for ethnic minorities;
- 3) Conducting school sponsored activities where no interracial couples are allowed to participate and racially mixed activities are discouraged or not permitted to occur;
- 4) Maintaining a personnel practice established at the time of desegregation requiring co-principals, one white and one black, which perpetuates vestiges of the former segregated school system.

Title VI states in part:

No person in the United States 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 receiving Federal financial assistance.

OCR determined that the DCSD is a recipient of Federal financial assistance from the U.S. Department of Education which provided OCR with jurisdiction to investigate the allegations under the Title VI implementing regulation. However, during the course of the investigation, the DCSD notified this Office that it would like to forego further investigative activity and proceed directly to a resolution of the complaint allegations. Information had already been acquired indicating that there was no evidence to support Allegation 3 and the complainant was unable to provide any information in support of that charge. Thus, no further action was necessary regarding Allegation 3.

The DCSD subsequently submitted the attached voluntary Commitment To Resolve (CTR), received on October 27, 1997, which OCR has determined will appropriately resolve allegations 1, 2 and 4 delineated above.

Submission of the resolution document demonstrates the DCSD formal commitment to equal educational opportunity and its willingness to work proactively to maintain compliance with the applicable sections of the regulation implementing Title VI. The CTR agreement, combined with the OCR determination that Allegation 3 was without merit provides a sufficient basis for resolution of this case. Therefore, this case is being closed as of the date of this letter.

Assistance is available through Federally funded Desegregation Assistance Centers (DAC) to provide essential guidance and technical direction to school systems seeking to comply with various Federal civil rights statutes. The DAC office serving the State of Mississippi can be reached at the address provided below:

Dr. Nancy Peck, Executive Director
Desegregation Assistance Center
8603 South Dixie Highway, Suite 304
Miami, Florida 33143

Page 3 - Mr. Jerry R. Baird, Superintendent

Actual implementation of the CTR agreement will be monitored by OCR through submission of periodic progress reports describing the progress made toward implementation of specific CTR initiatives as agreed. Please be advised that as a formal document between the DCSD and OCR, failure to properly implement all or a portion of the commitment could result in a reopening of the case and resumption of the investigative process.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent protected by law, personally identifiable information which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

This Office appreciates your commitment to civil rights compliance. If you have any questions, please contact me at 214/880-2463.

Sincerely,


Taylor D. August, Director
Southern Division, Dallas Office
Office for Civil Rights

Attachment

**Commitment To Resolve
Case Number 06971345
Desoto County School District**

The Desoto County School District (DCSD) submits the following Commitment To Resolve (CTR) document as a formalized agreement between the DCSD and the Office for Civil Rights (OCR). Implementation of the measures specified in this document will resolve compliance allegations delineated in the above referenced complaint. The agreement provides a categorical framework from which to address each applicable allegation by the affected campus and the pertinent actions that will be taken to resolve the issue in question. Implementation of this agreement will be monitored through the District's submission of a progress report(s) as delineated in the monitoring section of this document.

Action Measures by Individual Campus

Kern Lake Middle School

Class Favorites

1996-1997 Practice - Selection of class favorites required a black student and white student co-nominee from each homeroom to be voted upon.

Resolution Commitment - Selection of class favorites will be accomplished through open student elections without co-nominations based on race in the 1997-1998 school year and each school year thereafter.

Hernando High School

Class Officers (President)

1996-1997 Practice - Co-nominations were required for each grade for a black co-president and a white co-president. All students voted in both categories. Co-presidents were selected by student election in the late spring of 1997 for the 1997-1998 school year.

Resolution Commitment - Open student elections will be held without co-nominations or co-presidents and without regard to race in the Spring of 1998 for one Class President position for the 1998-1999 school year and each year thereafter.

Page 2 - DeSoto County School District - Commitment To Resolve

Class Officers (Vice-President, Secretary/Treasurer)

1996-1997 Practice - The positions of class vice-president and secretary/treasurer were designated white or black on an alternating basis each year. If a student of another ethnic origin sought one of the positions above, that student was allowed to choose which ballot (white or black) that they wished to compete. All students in each grade would vote for their choice.

Resolution Commitment - Commencing in the 1998-1999 school year and each school year thereafter, open student elections will be held without regard to race in the Spring of each year for the position of class Vice-President and Secretary/Treasurer.

Homecoming Queen

1996-1997 Practice - Senior class chooses four representatives (two black and one white) to represent their class on the Homecoming Court. From the four winners, two will be crowned Homecoming Queens (one black and one white).

Resolution Commitment - Commencing in the 1997-1998 school year and each year thereafter, open student elections will be held without regard to race for the honor of Homecoming Queen.

Homecoming Court

1996-1997 Practice - Co-nominations were required for each grade/class for white and black student Homecoming Maids. Black and white Homecoming Maids were selected by student election held in the fall of the 1996-1997 school year.

Resolution Commitment - Commencing in the 1997-1998 school year and each school year thereafter, co-nominations will be eliminated and open student elections will be held without regard to race in the Fall of each school year for Homecoming Maid.

Beauty Review

1996-1997 Practice - Co-nominations were required for each grade for white and black student representatives. All students of a grade vote for a black and white student representative for the grade.

Resolution Commitment - Co-nominations will be eliminated and open student elections will be held without regard to race for the 1997-1998 school year and each school year thereafter.

1996-1997 Practice - Co-nominations were required for each grade for a minority and majority Princess. Princesses were selected by a student election held in the fall each school year.

Resolution Commitment - Winter Princesses will be selected by open student elections without co-nominations or regard to race in the Fall of the 1997-1998 school year and each school year thereafter.

Page 4 - DeSoto County School District - Commitment To Resolve

Who's Who (Class Favorites)

1996-1997 Practice - Class Favorites required co-nominations for majority and minority students for each class. Who's Who were selected by student election held in the fall of the 1996-1997 school year.

Resolution Commitment - Open student elections for Who's Who and class favorites will be held without co-nominations or regard to race in the fall of the 1997-1998 school year and each school year thereafter.

Support Measures

Further, the DCSD will initiate steps to facilitate transition from the former race based selection process to an open, nonracial process that ensures that a competitive election process will be established and maintained without regard to race. To do so requires the DCSD to adopt the following measures:

1. Provide guidance to administrators, faculty, students and staff, which adequately conveys the message that the practice of race based selection(s) for various student honors and recognition(s) is unacceptable and inconsistent with Federal law.

The DCSD's strategy will include developing, publishing and disseminating nonracial, objective policies and procedures for these selections and elections. Publication of the policies and procedures will occur in student/faculty handbooks.

Further, the DCSD will identify student "honor/recognition" positions (co-curricular and extra-curricular) where the nomination/selection/election process for the position is based on school-wide/class open voting. The DCSD will also encourage, through

administrators, faculty and counselors, participation of students from diverse racial, ethnic groups.

2. Facilitate communication and group interaction within affected DCSD schools among various ethnic groups to promote "multi-racial awareness" and "winning spirit/behaviors" that support fair, effective and racially/ethnically inclusive student nomination/election procedures.

DeSoto County Public School District will, at all times, be sensitive to the needs of all students. As situations/opportunities arise, the DeSoto County Public School District will encourage through administrators, faculty, and counselors participation of students from racially/ethnically diverse groups working together toward mutually compatible goals and objectives.

Monitoring Component

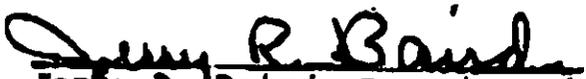
In order that the preceding resolution commitment is implemented in an appropriate and timely manner, it is necessary that the DCSD submit periodic progress reports to OCR providing sufficient specificity to ascertain that the commitment has achieved its intended purpose. Accordingly we ask that reports be submitted to OCR on or before the dates indicated below to properly assess the DCSD's efforts in this regard:

- By November 21, 1997, the DCSD will submit to OCR evidence demonstrating that the former racially based selection process for all types/forms of student honors/recognition has been discontinued at all affected campuses in the DCSD.
- By November 21, 1997, the DCSD will submit to OCR evidence demonstrating that a program has been developed and implemented system-wide, as delineated in item 1 above. Please include in subject report component, documentation the revised policies/procedures have been developed and disseminated in appropriate publications to students, faculty, and staff.
- By November 21, 1997, the DCSD will submit to OCR evidence demonstrating that the action measure described in item 2 has been developed and implemented

and implemented system-wide, as delineated in item 1 above. Please include in subject report component, documentation the revised policies/procedures have been developed and disseminated in appropriate publications to students, faculty, and staff.

- By November 21, 1997, the DCSD will submit to OCR evidence demonstrating that the action measure described in item 2 has been developed and implemented as a preliminary to actual student election/selection activities to facilitate open and diverse representation in all honor/recognition categories.
- The DCSD will eliminate the practice of having a white and a black principal at Hernando High School not later than September 1, 1998. Evidence to this effect will be submitted to OCR within 10 working days following either the retirement or reassignment of the current (1997-1998 school year) Hernando High School co-principals. The DCSD commits that there will be no co-administrative/professional positions in the DCSD subsequent to discontinuation of the current practice at Hernando High School.

