

**STATE OF TENNESSEE**

OFFICE OF THE  
**ATTORNEY GENERAL**  
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NASHVILLE, TENNESSEE 37243-0497

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Opinion No. 01-164

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

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**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/ELS<sup>1</sup> students from the Tennessee Comprehensive Assessment Program(TCAP) annual Achievement tests, used

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<sup>1</sup>For 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.<sup>2</sup> This statute, which is part of the Tennessee Value Added Assessment System (TVAAS), and in turn a part of the Education Improvement Act (EIA),<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> The “teacher effect” measure assesses the value added performance of students for each teacher.<sup>6</sup> “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.<sup>7</sup>

### **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

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<sup>2</sup>Tenn. 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.

<sup>3</sup> 1992, *Tennessee Public Acts*, Ch. 535, § 4.

<sup>4</sup>*See Id.*

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

<sup>6</sup>Tenn. Code Ann. 49-1-606.

<sup>7</sup>*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).<sup>8</sup> 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.<sup>9</sup>

### **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.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> 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

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

<sup>9</sup>Tenn. Code Ann. §§ 49-1-603 through 49-1-606.

<sup>10</sup>*Tennessee Public Acts, 1992*, Chapter 535, § 4.

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

<sup>12</sup>*Tennessee Public Acts, 1988*, Chapter 494, § 1.

coursework. The state board of education may establish by regulation additional requirements for students who do not pass the required tests. Such requirements may include remedial work that may be counted only for elective credit toward graduation.<sup>13</sup>

The legislature also acknowledged the existence of, and adopted by reference in six (6) additional statutes within the EIA, the TCAP that had resulted from its earlier mandate.<sup>14</sup> The TCAP currently includes five (5) categories of examinations, with a total of twenty (20) tests that are administered to students at various points in their education.<sup>15</sup> Student scores on the annual Achievement test have no impact on the academic progression of the students taking it in grades three (3) through eight (8).<sup>16</sup>

### **Statutory Authority**

There are no existing cases interpreting the interplay of the EIA, the TVAAS and TCAP. Therefore, this question turns, primarily, on rules governing statutory interpretation. The statutes at issue are drafted using simple and direct language. Two fundamental rules of statutory interpretation require that statutes be interpreted so as to give effect to the intent of the Legislature and that statutes written in *pari materia* be read in *pari materia*.<sup>17</sup> A third rule, important to the resolution of this question, is that if the plain language of a statute or statutes is devoid of ambiguity or contradiction, there is no need to apply any further rule of construction.<sup>18</sup>

Tenn. Code Ann. §49-1-606, which requires the annual calculation of “teacher effect”, incorporates a legislative mandate to utilize the already existing TCAP annual Achievement tests, administered in grades three (3) through eight (8). Looking to the language of Tenn. Code Ann. §49-1-606(a) there is a specific provision describing the circumstances under which a student’s test score can be

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<sup>13</sup>Tenn. Code Ann. §49-6-6001.

<sup>14</sup>See also Tenn. Code Ann. §§ 49-1-211, 49-1-601, 49-1-605, 49-1-606, 49-1-607 & 49-6-6004.

<sup>15</sup>Those tests include; annual *Achievement tests*, given in grades 3 through 8; *Writing Assessments*, given in grades 4, 7 & 11; *Gateway tests*, given at the end of 10<sup>th</sup> grade for Algebra, Biology, Math; *End of Course tests*, given variously before graduation, includes 3 Gateway tests, English, Math Foundations 2, Algebra 2, Geometry, Physical Science, Chemistry, and American History; and *the High School Competency test*, for graduating seniors to qualify for diploma.

<sup>16</sup>This proposition was verified by staff at the TN Department of Education. There are no statutes or rules documenting this policy.

<sup>17</sup>*State v. Wilkes*, 222 Tenn. 384, 436 S.W.2d 425 (Tenn. 1968); and *Dixie Rents v. City of Memphis, et. al.*, 594 S.W.2d 397, 398 (Tenn. Ct. App. 1979).

<sup>18</sup>*Hickman Co.v. Wright*, 141 Tenn. 412 (Tenn. 1919); and *Heiskell v. Lowe*, 153 S.W. 284 (Tenn. 1912).

included or excluded from the calculation of a teacher's "effect".<sup>19</sup> There is no statement or suggestion in the language of the statute that any group of students can or should be prohibited, excluded, or exempted from taking the annual Achievement test for purposes of facilitating the calculation of the "teacher effect".<sup>20</sup> Neither is there any language that suggests that they cannot be prohibited, excluded, or exempted.<sup>21</sup> It is clear from the language of the relevant statute(s) that the legislature intended that the "teacher effect" calculation utilize TCAP test data and that it did not wish to impose on the authority delegated to the Board and Department to develop and administer those tests.

