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New State Laws Reflect the Rethinking of Excessive Mandated Standardized Testing in America's Public Schools

Renalia Smith DuBose

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NEW STATE LAWS REFLECT THE RETHINKING OF EXCESSIVE MANDATED STANDARDIZED TESTING IN AMERICA'S PUBLIC SCHOOLS

Renalia Smith DuBose^A

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^A Renalia Smith DuBose resides in Plant City, Florida. She is a 34-year educator and was a social studies teacher, Supervisor of Teacher Training, and Director of Staff Development for the School District of Hillsborough County in Tampa, Florida. She was Executive Director of Training and Benefits for Orange County Public Schools in Orlando, Florida. Renalia was the Assistant Superintendent for Administration for Pasco County Public Schools in Land O'Lakes, Florida. Renalia taught School Law for the University of South Florida. She taught School Law, Instructional Leadership, Human Resources, School Finance, and School Management for St. Leo University. Renalia is currently an Assistant Professor of Law at Western Michigan University Thomas Cooley School of Law in Tampa, where she teaches Contracts I, Contracts II, Personal and Professional Ethics, Employment Law, and Education Law. Renalia has a Bachelor's Degree in Social Studies Education from the University of Florida (1978), a Master's Degree in Public Administration from the University of South Florida (1979), a Specialist Degree in Education Leadership from Nova Southeastern University (1991), and a Juris Doctorate from Florida Agricultural and Mechanical University (2005).

INTRODUCTION

The largest standardized testing cheating scandal in American history has caused many to question the practice of excessive standardized testing in America's public education system.¹ In the spring of 2013, thirty-five educators in Atlanta, Georgia, including the former superintendent, principals, teachers, and testing coordinators were indicted for cheating on statewide-standardized tests.² While most of these educators accepted plea bargains, eleven were convicted of racketeering and face up to twenty years in prison. Americans were shocked as they watched ten of the defendants being taken into custody while one pregnant woman was allowed to remain free until sentencing.³

Notwithstanding the issues of honesty, integrity, and depriving children of an accurate assessment of their academic abilities, the unfortunate events in Fulton County triggered a nationwide conversation regarding mandated standardized testing. Students are taking more standardized tests from kindergarten through twelfth grade than ever before in the history of our nation.⁴ On August 21, 2014, the United States Department of Education (USDOE) Secretary Arne Duncan posted his back-to-school message on the Official Blog of the U.S. Department of Education, in which he stated that testing and testing preparation take too much time in America's public schools. During the 2013-2014 academic year, America's students had the highest academic achievement, including the highest graduation rates on record, due in large part to improved instructional strategies driven by data gleaned from standardized testing. This is even true for groups of students who have historically not participated in improved achievement. Nevertheless, Secretary Duncan declared, "I believe testing issues today are sucking the oxygen out of the room in a lot of schools - oxygen that is needed for a healthy transition to higher standards, improved

1. See Nick Chiles, *Three School Administrators Convicted in Cheating Scandal Get Sentences Reduced by Judge*, ATLANTA BLACK STAR (Apr. 30, 2015), <http://atlantablackstar.com/2015/04/30/three-school-administrators-convicted-in-cheating-scandal-get-sentences-reduced-by-judge/>.

2. Emily Richmond, *Did High-Stakes Testing Cause the Atlanta Schools Cheating Scandal?*, THE ATLANTIC (Apr. 3, 2013), <http://www.theatlantic.com/national/archive/2013/04/did-high-stakes-testing-cause-the-atlanta-schools-cheating-scandal/274619/>.

3. See Steve Almasy, *Atlanta Schools Cheating Scandal: 11 of 12 Defendants Convicted*, CNN (Apr. 14, 2015), <http://www.cnn.com/2015/04/01/us/atlanta-schools-cheating-scandal/>.

4. Dan Fletcher, *Brief History Standardized Testing*, TIME (Dec. 11, 2009), <http://content.time.com/time/nation/article/0,8599,1947019,00.html>.

systems for data, better aligned assessments, teacher professional development, evaluation and support and more.”⁵

Such statements from the chief education officer in the United States did not go unnoticed by other national-level educators. The Council of Chief State School Officers and the Council of the Great City Schools issued a joint press release on October 15, 2014, acknowledging that quality student assessments are necessary to accurately gauge student progress and determine college and career readiness prior to graduation. Nevertheless, they concluded that America’s children need more than “cumbersome ranking systems and fill-in bubble tests to improve achievement.”⁶

The situation in Atlanta, Fulton County, Georgia, triggered a conversation about excessive mandated standardized testing in America’s public schools and caused public outcry against the negative impact of standardized testing. As a result, new state laws are being passed throughout the United States to not only end the rapid increase in standardized testing but to reduce state standardized testing requirements.⁷ This article presents evidence outlining three of the primary reasons for excessive mandatory testing in America’s public schools: (1) increasing federal intervention into public education, (2) federal pressure on states to accommodate standardized test reporting requirements, and (3) vendor pressure to contract with state departments of education.

I. A BRIEF HISTORY OF STANDARDIZED TESTING

A. *The Beginning of Standardized Testing*

The advent of standardized testing can be traced to ancient China around 2200 B.C., where the emperor used results of testing to assess subjects’ qualifications for government positions.⁸ Government officials were tested on their knowledge of Confucian philosophy and

5. Arne Duncan, *A Back-to-School Conversation with Teachers and School Leaders*, HOMEROOM (Aug. 21, 2014), <http://blog.ed.gov/2014/08/a-back-to-school-conversation-with-teachers-and-school-leaders/>.

6. Press Release, Council of Chief State Sch. Officers, Chief State School Officers and Urban School Leaders Announce Joint Effort to Improve Student Testing, (Oct. 15, 2014), http://www.ccsso.org/News_and_Events/Press_Releases/Chief_State_School_Officers_and_Urban_School_Leaders_Announce_Joint_Effort_to_Improve_Student_Testing.html.

7. Duncan, *supra* note 5.

8. *Education Discussion: The History and Evolution of Standardized Testing*, HUBPAGES (Apr. 1, 2013), <http://epsilon5.hubpages.com/hub/Education-Discussion-The-History—Evolution—and-Acceptance-of-Standardized-Testing> (citing JAMES L. WALDROP, *STANDARDIZED TESTING IN THE SCHOOLS: USES AND ROLES* 5-9 (1976)).

poetry.⁹ They were retested every three years, and any official who was not promoted after three cycles of testing was terminated. This system of testing lasted until 1905, when it was banned in China.¹⁰

Because early educational systems of testing in the United States were modeled after those of western civilizations, especially Greece, where philosophers used the Socratic method of testing, oral and written essays were the primary method of testing early colonial students.¹¹ During the late 19th and early 20th centuries, progressive ideas about the education of children and the influx of immigrants caused the number of children sitting behind desks in urban settings to increase at dramatic rates.¹² As a result, American educational testing transitioned from oral and written essays to standardized testing, as it allowed educators to test the masses more efficiently than essay testing.¹³

Alfred Binet, the father of standardized testing, believed he could develop a standardized test to measure the intelligence of children based on their age.¹⁴ This French psychologist began his work in 1905, after France passed compulsory education laws for all students.¹⁵ To identify the level of assistance needed for student success, he developed a battery of questions designed to test skills not typically taught in school, such as problem-solving, attention, and memory.¹⁶ The result of his work was the first usable intelligence test, the Binet-Simon Scale.¹⁷ The Binet-Simon scale was introduced to the United States by Lewis Terman, a Stanford University psychologist.¹⁸ While numerous revisions have occurred, the Stanford-Binet Intelligence Test is currently used to determine the intelligence quotient (IQ) of students throughout the United States.¹⁹

9. Fletcher, *supra* note 4.

10. *Education Discussion*, *supra* note 8.