Executive Approval:


Jerry R. Baird, Superintendent
DeSoto County School District
Hernando, Mississippi

Educational - civil rights issues

OCT 27 1997

NOTE TO ELENA KAGEN, MIKE COHEN AND BILL KINCAID

FROM ART COLEMAN

As Bill and I discussed last week, here is a draft of a handout we plan to circulate regarding civil rights and charter schools.

The U.S. Department of Education's Office for Civil Rights has prepared a Questions and Answers brochure that addresses the application of Federal civil rights laws to public charter schools. The attached brochure will be available for dissemination at the national charter schools conference being sponsored by the Department, beginning November 3.

Because the charter schools movement is so new, charter school operators and parents have many questions about the civil rights requirements applicable to charter schools. The Questions and Answers focus on issues that have been the subject of OCR investigations regarding charter schools or that have been the most frequently asked questions that OCR has received regarding charter schools. The Questions and Answers provide general information on three major aspects of these requirements: 1) recruitment and admissions; 2) the provision of alternative language services to limited English proficient students; and 3) the provision of a free appropriate public education and program accessibility to students with disabilities.

The U.S. Department of Justice is currently reviewing this draft, as well.

Thank you for your help on this.

**QUESTIONS AND ANSWERS ON THE APPLICATION OF FEDERAL
CIVIL RIGHTS LAWS TO PUBLIC CHARTER SCHOOLS**

One of the fastest growing areas of public school reform is the charter schools movement. President Clinton has called for the creation of 3,000 charter schools by early in the next century as a vehicle for promoting choice within public school systems. Charter schools are public schools under contract--or charter--between a public agency and groups of parents, teachers, school administrators or others who want to create alternatives and choice within the public school system. Although public charter schools are freed from many regulatory burdens and paperwork requirements, they must comply with federal civil rights laws.

The Office for Civil Rights (OCR) in the U.S. Department of Education (ED) enforces civil rights laws that protect students and other participants from discrimination on the basis of race, color, national origin, sex, disability, and age in programs and activities that receive federal financial assistance. These laws are: 1) Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, and national origin; 2) Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex; 3) Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability; 4) the Age Discrimination Act of 1975, which prohibits discrimination on the basis of age; and 5) Title II of the Americans with Disabilities Act of 1990, which prohibits discrimination on the basis of disability by public entities, including public charter schools and public school districts, regardless of whether they receive federal financial assistance.

The following Questions and Answers were developed to provide information on public charter schools' obligations under civil rights laws with respect to recruitment and admissions, provision of alternative language services to limited English proficient (LEP) students, and provision of a free appropriate public education and program accessibility to students with disabilities. These Questions and Answers focus on issues that have been the subject of OCR investigations concerning charter schools or have been the most frequently asked questions.

These Questions and Answers are not intended to provide you with all the information you may need to ensure compliance with civil rights laws. Rather, our intent is to highlight key requirements. Details of these requirements are described in OCR regulations and policy documents and applicable court decisions.

For information about the civil rights requirements addressed in these Questions and Answers, as well as other requirements under the federal civil rights laws, please contact the OCR enforcement office that serves your state. A list of the addresses and telephone numbers of the OCR enforcement offices is attached.

Entity Responsible for Civil Rights Compliance

Q: Which legal entity is responsible for ensuring that a public charter school is complying with federal civil rights laws?

A: The entity that is responsible for ensuring that a public charter school is complying with federal civil rights laws generally is the same entity that is responsible for the operation of the charter school. State charter school laws provide guidance regarding entities that are responsible for the operation of charter schools within a particular state. Unless the applicable state law provides otherwise, the entity that is responsible for the operation of the public charter school would also be responsible for ensuring that the public charter school is complying with the requirements of the federal civil rights laws. For example, where a charter school is part of a local educational agency, the local educational agency would be responsible for ensuring that the charter school is complying with the requirements of the federal civil rights laws.

While the charter school operator generally has responsibility for ensuring that the charter school complies with federal civil rights laws, the state educational agency (SEA) or other authorized chartering agency also may be responsible. For example, in cases where the SEA is the direct recipient of federal funds and the charter school is a subgrantee, the SEA must have policies that ensure that the subgrantee will comply with federal requirements.

Effect of Existing Desegregation Plans on Public Charter Schools

Q: What effect does an existing desegregation plan for a school district have on the establishment or operation of a public charter school in that district?

A: When a public charter school is being established in a school district that is under either a Title VI desegregation plan approved by OCR or a court order requiring desegregation, the charter school must be established and operated in a manner that is consistent with the OCR-approved desegregation plan or court order. Generally, the establishment of a public charter school may not substantially impede or retard the scope of desegregation. For example, where the school district is operating under an OCR-approved or court-ordered desegregation plan, the establishment of a public charter school must not adversely affect the

racial composition of the schools from which the charter school students will be drawn, such that the school district would not be in compliance with the desegregation plan or court order. The local educational agency or other responsible entity should consult with its attorneys to determine whether establishment of a charter school is consistent with an applicable OCR-approved desegregation plan or court order and whether OCR or court approval is needed.

Recruitment and Admissions

Q: What steps should a public charter school take in order to be in compliance with federal civil rights laws with respect to the recruitment of students?

A: Consistent with Title VI, Title IX, Section 504, and Title II, a public charter school should not recruit in a manner that tends to exclude or limit the enrollment of students of a particular race, color, national origin, or sex, or students with disabilities. Public charter schools should make sure that any outreach and recruitment efforts are designed to effectively reach all segments of the parent community, including minority and limited English proficient parents. When a particular type of outreach program--such as radio advertisements or community meetings--is used to publicize a charter school generally, efforts should be made to ensure that those activities are carried out in a manner likely to reach a reasonable number of minorities.

Also, charter schools may make special efforts to encourage applications from minority and LEP students. For example, charter schools may: 1) conduct presentations or meetings with parent teacher associations or organizations at schools with a large number of minority students; 2) schedule meetings or consultations with minority community groups; 3) indicate in promotional materials that alternative language services will be provided for LEP students; 4) indicate in such materials that a free or low cost lunch program is available for eligible students; 5) disseminate information about the charter school in newspapers and other publications and on radio stations that serve minority communities; and 6) emphasize in meetings and promotional materials that students from all segments of the community will be welcome at the charter school.

Promotional materials that are used to recruit students should state that the charter school does not discriminate on the basis of race, color, national origin, sex, or disability in its programs and activities. These materials also should avoid perpetuating stereotypes as to race, color, national origin, sex, or disability.

Q: What steps does a public charter school have to take in its recruitment efforts with respect to parents who are limited English proficient?

A: A public charter school must ensure that parents who are not proficient in English are provided with appropriate and sufficient information about the charter school. This information must be effectively communicated to parents who are not proficient in English. For example, if outreach materials are made available to parents, these materials may have to be available in languages other than English to ensure effective communication in those communities that have significant numbers of LEP parents. If the charter school conducts informational meetings with parents or community groups, in order to ensure effective communication, translation services should be available where the local community includes significant numbers of individuals who have limited English proficiency.

Q: What steps does a public charter school have to take in its recruitment efforts with respect to parents with disabilities?

A: A public charter school must ensure that information about the charter school is communicated as effectively to parents with disabilities as to other parents. Appropriate auxiliary aids and services must be made available whenever they are necessary to ensure effective communication for parents with disabilities. For example, if outreach materials are made available to parents, these materials should be made available in such alternative formats as Braille or large print for parents with visual disabilities. If the charter school conducts informational meetings with parents or community groups, qualified interpreters should be provided on request for individuals with hearing disabilities.

Q: What steps should a public charter school take in order to ensure that all students, regardless of race, color, and national origin, are treated in a nondiscriminatory manner in admissions?

A: Public charter schools should not use an admissions process that has the effect of excluding or limiting admission of students of a particular race, color, or national origin. In order to receive the charter school start-up grants that are available through the Federal Charter Schools Program, public charter schools must admit students on the basis of a lottery if more students apply for admission than can be accommodated.

Many state charter school laws also have specific provisions that are designed to ensure that charter schools are open to all students. For example, consistent with the Federal Charter Schools Program, a significant number of states specifically require that public charter schools use a lottery system for admissions purposes. A few state charter school laws contain provisions designed to ensure that transportation services are provided to low-income students attending such schools.

In public charter schools that do not use a lottery for admissions, eligibility criteria must be nondiscriminatory on their face and must be applied in a nondiscriminatory manner. If these criteria have a disparate impact on the basis of race, color, or national origin, they must be necessary to meet the school's educational objectives. A public charter school may use admissions criteria that are related to the nature of the school, for example, a requirement that students be at a particular grade level or that students be concentrating in a particular subject area.

