DOCUMENT RESUME

ED 228 279 TM 830 155

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TITLE Minimum Competency Testing, the Denied Diploma and the Pursuit of Educational Opportunity and Educational Adequacy.
INSTITUTION California Univ., Los Angeles. Center for the Study of Evaluation.
SPONS AGENCY National Inst. of Education (ED), Washington, DC.
REPORT NO CSE-R-180
PUB DATE 82
NOTE 38p.
PUB TYPE Viewpoints (120) -- Information Analyses (070)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Academic Achievement; Black Students; Court Litigation; Educational Malpractice; *Educational Opportunities; Equal Education; *Graduation Requirements; High School Students; *Minimum Competency Testing; Minority Groups; Racial Bias; Secondary Education; *Standards; Test Bias; *Test Use
IDENTIFIERS *Debra P v Turlington; *Rodriguez v San Antonio Independent School Dist

ABSTRACT

There is no current evidence that Minimum Competency Testing (MCT) used to deny high school diplomas has enhanced equal educational opportunities for minority students. Test results, largely indicate that MCT requirements impact disproportionately on black students. Black students' scores may reflect a long history of racial discrimination in the schools, as well as bias in the testing process. While MCT programs may beneficially focus on teaching basic skills, there is no evidence that the diploma sanction is necessary to achieve this focus. The MCT movement may have advanced the thinking of judges and legal scholars about standards of good educational practice. These results of the MCT movement are not direct benefits of the programs which have been implemented. The educational standards articulated for MCT programs and the disproportionate racial impact of MCT require recognition that the problems of racial discrimination still exist in the schools, and the fundamentals of good teaching and testing practices are not always implemented. The promised benefits and goals of MCT are not yet realized. There is no assurance that the programs are effective in increasing educational achievement since it has not been proven that the tests are accurate measures of such achievement. (CM)

MINIMUM COMPETENCY TESTING, THE DENIED DIPLOMA AND THE PURSUIT OF EDUCATIONAL OPPORTUNITY AND EDUCATIONAL ADEQUACY

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CSE Report No. 180
1982

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The research reported herein was supported in part by a grant to the Center for the Study of Evaluation, U. S. Department of Education. However, the opinions and findings expressed here do not necessarily reflect the position or policy of NIE and no official endorsement should be inferred.

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INTRODUCTION

Recent civil rights litigation challenging Florida's use of minimum competency tests (MCT) to deny high school diplomas[1] has prompted controversy over the manner in which such challenges are consistent with goals of past civil rights efforts in American public education. How, critics argue, can civil rights advocates oppose programs which deny high school diplomas to students who cannot pass minimum competency tests, especially when the testing programs are linked to opportunities for remedial instruction? According to MCT supporters, federal court injunctions against test-for-diploma requirements deny educators an opportunity to stimulate basic skills achievement and to restore the credibility of high school diplomas, thereby enhancing educational opportunities for disadvantaged students. Those who challenge the use, or some uses, of MCT see the movement as a dangerous innovation which may do more to harm than to help the nation's educationally disadvantaged.

Proponents of MCT promise that elementary and secondary school competency testing programs foster one or more of the following program goals when used to determine student certification (such as receipt of a high school diploma) or classification (such as need for remedial class tracking): basic skills achievement; educational accountability; restoration of credibility to the high school diploma; elimination of social promotion; and reduction of the risk of "educational malpractice" lawsuits by ensuring that every high school graduate has, in fact, attained a level of

competence in the basic skills or in adult life functioning.

Those who question the wisdom of programs which rely upon MCT to determine student certification or classification question these assumptions. While MCT critics agree that new means for improving educational effectiveness must be sought, they warn that minimum competency testing is not only not the solution to complex educational problems, but may in fact be an educational prescription with dangerous side effects. These critics urge that minimum competency testing fosters over-reliance upon testing technologies not sufficiently sophisticated for the purposes for which they are being used; wrongfully places exclusive responsibility for educational accountability on students; perpetuates past denials of equality of educational opportunity for minority youth; and that MCT is usually implemented too quickly to allow educators, parents, and students adequate time to insure that sufficient instruction has been offered to afford students a fair opportunity to pass the tests.[2] Finally, they assert that there is insufficient evidence that MCT actually fosters teaching and learning for disadvantaged youth; according to its opponents, MCT does not necessarily afford all students a chance to succeed in school.

MCT opponents see a fundamental unfairness in "sacrificing the victims"[3] of past educational deprivations in order to establish a new order in which students are compelled to learn under threat of losing a diploma on the basis of test performance. The only manner in which MCT proponents have been able to justify what appears to be such fundamental unfair-

ness is to assert that no student, of any color, is better off for having been awarded a "meaningless" diploma. Aside from the automatic access to many sectors of the job market afforded by the high school diploma, regardless of whether the diploma or the skills it represents to those employers are actually job-related enough to be essential for successful on-the-job performance, no one could disagree. No opponent of competency testing is in favor of giving students worthless diplomas. No opponent of minimum competency testing is in favor of further reduction of educational standards in our schools. And, no opponent of minimum competency testing is in favor of denying disadvantaged students, of any background, the opportunity for remedial or compensatory educational services. In fact, most "opponents" of minimum competency testing are not opposed to MCT per se (and a large number of this group are probably in favor of the use of some form of testing and/or minimum competency testing to foster educational improvement), but are instead opposed to the methods by which MCT is currently being implemented. In particular, these persons and organizations are concerned that many test-for-diploma schemes sacrifice large numbers of young people, particularly minority young people, for the sake of quickly implementing this latest trendy, and overly simplistic, solution to our country's educational problems.

