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Legal Aspects of Minimum Competency Testing in the Schools

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In November, 1980, the Wyoming State Board of Education adopted their final policy on minimum competency for the state's school districts. Minimum state requirements for the issuing of a public high school diploma now include a demonstrated ability to read, write, and compute with proficiency. Local school districts are required to establish their own standards of proficiency and program requirements for graduation.

The author of this article discusses the numerous legal obstacles now facing school districts attempting to set up a minimum competency program as a graduation requirement. The risks of litigation for the school district are outlined and include such areas as test validity, the use of test results, and prior notice of possible post-test sanctions.

LEGAL ASPECTS OF MINIMUM COMPETENCY TESTING IN THE SCHOOLS*

*Edgar Young***

OUTLINE

*This article stems from a report prepared for the Wyoming State Board of Education. The views expressed here are not necessarily those of that body, the State Department of Education, or the office of the Attorney General.

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I. INTRODUCTION

The public's concern with high school graduates who cannot read, write, or compute at the minimal level sufficient to function in society is a political fact of life which must be dealt with by the educational community. In over forty states, competency testing programs have been adopted to do something about this concern.[1] Unfortunately, the competency testing movement has frequently pitted politicians seeking an expedient panacea, against educators and scholars wanting reassurances about the efficacy of competency testing. School administrators, teachers, parents, and students have often been caught in the middle.

The concept of minimal competencies does not have to be limited to competency testing; teacher observations or Individual Education Plans (IEPs) for every child are examples of other means of monitoring a child's progress towards functional literacy. But since competency testing is the method adopted by most states[2] and the other means of measuring individual competencies are quite expensive and administratively impractical, this article will focus on the legal aspects of competency testing.

The risk of litigation over competency testing is less when neither the diploma sanction nor "tracking" is the result. Tracking is the practice, now largely abandoned, of placing students in one of several achievement curricula, such as college preparatory, vocational skills or basic skills, based upon each student's prior academic performance or test scores. If the use of competency testing is to provide individual remedial instruction or to make curricular changes, competency testing is on its firmest legal, if not educational, foundation. Nonetheless, the major uses of competency testing are for the diploma sanction and, to a lesser extent, the

1. Gallagher and Ramsbotham, *Developing North Carolina's Competency Testing Program*, 9 SCH. L. BULL. 1 (Oct. 1978).
2. A comparison of the 50 states' minimum competency testing activities, prepared by the Education Commission of the States in February, 1980, is on file at the offices of the LAND AND WATER LAW REVIEW. Copies are available from the Wyoming State Department of Education and the Attorney General's Office.

placement of children in a remedial or "slow learner" curriculum track.

Competency tests which examine basic school subjects may appear to be just another school exam, yet there are significant legal differences. The severe diploma sanction penalty, the development of the exams by outside testing experts, the claimed objectivity for the tests (*i.e.* the result is not dependent upon a teacher's grading), and the breadth of the exams' coverage (*i.e.* potentially all school courses taken prior to the test), are significant distinctions between competency tests and regular school exams.

The assumption that competency tests can adequately and fairly measure minimal levels of functional literacy is difficult at best to substantiate. But such substantiation may be a legal prerequisite to upholding diploma sanction and tracking decisions by school districts. Since a student's failure to obtain a high school diploma likely will limit his employment opportunities for life, and since compulsory attendance laws prevent a student from leaving the educational environment in which the competency tests will be imposed, courts may well hold district and state boards of education to strict standards for any competency program.

This article will not discuss higher education or private educational institutions since students are not required by law to attend either. College students have a lesser legal property right and liberty interest in receiving an undergraduate or graduate degree than do public school students in receiving a high school diploma. Private schools are normally beyond the regulatory authority necessary for the state to impose competency testing requirements.[3]

One difference between competency testing and its parent, the accountability movement in education, is its focus on measurement of a student's learning instead of a teacher's teaching. The accountability movement assumed

3. The leading competency testing case upheld the exemption of private schools from the state-imposed test requirement. Debra P. v. Turlington, 474 F.Supp. 244, 263 (M.D. Fla. 1979) *aff'd*, ... F.2d ..... (5th Cir. 1981); *and see* Ambach v. Norwick, 441 U.S. 68, 76, 78 n. 6, 8 (1979).

that the problem with our schools lay in what and how material was taught. Competency testing with diploma sanction punishes the student, who may be a victim of poor curriculum and poor teaching, over which the student has no control. On the other hand, if the problem with our schools is indeed with students not learning, then competency testing focuses on the real culprit. Ultimately, courts may ask schools to empirically demonstrate the correctness of the focus of competency testing on students. If that occurs it may be impossible to prove that a particular student's functional illiteracy is due to his unwillingness to learn, instead of what is taught, how it is taught, his home environment, or sociological factors.

Three basic questions should be answered before imposing any competency program. They are: 1) What competencies should a student have before graduating from high school? 2) How should these competencies be measured? and 3) What level of performance constitutes minimal competence?

Unfortunately, there are no agreed answers to any of the questions. An objective and precise answer to each question may be unachievable. This uncertainty underlies many of the legal challenges likely to be raised against competency testing. Thus, the policy question is whether the perceived advantages to competency programs outweigh the potential problems with its implementation, including the likelihood of any successful litigation.

II. BACKGROUND

A. Terminology

Competency may be defined as: Being functionally adequate or having sufficient knowledge, judgment, skill or strength. *Proficiency* may be defined as: The level of acceptable achievement. *Minimal competency* may be defined as:

Proficiency in the basic skills essential to effective adult citizenship.[4]

Minimal competency or *minimum competency* may be used interchangeably, along with *functional literacy.* They will be used in this article to mean proficiency in the skills necessary to adequately function as an adult citizen. *Competency testing* and *proficiency testing* are interchangeable terms which may be defined to include tests or testing programs designed to measure whether a student has achieved functional literacy. *Literacy testing* is an unrelated civil rights term of art normally associated with an unconstitutional prerequisite to voting.

B. The Minimum Competency Movement

The Minimum Competency Movement has derived from citizen pressure, rather than careful deliberation of professional educators.[5] Its advocates may believe that it will provide a remedy for the perceived failure of the public schools to educate its graduates to function in society. Competency programs may provide an alternative to social promotion, or advancing a student to the next grade even if the skills taught have not been mastered. Social promotion may be viewed as unacceptable by the general public, or at least by those who are not parents of a child being held back a grade. Competency testing with diploma sanction may be viewed as encouraging accountability in education, enhancing the value of a high school diploma in the job market, and motivating sudents to learn.[6] School board members may believe that competency testing is a reasonable reaction to public outcries about what is wrong with our schools.

4. Definitions adopted from those reported by the Wyoming State Board of Education's Minimum Competency Task Force in its 1980 report. A copy of the report is on file at the offices of the LAND & WATER LAW REVIEW. Copies are available from the Wyoming State Department of Education and the Attorney General's Office.
5. Carter, *Proficiency Testing and the Law: An Old Problem with a New Twist,* NOLPE CONTEMPORARY LEGAL ISSUES IN EDUCATION 32, 35 (1979).
6. Former State Lgislator Ralph Turlington, who is Florida Commissioner of Education, believes that minimum competency testing, with diploma sanction, is "the most effective thing we have ever done to improve education in Florida". Kaercher, *Minimum Competency Tests,* Better Homes & Gardens, May, 1980, at 27, 32.

On the other hand, competency testing with diploma sanction punishes the student, even when the fault for the failure to learn may lie with the teacher, administrator, home, or society. Opponents of competency testing may point out that no evidence supports its success.[7] Competency programs may limit teaching methods and subjects to those which easily adapt to testing. Objective test instruments have "right" answers. Thus, development of creative thinking and problem-solving skills may be discouraged by competency programs. Appreciative and interpretive skills, and subjects in the arts and humanities do not lend themselves to objective measurement. Therefore, those important life skills may be deemphasized in a school curriculum utilizing competency tests.

Competency testing programs may address the wrong problem. It may be that students have the basic reading, writing, and computation school skills, but lack the ability to apply those skills to everyday problem-solving.[8] And, rather than motivating the poorer student, the effect of a competency program may be to encourage students to drop out of school before taking a test they fear they will fail.

C. National Response

One commentator has analyzed competency test program legislation in many states and found three major themes: (1) the state has a duty to provide a minimal level of functional literacy skills to its public school students; (2) testing is the most practicable means available to measure whether students are receiving those skills; and (3) the test results

7. No evidence supports the belief that competency testing programs increase functional literacy. Even Denver's 20 year old program fails to validate the program for the purposes for which it is advocated. The Denver test failure rate has been reduced from 14% to 1.5%. McClung, *Competency Testing Programs: Legal and Educational Issues*, 47 FORDHAM L. REV. 651, 659 (1979) *and see* Beal, *Denver Colorado: A 17-Year Old Minimum Competency Testing Program*, 59 Phi Delta Kappan 610 (1978). However, there is no evidence that persons passing the test function better in life than those who fail.

8. Achievement test results indicate that the problem lies not in the basics, but in students' inability to grasp complex ideas, analyze diverse information, make inferences, and apply what is read. *Id.*

should be used to assess and make adjustments in the manner in which the schools treat their students.[9]

The same writer has noted several purposes behind competency testing legislation: to enhance a student's education by emphasizing mastery of basic skills, to identify students lacking such skills, to guarantee programs to provide such skills and to expand students' life opportunities, to extend these benefits to students uniformly without regard to their geographic location or socio-economic status, to define and measure the quality of education, to provide information to officials responsible for allocating resources, to aid in evaluating the effectiveness of educational programs, to facilitate the evaluation of school personnel, to ensure the accountability of school administrators, to compare school systems' performance, and to inform the public about the value and performance of its schools.[10]

Across the country, states have focused their competency tests on basic communication and computation skills. Typically, each student is evaluated at several grade levels, with the final passage opportunity occurring in the eleventh or twelfth grade.[11]

Even Congress has gotten into the act. Under the 1978 Basic Skills Improvement Act[12] the federal government offers financial assistance to state and local efforts to improve classroom instruction in basic skills. Such plans, however, must contain assurances that students who fail competency tests will receive remedial instruction.

Advocates of competency testing believe that ultimately the court will uphold the concept. They may point to judicial affirmation of the National Teacher Examination (NTE) for proof that certification of an individual as a minimally competent teacher by use of an exam does not violate either

9. Lewis, *Certifying Functional Literacy: Competency Testing and Implications for Due Process and Equal Educational Opportunity*, 8 J. L. & EDUC. 145, 150 (1979).
10. *Id.* at 150-51.
11. *Id.* at 151.
12. Section 921 of the Education Amendments of 1978, 20 U.S.C. §§ 3331-3332 (Supp. III 1979).

the fourteenth amendment's equal protection clause or Title VII of the Civil Rights Act of 1964.[13] The NTE analogy may not hold, however, since it deals with professional certification rather than granting diplomas to persons who must attend school under penalty of law.

D. Wyoming History

For several years, Wyoming's State Board of Education has debated the competency issue, focusing largely on the implications for local control of the schools. In September of 1977, it approved a policy statement calling for Wyoming high school graduates to demonstrate proficiency in the basic skills and establishing minimum state requirements for graduation. No compliance deadline was established.

During the next two years, the State Board received reports and reactions to implementing its policy from teachers, administrators, and school boards of the state; from the State Department of Education; and from outside sources, including the National Association of State Boards of Education. During this period, proposed competency objectives were drafted by the Department and circulated among local school districts.[14] In 1979, the State Board established a task force to study the issue and report back.[15]

On November 8, 1980, the State Board adopted a revised policy on minimum competency.[16] The policy now in

13. *See* United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), *aff'd* 434 U.S. 1026 (1978).
14. A copy of the proposed objectivs, specific competencies, and tasks to test the competencies, along with the results of a survey of Wyoming school districts on the proposal is on file at the offices of the LAND AND WATER LAW REVIEW. Copies may be obtained from the Wyoming State Department of Education and the Attorney General's Office.
15. A copy of the May, 1980, Report of the Wyoming Minimum Competency Task Force is on file at the offices of the LAND AND WATER LAW REVIEW. Copies may be obtained from the Wyoming State Department of Education and the Attorney General's Office.
16. FINAL POLICY ON MINIMUM COMPETENCY
Adopted by the Wyoming State Board of Education
November 8, 1980:

All schools in Wyoming will provide within their programs a process for identifying students who need assistance in the basic skills required for effective adult citizenship and will provide assistance to those students in order to assure them every opportunity to demonstrate those proficiencies. Minimum state requirements for the issuing of a public high school diploma include:

1. Successful completion of a program including credits or units ident-

effect emphasizes the identification of students who need assistance in the basic skills and providing remedial efforts. The responsibility for this, as well as implementing the state minimum requirements, belongs with the local school districts. Thus, the State of Wyoming has set general minimum standards. Translating those standards into specific levels of performance is a local school district responsibility. Establishment of a competency test program, setting any cut-off levels and determining what use will be made of student test scores remains a matter of local control of the schools in Wyoming.

III. THE CONTROLLING LAW

A. Wyoming Law

Wyoming law prohibits the denial of a diploma or course credit to a student who has earned it.[17] Although this law has never been judicially interpreted in a reported case, similar statutory provisions have been interpreted in other states. One principle emerging from those decisions is that a pupil who completes the prescribed courses and attains the standards of scholarship fixed for graduation is entitled to a diploma.[18] But, so long as the student has sufficient

16. Continued—
tified in the Wyoming School Accreditation Standards equal to a regular student course load extending through the senior year of high school.
2. Sufficient attendance in courses and programs to gain fully the educational and social benefits of the secondary program.
3. Demonstrated ability to read, write, and compute with proficiency, and an understanding of the process and structure of democratic governance and the free enterprise system; or completion of remedial programs designed to meet individual needs in those areas.

Required standards for graduation are the responsibility of the local school district working in conjunction with the State Department of Education. Local school districts are required to establish their own standards of proficiency and program requirements for graduation, and encouraged to go beyond those minimum standards established by the State Board of Education.

17. WYO. STAT. § 21-4-308(b) (1977) provides that:
No diploma or credit for a course which has been completed successfully shall be denied a pupil who has earned it; provided, such diploma or credit shall not be deemed earned until payment has been made for all indebtedness due to the school district.