Public charter schools may not treat an individual differently on the basis of race, color, or national origin in determining whether he or she satisfies any admissions requirement. Also, public charter schools may not utilize criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, or national origin.

Where a public charter school is established in a school district that is remedying past discrimination, the charter school may consider race or national origin in admissions to remedy the effects of that past discrimination. A public charter school may also

voluntarily consider race in a narrowly tailored way in admissions to achieve the educational benefits of diversity.¹

Q: Under Section 504 and Title II, what steps should a public charter school take in order to ensure that students with disabilities are treated in a nondiscriminatory manner in admissions?

A: Students with disabilities may not be excluded from admission to a public charter school solely on the basis of their disability. In applying admissions criteria to students with disabilities, individualized determinations must be made as to whether a particular student can be provided an appropriate program at the public charter school, including whether the student can participate in the program with the provision of supplementary aids and services.

Discrimination on the Basis of Sex

Q: Do charter schools have the same Title IX obligations as other public schools?

A: Yes. Consistent with Title IX, public charter schools must ensure that they do not discriminate on the basis of sex in their programs and activities. Also, Title IX protects students from unlawful sexual harassment in all of a school's programs or activities, whether they take place in the facilities of the school, on a school bus, or at a class, training program, or other activity sponsored by the school at another location. In order to receive technical assistance regarding Title IX, please contact the OCR enforcement office that serves your state.

Provision of Appropriate Services to Students with Limited English Proficiency

Q: May a public charter school exclude from admission students who have limited English language proficiency?

A: A public charter school may not categorically exclude LEP students from participating in a public charter

¹ In Hopwood v. State of Texas, the U.S. Court of Appeals for the Fifth Circuit determined that colleges may not consider race or national origin for the purpose of achieving diversity, although race or national origin may be considered when needed to remedy the effects of discrimination by a college. This ruling applies only in the states of Texas, Louisiana, and Mississippi.

school's program. If there are questions about the legality of the specific requirements of a program being offered by a charter school, please feel free to contact the OCR enforcement office that serves your state.

Q: Do the same requirements to provide alternative language services to LEP students that apply when a LEP student attends any other public school also apply when a LEP student attends a public charter school?

A: Yes. Title VI prohibits the denial of equal access to education for national origin minority children. Where the inability to speak and understand the English language excludes national origin minority group children from effective participation in the educational program offered by a public school, the school must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

Public schools must implement procedures that ensure that all LEP students are identified, evaluated, and provided necessary alternative language services by properly trained staff and that the alternative language program is periodically evaluated to ensure that it is effective in meeting the educational needs of LEP students. These legal requirements are explained in OCR policy documents and technical assistance materials. Public charter schools need to become familiar with the details of these legal requirements.

There are, of course, many different kinds of programs offered by public charter schools. For technical assistance regarding how the program being offered by a charter school can comply with Federal civil rights requirements to serve LEP students, you should contact the OCR enforcement office that serves your state.

Q: Under Title VI, what must a public charter school do to ensure that parents who are not proficient in English are provided with appropriate and sufficient information about school activities?

A: Public charter schools must effectively notify parents who are not proficient in English of school activities that are called to the attention of other parents. Such a notice, to be effective, may have to be provided in a language other than English.

from ED's Office of Elementary and Secondary Education. Charter schools would receive Title I funds directly from the SEA if the charter school is treated as an LEA or from the school district if the charter school is treated as a public school within an LEA. Title I funds also may be used to meet the educational needs of LEP students. In addition, a public charter school could be assisted in meeting its obligations through such means as joining with other charter schools or working with LEAs to share qualified staff. It is important to note that a public charter school cannot excuse its failure to provide appropriate educational services to LEP students because of inadequate financial resources.

Program Accessibility for Individuals with Disabilities

Q: Are public charter schools responsible for ensuring that their programs and activities are accessible to persons with disabilities?

A: Yes. Public charter schools are subject to the same program accessibility requirements as other public schools. Program accessibility requirements often involve complex issues. For assistance in understanding program accessibility requirements, you may want to review OCR technical assistance materials.

Rehabilitative Services (OSERS), while Section 504 and Title II are enforced by OCR. Under certain circumstances, public charter schools may be eligible for IDEA funds. For further information about IDEA requirements, contact OSERS's Office of Special Education Programs.

Education - Civil Rights Issues

NOTE FROM NORMA V. CANTÚ**SUBJECT: MALDEF Lawsuit**

This is a brief overview of the attached; we will follow-up with additional information regarding this case.

On October 14, 1997, the Mexican American Legal Defense and Educational Fund (MALDEF) filed suit against the Texas Education Agency and the State Board of Education and its use of the high school graduation test--Texas assessment of Academic skills (TAAS). Filed in federal court in San Antonio, Texas, the lawsuit alleges that African American, Mexican American, and limited-English-proficient students suffered discrimination in the denial of diplomas on the basis of the TAAS test. The suit also charges that the state defendants have failed to take steps to eliminate the vestiges of a history of segregation in elementary and segregation school, and that those vestiges have prevented African American and Mexican American students from receiving the education they need in order to pass the TAAS test.

MALDEF's press release was critical of "administrative and legislative levels" which have failed. One reading of the criticism is that the plaintiffs American GI Forum and IMAGE of Texas are displeased with the US Department of Education's resolution of a complaint filed by the Texas NAACP. In that OCR resolution, the Texas Education Agency was obliged to evaluate disparate TAAS pass rates by race, ethnicity and language groups and to take concrete steps to address the disparities. The OCR resolution did not halt the use of TAAS test, however. Instead, OCR preserved to the State its flexibility to set high standards and adopt new forms of standardized assessments.

It is interesting to note that LULAC was not a plaintiff. LULAC typically joins GI Forum in MALDEF complaints, but did not participate in this TAAS suit.

OCT-15-97 WED 02:48 PM M. A. L. D. E. F.

FAX NO. 2023934208
213 224-6312

P. 02

**Mexican American
Legal Defense
and Educational Fund**The Book Building
140 E. Houston Street
Suite 300
San Antonio, TX 78205
(210) 224-5476
FAX: (210) 224-6312**MALDEF****EMBARGOED FOR RELEASE UNTIL TUESDAY - OCTOBER 14, 1997****For Immediate Release****For More Information
Al Kauffman (210) 224-5476
Jennie Mordant or Alicia Maldonado (213) 629-2512****MALDEF CHALLENGES TEXAS HIGH SCHOOL "GRADUATION" TEST
Says Standardized Test Requirement Does Not Measure Students' Skills or Knowledge**

(San Antonio-October 14, 1997) The Mexican American Legal Defense and Educational Fund (MALDEF) today filed suit against the State of Texas and its use of the Texas Assessment of Academic Skills (TAAS) exit test for high school graduation, calling the test discriminatory and invalid. The suit, filed in the United States District Court for the Western District of Texas, alleges that the test denies diplomas to students without sufficient proof that the use of the test will enhance the education or life opportunities of students. The suit also charges the State, the Texas Education Agency and the Texas State Board of Education with failing to take affirmative steps to eliminate the vestiges of discrimination against Mexican American and African American students in the state's public school system.

"We bring this litigation because our efforts to deal with the problem at the administrative and legislative levels have failed," says Al Kauffman, MALDEF Regional Counsel and lead attorney on the case. "The litigation is a direct challenge to the misuse of the TAAS test as an absolute requirement for receiving a high school diploma, regardless of other academic achievements of the students."

Approximately 7,500 students each year do not pass the TAAS test and are denied a diploma, including students with good grades and those on the honor roll. "This test is

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MALDEF CHALLENGES TAAS TEST 2-2-2-2

unfair to all students," Kauffman notes, "and has particularly negative effects on minority students who have long received a substandard education. The test does not correspond to the curricula available nor to what actually is taught in these communities."

First implemented in the 1990-91 school year, the TAAS is now administered in Texas public schools in grades 3, 5, 7, and 10. Beginning in the spring semester of the tenth grade, students have eight opportunities to pass the exit level TAAS prior to their class scheduled graduation. If a student fails a portion or portions of the test, he or she may retake the exam but has no legal right to remedial instruction from any Texas school district if he or she has completed all high school course work.

"It is extremely harmful to our community to deny a high school diploma to good students who have worked in school for twelve years, been assessed by dozens of teachers and have performed at grade level or above," Kauffman stresses. "We cannot permit the continuation of a practice that allows one point on a standardized test to end a student's educational and economic development."

Over half of Texas' minority students in the sophomore year do not pass one or more parts of the TAAS test, and approximately 85% of the students who do not pass the TAAS in May before graduation are Mexican American or African American.

The suit asks the court to halt the use of the high school graduation test as a criteria for receiving a high school diploma. It also asks the court to halt the use of tracking in the public schools which places many students into a sequence of TAAS remedial courses in which they cannot receive the necessary classes to proceed with their education or prepare for college.

A national nonprofit organization, MALDEF promotes and protects the civil rights of Latinos through advocacy, community education and outreach, leadership development and, when necessary, through the legal system.

