The Journal of Law and Education

Volume 13
Issue 1 *1*

Article 5

1-1984

Minimum Competency Testing in Schools Legislative Action and Judicial Review

Antonette Logar

Minimum Competency Testing in Schools: Legislative Action and Judicial Review

ANTONETTE LOGAR*

I. Introduction

The following (unfortunately lengthy) introduction is necessary to provide a common understanding of the terms on which the courts and litigants rely. What is a competency test? It has been defined as a standardized exam designed to demonstrate whether a student has reached a given level of proficiency in any one of several basic skills.[1] Two points need to be made about this definition. First, it is necessary to understand that a competency test measures what a student has learned or what skills the student has acquired. It is important to understand the difference between a competency test, which measures acquired skills, and ability or I.Q. tests which are designed to measure innate ability. This distinction is important because one of the major criticisms of competency tests is that they may often test for knowledge to which a student has not been exposed in school.[2] Secondly, "basic skills" is not a fixed concept. Some school districts interpret the role of competency tests to evaluate reading, writing and computation skills, while others feel it includes testing for life skills, such as how to get along with others. The implications of these different concepts of competency tests will be examined later.

The next question is: why are they necessary? Advocates[3] of compet-

---

* The author received her B.A. from Lehigh University and her J.D. from the University of Louisville. She is currently an instructor of mathematics at South Dakota School of Mines and Technology.

[1] McClung, *Competency Testing Programs: Legal and Educational Issues*, 47 FORDHAM L. REV. 651 (April 1979).

[2] McClung, *Competency Testing: Potential for Discrimination*, 11 CLEARINGHOUSE REV. 439 (Spring 1977).

[3] Lewis, *Certifying Functional Literacy: Competency Testing and Implications for Due Process and Equal Educational Opportunity*, 8 J.L. & EDUC. 145 (April 1979); McClung, *supra* note 2; Teicher, *Minimum Competency Test Requirements for High School Graduation: Are We Boxing in Minority Students for a Lifetime*?, 8 HUM. RTS. 20 (Winter 1980); *see also* Beckwith, *Constitutional Requirements for Standardized Ability Tests Used in Education*, 26 VAND. L. REV. 789 (May 1973); Bohrer, *Educational Testing: A Challenge for the Courts*, 1973 U. ILL. L. F. 375 (1973); Robertson,

ency tests cite several arguments. First, they claim the test would improve the class of high school graduates. Currently, students are graduating who cannot read or write. With competency tests, those who receive diplomas will at least be proficient in the basic skills. Secondly, the test would make both students and teachers accountable for their actions. When a student graduates without being able to read or write, the fault lies with the teacher, the student, or both, but only the student suffers. One result of competency tests, it is argued, would be that teachers who are not teaching well could be identified. This fact should inspire teachers to work harder. Similarly, since a student knows that he will not automatically graduate, there will be an incentive for the student to work harder as well. The result should be a better education for the student and a generally more efficient educational system. Third, the test would give some meaning to the diploma. Currently, it is just a certificate of relatively docile attendance, with no assurances of acquired learning associated with it. Since only those who have mastered the basic skills would pass the test and get a diploma, it would become a symbol of at least minimal achievement, thereby providing an additional incentive for students. Fourth, the test results could be used to give remedial help to those who need it. Many students have undetected learning problems which the test would help to identify. Fifth, the test could also identify structural problems in the system's education program. Student scores would locate the weaknesses and attention could be directed toward strengthening those areas. Sixth, it is hoped that the tests would help to reduce some of the frustration generated by the current educational system. Parents are frustrated because their children cannot read; employers are frustrated because they cannot find employees who are literate enough to fill out an application; students are frustrated because many employment and educational opportunities remain closed to them. Last, it is claimed that such tests would provide much needed state-wide uniformity of education among schools. They would provide a standard against which all students could be measured, which may be helpful to employers and institutions of higher education. Also, it would insure that the curricula are standardized at least to the extent of providing the basic skills.