18. *See* State ex rel. Miller v. McLeod, 605 S.W.2d 160 (Mo. App. 1980); State ex rel. Sageser v. Ledbetter, 559 S.W.2d 230 (Mo. App. 1977); Clark v. Board of Education, 51 Ohio Misc. 71, 367 N.E.2d 69 (1977); United States v. Choctaw County Board of Education, 310 F.Supp. 804 (S.D. Ala. 1969); Valentine v. Independent School District of Casey, 191 Iowa 1100, 183 N.W. 434 (1921).

notice that the standards of scholarship fixed for graduation include passage of a minimum competency test, Wyoming law seems to permit minimum competency testing with diploma sanction. However, a diploma cannot be denied arbitrarily. A competency test that is not fair and valid to all those who take it, is probably arbitrary. Therefore, unless the competency test instrument and process is fair, the diploma sanction may well be arbitrary, and a school district should not impose the diploma sanction. Also, the district's procedure in withholding a diploma must be written and fair, and should be established through administrative rulemaking. It should provide the student an opportunity to challenge any decision by the district to deny his diploma, or the denial may be arbitrary governmental action.

B. Applicable Federal Law

Other than the related federal legislation assisting state and local programs designed to improve basic skills through classroom instruction,[19] there are no federal laws or regulations which address competency programs. Nonetheless, federal law will be at the heart of most challenges to competency tests. Competency programs which are mandated by state or local agencies constitute government action, and likely will be subject to attack on federal constitutional or statutory grounds.

For instance, the *Debra P.*[20] case is founded upon the due process and equal protection clauses of the fourteenth amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964, and the Equal Educational Opportunities Act of 1974.[21]

The *Larry P. v. Riles* cases[22] discuss the use of standardized tests to place all children, including minority and

19. Section 921 of the Education Amendments of 1978, 20 U.S.C. Sections 3331-32 (Supp. III 1979).
20. Debra P. v. Turlington, *supra* note 3.
21. *See* Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d (1976) and its regulations—45 C.F.R. §§ 80.1-.13 (1979); Equal Educational Opportunity Act of 1974, 20 U.S.C. §§ 1701-58 (1976).
22. Larry P. v. Riles, 495 F.Supp. 926 (N.D.Cal. 1979) and its namesake predecessor case, Larry P. v. Riles, 343 F.Supp. 1306 (N.D.Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974). *But see* Parents in Action on Special Education v. Hannon, No. 74-C-3586 (N.D. Ill., decision July 8, 1980; on appeal to 7th Circuit).

handicapped students, in special education classrooms. Those cases are based upon Section 504 of the Rehabilitation Act of 1973, P.L. 94-142 (the Education for All Handicapped Children Act of 1975), and Title VI of the Civil Rights Act of 1964.[23]

Potentially any federal civil rights act, including Title IX,[24] could be the basis for judicial action prohibiting the use of competency tests.

C. Court Cases

1. Judicial Deference

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and strength . . . By and large, public education in our Nation is committed to the control of the state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply indicate basic constitutional values.[25]

Courts are not the proper place to second guess the judgment of educators.[26] The judicial system will defer to school authorities to establish, enforce and interpret how our children are to be educated. Courts will intervene only when school authorities act arbitrarily, capriciously, beyond their authority, or in violation of constitutional or statutory rights.[27] This judicial restraint is self-imposed, but strong. Students, teachers, parents and others in the educational environment do not give up their constitutional and stat-

23. *See* Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976) and its HEW Regulations—45 C.F.R. §§ 84.1-.99 (1978); the Education for All Handicapped Children Act, 20 U.S.C. §§ 1401-61 (1976) and its HEW Regulations—45 C.F.R. §§ 121a.1-.754 (1979) [hereinafter P.L. 94-142]; and Title VI of Civil Rights Act of 1964, 42 U.S.C. § 2000d (1964) and its regulations—29 C.F.R. §§ 80.1-.13 (1979).
24. Title IX of Education Amendments of 1972, 20 U.S.C. §§ 1681-86 (1976) and its Regulations—45 C.F.R. §§ 86.1-.70 (1979) prohibit sex discrimination in programs receiving federal assistance.
25. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).
26. Hoffman v. Board of Education of the City of New York, 64 A.D.2d 369, 410 N.Y.S.2d 99 (1978); *rev'd* on other grounds, 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979).
27. Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, 90-91 (1978); Fiacco v. Santee, 72 A.2d 652, 421 N.Y.S.2d 431 (1979).

utory rights.[28] But, particularly in light of the *in loco parentis* doctrine,[29] courts have said that educators have the right and responsibility to run the schools without judicial interference. Even where a court may view a school administrator's decision as unwise or uncaring, it will still be very reluctant to interfere.[30]

Judicial self-restraint has been applied in several cases which indicate that the courts will be particularly hesitant to review a decision of school authorities relating to academic qualifications of students, including the awarding of a diploma.[31] Even in the area of establishing high school graduation requirements, however, school authorities must be fair to all students, exercise good faith, and be reasonably flexible.[32] When there is evidence that a graduation certificate has been denied arbitrarily or capriciously, the courts will not hesitate to interfere and grant relief.[33]

Public school administrators have wide latitude to manage, control, direct, supervise and establish rules and regulations to operate the schools, but they may not exercise that authority disproportionately among students.[34] If school administrators act in an arbitrary manner, they may be enjoined by court action, including an order to award a diploma.[35]

There is reason to believe that traditional judicial court deference is more likely to be abandoned in the context of

28. Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 506 (1969).
29. The *in loco parentis* principle holds that the schools stand in place of the parents when students are under their care. This judicial doctrine provides the authority necessary for teachers to reasonably direct the actions of students and for administrators to reasonably punish student infractions. The broad authority of the doctrine is tempered by an increasing recognition of student rights. See *Annot.*, 53 A.L.R.3d 1124 (1973); Clements v. Board of Trustees, 585 P.2d 197, 204 (Wyo. 1978); Goss v. Lopez, 419 U.S. 565 (1975).
30. Wood v. Strickland, 420 U.S. 308, 326 (1975).
31. *See* DeMarco v. University of Health Sciences, 40 Ill.App.3d 474, 352 N.E.2d 356 (1976); Mahavongsanan v. Hall, 529 F.2d 448, 450 (5th Cir. 1976); Valentine v. Independent School District of Casey, *supra* note 18; Sweitzer v. Fisher, 172 Iowa 266, 154 N.W. 465 (1915); *and see* Debra P. v. Turlington, *supra* note 3; Wells v. Banks, 153 Ga. App. 581, 266 S.E.2d 270 (1980).
32. Department of Institutions v. Bushnell, 195 Colo. 566, 579 P.2d 1168 (1978).
33. Fiacco v. Santee, *supra* note 27; Clark v. Board of Education, *supra* note 18.
34. Clark v. Board of Education, *supra* note 18, at 74-75; State ex rel. Sageser v. Ledbetter, *supra* note 18.
35. *Id.*

competency testing with diploma sanction than in many of the other school contexts in which that principle has been evoked. Since competency testing programs make assumptions of objectivity, and since the injury to a student receiving a less-than-standard diploma is life-long, the courts' rationale for past restraint is far less persuasive when the subject is competency testing with diploma sanction.[36] It can reasonably be expected, particularly when minorities or handicapped children are involved, that competency testing used to deny a diploma or for tracking will spawn substantial litigation, directed toward the authorities imposing the competency test program.

2. Competency Testing in the Courts

The landmark decision dealing with the major legal questions raised by competency tests used as a prerequisite to the granting of a high school diploma is *Debra P. v. Turlington.*[37] That 1979 decision held that Florida's competency testing program: 1) utilized a test instrument that withstood constitutional challenge; 2) constitutionally excluded private schools from the testing requirement; and 3) did not resegregate minorities who were placed in special remedial classes because of low test scores. But the court also held that: 4) students had a property right and liberty interest in receiving a high school diploma; 5) the program carried forward the effects of past racial discrimination; 6) denial of a standard diploma results in stigmatizing injuries to a student; 7) the school failed to give students timely notice of the new diploma requirements; and 8) the program violated the due process and equal protection clause of the fourteenth amendment of the United States Constitution, Title VI of the Civil Rights Act of 1964, and the Equal Educational Opportunities Act of 1974.[38]

Florida required achievement of a minimum score on a competency test prior to awarding a standard diploma. In lieu of this standard diploma, students were given a

36. McClung, *supra* note 7, at 664.
37. Debra P. v. Turlington, *supra* note 3.
38. *Id.*

certificate of attendance. The remedy provided by the *Debra P.* court was to enjoin Florida from implementing the diploma sanction for four years, until the 1982-83 school year. The remedy focused on the need to give students in earlier grades, when basic skills are normally taught, an opportunity to learn those basic skills with the knowledge that a high school diploma would depend upon tested ability in those skills.[39]

Another Florida case attacking the same statute was filed recently.[40] A similar case was also filed in North Carolina for a class of blacks who failed to achieve a minimal passing score on the competency test.[41]

As in North Carolina and Florida, Georgia minorities have a statistically-significant higher failure rate than whites. In Georgia, two related federal class actions are awaiting decision on a motion to dismiss.[42] The Plaintiffs in those cases are parents of both black and white students whose children failed a minimum competency test requirement. Georgia has retest and remedial provisions. In a Georgia state appellate court decision, involving the same class of plaintiffs, the defendant school board and school authorities prevailed. That decision affirmed the local school board's authority to impose a competency testing program

39. Both sides appealed *Debra P.* to the Fifth Circuit and that decision may go from there to the U.S. Supreme Court. Even while *Debra P.* was on appeal, however, the trial court allowed amendment of the complaint to include additional parties and charges. Florida state attorneys agree that *Debra P.* is as much a civil rights discrimination case as it is a competency testing case. However, it would be a serious misreading of the case to believe that its legal rationale applies only to southern states with a history of *de jure* segregation. *Debra P.* is not based upon a finding of prior racial discrimination, and the due process holding (notice of diploma sanction must be given when basic material to be tested is presented in the classroom) applies to all students regardless of race. Education Commission of the States, *ECS Footnotes* 12 (Nov. 1979).

40. Love v. Turlington, No. 80-550 (N.D. Fla., filed May, 1980).

41. Iwanda H. v. Berry, No. CC80-0156 (W.D.N.C., filed May 2, 1980 voluntarily dismissed without prejudice Jan. 5, 1981). North Carolina's program allows students four opportunities to achieve a passing score.

42. Involving many of the same parties and circumstances as Wells v. Banks, *supra* note 31, are the cases of Johnson v. Sikes, No. CV479-323 (S.D. Ga., filed Oct. 30, 1979) and (in federal court), Wells v. Banks, No. CV478-138 S.D. Ga., filed in 1978). In the latter federal action, Wells, a black, was dismissed as a party in the case which has been restyled as Anderson v. Banks. Both federal cases were consolidated. A decision on the defendant's motion to dismiss was expected after this article was written.

with diploma sanction, and found no denial of due process or equal protection under the law.[43]

There is every indication that litigation will increase dramatically as additional students across the nation are denied a high school diploma for failure to achieve a minimum score on a competency test. Most challenges to competency testing programs so far have been in the context of minority plaintiffs. In Wyoming, for instance, if a competency testing program results in a disproportionate failure rate among American Indians, and they are denied regular high school diplomas, a court challenge should be expected.

Even where there are no minorities or handicapped children injured by the failure to achieve a standard high school diploma, several problem areas with competency testing are likely to prompt litigation. Until a definitive decision emerges, perhaps from the United States Supreme Court in three to five years, litigation can be expected wherever competency testing with diploma sanction or tracking is implemented. The ultimate success or failure of this litigation cannot be predicted; however, many of the grounds of the complaints can be. Those grounds are contained within the issues discussed below.

Where local districts impose competency test programs, local districts will be the defendants which must bear the cost of litigation. Where the minimum competency requirement is imposed by the state, the state department of education and state board of education are also likely defendants. One recent California case has given an indication that the state agency imposing the requirement must on its own validate testing instruments to be used, monitor implementation of procedural protections, and provide independent verification that a competency testing program is fair and valid.[44]

43. Wells v. Banks, *supra* note 31.

44. Larry P. v. Riles, *supra* note 22, at 946-47, 981-83.

IV. LEGAL ISSUES

Several legal issues about the competency testing controversy seem apparent to this writer. Until definitive court action expands or restricts the viability of each of these issues, all must be considered potential bases for competency testing program litigation.

A. What to Test

1. Defining Functional Literacy

"Functional literacy" and "minimum competency" mean different things to different people. The first basic question that must be answered by policy makers prior to imposing competency testing programs is: What is minimum competency?

Unless there is documented agreement as to what constitutes functional literacy, any program designed to achieve minimum competency invites a due process challenge. If the specific purposes underlying a competency program are not articulated and publicly known, then the program is subject to charges of arbitrariness, capriciousness, abuse of discretion, and violating constitutional and statutory civil rights when it is implemented. Unless the specific minimal competency goals are made public, the validity of testing instruments and the entire competency testing program can have no standard against which progress or regression can be measured.

Not only must policy makers determine what competencies should be measured, specific objectives within each competency area must also be articulated.[45] Once developed, minimum competency objectives then become the criteria with which tests should be compared. If individual competency test questions do not clearly relate to an articulated competency objective, the defense of a use of the test results against any student will be difficult.

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45. *See* note 14, *supra*.

2. Basic School Skills vs. Life Skills

Minimum competency tests are intended to determine whether or not a student has acquired sufficient proficiency in certain basic skills to function in the adult world. But there is a dilemma as to what specific skills should be examined.

On one hand, *basic skills*, and classroom, or *school skills* lend themselves to testing and a close match between testing and instruction. Basic math skills, such as adding and subtracting numbers, basic reading skills, and basic writing skills at some point are already tested in most school systems.

For school skills, the process is more important than the product. Setting up a math problem correctly, so that the student will know how to solve future computation situations, is more important than arriving at the right answer. But in life skills, getting the answer right is most important. By whatever method is used, arriving at the correct checkbook balance is what counts.

But, minimum competency is not usually thought of in terms of passing school tests; it generally means the basic level of skills that adults should have to exist in society. That level apparently lies somewhere between the sixth and ninth grade achievement level. The meaning of functional literacy cannot be just the basic skills of reading, writing, and computing. It has to be the ability to apply those basic skills to function in society, otherwise competency testing is no different from a super semester exam.

When it comes to testing adult life skills or the application of basic skills, the weaknesses in the state of the art of testing emerge. While testing life skills is certainly more legitimate in light of the expressed motivation and goals of the competency testing movement, a fair and valid life skills competency test is on the edge, if not beyond, test manufacturers' skills to construct. That does not mean that several states are not trying to test life skills; however, they are in a minority and their degree of success is unvalidated.

