School Law for Administrators

Headlines on School Law

Major failures in Tennessee with online testing modality

by Rob Taylor, Ph.D.

In November, 2014, Tennessee contracted with online testing vendor Measurement Inc. from North Carolina for $108 million to design a replacement for Tennessee's traditional state exam, TCAP. Since 2012 teachers have been frustrated in having to prepare students for a test aligned to the old state standards while at once using Tennessee's version of the new Common Core State Standards.

Finally, with the new online testing modality in place and new online tests ready to go, this misalignment of standards and testing was about to be fixed. But early this February when 44,513 students tried to log in to begin the math and English tests, which have now been tied to teacher evaluation and compensation, a nightmare happened. Computer screens froze when Measurement Inc.'s server went down.

It took only an hour for state schools' superintendent Candice McQueen to make a tough decision. She canceled the online exams and announced that the schools will administer a paper test instead, this April.

Tennessee legislators and Governor Bill Haslam immediately had second thoughts about tying this last-minute paper testing to teachers' evaluations, and the Governor drafted legislation that would allow teachers to choose how they want to use test results. This bill is expected to pass.

For several years Tennessee has been aggressive in moving toward the conversion from paper-and-pencil state tests to an updated online version. Millions of dollars of both Race to the Top grant funds plus state money have been spent upgrading school Wi-Fi networks and administering practice tests.

Responsibility for the technology platform malfunction was quickly laid at the feet of the vendor, Measurement Inc., by state officials. In an *EdWeek* article, Ms. McQueen was quoted as saying she would be re-evaluating the company's five-year contract. "Despite the many improvements the education department has helped to make to the system in recent months . . . we are not confident in the system's ability to perform consistently," she said.

President of Measurement Inc., Henry Scherich, deflected the criticism by claiming that the state had moved too precipitously in canceling the online test. His company had reserved space on 58 servers for the testing and more than 19,000 students did complete the test that day, he said. The online platform—called MIST—he went on, had been thoroughly tested in January with 1.1 million practice assessments to prepare for the February exams. Mr. Scherich added that he believed MIST'S "server overload problem" had already been fixed and that many of the student log-in problems could be attributed to "improper network utilization, not MIST functionality." Whoever is to be held most responsible, Measurement Inc. is currently printing up thousands of paper exams that will be sent out to Tennessee schools in the coming weeks.

As to Governor Haslam's proposed legislation backing away from utilizing the replacement tests in teacher evaluation, "That's a policy decision that has nothing to do with whether or not our online system works well or not," Scherich said.

Caught in the middle of these technical glitches and policy arguments, some teachers expressed deepening vexation about the volatility of how all the change is happening. By the 2014-15 school year, teachers were prepared to use new Common Core-aligned tests, designed under PARCC. But when the legislature grew concerned about the Common Core itself, lawmakers dropped the PARCC exam altogether so as to review what standards they wanted. Because of this vacillation, teachers had to return to the traditional state test that was not in sync with the Common Core.

At the news of this year's massive sever failure and the decision to resort to manual testing, some teachers are resignedly trying to make the best of it. The paper-and-pencil tests at least will be aligned with the current Tennessee academic standards. "We have to remember that, honestly, it does not impact the hard work we've done," said seventh grade math teacher Sunshine Light. "The only thing that's changing is the modality."

Tennessee is not alone in not trusting new online tests

Modality problems have been causing teachers a lot of frustration in Minnesota. The state successfully sued and then fired its vendor, Pearson, after hearing teacher complaints about servers crashing, online calculators giving incorrect answers, and computer screens freezing.

The Minnesota teachers union was not shy about its discontent. "We've seen the testing industry suck the joy out of teaching and learning," said union president Denise Specht. "That's not new for educators. But with the glitches, parents and educators can no longer trust the tests."