Opponents of the use of competency tests as a determinant in deciding whether to grant a diploma also advance several reasons. First, there is

---

Examining the Examiners: The Trend Toward Truth in Testing, 9 J.L. & EDUC. 167 (1980); Ruch, *Comments on Psychological Testing*, 69 COLUM. L. REV. 608 (April 1969); Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691 (April 1968); *Equal Eduational Opportunity: A Symposium*, 61 GEO. L.J. 845 (March 1973); McClung, *Are Competency Testing Programs Fair? Legal?*, 59 PHI DELTA KAPPAN 585 (1978).

the fear that education would sink to its lowest common denominator, i.e., teachers will teach-to-the-test—no more and no less. This could inhibit creativity within the classroom as well as stifle innovative and flexible curriculum decisions. Second, the test might encourage students to drop out of school. One black leader has said that many marginal students would make the personal, affirmative choice of quitting school rather than spend twelve years in the system, take the test and be branded a "dummy" for life.[4] Third, the competency test is potentially discriminatory. The fact that the movement to preserve standards did not arise until desegregation began to be effected nationally, has the black community wondering if these tests might not be just another way to internally segregate schools. The tests are often used for placing students into special classes or tracks based on ability, often resulting in racially segregated classrooms. Another suspicion is that the tests contain racial and cultural biases. Tests have historically been normalized on white, middle-class children since the majority of the test-takers fell into that category. Is it not reasonable to infer that poor minority students would not do as well on these tests?[5] The testing industry claims to have removed the bias, but there is still an undeniable impact on minority students. For example, the black failure rate was ten times that of the white failure rate on portions of the SSAT II that was given in Florida.[6] Last, there is the claim that the tests as given violate due process of law, since the children required to take them have not had adequate time to prepare for the test since it was instituted after the children were well into their educational careers.[7]

It is obvious that both sides have meritorious arguments. It will be the arduous responsibility of the legislatures and courts to balance the various interests to limit such tests to their legitimate roles.

As a final introductory matter, a few testing terms will be defined to assist an understanding of the arguments made for and against the tests.

1. *reliability*: The measure of a test's ability to replicate the results. Theoretically, the same test given to the same person should give the same results each time it is administered.
2. *validity*: The measure of a test's ability to measure what it is supposed to measure. Do the questions test the student's

[4] Lewis, *supra* note 3, at 165.
[5] Hobson v. Hanson, 269 F. Supp. 401, 514 (D.D.C. 1967).
[6] Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979).
[7] Young, *Legal Aspects of Minimum Competency Testing*, 6 LAND & WATER L. REV. 561 (Spring 1981).

knowledge or skill or do the correct answers depend on hidden variables in a student's background?

3. *instructional match*: The measure of a test's congruity with the topics that the student has been taught in school. The test should match the student's course of instruction.
4. *bias*: The failure of a test's results to have the same meaning for one group as for another. "When an item or test is biased, it is measuring different things for different groups. This concept is distinct from the possibility that one group may not achieve as well as another."[8]
5. *norm-referenced tests*: grading on the "curve". There will be a mean and a standard deviation on the test as it was taken by all students, and an individual's performance will be measured against that of his peers to determine success or failure.
6. *criterion-referenced tests*: grading against past performance. Incremental improvement on tests are the measure of success.

II. Legislation

According to HEW (now HHS), approximately one million children between the ages of twelve and fourteen are illiterate and about 20% of all adults have some literacy difficulty.[10] The legislative response to these statistics has been swift and sweeping. A survey of law reviews[11] and of the state educational codes indicates that thirty-seven states have enacted some sort of minimum competency legislation, and that legislation has been proposed in four others. Many of the states that have such legislation are those with heavy concentrations of population. Thus, states with as much as 75% of the population are covered by competency testing.

This rush may be attributed to the seemingly straightforward nature of the problem. Heretofore, there has been trust in the "process model" of public education: put a child in at an early age, and the public school process will turn out a literate, competent young adult. With the destruction of the trust by the release of the HEW figures, the easy answer seemed to be to switch to a "results model": if what we want are literate, competent young adults, test for those factors that identify them. The problems, however, do not yield so directly.