Specific *life skills* that have been discussed in the context of competency testing include balancing a checkbook, computing sales tax, family budget planning, figuring whether the individual can afford a better car, reading and using a computer printout, voting, filling out one's personal income tax form, completing a job application, having a job interview, determining the most economical size of a product, reading a bus schedule, applying for a bank loan, and writing an understandable personal or business letter. Broader life skills which competency testing may attempt to measure include consumer awareness, health, conservation, knowledge of the elective process, and family life. Life skill testing may also examine a student's ability to communicate with co-workers on the job, and make good use of his time at work, home, and at leisure. If specific life skills are difficult to test, broader and general life skills are nearly impossible to evaluate.

Both program objectives and the individual questions on a competency test must manifest what policy makers have determined are the minimum knowledge and skills that a student should possess to obtain a standard high school diploma. The administrative body imposing the test program must justify the content of test objectives. If test content correlates to what is taught in school, but not the skills that a student needs in life, then a critical motivation for having any competency program at all has been ignored. And if, as some critics have charged, competency testing programs will have the effect of limiting instruction to basic test skills, the school may be doing its students a greater disservice than if no competency test requirements were imposed. If competency tests focus on basic skills, teaching may focus on basic skills, and the student's ability to apply basic skills to his job, home and leisure situations may suffer. Yet determining what future skills a student may require involves considerable speculation.

For instance, it is reasonable to assume that a student in elementary school now will need to have an understanding, by the time he enters the adult job market, of how to use

computer products. However, predicting what computer products will look like and be used for in fifteen years is difficult.[46]

Wyoming's State Board of Education policy states that minimum state requirements for a high school diploma include an "ability to read, write, and compute with proficiency."[47] It appears that the State Board has adopted the basic school skills competency testing philosophy. As has been discussed, testing for basic or school skills is more prevalent, fairer, and more practicable than testing for life skill competencies. However, showing the relationship between basic skills and functional literacy in society is extremely difficult. Without showing that correlation, the whole basis for competency testing is subject to challenge as unnecessary at best and inadequate and counter-productive at worst. The ability to add a row of numbers, understand McGuffy's Reader, or write a grammatically correct paragraph does not necessarily or demonstrably indicate that the individual can fill out a job application form, vote, or pay his taxes. And if a student passing a competency test is not demonstrably more literate in the adult world than the student who fails the competency test, the whole program has failed to meet its stated goals and may be thrown out by a court.

But, it may be reasoned, a student with basic literacy skills should have no difficulty in satisfactorily completing the adult life skills which we can't adequately test. This statement is founded upon the assumption that satisfactory

46. A district may conclude that a test over basic computation skills will suffice to cover any student's need for computer-product-use skills in the future. Therefore, teachers will concentrate on basic computation skills, perhaps to the detriment of computer courses, which some people have labeled as "frills". The student's education and his employment potential will have been limited unnecessarily.

For instance, if the school district determines a student in a mining town, whose family members for generations have been miners, doesn't need any computer skills because he is going to be a miner; the district has imposed a limit upon that child's future. Certainly the mining industry depends upon manual labor. But just as certainly, it depends upon computer products for payroll, production, and management functions. Even if it could be assumed that a specific child will stay in a specific town and work at a specific job in the future, it is doubtful whether the school can ethically or legally limit his ability for job promotion by deliberately limiting the functioning skills the school now knows he may need.

47. The entire policy appears in note 16, *supra*.

performance of basic skills necessarily, or probably, indicates successful performance of life skills. That assumption deals with what are called *transference skills.*

It may be likely that a student who can't add and subtract columns of numbers also can't balance his checkbook, but is the converse true? Does the ability to add and subtract a column of numbers indicate a probability of being able to balance a checkbook? Common sense might indicate so; however, empirical studies do not. Massachusetts has found that transference skills are a separate ability of students. In many cases, students learn traditional school skills without also gaining the ability to transfer, or apply those skills to everyday life.[48]

The transference problem is one of many reasons why competency testing programs have often focused upon basic, rather than life skills. For whatever reason, in 1978, twenty-nine states tested for minimum competency in basic skills, nine tested for functional literacy, and eleven states included areas such as citizenship, leisure skills, life-long learning, and attitudes toward school.[49]

3. Test-Instruction Match

A competency test that measures skills which were never taught in the school and is then used as a basis for denying a diploma may be so arbitrary as to violate due process of law.[50] The need for some kind of match between test and instruction seems basic to the concept of fair play; however, the use of statewide or purchased tests, and tests of adult life-skills suggests that what many competency tests measure may not have been taught in a local school district.

The test-instruction match concept may be divided into terms of curricular and instructional validity. *Curricular validity* is a measure of how well the test items represent the objectives of the curriculum. *Instructional validity* is a

48. McClung, *supra* note 7, at 684.
49. *Id.* at 674.
50. *See* St. Ann v. Palisi, 495 F.2d 423 (5th Cir. 1974).

measure of whether a school district's stated objectives were translated into topics actually taught in the classroom. As one commentator has concluded, "[a] school or school system that cannot ensure the curricular and instructional validity of its competency tests should not use them as a basis for denying promotion or a diploma to any of its students."[51]

If a litigant can show that the test instrument lacks instructional validity—that it measures what in fact was never taught in the schools—then the denial of the diploma can be equated with inflicting punishment on a student who lacks culpable fault.[52]

Therefore, adding minimum competency requirements may, and probably should, mean changing the school curriculum.[53] Schools should expose students to knowledge and skills necessary for "passage" of the competency test. Failure to do so may result in legal liability for a school district which utilizes competency test instruments that lack a high degree of curricular validity.

The match of tests to instruction is particularly controversial when the objective or question deals with values, such as "an understanding of the process and structure of democratic governments in our free enterprise system".[54] Tests over such skills are legally vulnerable because it is questionable whether these values can be measured or taught, and because value questions are inherently subjective.[55]

Finally, there may have to be a correlation between competency test scores and regular classroom grades, since both are regarded as accepted measures of school performance.[56]

51. McClung, *supra* note 7, at 682.
52. Clague, *Competency Testing and Potential Constitutional Challenges of "Everystudent"*, 28 CATH. L. REV. 469, 495-96 (1979).
53. *See* text accompanying note 121, *infra*, for the problems which may be encountered in in doing so.
54. The quoted policy is part of that adopted in Wyoming, which appears in note 16, *supra*.
55. *See* discussion in text accompanying notes 61-68, *infra*.
56. *See* Larry P. v. Riles, *supra* note 22.

4. Setting Test Cut-Off Scores

There is no agreed standard of what constitutes "minimally competent." Is it the lowest score made by a member of a preselected group of "successful" adults in the community? Is it one level higher than the top score made by adults receiving public assistance or in prison? The political implications and government-imposed value judgments involved in setting the pass-fail dividing lines are obvious.

Often cloaked in protective claims of objectivity, the determination of what is the minimum score to obtain a high school diploma is ultimately a political decision that is inherently subjective. Some critics have charged that a principal factor in determining a cut-off score is the answer to the question "What percentage of students can we fail and still keep our jobs?" Setting the cut-off point in any case will be an arbitrary determination of what constitutes minimum competence on a specific test instrument.

It may be that instead of using a single score, a cut-off range may be established. Students with near-pass scores within the range would then be evaluated by other means before making a final decision about their performance. Since setting the cut-off score is subjective and yet so critical, it is perhaps a key point for involvement of the community in the competency program formulation. If the cut-off score is set too low, it does little to enhance the value of the diploma. If almost everybody "passes", the whole competency program may be a joke to students, parents, and taxpayers. On the other hand, if the cut-off score is set too high, more students will avoid the incompetence label by dropping out of school in their last year of high school. There are political implications of a high failure rate. Many taxpayers may take a fifteen percent-plus failure rate as strong evidence of poor schools. Thus, implementing a competency testing program with diploma sanction could create new recriminations about who is to blame for poor students, teachers, administrators, and even board members.

In developing its competency testing program, North Carolina's school authorities acknowledged that establishing

a standard for minimum competency eventually comes down to human judgment. Therefore, they utilized a series of studies before setting minimum passing scores.[57]

Even though the determination of a cut-off score is critical, it is one of the areas in which the courts are most likely to defer to the school system and educational expertise. Therefore, it is not a likely litigation issue, except in the larger context of objectivity and arbitrariness. Nonetheless, community involvement and other steps taken to determine the cut-off score may go a long way to avoiding competency testing litigation. After all, it is the child who didn't make the cut-off score or his parents that are going to be plaintiffs in competency litigation. If parents are aware that the cut-off score was established with community involvement, they are much less likely to be suspicious of the whole competency program.

It may be that establishing the cut-off score is a rule-making function which must be done in compliance with the Administrative Procedure Act.[58] One court has so held and a Wyoming decision suggests that school districts should carefully consider the matter.[59] In fact, it may develop that the entire competency program should be established through the promulgation of rules.

5. What a Competency Test Looks Like

Set out in the footnotes below are some minimum competency test questions and their answers. These are repre-

57. Those studies included: 1) experimental studies, which looked to see if there were observable differences between students ranked as minimally competent and students ranked as not competent; 2) judgmental tests, which sought the views of experts in content fields on what would be minimum passing scores; 3) statistical studies, which looked for a score on the cumulative distribution that seemed to be a natural cut-off point; and 4) referential studies, which compared results on a pre-test, with performance on achievement, intelligence, and regular classroom tests, by the same students. Gallagher and Ramsbotham, *supra* note 1, at 13.

58. WYO. STAT. §§ 9-4-101 to 9-4-106.

59. Brady v. Florida State Board of Education, No. 78-6534 (Fla. Div. Adm. Hearings, final order June 15, 1978, as reported in McClung, *supra* note 7, at 664); Clements v. Board of Trustees, 595 P.2d 197, 204 (Wyo. 1978).

sentative questions and were gleaned from publications available in the public sector.[60]

B. How to Test

A student required to take a competency test will reasonably demand that it be "fair." One major aspect of that fairness is the methodology employed to test competencies. The answer to the question "How will the minimum competencies be measured?" is one issue of the minimum competency testing debate that is likely to be a part of most litigation. Analysis of individual questions on a competency test, the validity and reliability of the test instrument, the process of selecting the test instrument, and the procedures

60. SAMPLE TEST QUESTIONS:

1) Add the following sets of numbers:

978 The correct answer is:
669 a. 2568
435 b. 2569
+587 c. 2659
—— d. 2669
e. none of the above

2) A job pays $6.50 per hour with time-and-a-half for overtime. If you worked 40 regular hours and 8 overtime hours at the job, how much would you earn?
   a. $360.00
   b. $312.00
   c. $338.00
   d. $468.00

3) According to the label, a gallon of paint will cover 400 square feet. How many gallons will be needed to paint a room with four walls, each of which is 8 feet high and 12 feet long?

4) The balance in your checking account is $87.24. You make a deposit of $53.67. A few days later you write checks for $31.33 and $5.92. What is your balance after completing these transactions?

5) If you think a word is misspelled circle the letter before it. If you think all the words are spelled correctly, circle the letter before the answer NONE:
   a. touch,
   b. message,
   c. chocolate,
   d. yourself,
   e. NONE

6) Read each of the following statements and decide whether that situation would generally be true in a democratic society:
   a. The President vetoes a bill passed by Congress.
      YES ..... NO .....
   b. People are barred from all city council meetings.
      YES ..... NO .....
   c. People organize to elect a person to represent them.
      YES ..... NO .....

ANSWERS TO SAMPLE TEST QUESTIONS:
1) d. 2669; 2) c. $338.00; 3) Each wall has 96 square feet. Four walls have 384 square feet. Therefore, on gallon will do it; 4) After making a deposit, you will have $140.91. The two checks total $37.25. The difference and thus your balance is $103.66; 5) e. NONE; 6) a. yes; b. no; c. yes.

employed in administering the test all must be fair and documented for the measurement process to escape judicial intervention. Even then, larger questions about the state of the art of developing and validating test instruments, and testing *per se* remain part of the minimum competency debate.

1. Appropriate Test Content

Competency tests will be legally vulnerable if they include inappropriate test questions. Test questions which cover value systems or beliefs are particularly susceptible to legal challenge. Seemingly innocent on their face, such questions may involve the problem areas of coerced belief, invasion of privacy, and unteachable or unmeasurable content.

For instance, one Florida school district purchased a proficiency test which it planned to use as the basis for imposing the diploma sanction. Three questions on that test are reported as follows, with the subject area in parenthesis:

> 1. "Discuss the idea that just because a rich family can afford to feed, clothe and educate a large number of children, this does not mean that the world will be able to support their children and grandchildren." (Consumer Economics)
> 2. "Discuss proper behavior and attitudes for keeping a job." (Occupational Knowledge)
> 3. "Discuss the physical and psychological benefits gained when food is served attractively in a pleasant atmosphere." (Health)[61]

Each of these questions assumes that certain beliefs or values are correct, proper, and held by "good" citizens. A student's answers which do not conform to those officially-deemed correct can result in the denial of a high school diploma. Consider the diverse background of those that might be denied a diploma for their failure to relate to upper-middle-class socio-economic philosophy, the work ethic, having parents who are home to prepare food, and having a

61. McClung, *supra* note 7, at 672-73.

decent place for food to be served. To a ghetto Chicano, reservation American Indian, or transient student, each of the above questions demands a background and "right" answer that may be entirely foreign and inappropriate. Such students may not pass the competency test. And yet, each such student may function well in his or her society, so he or she should not be labeled as functionally illiterate.

Coerced belief is a violation of the first amendment. When the state is involved, there can be no "right answers" in matters that touch individual opinion and personal attitude.[62] Any competency testing program in which the state imposes a penalty for the failure of students to conform to specified beliefs or values probably violates the first amendment. The vice is in the state compulsion to select the "right" answer, not the validity of the belief itself. Any constitutional infirmity cannot be cured by a majority vote of the parents, school board, legislature or students.[63]

The authority and legitimacy of action by educational authorities to insist upon "an understanding of the process and structure of democratic governance and our free enterprise system"[64] is beyond question; however, any competency test questions on those subjects must withstand strict scrutiny to insure that they do not imply "correct" value judgments on representative government or capitalism. It may

62. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). In the *Barnette* case, the United States Supreme Court held that compulsory flag salutes in public schools were unconstitutional. The court spoke to invasion of "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.* at 642. Justice Jackson further wrote:

> (F)reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. *Id.* at 642.

63. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, and to place them beyond the reach of majorities and officials. . ." *Id.* at 638. And note that in the case of students protesting the Vietnam War by wearing black armbands, the United States Suprme Court upheld their first amendment rights against a charge based on the disruptive potential of the students' action. Tinker v. Des Moines Independent Community School District, *supra* note 28.

64. The quoted policy adopted in 1980 by the Wyoming State Board of Education appears in note 16, *supra*.

be possible to construct questions which explore knowledge and understanding of the democratic political system,[65] but any question which calls for a "proper" value or belief is highly suspect under constitutional analysis.

Value or belief questions may also be unconstitutional invasions of privacy. When public school officials, struggling with a serious drug abuse problem, developed a test questionnaire seeking personal information from students about themselves, their families, and other students, a federal district court threw out the test instrument on privacy grounds, stating that the right to privacy "should be treated with as much deference as free speech."[66]

In the context of a competency test, a student's answers to questions dealing with responsible citizenship, appropriate ways to change a law, positive self-concept, proper behavior for work or leisure situations, the nature of the two party political system, or feelings of empathy and objectivity about the arts, are probably within the protected sphere of privacy.[67] Questions on those subjects which imply correct answers, or which penalize a student for refusing to disclose his opinion, may well be unconstitutional.

In addition, certain social responsibility, good citizenship, self-concept, and job preparedness skills may be unteachable or unmeasurable. Denial of a diploma based upon improper answers to questions in unteachable and unmeasurable areas may violate a student's right to be free of punishment for his failure to learn that which cannot be taught or quantified.[68]

65. Merle McClung has pointed out that many inappropriate test questions with key value words ("accept, value, appreciate, support, justify") can be rewritten to elicit a student's knowledge ("describe, list, explain, apply"). Many performance objectives that have a value orientation could easily be revised in knowledge terms. For instance, an unacceptable question ("Describe what is appropriate behavior in this work situation:") may be rewritten in knowledge terms ("Describe what most employers consider appropriate in this work situation."). McClung, *supra* note 7, at 679.

66. Merriken v. Cressman, 364 F.Supp. 913, 918 (E.D. Pa. 1973).

67. McClung, *supra* note 7, at 678.

68. *Id.* at 678-79.

2. Validating the Test Instrument

Fair competency tests should measure knowledge that has previously been taught and measure it accurately. A student passing a competency test should function in society noticeably better than a student not passing the test. Ensuring this fairness is the legal responsibility of the school authorities imposing the competency testing program. Those authorities must insure the test instrument is properly validated. Such validation efforts will examine test reliability and validity. Such validation will probably require a pre-test prior to regular use.

a. Test Reliability. Test reliability refers to whether what the test instrument measures is measured accurately. If a test yields comparable results when used at different times (high test reliability), then it will minimize technological and human measurement errors. If a competency test produces significantly different results when given to the same group more than once (low test reliability), it is undependable. The higher the reliability of a competency test, the more accurate will be educational judgments based upon test scores.

b. Test Validity. Test validity refers to whether the test instrument measures what it purports to measure. If a competency test does not measure competencies, it is invalid. Unless there is a high degree of test validity, inferences drawn from a student's performance on that test should not be used for any educational decisions. And for handicapped students, federal law[69] requires that all test and evaluation materials be validated for the specific purpose for which they are used.[70]

69. 45 C.F.R. § 121a.532(a)(2) (1979), of the Regulations implementing P.L. 94-142 (20 U.S.C. §§ 1401-61 (1976).

70. There are several types of test validity; each differs depending upon the type of inferences one wishes to draw from the test results. All types of validity should be statistically high or the competency test instrument should not be used. *See* McClung, *supra* note 7, at 666-67; and Lewis, *supra* note 9, at 159-160.

Construct Validity is a measure of how well test items correlate to the theory, or "constructs" underlying the test instrument. One such construct might be "computation skills are necessary in order to function well as an adult." Test manufacturers should conduct experiments to test the construct. For instance, they should find out whether those who passed the test will compute as an adult better than those who failed the test.

c. Instructional Match. An otherwise reliable and valid competency test will still be legally suspect if it measures what the student has never been taught. Notions of due process require school officials to provide students a fair chance to acquire those skills necessary for a successful performance on the examination. Thus, instructional match is both a measure of the test and an examination of a school's curriculum. Instructional match involves both curricular validity and instructional validity. *Curricular validity* requires a comparison of the test objectives with the school's course objectives. *Instructional validity* compares the course objectives with what is actually taught in the classroom.

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70. Continued—

Content Validity is a measure of how well specific test questions represent the knowledge that the test purports to measure. A test would have a high content validity if persons doing well in fact had a high degree of knowledge on the subjects the questions addressed. A computation test question would have an unacceptably low content validity if students who, determined by other measurement methods, had a great knowledge and skill in computation did poorly on the test's computation questions.

There are two criterion-related validities. *Concurrent Validity* measures how well test scores correlate with other information available about the students taking the tests (e.g., grade point average). A low concurrent validity would result in the anomalous situation of a school's better students performing poorly on competency tests that determine who receives a diploma. If "A" students score poorly on a competency test, they would be denied a diploma. That would be evidence that something was amiss either with the test or with all the "A" grades given by the school.

Predictive Validity is a measure of how well the test items will predict the future performance of the test takers. Predictive validity is particularly important when selecting a competency test instrument. Since one of the major thrusts behind the competency testing movement is to achieve functional literacy in students when they become adults, it is imperative that students who achieve a passing test score indeed function better as adults than those who fail the test. If a good test score is not in fact predictive of a pupil's capacity to function later as an adult, a school district is on tenuous legal grounds to deny a diploma to a student who did not achieve a passing test score. A high degree of predictive validity is necessary for a test to survive legal challenge. Larry P. v. Riles, *supra* note 22, at 969-70; *and see* Washington v. Davis, 426 U.S. 229 (1976).

Although it is not an aspect of test validity, whether a test is designed to be criterion-referenced or norm-referenced bears upon how a test is validated. The difference is in the methods the test manufacturer uses to separate those who score high from those who score low.

Criterion-referenced tests, usually utilized for competency tests, measure student responses against predetermined criteria which are test objectives or standards. Criterion-referenced tests depend heavily upon the validation of the criteria for their legal viability. Thus, validation of a criterion-referenced competency test against its specific test objectives is essential.

Norm-referenced tests measure student responses against each other, in order to produce a bell-shaped grading curve. Norm-referenced tests try for a statistical distribution of test scores by eliminating questions most students can answer, thus exaggerating differences between students. It is questionable whether norm-reference tests are suitable for competency testing programs. Functional literacy is a standard, not a comparison of students to each other. If all students meet the minimum level of competency, then all students should pass.

Some courts have addressed the importance of instructional match; however the court in *Debra P.*[71] passed over plaintiff's allegation of instructional mismatch, because it found inadequate notice to be a more basic problem. Another court characterized punishment of a child (here, the denial of a diploma) when the fault is not the child's (here, where the test measures what in fact was never taught in the schools) as a violation of the basic constitutional principle that individuals cannot be punished without personal guilt. To do so violates a child's due process rights guaranteed by the fourteenth amendment.[72]

d. Responsibility for a Proper Test. A series of California cases examined the use of IQ tests to place children in educable mentally retarded (EMR) classes. In those cases the responsibility of school authorities imposing the test requirement was discussed. When the focus was on applying standardized IQ tests to black students who were borderline EMR's, which resulted in a disproportionate EMR classification of blacks, the judicial result was a statewide moratorium on IQ testing for EMR placement.[73] In a more recent decision involving the same class of plaintiffs, the judge looked at the responsibility of state authorities in approving the use of IQ tests for EMR placement. Judge Peckham noted that the California State Board of Education had adopted a resolution proposed by the State Department of Education requiring the use of approved IQ tests for EMR placement. But, neither the Education Department nor the State Board had made an independent investigation of the tests to be used. The judge cited the Education Department's failure to explore, monitor and follow up in the areas of bias, procedural protections imposed by the legislature, and the disproportionate impact of the tests upon minorities. Both the Education Department and the State Board were well aware of the general controversy over the validity and use of IQ testing, but did not independently investigate the matter. Instead, both bodies authorized and directed the IQ test

71. Debra P. v Turlington, *supra* note 3.

72. St. Ann v. Palisi, *supra* note 50; *and see* Clague, *supra* note 42, at 495-96.

73. Larry P. v. Riles, *supra* note 22, at 343 F. Supp. 1306.

usage in question. Therefore, the judge concluded that the decision by the State Department of Education, which was supported by a resolution of the State Board of Education "to compel the use of standardized I.Q. tests clearly . . . reveals the impermissible intent to discriminate."[74]

The implications of *Larry P.* are enormous for both local and state school officials who impose competency test programs. Local school officials who deny a diploma pursuant to a competency testing program may be liable to failed students if they cannot show the test instrument has been validated in all ways for that individual district's school population. Many local school districts have neither the expertise nor resources to do such validation themselves, except in a limited way. Therefore, they are likely to look to their state department of education for assistance. The Department may lack the capacity to perform the validation. Whether in-house or through consultants, the State Department of Education will likely be caught up in validating and monitoring local school district competency tests. If the Department cannot obtain adequate validation of existing commercial competency tests for the state's school districts, it will likely have to modify or develop unique test instruments for the state, which in turn must be validated for each local district. The State Board, to the extent it imposes or even approves of competency testing for diploma denial or placement purposes, may have to independently evaluate the test instrument. The Department, and perhaps the State Board, may have to monitor implementation of procedural protections designed to keep the competency testing programs within the state as fair as possible.

All of this will be very expensive and time-consuming for local districts, the State Department of Education, and the State Board of Education. One alternative is to ignore these problems and hope they won't develop. But in California, there was a judicial finding that the State Department of Education, working in hand with the State Board of

74. Larry P. v. Riles, *supra* note 22, at 495 F.Supp. 926, 980. *Larry P.* has been appealed, with this finding of intent to discriminate being one issue advanced by counsel for the California Department of Education.

Education, manifested an impermissible intent to discriminate when it did not do the described independent investigation, validation, and monitoring.[75]

However, a more recent Chicago case known as *PASE*,[76] in which the judge made an item analysis to the same tests, came to the conclusion that they were not culturally biased. In that decision, the judge found very few questions which he determined were culturally discriminatory. Thus he rejected the discrimination allegation, even though the test's disproportionate impact upon minority and disadvantaged students was apparent.[77]

The legal risks outside the discrimination context are no less. In fact, a finding of the intent to discriminate is an obstacle plaintiffs will not otherwise face.[78] Outside the discrimination litigation context, the general rule is that administrative bodies are presumed to intend the actual result of their official action, unless such results are too unique or indirect to be predicted. Thus, it would be difficult to argue that local school districts, the State Department, and the State Board could not reasonably predict validity problems with competency test instruments. Further, if the value of the diplomas denied students exceed the cost to the school district of validating the test instrument, due process requires local validation.[79] The cost of validation may be high, but the potential lifetime earning loss to all students denied a regular high school diploma is likely higher. Thus, school use of competency tests to deny diplomas or place students in curriculum tracks may be enjoined until school authorities, be they local, state or both, can demonstrate test instrument validity.

e. Methods of Validation. Local school districts do have the capacity to perform some aspects of the required validation. They can produce the specific competency testing program objectives and utilize a pre-test program to sample

75. *Id.*
76. Parents in Action on Special Education v. Hannon, *supra* note 22.
77. *Id.*
78. *See* Washington v. Davis, 426 U.S. 229 (1976).
79. Lewis, *supra* note 9, at 161.

their students on a proposed test instrument. Utilizing this information, and other indicators of school performance (such as student grades and test scores in similar subject areas) for the randomly-selected pre-test students, there would be sufficient information available to analyze construct validity, content validity, concurrent validity, and test reliability. Then, by making and utilizing a study of classroom objectives and actual instruction, curricular validity and instructional validity can be analyzed to determine if there is an instructional match problem. Specific curriculum changes can be made to match the test instrument. Then, the local school district can administer the competency test instruments to all students at the selected grade level(s). After those students have graduated from high school, the local schools presumably can, by some means, evaluate their functional literacy. Thus a measurement of predictive validity can be obtained. Then the local school district is in a position to impose the diploma sanction. Throughout this multi-year test instrument selection and validation process, the diploma sanction or tracking should not be implemented, since the local school district has inadequate information to defend against charges of denial of due process, equal protection, and other allegations.

Although some local Wyoming school districts may have the resources and expertise, or can afford to purchase that expertise, to perform the minimum test instrument validation, most districts are going to have to rely on the State Department of Education for the local validation assistance. Of course, test manufacturers will have validation information on the products which they are trying to sell. However, unless it can be shown that their test instrument validation fits the individual school district utilizing the test, there is no legally adequate validation. Many test instruments are validated on urban, white middle-class student groups that may not be representative of the school district using the test.

North Carolina is unique in that, at a state level, it attempted to validate several test instruments for use by

local school districts. The process it employed was quite extensive and expensive, but does appear well-designed to avoid the infirmities otherwise inherent in the validation problem. That program involved extensive pre-testing, careful development of educational objectives, public hearings, field tests, extensive analysis of test items for cultural and racial bias, modification of commercially-available competency tests, verifying minimum pass rates by several independent means, and provisions for future control testing.[80]

3. How the Test Is Administered

There are at least four ways to measure or test for competencies:[81]

(1) *Actual performance situations* in post-secondary school situations or on the job are ideal. Nothing offers better proof of functional literacy than getting a job, keeping it and being promoted. But actual performance is more in the nature of predictive validation[82] than it is testing. It takes years to know actual performance results. By then it is too late to help either the school or the student, and the job market entry skill requirements may have changed.

(2) *Simulated performance situations* set up in school to resemble later school or job settings are good testing methods. They are more realistic and will have a higher predictive validity than paper-and-pencil tests. But they may not be realistic enough, there are few good test instruments available, and they are more costly and much more time-consuming to administer.

