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COMMENTS

MINIMUM COMPETENCY TESTING: EDUCATION OR DISCRIMINATION?

I. INTRODUCTION

Minimum competency testing¹ has been described as the "next major

1. For an overview of the issues involved in minimum competency testing see Brickell, *Seven Key Notes on Minimum Competency Testing*, 59 PHI DELTA KAPPAN 589 (1978); Haney and Maudus, *Making Sense of the Competency Testing Movement*, 48 HARV. EDUC. REV. 462 (1978); Pipho, *Minimum Competency Testing in 1978: A Look at State Standards*, 59 PHI DELTA KAPPAN 585 (1978).

Examples of questions appearing on the Virginia test include the following:

MATHEMATICS—1. Write the word names for numbers

The word name for 3,062 is

- a) three hundred sixty-two
- b) thirty-six hundred two
- c) three thousand sixty-two
- d) three thousand six hundred two

2. Compare numerical values

Which set of numbers goes from the smallest to the largest?

- a) [110, 249, 72, 300, 515]
- b) [3, 7, 9, 5, 8]
- c) [39, 27, 14, 11, 1]
- d) [7, 16, 21, 27, 41]

VIRGINIA DEPARTMENT OF EDUCATION, GRADUATION COMPETENCY TEST-MATHEMATICS RELEASED ITEMS 1 (Fall 1978).

READING-DIRECTIONS: Read the safety warnings below, and answer the questions that follow.

COLD MEDICINE

ADULT DOSAGE: Two tablets every four hours, one to four times daily as needed, or as directed by a physician. For children 6 to 12 years of age, use half adult dosage. **WARNING:** Do not give to children under 6 or use for more than 10 days unless directed by a physician. **KEEP THIS AND ALL MEDICINES OUT OF REACH OF CHILDREN.** **CAUTION:** Do not take without consulting a physician if under medical care.

- 1. Your three year old brother has a cold, and you give him one half of one cold tablet. According to the warning above, you are acting:
 - a) correctly
 - b) incorrectly

VIRGINIA DEPARTMENT OF EDUCATION, GRADUATION COMPETENCY TEST-READING (1978).

reform movement in American education."² It also has been described as the "Great American Fad of the 1970's."³ The call for a minimum competency test requirement for graduation from high school resulted from increasing public concern about rising illiteracy rates⁴ and declining standardized test scores.⁵ This concern has created a "back to basics" trend in education,⁶ with a concurrent emphasis on educational accountability.⁷ This was the point at which most state legislatures entered the process by enacting accountability statutes. The competency tests are an aspect of

2. Walker, *The Hard Lot of the Professional in the Reform Movement*, 35 *EDUC. LEADERSHIP* 83 (1977).

3. PHI DELTA KAPPAN, *MINIMUM COMPETENCY TESTING IN THE 3 R'S: A DESCRIPTIVE STUDY OF MINIMUM COMPETENCY TESTING IN CUYAHOGA COUNTY—RESEARCH, PRACTICES, AND IMPLICATIONS* 1 (1978).

4. The Department of Health, Education, and Welfare found that more than one million teenagers in the United States were illiterate. *PUBLIC HEALTH SERVICE, LITERACY AMONG YOUTHS 12-17 YEARS*, HEW PUB. NO. (HRA) 74-1613, at 3 (1973). See generally Harman, *Illiteracy: An Overview*, 40 *HARV. EDUC. REV.* 226 (1970).

5. One commentator has stated that the concern about test scores is typically with reference to lower college entrance examination (e.g., Scholastic Aptitude Test) results, and "probably not one student from that segment of our schools will be hindered by a competency test. Rather it will be the marginal student who will be affected." PHI DELTA KAPPAN, *supra* note 3, at 22 (emphasis in the original). See generally *THE TEST SCORE DECLINE: MEANING AND ISSUES* (Lipsitz ed. 1977).

6. In an analysis of public opinion in an eight year Gallup Poll compilation, the surveyors found that most people who were interviewed felt that education could be improved by devoting more time to instruction of basic skills. V. SMITH AND G. GALLUP, *WHAT PEOPLE THINK ABOUT THEIR SCHOOLS: GALLUP'S FINDINGS* (1977). See Brodinsky, *Back to the Basics: The Movement and Its Meaning*, 58 *PHI DELTA KAPPAN* 522 (1977); Jarrett, *I'm For Basics, But Let Me Define Them*, 59 *PHI DELTA KAPPAN* 235 (1977). See also *Accountability, Competency Testing, Back to Basics: Symposium*, 62 *NASSP BULL.* 1 (1978). But cf. Pinkney, *Public Education: Let's Not Oversimplify the Basics Through Rhetoric*, 55 *PEABODY J. OF EDUC.* 346 (1978) (asserting that American education has never left the basics).

7. "Educational accountability involves holding educators both responsible and answerable for the 'educational outcome' of their students." Note, *Educational Malfeasance: A New Cause of Action For Failure to Educate?*, 14 *TULSA L.J.* 383, 404 (1979). "The contemporary demand for school assessment and educational accountability arises in part from the school's failure to provide high quality education and thus equality of educational opportunity to large segments of American youth." Gigliotti, Henderson, Niles and Schneider, *Quality of Educational Attainment, Standardized Testing, Assessment, and Accountability*, in *EDUCATING THE DISADVANTAGED* 232 (E. Flaxman, ed. 1972-73). For an analysis of the accountability concept with an emphasis on minimum competency testing see Dixon, *Testing-Its Impact on Expectations, Practice, and Accountability*, 35 *EDUC. LEADERSHIP* 294 (1978); Lewis, *Certifying Functional Literacy: Competency Testing and Implications for Due Process and Equal Educational Opportunity*, 8 *J. OF L. AND EDUC.* 145, 146-53 (1979). See also McClung, *Are Competency Testing Programs Fair? Legal?*, 59 *PHI DELTA KAPPAN* 397 (1978) in which the author states that "[r]esponding to the public's demand for accountability in teaching and learning basic skills, legislators and educators in many states have unfairly shifted the burden of poor performance from the schools to the students." *Id.* at 397.

this accountability. They are an examination of the student's "competence," but they are also an examination of the quality of education the student has received.⁸ Virginia responded to the demand for some standard of educational measurement by enacting an accountability statute through the General Assembly⁹ and by revising the standards for public school accreditation through the State Board of Education.¹⁰ The effect of

8. The minimum competency testing provisions in accountability statutes have been intended to serve three primary purposes: (1) to add to the value of education by stressing the acquisition of basic skills; (2) to measure the effectiveness of the school system; and (3) to provide a means of assessing the work of school administrators. Lewis, *supra* note 7, at 150-51.