---

[8] Anderson v. Banks, 520 F. Supp. 472, 489 (S.D. Ga. 1981).

[9] McClung, *supra* note 1.

[10] Goss, *Minimum Competency Testing: Redundancy or Necessity?*, 15 AKRON L. REV. 91 (Summer 1981).

[11] Goss, *supra* note 10; Lewis, *supra* note 3; Benjes, *Legality of Minimum Competency Tests under Title VI*, HARV. C.R.-C.L. L. REV. 537 (Winter 1980); Pipho, *Minimum Competency Testing in 1978: A Look at State Standards*, 59 PHI DELTA KAPPAN 585.

In his 1979 article,[12] Merle McClung classified the statutes to be of three basic types. First, a statute may provide for the results to be used for studies only. There is no penalty attached to poor performance, but the scores are used for diagnostic and remedial purposes.[13] The second category is one in which graduation or promotion depend on test results. This is the type of statute that was in use in Florida when the *Debra P.*[14] case was filed. The statute was upheld but restrictions were placed on how and when the tests could be given.[15] The third category is comprised of those states where the local school districts have the option of deciding what to do with the test results.[16] In addition, the following states have enacted legislation that does not easily fit the categories: Connecticut[17] (for early exit program, high school equivalency degree, evaluation and remediation), Mississippi[18] (requires accountability and assessment of performance but does not set out what to do with the assessment) and New Mexico[19] (proficiency endorsement on diploma if student passes the test). Finally, South Carolina[20] is collecting baseline skills data and will have a graduation requirement when standards can be set. Illinois required that a test be developed by December 15, 1978,[21] but nothing in the statute indicates how the test results should be used. Bills have been introduced in Iowa, Minnesota, North Dakota and South Dakota[22] to require minimum competency tests, but no action has been taken in any of these states at this time.

While thirty states passed enabling legislation between 1976-1978, only two states had passed similar legislation in 1979. This suggests that the wildfire is over and that the states that have not yet enacted such legislation are proceeding more slowly, doing more studies and in general being more cautious. One major cause for this could be the *Debra P.* case

---

[12] McClung, *supra* note 1.

[13] States in this category include Arkansas, Kentucky, Louisiana, Missouri, Nebraska, New Jersey, and Rhode Island.

[14] 474 F. Supp. 244.

[15] This category contains the majority of the the states that have competency test requirements and include Alabama, Arizona, California, Delaware, Florida, Georgia, Maine, Maryland, Nevada, New York, North Carolina, Oregon, Tennessee, Utah, Vermont, Virginia, and Wyoming.

[16] States that have this local option include Colorado, Idaho, Indiana (stated purpose is remediation but local districts can use it for other purposes), Kansas, Massachusetts, Michigan, New Hampshire, and Washington.

[17] CONN. GEN. STAT. ANN. §§ 10-14m. to 10-41r (West Supp. 1980).

[18] MISS. CODE ANN. § 37-3-45 (1980 Supp.).

[19] Pipho, *supra* note 11.

[20] S.C. CODE ANN. § 59-30-10 (Law. Co-op. 1981).

[21] ILL. REV. STAT. ch. 122, § 2-3.42.

[22] On Jan. 9, 1984 the Board of Regents of the State of South Dakota decided that a competency test will be given. This test, however, will be given to students graduating from college not those graduating from high school. State of South Dakota, Public Information Newspaper, Vol. 4, No. 4, Jan. 1984.

which was decided in 1979. The case may have alerted the states to some of the more complex policy issues of competency testing and to the fact that certain statutes might be susceptible to constitutional attack. Whatever the reason, there has been a dramatic deceleration in the spread of such legislation, although no retrenchment has occurred.

III. Past Challenges

There are really only two cases directly on point as to the legality of competency test requirements. The two cases are *Debra P. v. Turlington*[23] and *Anderson v. Banks*.[24] A summary of the claims made in both cases follows.