The debate over the benefits and hazards of MCT used to make critical decisions about students focuses upon questions of educational accountability and is an outgrowth of the school accountability movement which began in the early 1960s and the civil rights movement in schools which began in the early 1950s. The questions which are now being addressed concern

the extent to which minimum competency testing impacts the struggle for equality of educational opportunities offered minority students and the struggle for quality educational opportunities for all students.[4]

MCT AND THE NEED FOR ACHIEVING ACCOUNTABILITY

The use of minimum competency testing to determine student certification and classification is another step in the educational accountability effort begun in the mid-1960s. Most of these early efforts focused upon management techniques and school-based efforts although much attention was also paid to more "scientific" control of individual learning activities.[5] For the most part, these activities were initiated by educators themselves, influenced by methods pursued by business or the military or by behavioral science research. Occasionally, state legislators made their own demands during this time period.[6] The concern in all instances, however, was with educational achievement and insuring minimal educational adequacy rather than fostering educational equity.[7] However, the second phase of this era of accountability, a phase which extended to the end of the 1970s, was marked by activity initiated by attorneys. The so-called "educational malpractice" lawsuits sought to obtain monetary damages from school districts for instances in which, it was alleged, individual students who graduated from high school lacked the basic skills they should have attained as the result of school attendance.[8] Both types of accountability efforts stimulated the MCT movement. Perhaps the most compelling force in the move toward minimum competency testing, however,

has been the perception--substantiated by some studies--that basic skills achievement among the nation's students is plummeting.[9]

No matter which accountability goal is sought by MCT-implementers, one question is ever present: why should we believe MCT will foster educational achievement when years of educational achievement testing have not done so, especially when responsibility under this form of accountability rests exclusively on the shoulders of students? Making one group of actors in the educational process primarily responsible for successful educational outcomes is a shift in focus from previous approaches in which responsibility was poorly defined and inexactly shared. We do need a mechanism--or mechanisms--for assessing and attributing responsibility for educational outcomes in such a way that it is possible to know how schools are functioning, to know the causes of any dysfunctions, and to compel positive change. While we have reasonably accurate knowledge of how schools are functioning and at least some understanding of why some educational processes are not working, we have no mechanism for compelling schools to educate all students successfully. The use of MCT to make student classification or certification decisions, including determinations of whether to award high school diplomas, does nothing to insure that students will learn. In fact, by placing all accountability demands on students, MCT proponents selected the line of least resistance. While a student's willingness to learn is a critical variable in educational effectiveness, students have no control over the myriad additional resources which are critical to schooling. The balance of power is in fact so tipped against students that they are the one group in the educa-

tional community which is so politically powerless that they cannot even be expected to complain loudly about this turn of events. Imagine, if you will, the controversy which would have been generated if accountability with strong sanctions, such as denial of employment opportunities, rested exclusively on the shoulders of school administrators or teachers or boards of education.[10]

The fatal flaw in the educational malpractice lawsuits was the inability of the complaining students and their attorneys to define a minimally adequate education and the minimal level of professional care required on the part of educators in working to instill that quantum of learning in students. If, however, there has now been, through MCT, a definition of minimally adequate education,[11] the future course of so-called educational malpractice litigation may have been altered. While there may not be additional tort law negligence suits filed against educators, there may now exist, courtesy of MCT efforts, further alternatives for students to successfully present claims of "constitutional torts."[12]

DEFINING EDUCATIONAL ADEQUACY

When a state, or a local school district, sets minimum competency standards, it is defining the components of a minimally adequate education. The skills and objectives which have been defined as essential for successful functioning as an "educated" individual.

The decision-makers establishing an MCT program, be they legislators, board members, or educators, generally provide at least a general statement of the purposes of the testing program. Thus, minimum competency

testing programs are initiated "to combat the ills of social promotion," "to assess the ability to function in the adult real world," or "to insure proficiency in the basic skills and to promote good citizenship." This charge to the test-makers begins the process of defining the "educated" individual. The definition is further substantiated when the test-makers establish the goals and objectives, or skills and knowledge, which will be assessed in determining whether the overriding mandate is being met by a particular student. Some programs have relied upon extensive public input at this stage; in other programs public input has been minimal or nonexistanet. In any event, when test content is defined, a simultaneous and congruent definition is implicitly written for what is required for a student to be labelled as having been successfully educated.

This process of defining education causes little controversy when only the most fundamental and basic of skills in reading, writing, and computation are at issue. However, once the testing mandate goes beyond proficiency in the basic skills, controversy abounds. Programs to assess "functional literacy," "adult basic competency," or "fundamental survival skills" provoke considerable debate about what public education is and should be doing. At times, the debate concerns the ambiguity of those terms, but once the test-makers sharpen the definitions of those terms by articulating the skills and knowledge which they feel are components of each construct, an unending debate if provoked. Too often, the test mandate and the test-makers seek to measure that which is subjective, infringes on privacy, contains value judgments, conflicts with religious

beliefs, or imposes certain political perspectives.[13] However, no matter how the standards are set and no matter how far beyond the basic skills areas they reach, the test standards become, by definition, the minimum standards for an adequate education.