11. Fletcher, *supra* note 4.

12. U.S. CONG., OFFICE OF TECH. ASSESSMENT, TESTING IN AMERICAN SCHOOLS: ASKING THE RIGHT QUESTIONS 103, 105 (Feb. 1992), http://govinfo.library.unt.edu/ota/Ota_1/DATA/1992/9236.PDF [hereinafter TESTING IN AMERICAN SCHOOLS].

13. Fletcher, *supra* note 4.

14. *Education Discussion*, *supra* note 8 (citing DAVID OWEN, NONE OF THE ABOVE: BEHIND THE MYTH OF SCHOLASTIC APTITUDE 189 (1985)).

15. Kendra Cherry, *History of Intelligence Testing*, ABOUT.COM, <http://psychology.about.com/od/psychologicaltesting/a/int-history.htm> (last visited Jan. 9, 2016).

16. *Id.*

17. *Id.*

18. *Id.*

19. *See generally id.*

B. *The Impact of the Industrial Revolution and World War I*

At the beginning of the 20th century, the effects of the Industrial Revolution led to permanent changes in public education. The need for qualified professionals for positions such as business executives, engineers, researchers, managers, and agriculturalists was critical to the success of the capitalistic economy in the United States.²⁰ Industrialists began to demand more progressive methods of identifying candidates who could drive the economic engines in America.²¹ At the onset, public school and university educators resisted the pressure to provide candidates who could operate an economy suitable for the Industrial Revolution, primarily because it would require educators to change their teaching methods; nevertheless, industrialists demanded that educators produce candidates capable of running the new technological systems of the growing capitalistic society.²² As a consequence of this pressure, Columbia University, between 1908 and 1916, created standardized achievement tests designed to measure arithmetic, language, reading, spelling, drawing, and hand-writing abilities of elementary and secondary students.²³ By 1918, over 100 standardized tests had been developed in the United States to measure the achievement levels of students.²⁴

The effects of World War I on standardized testing cannot be overstated. The inventions of the Industrial Revolution changed warfare because a more educated soldier was necessary to fight this first industrialized war from 1914 to 1918. The use of weapons such as tanks, submarines, airplanes, and nerve gas required soldiers and potential officers to possess a level of intelligence greater than in previous wars.²⁵ The United States Army needed an efficient method to determine the intelligence level of mass numbers of recruits and potential officers. Arthur Otis and Robert Yerkes developed the Army Alpha Test, a major contribution to the future of standardized testing.²⁶ As President of the American Psychological Association, Yerkes also participated in the development of the Army Beta Intelligence

20. TESTING IN AMERICAN SCHOOLS, *supra* note 12, at 115.

21. *Id.*

22. *Id.*

23. *Id.* at 116.

24. *Id.*

25. 1914-1918: The First Industrial War, EURONEWS (Nov. 11, 2008), <http://www.euronews.com/2008/11/11/1914-1918-the-first-industrial-war/>.

26. N.T. Edwards, *The Historical and Social Foundations of Standardized Testing: In Search of a Balance Between Learning and Evaluation*, 10 SHIKEN: JALT TESTING & EVALUATION SIG NEWSL. 8, 8 (2006), http://jalt.org/test/edw_1.htm.

Test. These two tests were administered to over two million soldiers in an effort to best match soldiers with positions.²⁷ These Army tests were the first grand-scale use of multiple-choice questions graded by clerical workers with specialized pencils.²⁸

In 1929, Everett Lindquist, Professor of College of Education at the University of Iowa, developed the first major statewide testing program where schools could volunteer to participate.²⁹ Individual students and schools were measured, and schools that scored well received awards and accolades.³⁰ The Iowa Test of Basic Skills was given to students in grades three through eight, and the Iowa Test of Educational Development was given to high school students.³¹ Lindquist is responsible for the transition in standardized testing from intelligence testing for the purpose of classifying students to achievement testing for diagnosing and monitoring.³² Lindquist is also credited with inventing the first mechanized scoring machine, which increased the popularity of standardized testing due to the efficiency of the grading process.³³ By the late 1930s, states outside of Iowa were using these tests to measure performance of individual students and schools.³⁴ Later in his career at the University of Iowa, Lindquist developed the American College Testing (ACT), which tests reading, math, and English skills and helps students identify their preferred course of study, and the General Education Development (GED) tests,³⁵ a series of tests designed to determine whether students have high school level academic skills.³⁶

University settings were not insulated from the standardized testing movement. During the late 1800s and early 1900s, prominent universities such as Princeton, Harvard, Yale, and Johns Hopkins began to require admissions examinations; however, each university had

27. Cherry, *supra* note 15.

28. TESTING IN AMERICAN SCHOOLS, *supra* note 12, at 124.

29. *Id.* at 122-24.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. Fletcher, *supra* note 4.

36. 2002 Series GED Test FAQs, GED TESTING SER., http://www.gedtestingservice.com/testers/faqs-test-taker#GED_stand_for (last visited Jan. 9, 2016).

its own specialized test.³⁷ Public outcry caused universities to examine this disjointed and confusing process.³⁸

In 1933, James Bryant Conant was appointed president of Harvard College, and he strongly believed students of modest means should have access to a high-quality post-secondary education.³⁹ He established a scholarship program for students who were not members of the American aristocracy and directed his assistants, Henry Chauncey and Wilbur Bender, to find an examination to assess the skills of these students.⁴⁰ Chauncey recommended the Scholastic Aptitude Test (SAT), established by a Princeton psychology professor, Carl Brigham.⁴¹ Brigham helped develop the Army Alpha Test, the forerunner to the SAT.⁴² In 1937, Conant published a series of articles in which he recommended that all testing agencies merge into one organization.⁴³ In 1948, after the end of World War II, Conant established the Education Testing Service (ETS) as a private, non-profit organization combining all the major testing agencies, and he became the first Chairman of the Board.⁴⁴ Modernly, the ACT and the SAT are two standardized tests routinely required by colleges and universities throughout the United States.⁴⁵

C. *The Impact of World War II and Post World War II Events*

As in World War I, standardized testing was used during World War II to match service personnel to positions, especially to identify officer candidates.⁴⁶ Under Chauncey's direction, an adapted SAT was administered to over 300,000 candidates.⁴⁷ In schools post-World War II, standardized testing was, however, very different from Post-World War I testing.⁴⁸ Standardized testing after World War II was used pri-

37. Shaaban Fundi, *High Stakes Standardized Testing in America: The History*, KIBOGOJI.COM (Apr. 17, 2013), <http://kibogoji.com/2013/04/17/high-stake-standardized-testing-in-the-american-education-system-what-led-us-here/>.

38. *Id.*

39. *Americans Instrumental in Establishing Standardized Testing*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/sats/where/three.html> (last visited Jan. 9, 2016).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Fletcher, *supra* note 4.

