

STATE OF TENNESSEE

OFFICE OF THE
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Opinion No. 01-164

ELL student TCAP results in calculating “teacher effect” for the TVAAS

QUESTIONS

1. Are there any federal or state constitutional or statutory provisions which would prohibit LEP(limited English proficiency), ESL(English as a second language), or ELL(English language learners) from taking the TCAP exam until they achieve some level of English proficiency?

2. If the answer to the first question is yes, are there any federal or state constitutional or statutory provisions which would prohibit the “teacher effect” data from being disaggregated to show “teacher effect” data both with and without data from LEP(limited English proficiency), ESL(English as a second language), or ELL(English language learners) students’ tests?

OPINIONS

1. No. There are no statutory or constitutional barriers under state or federal law to exempting LEP/ESL/ELL students from taking any TCAP exam. Nor is there express statutory permission. However, pursuant to a delegation of legislative authority and their general administrative authority, the Tennessee Board of Education [the Board] and Department of Education [the Department] have entered into an agreement with the federal government that will exempt those students from taking the TCAP annual Achievement test until they demonstrate sufficient English language skills.

2. This question is pretermitted by our answer to question No. 1.

ANALYSIS

Question 1

Question #1 asks whether there are statutory or constitutional barriers to excluding ELL/LEP/ELS¹ students from the Tennessee Comprehensive Assessment Program(TCAP) annual Achievement tests, used

¹For ease of discussion, ELL or English Language Learner will be used throughout this opinion to describe all possible variations or groups of non-English speaking students.

to calculate the “teacher effect” under Tenn. Code Ann. §49-1-606(a). The answer to this question requires an understanding of the interaction of several statutes that, by themselves are fairly simple to understand, but that interact with each other in a sometimes complex manner.

Tenn. Code Ann. §49-1-606

The statute first implicated by the question posed is Tenn. Code Ann. §49-1-606.² This statute, which is part of the Tennessee Value Added Assessment System (TVAAS), and in turn a part of the Education Improvement Act (EIA),³ provides the legislative authority for assessing the annual calculation of “teacher effects”. That calculation is an attempt to measure the effectiveness of teachers in grades three (3) through eight (8), throughout the State of Tennessee based on the improvement in students’ scores on the annual (TCAP) examination.⁴ The calculation utilizes a statistical model that attempts to quantify student performance on the TCAP examination in comparison to a student’s performance over a period of time.⁵ The “teacher effect” measure assesses the value added performance of students for each teacher.⁶ “Teacher effect” calculations are not public record, but can be utilized as part of a teacher’s formal professional evaluation process, once three (3) years of “teacher effect” data has been collected.⁷

Tennessee Value Added Assessment System

As discussed *supra*, Tenn. Code Ann. §49-1-606, is part of the larger, Tennessee Value Added Assessment System (TVAAS). The TVAAS was enacted by the legislature of Tennessee in 1992, as a

²Tenn. Code Ann. 49-1-606 provides:

(a) On or before November 1, 1996, and annually thereafter, data from the TCAP tests, or their future replacements, will be used to provide an estimate of the statistical distribution of teacher effects on the educational progress of students within school districts for grades three (3) through eight (8). A specific teacher's effect on the educational progress of students may not be used as a part of formal personnel evaluation until data from three (3) complete academic years are obtained. Teacher effect data shall not be retained for use in evaluations for more than the most recent five (5) years. A student must have been present for one hundred fifty (150) days of classroom instruction per year or seventy-five (75) days of classroom instruction per semester before that student's record is attributable to a specific teacher. Records from any student who is eligible for special education services under federal law will not be used as part of the value added assessment.

(b) The estimates of specific teacher effects on the educational progress of students will not be a public record, and will be made available only to the specific teacher, the teacher's appropriate administrators as designated by the local board of education, and school board members.

³ 1992, *Tennessee Public Acts*, Ch. 535, § 4.

⁴*See Id.*

⁵The Sanders’ Model, *see* Tenn. Code Ann. §§ 49-1-603, 49-1-604 & 49-1-606.

⁶Tenn. Code Ann. 49-1-606.