A. Equal Protection

The students in both cases claimed that the tests were racially discriminatory because the failure rate among blacks was much higher than that among white students. For example, in the *Debra P.* case, on one or both portions of the test, 78% of the black students failed as compared to 25% of the white students.[25] Similarly, in *Anderson* in a school district that was approximately 30% black, some 57% of the blacks failed. After three years of administering the test, only six students failed and all were black.[26] The students claimed that these patterns established a violation of the equal protection clause of the fourteenth amendment. The courts agreed that discriminatory impact was not enough to sustain this challenge.[27] There must be some evidence of discriminatory intent. The standard applied for determining such intent was that after discriminatory impact has been shown to have been known, it must be further demonstrated that the action was taken "because of" the impact it would have on a certain group, rather than "in spite of" the impact.[28] As so stated, the students were unable to show that there was discriminatory intent.

A different equal protection argument was based on the fact that some of the students who took the test had spent the first few years of their education in segregated schools. The court in *Debra P.* acknowledged that the first few years of school are critical and since the minority children had spent those years in segregated and inferior schools, it

[23] 474 F. Supp. 244.

[24] 520 F. Supp. 472.

[25] 474 F. Supp. at 248.

[26] 520 F. Supp. at 490.

[27] Washington v. Davis, 426 U.S. 229 (1976). *See also* Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264 (9th Cir. 1974).

[28] Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979).

violated the equal protection clause to require them to take the same test as the white children who had the benefits of the superior schools.[29] An injunction was issued to prohibit use of the test until all students taking the test had been trained exclusively in desegregated schools. The *Anderson* court came to the same conclusion by a slightly different route. They also granted an injunction on the segregated early education ground but viewed the issue as arising under Title VI of the Civil Rights Act of 1964[30] and the Equal Educational Opportunity Act.[31] They found that the school district violated these statutes because it had formerly practiced deliberate discrimination and had not taken sufficient affirmative steps to remove the vestiges of that dual system.[32] The court in *Debra P.* referred to these statutes, but having found a constitutional violation, did not consider the statutes in detail.

The court in *Anderson* also noted an equal protection problem with the "tracking" system used by the school district. The court recognized that the system produced racially segregated classes, and since there was evidence that black children were placed in lower-ability classes than white students with identical scores, the system was found to be unconstitutional.

B. Procedural Due Process

The claim of the students in both cases was that the implementation of the test was unfair because they did not have adequate notice of the test requirement for graduation. In *Debra P.* the students were in the spring semester of the eleventh grade when they first took the test. Those who failed had their senior year to try again, with a total of three chances to pass. The court found that this violated due process, reasoning that the students may have studied differently and the teachers may have taught differently had they been aware of the requirement earlier. The court in *Anderson,* however, found that two years was adequate notice and found no procedural due process problem.

First, the courts determined that there was a property interest upon which to base a due process claim.[33] The courts noted that school attendance was mandatory. If the law requires a child to spend at least ten years of his life in public institutions, there is certainly more than a

---

[29] Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

[30] Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1976).

[31] Equal Educational Opportunity Act, 20 U.S.C. § 1703(b) (1976).

[32] *See also* Arthur v. Nyquist, 573 F.2d 134 (2d Cir. 1978).

[33] *See also* Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S.2d 899 (Sup. Ct. Special Term, Queens Co., Part 1. 1967); Clements v. Board of Trustees of Sheridan County School Dist. #2, in the County of Sheridan, 585 P.2d 197 (Wyo. 1978).

unilateral expectation on the part of the student.[34] Therefore, the courts concluded that a student does have a property interest in a diploma if he has met all the requirements for graduation for which he has timely notice. The second step was to decide how much notice was required. As indicated above, the Florida court found a little over a year to be inadequate while the Georgia court found two years to be sufficient.

C. *Substantive Due Process*

Only the *Anderson* court addressed the particular issue of whether the tests themselves were so arbitrary and capricious as to violate substantive due process and thus be totally banned. The court found that the state met its burden of showing a rational relationship between the test and the concededly legitimate state interest of improving education. Therefore, the statute itself was allowed to stand with only minor modification as to how it could be used. But another substantive due process claim was successful in both cases. The tests were unfair as applied, because they may have tested students on topics not covered in class. The plaintiffs raised the possibility and it was the state's evidentiary burden to show that there was indeed instructional match. The plaintiffs prevailed when the defendants did not present adequate proof.