46. Cherry, *supra* note 15.

47. *Americans Instrumental in Establishing Standardized Testing*, *supra* note 39.

48. TESTING IN AMERICAN SCHOOLS, *supra* note 12, at 124.

marily as the basis for selection and segregation of students rather than to monitor and diagnose student achievement.⁴⁹

First, the era of intense Post-World War II competition between the United States and the Soviet Union led to the use of standardized testing to determine class placement so that more advanced students could be separated from those who were perceived as unable to further the United States' attempts at dominance in the Cold War era.⁵⁰ The Soviet Union's launching of Sputnik on October 4, 1957, "the first man-made object to orbit the earth," shocked Americans and caused the United States' educational systems to emphasize math and science education.⁵¹ "The Sputnik Effect" caused concern that American students were not able to compete with students from other countries, especially the Soviet Union; as a result, gifted education programs for math and science sprang up all over America.⁵² Intelligence quotient test scores are typically used to identify students for gifted education with a predetermined score requirement. The Stanford-Binet Intelligence Test was used then and is still one of the standardized tests used nationwide to determine giftedness.⁵³ This spurred legal challenges by students who were excluded from the gifted and advanced programs. In *Roe v. Commonwealth of Pennsylvania*, a student excluded from the gifted program challenged the constitutionality of the required IQ score of 130 or higher as a violation of her equal protection and due process rights under the Fifth and Fourteenth Amendments.⁵⁴ The court ruled she had no property interest or legitimate claim of entitlement to the gifted program.⁵⁵

Second, after World War II, scores from standardized testing were used to achieve intra-school segregation through a phenomenon commonly known as tracking or ability grouping.⁵⁶ The practice of seg-

49. *Id.* at 127.

50. Edwards, *supra* note 26, at 9.

51. *Sputnik*, U.S. HISTORY, <http://www.u-s-history.com/pages/h1716.html> (last visited Jan. 9, 2016).

52. TOM LOVELESS, MAKING SENSE OF THE TRACKING AND ABILITY GROUPING DEBATE 14 (Aug. 1998), http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/Loveless%20Final%20Copy_8.pdf.

53. *Tests and Assessments*, NAT'L ASS'N FOR GIFTED CHILDREN, <http://www.nagc.org/resources-publications/gifted-education-practices/identification/tests-assessments> (last visited Jan. 9, 2016).

54. Student *Roe v. Commonwealth of Pennsylvania*, 638 F. Supp. 929, 930 (E.D. Pa. 1986).

55. *Id.*

56. Bonnie Grossen, *How Should We Group to Achieve Excellence with Equity?*, NAT'L CTR. TO IMPROVE THE TOOLS OF EDUCATORS (Jul. 1996), <http://www.uoregon.edu/~adiepr/grp.htm>.

regation already had a strong foundation following *Plessy v. Ferguson*, a decision of the United States Supreme Court that upheld a Louisiana state law requiring public accommodations to be separate but equal; based on the opinion of the Court, this practice became legal throughout the United States.⁵⁷ The Court later declared in *Brown v. Board of Education*, however, that “separate but equal” has no place in public education.⁵⁸ Nevertheless, public educators utilized standardized testing as a means to segregate students within schools by dividing a school’s population based on the results of standardized test scores.⁵⁹ Over time, this practice was challenged in federal courts. In *McNeal v. Tate County School District*, the Fifth Circuit of the United States Court of Appeals opined that a school district could not track black students into low-level classes based on scores from standardized testing; furthermore, the court stated the performance of black students on the standardized tests was predictable due to the district’s history of unequal education for minority children.⁶⁰

Third, the impact of standardized testing as a means to select and segregate students in the Post-World War II era, and the legal challenges associated therein, took a different direction near the end of the 20th century. The awakening of America’s social consciousness fueled by the Civil Rights Movement caused many to wonder about the education of all minority students in America.⁶¹ The Civil Rights Act of 1964, signed by President Lyndon Johnson, required Americans to closely examine the impact of segregation on America’s minority children and standardized testing played a major role in that examination.⁶² As required by Section 402 of the Civil Rights Act of 1964:

The Commissioner shall conduct a survey and make a report to the President and the Congress, within two years of the enactment of this title, concerning the lack of availability of equal educational opportunities for individuals by reason of race, color, religion, or national origin in educational institutions at all levels in the United States, its territories and possessions, and the District of Columbia.⁶³

57. 163 U.S. 537, 552 (1896).

58. 347 U.S. 483, 692 (1954).

59. See, e.g., *McNeal v. Tate County School District*, 508 F. 2d 1017 (5th Cir. 1975).

60. *Id.* at 1020.

61. TESTING IN AMERICAN SCHOOLS, *supra* note 12, at 128.

62. JAMES COLEMAN ET AL., U.S. DEP’T OF HEALTH, EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY iii-iv (July 1966), <http://files.eric.ed.gov/fulltext/ED012275.pdf>.

63. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

For public education, the Civil Rights Act resulted in the first nationwide standardized test and the first survey of public educators, the Equality of Educational Opportunity Survey.⁶⁴ It was representative of all American schools in the North, South, East, and West.⁶⁵ The survey concentrated on six racial and ethnic groups: Negroes, American Indians, Oriental Americans, Puerto Ricans living on the mainland, and whites.⁶⁶ The survey asked four major questions:

1. How segregated are racial and ethnic groups in public schools?
2. Do public schools offer equal educational opportunities for all children?
3. How much do children learn as measured by standardized tests?
4. What is the relationship between students' achievement and the kinds of schools the students attend?⁶⁷

The results were reported to the President and Congress in July 1966, in *The Equality of Educational Opportunity*, which gave Americans nationwide their first glimpse of the disparate quality of public education in the midst of the Cold War.⁶⁸ Regrettably, the results of the survey were not good news for the nation because they showed that minority pupils in America were achieving at levels well below the levels of white pupils.⁶⁹

In Florida, statewide assessments began in the 1970s and the Florida Legislature authorized its first standardized graduation exit examination in 1976.⁷⁰ The Florida State Student Assessment Test Part II, a minimum competency test, was first implemented with the graduating class of 1983 and was the first graduation-required test in America's public schools.⁷¹ In 1984, the test was challenged in *Debra P. v. Turlington*, and the Eleventh Circuit of the United States Court of Appeals affirmed the denial of a high school diploma to a black student based on her performance on the standardized test.⁷² She claimed her constitutional due process rights were violated because of inferior education offered to black students throughout Florida.⁷³ The court opined

64. See generally COLEMAN ET AL., *supra* note 62.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 21.

70. FLA. DEP'T OF EDUC., ASSESSMENT INVESTIGATION 8 (Feb. 18, 2015), <http://www.fldoe.org/core/fileparse.php/12003/urlt/CommAssessmentInvestigationReport.pdf> [hereinafter ASSESSMENT INVESTIGATION].

71. *Id.*

72. 730 F.2d 1405, 1416-17 (11th Cir. 1984).

73. *Id.* at 1406.

that students graduating near the end of the 20th century were no longer victims of past segregation, which afforded them an inferior education.⁷⁴ The Florida Department of Education Commissioner Ralph Turlington was able to carry the burden of providing proof that the test was a valid measure of the curriculum taught in Florida's schools.⁷⁵ A new era of standardized testing was born in Florida and across the nation, allowing students to be selected for promotion and graduation based on standardized test scores.