Once minimum levels of educational functioning have been set, a definition of the minimum level of professional care to be exercised by educators does not necessarily follow. In fact, when the exclusive responsibility for competency achievement rests upon students, it might well be that the duty of care by educators has been almost totally eliminated. However, judicial decisions in litigation challenging minimum competency testing have had, under the rubric of "due process," the effect of defining a new standard of care shared by educators and by those educational policy makers who have established MCT systems.

Due process requirements of sufficient "notice" prior to the implementation of a test-for-diploma scheme arise from judicial recognition that students must be given a fair chance to learn the information included on a test and should know, as they are learning, that the knowledge being offered is critical to graduation or other educational progress.[14] The requisite level of professional care, therefore, rests upon the need to insure that students have an adequate opportunity to learn and to learn well. While this standard of care does not compel particular teaching techniques, it does require that teachers work in a timely and coherent manner toward the goal of successful student performance on the MCT. Working to insure that every student has ample opportunity to master every skill covered on the test becomes, therefore, the minimum required

of every educator.

The movement for financial accountability has also impacted the development of MCT. School finance reform efforts, both legislative and litigative, began as an effort to equalize financial burdens and educational resources between school districts within a state. Over time, however, issues of equality of educational opportunity and of adequacy of educational outcomes were also addressed. The United States Supreme Court decision on school finance, Rodriguez v. San Antonio Independent School District,[15] is illustrative. The Court held that there was no basis, under the federal constitution's equal protection clause, for finding that there was a constitutionally-protected right to education or that the Texas school finance scheme denied any constitutional rights to students in poor school districts.[16] The Court did, however, imply that financial resources were linked with educational opportunity. More important, however, was the Court's clear differentiation between the Texas case it considered and some other situation in which students might assert that financial disparities were so severe that they were not receiving even a minimally adequate education.[17] The Court thus suggests that a change in emphasis from concern about the "opportunity to learn" to the need for "minimally adequate education" as determined by some measure of educational outcomes could give complainants a stronger basis for their challenges to the educational system. This was the theme of successful state court school finance challenges.[18]

Minimum competency testing challenges raise both equity and adequacy[19] issues. Test results for students failing the MCT (assuming it is a valid

and reliable measure) indicate that these students have been denied minimally adequate educational opportunities (assuming the students themselves made good faith efforts to learn and exhibited good school attendance records). For some of these students (i.e., minority students) we know that some problems concerning educational adequacy result from past denials of educational opportunities. Indeed, scrutiny of the impact of MCT provokes reconsideration of the meaning of past efforts to insure equal educational opportunity.

MCT AND THE SEARCH FOR EQUAL EDUCATIONAL OPPORTUNITY

To date, the only impact minimum competency testing has had on equality of educational opportunity has been the confirmation, by the test results, that we have not yet achieved equality of educational opportunity for students of all races and cultures. In fact, the tests confirm that we have far to go in our efforts.[20] No minimum competency testing program has as yet shown anything other than significantly lower educational achievement for minority students. The data show achievement so low that it cannot be primarily attributable to the family socioeconomic background of the student. In fact, analysis of test scores and other student data indicate that race was a far more potent predictor of student success on one major minimum competency test than other variables, including socioeconomic status.[21]

Minimum competency test results available to date compel us to re-

assess educational history concerning efforts to promote equal educational opportunity over the past twenty-five years. What did the courts, and later, Congress, intend when educational equity was mandated? How were equity mandates translated into educational practices? Finally, how, if good faith efforts toward achieving equity have in fact been applied for twenty-five years, do we explain present vastly different achievement performance between the races?

Efforts to explain away low minority test performance on grounds that test results are being used primarily to identify students in need of remedial or compensatory educational opportunities must be carefully scrutinized. When the use of a minimum competency test has the effect of segregating or resegregating students on the basis of race, are we able to sufficiently justify, for both educational and social reasons, the practice? Further, is such isolation of the races justifiable when we have no proof that any increase in test scores which might result is not caused by the teaching of test-taking skills or manipulation of test standards, rather than the result of increased proficiency in the fundamental skills being measured on the test?

Opponents of MCT quickly resorted to a legal forum for presenting their criticism of MCT used to deny high school diplomas precisely because of their fear that MCT adversely impacts the educational progress of blacks.[22] The first federal court litigation concerning MCT, therefore, focused primarily on the extent a test-for-diploma scheme with a disproportionate impact on blacks denied constitutional and statutory guarantees

of equal protection of the law. The legal theories advanced were based upon the same approaches used to attack various forms of race discrimination in public education, such as racially segregated schools, and isolation of the races through class placement or tracking practices. In Debra P. v. Turlington,[23] students challenged Florida's implementation of a 1976 statute which required a student to demonstrate proficiency in "functional literacy" in order to receive a standard high school diploma. Students who failed a functional literacy test (FLT) but had met all other graduation requirements were to receive a "certificate of completion." When the test was first given in October of 1977, 77% of the black students failed FLT compared to 24% of the white students. After three chances to pass the test, the first graduating class subjected to the test-for-diploma requirement, the Class of 1979, included 1.9% of the white seniors who would not receive high school diplomas and 20% of the black seniors who would not receive diplomas. In short, if you were a black high school senior in Florida in Spring, 1979, you had a ten times greater chance of failing to receive your diploma on the basis of your FLT performance than you would if you were white.