(3) *School products and performances* are such as a shop class project, a painting, a horn solo, a brake job, a speech, a history report, an original story, or a touchdown. Rating the products and performances a student makes or does while in school takes less time and money than arranging special simulations. But correlating these student prod-

80. *See* Gallagher and Ramsbotham, *supra* note 1, at 9-14.
81. *See* "Setting a Policy for Minimum Competency Testing," AASA Critical Issues Report (Date unknown), a copy of which is in the files of this writer and Brickell, *Seven Key Notes on Minimum Competency Testing*, 59 Phi Delta Kappan 589 (1978).
82. *See* note 70, *supra*.

ucts and performances to specific levels of functional literacy may be difficult. And for most of these situations, the student usually has had help, the test pressures are missing, and it is difficult to score the results.

(4) *Paper-and-pencil tests* are the usual method of testing. They are the easiest, quickest, least expensive, and most available means to test. But they measure a narrow band of knowledge or skills and are far removed from actual performance situations. They have a questionable ability to predict adult-life skill success. They are very poor at measuring attitudes, integrity, leadership, creativity, physical strength, cooperativeness, and abilities to communicate and persuade. All of those personal attributes may be significant factors in later school or job success.

For the sake of objectivity and ease of grading, most minimum competency measurements will be paper-and-pencil tests, rather than oral tests or observations of students by experts. It may be, however, that oral examinations for reading comprehension and citizenship are necessary for any testing of those areas to be valid. It may also be that asking a student to complete an I.R.S. Form 1040 or follow a recipe are the most valid ways to test knowledge of certain life skills, instead of asking questions about performing those skills.

Test administration techniques may have to be modified for handicapped children and non-English speaking students.[83] In the case of handicapped and non-English speaking students, legal challenges to the written test method of assessing minimum competency can be expected.

4. The Larger Testing Controversy

Some critics of competency test programs view the subject as a part of the larger controversy surrounding standardized tests and test usage in general. The *Larry P.* litigation deals with IQ tests, yet it may be persuasive in competency testing litigation, since there are so many similar

83. *See* text accompanying notes 135-167, *infra*.

elements: The use of supposedly objective and validated tests, disparate impact on minorities, use of test results for significant educational decisions, proclaimed ability to predict life performance based upon a school test, racial and cultural bias problems in test instruments, state involvement in the program to help students, and a state educational mandate. The *Larry P.* judge analyzed testimony from many experts and concluded that "[W]e cannot truly define, much less measure, intelligence. . . . I.Q. tests, like other ability tests, essentially measure achievement in skills covered by the examinations."[84]

It takes little prescience to predict that a court might similarly say "We cannot truly define, much less measure, minimum competency. . . . Minimum competency tests, like other ability tests, essentially measure achievement in skills covered by the test."[85]

In a book appropriately entitled "The Myth of Measurability" it is illustrated that the state of the art of testing is not sufficiently developed to adequately and fairly test minimum competency.[86] Measurement technology lacks the sophistication necessary for educators to use minimum competency tests as the basis for denying a high school diploma.[87]

C. Notice and When to Test

1. Notice of Implementing Test Sanctions

When we got to school, they told us we have to have

84. Larry P. v. Riles, *supra* note 22, at 952, *but see* Parents in Action on Special Education v. Hannon, *supra* note 22.
85. *But see* the summary judgment decision upholding the use of standardized placement tests for elementary school grade placement where the plaintiffs offered no prima facie evidence of disparate impact upon a protected class of students. Smith v. Dallas County Board of Education, 480 F.Supp. 1324 (S.D. Ala. 1979).
86. *The Myth of Measurability*, 229, 290 (P. Houts ed. 1977), as quoted in McClung, *supra* note 7, at 671 n.98, 694 n.217.
87. Professor Gene Glass of the University of Colorado has said:
> Teachers and their consultants attempting to define 'competencies' and writing test items intended to reflect minimal levels of acquisition are engaged in a bootless and potentially embarrassing endeavor. . . . (Minimum competency testing programs with diploma sanction are) based on indefensible technology. The items of the test have never been validated as measures of 'survival skills' and the pass-fail standards were set mindlessly and capriciously.

Glass, *Minimum Competence and Incompetence in Florida*, 59 PHI DELTA KAPPAN 602, 603, 605 (1978).

> 20 credits to graduate. Now they jump up and tell us we have to pass this test to graduate.

That was the reaction of two Florida high school students when being told of an added competency test requirement to receive a diploma.[88] In Florida, high school teachers were notified of the test objectives only four months before it was first given, in the fall of 1978. This left teachers only two months of instructional time to prepare students. Further, there were only thirteen months of instructional time between the date the results of the first test were released and the date that the third and final tests were held. Since the test was supposed to cover knowledge and skills students would have acquired over their twelve year period of public schooling, thirteen months was insufficient time to remedy any deficiencies[89]

The fourteenth amendment to the United States Constitution commands that no state "shall deprive any person of life, liberty or property, without due process of law." Thus due process in the context of competency testing requires that students have adequate notice prior to any rule that would cause irreparable harm to their educational or occupational prospects. The due process inquiry first requires analysis of whether property or liberty interests are

88. McClung, *supra* note 7, at 680.

89. Debra v. Turlington, *supra* note 3, at 247-49, 265-67. The Florida court considered it critical that during the time of classroom instruction in skills such as reading, students had not been on notice that performance on one ultimate test in that skill would be a prerequisite to obtaining a high school diploma. The court noted "expert testimony upon which the Court relied indicates that four to six years should intervene between the announcement of the objectives and the implementation of the diploma sanction." *Id.* at 267; *accord,* Northport—East Northport School Dist. v. Ambach, ... Misc. 2d ....., 436 NYS 2d 564 (S.C. 1981).

One knowledgeable commentator has described the notice problem succinctly:

> Many competency programs are being imposed upon students late in their secondary education with little prior notice. Imposing the requirement one year before graduation means that students will have spent the first ten or eleven years in the school system without notice or knowledge that passing a competency test would be a condition for acquiring a diploma. In fact, the school district would have explicitly approved their progress by promoting them each year, even if they did not have the basic competencies. It is likely that many if not most of those students failing the test would have studied differently in earlier years had they been given such notice—and teachers might have taught differently as well.

McClung, *supra* note 7, at 679.

involved.[90] It also involves a discussion of what process is due. Under this analysis, notice is the key process that is due to students prior to imposing a diploma sanction. Students must be provided with adequate notice of any significant change in graduation requirements.[91] The failure to receive a standard high school diploma will have significant impact upon a student's ability to enter college or seek many high paying jobs. Since school attendance is compelled by the state, due process requires adequate notice of the diploma sanction at a time when the skills to be tested are taught in the regular school curriculum. Competency tests of basic reading, writing and computation skills are in fact testing material taught in grade school, thus grade school may well be the point at which notice has to be given. No court has yet required ten years notice, but that is one possible judicial interpretation.

According to the *Debra P.* court, the notice date is when students are given notice of the specific performance objectives, not when they are given notice that passing a test will be a prerequisite to a high school diploma.[92]

The inadequacy of prior notice of the standards that the student is required to meet is an aspect of substantive due process, as opposed to procedural due process. The distinction is significant when it is understood that the procedural due process guaranteed to citizens by the fourteenth amendment would permit competency testing with diploma sanction, so long as the test validation, cut-off score and remedial opportunities indicated the test program was fair. In contrast, substantive due process protects students from the denial of the deprivation of life, liberty or property, even if the method used for the deprivation is the fairest possible procedure. Thus, procedural due process focuses upon what is tested and how, while substantive due process focuses upon the student's advance notice that the diploma might be denied and whether the test measures what was taught.

90. *See* text accompanying notes 100-117 *infra*.
91. *See* Mahavongsanan v. Hall, *supra* note 31.
92. Debra P. v. Turlington, *supra* note 3; *accord*, McClung, *supra* note 7, at 680.

It is substantive due process which requires extensive advance notice to students prior to implementation of the diploma sanction.[93] The student must have sufficient advance knowledge of the competency test requirement to adjust his learning patterns so as to acquire the necessary knowledge to pass the test. And since substantive due process is a legal concept over which courts have special expertise, as opposed to determinations of academic qualifications (over which courts have traditionally deferred to educator's expertise), judicial review of the substantive due process and notice aspects of competency testing may be expected.[94]

2. When to Give the Test

Three questions must be answered: at what grade levels should the test be given, how many opportunities should an individual student have to pass the test, and when during the school year should the test be administered.

Educators may agree that the early years of schooling are the crucial times for teaching, learning, and remedying weaknesses in basic skills. Therefore, competency test programs frequently give students their first opportunity to demonstrate minimal competency and basic skills somewhere between fourth and eighth grade. A second standard opportunity may occur between the seventh and ninth grade, and the third in the eleventh grade. Since an implied goal of competency testing is to provide students with functional literacy, as well as to certify they have achieved it, testing imposed in grades eleven or twelve for the first time may make remedial help meaningless.

Genuine remedial efforts are meaningless, also, if the burden of test failures creates a budgetary difficulty that state and local treasuries cannot, or will not fund. Remediation programs are more expensive at the secondary level.

93. *See* Clague, *supra* note 52, at 494.
94. *Id.* at 502-505; *but see* Board of Curators of the University of Missouri v. Horowitz, *supra* note 27; Wood v. Strickland, 420 U.S. 308, 326 (1975); and Smith, *Legal Considerations of Competency Testing Program*, 9 SCH. L. BULL. 1, 8 (Oct. 1978); *and see* Valentine v. Independent School District of Casey, *supra* note 18.

When the Florida legislature initially imposed competency testing with diploma sanction, it appropriated ten million dollars for remedial instruction. That translated into only $246.00 for each of the 40,700 students who failed the October 1977 test, and necessitated an additional twenty-six million dollar appropriation for competency test remediation programs.[95]

North Carolina's stated competency test program objective is to keep a student in high school long enough to guarantee him a useful education through the mastery of minimum educational requirements.[96] A student who fails the test in North Carolina must be given remedial instruction and three more opportunities to pass before his class graduates. He may then continue to take the competency test until he reaches age twenty-one.[97] Some other states extend the opportunity for free public schooling in competency test remedial programs for years past the normal matriculation age. They also may have no limit upon the number of times or maximum age at which a student may take the test.

One careful decision that policy makers must make, particularly in light of necessary remedial programs, is at what levels and how many times a student may take the test. It may be that the decision should be made at the state level. Allowing local school districts to determine when a test is given, may deny students equal protection.[98] If a student in one local school district has an extra year of free remedial programs and unlimited opportunities to retest, and a student in another local district has no extra remedial opportunities and only one chance for a retest, the second student may have a valid equal protection challenge to the competency testing program of his district, or even the state as a whole.[99]

School officials will also need to establish at what point in the school year the competency tests will be administered.

95. McClung, *supra* note 7, at 681.
96. Smith, *supra* note 94, at 7.
97. *Id.* at 2.
98. *See* text accompanying notes 130-34 *infra*.
99. *Cf.* Wells v. Banks, *supra* note 31.

If given at the end of the school year, the notice provided to failing students will be insufficient to permit any remediation, but the students who start each year slowly and then catch up will be treated fairly. If the test is given sometime during the year, the slow-starting students will be penalized, but remediation will be more effective and some changes to curriculum and pedagogy can be made to correct perceived areas of general student weakness.

D. Due Process and Student Rights

To have a property interest in a government benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.[100]

Having chosen to extend the right to an education generally, a state may not withdraw that right on grounds of a student's misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred.[101]

1. A Student's Right to a Diploma

Wyoming compels its children over seven and under sixteen to attend school.[102] In return, the state guarantees its young citizens a free and appropriate public education.[103]

The United States Supreme Court has held that since a state guarantees its young citizens a free public education, the fourteenth amendment protects against an arbitrary denial of those educational benefits.[104] Public education is not a privilege to be arbitrarily denied by authorities; neither

100. Board of Regents v. Roth, 408 U.S. 564 (1972).
101. Goss v. Lopez, *supra* note 29.
102. WYO. STAT. § 21-4-102 (1977).
103. Article 7, Section 1 of the Wyoming Constitution requires "a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade." Wyoming Statutes mandate that public schools in each school district will be equally free and accessible to all resident children over 6 and under 21. WYO. STAT. § 21-4-301 (1977). State law requires each school district to adhere to the State Board of Education's minimum standards for educational programs. WYO. STAT. § 21-9-101 (1977). State law also guarantees every handicapped child a free and appropriate education. WYO. STAT. § 21-14-101 (1977).
104. Goss v. Lopez, *supra* note 29, at 573-574.

is it a mere "unilateral expectation". It is an understanding between the state and the student; both are to benefit from compulsory school attendance: the state by securing an enlightened citizenry, and the student by securing the fundamental prerequisites of economic livelihood and political participation. It would be unreasonable to allow the state to encourage and compel acceptance of public education, and yet arbitrarily deny its benefits without accountability.[105] Thus, students are protected by the due process guarantee of the fourteenth amendment against arbitrary denial of a public education, and the regular high school diploma which is evidence of its satisfactory completion.[106]

Separate from the substantive due process guarantees of the fourteenth amendment discussed earlier in the Notice section, a student's right to a regular diploma also contains an element of procedural due process. This due process analysis is not based upon the substantive right; rather, it is based on the procedure utilized to deny that right. A student's right to obtain a regular high school diploma may be removed by a school district for failure of the student to achieve a passing score on a competency test; however, it can only be done pursuant to established procedures which protect against arbitrary state action. The procedure followed must be designed to remove almost all margin of error.[107] Procedural due process is particularly applicable where the government action forecloses a range of opportunities, such as employment opportunities.[108]

That is not to say that competency testing will create the need for a full-blown and expensive formal due process

105. *Id.* at 574; *and see* Board of Regents v. Roth, *supra* note 100, at 577.
106. Goldyn v. Allen, 281 N.Y.S.2d 899, 905 (1967).
107. "When a program talks about labeling someone as a particular type and such a label could remain with him for the remainder of his life, the margin of error must be almost nil." Merriken v. Cressman, *supra* note 66, at 920.
108. Board of Regents v. Roth, *supra* note 100, at 573-74. The United States Supreme Court has also said that:

> [W]here the State attaches a 'badge of infamy' to the citizen, due process comes into play. . . . Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

hearing prior to denial of each high school diploma. Prior notice and an opportunity for hearing will suffice. The United States Supreme Court has recognized that due process is a flexible concept whose demands vary with the circumstances. Different types of proceedings require different rules of fair play, and the judicial system is likely to defer to any fair system which accurately determines a students competency and allows that student to challenge the determination.[109]

Property rights are created by state law.[110] A student's property right to a diploma is created when the state compels a student to attend school, and promises a free and appropriate education in return.[111] A student's entitlement to a public education is a recognized property interest protected by the fourteenth amendment's due process clause.[112] The diploma is the piece of property the student is entitled to upon completion of all reasonable graduation requirements.