Faced with a volume of issues and hundreds of complaints, the state conducted an audit and lawmakers decided to cut back

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Around the Nation ~ North Carolina

The Dress Code At A Charter School in North Carolina Is Being Questioned By The ACLU

A lawsuit was filed in federal court by the American Civil Liberties Union of North Carolina against Charter Day School (CDS) questioning the school's dress code. According to the lawsuit, CDS' dress code, which requires girls to wear skirts, "skorts", or jumper dresses, discriminates against girls on the basis of gender in violation of federal Title IX.

The parents of three girls attending CDS partnered with ACLU-NC to bring this lawsuit against the district. The parents claim that they are supportive of a school uniform policy, but want the option of allowing girls to wear pants or shorts, which boys are allowed to wear. Chris Brook, legal director for ACLU-NC, said that a uniform policy at public schools would be acceptable as long as it was a policy that applied to boys and girls equally and did not discriminate based on gender.

Many CDS parents disagree with this lawsuit, and believe that the current dress code is not discriminatory toward female students. In a letter to ACLU-NC, CDS' attorney, George Fletcher, wrote that the school does not discriminate based on gender. "CDS agrees that all students should be able to attend school and actively participate in school related activities without unfair or unequal treatment based on sex," Fletcher wrote.

Past precedence seems to be on the side of the school, and accordingly Fletcher contends that the school has no intention of changing its policy. "The uniform policy is constitutionally and statutorily permissible and does not violate CDS students' rights in any manner," he said. Several parents pointed out that they were required to sign forms upon a child's admission to the school stating that they understand the dress code.

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the amount of required student testing. But, with the legislative session having opened March 8, union officials are clamoring for more action to force quicker and better fixes, such as more openness on how statewide tests are scored.

In Indiana, as in Tennessee, lawmakers in 2014 became wary of further support of the Common Core and threw out the PARCC exam because of its ties to the Core. Soon after, the state school board wrote a new exam, called ISTEP, which was to be administered by CTB/McGraw Hill.

This maneuvering led to so many problems that the *Indianapolis Star* conducted an investigation and found that CTB/McGraw Hill had calculated several student scores incorrectly. The *Associated Press* shortly thereafter revealed that a school board employee had tried secretly to mitigate critical language about the exam in an audit.

As a response, Gov. Mike Pence early in this session signed legislation "decoupling" 2015 test scores from compensation for teachers and from evaluations of school performance. Also legislation has been drafted that would get rid of the ISTEP exam by the end of next year.

While the entire online testing regime has found itself on shaky ground in many states, test advocates are defending the online development process by claiming that unions are making too much hoopla over minor incidents so as to force cut-backs in tests themselves.

Moreover, say some, testing is absolutely necessary, even with its inevitable growing pains. Henry Scherich of Measurement Inc., for example, is quoted in an *EdWeek* article that "So far, I don't think anybody has come up with a better system than having a testing program."

But critics of the wholesale move to online testing question the validity of such testing generally, pointing to what is called "mode effects." Some studies, as mentioned in a recent *Amazon-business* article, are showing, for example, a frequent pattern of higher scores by students in paper-based testing over computer-based exams.

One possible mode effect is that some students—often low-income—have less familiarity with computers than many peers, making their test scores lower. Also, schools more likely to be turning to online exams earlier are more likely to have a higher ratio of computers to students than less affluent schools. The myriad possible mode effects have become a subject of intense scientific study across the states.

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Discrimination

Former principal sues after he is replaced by someone less qualified but related to decision-makers

Citation: *Deputee v. Lodge Grass Public Schools, 128 Fair Empl. Prac. Cas. (BNA) 1372, 2016 WL 676363 (D. Mont. 2016)*

A federal district court in Montana recently granted a school district's request for summary judgment in part and denied it in part in a case in which the former principal of an elementary school in the district sued the district after he was demoted and then later let go in a reduction in force (RIF). He claimed that though the terms of the RIF required the district to notify him if openings became available, instead his former principal job became available and was filled by the superintendent of schools, at a substantial increase in his pay. The former principal claimed that the adverse actions he suffered were because of his age, gender, and lack of family relationship with members of the school board.