II. WHY THE DRAMATIC INCREASE IN MANDATORY STANDARDIZED TESTING?

In October 2014, the Center for American Progress published *Testing Overload in America's Schools*, in which it released the results of its study of fourteen school districts.⁷⁶ According to the results, students in grades three through eight take as many as twenty standardized tests per year, with an average of ten per year.⁷⁷ The Secretary of Education, Arne Duncan, echoed the claim that schools are administering too many standardized tests in America's public schools last year.⁷⁸ One has to wonder why there is so much standardized testing of America's public school students. The author of this article contends that there are three primary forces that have caused the excessive mandated standardized testing in America's public schools: (1) increasing federal intervention into public education, (2) federal pressure on states to accommodate standardized test reporting requirements, and (3) vendor pressure to contract with state departments of education.

A. Reason 1: Federal Intervention

The word "education" does not appear in the U.S. Constitution. Education is considered to be a responsibility reserved to states based on the Tenth Amendment.⁷⁹ Nevertheless, the federal government has a history of intervening into public education by providing various forms of support with accompanying conditions. That intervention be-

74. *Id.* at 1415.

75. *Id.* at 1416.

76. See MELISSA LAZARIN, CTR. FOR AM. PROGRESS, *TESTING OVERLOAD IN AMERICA'S SCHOOLS* (Oct. 2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/10/LazarinOvertestingReport.pdf>.

77. *Id.* at 3.

78. Duncan, *supra* note 5.

79. See U.S. CONST. amend. X.

gan during colonial times as early as the Land Ordinance of 1785, where the Continental Congress required territories wanting to join the Union to carve out land to be set aside for the establishment of public schools.⁸⁰

There shall be reserved for the United States out of every township, the four lots, being numbered 8, 11, 26, 29, and out of every fractional part of a township, so many lots of the same numbers shall be found thereon, for future sale. There shall be reserved the lot No. 16, of every township, for the maintenance of public schools within the said township; also one third part of all gold, silver, lead, and copper mines, to be sold, or otherwise disposed of, as Congress shall hereafter direct.⁸¹

As previously noted, the level of federal intervention increased as a result of the Civil Rights Act of 1964, which commissioned a thorough examination of the condition of public education in the United States.⁸² The report to the President and Congress, *Equality of Educational Opportunity*, included information regarding America's first nationwide standardized testing of kindergarten through twelfth grade students.⁸³ Section 405 of the Civil Rights Act of 1964 also provided grants to school boards to fund training stipends for teachers and other personnel and to hire specialists to assist with the desegregation process.⁸⁴

Another flashpoint of federal intervention into public education occurred when Ronald Reagan was elected President of the United States in 1981, and the conservative movement, the Moral Majority, demanded more accountability from public education. Their expectation of measurable outputs, by which students and the educational systems would be judged, required regular standardized testing data.⁸⁵ In 1981, Secretary of Education T. H. Bell brought together educational leaders from throughout the country to form the National Commission on Excellence, directing them to report on the condition of

80. KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 77 (8th ed. 2012).

81. *Land Ordinance of 1785*, THE NAT'L ARCHIVES CATALOG (May 20, 1785), <https://research.archives.gov/id/1943531>.

82. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

83. COLEMAN ET AL., *supra* note 62.

84. Civil Rights Act of 1964 § 405, Pub. L. No. 88-352, 78 Stat. 247-48 (1964).

85. G.R. Girod & M. Girod, *A Brief History of the Standards-Based Movement in Education*, W. OR. UNIVERSITY (June 20, 2012), http://www.wou.edu/~girodm/100/brief_history_of_standards.pdf.

public education within eighteen months.⁸⁶ The resulting report, *A Nation at Risk*, described a mediocre educational system that put our political freedoms and economic survival at risk.⁸⁷ It described students' performance on standardized tests as being lower than when Sputnik was launched by the Soviet Union.⁸⁸ Two terms signaled a new level of federal intervention into public education, *standards* and *accountability*, and caused standardized testing to become a staple in judging the success or failure of students, schools, districts, and state educational systems.⁸⁹

No Child Left Behind (NCLB), a reauthorization of the Elementary and Secondary Education Act, originally signed into law by President Lyndon Johnson in 1965,⁹⁰ was signed into law by President George W. Bush in 2001.⁹¹ It introduced the most sweeping changes in public education in the history of the United States. For the first time, the federal government required regular and systematic standardized testing of students nationwide, and compliance was tied to federal funds flowing to states.⁹² States were required to develop subject area standards and use them to test third through eighth grade students annually in reading and mathematics by 2005-2006; test students at least once in elementary, middle school, and high school in science by 2007-2008; and test a sample of fourth and eighth graders with the National Assessment Educational Progress program in reading and math to compare them with other students in the nation.⁹³ Schools had to meet "adequate yearly progress" goals, and all students had to reach proficiency by 2013-2014.⁹⁴

The standardized tests associated with NCLB were called "high-stakes tests" because consequences for not meeting the goals were more intense than ever before in American public education.⁹⁵ The sanctions included public reporting of school and district report

86. DAVID P. GARDNER ET AL., NAT'L COMM. ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 1* (Apr. 1983), <http://files.eric.ed.gov/fulltext/ED226006.pdf>.

87. *See generally id.*

88. *Id.* at 5.

89. Girod & Girod, *supra* note 85.

90. *Every Student Succeeds Act (ESSA)*, U.S. DEP'T OF EDUC., <http://www.ed.gov/essa> (last visited Jan. 9, 2016).

91. *No Child Left Behind*, EDUC. WEEK, <http://www.edweek.org/ew/issues/no-child-left-behind/> (last updated Sept. 19, 2011).

92. *Id.*

93. *Id.*

94. *Id.*

95. Patte Barth, *Standards-Based Reform*, CTR. FOR PUB. EDUC., http://www.education.com/reference/article/Ref_Standards_based/ (last updated Dec. 16, 2008).

cards, financial rewards for schools that met specified goals, public censure and corrective actions for schools that did not meet goals, student options to leave failing schools, and teacher and administrative changes at unsuccessful schools.⁹⁶ Testing requirements associated with NCLB regularly touched almost every child and every public school in America.⁹⁷

President Barack Obama increased the use of standardized testing when he signed 'Race to the Top' into law in 2009.⁹⁸ Two key elements of this competitive grant process, to which forty-six states and the District of Columbia made initial applications, were rigorous standards with better assessments and improved data systems for schools, teachers, and parents to access student achievement data.⁹⁹ Both of these elements were dependent upon new standardized tests based on the nation's first attempt at national standards, Common Core.¹⁰⁰ Because the grant awards were high, participating states were willing to increase their testing of students in all subject areas as required by Race to the Top.¹⁰¹ Florida received \$700,000,000 as a second phase grant recipient of Race to the Top.¹⁰² In order to have a consistent measure of achievement, states developed standardized tests for content areas that did not previously have standardized testing, such as art, music, and physical education.¹⁰³ To assist art teachers unfamiliar with standardized testing, the National Endowment for the Arts recommended the development of a national, online database of assessments from thirty exemplary programs throughout the United States.¹⁰⁴ Standardized testing in these areas was very controversial, and the increased standardized testing associated with Race to the Top was widely criticized by parents, educators, and educational advocacy groups.¹⁰⁵ Federal intervention into public education thus caused stan-

96. *Id.*

97. *Id.*

98. *Race to the Top*, THE WHITE HOUSE, <https://www.whitehouse.gov/issues/education/k-12/race-to-the-top> (last visited Jan. 9, 2016).