In summary, the statutes were facially constitutional, but implementation of the tests was postponed until all students to be tested were from unified school districts. In addition, adequate notice and instructional match are necessary to satisfy due process, with the burden of proof on the schools to show that the match does exist.

IV. Possible Future Challenges

A. *Life-skills vs. School-skills*

Some states require that students be tested only on "school-skills" or the basic skills or reading, writing and computation. Other states, however, require that an individual be tested for social functional capacity and hence have examinations that purport to measure life-skills. One article claimed that proposed life-skill areas included "heterosexual behavior", "controls desired impulses", and "personality traits".[35] One problem with these exams would be that they might violate a student's right of privacy. It has been held to be an invasion of privacy when a school implemented a drug abuser identification program requiring

---

[34] Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

[35] Claque, *Competency Testing and Potential Constitutional Challenges of "Every Student"*, 28 CATH. U.L. REV. 469 (Spring 1979).

children to answer questions about family relationships.[36] The same rationale could be applied to questions which would identify a student's sexual preferences, and where a high school diploma would be at stake, would seemingly fail for lack of a rational basis for the questions. A second challenge would involve the first amendment prohibition against coerced belief. The Supreme Court has held that a student cannot be compelled to embrace particular doctrine and therefore has upheld a student's right to wear an armband to protest the Vietnam war[37] and the student's right not to salute the flag.[38] Since a passing grade on the test would be conditioned in part upon making the "correct" or orthodox response, a student would be faced with the choice of adhering to his beliefs and possibly failing, or embracing the beliefs of the test designers in order to secure the basic educational validation certificate—the high school diploma. Finally, this type of question may be susceptible to substantive due process attack. Assuming for the moment that there is a protectable life, liberty or property interest in the diploma, it is arguable that life-skills are unteachable, and therefore the question would be irredeemably defective for failure of instructional match. Alternatively, life-skills tests may fail the elemental requirements of any minimum competency test: validity; reliability; and absence of bias.

B. *Title VI Challenges*

Although Title VI of the Civil Rights Act of 1964 was a factor in deciding the two cases mentioned in the last section, at least one writer believes that the full potential of Title VI has not yet been realized.[39] Title VII of the Civil Rights Act of 1964 outlaws discrimination in employment. Many cases challenging the discriminatory effect of test requirements in employment under Title VII have uniformly held that a three-step analysis is appropriate where tests have been used for job selection.[40] First, the plaintiff must show that there has been discrimination, and evidence of discriminatory impact will suffice. It is important to notice that impact alone will establish a Title VII claim, while it will not sustain an equal protection argument to Title VII. Once the plaintiff has shown there has been an impact, the burden shifts to the defendant to prove that the test is significantly related to successful job performance. Even if the defendant sustains that burden, the plaintiff can still

---

[36] Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973).

[37] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

[38] West Virginia State Bd. of Education v. Barnette, 319 U.S. 624 (1943).

[39] Benjes, *supra* note 11.

[40] Griggs v. Duke Power Co., 401 U.S. 424 (1971); Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir. 1975); Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); Boston Chapter NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974).

win by showing that there is an alternative which does not have the complained-of impact. It can be persuasively argued that the same analysis should be used under Title VI as that in Title VII, and, if so the burdens of the plaintiff and defendant will be markedly changed.[41] Support for this analysis lies in an examination of the statutory language and legislative history of Title VI, as well as administrative and judicial interpretations of the Act.[42]