Kenneth Deputee was hired by the Lodge Grass Public Schools as an elementary school principal in 1997. Deputee performed well by reaching his annual standards and goals and otherwise meeting his professional duties. At the time, John Small was the district superintendent. With the school board's approval and despite Deputee's distinguished service, Small demoted Deputee from his position as elementary school principal to the position of dean of students in 2011.

In Deputee's place, the district hired Trivian Rides the Bear as elementary school principal. Rides the Bear is female, about 20 years younger than Deputee, and did not have a valid administrator's license. Deputee had more experience and professional success as both a classroom teacher and an administrator than Rides the Bear. Rides the Bear is also Small's niece and was related to several members of the school board.

From 2011 through 2013, Small subjected Deputee to "harassment and disparate treatment," according to Deputee, including putting Deputee in a cramped office with insufficient space to perform his job duties effectively and repeatedly shifting him among different classrooms, offices, and facilities. Deputee was also assigned duties outside the dean of student's job description, such as monitoring lunch periods and busing, as well as preparing a Title IX compliance program. Rides the Bear and other administrators were not assigned these duties. Small regularly criticized, threatened, and harassed Deputee, according to the complaint, including verbally attacking him and threatening to fire him without any explanation. Small continued these verbal attacks through June 2013. Despite this treatment, Deputee's evaluations were positive and no disciplinary proceeding or investigation was ever initiated against Deputee. Meanwhile, Rides the Bear failed to achieve many of her professional goals in 2012. During all of this, Deputee earned substantially less than Rides the Bear.

In 2013, the district instituted a RIF to identify which staff would be let go. In March 2013, Small recommended that Deputee's contract not be renewed, stating that this was needed to reduce salary and overhead. At a board meeting on May 14, 2013, Deputee challenged the recommendation but the board members approved the RIF (and Deputee's non-renewal) without giving his arguments any consideration. Under the terms of the RIF, all terminated employees were to be notified of future job openings.

In 2014, Rides the Bear resigned as the elementary school principal, which created the need for a new principal. Deputee never received notification of the job opening. Instead, Small assumed the position of elementary school principal and received a substantial increase in his own pay.

A few months after he was terminated, Deputee filed a charge of discrimination with the EEOC and the state human rights bureau, claiming that he had been terminated because of his gender, age, and lack of familial relationship to Small and school board members. After receiving a right-to-sue letter from the EEOC, Deputee sued the district and Small under § 1983. The claim against Small was dismissed after Small motioned for dismissal and Deputee did not contest this. The district also requested dismissal but Deputee opposed this, amending his complaint to include a discrimination equal treatment claim, along with age and gender discrimination claims under Title VII. The district again moved to dismiss, arguing that § 1983 does not provide a separate remedy for gender and age discrimination and that Deputee's age and gender discrimination complaints were time-barred. Alternatively, the district argued that Deputee failed to exhaust his administrative remedies on his discrimination claim. The district also argued that punitive damages, which Deputee requested, were not an available remedy.

The appeals court noted that "Section 1983 does not create any substantive rights, but is instead a vehicle by which plaintiffs can bring federal constitutional and statutory challenges to actions by state and local officials," citing *Anderson v. Warner*. The court also noted that federal law also prohibits employers from discriminating based on gender in Title VII, and age in the ADEA. Section 1983 cannot be used to "vindicate all federally-created rights" the court explained, noting that Congress may specifically foreclose a remedy under § 1983 if a separate statute's remedies are sufficiently comprehensive.

Applying this to Deputee's claims, the court concluded that the ADEA precludes the assertion of employment age discrimination complaints under § 1983, but that Title VII does not preclude a separate action under § 1983 for gender discrimination. However, one cannot use § 1983's remedies to vindicate rights provided by Title VII.