9. Act of April 12, 1976, ch. 714, 1976 Va. Acts 1105. This Act provided that by 1978 the State Board of Education would establish "specific minimum Statewide educational objectives in reading, communications, and mathematics skills." *Id.* at 1106. There was also an affirmation of the goals of Virginia public education: to aid each student in developing a mastery of "fundamental academic skills," in acquiring the necessary training to pursue "further education and/or employment," in participating in society as a "responsible citizen," in cultivating "ethical standards of behavior and a positive and realistic self-image," in exhibiting a "responsibility for the enhancement of beauty in daily life," and in practicing "sound habits of personal health." *Id.* at 1105-06.

Act of March 29, 1977, ch. 528, 1977 Va. Acts 791 restated that the "highest priority" was to be given to "developing the reading, communications, and mathematics skills of all students." *Id.* at 792. With minor variations, this revision reflected the same policy and procedure as the previous version.

In 1978, the "Standards of Quality" were revised again. Act of April 4, 1978, ch. 529, 1978 Va. Acts 786 provides for extensive testing in the primary grades as well as for the implementation of the minimum competency test for graduation. The General Assembly provided that graduation from an accredited secondary school was to be predicated on attainment of the established number of academic credits and acquisition of "minimum competencies prescribed by the Board of Education. Attainment of such competencies shall be demonstrated by means of a test prescribed by the Board of Education." *Id.* at 790.

10. In May 1976, the Board of Education requested the Department of Education to recommend competency-based graduation requirements. The recommendations which were accepted by the Board in July 1976 included four competency requirements. J. Impara, Virginia's Approach to Minimum Competency Testing 9 (1979) (unpublished paper by Professor, School of Education, Virginia Polytechnic Institute and State University, Blacksburg, Virginia). To receive a diploma a student must be able to demonstrate "minimum competencies" in "communicative skills," "computational skills," "history and cultures of the United States," and the "ability to pursue higher education in post-secondary schools or gain employment as a result of having gained a job-entry skill." VIRGINIA BOARD OF EDUCATION, STANDARDS FOR ACCREDITING SECONDARY SCHOOLS IN VIRGINIA (July 1976).

At the March 1978 Board meeting the accreditation standards were again revised. Impara, *supra* at 12. Under this revision, a statewide test would be used to ascertain minimum competencies in reading and mathematics, but local school districts were to evaluate "citizenship skills, concepts, and knowledge of history and government necessary for responsible participation in American society," as well as "the skills necessary to qualify for further education or employment." VIRGINIA BOARD OF EDUCATION, STANDARDS FOR ACCREDITING PUBLIC SCHOOLS IN VIRGINIA (March 1978).

these actions and later revisions was to require minimum competency in certain areas as a prerequisite for high school graduation. The testing program in Virginia has received little attention, while most of the current emphasis has been on the Florida program.¹¹ Florida was an early entrant in the field, and its program can be used to some extent to gauge the legal and the educational effects of minimum competency testing.

II. THE CONTROVERSY

The debate centers on the propriety of using a test score as a basis for denying a high school diploma to a student who has met all other graduation requirements. Proponents of competency testing see it as a way to revive the significance of a high school diploma¹² and to insure that graduates have a grasp of the basic skills that they will need to function successfully in society.¹³ The tests are seen as agents which can motivate both teachers and students.¹⁴ They also may serve as checks on the caliber of classroom instruction and indicators of problem areas in the school curriculum.¹⁵ In addition, the tests are said to be objective in their evaluation, as opposed to the subjective criteria used in traditional instructor-graded evaluations.¹⁶

On the other hand, testing opponents¹⁷ believe that competency tests are not the solution to today's problems in education. Competency tests

11. For articles dealing with the Florida test see Fisher, *Florida's Approach to Competency Testing*, 59 PHI DELTA KAPPAN 599 (1978); Glass, *Minimum Competence and Incompetence in Florida*, 59 PHI DELTA KAPPAN 602 (1978); National Education Association, *Impact of the Minimum Competency Testing in Florida*, 67 TODAY'S EDUC. 30 (Sept.-Oct. 1978).

12. Nickse, *Comments on Minimum Competency Testing*, in PROCEEDINGS OF THE NATIONAL CONFERENCE ON MINIMUM COMPETENCY TESTING 63 (1978). See also Gilman, *The Logic of Minimal Competency Testing*, 44 EDUC. DIGEST 19, 22 (Dec. 1978).

13. "Most major polls show that, nationwide, the public view of its education system has dimmed considerably in recent years. The minimum competency test requirement was an effort by the General Assembly to restore public confidence in Virginia's schools by proving that graduates have mastered at least the basics." *Virginian Pilot*, Dec. 20, 1978, at 1, col. 1.

14. Ebel, *The Case for Minimum Competency Testing*, 59 PHI DELTA KAPPAN 546, 547 (1978). *Contra*, Cawelti, *National Competency Testing: A Bogus Solution*, 59 PHI DELTA KAPPAN 619, 620 (1978).

15. Nickse, *supra* note 12, at 64.

16. J. CLARK AND S. THOMSON, *COMPETENCY TESTS AND GRADUATION REQUIREMENTS* (1976); Doggett, *The ABC Affair*, 64 ENG. J. 72 (March 1975); Turnbull, *Testing Scores in Perspective*, 59 EDUC. REC. 291, 292 (1978).