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MALDEF

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MALDEF's Statement on TAAS Litigation

MALDEF is firmly committed to high academic standards for all schools and students. Throughout MALDEF's history, we have fought vigorously in the courts, in the legislatures and at the community level to improve our schools and to encourage opportunity for all students within our schools. We want to hold our schools and our teachers accountable for hard work and reward them for dedication to the task of educating our students.

However, when individual students and group of students that have been historically discriminated against are arbitrarily denied a diploma because of one part of a standardized examination, that is wrong. With the TAAS, Texas has put too much emphasis on standardized tests and not enough emphasis on the total assessment of the students' and the schools' abilities and progress.

For years, MALDEF has seen students who have gone through the arduous task of completing twelve years of school, overcome tremendous personal and family difficulties, performed extremely well in school and nevertheless been denied a high school diploma because of their inability to pass a standardized test.

It is simply unfair to disregard actual academic achievement when awarding something as important as a high school diploma. It is particularly unfair to minority students for whom the test is less valid and who have not been given equal educational opportunities within the Texas school system.

We will continue to work with state officials, school officials and community members to improve the accountability of our schools, teachers and students. However, we will fight against any misuse of standardized tests that negatively affects the opportunities of our community to progress in education and reach the quality of opportunity in education, employment and public affairs to which we are dedicated.

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P. 05

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EMBARGOED FOR RELEASE UNTIL TUESDAY - OCTOBER 14, 1997**TAAS EXIT TEST PASSING RATES 1996 SOPHOMORES
(CLASS OF 1998)**

	White	Hispanic	African American	Asian	Native American	Total
Number Pass	81,000	29,000	10,000	4,200	120	124,320
% Pass	71%	42%	36%	72%	60%	
Number Fail	33,000	39,000	18,000	1,600	80	91,680
% Fail	29%	58%	64%	23%	40%	
Number of Test Takers	114,000	68,000	28,000	5,800	200	216,000

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P. 06

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**THE EFFECT OF THE TAAS ON TEXAS 1996 PUBLIC SCHOOL SENIORS
(CLASS OF 1996)**

	White	Hispanic	African American	Asian	Native American	Total
Number of Sophomores that took the Spring 1994 TAAS Administration	114,810	72,363	30,259	5,991	603	224,026
Number of Sophomores that had results reported for the Spring 1994 Administration	105,398	61,595	25,008	5,207	207	197,417
Number of Sophomores that passed the Spring 1994 Administration (Pass Rate)	67,821 (64.35%)	20,751 (33.69%)	6,942 (27.75%)	3,342 (64.18%)	113 (54.07%)	98,969 (50.13%)
Number of members of the 1994 Cohort (Class of 1996) who eventually passed	89,480	43,132	16,332	4,362	133	153,439
Number of members of the 1994 Cohort (Class of 1996) who 'were lost' in the TAAS pipeline	25,350	29,251	13,927	1,629	473	70,627
Overall Pass Rate	77.94%	59.61%	53.97%	72.81%	22.06%	68.49%
Number of members of the 1994 Cohort (Class of 1996) who had results for the May 1996 Administration (of this, the number that passed)	248 (72)	2,293 (367)	819 (145)	113 (15)	1 (0)	3,474 (599)

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test in a state with Texas' history of discrimination is particularly counterproductive and violates the orders of the Court in *U.S. v. Texas*.

II. JURISDICTION

2. There is jurisdiction of this case under 28 U.S.C. §1331, 28 U.S.C. §1343, 20 U.S.C. §1706, 42 U.S.C. §2000 (d)(7) and this court's equity jurisdiction to enforce the decrees of the United States District Court for the Eastern District of Texas in *U.S. v. Texas*, 330 F. Supp. 235 (E.D. Tex. 1970), *aff'd*, 447 F. 2d 441(5th Cir. 1971), *cert denied*, 404 U.S. 1016 (1974).

III. PLAINTIFFS

3. Plaintiff GI FORUM is an organization dedicated to the educational advancement of Mexican Americans in Texas. They bring this action to ensure that their members' children -- Mexican American students in Texas public schools in hundreds of Texas school districts around the state -- are not denied an equal educational opportunity to graduate from high school, pursue higher education, join the military or compete in the job market.

4. Plaintiff IMAGE DE TEJAS is an organization dedicated to the educational advancement of Mexican Americans in Texas. They bring this action to ensure that their members' children -- Mexican American students in Texas public schools in hundreds of Texas school districts around the state -- are not denied an equal educational opportunity to graduate from high school, pursue higher education, join the military or compete in the job market.

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5. Plaintiff 1 is a Mexican American student who attended high school in the San Antonio Independent School District. She would have graduated and received a diploma in 1997 but for her failure of the math part of the TAAS test. She has suffered and continues to suffer from the discriminatory policies of the defendants.

6. Plaintiff 2 is a Mexican American student who attended high school in the San Antonio Independent School District. She would have graduated and received a diploma in 1997 but for one point on one part of the TAAS test. Although she had good grades and was on the honor roll for three years, she did not receive a diploma only because of the TAAS. She has suffered and continues to suffer from the discriminatory policies of the defendants.

7. Plaintiff 3 is a Mexican American student who attended high school in the Northside school district for four years. She would have graduated and received a diploma in 1997 but for the TAAS test. She was actively involved in school activities including leadership positions, but failed the math portion of the TAAS. She has suffered and continues to suffer from the discriminatory policies of the defendants.

8. Plaintiff 4 is a Mexican American student who attended high school in an El Paso school district. He would have graduated and received a diploma in 1997 but for one portion of the TAAS test. He has suffered and continues to suffer from the discriminatory policies of the defendants.

9. Plaintiff 5 is a Mexican American student who attended high school in the San Antonio Independent School District. He would have graduated and received a diploma but

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for the TAAS test. He had good grades and was on the honor roll for two years, but failed the TAAS and did not graduate. He has suffered and continues to suffer from the discriminatory policies of the defendants.

10. Plaintiff 6 is an African American student who attended public schools in Paris, Texas, who should have graduated in May, 1993. He continued to take the TAAS test at every available opportunity until within the last two years. Because of his age, he is now denied the opportunity to take the test. He completed all requirements to receive a diploma except for the math and reading sections of the TAAS. He has suffered and continues to suffer from the discriminatory policies of the defendants.

11. Plaintiff 7 is a Mexican American student who attended high school in the Harlandale school district for four years. She would have graduated and received a diploma but for one part of the TAAS test. She has suffered and continues to suffer from the discriminatory policies of the defendants.

12. These individual Plaintiffs are representative of the approximately 7,500 students each year who fail the exit level TAAS and do not graduate. These individual Plaintiffs are also representative of the approximately 20,000 to 30,000 members of each sophomore class in Texas schools who drop-out before graduation in part because of the TAAS test. These students are denied a diploma, college admission and scholarship opportunities, selection by the military and job opportunities because of the TAAS, regardless of their other qualities, achievements and abilities.

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EMBARGOED FOR RELEASE UNTIL TUESDAY - OCTOBER 14, 1997**IV. DEFENDANTS**

13. Defendants Texas Education Agency, members of the Texas State Board of Education and Mike Moses, as Texas Commissioner of Education have developed and implemented the TAAS, chosen the method of using the TAAS as a graduation requirement, and set the cut-off scores on the TAAS. Individual Defendants are sued in their official capacities. Defendants are the recipients of federal funds.

V. FACTS**A. History of Discrimination Against Mexican Americans and African Americans in Public Schools**

14. Mexican Americans and African Americans have suffered from a long and well-documented history of discrimination in Texas public schools. Decades of separate and unequal education have adversely impacted generations of Mexican Americans and African Americans. This past discrimination has consequences in the present, and the Court in *U.S. v. Texas* ordered the state to take affirmative steps to eliminate the vestiges of this past discrimination.

B. What the TAAS Is and How It Is Used

15. First implemented during the 1990-91 school year, the TAAS is now administered in Texas public schools to students in grades 3, 5, 7, and 10. In addition to completing the required high school curriculum, a student in every public high school in Texas must now pass the reading, writing, and mathematics sections of the exit-level TAAS to receive a diploma. Beginning in the student's spring semester of the tenth grade, the student has eight opportunities to pass the exit level TAAS prior to his or her class

October 30, 1997

NOTE TO ELENA KAGAN

Attached is Draft Q&A guidance prepared by the Office for Civil Rights at Education that is designed to advise charter school operators of their obligations under federal civil rights law. The guidance has been prepared to distribute beginning Monday at next week's national charter school conference that ED is hosting, in the context of sessions that OCR is going to run on this topic.

I believe that a copy of this was faxed to you by Art Coleman earlier this week. The attached copy also includes comments provided by OLC at Justice, and notes some other changes that OCR has indicated to me that they plan to make.