In Deputee's case, this meant that while he could not bring his

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Around the Nation ~ Mississippi

Desegregation Plan Renewed By DOJ, Approved By A Federal Court Judge

In an effort to move toward a higher level of racial equality in the schools, U.S. District Court Judge Michael P. Mills recently approved a desegregation order negotiated between Starkville-Oktibbeha Consolidated School District (SOCSD) and the U.S. Department of Justice (DOJ). This order sets the school attendance zones agreed upon by both sides. Before the student assignment plan can be executed, funding must be secured for a SOCSD-Mississippi State University partnership school, which will educate all countrywide sixth and seventh graders.

Racial equality will not be the only factor taken into consideration when placing students in schools. Other factors include advanced placement programs, extracurricular activities, transportation, school construction, and staff issues are included in the report to prevent the creation of a dual school system. To ensure that the school district is following through with the agreement, they will be expected to report a large volume of information to the court and DOJ every year, including the racial composition of its student body, staff, teachers, and administrators; transfer requests; classroom enrollment; hirings and other staffing matters; proposed campus construction plans; district transportation information; and other targeted data points.

Superintendent Lewis Holloway sees this agreement as a victory, and he says that he is relieved that the school district and DOJ could reach a compromise and avoid a lengthy court fight. "After working for a year and a half on this, we're very glad to have conclusion and a resolution we can live with. I think it's a good deal, and we can now turn our focus back to educating all Oktibbeha County school children," he said.

A year ago a temporary desegregation order was approved by Judge Mills asking both sides to develop a permanent plan for this year. DOJ previously objected to operating East at the same 94% African-American enrollment previously allowed by the former Oktibbeha County School District. It also objected to separating county and city school district sixth graders at different campuses, while countrywide high school students would join together at SHS.

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age discrimination complaint under § 1983, he could allege gender discrimination under § 1983 to the extent that it supplemented the remedies provided by Title VII.

On his procedural due process claims, the court concluded that Deputee pled sufficient facts to support his claim when he alleged that despite his satisfactory performance, the district demoted him and replaced him with someone less qualified but someone who was related to the principal and several board members. Further, while he was allowed to appear before the board before he was terminated in the RIF, Deputee argued that the board was biased because of the several members who were related to Rides the Bear. The court agreed, concluding that these facts stated a plausible claim that the district did not afford Deputee a fair tribunal.

Next the court rejected the district's argument that Deputee's race and age discrimination complaints were time-barred, noting that his first complaint (which stated causes of action under § 1983 for these claims) was filed within the 90-day timeline of the EEOC right-to-sue letter and his amended complaint (which added the actions under the ADEA and Title VII) was related to the first complaint sufficiently that it did not create the time bar even through the amendment was made after the 90-day requirement. The factual allegations, the court noted were identical in that he alleged the board discriminated against him due to his age and gender.

Further, the court rejected the argument that Deputee's claims fell outside of the 300-day timeline required for filing a discrimination charge with the EEOC following discriminatory conduct. While the court agreed that some of the complained-of activity occurred more than 300 days prior to Deputee's complaint, it noted that a hostile work environment claim is timely if any part of the "unlawful employment practice" occurred within the 180 or 300 days prior to the charge's filing, i.e. distinguishing between discrimination based on discrete acts and hostile work environment claims. In this case, the court found that Deputee alleged facts to support a claim of hostile work environment in violation of Title VII, with the latest alleged incidence of discrimination occurring in June 2013, within the 300-day time period. He could therefore assert that the hostile work environment originated in 2011 when he was demoted from his position and replaced by a younger, less qualified woman who was also related to several decision makers.

On Deputee's race discrimination claim however, the court found that Deputee did not raise this complaint with the EEOC and therefore the court dismissed this claim, along with the claim for punitive damages.

See also: *Anderson v. Warner, 451 F.3d 1063, 1067 (9th Cir. 2006).*

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