The initial and most obvious harmful impact of the Florida MCT was therefore one of disproportion, on the basis of race, in numbers alone. The ranks of diploma recipients and non-recipients broke down almost exclusively on racial lines, making the FLT a new means of racial classification. But the problem ran deeper than that.

The harm to minority students inherent in the Florida program, and

in most MCT programs, is linked to either the past denials of educational opportunity to which these students have been subjected or to flaws in the scheme for implementing the MCT program, flaws which in some cases impact the ability of all students to succeed in the program but which present particularly troublesome obstacles for minority youth. In some cases both sets of problems impact test performance. MCT used to deny high school diplomas can serve to perpetuate, rather than ameliorate, denials of equal educational opportunity.

Many students who face MCT requirements as part of present graduation requirements are students who have not had the benefit of a full twelve years of racially integrated education. Those minority students who today face a test-for-diploma requirement and who were previously placed in racially isolated are disadvantaged on examination day because they were previously subjected to inferior educational opportunities. For over twenty-five years, this nation's courts have recognized that minority students who attend segregated schools receive an education which is, by definition, legally inferior. This doctrine was first enunciated by the United States Supreme Court in Brown v. Board of Education in a declaration as apt for the present as it was in 1954:

> Today education is perhaps the most important function of state and local governments. . . In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. . . .We conclude that in the field of public education, the doctrine of separate but equal has no place. Separated educational facilities are inherently unequal.[24]

The doctrine is now as much a part of social policy as it is a matter of law.

PROGRESS OR PERPETUATION OF PAST PROBLEMS?

One might well ask what difference racial isolation in the first few years of schooling could make on performance on a high school graduation test, particularly when the test measures minimum or basic skills. It is precisely because basic skills are at issue that inferior educational opportunities in the early years of schooling are important. An inadequate foundation in the fundamentals impedes educational advancement throughout a school career and simultaneously forecloses opportunities for successful performance on the minimum competency test. Further, ongoing racial discrimination in the schools creates additional impediments to learning.

But surely these past educational deficits can be overcome during ensuring periods of educational intervention, the test proponent would assert. To advance this argument as a justification for use of MCT, given low minority pass rates, is to forget that MCT proponents have also acknowledged that current educational problems have been provoked in large part by what are now regarded as lax educational practices. Social promotion is but one of a number of such practices. The past ten to twenty years have seen widespread reliance on the use of social promotion as a tool for alleviating political and social pressures on the schools, particularly pressures resulting from racial integration. Many black

students, in particular, were the "beneficiaries" of this educational practice. As a result, black students coming from segregated schools were in many cases received by newly integrated schools which, poorly equipped to handle the needs of any students in confronting the traumas of integration and not knowing what else to do in response to the particular needs of black students, simply passed black students on from grade-to-grade to keep them with their chronological peers. In Florida, a state legislator declared that elimination of the evils of social promotion was a particular goal of minimum competency testing legislation;[25] educational officials in the same state also admitted that it was black students in particular who were victims of that promotion practice.[26]

Minority students facing a new test-for-diploma requirement therefore enter the competition with two strikes against them: first, inferior educational opportunities, particularly in the early grades and, second, grade-to-grade promotion policies which passed them through elementary and secondary school even though they had not been exhibiting satisfactory academic performance. The third strike follows in quick succession: the test instrument itself is, in many instances, racially biased.

Racial or cultural bias in standardized tests is not a new item of discussion for educators or educational policy-makers. The possibility of test bias exists when empirical or observational data indicate that a test is not measuring the same factors for one racial or cultural group that it is measuring for others. Like all other standardized tests, minimum competency tests have been subject to challenges of racial or cultural

bias inherent in the test instruments themselves. Such challenges were perhaps inevitable given vast disproportions in minority pass rates on most of the tests. The claims are particularly troublesome because the tests involved attempt to measure fundamental academic achievement and, in some cases, also to predict successful adult life functioning. In addition, the test results play a significant role in the life of a student, determining whether a high school diploma will be awarded and, as a result, determining access to the job market and higher education.

The nature of the content of an MCT is a particularly important issue for minority students when the test covers "real life" or "functional" applications of basic skills. Many of the "real world" contexts in which MCT questions are posed involve situations with which middle and upper-class students have familiarity, but which are not typical to the life experiences of many low-income or minority children. If training to familiarize students with these situations is not offered by the schools prior to the administration of the tests, students from homes and families where the information was provided will have considerable advantage over those who didn't receive the training at home or at school.