* | OCR is anxious to know of any comments that we have so they can make final changes on Friday and get copies printed for Monday. I have also distributed copies for Mike, Tanya, Dawn Chirwa, and Jon Schnur (in OVP) to look at. Dawn is also checking with Civil Rights and the Associate's office at DOJ on this.

Could you please take a look at this tonight? I see some of the issues presented by this document as the following:

1. Overall issue: At this point, is it too counter-productive message-wise to put out paper like this, dealing with issues of legal requirements, in the midst of a conference that is designed to focus on the non-bureaucratic approach of charter schools?

2. PP. 5 -6: Note the assertion about use of race for diversity purposes beginning at the bottom of p. 5. ED indicates that OLC requested this statement, as well as the added language and footnote, because it was concerned that to do otherwise would signal that such a use is not permissible. On the other hand, there is little to point to in terms of case law, etc., as grounding for such an approach for K-12 education (as opposed to higher ed, where there is Bakke). ED acknowledged that they were basically extending the principles derived from higher ed to K-12. My question is whether this will be perceived as breaking new policy ground and possibly make this document more controversial than it needs to be.

3. P. 6: The guidance notes the Title IX responsibility of schools not to discriminate on the basis of sex "in their programs and activities." The guidance does not address the issue of single-sex schools, although this section might prompt a reader to wonder whether that's something that's allowed.

4. Pp. 6-8: LEP Requirements. Here again, the guidance does not address the issue of bilingual instruction versus other approaches to meeting the needs of LEP kids, but the discussion of the requirement to provide "alternative language services" could prompt questions about the

California initiative, etc.

My general take is that, while the document is a little clumsy, we should probably let it go forward, perhaps with "DRAFT" stamped on it and an invitation to conference attendees to comment. While we may risk a little flak for sending mixed messages about flexibility and freedom from bureaucracy, if we don't provide something concrete like this to charter school developers, we could well be increasing the likelihood of a much stickier problem down the road, when well-meaning, entrepreneurial charter school developers run afoul of civil rights requirements and OCR has to investigate. In addition, providing this guidance probably will be helpful to our long-term efforts to build support for charter schools, as some groups that have been skeptical of charter schools (including many in the minority community) as potentially hostile to civil rights will see that we are serious about helping make sure that these schools understand and follow through on their civil rights obligations.

Thanks.

-- Bill

Overall: Distinguish between statutory requirements and recommendations.

QUESTIONS AND ANSWERS ON THE APPLICATION OF FEDERAL CIVIL RIGHTS LAWS TO PUBLIC CHARTER SCHOOLS

One of the fastest growing areas of public school reform is the charter schools movement. President Clinton has called for the creation of 3,000 charter schools by early in the next century as a vehicle for promoting choice within public school systems. Charter schools are public schools under contract--or charter--between a public agency and groups of parents, teachers, school administrators or others who want to create alternatives and choice within the public school system. Although public charter schools are freed from many regulatory burdens and paperwork requirements, they must comply with federal civil rights laws.

The Office for Civil Rights (OCR) in the U.S. Department of Education (ED) enforces civil rights laws that protect students and other participants from discrimination on the basis of race, color, national origin, sex, disability, and age in programs and activities that receive federal financial assistance. These laws are: 1) Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, and national origin; 2) Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex; 3) Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability; 4) the Age Discrimination Act of 1975, which prohibits discrimination on the basis of age; and 5) Title II of the Americans with Disabilities Act of 1990, which prohibits discrimination on the basis of disability by public entities, including public charter schools and public school districts, regardless of whether they receive federal financial assistance.

The following Questions and Answers were developed to provide information on public charter schools' obligations under civil rights laws with respect to recruitment and admissions, provision of alternative language services to limited English proficient (LEP) students, and provision of a free appropriate public education and program accessibility to students with disabilities. These Questions and Answers focus on issues that have been the subject of OCR investigations concerning charter schools or have been the most frequently asked questions.

These Questions and Answers are not intended to provide you with all the information you may need to ensure compliance with civil rights laws. Rather, our intent is to highlight key requirements. Details of these requirements are described in OCR regulations and policy documents and applicable court decisions.

For information about the civil rights requirements addressed in these Questions and Answers, as well as other requirements under the federal civil rights laws, please contact the OCR enforcement office that serves your state. A list of the addresses and telephone numbers of the OCR enforcement offices is attached.

Entity Responsible for Civil Rights Compliance

Q: Which legal entity is responsible for ensuring that a public charter school is complying with federal civil rights laws?

A: The entity that is responsible for ensuring that a public charter school is complying with federal civil rights laws generally is the same entity that is responsible for the operation of the charter school. State charter school laws provide guidance regarding entities that are responsible for the operation of charter schools within a particular state. Unless the applicable state law provides otherwise, the entity that is responsible for the operation of the public charter school would also be responsible for ensuring that the public charter school is complying with the requirements of the federal civil rights laws. For example, where a charter school is part of a local educational agency, the local educational agency would be responsible for ensuring that the charter school is complying with the requirements of the federal civil rights laws.

While the charter school operator generally has responsibility for ensuring that the charter school complies with federal civil rights laws, the state educational agency (SEA) or other authorized chartering agency also may be responsible. For example, in cases where the SEA is the direct recipient of federal funds and the charter school is a subgrantee, the SEA must have policies that ensure that the subgrantee will comply with federal requirements.

Effect of Existing Desegregation Plans on Public Charter Schools

Q: What effect does an existing desegregation plan for a school district have on the establishment or operation of a public charter school in that district?

A: When a public charter school is being established in a school district that is under either a Title VI desegregation plan approved by OCR or a court order requiring desegregation, the charter school must be established and operated in a manner that is consistent with the OCR-approved desegregation plan or court order. Generally, the establishment of a public charter school may not substantially impede or retard the scope of desegregation. For example, where the school district is operating under an OCR-approved or court-ordered desegregation plan, the establishment of a public charter school must not adversely affect the

racial composition of the schools from which the charter school students will be drawn, such that the school district would not be in compliance with the desegregation plan or court order. The local educational agency or other responsible entity should consult with its attorneys to determine whether establishment of a charter school is consistent with an applicable OCR-approved desegregation plan or court order and whether OCR or court approval is needed.

Recruitment and Admissions

Q: What steps should a public charter school take in order to be in compliance with federal civil rights laws with respect to the recruitment of students?

A: Consistent with Title VI, Title IX, ^{must not} Section 504, and Title II, a public charter school ~~should not recruit in a manner that tends to exclude or limit~~ ^{statutory?} the enrollment of students of a particular race, color, national origin, or sex, or students with disabilities. Public charter schools should make sure that any outreach and recruitment efforts ~~are designed to effectively reach all segments of the parent community, including minority and limited English proficient parents. When a particular type of outreach program (such as radio advertisements or community meetings) is used to publicize a charter school generally, efforts should be made to ensure that these activities are carried out in a manner likely to reach a reasonable number of minorities.~~

If statutory, obligation, then don't use "tends"

Don't ask.

Also, charter schools may make special efforts to encourage applications from minority and LEP students. For example, charter schools may: 1) conduct presentations or meetings with parent teacher associations or organizations at schools with a large number of minority students; 2) schedule meetings or consultations with minority community groups; 3) indicate in promotional materials that alternative language services will be provided for LEP students; 4) indicate in such materials that a free or low cost lunch program is available for eligible students; 5) disseminate information about the charter school in newspapers and other publications and on radio stations that serve minority communities; and 6) emphasize in meetings and promotional materials that students from all segments of the community will be welcome at the charter school.

requirement?

Promotional materials that are used to recruit students should state that the charter school does not discriminate on the basis of race, color, national origin, sex, or disability in its programs and activities. ~~These materials also should avoid perpetuating stereotypes as to race, color, national origin, sex, or disability.~~

to be removed per Art Column

Q: What steps does a public charter school have to take in its recruitment efforts with respect to parents who are limited English proficient?

A: A public charter school must ensure that parents who are not proficient in English are provided with appropriate and sufficient information about the charter school. This information must be effectively communicated to parents who are not proficient in English. For example, if outreach materials are made available to parents, these materials may have to be available in languages other than English to ensure effective communication in those communities that have significant numbers of LEP parents. If the charter school conducts informational meetings with parents or community groups, in order to ensure effective communication, translation services should be available where the local community includes significant numbers of individuals who have limited English proficiency.

Q: What steps does a public charter school have to take in its recruitment efforts with respect to parents with disabilities?

A: A public charter school must ensure that information about the charter school is communicated as effectively to parents with disabilities as to other parents. Appropriate auxiliary aids and services must be made available whenever they are necessary to ensure effective communication for parents with disabilities. For example, if outreach materials are made available to parents, these materials should be made available in such alternative formats as Braille or large print for parents with visual disabilities. If the charter school conducts informational meetings with parents or community groups, qualified interpreters should be provided on request for individuals with hearing disabilities.

on request

Q: What steps should a public charter school take in order to ensure that all students, regardless of race, color, and national origin, are treated in a nondiscriminatory manner in admissions?