99. *Id.*

100. *Id.*

101. Joe Onosko, *Race to the Top Leaves Children and Future Citizens Behind: The Devastating Effects of Centralization, Standardization, and High Stakes Accountability*, 19 DEMOCRACY & EDUC. J. 1, 1 (2011), <http://democracyeducationjournal.org/home/vol19/iss2/1/>.

102. *Id.*

103. Dana Goldstein, *No More Ditching Gym Class*, SLATE (June 13, 2012), http://www.slate.com/articles/double_x/doublex/2012/06/standardized_tests_for_the_arts_is_that_a_good_idea_.2.html.

104. *Id.*

105. *Id.*

standardized testing to increase in public schools at an unprecedented rate.¹⁰⁶

Throughout history, attempts at widespread standardized testing in the United States have taken various forms as documented in this article. Admittedly, early forms of national standardized testing systems had mixed results in meeting the educational needs of students, parents, educators, and the general public.¹⁰⁷ Standardized tests, by definition, are administered consistently under standard conditions.¹⁰⁸ Norm-referenced tests and criterion-referenced tests are the two types of testing instruments typically used in America's public schools.¹⁰⁹ Norm-referenced tests compare students to a representative sample of their peers and are indicative of IQ.¹¹⁰ Criterion-referenced tests are designed to assess student knowledge or achievement in a specific content area or based on established content standards.¹¹¹

Modernly, NCLB dramatically increased criterion-referenced tests because federal reporting requirements were based on established state standards.¹¹² Meeting or exceeding the state standards was the foundation of the standards-based accountability movement.¹¹³ As stated in this article, the use of mandated standardized testing was also dramatically increased under *Race to the Top*, and many states joined the national standards movement by adopting Common Core as the standard for statewide standardized testing.¹¹⁴ The process used by states to create criterion-based standardized tests for compliance with federal mandates typically includes:

- Adoption of Content Standards – These may be developed at either the state or national level and are benchmarks for stu-

106. *Id.*

107. See *National Assessment of Educational Progress*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/nationsreportcard/about/naephistory.aspx> (last visited Jan. 9, 2016).

108. Dawn Flanagan, Jennifer Mascolo & Steven Hardy-Braz, *Standardized Testing*, EDUCATION.COM, <http://www.education.com/reference/article/standardized-testing/> (last updated Dec. 23, 2009).

109. *Id.*

110. *Id.*

111. *Id.*

112. *A Guide to Standardized Testing: The Nature of Assessment*, CTR. FOR PUB. EDUC. (Feb. 15, 2006), <http://www.centerforpubliceducation.org/Main-Menu/Evaluating-performance/A-guide-to-standardized-testing-The-nature-of-assessment> [hereinafter *A Guide to Standardized Testing*].

113. *Id.*

114. *Race to the Top*, *supra* note 98.

dents' performance at a pre-determined point in the students' academic career.¹¹⁵

- Test Item Development – Educational experts create test items that assess students' knowledge and skills based on the adopted content standards.¹¹⁶
- Field-Testing – Diverse groups of students take standardized tests consisting of the test items developed by the experts to determine whether the items fairly and accurately indicate the students' knowledge of the standards.¹¹⁷ Students do not receive test evaluation results during field-testing; the items, not the students, are evaluated.¹¹⁸
- Test Construction – Based on the results of the field-testing, items are included, excluded, or revised for the production of the standardized test.¹¹⁹ The selected items must assess the varying achievement levels of students to whom the standardized test will be administered.¹²⁰
- Establishment of Performance Standards – Educators make decisions regarding the level of performance required to meet the established standards.¹²¹ Gradations of performance levels are used, such as exceptional, proficient, basic, and novice to provide feedback to students, parents, educators, and policymakers.¹²²

Typically, mandated standardized tests are machine-graded, multiple-choice examinations because of the efficiency in grading and the objectivity in determining student performance.¹²³ Nevertheless, other formats, such as open-ended essay questions, performance-based demonstrations, and compilation of students' work in portfolios have been used.¹²⁴

115. Kimberly O'Malley, *Standardized Testing. What Is It and How Does It Work?*, PEARSON RES. & INNOVATION NETWORK (May 17, 2012), <http://researchnetwork.pearson.com/college-career-success/standardized-testing-what-is-it-and-how-does-it-work>.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *A Guide to Standardized Testing*, *supra* note 112.

124. *Id.*

B. Reason 2: Federal Pressure on States to Accommodate Federal Standardized Testing Reporting Requirements

Before pressure to accommodate federal standardized test reporting requirements, states made early attempts at standardized testing as a means to genuinely assess, monitor, and improve student achievement among students.¹²⁵ The problems with excessive mandated standardized testing occurred when federal intervention into public education became overly intrusive in that federal programs had increased standardized testing reporting requirements beyond what states required. States' compliance with federal initiatives, such as NCLB and Race to the Top, was necessary to receive previously allocated federal funds and to become eligible to receive newly allocated federal funds.¹²⁶

The genesis of Florida's statewide-standardized testing program began in 1968, with the passage of Section 229.551 of the Florida Statutes, directing the Commissioner of Education to increase the quality of education throughout Florida. In 1969, the Department of Education, under the direction of the Commissioner of Education, outlined nine principles necessary to meet the mandate, two of which directly addressed standardized testing: the creation of minimum standards of achievement and assistance to districts for evaluating results.¹²⁷ The Florida Statewide Assessment Program was created by the Legislature in 1971, and the first statewide assessment in reading was administered during the 1971-1972 school year.¹²⁸ Over the next five years, a series of statewide assessments were developed with the assistance of the University of California at Los Angeles, University of Florida, Florida State University, Florida International University, University of West Florida, Westinghouse Learning Corporation, Education Testing Service, and various Florida school districts.¹²⁹

From 1971-1978, public universities, private educational vendors and school districts carried the Florida Department of Education through the process of developing various standardized tests.¹³⁰ In 1975, trainable mentally handicapped students participated in stan-

125. *A Chronology of Events: 1968-1978*, FLA. DEP'T OF EDUC., <http://www.fldoe.org/accountability/assessments/k-12-student-assessment/history-of-fls-statewide-assessment/assessment-chronology/hsap6878.stml> (last visited Jan. 9, 2016).

126. Onosko, *supra* note 101.

127. *A Chronology of Events: 1968-1978*, *supra* note 125.