⁷*Id.*; *see also* Op. Tenn. Atty Gen. 96-033 (1996).

means for evaluating the performance of school districts, schools and teachers in the State, as part of the Education Improvement Act (the EIA).⁸ The TVAAS attempts to provide measures, not just of teacher performance, but of school districts and individual schools, using the same approach applied to “teacher effect” calculation.⁹

Tennessee Comprehensive Assessment Program

Though there is scant legislative history, the TCAP developed separately from the EIA and the TVAAS. There is no statute or other legislative pronouncement enacting or declaring the existence of the TCAP. The first statutory reference to the existence of the TCAP, appeared in 1992 when it was incorporated into several sections of the EIA.¹⁰ Previous to that Act, the sole statutory reference to a statewide program of comprehensive testing, enacted in 1981, provided:

(a) The state board of education shall be responsible for developing and implementing a comprehensive system of proficiency testing in the public schools of Tennessee. This system shall be designed to determine whether or not students are achieving at grade level in language arts and mathematical skills. The proficiency testing program in place on January 1, 1981, shall be continued and completely implemented so as to achieve this evaluation, but the state board may provide by regulation for additional requirements or more frequent or more inclusive testing as it deems necessary.¹¹

Though the language of the statute establishes that the Board of Education (the Board) had already developed a proficiency testing system, it stood as a legislative mandate to create a comprehensive system for the measurement of student performance in Tennessee. In 1988, an amendment to the statute permitted the State Board of Education to continue to utilize the pre-existing comprehensive testing program as “one means” of evaluating students, but again authorized the use of additional or alternate tests.¹² In 1992, as part of the EIA, the statute was amended to its current form:

(a) (1) To receive a full diploma upon graduation from high school, a student shall pass the **Tennessee comprehensive assessment program tests as adopted by the state board of education**, with scores established by the board. Students may take each of the required tests at any administration and in any order upon completion of the required

⁸*Tennessee Public Acts, 1992*, Chapter 535; and Tenn. Code Ann. §§ 49-1-601 - 49-1-610.

⁹Tenn. Code Ann. §§ 49-1-603 through 49-1-606.

¹⁰*Tennessee Public Acts, 1992*, Chapter 535, § 4.

¹¹Tenn. Code Ann. §49-117. The statute was renumbered Tenn. Code Ann. §49-6-6001, in 1983.

¹²*Tennessee Public Acts, 1988*, Chapter 494, § 1.

test, that Student's access to education, educational resources, or advancement to the next grade is not affected.

It is equally difficult to envision a successful argument that the new policy bears an insufficiently close relationship to an appropriate state goal, to the extent that any right of ELL students might be imposed upon. The Equal Protection Clause requires that "all persons similarly circumstanced shall be treated alike."³⁴ But, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."³⁵ States are given wide latitude to determine what is different and what is the same and whether the classification and the associated regulation bear the appropriate relationship to a legitimate public purpose.³⁶

Here it is likely that the requisite relationship exists between the classification of ELL students that are exempted from the Achievement exam and legitimate State policy goals, to pass constitutional scrutiny, regardless of the level of review applied. In this case the State has merely chosen to exempt a group of students from taking the TCAP Achievement test for 1 year, based upon rational and logical grounds -- an identifiable language skill deficiency. Exemption in future years will continue only if the student does not demonstrate English language proficiency, as measured by an objective test of those skills. This policy does not restrict access to continued education, promotion in grade, or graduation for the affected ELL students. It is accompanied by a requirement to provide special educational services to ELL students and a mandate to track their academic progress in the school system in order to ensure equal access to educational resources. This policy permits the State to achieve its legitimate goal of obtaining an accurate measure of the academic performance of its students. At the same time, the policy prevents such measurements from being skewed by the extraneous factor of scores from students with insufficient language skills to provide an accurate measure their capabilities. The policy will simultaneously ensure that ELL students receive equal access to the educational system in Tennessee.

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³⁴*Plyler v. Doe*, 457 U.S. 202, 215, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982), quoting, *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920).

³⁵*Tigner v. Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940).

³⁶*Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982)

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