The statutory language of Title VI flatly prohibits discrimination and is void of express limitations requiring a showing of intentional discrimination, the standard of proof equivalent to that of the equal protection clause. The only statutory limitation in Title VI appears in school desegregation cases. It can be inferred that since Congress specified a situation where Title VI and equal protection clause were co-extensive, it imposed no limitations outside of this category. Further, Congress may have deliberately left the task of determining whether the effects standard should be applied to Title VI to administrative agencies. These agencies have consistently interpreted Title VI as employing an effects standard, and the courts have shown deference to these interpretations. The last indicator, judicial interpretation of Title VI, is less clear cut. In *Lau v. Nichols*,[43] the Court held that Title VI incorporates an effects standard. The validity of the effects standard was questioned, however, in *Regents of the University of California* v. *Bakke*. These cases are reconcilable if it is viewed that *Bakke's* holding was based on a concern for a reading of Title VI that is most advantageous to an historically disadvantaged group. Had the Court in *Bakke* found that Title VI had greater proscriptive reach than did the equal protection clause, benign discrimination would have been found to be improper.[44]

If the student could show the discriminatory impact, which would be fairly easy in a situation like *Debra P.*, then the burden would be on the state to prove that the test was significantly related to achieving the legitimate state goal of better quality education. Even if the state succeeds, the students still have the chance to prove that there is a less restrictive way to reach the same goal. This line of attack may be successful in challenging cut-off scores. As the systems currently stand, there is a minimum score which a student must achieve to be granted a diploma. Assume that the cut-off score is seventy and a student scores a

---

[41] *But see* Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978) (plurality opinion of C.J. Burger, holding that the structures of Title VI are no more stringent than those of the equal protection clause).

[42] Benjes, *supra* note 11.

[43] Lau v. Nichols, 414 U.S. 563 (1974).

[44] For a more in-depth discussion of judicial interpretations of Title VI, see Benjes, *supra* note 11, at 548-55.

sixty-nine. Also suppose that a large percentage of those students who score between sixty and sixty-nine were black. The students would be able to show that the cut-off had a disproportionate impact on the black students. The state would probably point out that the law is a series of drawn lines and that a cut-off point must be established somewhere. But, the state would have to show why a student with a seventy is literate but a student with a sixty-nine is not; that is, there would have to be some rational basis for the decision to choose that cut-off. Even if the state could do so, the students would be able to present less restrictive alternatives, such as having more than one criterion for evaluation. This would be more costly, but it would also reduce the severity of an absolute cut-off and may reduce the impact on black children, who historically score lower on standardized tests than white children of equal ability. This is just an example of the way the Title VII analysis could work in education under Title VI. The Supreme Court did use a similar analysis in an education case where Chinese students were seeking special language instruction.[45] The case was decided under Title VI and the Court looked at the effect of the lack of classes rather than requiring any discriminatory intent. This case has not been overruled but it has also not been cited as precedent in similar education cases. It is possible, though, that analogy to the employment discrimination cases coupled with the above decision may convince a court to apply the Title VII analysis under Title VI.

C. *Differentiated Diplomas*

In the *Debra P.* case, the school district was going to issue certificates of attendance to those students who completed twelve years of school but did not pass the competency test. It would seem that issuance of such a certificate may implicate the due process clause. The Supreme Court has bound a liberty interest in the right not to be stigmatized.[46] Thus, for example, a woman had a right to protest the posting of her name as an excessive drinker because that stigmatized her and was a badge of disgrace. There must, however, be something more than reputation at stake; some economic or other personal interest is also required to sustain a due process claim.[47] A differentiated diploma meets both requirements. Like a general discharge, it is an undifferentiated symbol of failure, one that forever classifies a student as inferior, and it has implications beyond damage to reputation. Educational and employment opportunities would

---

[45] 414 U.S. 563.

[46] Wisconsin v. Constantineau, 400 U.S. 433 (1971).

[47] Paul v. Davis, 424 U.S. 693 (1976).

be foreclosed to students who received certificates of attendance rather than diplomas. It seems likely that a due process argument can be made, but it is important to note that finding an interest is only the beginning of the analysis. All that the due process clause requires is that a person be given appropriate procedural protections before being deprived of that interest. Thus, just showing that a liberty interest is at stake will not suffice to prevent issuance of the certificates, but it will give the student a chance to be "heard". Perhaps the student could then show that he is capable of functioning in society as well as the student who was awarded a diploma. Also, it may be a way of forcing retesting,[48] of giving the student a second chance if one has not been provided.