17. Testing generally has come under attack recently. See H. BLACK, *THEY SHALL NOT PASS* (1963); B. HOFFMAN, *THE TYRANNY OF TESTING* (1962); J. LINDEN & K. LINDEN, *TESTS ON TRIAL* (1971). For a summary of the various critics and their criticisms of competency tests see Rudman, *The Standardized Test Flap*, 59 PHI DELTA KAPPAN 179 (1977).

are viewed as merely contributing to the "proliferation of testing" present in American education.¹⁸ It is said that the tests are incapable of measuring what they purport to measure.¹⁹ It is also feared that the minimum standard will become the maximum, and average and above-average students will be lulled into complacency.²⁰ Furthermore, a legitimate concern has been expressed that eventually, classroom instruction might involve only "teaching the test" and ignoring anything that will not be tested explicitly.²¹ In addition, it is foreseen that the costs of testing and remediation will force so-called superfluous subjects, such as art, music, and foreign language, out of the curriculum.²² There are also critics who

18. Cawelti, *Requiring Competencies for Graduation-Some Curricular Issues*, 35 EDUC. LEADERSHIP 86, 89 (1977). The number of standardized tests given is increasing each year. H. LYMAN, *TEST SCORES AND WHAT THEY MEAN* iii (2d ed. 1971). As of 1977, school systems in the United States were spending \$24 million annually on testing. In addition, it is claimed that the "testing industry is subject only to the law of supply and demand. Despite its protestations to the contrary, it answers to no one but itself." Kohn, *The Numbers Game: How the Testing Industry Operates*, 54 NAT'L ELEM. PRINCIPAL 11, 19 (July-Aug. 1975).

19. C. PURSELL, *EDUCATION AND INEQUALITY - A THEORETICAL AND EMPIRICAL SYNTHESIS* 72 (1977). Educators admit that standardized testing is not completely reliable in determining innate mental ability, but they do assert that the tests are legitimate predictors of later school performance. Sorgen, *Testing and Tracking in Public Schools*, 24 HASTINGS L. J. 1129 (1972). There are challenges, however, to the predictive validity of standardized tests. See W. SEDLACEK & G. BROOKS, *RACISM IN AMERICAN EDUCATION: A MODEL FOR CHANGE* 51 (1976); "Human abilities and potentialities are too complex, too diverse, and too intricately interactive to be measured satisfactorily by present techniques." Hoffman, *supra* note 17, at 30; Nathan and Jennings, *Educational Bait-and-Switch*, 59 PHI DELTA KAPPAN 621, 623 (1978).

20. PHI DELTA KAPPAN, *supra* note 3, at 24. *Contra*, R. Floden, A. Porter, W. Schmidt, & D. Freeman, *Don't They All Measure the Same Thing? Consequences of Selecting Standardized Tests* (1978) (paper presented at the Winter Conference on Measurement and Methodology).

21. M. Minter, *Implementing a Minimum Competency Testing Program 3* (March 1978)(paper presented at the Annual Meeting of the American Educational Research Association).

22. "Back to the Basics becomes a demand for 'cutting out the frills' raised as much in response to a general taxpayers' revolt . . . as in support of the puritanical view of education. . . . Almost invariably the first subjects to get the ax are the allegedly esoteric ones, led by music and art." Hehinger, *The Back-to-the-Basics Impact*, 67 TODAY'S EDUC. 31, 32 (1978). For a discussion of the role of art, music, etc. in education see Broudy, *How Basic is Aesthetic Education? Or is Right the Fourth R?*, 35 EDUC. LEADERSHIP 134 (1977).

The financial price of designing and implementing mass competency testing programs may be prohibitive. Nickse, *supra* note 12, at 61. The major cost involves establishing a system of remediation for those who failed the test. In Florida, the legislature allowed \$10 million for remediation under FLA. STAT. §§ 236.088-.089 (1977) and increased the amount to \$26.5 million in 1978. 1978 Fla. Sess. Law Serv. ch. 78-401, § 1 (West). The Virginia General Assembly has not provided specific funds for remediation thus far.

believe that the state legislatures should not be mandating the implementation of testing programs.²³ By far the most frequently voiced criticism of testing, however, is that it has a great potential for discriminating against racial and ethnic minorities.²⁴

A. *The Role of the Court*

Minimum competency testing could promote a substantial amount of litigation due to the widespread public interest, the division of the population among both laymen and educators on this issue, the statutory nature of the imposition, and the severity of the consequences for failure of the test, as well as the disproportionate failure rate experienced by minority students in states which have administered minimum competency tests. Competency testing has been challenged under the due process and equal protection clauses of the United States Constitution, and through the provisions of Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act.²⁵

*Brown v. Board of Education*²⁶ began the Supreme Court's "unprecedented intervention into the field of education."²⁷ The recognition by the Court of its role in dealing with constitutional violations in public education heralded a time when educational improprieties would be examined

23. "The mandate by the states - the coerciveness that seems involved in minimum competency testing - makes people from the education world uneasy." Nickse, *supra* note 12, at 61. Minimum competency testing is also seen as "not so much an educational movement as it is a power struggle. State legislatures will be the winners; teachers and poor students the losers." Wise, *Why Minimum Competency Testing Will Not Improve Education*, 36 *EDUC. LEADERSHIP* 546 (1979). See also Cawelti, *supra* note 14, at 620.

24. See, e.g., FLORIDA TEACHING PROFESSION - NATIONAL EDUCATION ASSOCIATION, THE FLORIDA ACCOUNTABILITY PROGRAM: AN EVALUATION OF ITS EDUCATIONAL SOUNDNESS AND IMPLEMENTATION 11, 12 (1978); Van Til, *What to Expect If Your Legislature Orders Literacy Testing*, 59 *PHI DELTA KAPPAN* 556 (1978).

The claim that the minority failure rate is disproportionate is a generalization. In fact, in some Virginia counties the black passing rate was higher than the white rate, e.g., higher mathematics passing percentages for black ninth graders in Floyd and Radford Counties and a higher reading passing rate in Tazewell County and West Point. VIRGINIA DEPARTMENT OF EDUCATION, REPORTS OF RESULTS OF VIRGINIA GRADUATION REQUIREMENTS BY SCHOOL DIVISION Table 1 (Spring 1979).