This writer has found only a few reported cases which discuss competency tests. *Debra P.*[113] held that students have a property right to graduate from high school and receive a standard diploma if they have satisfied the requirements they were aware of when they entered high school. *Wells v. Banks*,[114] made no finding on the subject.

A Florida court found that students have a liberty interest in being free of the stigma associated with receiving less than a standard school diploma. "This stigma is very

109. *See* Ingraham v. Wright, 430 U.S. 651 (1977); Board of Curators v. Horowitz, *supra* note 27; Goss v. Lopez, *supra* note 29; Mathews v. Eldridge, 424 U.S. 334-335 (1976).

110. Horowitz, *supra* note 27; Perry v. Sinderman, 408 U.S. 593, 599-603 (1972).

111. Clark v. Board of Education, *supra* note 18; United States v. Choctaw County Board of Education, *supra* note 18; Valentine v. Independent School District of Casey, *supra* note 18.

112. Goss v. Lopez, *supra* note 29; Gaspar v. Bruton, 513 F.2d 843 (10th Cir. (1975).

113. Debra P. v. Turlington, *supra* note 3; *and see* Northport—East Northport School Dist. v. Ambach, *supra* note 89, which also found that handicapped students have a property right in receiving a high school diploma.

114. Wells v. Banks, *supra* note 31.

real and will effect the economic and psychological development of the individual."[115]

A student's *liberty interest* is to be free of the stigma associated with failing to receive a regular high school diploma, and to pursue meaningful future employment opportunities without arbitrary state interference. The United States Supreme Court has directly or indirectly recognized a person's liberty interest in freedom from a state-imposed stigma.[116] And, in case anyone thinks that the denial of a student's liberty interest is an unfortunate, but harmless error, within the last two years a New York jury awarded $750,000 to make a student whole for psychological and emotional injury suffered by the stigma of being improperly classified and placed in a retarded mental development class for eleven years.[117]

E. Use of Test Results

How the results from competency tests are used has legal significance. For instance, the most common uses are the diploma sanction (denial of a regular high school diploma), grade non-promotion, or tracking (placement in a curricular program by ability grouping).[118] These test result uses cause

115. Debra P. v. Turlington, *supra* note 3, at 266. That court found both economic and academic injuries develop from the stigmatizing effect of a student receiving less than the standard high school diploma. For instance, the state of Florida employed only 10% of its labor force from those people who did not have high school diplomas, and those jobs were described as both "menial" and "dead end" positions. *Id.* at 249. A certificate of completion would not be considered a diploma for purposes of state employment in Florida. Similarly, a certificate of completion would not be an acceptable substitute for admission to any Florida state university. Thus, the disproportionate competency test failure rate by minorities, would result in a substantial decline in minority college attendance. It would be ironic if competency testing, designed to aid functional literacy, had the primary result of creating another obstacle to employment or post-secondary education for minorities and disadvantaged students.

116. *See, e.g.*, Wisconsin v. Constantineau, *supra* note 108; Board of Regents v. Roth, *supra* note 100; Goss v. Lopez, *supra* note 29; *accord* Debra P. v. Turlington, *supra* note 31, and Northport—East Northport School Dist. v. Ambach, *supra* note 89.

117. In Hoffman v. Board of Education of the City of New York, *supra* note 26, the jury verdict for the school district's negligence was reduced one-third by remittitur. The case was reversed on appeal, but the potential for a sizable jury verdict had been shown.

118. The diploma sanction was the Florida practice invalidated in Debra P. v. Turlington, *supra* note 3. The tracking-related practice of placing EMR students in a group was enjoined in California, Larry P. v. Riles, *supra* note 22, but upheld in Parents in Action on Special Education v. Hannon, *supra* note 22.

the greatest injury to individual students. Therefore, they raise the most substantial legal questions.

On the positive end, the use of competency test results for individual remediation is a helpful aspect of competency testing. This use looks very similar to the evaluation and placement process employed under P.L. 94-142[119] to develop an Individualized Education Program (IEP) for a handicapped student. So long as the P.L. 94-142 model is followed, with its emphasis on proper testing, evaluation, and placement, this use of competency testing results is likely to receive broad support from students, parents, and educators. It is also likely to escape court challenge.[120]

The use of competency test results to make curricular changes appears to be legally valid, but perhaps not educationally sound. Instructional match concerns will likely require curricular changes when competency test programs are implemented.[121] Curricular changes to fit the testing program are critical. But there is an educational risk in adjusting curricula to the test, to the exclusion of non-tested, or non-testable subjects. Since most competency programs test basic or school skills, and since public education strives to provide its graduates much more than that, perhaps limits should be placed upon how much the curriculum is adjusted to fit competency test programs.

A diploma sanction which substitutes a "certificate of attendance" or other ersatz document, has been enjoined or prohibited by at least two courts.[122] Because the diploma sanction has the likely effect of perpetuating an individual's

119. Education for All Handicapped Children Act, 20 U.S.C. §§ 1401-1461 (1977) and its Regulations—45 C.F.R. §§ 121a.1-.754 (1979).

120. The use of test results for remediation has been heralded even by critics of competency testing. A National Academy Report states:

> [T]he Panel is in agreement that a series of standardized tests at the lower grade levels used for diagnosing individual student weaknesses, pinpointing remediation needs, and building public pressures if school-wide performances in basic skills continue over time to be consistently low, could be positive influences on student learning. *Report to the Assistant Secretary of Education: Improving Education Achievement*, 9 NATIONAL ACADEMY OF EDUCATION COMMITTEE ON TESTING AND BASIC SKILLS (1978), reported in McClung, *supra* note 7, at 702 n.246.

121. *See* text accompanying notes 50-56 *supra*.

122. *See* Debra P. v. Turlington *supra* note 3; Goldwyn v. Allen, 281 N.Y.S.2d 899 (1967).

lower socio-economic position, one black leader has commented that it would be better for a student to drop out of school than to be stigmatized as a certified dummy.[123]

Federal courts have not declared tracking unconstitutional *per se;* however the practice is fraught with legal risks and has generally been abandoned by the schools as educationally counter-productive. So long as it does not perpetuate the effects of past discrimination, or otherwise deny a student equal protection under the law, the courts have upheld ability grouping of students.[124] But where there is evidence of disproportionate impact upon minority or handicapped students, tracking or placement based on a standardized test can expect disapproval by the courts.[125]

Even in upholding the constitutionality of the tracking concept in general, one federal district judge found Washington D.C.'s specific scheme unconstitutional.[126] The District schools' use of standardized tests was to assign students of comparable ability to one of four tracks, each offering a separate curriculum. Minority youngsters usually occupied the lower tracks, and in practice the system provided little opportunity for them to move to upper levels. Judge Wright invalidated the scheme because it was based on inaccurate test results which reflected "socio-economic status, . . . environmental and psychological factors which have nothing to do with innate ability."[127]

123. Florida NAACP attorney Morris Milton has said, "Kids would be better off dropping out of school at the end of their senior year than being stigmatized by a certificate of attendance as certified dummies." McClung, *supra* note 7, at 660 n.45.
124. McNeal v. Tate County School District, 508 F.2d 1017 (1975); Hobson v. Hansen, 269 F. Supp. 401, 511 (D.D.C. 1967); *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969), *appeal dismissed,* 393 U.S. 801 (1971); *and see* Drowatzky, *Tracking and Ability Grouping in Education,* 10 J. L. & ED. 43 (1981).
125. *See, e.g.,* Larry P. v. Riles, *supra* note 22; Diana v. California State Board of Education, No. C-70-37 RFP (N.D. Cal., Jan. 1970; stipulated settlement approved June 6, 1973; supplemental court memorandum order entered May 24, 1974).
126. Hobson v. Hansen, *supra* note 124.
127. The effect on minorities, the Court found, was devastating (the same comment may apply to tracking based on competency test results):
> (T)eachers acting under false assumptions because of low test scores will treat the disadvantaged student in such a way as to make him conform to their low expectations; this acting-out process—the self-fulfilling prophecy—makes it appear that the false assumptions were correct, and that a student's real talent is

A low score on a competency test might better prompt a more careful evaluation of a student's performance rather than be the final determination of a student's failure. Since a commitment to remedial education is the best educational justification for competency programs, judicial scrutiny of testing programs will likely focus on how effectively school authorities respond to students identified as lacking the requisite skills.[128] School remedial efforts may include both improved and remedial instruction, and frequent opportunities for retesting, even after the normal matriculation age. Most important for remediation purposes is the giving of the competency test at grade levels early enough to allow failing students to learn the necessary skills. Still, a student will not receive a fair second chance to show his abilities if the test instrument is faulty; test validation is a necessary prerequisite to any effective remediation program based upon test results.

Another possible use of competency test results is an indirect one. If a student is penalized for not passing a competency test on material he should have learned in school, parents may quickly seize upon that fact as evidence that the schools aren't educating. Thus, one result of competency testing may be increased pressure on teachers and administrators.[129]

Teachers may be evaluated on the basis of the comparative performance of their students on the competency

127. Continued—
> wasted. . . . (T)he track system as an institution cannot escape blame for the error in placements, for it is tracking that places such an emphasis on defining ability, elevating its importance to the point where the whole of a student's education and future are made to turn on his facility in demonstrating his qualifications for the higher levels of opportunity. Aside from the fact that this makes the consequences of misjudgment so much the worse, it also tends to alienate the disadvantaged student who feels unequal to the task of competing in an ethnocentric school system dominated by the white middle class values, and alienated students inevitably do not reveal their true abilities either in school or on tests. *Id.* at 514.

128. Lewis, *supra* note 9, at 170.

129. Commenting on the use of competency test results against teachers, Indiana State Senator Joan Gubbins said, "Shouldn't we first see if the teachers are competent?" *Help! Teacher Can't Teach*, TIME, June 16, 1980, at 54-55. And when 53% of the students flunked Mobile, Alabama's first competency exam, some parents said to school board members, "If you're going to crack down on my child, let me tell you about some of my children's teachers." *Id.* at 57.

test. If so, teachers will be pressured to teach to the test, and limit their teaching methods to those designed to aid test passage, rather than more creative pedagogical approaches. The expected next step would be for school boards not to renew the contracts of teachers whose students, by comparison, have lower test scores. A teacher may have a valid challenge to either a denial of tenure, or non-renewal, decision based upon a high failure rate of his students, if the school district cannot demonstrate a cause-and-effect relationship. That is, before a school district makes career decisions for its teachers or administrators based upon comparing student competency test results, the district should be able to exclude other possible causes of the higher failure rate. Teachers and administrators will likely argue that the failure was the fault of the student, each other, the parents, the home environment, classroom overcrowding, or lack of equipment or textbooks, instead of poor instruction or educational mismanagement. In response, the district may have a difficult time proving that the fault was teaching or administrating.

F. Local Control vs. State Standards

A recent California decision examined the actions of that state's department of education and board of education and found both agencies at fault for not investigating the subject thoroughly before imposing a general testing requirement.[130]

A statewide test, or purchased standardized test, must be validated for local curriculum and instruction.[131] Statewide tests are inherently vulnerable to a charge of insufficient match between what the test measures and what the students have been taught in each school district.

But there are also problems associated with local tests. There is a lack of uniformity when local districts develop

130. Larry P. v. Riles, *supra* note 22. In California, the state is precluded from developing a single statewide test, the responsibility lies with each school district. McClung, *supra* note 7, at 656.
131. *See* text accompanying notes 69-80, *supra; and* McClung, *supra* note 7, at 685.

tests. Students moving from one school district to another within the state may enhance their likelihood of passing the test, based solely upon where they live. Where each district determines its own cut-off score, a constitutional denial-of-equal-protection challenge may occur since a student who failed to receive a diploma in one district might have in another.[132] Employers and higher education institutions cannot be assured of what minimum competencies are represented by test passage, without intimate knowledge of each school district's competency program. Finally, designing a reliable and valid test that meets professional psychometric standards is probably beyond the expertise and budgets of most local school districts. Thus, Florida chose statewide standards and a statewide test.[133]

One possible compromise is for the state to mandate competency testing, and have the state department of education provide expertise to local districts in obtaining and validating test instruments, but leave the tracking or diploma sanction use decision to local districts. Massachusetts, Connecticut, Rhode Island, and New Hampshire have followed this course.[134] No matter which position is taken in the local-vs.-state controversy, public involvement in the process will probably go a long way to discourage litigation.

G. Discrimination and Equal Protection

> The most frequently voiced objection against competency testing is that it will unlawfully discriminate against minority students in violation of the equal protection clause of the Fourteenth Amendment. Critics contend that, because of unequal educational opportunities and test bias, a disproportionate number of minority students will fail and not be awarded high school diplomas. Providing remedial instruction after a student fails the test does not overcome the initial objection, the critics

132. Such an equal protection challenge underlies Barber v. State Board of Education, No. C340963 (Los Angeles Superior Ct., filed Oct. 8, 1980), a taxpayers' declaratory judgment action filed against California's minimum competency testing program in that state's school districts. *Cf.* Wells v. Banks, *supra* note 31.

133. McClung, *supra* note 7, at 656.

134. *Id.* at 657.