Test makers did not, many minorities allege, take adequate precautions to insure that minimum competency tests were free from racial and cultural bias. In part the indictment here is a criticism of the state of the art of psychometry since few of the technicians themselves can agree on the steps to be taken to insure this type of test fairness. However, much more of the criticism is directed at a failure to take any reasonable steps to insure racial or cultural fairness. Many development

processes have not, for example, included public participation in standard-setting[27] or adequate reviews of potential test items by members of the black community to safeguard against inclusion of items which include referents so unfamiliar to black students that those students would be precluded from being able to successfully demonstrate proficiency in the content area actually being assessed.[28]

Low minority pass rates on minimum competency tests used to determine the award of high school diplomas can be legitimately explained by past denials of equal educational opportunity or by problems inherent in the scheme for implementing MCT, either in developing the test instrument itself or in phasing in the new test-for-diploma program. Given these problems alone, there are sufficient grounds for attacking use of a minimum competency test to determine the award of high school diplomas. Such an attack is based simply upon a goal of preventing a scheme which serves to place upon minority students another badge of inferiority, a badge which may not be warranted because the test did not give the student a fair chance to demonstrate what he or she did in fact know or because the failure to learn may not have been the student's fault.[29]

Minimum competency testing under some or all of the conditions described above serves simply as a further confirmation of past denials of equal educational opportunity. Poor test performance by minority youngsters reflects what we have known all along: American public education has not adequately served the needs of disadvantaged students and, as a result, the academic achievements of those students has suffered. To reconfirm the ex-

istence of educational inequities is one matte : the denial of high school diplomas on the basis of such information is quite another.

Those who advocate minimum competency testing assert that one of the chief benefits of MCT is the remedial opportunities tied to test failure. This claim must be viewed with some cynicism because in most cases the link between the test and remedial or compensatory educational opportunities has been an afterthought. In Florida, for example, a compensatory program was not initiated by the state until one year after the test requirement was imposed and after nearly 40% of eleventh graders failed the mathematics portion of the test.[30] Other states include no provisions or appropriations in their MCT programs for remediation.[31]

It is also difficult to justify the remedial educational benefits of MCT when the tests developed for use in MCT programs which are linked to a remedial opportunities are not written to be useful diagnostic tools for classroom teachers. Instead, the tests are typically achievement measures to certify school exit competencies, a far different function.

Whether remediation actually works in another concern of those who question the wisdom of MCT programs. The Florida Commissioner of Education proudly touts the success of his MCT program, pointing to the gains of students, particularly black students, in successive admissions of his competency test.[32] Test opponents at first breathed a sigh of relief that smaller numbers of blacks would be harmed by diploma denials. A second look, however, indicated several troublesome factors to consider in assessing these gains. High percentage gains in black pass rates was not

unexpected since statistics indicated large numbers of black students had been clustered just below the cut-score on the test; success on one or two additional items would move significant numbers of blacks from the "failing" to the "passing" category. Particularly given the number of test items identified as racially/culturally biased,[33] many asked if most of these students shouldn't have properly been classified as "passers" on the first administrations of the test. One expert has estimated that, on the first administration of the Florida functional literacy test in October, 1979, 28% of the students who failed the math portion of the test would have passed had the passing score been reduced by a mere three questions. Most of these students were black.[34]

Other concerns have been voiced also, concerns which directly address the extent to which MCT impacts equality of educational opportunity. There is little evidence that those students now passing Florida's MCT have actually been afforded increased educational opportunities. As might be expected, there are many allegations that increased scores resulted from coaching on test-taking skills, rote drills, and breaches in test security. In addition, the relatively small number of items in the pool of test items used in Florida meant that students who repeated the test had a high likelihood of becoming very familiar with test content. Finally, with no equating studies being conducted by Florida to determine the relative difficulty of various versions of the tests, there is no evidence to refute charges that the test is simply becoming easier and easier.[35] Given all of these problems, there is no assurance that for Florida's program, MCT has in fact caused a real improvement in educational attainment among disadvantaged youngsters.

MCT AND THE JUDICIAL RESPONSE TO THE EDUCATIONAL POLICY ISSUES PRESENTED

The educational equity issues presented by the use of MCT to deny high school diplomas have been addressed now by two courts of law, one state and one federal. The first decision, in Debra P. v. Turlington, addressed the Florida functional literacy examination discussed previously here. The second, a New York state court case,[36] concerned a state MCT program for diploma denials as it was applied to handicapped students. Both cases can be understood only in the context of the judicial restraint displayed by those who decided the cases and of the context in which judges act as educational policy-makers.

Minimum Competency Testing to Deny Diplomas Halted in Florida

Following a trial court decision in Florida, the case was considered by an appellate level federal court. The United States Court of Appeals for the Fifth Circuit entered a decision which in large part upheld the trial court's determinations, but found that the lower court did not go far enough in its decision and orders concerning the race issues or the teaching-testing process. At the heart of the appellate court's decision lie legal principles. That court said, first, that a diploma sanction which impacts disproportionately on black students is unlawful unless the state can prove that the disproportionate impact does not result from the effects of past unlawful racial discrimination. Second, the Fifth Circuit said that no test-for-diploma scheme can ever be undertaken unless

the state can prove that students were actually taught the material covered on the test.[37]

The decisions in Debra P. v. Turlington do not question the validity or legality of state or local educational practice which uses minimum competency test instruments to determine whether to award a high school diploma. However, the decisions do indicate that there are some parameters for such a practice. Specifically, the decisions indicated the following:

- A disproportionate failure rate for black students resulting from an inferior education received during the existence of a dual school system places a moratorium upon the use of a test to deny high school diplomas until all of the students taking the test have gone through twelve years in a physically unitary school system. "In the Court's opinion, punishing the victims of past discrimination for deficits created by an inferior educational environment neither constitutes a remedy nor creates better educational opportunities."[38]
- The use of a term such as "functional illiterate" or "functional incompetent" which has a universally negative inference and connotation to describe students who fail the examination creates a significant harm for all students who fail the test.[39]
- The fact that Florida's statute requires passing a test for receipt of a diploma only for public schools and ex-

empts private schools from the requirement does not invalidate the test on equal protection grounds.[40]

- Two years notice of the implementation of a testing program is inadequate for students where there is a statewide test but there has been not statewide curriculum, there has not been adequate instruction in all skills and objectives measured on the test, and students do not know during the time of their instruction that the individual skills being taught will be required to be learned prior to graduation from high school. As the federal judge stated:

> The Plaintiffs, after spending ten years in schools where their attendance was compelled, were informed of a requirement concerning skills, which, if taught, should have been taught in grades they had long since completed. While it is impossible to determine if all the skills were taught to all the students, it is obvious that the instruction given was not presented in an educational atmosphere directed by the existence of specific objectives stimulated throughout the period of instruction by a diploma sanction.[41]

- The test used to determine the award of a high school diploma must have content validity, which must include proof that students have actually been taught the material covered on the test.[42]

- Students have a property right in graduation from high school with a standard diploma if they have fulfilled the requirements for graduation exclusive of the passage

of the minimum competency or functional literacy examination.[43]

- Students have a liberty interest in being free of the adverse stigma associated with receiving a certificate of completion rather than a regular high school diploma.[44]
- There are other constitutionally acceptable and less onerous alternatives to implementation of the test requirement two years after the statute was enacted, such as phased-in introduction of the objectives in all grades without the diploma sanction and the use of longer term remediation programs to bring students up to the standards.[45]
- Any situation in which a minimum competency test is used to place students into remedial or compensatory education classes is constitutionally acceptable even if the classes are disporportionately black, if they have an enrollment which seems to be fluid, a program which appears to present significant improvement in test performance, and the class consumes only one or two class hours per day with the rest of the day spent in a regular class.[46]

MCT and Standards for Teaching

The trial court in Florida offered some clear criteria for determin-

ing whether a student has been offered a fair opportunity to learn the knowledge and skills covered on a minimum competency test. These criteria are contained in the court's discussion of the due process protections to which students are entitled in a test-for-diploma program. The trial court lists the following components of a constitutionally fair teaching program:

- Students must be told the specific objectives that will be covered on the test used for graduation. This announcement must occur at the time of instruction in the objective.[47]
- The curriculum offered students must include instruction in the objectives covered on the test.[48]
- The acquisition of skills is a cumulative process. Students must be offered instruction in a rational and orderly sequence which afford them an opportunity to acquire proficiency through an appropriate developmental process.[49]
- The amount of time spent on instruction of a particular skill or unit of knowledge is important.[50]
- The timing of the instruction received by students is important. In addition to receiving sufficient instruction in a skill, students must be provided instruction, or a review of prior instruction, at a time just prior to administration of the test.[51]
- The teaching process must include some mechanism for identify-

ing whether objectives are being learned by individual students, since teaching and learning are not always coterminous.[52]

- Students must be offered an opportunity for remedial instruction if they have not mastered an objective.[53]

Minimum Competency Testing to Deny Diplomas Halted in New York

A New York state trial court has found that minimum competency testing used to deny high school diplomas must be phased in slowly with sufficiently early notice of the test-for-diploma requirement to afford handicapped students a fair opportunity to pass the test. While the court refused to set a specific time period for notice, it found that for handicapped students early notice is especially important to allow for consideration of whether to include preparation for the test as part of the students' programs and to afford appropriate time for instruction aimed at reaching that goal.

The case, Board of Education of the Northport-East Northport Union Free School District v. Ambach[54] was brought by a local school district seeking to bar a New York state department of education order concerning the use of MCT and the award of diplomas to handicapped students. Beginning in June, 1979, high school seniors in New York were required, under Regulations of the New York Commissioner of Education, to pass a Basic Competency Test in order to receive regular high school diplomas. In open defiance of this regulation, the Northport School District awarded diplomas to two handicapped students who had not passed the test but had

successfully completed their individualized educational programs (IEPs). When the state learned of the award of these diplomas, it issued an order invalidating the diplomas and requiring the district to disclose the names of the students involved. The district refused and sought court action permanently enjoining enforcement of the state order. When the matter went to court, the two students intervened as co-complainants against the New York Commissioner.

In addressing claims made under the state and federal constitutions, 1983 of the Civil Rights Act,[55] 504 of the Rehabilitation Act,[56] and P. L. 94-142[57] the court made the following determinations:

- The state has a legitimate interest in attempting to insure the value of its diplomas and to improve upon the quality of education provided. Use of MCT to achieve these goals is appropriate.
- The denial of diplomas to the handicapped students because of their failure to pass the MCT does not violate 504 of the Rehabilitation Act. That statute requires that a handicapped student be provided with an appropriate education but doesn't guarantee that s/he will successfully achieve the academic level needed to pass the test.
- Under P. L. 94-142, the state educational agency has the authority to set educational standards regarding appropriate education for the handicapped and the standards set here required passage of an MCT to receive a diploma.