25. These are the bases of challenge which were used in *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D. Fla. 1979) [hereinafter cited as *Debra P.*]. For a discussion of the various methods of challenging testing see Weckstein, *Legal Challenges to Educational Testing Practices*, 15 *INEQUALITY IN EDUC.* 92 (1973). See also, Note, *Constitutional Requirements for Standardized Ability Tests Used in Education*, 26 *VAND. L. REV.* 789 (1973).

26. 349 U.S. 294 (1954).

27. Levin, *Recent Developments in the Law of Equal Educational Opportunity*, 4 *J. OF L. AND EDUC.* 411 (1975).

within the judicial system.²⁸ *Brown's* immediate impact, however, was on racial segregation. Until *Brown*, segregation was the rule both socially and legally. This decision appeared to put an end to segregation in public education.²⁹ With *Brown's* mandate to eliminate racial discrimination and separation in the public schools, the disproportionate number of minority failures makes jurisdictions which were formerly segregated by law the most fertile ground for competency testing litigation.

B. *Brown, Hobson, Debra P.-An Evolution*

In *Debra P. v. Turlington*,³⁰ a class action³¹ suit was instituted against Florida Commissioner of Education Ralph Turlington, challenging the Florida competency test graduation requirement. The plaintiffs claimed that the test and/or the testing program was racially biased and violative of the fourteenth amendment, that the students were not given adequate notice of the competency requirement or sufficient time to prepare for the test, and that the test and the remediation program had the effect of "resegregating" the public schools.³² The District Court, relying on the disproportionate racial impact of the test, the previous history of purposeful discrimination, and the sociological effects of segregation and diploma denial, ruled that the Florida competency test could not be admin-

28. See, e.g., *Ingraham v. Wright*, 430 U.S. 651 (1977) (corporal punishment); *Lau v. Nichols*, 414 U.S. 563 (1974) (language instruction).

29. In fact, segregation continued to exist in various forms (both de jure and de facto). The *Brown* decision was found to be ambiguous, and there was disagreement as to which aspects of segregation made it unconstitutional. One group of courts saw the decision as finding that all segregated facilities were inherently unequal. See *Blocker v. Board of Educ.*, 226 F. Supp. 208, 218-23 (E.D.N.Y. 1964). The other faction believed that it was the method (complete exclusion on the basis of race) that was forbidden. See *Deal v. Cincinnati Bd. of Educ.*, 369 F.2d 55, 58-59 (6th Cir. 1966). For an analysis of these positions see Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317 (1976).

There were four stages in the desegregation of education in the South after *Brown*. The first stage was that of "absolute defiance" (1955-59) to the desegregation decision. The second was "token compliance" (1959-passage of the Civil Rights Act of 1964). "Modest integration" came next, followed by "massive integration" (beginning with *Green v. County School Board*, 391 U.S. 430 (1968)). Wilkinson, *The Supreme Court and Southern School Desegregation, 1955-1970: A History and Analysis*, 64 VA. L. REV. 485, 487 (1978).

30. 474 F. Supp. 244 (M.D. Fla. 1979).

31. Class A included all present and future twelfth grade public school students in Florida who have failed or who will fail the state competency test. Class B was composed of all present and future twelfth grade black public school students in Florida who have failed or who will fail the competency test. Class C was all present and future black public school students in Hillsborough County, Florida who have failed or who will fail the competency test. *Id.* at 246.

32. *Id.* at 247.

istered fairly at the present time and restrained the school authorities from using the test as a graduation requirement until the 1982-83 school year.³³

Debra P. is the first case to be decided in the competency testing area and therefore cannot be compared factually to any other court ruling. However, the case is in line with *Hobson v. Hanson*,³⁴ dealing with testing and ability grouping in the schools. The plaintiffs in *Hobson* claimed that "tracking"³⁵ caused an unconstitutional resegregation of the District of Columbia public schools, since a far greater number of black students were assigned to the lower tracks than white students.³⁶ Judge J. Skelly Wright found that against the background of de jure segregation and the inferiority of the black schools, the disproportionate racial impact and the unreliability of standardized test data were sufficient to justify the abolition of the track system.³⁷

Just as *Debra P.* carried the *Hobson* theories into a new, yet related, area of education, both decisions are in essence descendants of *Brown*. They serve to reinforce and reaffirm the *Brown* ruling and reasoning.³⁸

III. DUE PROCESS

A. "Life, Liberty, or Property?"

The court in *Debra P.* found that the plaintiffs had been denied due process of law³⁹ because they had received inadequate notice of the com-

33. *Id.* at 267. The competency tests still could be used in the schools as diagnostic tools and could be used as a prerequisite for graduation for the 1983 graduating class.

34. 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). For a discussion of this case see 81 HARV. L. REV. 1511 (1968).

35. "Tracking" involves grouping students in "tracks" (grouping levels) according to their ascertained ability. Each track is a separate and self-contained curriculum. 269 F. Supp. at 511-14. For the legal implications of tracking see Comer, *The Circle Game in Tracking*, 12 INEQUALITY IN EDUC. 23 (1972); Dimond, *The Law of School Classification*, 12 INEQUALITY IN EDUC. 30 (1972); Sorgen, *supra* note 19.

36. 269 F. Supp. at 451-52.

37. *Id.* at 515.

38. *Debra P.* and *Hobson* both struck down racially discriminatory practices in public education. They also used the *Brown*-type analysis by relying on social science studies to show the inequality of dual education systems. For a discussion of the post-*Brown* use of extra-legal studies in judicial decisionmaking see Levin and Moise, *School Desegregation Litigation in the Seventies and the Use of Social Science Evidence: An Annotated Guide*, 39 LAW AND CONTEMP. PROB. 50 (1975); Rist and Anson, *Social Science and the Judicial Process in Education Cases*, 6 J. OF L. AND EDUC. 1 (1977).