> say, because this instruction will result in a racial grouping or classification that constitutes a denial of equal protection.[135]

When competency tests were initially administered in Florida, Virginia, North Carolina, and Milwaukee, Wisconsin, proportionately more Black and Hispanic than white students failed. For example, statewide assessment results released by the Florida State Department of Education on March 16, 1978, revealed that the failure rates for high school juniors on the mathematic portion were 75% for Blacks, 40% for Hispanics, 30% for Asians, and 25% for whites.[136] Under traditional equal protection legal analysis, such a disproportionate failure rate for minorities may satisfy the first requirement for a successful discrimination lawsuit. It may make a prima facie case of discrimination by showing disparate impact upon minorities of a state-imposed action.[137]

It should not be surprising that minority and socio-economically disadvantaged students have a disproportionately high failure rate on standardized tests. In the context of standardized IQ tests, a California court noted the test manufacturer's admission that the test instruments had been validated and standardized upon white students only, and the norms could not be applied to minorities. Minorities have a cultural heritage and experience pool which is not drawn upon or tested by standardized tests.[138] The situation is similar for administering English language tests to non-English speaking people.[139]

There was a time when a test's disparate impact upon minorities was sufficient evidence of discriminatory intent

135. Smith, *supra* note 94. *Also see*, Lewis, *supra* note 9, at 173, 183, for a comment on the social and economic impact of labeling educationally disadvantaged children as incompetent stating that, "No interest in 'restoring confidence' in the diploma can be so great as to justify the use of the competency testing as an agent for arbitrary deprivation and racial discrimination."
136. McClung, *supra* note 7, at 659, 687.
137. *See* Castaneda v. Partida, 430 U.S. 482, 495 (1977); Debra P. v. Turlington, *supra* note 3, at 252.
138. Education Commission of the States, *ECS Footnotes* 20 (Feb. 1980).
139. *See* Diana v. California State Board of Education, No. C-70-37 RFP (N.D. Cal., Jan. 1970; stipulated settlement approved June 6, 1973; supplemental court memorandum order entered May 24, 1974).

for courts to apply strict scrutiny to their state-imposed use, and invalidate the program unless the state could demonstrate a compelling interest to impose the program. Then came a 1976 United States Supreme Court decision which seemed to require proof of discriminatory intent before a program would come under strict scrutiny.[140] But the impact and meaning of the decision is unclear, because the same case stated that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [state action] bears more heavily on one race than another."[141] Also, there are distinctions between equal protection challenges under the Constitution and under Title VII of the 1964 Civil Rights Act. *Washington v. Davis* refused to apply the broader Title VII standard to a challenge based upon the fourteenth amendment's equal protection clause.

Courts since *Washington v. Davis* apparently have felt that the decision does not invalidate the normal indicators of intent. Those indicators are objective evidence of what actually happened, and the presumption that a person or administrative body intended the natural consequences of its actions.[142]

It may be that a compromise legal test of "institutional intent" is emerging. As applied to a school board, "institutional intent"[143] infers discriminatory intent when the board cannot justify its action by non-discriminatory, legitimate

140. Washington v. Davis *supra* note 78.
141. *Id.* at 242.
142. *See, e.g.*, Debra P. v. Turlington, *supra* note 3, at 253; United States v. Texas Education Agency, 564 F.2d 162 (5th Cir. 1977); *cert. denied*, 443 U.S. 915 (1979). Washington v. Davis, *supra* note 78, at 253 (concurring opinion of Justice Stevens).
143. A presumption of impermissible purpose is established where social factors known to school authorities make discriminatory outcomes the foreseeable results of their actions. The burden upon the authorities is to produce a significant non-racial objective for their action and to demonstrate the absence of a less discriminatory means to achieve that objective. In various forms, this standard has been adopted in five of the twelve federal circuit courts of appeal. Arthur v. Nyquist, 573 F.2d 134 (2d Cir.) *cert. denied*, 439 U.S. 860 (1978); United States v. Board of Commissioners, 573 F.2d 400 (7th Cir.), *cert. denied*, 439 U.S. 824 (1978); NAACP v. Lansing Board of Education, 559 F.2d 1042 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977); United States v. School Dist. of Omaha, 565 F.2d 127 (8th Cir.), *cert. denied*, 434 U.S. 1064 (1977); United States v. Texas Education Agency, 564 F.2d 162 (5th Cir. 1977), *cert. denied*, 443 U.S. 915 (1979).

educational objectives. The same rationale applies to a state department of education and state board of education.[144]

1. Statutory Discrimination

Civil rights statutes may provide greater protection against discrimination than the equal protection clause of the fourteenth amendment.[145] Accordingly, Title VI and Title VII of the Civil Rights Act of 1964 have frequently appeared in complaints against certain school or testing practices. Title IX may similarly be cited. And where applicable, P.L. 94-142, Section 504 of the Rehabilitation Act of 1973, the Equal Educational Opportunities Act of 1974, and Section 921 of the Education Amendments of 1978 are also likely bases for litigation related to competency testing.[146]

The disproportionate racial and linguistic impact of most competency tests may derive from cultural bias in test content. Yet a "culture-fair" test is perhaps an impos-

144. An intent to discriminate was found by a California court when those state agencies had knowledge of the potential for disparate impact upon minorities, but imposed general test policies anyway, without independent verification that no less restrictive alternative was available. Larry P. v. Riles, *supra* note 22, at 946-47, 980-83.

In the most recent case focusing on discriminatory impact of standardized tests (used for EMR placement), a Chicago federal judge upheld the WISC-R IQ test. Despite an overall disproportionate impact of the test on minorities, Judge Grady made his own item analysis of each test question. Finding cultural bias in only a few questions, the judge therefore found the test to be legally acceptable. The state agencies' separate duty to investigate was not a trial issue, but will be argued on appeal. Parents in Action on Special Education v. Hannon, *supra* note 22.

145. Washington v. Davis, *supra* note 78. Title VI of the 1964 Civil Rights Act provides that "(n)o person in the United States shall, on the ground of race, color or national origin, be . . . subjected to discrimination under any program or activity receiving federal financial assistance." Since virtually all public schools receive federal aid and are subject to Title VI regulations, a competency testing program that discriminates against minorities may violate Title VI. HEW regulations declare that Title VI is violated by any practice or procdeure that has a disproportionate racial impact. 45 C.F.R. § 80.3(b)(2) (1979). The United States Supreme Court has approved this declaration. Lau v. Nichols, 414 U.S. 563 (1974). A testing program that is culturally or linguistically biased apparently will not survive a Title VI challenge. United States v. Texas, 330 F.Supp. 235 (1971) modified 447 F.2d 441 (5th Cir.), application for stay dismissed sub nom. Edgar v. U.S., 404 U.S. 1026 (1971); Carter, *supra* note 5, at 43. Note however, the U.S. Supreme Court's Title VI decision in Regents of the University of California v. Bakke, 438 U.S. 265 (1978); in which, Justice Powell, writing for a divided court, cited with approval *Lau v. Nichols, supra* (a case in which no discrimatory purpose was proven), but limited Alan Bakke's Title VI claim. Therefore, plaintiffs who challenge competency testing programs may be required to show some outside evidence of discriminatory intent.

sible goal. Some may argue it is an undesirable goal, believing that functional literacy necessarily means an individual's ability to function in the predominantly white middle class culture of our society. However, many minority students will never function in the majoritarian heart of American culture. It may be argued that one function of the public schools is to prepare students, regardless of background, to seek higher education and advance in majoritarian institutions. However, that is not to say that if minority students do not conform to the majoritarian value system they should be denied a high school diploma. It may be desirable and fair to give minorities the skills they need to integrate into white middle class society. But it may be unfair and perhaps illegal to base a high school diploma upon their ability to perform in that context.

Title VII of the 1964 Civil Rights Act[147] was at issue in the *Washington v. Davis*[148] testing discrimination case. A Title VII employment test discrimination case's proof analysis might be summarized as: (1) Plaintiff must first establish a prima facie case of the test's discriminatory impact upon minority employees or job applicants; then (2) the burden shifts to the employer to show the test is valid for predicting job performance; then, (3) the plaintiff must be afforded an opportunity to show that alternative selection devices exist which would serve the employer's legitimate interests without discriminatory effects.[149]

146. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976) and its regulations—45 C.F.R. §§ 80.1-.13 (1979); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976) and its regulations—29 C.F.R. § 1601.1-.741 (1979); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1974) and its regulations—45 C.F.R. §§ 86.1-.70 (1979); P.L. 94-142, the Education for All Handicapped Children Act, 20 U.S.C. §§ 1401-1461 (1976) and its regulations—45 C.F.R. §§ 121a.1-.754 (1979); Section 504 of Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976) and its regulations—45 C.F.R. §§ 84.1-.99 (1979); The Equal Educational Opportunity Acts of 1974, § 101 of P.L. 93-380, 20 U.S.C. §§ 1701-1758 (1976); and The 1978 Basic Skills Improvement Act, § 921 of the Education Amendments of 1978, 20 U.S.C. §§ 3331-3332 (1978).

147. 42 U.S.C. § 2000e (1976), and its implementing regulations—29 C.F.R. §§ 1601.1-.74(i) (1979).

148. Washington v. Davis, *supra* note 78.

149. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albenarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Washington v. Davis, *supra* note 78 at 246-47; Larry P. v. Riles, 495 F.Supp. 926, 969 (N.D. Cal. 1979); LARSON, 3 EMPLOYMENT DISCRIMINATION, Ch 45 (1980).

At least one court has applied the three-part Title VII employment testing analysis to educational testing programs.[150] In his *Larry P.* decision, Judge Peckham modified the test in light of that state's compulsory attendance law. If tests can predict that a person is going to be a poor employee, the employer can legitimately deny that person a job; but if tests suggest that a young child is going to be a poor student, the school cannot prohibit that child from going to school. Judge Peckham thus replaced the predictive validity requirement of Title VII employment cases with a requirement for validation keyed to the purpose for which the test is used, such as tracking or denial of a regular high school diploma.[151]

In any school district having significant numbers of minority students, the expected discriminatory impact will likely be a prominent part of any litigation involving competency test programs. This will be particularly true if competency test results are used to impose the diploma sanction or to implement tracking.

H. Handicapped Children

If discrimination challenges to competency tests programs are likely to be limited to communities with significant minority populations, the same cannot be applied to handicapped children. Every school district that adopts a competency testing program is a likely defendant of litigation brought by students who are handicapped, their parents, or advocacy groups.

The problem of handicapped children is complex. Since handicaps may be of so many different types and degrees, generalized efforts by school authorities to reduce the unfair and illegal impact of competency testing on handicapped students may fail. Nothing short of individualized consid-

150. Larry P. v. Riles, 495 F.Supp. 926, 969 (N.D. Cal. 1979).
151. *Id.*

eration of each handicapped student relative to a competency test program is likely to survive court challenge.[152]

Unfortunately, individualized treatment of handicapped children *vis-a-vis* a competency test program with diploma sanction thwarts a basic goal of such a program: to ensure employers that each person holding a regular high school diploma is functionally literate and can perform at certain minimum levels. If a regular high school diploma is awarded to a handicapped child based upon his progress on his Individualized Education Program (IEP), and the child's handicap is not readily apparent, an employer will not have the assurances competency testing programs are designed to provide.[153]

As a logical extension of the concept of integrating handicapped students into the mainstream of school and social environments, such students should be encouraged to participate in competency programs with their classmates to the greatest extent possible.[154] Unfortunately, one state's experience is not encouraging. During Florida's first year of its Statewide Assessment Program, three-fourths of the handicapped students followed state guidelines exempting them from the test requirement. Of the 2,022 who did participate, no more than 33% of those in any handicap cate-

152. Letter from Region V OCR Director Mines to Peoria Public Schools Superintendent Whitaker, 257 OCR Complaint LOFS 135, Supp. 31 (Sept. 5, 1980), reported in Ed. Commission of the States, ECS footnotes 60 (April 1981). Peoria's automatic inclusion of all handicapped children in its competency testing program has been challenged by 15 handicapped students. Deborah B. v. Illinois St. Bd. of Ed., C.A. No. 81-3089 (Cen. D. Illinois Filed March 5, 1981) as reported in Ed. Commission of the States.
Such individualized consideration of handicapped students may not be onerous, since it can be incorporated into an Individualized Education Program (IEP) already required of each handicapped child by P.L. 94-142. 20 U.S.C. §§ 1401-1461. But, such individualized treatment may be challenged as unfair to other, non-handicapped children. So far, reverse-opportunity challenges to P.L. 94-142 have been unsuccessful; however, when the challenge is couched in terms of a state competency test program, such challenges may have a greater viability.

153. There is no easy solution to this problem for some employers. An employer, who receives federal financial assistance and who asks applicants about handicaps, may be in violation of Section 504 of the Rehabilitation Act of 1973. Doe v. Syracuse School Dist., 508 F. Supp. 333 (N.D. N.Y. 1981). Coding diplomas, as was done with discharge certificates from the armed forces in the past, may similarly violate Section 504. 29 U.S.C. § 794 (1976) and its regulations.

154. Grisé, *Florida's Minimum Competency Testing Program for Handicapped Students*, 47 EXCEPTIONAL CHILDREN 186, 191 (Nov. 1980).

gory passed.[155] In the second year, handicapped students improved their scores. This may be because fewer students felt prepared to take the test and because the state adapted test procedures for handicapped students.[156] By the time the third-year testing had arrived, a court order[157] prevented the immediate use of diploma sanction. More handicapped students took the test, and the percentage who passed dropped.[158]

Several approaches to the handicapped student problem have been proposed. They include total exemption, differential diploma, differential assessment procedures, and individual determinations.

Total exemption of handicapped students from a competency testing program is favored by some policy-makers. This may be because of the special problems encountered in designing fair assessment procedures for handicapped students and the individual emphasis of P.L. 94-142.[159] A handicapped student may lack the potential to pass a competency test, according to his IEP. The impact of test failure upon a handicapped child's self-concept and his family is often greater than it is for a non-handicapped student.[160] Total exemption will add a government-created impediment to the successful integration of handicapped persons into our so-

155. In 1977, 33% of the visually impaired and speech impaired students passed. The other handicap categories and their pass rates were: hard of hearing, 29%; socially maladjusted, 25%; physically impaired, 19%; deaf, 18%; specific learning disabled, 17%; emotionally handicapped, 17%; EMR, 1%. *Id.* at 187.

156. The 1978 pass rates for the 1,542 handicapped students who took the test were: visually impaired, 57%; speech impaired, 40%; hard of hearing, 49%; socially maladjusted, 48%; physically impaired, 38%; deaf, 52%; specific learning disabled, 27%; emotionally handicapped, 42%; EMR, 9%. *Id.*

Florida's adaptions of test procedures for handicapped students included braille and large print test editions, audio tapes and the use of narrators, shortened testing sessions, small group and individual test environments, the use of proctors and permitting answers to be typewritten or marked in the test booklet. Amos, *Competency Testing: Will the LD Student Be Included?*, 47 EXCEPTIONAL CHILDREN 194, 196 (Nov. 1980).

157. Debra P. v. Turlington, *supra* note 3.

158. The pass rates for the 2,228 handicapped students who took the Statewide Assessment Program's 1979 test were: visually impaired, 54%; speech impaired 46%; hard of hearing, 28%; socially maladjusted, 33%; physically impaired, 34%; deaf, 26%; specific learning disabled, 30%; emotionally handicapped, 42%; EMR, 3%. Grisé, *supra* note 154, at 187.