128. *Id.*

129. *Id.*

130. *Id.*

standardized testing for the first time in Florida.¹³¹ In 1976, the Florida Legislature passed legislation requiring all students to pass a standardized functional literacy test of minimum competencies in order to receive their high school diploma.¹³² As previously stated, this was the first time in the United States' history that passing a standardized examination became a condition for receiving a high school diploma.¹³³ In 1977, approximately 440,000 third, fifth, eighth, and eleventh grade students took statewide-standardized tests in reading, writing, and mathematics.¹³⁴

In 1968, when the State of Florida passed Section 229.551 of the Florida Statutes to greatly expand the role of the Florida Department of Education, the Legislature understood quality standardized testing designed to provide data about student achievement was vital to improving instruction and student achievement, and that this standardized testing program was not mandated by the federal government.¹³⁵ It was a genuine effort to improve student achievement.¹³⁶ In 1977, nine years after passing this landmark legislation, the Legislature allocated funds to address low achievement in Florida with the Compensatory Education Program, funded with \$26,500,000.¹³⁷ These funds were to provide services directly to low-achieving students.¹³⁸ The Legislature understood that the graduating class of 1979, including those in adult education programs, would be the first to be required to pass the Florida State Student Assessment Test, Part II.¹³⁹ Therefore, districts were allowed to allocate the Compensatory Education Program funds to high schools to assist students who failed the first standardized high school exit examination.¹⁴⁰

In 1979, students who failed to pass the examination as eleventh graders were allowed to retake the standardized test during their twelfth grade year, and approximately 35,000 students were retested.¹⁴¹ In subsequent years, districts distributed the funds among

131. *Id.*

132. *Id.*

133. ASSESSMENT INVESTIGATION, *supra* note 70, at 8.

134. *A Chronology of Events: 1968-1978*, *supra* note 125.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *A Chronology of Events: 1978-1989*, FLA. DEP'T OF EDUC., <http://www.fldoe.org/accountability/assessments/k-12-student-assessment/history-of-fls-statewide-assessment/as>

various grade levels based on feedback from standardized testing.¹⁴² Because of legal challenges to the ruling in *Debra P. v Turlington*, Florida allowed students to graduate who passed the necessary courses and demonstrated mastery of the standards on the Florida State Student Assessment Test, Part II based on district assessments.¹⁴³ Until 1984, when the State of Florida prevailed in the Eleventh Circuit of the United States Court of Appeals, no student was denied a diploma based on failure on the state assessment.¹⁴⁴ After 1984, diplomas were withheld based on failure of the Florida State Student Assessment Test, Part II; however, these students received remedial services through the Compensatory Education Program.¹⁴⁵

From 1978-1989, state mandated standardized testing in Florida became a regular part of life for public school students in third, fifth, eighth, and eleventh grade, including students with various exceptionalities.¹⁴⁶ Numerous significant events occurred during this time period. In 1985, Florida participated in the National Achievement Comparison Project under the auspices of the National Assessment of Educational Progress, as provided by the federal 1984 Omnibus Educational Act.¹⁴⁷ Florida's participation was significant because the purpose of participation was to compare standardized test data of Florida's students to other students around the nation.¹⁴⁸ Additionally, in 1985, the Florida Department of Education added standardized testing in science and computer literacy to the traditional standardized testing in reading, writing, and mathematics.¹⁴⁹ In 1986, Florida once again participated in a project of the National Assessment of Educational Progress, coordinated this time by the Southern Regional Education Board to compare Florida's standardized testing data to those of other states around the nation.¹⁵⁰ It was during this era that Florida, as well as other states, began to routinely use standardized test data not just to assess student achievement but to compare standardized test scores of students in Florida to those of students throughout the nation.¹⁵¹

assessment-chronology/hsap7889.shtml (last visited Jan. 9, 2016) [hereinafter *A Chronology of Events: 1978-1989*].

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *A Chronology of Events: 1978-79*, *supra* note 141.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

In the late 1990s, two events occurred at the state level and the national level to significantly increase standardized testing requirements for Florida's public school students. In 1997, John Ellis "Jeb" Bush was elected Governor of Florida.¹⁵² In 1999, George W. Bush was elected President of the United States.¹⁵³ In 1999, Governor Bush's A Plus Plan greatly expanded standardized testing.¹⁵⁴ Before 1999, the Florida Accountability Act mandated statewide standardized examinations for students in grades three, five, eight, and eleven.¹⁵⁵ After passage of the A Plus Plan, the Florida Comprehensive Assessment Test (FCAT) was administered to students every year in grades three through ten.¹⁵⁶ The FCAT became the high school exit examination, and students who did not pass all parts of FCAT were allowed to continue testing during grades eleven and twelve.¹⁵⁷ In January 1999, a Request for Proposal was issued for vendors to develop and administer the greatly expanded statewide standardized testing system in Florida.¹⁵⁸ Harcourt Educational Measurement won the bid; however, a dispute ensued regarding the bidding process.¹⁵⁹ National Computer Services, now known as NCS Pearson or simply Pearson, was ultimately awarded the bid to administer the statewide FCAT to Florida's students.¹⁶⁰ The results of FCAT became the basis for assigning school grades to Florida's public schools.¹⁶¹ The process of grading schools based on standardized test scores was quickly followed by other states around the country. By 2013, fifteen states had A through F grading systems similar to Florida's, and ten additional states had other grading designations using symbols such as stars or labels, rather than

152. *Jeb Bush Biography*, BIOGRAPHY.COM, <http://www.biography.com/people/jeb-bush-201294> (last visited Jan. 9, 2016).

153. *George W. Bush Biography*, BIOGRAPHY.COM, <http://www.biography.com/people/george-w-bush-9232768> (last visited Jan. 9, 2016).

154. *A Chronology of Events: 1990-2000*, FLA. DEP'T OF EDUC., <http://www.fldoe.org/accountability/assessments/k-12-student-assessment/history-of-fls-statewide-assessment/assessment-chronology/hsap9000.shtml> (last visited Jan. 9, 2016) [hereinafter *A Chronology of Events: 1990-2000*].

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *A Chronology of Events: 1968-1978*, *supra* note 125.

letter grading.¹⁶² All of these grading systems were based on widespread standardized testing.¹⁶³

As stated, George W. Bush was elected President of the United States in 1999, the year Governor Jeb Bush signed his A Plus Plan into law in Florida.¹⁶⁴ As already addressed in this article, NCLB, signed into law in 2001, changed the course of public education based on the increased standardized testing requirements for America's children. The threat of withholding federal funds from states that did not comply with the requirements induced compliance across the country.¹⁶⁵ As one might expect, the A Plus Plan and NCLB merged, in that the dramatically increased standardized testing requirements under the A Plus plan were the mechanism chosen by the State of Florida for the mandatory reporting requirements under NCLB, and the elements of the A Plus Plan received approval from the federal government for this purpose.¹⁶⁶ In fact, many states across the nation developed programs of standardized testing and grading schools similar to the landmark A Plus Plan as their reporting system for NCLB.¹⁶⁷

President Barack Obama's Race to the Top, signed into law in 2009, greatly increased standardized testing reporting requirements for states that received the competitive grant funds. Under Race to the Top, Florida received \$700,000,000.¹⁶⁸ Florida, as required of all the grantees, expanded testing to subject areas not typically tested, such as art, music, and physical education.¹⁶⁹ In Florida, districts typically submit their annual testing schedules, including federally required standardized tests, to their local school boards. Pasco County, Florida, is a district located on the west coast of central Florida with a student population of approximately 79,200 students and 5,000 teachers.¹⁷⁰ On November 18, 2014, district instructional staff presented the Revised 2014-2015 Schedule of Assessments to the School Board at a School

162. Celia R. Baker, *School Grading Systems: A Hot Topic Around the Nation*, DESERET NEWS NAT'L (Sept. 3, 2013), <http://national.deseretnews.com/article/280/school-grading-systems-a-hot-topic-around-the-nation.html>.