39. "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V; "[N]or shall any State deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV.

petency requirement and the test. The court stated that the plaintiffs had "a property right in graduation from high school with a standard diploma if they had fulfilled the present requirements for graduation" exclusive of the competency test.⁴⁰ It was observed that Florida has a compulsory education statute and that the receipt of a standard diploma is the logical culmination of twelve years of successful course work.⁴¹ In addition, the court found that the plaintiffs had a liberty interest in being free from the stigma which would result from receiving a certificate of completion rather than a typical diploma.⁴²

The Supreme Court has recognized a property interest in attending school,⁴³ but there is a question as to whether the Court would recognize a constitutionally protected right to be free from stigma. The Court has rejected claims of due process denial when the plaintiff's name appeared on a circular which purported to list active shoplifters before the plaintiff had been convicted of shoplifting⁴⁴ or when the plaintiff was released from his employment due to substandard performance, but the reasons for his termination were not publicly released.⁴⁵ The Court has found, however, that there was a violation of due process rights when the plaintiff's name was displayed on a circular as an excessive drinker.⁴⁶ The Court has held generally that in cases involving the deprivation of a liberty or property right there must be some "more tangible interests such as employment" implicated. Damage to one's reputation alone is insuffi-

In order for a violation of due process to occur, there must be a substantial impairment of a protected life, liberty, or property interest. There also must be some "entitlement" to the benefit or interest which is being denied. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (holding that a nontenured professor need not be afforded a hearing when dismissed). For an analysis of due process see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 421-55, 501-63, 886-990 (1978).

40. 474 F. Supp. at 266.

41. All states have compulsory education statutes. See, e.g., VA. CODE ANN. § 22-275.2 (Repl. Vol. 1973) (required attendance until age seventeen).

42. 474 F. Supp. at 266. The Florida statute provides for receipt of a certificate of completion in lieu of a standard diploma for students who fulfill all graduation requirements but fail the competency test. FLA. STAT. § 232.246 (1977).

43. *Goss v. Lopez*, 419 U.S. 565 (1975). In *Goss* the Court recognized that a student must be allowed certain procedural safeguards (notice of grounds for suspension and opportunity to be heard) even when he is suspended from school for only one day.

44. *Paul v. Davis*, 424 U.S. 693 (1976).

45. *Bishop v. Wood*, 426 U.S. 341 (1976).

46. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). The posting of the plaintiff's name made it illegal to give or sell him alcoholic beverages. The Court found that this deprivation went beyond mere damage to the plaintiff's reputation, and thus procedural safeguards were required. *Id.* at 436.

cient to warrant procedural safeguards.⁴⁷

Competency testing does result in injury to "reputation plus."⁴⁸ Economic and educational denials⁴⁹ can stem from failure of the test, and the stigma of these denials arguably has a greater effect on minorities. Courts and sociologists have recognized that minorities already may suffer from a lack of self-esteem, resulting from segregation and general school and societal experiences.⁵⁰ It has been observed that for competency testing programs to have a beneficial result and to measure accurately scholastic achievement, the schools first must provide the students with the opportunity to gain confidence in themselves as learners.⁵¹ The testing of culturally deprived students cannot be done fairly until compensatory education programs have been instituted.⁵² The situation as it now exists may result in minority students viewing competency testing as another form of "tracking" which may force them out of the educational system.⁵³

47. 424 U.S. at 701.

48. For a discussion of Justice Rehnquist's concept of "reputation plus" see *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 88 (1976).

49. A certificate of completion in Florida is not considered a diploma for purposes of state employment or higher education. Florida hires only 10% of its labor force from those who do not hold high school diplomas, and it admits only those with recognized diplomas to the state universities. 474 F. Supp. at 249.

In Virginia, there is no provision for the receipt of any certification of high school completion in the event that one fails the test.

"[The] capacity for future employment becomes a tangible interest threatened by the label of academic incompetence." Lewis, *supra* note 7, at 157. See *Greenhill v. Bailey*, 519 F.2d 5 (8th Cir. 1975)(dismissal from medical school and notice available to other schools that plaintiff unfit for medical school).

50. *Hobson*, 269 F. Supp. at 479.

There is evidence that disadvantaged children . . . are those most likely to lack self-confidence in the school situation. . . . The disadvantaged child is made profoundly aware of this academic shortcoming as soon as he enters school. There is a great risk of his losing confidence in his ability to compete in school with children who are "better off."

Id. at 481.

51. Chamberlain, *Minimum Competency Testing: Its Impact on Students*, 9 AM. SECONDARY EDUC. 50 (1979).

52. For a discussion of compensatory education see BLOOM, DAVIS & HESS, *COMPENSATORY EDUCATION FOR CULTURAL DEPRIVATION* (1965)("By the beginning of secondary school, the typical culturally deprived student is reading at a level 3 ½ years below grade level." *Id.* at 34); J. FROST & G. ROWLAND, *COMPENSATORY EDUCATION: THE ACID TEST OF AMERICAN EDUCATION* (1971); H. REES, *DEPRIVATION AND COMPENSATORY EDUCATION* (1968).

Compensatory education, however, may cause undesirable results such as segregation of the classroom. This was found to be true in the remediation classes for those who failed the Florida competency test. 474 F. Supp. at 268.

53. *A Look at Legal Issues in Competency Testing*, 11 REPORT ON EDUCATIONAL RESOURCES 9 (June 27, 1979).

B. Notice and Testing

Notice is a basic element in any due process discussion. A person must have adequate warning that some change in his status is imminent. The court in *Debra P.* emphasized that “[i]nstruction of the skills necessary to successfully complete the functional literacy test is a cumulative and time consuming process” and that a student should know at an early date that mastery of a certain skill will be required for graduation.⁵⁴ The opinion pointed out that, according to expert testimony, there should be a four to six year interval between the time the testing objectives are announced and the time the diploma sanction applies.⁵⁵ In Florida, the objectives were distributed to the schools in the summer of 1977. The teachers thus were provided the objectives four months before actual testing was to begin. Additionally, there was only a thirteen month period for instruction and remediation between the date the results of the first test were announced and the date the final test was administered.⁵⁶ Comparatively, Virginia has a more lenient time table. The General Assembly and the Board of Education both acted in 1976. At the March 1978 meeting of the Board of Education, the new accreditation standards were adopted, and the tests themselves were approved at the June 1978 meeting. Actual testing began in November of 1978 for the graduating class of 1981.⁵⁷ The plan provided for a five year interval between the adoption of the new accreditation standards and the date that the new requirements would result in diploma denial. There also would be a three year period between the administration of the first and the final tests.