- P. L. 94-142 does not require specific results but rather the availability of a free appropriate education. The award of a diploma is not a necessary part of a free appropriate public education.
- There is a rational basis for a test-for-diploma requirement and for application of that requirement to handicapped students.
- The diploma represents a liberty and a property interest for the purposes of due process protection. Denial of the diplomas would have grave consequences for the employability and future life chances of the students.
- Due to the rule of judicial restraint in education matters, the court declines to determine the validity of the test for use with handicapped students.
- The state did fail to provide timely notice of the diploma sanction. There was not sufficient time to structure the students' individual educational programs to prepare them for the test-for-diploma scheme.
- Two years of notice of the diploma sanction to the school district is inadequate. No notice at all was given the students or their parents although state special education statutes would require notice.
- The time frame for notice to handicapped students is much more crucial than for non-handicapped students. Handicapped students

require notice of a test-for-diploma scheme sufficiently early to allow the IEP to be written to prepare for the test and to allow appropriate time for instruction to pass the test.

As a result of its findings, the court permanently enjoined the enforcement of the state order to the local district regarding the issuance of the two diplomas. The court also ruled that the test-for-diploma requirement of the state Commissioner of Education was improper as to the two students involved in the lawsuit.

The New York case has now been appealed, by both sides, to a state intermediate level appellate court.

EDUCATIONAL OPPORTUNITY AND ADEQUACY: IS MCT THE ANSWER?

Scrutiny of the MCT movement does provide some insight into the nature of the struggle for equal educational opportunity for minority students and the definition of adequate educational opportunities for all students.

There is no evidence currently available that MCT used to deny high school diplomas has enhanced equal educational opportunities for minority students, particularly blacks. In large part, test results indicate that MCT requirements impact disproportionately on black students. Black students' scores may reflect a long history of racial discrimination in the schools, as well as bias inherent in the testing process itself. While

MCT programs may beneficially focus educators' attention on teaching basic ski there is no evidence that the diploma sanction is necessary to achieve this focus.

The MCT movement may have done a good deal, however, to advance the thinking of judges and legal scholars about standards of good educational practice. First, the federal courts considering the Florida case embraced some standards of practice from the psychometric profession by requiring that educators demonstrate the content validity of their MCTs and the match between the tests and what students were actually taught. The courts sitting in the Florida case, as well as the New York state court, also established the outlines of a constitutional standard for fair teaching in a test-for-diploma program: students must be notified of the importance of the training; must be told the specific criteria upon which the graduation/test will be made; must be given developmental instruction; must be afforded adequate time-on-task; and must be given adequate diagnostic and remedial opportunities to meet graduation standards.

It is important to note that these results of the MCT movement are not direct benefits of the programs which have been implemented. The educational standards articulated for MCT programs and the disporportionate racial impact of MCT require that we recognize what we have all known, but may often have ignored about the educational process. First, the problems of racial discrimination are still with us in the schools. Second, while educators know the fundamentals of good teaching and good testing practices, those practices are not always implemented, sometimes

perhaps because legislatures and other policy-makers don't take such practical considerations into account when they formulate new policy.

The promised benefits of MCT, the goals pursued by MCT proponents, are not yet realized. For the most part, we can't be assured that the programs are effective in increasing real educational achievement since we don't know that the tests are accurate measures of such achievement. We also have no assurance that MCT programs will not simply reduce the entire curriculum, limiting it to the minimum standards set forth for MCT, so that the "minimums" become the "maximums" for educational programming. Finally, we have never been offered any proof that the goals of MCT proponents can only be furthered by making students exclusively accountable, through a diploma or promotion sanction, for educational outcomes.

FOOTNOTES

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** The author, an educator and attorney affiliated with the Center for Law and Education, represented the students who successfully challenged Florida's minimum competency testing program in Debra P. v. Turlington. The opinions expressed here are solely her own.

1. Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979); affirmed in part, vacated and remanded in part; 644 F. 2d 397 (5th Cir. 1981).

2. See G. Madaus, "NIE Clarification Hearing: The Negative Team's Case," 63 Phi Delta Kappan 92 (Oct., 1981); for a summary of the arguments against MCT.

3. 474 F. Supp. at 257.

4. See A. Wise, LEGISLATED LEARNING (1979), pp. 1-31 for a discussion of equality and adequacy issues and their interrelationship.

5. Id., pp. 12-23.

6. Id.

7. Id., pp. 118-185.

8. These lawsuits, which played a major role in the "Why Johnny Can't Read" movement, were all unsuccessful. They generated a storm of controversy within the educational profession and some segments of the political community involved in educational policy-making. For descriptions and reviews of the malpractice phenomenon, see N. Hentoff, "Who's to Blame: The Politics of Educational Malpractice," 6 Learning, Oct., 1977, pp. 40-46; J. Blackburn, "Educational Malpractice: When Can Johnny Sue?" 7 Fordham Urban Law Journal, 1978.