163. *Id.*

164. *George W. Bush Biography*, *supra* note 153.

165. *No Child Left Behind*, *supra* note 91.

166. Andrew Ujifusa, *NCLB Waiver Plans Push School Grading Systems*, EDUC. WEEK (May 9, 2012), <http://www.edweek.org/ew/articles/2012/05/09/30gradings.h31.html>.

167. *Id.*

168. Onosko, *supra* note 101.

169. Goldstein, *supra* note 103.

170. *2014-2015 Fact Sheet*, DIST. SCH. BD. OF PASCO CNTY., http://www.pasco.k12.fl.us/library/communications/guide/fact_sheet.pdf (last updated Oct. 2013).

Board Workshop.¹⁷¹ The document contained the following information:

Grade Level	Number of Required Assessments	Number of Optional District Provided Assessments
Kindergarten	7	7
Grade 1	6	7
Grade 2	8	9
Grade 3	13	14
Grade 4	14	14
Grade 5	15	14
Grade 6	12	5
Grade 7	13	5
Grade 8	15	5
Grade 9	14	2
Grade 10	19	3
Grade 11	25	0
Grade 12	Make-ups as necessary	Make-ups as necessary
Total	161	85

The District School Board of Pasco County, Florida, administered 161 required and 85 optional district-provided standardized tests during the 2014-2015 school year!¹⁷² Based on the Schedule of Assessments document, specific test administration dates were listed for both the required and the *optional* examinations.¹⁷³ Additionally, the following statement was on the bottom of the twenty-page document: “Teachers and PLCs [Professional Learning Communities] develop and utilize ongoing formative and summative assessment measures for instructional decision-making throughout the year.”¹⁷⁴ Statewide, the Legislature and the Department of Education began to receive negative feedback from school district officials regarding the testing requirements. According to Alberto Carvalho, Miami-Dade County Superintendent and 2014 National Superintendent of the Year, “The

171. *School Board Meeting Summary*, DIST. SCH. BD. OF PASCO CNTY. (Nov. 18, 2014), http://www.pasco.k12.fl.us/library/school_board/minutes/11_18_14_minutes.pdf.

172. *Id.*

173. 2014-2015 Schedule of Assessments, District School Board of Pasco County (Dec. 1, 2014) (on file with author).

174. *Id.*

state must own and address over-assessment. Instructional time is too precious to spend it assessing students on duplicative measures.¹⁷⁵ Florida began to realize that accepting federal dollars as a motivator to administer more and more standardized tests was having negative consequences around Florida.

*C. Reason 3: Vendor Pressure to Contract with State
Departments of Education*

The third reason for the dramatic increase in excessive mandated standardized testing in America's public schools is pressure on states by private vendors to increase their contracts with state departments of education. For private educational vendors, standardized testing is big business, and they aggressively pursue state departments of education for large contracts designed to meet federal and state reporting requirements.¹⁷⁶

States, without federal intervention, have used standardized testing as a means to assess, monitor, and improve student achievement.¹⁷⁷ Prior to the A Plus Plan in Florida, NCLB and Race to the Top, private vendors were not the primary entities designated by states to develop and implement standardized testing for students.¹⁷⁸ In Florida, in the 1960s and 1970s, various state universities and school district staff and teachers were the driving forces for the development and implementation of standardized testing with minor assistance from private educational vendors.¹⁷⁹

In Florida, all of this changed after Governor Jeb Bush's A Plus Plan was signed into law in 1999. The role of private educational vendors skyrocketed. In Florida, the dramatically expanded standardized testing requirements caused a showdown between two private educational vendors, Harcourt Educational Measurement and Pearson.¹⁸⁰ A hearing officer heard the bidding dispute, and the Commissioner of Education eventually guided the opposing parties to a resolution in which

175. Valerie Strauss, *Testing Revolt Brews in Florida as Miami Schools Chief Urges Delay in New Exams*, WASH. POST (Sept. 6, 2015), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/09/06/testing-revolt-brews-in-florida-as-miami-schools-chief-urges-delay-in-new-exams/>.

176. Stephanie Simon, *Privatizing Public Schools: Big Firms Eying Profits From U.S. K-12 Market*, HUFFINGTON POST (Oct. 2, 2012), http://www.huffingtonpost.com/2012/08/02/private-firms-eyeing-prof_n_1732856.html.

177. *A Chronology of Events: 1968-1978*, *supra* note 125.

178. *Id.*

179. *Id.*

180. *See A Chronology of Events: 1990-2000*, *supra* note 154.

Pearson was awarded the contract.¹⁸¹ Many other states followed Governor Bush's example in Florida of greatly expanding opportunities for private vendors.¹⁸²

After NCLB and Race to the Top, things changed again for private educational vendors because standardized testing became big business. The nationwide economic recession at the end of the 20th and the beginning of the 21st centuries caused private companies to eye public education, a \$500 billion a year business, differently. The standards-driven accountability movement created a direct pathway for private educational vendors' economic advancement as the bipartisan educational reforms, NCLB and Race to the Top, placed great emphasis on mandated standardized testing in America's public schools.¹⁸³

On June 22, 2009, the Florida Department of Education entered into a \$345,579,802 contract with Pearson for the administration of its standards-based assessment program.¹⁸⁴ In 2014, Florida did not renew the contract with Pearson.¹⁸⁵ After an extensive bidding process in which Pearson, McGraw-Hill, and American Institutes for Research participated, Florida signed a \$220,000,000 contract with The American Institutes for Research for the development and administration of state assessments to replace the FCAT.¹⁸⁶

Economic pressure by private vendors to establish lucrative contracts with departments of education has flourished, and vendors are eager to garner the public dollars involved in public education.¹⁸⁷ However, contracts for standardized testing are only the tip of the iceberg. Areas such as providing instruction for core curriculum and for providing services for special education students are also on the horizon.¹⁸⁸

181. *Id.*

182. Baker, *supra* note 162.

183. Simon, *supra* note 176.

184. *Contract Information*, FLA. ACCOUNTABILITY CONTRACT TRACKING SYSTEM, <https://facts.flds.com/Search/ContractDetail.aspx?AgencyId=480000&ContractId=09658&Tab=4> (last visited Jan. 9, 2016).

185. Kathleen McGrory, *Florida Education Department Gives Nonprofit \$220 Million Contract to Replace the FCAT*, TAMPA BAY TIMES (Mar. 17, 2014), <http://www.tampabay.com/news/education/k12/florida-education-department-selects-new-state-tests/2170571>.