A:

~~Public charter schools should not use an admissions process that has the effect of excluding or limiting admission of students of a particular race, color, or national origin. In order to receive the charter school start-up grants that are available through the Federal Charter Schools Program, public charter schools must admit students on the basis of a lottery if more students apply for admission than can be accommodated.~~

Many state charter school laws also have specific provisions that are designed to ensure that charter schools are open to all students. For example, consistent with the Federal Charter Schools Program, a significant number of states specifically require that public charter schools use a lottery system for admissions purposes. A few state charter school laws contain provisions designed to ensure that transportation services are provided to low-income students attending such schools.

In public charter schools that do not use a lottery for admissions, eligibility criteria must be nondiscriminatory on their face and must be applied in a nondiscriminatory manner. If these criteria have a disparate impact on the basis of race, color, or national origin, they must be necessary to meet the school's educational objectives. A public charter school may use admissions criteria that are related to the nature of the school, for example, a requirement that students be at a particular grade level or that students be concentrating in a particular subject area.

Public charter schools may not treat an individual differently on the basis of race, color, or national origin in determining whether he or she satisfies any admissions requirement. ~~Also, public charter schools may not utilize criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, or national origin.~~

Where a public charter school is established in a school district that is remedying past discrimination, the charter school may consider race or national origin in admissions to remedy the effects of that past discrimination. A public charter school may also

make a narrowly tailored use

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sentences

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that may impact LEP students

school's program. If there are questions about the legality of the specific requirements of a program being offered by a charter school, please feel free to contact the OCR enforcement office that serves your state.

Q: Do the same requirements to provide alternative language services to LEP students that apply when a LEP student attends any other public school also apply when a LEP student attends a public charter school?

A: Yes. Title VI prohibits the denial of equal access to education for national origin minority children. Where the inability to speak and understand the English language excludes national origin minority group children from effective participation in the educational program offered by a public school, the school must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

*make clear -
not necessarily
mandatory*

Public schools must implement procedures that ensure that all LEP students are identified, evaluated, and provided necessary alternative language services by properly trained staff and that the alternative language program is periodically evaluated to ensure that it is effective in meeting the educational needs of LEP students. These legal requirements are explained in OCR policy documents and technical assistance materials. Public charter schools need to become familiar with the details of these legal requirements.

There are, of course, many different kinds of programs offered by public charter schools. For technical assistance regarding how the program being offered by a charter school can comply with Federal civil rights requirements to serve LEP students, you should contact the OCR enforcement office that serves your state.

Q: Under Title VI, what must a public charter school do to ensure that parents who are not proficient in English are provided with appropriate and sufficient information about school activities?

A: Public charter schools must effectively notify parents who are not proficient in English of school activities that are called to the attention of other parents. Such a notice, to be effective, may have to be provided in a language other than English.

mandatory?

Q: How do charter schools pay for the provision of appropriate educational services to LEP students?

A: Where a public charter school is part of an LEA, unless state law makes another agency responsible, the LEA would be responsible for ensuring that there is adequate funding for the provision of appropriate services to LEP students. Where the charter school is controlled by a governing board independent of the LEA, unless state law makes another agency responsible, the independent governing board would be responsible for ensuring that there is adequate funding for the provision of appropriate services to LEP students.

The entity responsible for the operation of the public charter school may want to consider applying for Title VII funds from ED's Office of Bilingual Education and Minority Languages Affairs. However, if an independent governing board is responsible for the operation of a public charter school, the charter school must constitute an LEA under the Elementary and Secondary Education Act of 1965 in order for the charter school to receive Title VII funds as an LEA.

Many public charter schools receive Title I funding from ED's Office of Elementary and Secondary Education. Charter schools would receive Title I funds directly from the SEA if the charter school is treated as an LEA or from the school district if the charter school is treated as a public school within an LEA. Title I funds also may be used to meet the educational needs of LEP students. In addition, a public charter school could be assisted in meeting its obligations through such means as joining with other charter schools or working with LEAs to share qualified staff. It is important to note that a public charter school cannot excuse its failure to provide appropriate educational services to LEP students because of inadequate financial resources.

Program Accessibility for Individuals with Disabilities

Q: Are public charter schools responsible for ensuring that their programs and activities are accessible to persons with disabilities?

A: Yes. Public charter schools are subject to the same program accessibility requirements as other public schools. Program accessibility requirements often involve complex issues. For assistance in understanding program accessibility requirements, you may want to review OCR technical assistance materials.

Q: Are there different legal requirements that apply to public charter schools located in older facilities as compared to newer facilities?

A: Yes, the legal requirements are different. Under the federal civil rights laws, older facilities (which are referred to as "existing facilities" in the Section 504 and Title II regulations) do not have to meet the requirements of federal accessibility codes. For such facilities, the legal standard is that programs and activities, when viewed in their entirety, must be readily accessible to and usable by individuals with disabilities. New construction and alterations are required to be in compliance with federal accessibility codes.

[You should be aware] that Section 504 and Title II have different time frames regarding what constitutes existing facilities and new construction and alterations. Under Section 504, an existing facility is a facility that was in existence or in the process of construction before June 3, 1977, the effective date of the regulation. Under Section 504, new construction means ground-breaking took place on or after June 3, 1977. Under Title II, an existing facility is a facility that was in existence or in the process of construction on January 26, 1992, the effective date of the regulation. Under Title II, new construction refers to any building for which bids were invited after January 26, 1992.

Q: What are the program accessibility requirements that apply if the public charter school leases its space from another entity?

A: Leased facilities are subject to the program accessibility requirements for existing facilities or new construction and alterations, depending on the date that the buildings were constructed or altered.

Provision of a Free Appropriate Public Education to Students with Disabilities

Q: What are the responsibilities of public charter schools to educate students with disabilities who are protected by Section 504 and Title II?

A: A state or local government agency must provide students with disabilities, consistent with their individual educational needs, a range of choice in educational programs and activities that is comparable to that offered to students without disabilities. This

includes magnet schools, charter schools, or other schools offering different curricula or instructional techniques. Under Section 504 and Title II, the charter school itself, if it is considered a local educational agency, or the local educational agency, of which a charter school may be part, must provide a free appropriate public education (FAPE) to all students with disabilities who have been admitted to the charter school, unless state law designates another entity as being responsible for the provision of FAPE.

Under Section 504 and Title II, the provision of FAPE includes: 1) establishment of nondiscriminatory evaluation and placement procedures to prevent misclassification or inappropriate placement of students and periodic reevaluation of students who have been provided special education or related services; 2) the provision of regular or special education and related services designed to meet the individual educational needs of students with disabilities as adequately as the needs of nondisabled students are met; 3) participation of each student with a disability with nondisabled students in academic settings and in nonacademic services and activities to the maximum extent appropriate to the needs of the student with a disability; and 4) establishment of due process procedures and procedural safeguards. FAPE requirements cover many specific issues that you may become familiar with by reviewing the Section 504 and Title II regulations and OCR's technical assistance resources.

Q: Could a child be covered under Section 504 and Title II but not be eligible to receive services under Part B of the Individuals with Disabilities Education Act (IDEA)?

A: Yes. Although, this is a rare occurrence, there are students with disabilities who are covered only by Section 504 and Title II, but who are not eligible to receive services under Part B of the IDEA. For example, a child with juvenile rheumatoid arthritis who requires the periodic administration of medication during the school day, but does not need any special education services, may be covered by Section 504 and Title II, even though the child is not eligible for services under Part B of the IDEA. Public charter schools need to make sure that they have in place procedures to ensure that students covered by Section 504 and Title II, but not by the IDEA, receive FAPE.

It should be noted that the IDEA is administered by the Department's Office of Special Education and

Rehabilitative Services (OSERS), while Section 504 and Title II are enforced by OCR. Under certain circumstances, public charter schools may be eligible for IDEA funds. For further information about IDEA requirements, contact OSERS's Office of Special Education Programs.

Education - Civil Rights

Civil Rights Mtg - 10/8/97

1. High-stakes: Wants guidance to be formal - stated in regulation
Need for a level of comfort ^{as to have} - but it will be controversial.
Not optimistic that will have sufficient resources to hire 8-10 more people. \$ just hasn't been forthcoming.

Center: Can't say today will do req. Have to talk w/ council, courts, etc
Cree: Politically explosive. And always an indiv. inquiry.
Just say flat out: not to be used for high stakes purposes.

Want: preclearance ↙
remedies - better / more /
| different
enforcement mechanism
generally

2. LEP

30-100,000 Spanish-speaking kids w/out 3 years instruction
Spanish = 70% of total
Not about \$.

INTERNAL

Education - civil rights

10/8/97

National Test Issues and proposals

A. High Stakes Testing

1. OCR: Develop a strategy and plan for technical assistance and for monitoring compliance with Title VI. Widely disseminate existing guidelines and the new guidelines that are in final stages of preparation. Underscore that the guidelines must follow the federal legal requirements. We can suggest that they follow the APA/AERA/NCME standards that, among other things, hold that single tests should not be used alone for making high stakes decisions for students such as promotion, tracking, or graduation. OCR will also put out a clear, readable statement that sets out their guidelines in a few pages, as well as specifically addresses the voluntary national tests.