159. Education for All Handicapped Children Act, 20 U.S.C. §§ 1401-1461 and its regulations—45 C.F.R. §§ 121a.1-.754 (1976).

160. Amos, *supra* note 156, at 196.

ciety. Handicapped persons often have been very successful in becoming self-supporting and fully integrated members of society. The failure of a handicapped person to have a regular high school diploma almost certainly means that his handicap will be discussed as part of any job interview. Therefore, handicapped students that are exempt from competency testing programs should be given the opportunity of taking the test. Failure to do so may deny students the benefits of an educational program, in violation of Section 504 of the Rehabilitation Act of 1973.[161]

Some persons have suggested that a *differential diploma* is the appropriate way to handle the handicapped, and perhaps minority student in a competency testing program. A differential diploma would be distinguishable by color, shape, wording, or coding. The use of differential diplomas would not be limited to handicapped students; however, a stigma likely would attach to differential diplomas much as it has to armed forces general discharges. Differential diplomas do give an employer notice of distinctions between job applicants. For handicapped students, that distinction may be illegal and certainly is contrary to the integrative thrust of federal handicapped laws. Also, the receipt of a diploma, regardless of type, could preclude a student from further educational services that he may be entitled to until age 21.[162]

To avoid the problem of stigmatizing a handicapped child for failing a competency test that the handicap may prevent the child from passing, some educational experts have proposed that differential standards be employed for handicapped students. Thus, handicapped students would be given a standard high school diploma, but they would obtain that diploma by meeting different standards than

161. *Cf.* Northport-East Northport School Dist. v. Ambach, *supra* note 89 (N.Y. Sup., decision of Jan. 23, 1980).

162. In a 1979 Georgia case, Johnson v. Sikes, No. CV479-323 (S.D. Fla., filed Oct. 30, 1979) n.43, the plaintiff sought a permanent injunction against the issuance of a certificate of attendance rather than standard diplomas for handicapped students. In that case, the plaintiff class of black handicapped students has charged that the use of a standardized achievement test as a prerequisite for the issuance of a diploma violates Section 504 of the Rehabilitation Act of 1973, the Equal Educational Opportunity Act of 1974; the Civil Rights Act of 1964 and the fourteenth amendment of the United States Constitution. *Cf.* Northport-East Northport Sch. Dist. v. Ambach, *supra* note 89.

non-handicapped students. As a general concept, differential standards set handicapped students apart from other students, in violation of the spirit if not the letter of federal statutes designed to integrate handicapped persons into the mainstream of society. Still, they may be preferable to exemption or the use of differential diplomas.[163]

Legal and policy considerations suggest the other approach: *individual determinations* about the nature and extent of participation of handicapped students in any competency testing program. Individual decisions of this kind readily adapt to the IEP procedure already mandated by P.L. 94-142 and its implementing regulations. Thus, if a child makes the specified level of progress required by his IEP, a regular high school diploma should be awarded. But such a result is not without its own legal risks. When a New York school district awarded high school diplomas to two handicapped students who met the requirements of their IEP, but had not and could not take the state-required competency test, the New York Commissioner of Education ordered the district to reveal the names of the students. The state apparently intended to notify the two students that their diplomas were invalid and that they were entitled to continued educational services to age 21. The district refused to identify the students. In litigation the district was suc-

163. Two particular approaches to differential standards have received separate attention.

One approach is for school districts to apply *differential assessment procedures* for handicapped students. This could take the form of modifying the paper-and-pencil test normally given to regular students, by developing oral or other methods of assessment that do not require a paper-and-pencil test. For instance Florida has prepared braille and large print versions of the statewide test for visually-impaired students. Where modification of test instruments can be easily made, handicapped students with a sensory or motor problem may have a valid demand that it be done.

The California State Department of Education has recommended assessment of student performance be based on multiple criteria, not just a single test score. McClung, *supra* note 7, at 700. For handicapped students, that advice may turn out to be mandatory. Yet, constructing modifications to test procedures, or employing alternative measurements methods, is expensive, time-consuming, and difficult for many types of handicapping conditions. Where such modifications are unavailable, however, the imposition of the diploma sanction upon handicapped students is legally risky. Federal law presumes that providing equal treatment (ie., all students are tested alike) to persons with unequal needs (ie., those with severe or multiple handicaps), may be unfair. 45 C.F.R. § 84.4(b)(iv) (1978) of the regulations implementing section 504 of the Rehabilitation Act of 1973. Northport-East Northport Sch. Dist. v. Ambach, *supra* note 161.

cessful in securing a preliminary injunction against the state.[164]

I. Educational Malpractice

> Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedogogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might—and commonly does—have his own emphatic views on the subject.[165]

The plaintiff in the case from which the above statement is taken was a high school graduate who could read at only the fifth grade level. He argued that just as public school authorities have a duty to exercise reasonable care for the physical safety of students under their supervision, they also have a duty to educate those students. In dismissing the suit on appeal, the California court cited three grounds. First, the state's sovereign immunity shielded the school and its people from liability for injury resulting from negligence. Second, it violated public policy to hold a school district accountable for a duty of care in the discharge of its academic functions. Third, the variety of classroom methodologies affords no readily definable standard of care. Achievement of literacy in schools is influenced by a host of physical, neurological, emotional, cultural, and environmental factors beyond the control of the schools.

That recent decision represents the old "court deference" view: Courts should not interfere with academic judgments made by school authorities. But legal trends seem to be away from each of the three grounds cited.

164. Northport-East Northport School Dist. v. Ambach, *supra* note 89.
165. Peter W. v. San Francisco Unified School District, 60 Cal.App.2d 814, 131 Cal.Rptr. 854, 860-861 (Ct. App. 1976); *accord*, Donahue v. Copiague Union School District, 407 N.Y.S.2d 874, 878 (1978); Hunter v. Bd. of Ed. of Montgomery Cnty., 425 A.2d 681 (Maryland App. 1981).

Decisions in recent years have significantly eroded the doctrine of sovereign immunity.[166] Legislatures have reacted to the inequities of governmental immunity by enacting laws such as Wyoming's Governmental Claims Act,[167] to make school districts generally subject to suit. Sovereign immunity is a defense that appears to be slowly dying out.

Also, the trend is toward holding public agencies liable for failing to perform their required tasks. This lessening of court deference for education would be particularly true for competency programs, in which the tests are supposedly objective. A court is equally competent with school authorities to review objective test programs.

Finally, competency tests may define the school's duty of care. The test may establish the extent to which the student is below or above the particular level of minimum competency that has been agreed upon.[168] Thus competency programs may define the minimum standard and enable educational malpractice suits to succeed.[169]

A successful educational malpractice case requires a showing of a duty of care, a breach of that duty (negligence), proof of injury to the plaintiff, and evidence that the injury was proximately caused by the negligent or deliberate acts of the defendant. Defenses available to school districts include the non-school influences on learning, the contributory negligence of the student in failing to cooperate, and the assertion that large numbers of children in a classroom limit the individual attention a teacher can provide to any single student.[170]

Two educational malpractice lawsuits have already set the stage. In one, a learning-disabled class of learning dis-

166. *See, e.g.*, Wood v. Strickland, 420 U.S. 308 (1975); Monell v. Dept. of Social Services, New York City, 436 U.S. 658 (1978); *and* Oroz v. Board of County Com'rs, 575 P.2d 1155 (Wyo. 1978); *But see*, Biscar v. University of Wyoming, 605 P.2d 374 (Wyo. 1980).
167. WYO. STAT. §§ 1-39-101 through 1-39-119.
168. Carter, *supra* note 5, at 41.
169. *Can High School Students Be Put To the Test?* CHILDREN'S LEGAL RIGHTS JOURNAL, Jan. 1980, at 14, 15. *Accord, Implications of Minimum Competency Legislation: A Legal Duty of Care?*, 10 PACIFIC L. J. 947 (1979).
170. Lynch, *Legal Implications of Models of Individual and Group Treatment by Professionals*, 9 NOLPE SCHOOL L.J. 38, 45, 55 (1980).

abled children claimed they had been denied a minimum appropriate education. A federal district court ordered the district to submit a plan to identify all learning disabled students. The order was upheld by the Third Circuit Court of Appeals.[171] In the other, the New York City Schools permitted the inappropriate placement of a child in a mentally retarded program for eleven years despite their own psychologist's recommendation that plaintiff's intelligence be reevaluated within two years of the initial placement. A jury awarded $750,000. The verdict was reduced to $500,000, but the local board's liability for the result (diminished intellectual development and psychological injury to the student) was affirmed in principle.[172] On appeal, a divided court dismissed the case on the grounds of public policy.[173] Still, the holding of the lower court—that school officials are liable for damage resulting from negligence of their employees in failing to follow known recommendations critical to a child's educational progress—has a reasonable opportunity of succeeding in future litigation, particularly if it is asserted in the context of a competency testing program. Further, if the plaintiff in the educational malpractice suit is handicapped, he or she will benefit from the federal duty of care imposed by P.L. 94-142 and Section 504 of the Rehabilitation Act of 1973.

J. Objective Certification

One possible alternative to competency testing used with diploma sanction or for tracking has been described as "objective certification."[174]

171. Frederick L. v. Thomas, 419 F.Supp. 960 (E.D. Pa. 1976); *aff'd* 557 F.2d 373 (3d Cir. 1977).

172. Hoffman v. Board of Education of the City of New York, 64 A.D.2d 369, 410 N.Y.S.2d 99 (1978).

173. *Id., reversed,* 49 N.Y.2d 121, 400 N.E.2d 317, 424 N.Y.S.2d 376 (1979). The dissenters in *Hoffman* argued that this was not an educational malpractice case in the strict tort sense. Rather than being founded upon a failure to educate, they said, the suit stemmed from the school district's failure to follow its own evaluation procedures and the recommendations of its staff psychologist.

174. The concept is described by McClung in Education Commission of the States, *ECS Footnotes* 35 (Sept. 1980). Here, as throughout this article, this writer is indebted to Merle McClung for his excellent writings in the area of competency testing. As presented here, the concept also includes aspects of the pass/fail single diploma approach described in Ross and Weintraub, *Policy Approaches Regarding the Impact of Graduation Requirements on Handicapped Students,* 47 EXCEPTIONAL CHILDREN, Nov. 1980, at 200, 201.

The injury to a student who does not receive a regular high school diploma, as a result of a competency program, derives from being labeled as incompetent or functionally illiterate. The label is potentially a lifelong brand of second class citizenship that may limit employment opportunities and lower the individual's self-esteem. Similar self-fulfilling prophecy results may occur when competency test results are used for tracking or student placement decisions.

To minimize potential injury and litigation the concept of objective certification may be utilized to limit "certification of a student's achievement to objectively defensible statements."[175] In employing objective certification, a school district would note the competency test scores without drawing conclusions from the scores. Thus, instead of issuing a coded or differential diploma to those who have "failed", a single, standard diploma would be issued to all students who complete a prescribed course of study. The district would note the test results on each student's diploma, or on each student's transcript, attaching a copy of the transcript to the diploma. A statement that the student "scored 65 on the Standard Achievement Examination on March 2, 1981" is objective and legally defensible.

Objective certification leaves it up to the employer, or anyone else requiring the information, to draw performance conclusions. A particular employer may determine, based on his past experience, that a score of 60 on the Standard Achievement Exam is sufficient. Other employers may not care, being satisfied with the knowledge that the student completed his high school coursework requirements.

With objective certification, no cut-off point is set, no pass or fail categories are established, and no students are labeled by school officials as incompetent. It lessens the impact of faulty test questions or procedures. It limits the potential injury to students from a competency testing program.

175 *ECS Footnotes* 35, *supra*.

Of course, objective certification has no advantage if indirect labels are made known by the state or local district, as happened when the federal government coded honorable and general discharge papers, and surreptitiously let the codes become known. If the state or school district lets it be known that there is a cut-off score below which the student is probably functionally illiterate, then the diploma statements represent a subterfuge, not objective certification.

Objective certification is not a perfect solution. It does not solve the burden a competency testing program imposes upon the handicapped, the disadvantaged, or minorities. Further, objective certification makes employers do a little more work if they are to use competency test results as an employment screening device.

What objective certification would do is to place the state or local authority imposing the competency test requirement in an objective position. Rather than being in the business of labeling students as incompetent, school authorities could more properly concentrate on teaching, measurement, and remediation.

V. CONCLUSION

Given the potential injury to all students failing a minimum competency test, and the disproportionate problems minorities and handicapped students are likely to face under such a testing program, legal challenges and judicial scrutiny of competency programs is likely to increase. State education departments and boards may be held liable if they fail to independently investigate, validate, and monitor the competency test programs which they mandate.

A school district cannot withhold diplomas from some students without regard to the constitutional and statutory rights enjoyed by those students. Students do not "shed their constitutional rights . . . at the schoolhouse gate."[176] When school districts do withhold diplomas based on competency test scores, litigation is likely. Measurement tech-

176. Tinker v. Des Moines Independent Community School District, *supra* note 28, at 506. McClung, *supra* note 7, at 671.

nology is not yet advanced sufficiently to guarantee the accuracy necessary to justify the use of competency test scores for such basic educational decisions as whether a child should be held back a grade or denied a regular high school diploma.

If competency testing is implemented, extensive public involvement, and the use of formal rulemaking procedures are advisable and should reduce school districts' exposure to litigation.

If the thrust of any competency testing program is individual student remedial efforts, rather than diploma denial, tracking, or grade non-promotion, most of the inherent legal risks will be minimized.

The concept of competency testing is attractive and its goals honorable; however, putting the theory into practice may not be possible without substantial risks of litigation and injury to students.[177]

> Do you know what is happening?
> I just arrived myself. No one has time to explain; they are so busy trying to get wherever they're going up there. But what is at the top? No one knows that either, but it must be awfully good because everybody is rushing there.[178]

177. [A]ny setting of state-wide minimum competency standards for awarding the high school diploma—however understandable the public clamor that has produced the current movement and expectation—is basically unworkable, exceeds the present measurement arts of the teaching profession, and will create more social problems than it can conceivably solve. *Report to the Assistant Secretary of Education: Improving Education Achievement* 9, National Academy of Education Commission on Testing and Basic Skills (1978), as reported in McClung, *Competency Testing Programs: Legal and Educational Issues*, 47 FORDHAM L. REV. 651, 671 (1979).

178. PAULUS, HOPE FOR THE FLOWERS 20 (Paulist Press; New York, 1972).