186. *Id.*

187. Simon, *supra* note 176.

188. *Id.*

III. NATIONWIDE BACKLASH TO EXCESSIVE MANDATORY STANDARDIZED TESTING

A groundswell of revolution, rebellion, and backlash has swept public education in the United States, prompting a Boston Globe columnist to ask the question, “Can the tide turn against standardized testing?”¹⁸⁹ Parents, students, educators, teachers’ unions, and politicians answered with a resounding, “Yes.”¹⁹⁰ While this phenomenon seems to have erupted over the last few years, the discontent with excessive mandatory standardized testing began when testing increased exponentially with NCLB in 2001.¹⁹¹ To be sure, there are both proponents and opponents of the current state of testing in America’s public schools. Proponents point to standardized testing as the best indicator of teacher effectiveness and student achievement.¹⁹² Opponents point to the instructional time wasted on test preparation and administration and lack of instructional time to teach higher-order, creative-thinking skills.¹⁹³

During the 2014-2015 school year in Florida, the Lee County School Board voted to eliminate all standardized testing as an act of “civil disobedience.”¹⁹⁴ In other districts, school boards signed petitions asking lawmakers to scale back standardized testing.¹⁹⁵ Even the National Association for the Advancement of Colored People (NAACP) Legal Defense and Educational Fund has petitioned Congress to scale back its mandated standardized testing associated with federal funding for states.¹⁹⁶

IV. NEW STATE LAWS REFLECT THE RETHINKING OF EXCESSIVE MANDATED STANDARDIZED TESTING

State legislatures have responded to the backlash against excessive mandated standardized testing. In Florida—the birthplace of

189. Joanna Weiss, *Can the Tide Turn Against Standardized Testing?*, THE BOSTON GLOBE (Jan. 13, 2015), <https://www.bostonglobe.com/opinion/2015/01/13/can-tide-turn-against-standardized-testing/Wzuyqi0aja3SAqmQWzIimpN/story.html>.

190. *Id.*

191. *Testing Backlash*, SCHOLASTIC, <http://www.scholastic.com/browse/article.jsp?id=3757411> (last visited Jan. 9, 2016).

192. Stephanie Banchemo, *School-Test Backlash Grows*, WALL ST. J. (May 16, 2012), <http://www.wsj.com/articles/SB10001424052702303505504577406603829668714>.

193. *Id.*

194. Strauss, *supra* note 175.

195. Banchemo, *supra* note 192.

196. *Id.*

Jeb Bush's A Plus Plan, which became the model for reporting standardized test scores under NCLB—the Commissioner of Education was directed to conduct a comprehensive, statewide study of standardized testing in late 2014 and early 2015.¹⁹⁷ The recommendation from the Assessment Investigation was for Florida to “move forward with fewer, better assessments. . . .”¹⁹⁸ The resulting legislation was House Bill 7069, which limits the time for standardized testing to no more than five percent of a student's total school hours in a school year, and removes the requirement that districts administer standardized tests in subjects not tested by the State of Florida for the 2015-2016 school year.¹⁹⁹

CONCLUSION

Standardized testing has its place in public education—to monitor student progress and change instruction in order to maximize student achievement. For the three reasons already mentioned, state legislatures are stepping in and rescuing students from some of the negative consequences of excessive mandated standardized testing that find their way into any system of this breadth and scope. House Bill 7069 in Florida is indicative of a nationwide movement against standardized testing in its present form.²⁰⁰ Similar movements against standardized testing and new legislation are surfacing throughout the United States in places such as Connecticut, New Jersey, Texas, and South Carolina.²⁰¹

As a thirty-four year public educator, the author of this article understands the importance of appropriately assessing students for instructional purposes to meet students' instructional needs. Indeed, federal mandates such as NCLB and Race to the Top have caused educators to focus on students with specific instructional needs, including students in poverty, students with exceptionalities, students whose primary language is not English, and students who are not college bound. In the past, these students have been “invisible” in public education. Standardized testing is necessary to improve the performance of all students; however, excessive mandated standardized testing is a

197. ASSESSMENT INVESTIGATION, *supra* note 70, at 3.

198. *Id.* at 4.

199. H.R. 7069, 2015 Sess. (Fla. 2015), 2015 Fla. Laws 6.

200. *Id.*

201. Jeff Bryant, *Campaign for America's Future: Resistance to Standardized Testing Not Going Away*, NAT'L EDUC. POLICY CTR. (Apr. 7, 2015), <http://nepc.colorado.edu/blog/resistance-standardized>.

threat to public education. State legislative bodies have taken notice of the threat and are responding to it.

Public education in America is resilient. From colonial times when Horace Mann launched a grand experiment creating a secular educational system for the masses at taxpayer expense, to the days of taking poor children from farms and factories and sending them to school, of racially integrating public education, educating children with exceptionalities and limited English skills, to the days of appropriately using standardized testing to monitor student progress, public education in America has risen to the occasion to serve students and communities!²⁰²

To be sure, public education has had threats in the past; however, public education has survived and thrived. The current threat, excessive mandated standardized testing, has caused states to rethink their positions on standardized testing by passing new legislation limiting standardized testing. Honesty and integrity issues aside, watching educators being handcuffed and sent to prison for cheating on standardized tests was a seminal moment in America. Students, parents, educators, legislators, and the general public have a right to question whether we have gone too far down the road of standardized testing.²⁰³

The author of this article proposes four areas of consideration to help remedy the current excessive mandated standardized testing crisis in America's public schools. First, educators, parents, and students must continue to put pressure on state legislators to reduce testing time in order for America's schools to have instructional time necessary for teaching higher-order thinking skills. The legislative acts cited in this article demonstrate the power of public pressure; however, educators, parents, and students have much work to do. In order for the United States to remain competitive in the global market, our students must be deep-thinkers and problem-solvers, and learning these skills requires instructional time for tasks such as exploration, discussion, and analysis. The acquisition of these skills is time-consuming but necessary for the future success of our students and our nation.

Second, America must closely examine the foundational purpose of standardized testing. Do we test students for the purpose of changing instructional practices to maximize the student achievement, or do we test students for the purpose of meeting federal mandates to gain and maintain federal funding? The author of this article clearly

202. See ALEXANDER & ALEXANDER, *supra* note 80, at 27-75.

203. Richmond, *supra* note 2.

understands the necessity of securing federal funding in the current economic era of reduced educational funding at state levels. Nevertheless, the primary focus of public education must always be on maximizing student achievement, and standardized testing must be a means to achieving that end.

Third, the business of testing must be returned to professional educators, including teachers, school administrators, district staff, and colleges of education. The public has insisted that public educators make education more efficient by reducing staff at the school, district, and state levels. At the same time, the public has allowed very expensive contracts to be assigned to private vendors for standardized testing. As a result, professional educators no longer have meaningful input in the process of creating, administering, and analyzing the results of standardized testing. The business of assessing students has become the business of private vendors, and professional educators, who manage the business of delivering instruction to increase achievement, have paltry input into the standardized testing process. While private vendors may have a role to play in the process, the public, including state legislators, must monitor and reduce the profit motives involved in standardized testing.

Finally, the author believes that the next great threat to public education is already on the horizon and is connected to excessive mandated standardized testing—the move by private entities to privatize public education. American public education is a very expensive venture and potentially lucrative for private entities to make tremendous profit, as evidenced by private vendors involved in standardized testing.²⁰⁴ The remaining question is whether public education, as an institution, will rise to the occasion as it has throughout American history and as it has in recent years with standardized testing. To many, public education is a public resource and a jewel that may lose much of its luster when profits- and results-driven factoring leads to changes in recipients, content, and focus. There are intangibles in education that are fundamental to constitutionally guaranteed rights, such as the right to free speech and even the right to pursue happiness that only a publicly-minded, non-corporate guardian is qualified to protect. The need to protect these fundamental rights in a public education setting must be addressed in America and is a topic to be explored in a future article.

204. Simon, *supra* note 176.