2. NAGB: Specify in conference report language that NAGB should put out clear guidelines for use of the national tests in high stakes situations for students. The guidelines should follow the federal legal requirements and the APA/AERA/NCME guidelines.

3. The Department will issue a publication for teacher, parent, and community use to talk about how to use the tests most effectively.

4. OBEMLA and OESE would publish a clear brochure for parents about the uses of the test and how they can be used by parents. There also are MOUs for the development of materials on the use of the tests with NSF. In addition, the test contractor will be putting out materials on the use of the tests.

B. LEP Testing:

Propose the Use of Private Sector Developed Reading Tests in Spanish: Our goal is to assist and enable interested local school districts to administer high quality, privately developed reading tests in Spanish, which are consistent with the national reading test framework and performance standards. These tests would be administered at the same time as the national reading tests, and the results would be reported along with the national results. From the point of view of LEP students and parents, there would

be no difference between taking the Spanish language version of the tests and taking the English version of the test.

We are working with CGCS to identify and analyze existing tests to determine which are suitable for these purposes. Harcourt Brace has indicated that SUPERA, a Spanish-language version of Terra Nova, is based on the NAEP 4th grade reading framework, is linked to the NAEP performance standards, and is consistent with the draft specifications for the national test. The test is being analyzed to determine if this is in fact the case.

Once suitable tests are identified, we will work with interested school districts, NAGB, and the test contractor to ensure that test administration and reporting can occur simultaneously with the national test.

The Education Department will (work with local school districts) to develop and distribute sample Spanish reading questions and materials comparable to those that will be distributed each year when the national test items will be made public.

The Education Department will seek ways to pay for test administration, and determine if it is possible to add \$ to existing grant programs for these purposes. [When we talk about this, we need to be a little equivocal right now]

If no existing tests are suitable for these purposes, we anticipate that interested school districts will meet with test publishers and ask them to make necessary modifications to existing tests. We will provide the school districts with technical assistance in this effort if needed.

C. Reporting Requirements:

1. In conference report language, NAGB would be required to develop reporting requirements for the use of the test. The reporting requirements should meet the conditions set out in Title I.

2. NAGB would be required in conference report language to work with states to report state data.

3. Testing report materials would be developed to be as readable as possible by parents and teachers and others unfamiliar with testing. Focus groups, document design people, etc. would be used to insure that the materials are understandable and useful. R&D would be carried out on this to determine that the materials are in fact useful.

D. Accommodations:

CONVERSATION ONLY:

1. Conference Report language should make clear that NAGB will insure that all feasible and useful accommodations are made available for students that need them (LEP and disabled and others?).

2. The Department will develop a clear list of accommodations that have a core of must include accommodations, a set of desirable ones, and a set of possible accommodations that require research. The core of basic accommodations set must be equal to or exceed the highest standard set for a nationally available test.

319 **Standard 13.1**

320 **When the same test is used to serve multiple purposes, evidence of technical quality for each**
321 **purpose is needed.**

322 **Comment:** In educational testing, it has become common practice to use the same test
323 for multiple purposes (e.g., monitoring achievement of individual students, providing
324 information to assist in instructional planning for individuals or groups of students,
325 evaluating schools or districts). No assessment system will serve all purposes equally well:
326 Choices in test development and evaluation that enhance validity for one purpose may
327 diminish validity for other purposes. Different purposes require somewhat different kinds
328 of technical evidence, and appropriate evidence of technical quality for each purpose
329 should be provided. If the test user wishes to use the test for a purpose not supported by
330 the available evidence, it is incumbent on the user to provide the necessary additional
331 evidence.

332 **Standard 13.2**

333 **When a test is used as an indicator of achievement in an instructional domain or with**
334 **respect to specified curriculum standards, analyses of the fit between the test domain and**
335 **the instructional domain or curriculum standards should be provided. Both domains should**
336 **be described in sufficient detail so that coherence between the domains can be evaluated.**
337 **The analyses should make explicit those aspects of the target domain that the test represents**
338 **as well as those aspects that it fails to represent.**

339 **Comment:** Increasingly, tests are being used to monitor progress of individuals and
340 groups towards local, state or professional standards. Rarely can a single test cover the
341 full range of performances reflected in the standards. To guard against misinterpretation or
342 overinterpretation of test scores as indicators of performance on these standards, it is
343 essential to document and evaluate both the relevance of the test to the standards and the
344 extent to which the test underrepresents the standards. When existing tests are selected by
345 a school, district, or state to represent local curricula or standards, it is incumbent on the
346 user to provide the necessary analyses. This information should be made available to all
347 those who use test scores.

348 Standard 13.3

349 When a test is used as an indicator of achievement in an instructional domain or with
350 respect to specified curriculum standards, empirical evidence of the extent to which the test
351 in fact samples the range of knowledge and engages the processes reflected in the target
352 domain should be provided. When such evidence is not available, users should be cautioned
353 against unsupported generalizations from the test scores to the target domain.

354 Comment: For example, correlational studies among alternative indicators of
355 performance, carefully conceived to reflect the full range of performance implied by the
356 broader domain, accompanied by studies of the processes in which test takers engage,
357 enable evaluation of the extent to which generalizations to the broader domain are
358 supported.

359 Standard 13.4

360 When a test is used to make decisions about student promotion or graduation, there should
361 be evidence that the test covers only the specific or generalized content, skill, and
362 performances that students have had an opportunity to learn.

363 Standard 13.5

364 Students who must demonstrate mastery of certain skills or knowledge before being
365 promoted or granted a diploma should have multiple opportunities or be provided with
366 construct equivalent alternatives to demonstrate the skill.

367 Comment: If parallel test forms are not available, the provision of multiple trials on the
368 same test form may erode the inference to the construct intended. Furthermore, some
369 students may benefit from a different testing approach to demonstrate their achievement.
370 Care must be taken that evidence of construct-equivalence of alternative approaches is
371 provided as well as the equivalence of cut scores defining passing expectations.

372 When students are provided with multiple opportunities to demonstrate mastery,
373 the specification of the time interval between the opportunities should consider the need to
374 provide relevant instructional experiences to students.

375 **Standard 13.6**

376 **A decision or characterization that will have major impact on a test taker should not**
377 **automatically be made on the basis of a single test score. Other relevant information for the**
378 **decision should also be taken into account by the professionals making the decision.**

379 **Comment:** When the purpose of testing is to identify individuals with special needs, a
380 comprehensive assessment should be conducted. The comprehensive assessment should
381 involve the use of multiple measures, and data should be collected from multiple sources.
382 It is important that in addition to test scores, other relevant information (e.g., school
383 record, teacher observation, parent report) is taken into account by the professionals
384 making the decision.

385 **Standard 13.7**

386 **When test scores are used directly, without collateral information, to make decisions about**
387 **individuals or programs, logical and empirical evidence of the validity of the decision should**
388 **be provided.**

389 **Comment:** At the individual level, test scores have been used, for instance, to make
390 decisions about promotion, placement into special programs, and certification for
391 graduation. At the program level, aggregate scores have been used to allocate resources or
392 to designate schools in need of special assistance. When such decisions rest on test scores
393 alone, empirical evidence should be provided of the meaningfulness of the proposed cut
394 scores and the appropriateness of any associated decision.

395 **Standard 13.8**

396 **If test results are used in making statements about the differences between aptitude and**
397 **achievement for an individual student, any educational decision based on these differences**
398 **should take into account the overlap between the two constructs and the reliability or**
399 **standard error of the difference score.**

400 **Comment:** When difference scores between two tests are used to aid in making
401 educational decisions, it is important that the two tests are standardized on the same
402 normative sample at about the same time. In addition, the reliability and standard error of
403 the difference scores between the two tests are affected by the relationship between the

404 constructs measured by the tests as well as the standard errors of measurement of the
405 scores of the two tests. In the case of comparing aptitude with achievement test scores, the
406 overlapping nature of the two constructs may render the reliability of the difference scores
407 lower than test users normally would assume. If the aptitude and/or achievement tests
408 involve a significant amount of measurement error, this will also reduce the confidence
409 one may place on the difference scores. All these factors affect the accuracy of difference
410 scores between tests and should be considered by professional evaluators in using
411 difference scores as a basis for making important decisions about a student.