### **Administrative Policy**

As discussed above, the TCAP is a broad-ranging set of examinations that are administered at various points in the education of students between the third and twelfth grades.<sup>22</sup> TCAP's primary purpose is as a measure of student performance and competence for students throughout the State of Tennessee.<sup>23</sup> In its original mandate(s), the Legislature delegated broad authority to the Board to create a comprehensive system of tests to measure student performance.<sup>24</sup> Utilizing that authority, the Board has developed, and continues to develop, tests and rules for their administration, as part of the TCAP.<sup>25</sup> The Board has also continued to develop rules governing which students are required to take the exam(s).<sup>26</sup>

Historically, the Board and the Department have set procedures to gradually integrate ELL students into the TCAP process.<sup>27</sup> As part of its effort to comply with the requirements of Title I of the ESEA and

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<sup>19</sup>Tenn. Code Ann. §49-1-606(a) provides in pertinent part, "A student must have been present for one hundred and 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 of any student who is eligible for the special education assistance services under federal law will not be used as part of the value added assessment."

<sup>20</sup>*Id.* Nor is there any such suggestion in the separate, but analogous, statute requiring the calculation of school and school district effects. Tenn. Code Ann. §49-1-605.

<sup>21</sup>*Id.*

<sup>22</sup>*See* former Tenn. Code Ann. §49-117 and its successors, *supra*.

<sup>23</sup> *See id.*; and Tenn. Code Ann. §49-6-6001.

<sup>24</sup>*Id.*

<sup>25</sup>*See e.g.* TCAP Achievement Test, 2001 Administration Manual; and Proposed Policy for ELL students in Tennessee Comprehensive Assessment Program (TCAP) Testing.

<sup>26</sup>*Id.*

<sup>27</sup>Prior to the 20001-2002 school year, the Tennessee Board and Department of Education required that ELL students in their first year in a Tennessee school, take only the Math Computation portion of the annual Achievement test. Second year students were additionally required to additionally take the Vocabulary and Language portions of the

Title VI of the Civil Rights Act of 1964, as well as Tennessee's codification of the requirements of the Civil Rights Act,<sup>28</sup> the Board has entered into an agreement with the U.S. Department of Education regarding equal access to education and educational resources.<sup>29</sup> As part of that agreement, the Department is implementing a new policy expected to be effective for the 2001-2002 school year.<sup>30</sup> Pursuant to the agreement and the new policy, ELL students will be exempted from the annual achievement test during their first year in a U.S. school, provided the Department implements an English Proficiency Test (EPT).<sup>31</sup> Thereafter, inclusion of ELL students in the Achievement test in subsequent years is dependent upon a demonstration of English proficiency, through the EPT.

The result of the agreement, though not limited solely to the "teacher effect" calculus, is that ELL students will not be tested, and therefore, not included into the "teacher effect" calculation until they demonstrate sufficient English language proficiency. There is no statutory provision in Tennessee that prohibits this result. No provision of Title VI or any other federal statute prohibits this result, under the terms of Tennessee's voluntary agreement with the U.S. Department of Education.

### **Equal Protection**

Although no Tennessee statute expressly requires or prohibits any group from taking the TCAP Achievement tests, equal protection principles still operate to restrain other "official action" that might infringe the fundamental rights of identifiable persons or groups.<sup>32</sup> The equal protection provisions of the Fifth and Fourteenth Amendments come into play however, only when a statute or other official action acts to disadvantage a particular class of people or when they impinge upon the exercise of a "fundamental right."<sup>33</sup> Though impossible to analyze completely in the absence of a final rule and a specific set of facts, it is difficult to envision a successful argument that the new policy will impose on any fundamental right of ELL students in Tennessee. Regardless whether a student takes or passes the TCAP annual Achievement

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exam. In the third year, ELL students were to take the full Achievement Test. 2000-2001, Tennessee Comprehensive Assessment Program, Testing Coordinator's Manual, for the Annual Achievement Test, p.13.

<sup>28</sup>42 U.S.C. 2000d-d6; and Tenn. Code Ann. §4-21-901. As a recipient of Title I, and other federal educational funding, the Tennessee Board and Department of Education are subject to the requirements of Title VI.

<sup>29</sup>See 9/27/2000, letter from U.S. Dept. Of Education, acknowledging Title VI, voluntary resolution agreement, as well as a copy of the resolution agreement.

<sup>30</sup>See proposed Policy for ELL students in Tennessee Comprehensive Assessment Program (TCAP) Testing.

<sup>31</sup>*Id.*

<sup>32</sup>*City of Cleburne, et. al., v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed. 2d 313 (1985); and

<sup>33</sup>*Plyler v. Doe*, 457 U.S. 202, 216-217, 102 S.Ct. 2382, 2394-2395, 72 L.Ed.2d 786 (1982).

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."<sup>34</sup> 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."<sup>35</sup> 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.<sup>36</sup>

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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<sup>34</sup>*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).

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

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

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