A related issue to that of differentiated diplomas is the plight of the handicapped student. One effect of the minimum competency tests may be to impede handicapped children from receiving diplomas.[49] The issue will not be covered in detail here, but it is important to note that the competency test requirement may have ramifications in areas where perhaps none were contemplated.

It should be noted that there is a state versus local controversy on the horizon. Those who favor administration of competency tests at the local level cite the values of local control and the need for the test to match the material being taught in the local schools. But localized tests would defeat one of the main purposes for competency testing: a uniform standard against which all students can be measured. Also, the potential for abuse may be much greater on the local level. Those on the side of state administration cite the need for uniformity, the lack of proficiency at the local level for developing such tests and the expense saved by centralization. However, it is at least questionable that all students should be measured by the same yardstick when all students did not receive equal educations. For example, a wealthy school district may have the funds for enriching special programs while a poorer distict may not, and yet the students from both districts will be measured by the same test. Perhaps the way to resolve this is to follow the path of those states that have statewide administration of the test but permit the local school districts to decide what to do with the results. That way the scores could be regionalized but there would be no accusations that the test in one district was easier than that in another.

V. Possible Solutions

One way to lessen the discriminatory impact of the tests would be to

[48] 54 Misc. 2d 94, 281 N.Y.S.2d 899.

[49] Board of Educ. of Northport-East Northport Union Free School District v. Ambach, 107 Misc. 830, 436 N.Y.S.2d 564 (1981).

prevent using the tests until we are convinced that black and white students are on equal footing. The court in *Debra P.* recognized the inequity of measuring black and white students with the same test when they had not received equal educations in the past and its analysis is extendable. In the *Debra P.* case the students had been educated in segregated schools for the first few years of school, and the court enjoined use of the test until all students were solely the product of a unified school district. But many disadvantaged students do not start school with the same skills as their more fortunate counterparts. Poor children are often brought up in noisy environments and never develop the ability to concentrate.[50] Programs can be, and have been, developed to help remove the disadvantages with which a poor child may start school, but that is not universally the case. Delaying competency testing until black and white children have had fully equal eduational opportunities has been suggested.[51] A child should not be penalized for his origins, and testing may not be fair until those handicaps have been removed.

Another limitation would be objective certification.[52] The state would administer the test but would draw no conclusions about the scores. The raw scores would be placed on a student's record for reference by potential employers or institutions of higher education. This would do nothing to alleviate the problem of racially disparate scores or remove any possible racial or cultural bias, but it would give the student an incentive to do well on the test without having his diploma hang in the balance. Also, many of the constitutional problems would become muddier if the state were not, in effect, licensing literacy.

Attention must also be given to the special problem faced by handicapped children. The handicapped child may be doing excellent work for his ability and yet be denied the same tokens of achievement that his more favored peers will receive. Some possible alternatives have been suggested.[53] These students could be exempt from the minimum standards, but it seems that an automatic diploma may be as much of a disincentive as automatic denial. A second possibility would be to award differentiated diplomas. This may be better than receiving nothing for all the work the child has put into his education, but a stigma would still be attached—he would be more acutely aware of being "different". Finally, each student could be evaluated individually to see if he has achieved

---

[50] Frizzell, *Functional Literacy Testing and the Denial of High School Diplomas in a Post-Desegregation Setting*: Debra P. v. Turlington, 33 RUTGERS 564 (1981).

[51] Benjes, *supra* note 11.

[52] Young, *supra* note 7.

[53] McClung, *Competency Testing and Handicapped Students*, 11 CLEARINGHOUSE REV. 922 (March 1978); Neuberger, *Intelligence Tests: To Be or Not To Be Under the Education for All Handicapped Children Act of 1975*, 76 NW. U.L. REV. 640 (1981).

proportionately as much as he could with his particular ability as students in non-handicapped classes were expected to achieve with their abilities. This would be a costly and time-consuming alternative, but it would also be the most fair.