412 **Standard 13.9**

413 **When results of a test are intended to be used as a basis for educational placement,**
414 **promotion, or implementation of prescribed educational plans, empirical evidence**
415 **documenting the relationship among particular test results, the instructional programs, and**
416 **desired students outcomes should be provided. When adequate empirical evidence is not**
417 **available, users should be cautioned to weigh the test results accordingly in light of other**
418 **information about the student.**

419 **Comment:** The validity of test results for placement or promotion decisions rests, in part,
420 upon evidence about whether students, in fact, benefit from the differential instruction.
421 Similarly, in special education, when test results are used to develop specific educational
422 objectives and instruction strategies, evidence is needed to show that the prescribed
423 instruction enhances students' learning. When there is limited evidence about the
424 relationship among test results, instructional plans, and student achievement outcomes, test
425 developers and users should stress the tentative nature of the test-based recommendations
426 and encourage teachers and other decision makers to consider the usefulness of test results
427 in light of other information about the students.

428 **Standard 13.10**

429 **Judgments about the technical quality of achievement tests should consider the impact of**
430 **instructional history on performance. Findings from studies using uninstructed examinees**
431 **should not be applied to instructed examinees without additional support, or conversely.**

432 **Comment:** By design, achievement test scores are sensitive to the effects of formal

433 instruction. The psychometric properties of achievement test scores and their relations to
434 other variables may vary substantially depending upon the instruction examinees have
435 received. The same test item may call for complex reasoning on the part of one examinee
436 and rote recall or routine application of a learned procedure on the part of another.
437 Instruction may result in improved performance on test items of a certain kind without
438 bringing about any concomitant improvement in performance on other kinds of items or
439 tasks that call for similar knowledge or skills. When new assessment formats are
440 introduced, it may be especially important to monitor score generalizability and
441 correlations with other variables. Inferences about test quality will also depend upon the
442 distribution of performance by examinees, another aspect of instructional history.

443 **Standard 13.11**

444 Those responsible for educational testing programs should ensure that the individuals who
445 administer the test(s) are properly instructed in the appropriate test administration
446 procedures and that they understand the importance of adhering to the directions for
447 administration provided by the test developer.

448 **Standard 13.12**

449 Those responsible for educational testing programs should ensure that the individuals who
450 use the test scores within the school context are properly instructed in the appropriate
451 methods for interpreting test scores.

452 **Comment:** The interpretation of some test results is sufficiently complex to require that
453 the user have relevant psychological training and experience. Examples of such tests
454 include individually administered intelligence tests, personality inventories, projective
455 techniques, and neuropsychological tests. As formal testing programs become a more
456 prevalent strategy for guiding instruction, teachers expected to make inferences about
457 instructional needs may need assistance in interpreting test results for this purpose.

458 **Standard 13.13**

459 Score reports should be accompanied by a clear statement of the degree of measurement
460 error associated with each score or classification level.

461 **Comment:** This information should be communicated in a way that is accessible to
462 persons receiving the score report. For instance, the degree of uncertainty might be
463 indicated by a likely range of scores or by the probability of misclassification.

464 **Standard 13.14**

465 **Reports of group differences in test scores should be accompanied by sufficient background**
466 **information, where possible, to enable meaningful interpretation of these differences. Where**
467 **appropriate background information is not available, users should be cautioned against**
468 **overinterpretation.**

469 **Comment:** Observed differences in test scores between groups (e.g., classified by gender,
470 race/ethnicity, school/district, geographical region) can be influenced by factors like course
471 taking patterns, differences in curriculum, or differences in access to educational
472 resources. Differences in group performance across time may be influenced by changes in
473 the population of students tested or changes in learning opportunities for students.
474 Consumers should be made aware of the range of factors likely to contribute to any
475 observed differences in test scores.

476 **Standard 13.15**

477 **Whenever a test score is reported, the date on which the score was collected should be**
478 **indicated. The age of the test score should be considered by test users in making inferences.**

479 **Comment:** Depending on the particular construct measured, the validity of score
480 inferences may be questionable as time progresses. For example, inferences from aptitude
481 test scores may be more valid over a longer period of time than inferences from
482 achievement measures. This is because achievement as a construct is more susceptible to
483 intervention and therefore less stable than is aptitude. When a test score is used for a
484 particular purpose, the date of the test score should be taken into consideration in
485 determining its worth or appropriateness for making inferences about a student. For
486 instance, a reading score collected six months ago for a student may no longer reflect his
487 or her current reading ability. Thus, a test score should not be used if it has been
488 determined that sufficient time has passed since the time of data collection and that the
489 score no longer can be considered a valid indicator of a student's present functioning.

490 **Standard 13.16**

491 **When testing programs are mandated by school, district, state, or other authorities, the**
492 **ways in which test scores are intended to be used should be clearly described. Potential**
493 **consequences of the proposed uses, both intended and unintended, should be considered.**
494 **Those implementing the testing program should be cautioned against instructional and**
495 **administrative practices likely to result in negative consequences. Where resources permit,**
496 **evidence of the impact of the testing program, both intended and unintended, should be**
497 **monitored.**

498 **Comment:** Mandated testing programs are often justified in terms of their potential
499 benefits for teaching and learning beyond those directly associated with the meaning of
500 test scores. In conjunction, concerns have been raised about the potential negative impact
501 of mandated testing programs, particularly when they result directly in important decisions
502 for individuals or institutions. Concerns frequently raised include narrowing the
503 curriculum to focus only on the objectives tested, increasing the number of dropouts
504 among students who do not pass the test, or encouraging other instructional or
505 administrative practices designed to raise test scores without a concomitant improvement
506 in the quality of education. It is the responsibility of those who mandate the use of tests to
507 monitor the impact of their use on the quality of education and to minimize potential
508 negative consequences.

509 **Standard 13.17**

510 **Documentation of design, models, scoring algorithms, and methods of classification should**
511 **be provided for assessments administered and scored using multimedia or computer support**
512 **when results will be used to make decisions about individuals or programs.**

513 **Standard 13.18**

514 **Sample sizes permitting, reports of average scores for demographic groups or geographic**
515 **regions should be supplemented with additional information about the shape or dispersion**
516 **of score distributions.**

517 **Comment:** Score reports should be designed to communicate clearly and effectively to
518 their intended audiences. In most cases, reports that go beyond average score

519 comparisons are helpful in furthering thoughtful use and interpretation of assessment
520 findings. Depending on the intended purpose and audience of the score report, additional
521 information might take the form of standard deviations or other common measures of
522 score variability, or of selected percentile points for each distribution. Alternatively,
523 benchmark score levels might be established and then, for each group or region, the
524 proportions of examinees attaining each specified level could be reported. Such
525 benchmarks might be defined, for example, as selected percentiles of the pooled
526 distribution for all groups or regions. Other distributional summaries of reporting formats
527 may also be useful. The goal of more detailed reporting must be balances against goals
528 of clarity and conciseness communicating assessment findings. Excessive detail may
529 invite overinterpretation of trivial or unreliable group differences.

OCR's Fairness in Testing Guidance: Central Principles

- **Federal law prohibits the use of a test for any high stakes purpose¹ if that test has not been validated for that purpose. Accordingly, the use of a test as a sole criterion in high stakes decision making is not appropriate if the test is not designed and validated for that purpose. This means, for example, that federal law prohibits the placement of students in special education classes solely on the basis of an IQ test that has not been designed as a single placement instrument for such purposes.**
- **Federal law prohibits the use of a high stakes test that has a statistically significant adverse impact on the basis of race, national origin, or gender unless the recipient of federal funds can demonstrate that the test is valid and reliable and there is no alternative with less disparate impact. This means, for example, that where a test designed to make decisions about students' promotions from one grade to the next (and, thus, must be instructionally valid) has a disparate impact on the basis of race, the use of that test constitutes a violation of federal civil rights laws if those students have not been provided with adequate instruction in the content areas tested.**
- **Federal law prohibits tests from being used for high stakes purposes where students are treated differently on the basis of race, national origin, and gender, without a legitimate nondiscriminatory reason.**

10/97

For the purposes of the OCR Guidance, high stakes tests are defined as those that have an impact on the educational opportunities of students – through placement, promotion or graduation decisions, for instance. The Guidance does not apply to tests designed to assess student or institutional progress or advancement where such assessment has no performance or placement consequences for the student, individually.

OCR's Technical Assistance and Enforcement Strategy

OCR will enhance its national testing network (through which current trends, issues, and best practices are shared) and will supplement its current strategic planning and targeting of compliance reviews and technical assistance with an initiative in which two staff in each of OCR's four national divisions will be responsible for developing expertise in the area of testing misuse; monitoring developments in their respective jurisdictions regarding the use of tests for high stakes purposes; establishing relationships with stakeholders to ensure OCR's early opportunity to provide advice regarding federal legal standards and assistance; and providing input in national enforcement planning related to the initiation of compliance reviews or other proactive efforts to resolve problems of discrimination through the misuse of tests. Two national testing coordinators will support these efforts.

OCR anticipates the establishment of an external network of stakeholders, nationally, focused on this subject. OCR expects to broadly disseminate its testing guidance along with other related informational documents that will guide recipients regarding the appropriate uses of high stakes tests under federal law.

Work regarding these efforts is currently underway. OCR expects to establish 1998 timelines and detailed strategies in the fall of 1997.