The *Debra P.* court required a six year interval between the announcement of the testing objectives and the effective date for use of the test as a graduation requirement. Thus far, *Debra P.* is the only judicial interpretation of the adequacy of notice in this context. The Supreme Court, while not addressing a specific time range for sufficiency of notice, has recognized that certain procedural safeguards are necessary in instances where a protected interest is deprived.⁵⁸ This principle has guided the

54. 474 F. Supp. at 264. The Court's reasoning is in line with evidence which indicates that help in overcoming educational problems must come in the early years of a child's schooling. See, KOST, SUCCESS OR FAILURE BEGINS IN THE EARLY SCHOOL YEARS (1972).

55. 474 F. Supp. at 267.

56. *Id.* at 264.

57. *Impara, supra* note 10, at 16.

58. In *Board of Curators v. Horowitz*, 435 U.S. 78 (1978), the plaintiff was dismissed from medical school after receiving unsatisfactory grades and evaluations from her professors. She claimed that her due process rights were violated by the school's failure to provide a hearing prior to her dismissal. The Court found no violation since the plaintiff had been reviewed five times and had received warnings about her work. *Id.* at 84-85. For an analysis

federal courts in evaluating notice requirements in education.⁵⁹ Since case law prior to *Debra P.* had dealt with higher education, there can be no evaluation of notice requirements in competency testing beyond stating that the notice must be "timely." This standard still does not provide much guidance to courts evaluating competency testing since what is "timely" notice in evaluating four years of medical school or two years of graduate school will not be adequate to forewarn a student that skills acquired from twelve years of schooling will be tested.⁶⁰

C. *What Process is Due?*

The remedies for a deprivation of one's due process rights vary according to notions of fairness in the individual case.⁶¹ Courts are guided by this flexible standard and also by the countermanding effect of traditional judicial restraint in reviewing educational decisions.⁶² In determining what procedures are due, courts rely on the *Matthews v. Eldridge*⁶³ balancing test which involves an analysis of

First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirement would entail.⁶⁴

of this decision and its due process implications see Veron, *Due Process Flexibility in Academic Dismissals; Horowitz and Beyond*, 8 J. OF L. AND EDUC. 45 (1979).

59. In *Mahavongsanan v. Hall*, 529 F.2d 448 (5th Cir. 1976) the plaintiff, a graduate student in education, claimed that her rights had been violated by the imposition of a comprehensive examination requirement. She had received notice of the requirement six months after she had begun her degree work. The court held that this notice was "timely." *Id.* at 450.

60. McClung, *Competency Testing Programs: Legal and Educational Issues*, 47 FORDHAM L. REV. 651, 682 (1979) (urging that the legal argument for timely notice of changes in secondary school graduation requirements is stronger than in post-secondary education since attendance is compulsory and notice is not adequate after one has nearly completed school).

61. *Cafeteria and Restaurant Workers Local 473 v. McElroy*, 367 U.S. 886 (1961) (interest in national security superior to private interest in specific job).

62. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973) ("[E]ducational policy [is an] area in which the Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgements made at the state and local levels."); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of the school systems. . .").

63. 424 U.S. 319 (1976) (involving termination of disability benefits without a prior hearing).

64. *Id.* at 335.

Under this type of analysis, the student's interest in his diploma and a fair evaluation of his competence can be protected only by administering a reliable and unbiased test. Since the student's interest in his diploma and the tangible and intangible rewards associated with it are great,⁶⁵ as may be the risk of erroneous deprivation,⁶⁶ the state may be required to validate the tests to assure reliability, validity, and instructional match.⁶⁷ This requirement could be justified under *Eldridge* if the danger of personal deprivation outweighed the administrative difficulties and cost of validation.⁶⁸

The fair administration of testing can be examined in several ways, but most importantly, testing fairness depends on the instruction in the classroom of the skills which are to be evaluated by the test. Many tests profess to measure "adult life skills," but if the schools do not offer instruction in these areas, there is a patent unfairness in testing them as a graduation requirement.⁶⁹ The Florida test involves this type of evaluation,⁷⁰ and the Virginia test also appears to contain life skill questions.⁷¹

65. "[A] high school diploma is no longer a privilege or a luxury. It has become an economic necessity." Strike, *What Is a "Competent" High School Graduate?*, 35 EDUC. LEADERSHIP 93, 94 (1977).

66. For a discussion of the danger of misclassification as a result of standardized testing results see C. PURSELL, EDUCATION AND INEQUALITY: A THEORETICAL AND EMPIRICAL SYNTHESIS 72 (1977).

67. Lewis, *supra* note 7, at 159-60. The test must be reliable in the sense that it will give consistent results. In addition, it must measure what the student has been taught.

68. The cost of a proposed validity study of the Florida test was \$28,446. *Id.* at 161 n.116.

69. McClung, *supra* note 60, at 684-85.

70. Pihlo, *Minimal Competency Standards*, 67 TODAY'S EDUC. 34 (1978).

71. See, e.g.,

SAMPLE TEST ITEM

Directions: Use the references shown in the boxes below to answer the questions that follow.

INDEX TO INSTRUCTIONS

A	
Address of Internal Revenue Centers	3
Alien, Dual-Status	4
B	
Balance Due-How to Pay	12
Birth or Death of Dependent	8
Blindness	6
C	
Completing Your Return	12
Credit-	
General Tax	11
D	
Death of Spouse	7
Death of Taxpayer	5

This instruction match problem also arises with statewide tests, such as the tests in Florida and Virginia, in instances where particular school districts or schools will emphasize or teach only certain areas which may be different from those measured by the test.⁷² Additionally, there could be a requirement that the cut-off scores, as well as the test format, be validated to protect against arbitrary action in establishing the passing score.⁷³

IV. EQUAL PROTECTION

A. *Racial Segregation and Testing*

While due process requires notice and fairness when official action is taken, equal protection mandates equal treatment and rational classifica-

Dependents-	
Children	7
Other	5
Who Have Unearned Income	11
Dividends and Exclusion	9
Dual-Status Alien	4

E

Earned Income Credit	2 and 11
Special Instructions	2
Estimated Tax Payments	11
Exemptions	6, 7, and 8

1. According to the index shown above, on what page or pages can you find special instructions for filing for earned income credit?