9. In fact, the most recent evaluations conducted by the National Assessment of Educational Progress indicate that basic skills achievement is increasing, but that higher order skills are declining. "Three National Assessments of Reading: Changes in Performance, 1970-80, National Assessment of Educational Progress, April, 1981."

10. In fact, there has been litigation over teacher competency testing, particularly the racial impact of the use of the National Teacher Examination and the Graduate Record Examination. See, e.g., Armstead v. Starkville Municipal Separate School District, 325 F. Supp. 560 (N.D. Miss. 1971),

U. S. v. South Carolina, Fair Employment Practices Cases (D. So. Cour. 1977), affirmed, 98 S. Ct. 756 (1978).

11. The statutes and regulations implementing minimum competency testing programs set forth definitions of objectives, or skills and knowledge, upon which students must demonstrate proficiency in order to be designated "minimally competent." These definitions therefore set out the minimum educational standards for student achievement.

12. A "tort" is a legal wrong or injury committed by a person or organization; constitutional torts involve violations of duties imposed under the constitution.

13. Some MCT programs assess civic knowledge, family relationships, and health education which include areas which involve very subjective judgments.

14. See M. McClung, "Are Competency Testing Programs Fair? Legal? "Phi Delta Kappan (Feb., 1978), pp. 397-400; M. McClung, "Competency Testing Programs: Legal and Educational Issues," 47 Fordham Law Review (1979), pp. 652-711; D. Lewis, "Certifying Functional Literacy: Competency Testing and Implications for Due Process and Equal Educational Opportunity, 8 Journal of Law and Education" (April, 1979), pp. 145-183.

15. 93 S. Ct. 1278 (1973).

16. Id.

17. Id.

18. See, e.g., Serrano v. Priest, P. 2d (1974). Rubinson v. Cahill, 118 N. J. Super. 223, A. 2d 187 (1972).

19. Wise considers "equity" a political question and "adequacy" a productivity question, the latter a more troublesome set of issues since they suggest we do not know how to teach. Legis. Learning, At p. 53. The question, however, is whether we do in fact wish to implement a social-political policy of effectively educating all our children.

20. See discussion accompanying footnote 23. below.

21. W. O'Hare, "Race, Socioeconomic Status, and Competency Testing" (National Social Science and the Law Project, Oct. 1979).

22. See footnote 1 above.

23. 474 F. Supp. 244 (M.D. Fla., 1979); affirmed in part, vacated and remanded in part 644 F. 2d 397 (5th Cir. 1981).

24. 347 U.S 483 (1954).

25. Testimony of Rep. Young, Trial of Case Debra P. v. Turlington, in Minimum Competency Testing: A Case Study of the Florida Functional Literacy Examination (Center for Law and Education, 1980).

26. Deposition of Commissioner Ralph Turlington, Trial of Case Debra P. v. Turlington, in Minimum Competency Testing: A Case Study of the Florida Functional Literacy Examination (Center for Law and Education, 1980).

27. In Florida, the cut score of 70% was set after a short phone survey indicated that 70% was a commonly used, and understood, passing score in Florida's classrooms. See G. Glass, "Minimum Competency and Incompetence in Florida," 59 Phi Delta Kappan 602 (May, 1978).

28. See testimony of Asa Hilliard and Lillie James, Trial of Case Debra P. v. Turlington, in Minimum Competency Testing: A Case Study of the Florida Functional Literacy Examination. (Center for Law and Education, 1980).

29. While students should be held accountable, to some extent, for educational achievement, they should not be solely responsible for that achievement or for learning where there was not fair teaching.

30. See the history of the program set forth at 474 F. Supp. 244-248.

31. See the "Updates: Minimum Competency Testing," prepared on an irregular basis by C. Pipho, Education Commission of the States.

32. R. Turlington, "Good News From Florida: Our Minimum Competency Testing Program is Working," Phi Delta Kappan, pp. 649-651. (May, 1979)

33. Testimony of Dr. Hilliard, Trial in Case Debra P. v. Turlington.

34. Testimony of Prof. Robert Linn, National Institute of Education Issues Clarification Hearing on Minimum Competency Testing, Washington, D.C., 9 July 1981. The data are also available in unpublished form from Linn at the University of Illinois, Champaign-Urbana.

35. Testimony of G. Madaus, Trial of Case Debra P. v. Turlington.

36. Board of Education of Northport-East Northport v. Ambach, Sup. Ct. NY, Albany Cnty, 1981, Slip Opinion. Printed at 3 EDUCATION OF THE HANDICAPPED LAW REPORT 552:282.

37. 644 F. 2d at 408.

38. 474 F. Supp. at 257.

39. 474 F. Supp. at 263.

40. 474 F. Supp. at 267.

41. 474 F. Supp. at 266.

42. Id.

43. 474 F. Supp. at 267.

44. 474 F. Supp. at 267.

45. 474 F. Supp. at 268.

46. Id.

47. 474 F. Supp. at 264.

48. Id.

49. Id.

50. Id.

51. Id.

52. Id.

53. Id.

54. See footnote 36, above.

55. 42 U.S.C. 1983.

56. 29 U.S.C. 794

57. 20 U.S.C. 1401 et seq.