Finally, competency tests might place the schools in a "Catch-22" situation. If they do not award full diplomas to all students, they will be faced with statutory and constitutional charges of discrimination. If, on the other hand, the schools do award diplomas to all students, they may wind up in court anyway. Two recent cases[54] have been brought by students claiming that they were given diplomas when they were actually "functionally illiterate". They claimed that the schools were negligent, misrepresented that they would educate the students, and breached the duty to provide an education as required by state statutes. Neither case found a duty of care and therefore a tort action would not lie. But the difficulty of determining the level of education that would be required *if* a duty of care was recognized clearly inhibits the courts from advancing in that direction. The establishment of a "minimum competency" standard by the legislature might remove that disincentive.

Another form of malpractice has also been brought to the attention of the courts.[55] Students had been mistakenly placed in a class for educable mentally retarded students and sued for damages. In one case,[56] the student had been awarded $500,000, but the damages were reversed on appeal for public policy reasons. Although this type of case has not been successful to date, it does have potential because of the continuing equitable appeal to granting a remedy for an indisputable injury. Given the existence of the above situations, it is possible that school districts may some day be faced with damage awards to students injured in the system.

Perhaps one group is being ignored in all this litigation—the testing companies. Most tests, such as the California Achievement Test, are developed by the companies that specialize in developing standardized tests, such as the Educational Testing Service company (ETS). Students

---

[54] Donohue v. Copiague Union Free School Dist., 64 A.D.2d 29, 407 N.Y.S.2d 874 (1978); Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 131 Cal. Rptr. 854; Pabian, *Educational Malpractice and Minimum Competency Testing: Is There a Legal Remedy at Last?* 15 NEW ENG. L. REV. 101 (1979-1980); Shae, *An Educational Perspective of the Legality of Intelligence Testing and Ability Grouping*, 6 J.L. & EDUC. 137 (April 1977); *Ability Grouping in Public Schools: A Threat to Equal Protection*, 1 CONN. L. REV. 150 (June 1968).

[55] Larry P. v. Riles, 502 F.2d 963 (9th Cir. 1974); Hoffman v. Board of Educ. of City of New York, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979); Frederick, *Classification of the Educable Mentally Retarded by Intelligence Testing: A Discriminatory Effect*, 30 CATH. U.L. REV. 335 (Winter 1981); Waae, *Racial Discrimination in IQ Testing*: Larry P. v. Riles, 29 DEPAUL L. REV. 1193 (Summer 1980).

[56] 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376.

may be deprived of a diploma or placed in EMR (educable mentally retarded) classes as a result of taking the tests that these companies produce. The public policy reasons for denying recovering by students from school districts are less compelling when advanced by for-profit commercial enterprises. Furthermore, in the event that school districts are required to compensate these students, it seems reasonable that the districts could seek contribution from the companies for selling them defective tests. One possible source of liability, as attenuated as it might seem at first glance, is Article 2 of the Uniform Commercial Code: goods must be reasonably fit for the purpose for which they are intended.[57] First, the test should qualify as a good since what is sold is the test itself, not the service of administering the test. Second, it is at least arguable that a test that misclassifies students is not fit for its intended purpose. It may be possible to even find liability under the more stringent section dealing with fitness for a particular use.[58] Under that section, a showing that the seller was aware of the particular need, that the buyer relied on the seller's judgment and that the goods did not perform as expected would impose liability on the seller for the buyer's damages. This analysis is at present purely theoretical.

VI. Conclusion

The competency test movement swept the nation and has now died down to a great extent, but the lawsuits and challenges to the legislation have only begun. Some critics say that the tests will create more social problems than they could ever hope to solve, and, if that proves to be true, the tests should be abandoned. However, the old system is turning out graduates who cannot read or write, so merely staying with the system as it stands is not the answer either. In fact, the one thing that an in-depth study of this area reveals is that there are no easy answers. It will be a long struggle with educators seeking to improve the educational system and lawyers trying to protect the constitutional rights of the students. Perhaps the two forces will eventually find an equilibrium with the result being a fair and effective system. It can only be hoped that this process will not create too many human tragedies along the way.

---

[57] U.C.C. § 2-314 (1976).

[58] U.C.C. § 2-315 (1976).