- a. page 2 only
- b. page 11 only
- c. pages 2 and 11
- d. pages 3 and 11

VIRGINIA DEPARTMENT OF EDUCATION, GRADUATION COMPETENCY TEST-READING (1978).

72. "If the test measures knowledge and/or skills which were never taught in school, then the test may violate substantive due process," McClung, *Competency Testing: Potential For Discrimination* . . . 11 CLEARINGHOUSE REV. 439, 441 (1978).

73. For a discussion of setting passing scores see Burton, *Societal Standards*, 15 J. EDUC. MEAS. 263 (1978); Levin, *Educational Performance Standards: Image or Substance?*, 15 J. EDUC. MEAS. 309 (1978); Linn, *Demands, Cautions, and Suggestions for Setting Standards*, 15 J. EDUC. MEAS. 306 (1978).

The cut-off score chosen in the Florida test has been criticized as being arbitrary. National Education Association, *supra* note 11, at 31.

The Virginia test also could be open to criticism. Originally, the passing score was to be established by administering the test to tenth graders throughout the state and using the results as guidelines for establishing the base score. However, instead of using this method, school personnel and community members in a number of school districts took the test and recommended a passing score. The cut-off score of 70 percent was chosen from the recommendations of this "nonrandom, nonrepresentative" group. Impara, *supra* note 10, at 17-18.

tions.⁷⁴ Equal protection challenges to competency testing involve questioning the basis of classification of students as failures and attacking the racially segregative effects of testing. The disproportionate minority failure rate, which causes the racial segregation, has been attributed to the inferior education received by minorities in dual school systems.⁷⁵

Brown enunciated the principal that "where a state has undertaken to provide it, [education] is a right which must be made available to all on equal terms."⁷⁶ The plaintiffs in *Debra P.* charged that education had not been administered equally and pointed particularly to the Florida test results as evidence of the inequality. After three tests had been given, slightly more than twenty percent of the black students had never passed the test while only two percent of the white students had failed on all three attempts.⁷⁷ The fact that the failure rate of black students was ten times that of white students was sufficient for the court to find that the effects of previous segregation were being mirrored in the test scores.⁷⁸ The last test given in Virginia resulted in thirty-two percent of the black students passing both the reading and the mathematics tests as compared with sixty-six percent of the white students. Thirty-nine percent of the black students did not pass either test while fourteen percent of the white students passed neither. It may be that a pattern of disproportionate minority failure rates is becoming established in Virginia, but officials point out that minority failure rates decreased more significantly than did white rates from the fall to the spring tests.⁷⁹

Actual segregative intent arguably is not an essential element in creat-

74. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The purpose of the fourteenth amendment was to prevent unfair official distinctions based on race. See *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

75. Segregation in the schools is said to adversely affect the quality of education received by minority students. See generally Weinberg, *The Relationship Between School Desegregation and Academic Achievement: A Review of the Research*, 39 L. AND CONTEMP. PROB. 241 (1975) (study of research concluding that integration has a positive effect on minority achievement); U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 108 (1967) (minorities perform at higher level if in school with white students); Crain, *School Integration and the Academic Achievement of Negroes*, 44 SOCIOLOGY OF EDUC. 1 (1971) (integration motivates minority student); *Contra*, Crain and Mahard, *School Racial Composition and Black College Attendance and Achievement Test Performers*, 51 SOCIOLOGY OF EDUC. 81 (1978) (minority achievement not related to racial composition of school).

76. *Brown v. Board of Educ.*, 347 U.S. at 493.

77. FLORIDA DEPARTMENT OF EDUCATION, STATEWIDE ASSESSMENT RESULTS (1978).

78. 474 F. Supp. at 252.

79. VIRGINIA DEPARTMENT OF EDUCATION, REPORT OF THE RESULTS OF VIRGINIA GRADUATION COMPETENCY TESTS 2 (Spring 1979).

ing a prima facie case of racial discrimination in an area previously segregated by law.⁸⁰ The intent can be said to exist because the current policy perpetuates past purposeful discrimination. In *Gaston County, N.C. v. United States*,⁸¹ the Supreme Court struck down the state's literacy test for voter eligibility stating that "throughout the years Gaston County systematically deprived its black citizens of educational opportunities it granted to white citizens. 'Impartial' administration of the literacy test today would serve only to perpetuate these inequities in a different form."⁸² In areas where de jure segregation existed there is a duty to "provide meaningful assurance of the prompt and effective disestablishment of a dual system."⁸³ A showing of disproportionate racial effect may indicate that the burden to desegregate has not been met, and therefore racial discrimination can be deemed to exist. This is enough to shift the burden to the school district to show a lack of racial motivation in instituting the testing program.⁸⁴

Most of the testing cases before *Debra P.* have involved the use of employment tests,⁸⁵ and the levels of scrutiny in examining the tester's motivation have varied. Some courts have required that the action be justified by "legitimate state considerations,"⁸⁶ whereas others have adopted the position that "whenever the effect of a law or policy produces such a racial distortion, it is subject to strict scrutiny. [I]t must be justified by an overriding purpose independent of its racial effects."⁸⁷ In the latter instance the court used language which is typically reserved for cases involving a substantial deprivation of fundamental rights⁸⁸ or a suspect classification.⁸⁹ While in *San Antonio Independent School District v.*

80. Weckstein, *supra* note 25, at 95.

81. 395 U.S. 285 (1969).

82. *Id.* at 297.

83. *Green v. County School Bd.*, 391 U.S. 430, 438 (1968). Each failure to fulfill this duty is a violation of the fourteenth amendment. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Wright v. City Council*, 407 U.S. 451 (1972); *McDaniel v. Barresi*, 402 U.S. 39 (1971).

84. Weckstein, *supra* note 25, at 95.

85. In these instances, the plaintiff must create a prima facie case by illustrating that the tests had a disproportionate racial impact on minority applicants. See *Castro v. Beecher*, 459 F.2d 725, 732 (1st Cir. 1972); *Jones v. New York City Human Resources Administration*, 391 F. Supp. 1064, 1067 (S.D.N.Y. 1975). The burden then shifts to the defendant to prove that the tests are job related. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

86. *Chance v. Board of Examiners*, 458 F.2d 1167, 1175 (2d Cir. 1972).

87. *Baker v. Columbus Municipal Separate School Dist.*, 462 F.2d 1112, 1114 (5th Cir. 1972).

88. See, e.g., *Bodie v. Connecticut*, 401 U.S. 371 (1971)(right to equal litigation opportunities); *Shapiro v. Thompson*, 394 U.S. 618 (1969)(right to interstate travel); for a discussion of "fundamental rights" see TRIBE, *supra* note 39, at 1002-1011.

89. TRIBE, *supra* note 39, at 1012-82. See, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971)

*Rodriguez*⁹⁰ the Supreme Court held that education is not a fundamental right, the Court does recognize the importance of education. In *Brown*, the Court stated:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment. 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.⁹¹

It has been urged that since school attendance is compulsory, as opposed to the other services which government provides, classifications in this area should be suspect.⁹² It has also been argued that there is more to be protected where education is concerned than there is in some areas recognized as "fundamental rights" such as criminal defense and voting, since educational deprivation would have more far-reaching effects.⁹³ These arguments are in contrast to the actual judicial practice which generally is lenient in dealing with the protection of educational rights.⁹⁴

The *Debra P.* court did not follow the traditional rule of judicial deference to educational practices, but the court would not go so far as to demand a compelling state interest to justify competency testing. Instead, the court adopted an intermediate level of scrutiny which the test was able to survive.⁹⁵

Debra P. followed *Hobson* in adopting a stricter standard than that usually used in education cases.⁹⁶ The history of purposeful racial segregation in the localities coupled with the harsh impact of testing on minorities in these areas might be the reason for the stricter scrutiny. Other ability grouping cases followed *Hobson* in providing for suspension of the

(alienage).

90. 411 U.S. 1, 35 (1973).

91. *Brown*, 347 U.S. at 493.

92. Horowitz, *Unseparate But Unequal-The Emerging Fourteenth Amendment Issue in Public Education*, 13 U.C.L.A. L. REV. 1147, 1171 (1966).

93. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972).

94. See, e.g., *Deal v. Cincinnati Bd. of Educ.*, 369 F.2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967).

95. 474 F. Supp. at 260. The Court required that the classification of students as failures had to be rationally related to the purposes of test. The Court cited *Reed v. Reed*, 404 U.S. 71 (1971), the Supreme Court's statement of the intermediate standard of review.

96. See 81 HARV. L. REV. 1511 (1968).

grouping tests where a disproportionate minority failure rate is found in an area previously segregated by law. The suspension in these instances has remained in effect until a "unitary school system is established."⁹⁷ There must be, however, some showing that the effect on the minority students is onerous or unusual enough to warrant judicial intervention.⁹⁸

B. *Racial Motivation in Areas Which Were Not Segregated by Law*

In instances where de jure segregation has not existed, the burden on the plaintiff to establish a prima facie case will be more difficult. The Supreme Court held in *Washington v. Davis*⁹⁹ that disproportionate racial effect alone is not sufficient to prove racial discrimination.¹⁰⁰ The Court clarified this position to some extent in *Arlington Heights v. Metropolitan Housing Development Corp.* by referring to several indicators which may be used to ascertain intent.¹⁰¹ In *Personnel Administrator of Massachusetts v. Feeny*,¹⁰² the Supreme Court found that:

'[d]iscriminatory purpose', however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action as least in part 'because of' not merely 'in spite of' its adverse effects on an identifiable group.¹⁰³

Referring to *Washington* and *Arlington Heights*, the Court stated that

97. *Singleton v. Jackson Mun. Separate School Dist.*, 419 F.2d 1211 (5th Cir.) *rev'd in part sub nom. Carter v. West Feliciana School Bd.*, 396 U.S. 290 (1970). See *McNeal v. Tate County School Dist.*, 508 F.2d 1017 (5th Cir. 1975) (could not use ability grouping until the district operated a unitary system without grouping for a period sufficient to assure that underachievement is not due to past segregation); *Lemon v. Bossier Parish School Bd.*, 444 F.2d 1400 (5th Cir. 1971) (must have operated several years as a unitary system). *Accord*, *United States v. Gadsden County School Dist.*, 572 F.2d 1049 (5th Cir. 1978); *United States v. Sunflower City School Bd.*, 430 F.2d 839 (5th Cir. 1970).

98. See *Morales v. Shannon*, 516 F.2d 411 (5th Cir. 1975) (results of groupings not so unusual as to justify a presumption of discrimination); *Copeland v. School Bd.*, 464 F.2d 932 (4th Cir. 1972) (no reason to close a school for mentally retarded children because there were more black than white students).

99. 426 U.S. 229 (1976).

100. *Id.* at 239.

101. 429 U.S. 252 (1977). In determining whether intent to discriminate is present, "[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." *Id.* at 267. The Court also should consider the events leading up to the decisions, deviations from normal procedure, and the legislative and administrative history. Additionally, the disproportionate racial impact could be used as evidence of discriminatory purpose. *Id.* at 268.

102. 99 S. Ct. 2282 (1979) (upholding veteran preference statute against challenges alleging unconstitutional gender discrimination).

103. *Id.* at 2296.

the fourteenth amendment guarantees "equal laws, not equal results."¹⁰⁴ Prior to this decision, some courts had sought a compromise position between a reliance solely on the disproportionate racial impact and the requirement of proof of discriminatory intent. These courts had used a "natural and foreseeable consequences" test. This "Omaha presumption" allowed the plaintiff to create a presumption of discriminatory purpose by showing that the actions of the officials had a foreseeably discriminatory result.¹⁰⁵ The burden shifted to the defendant to show an actual lack of intent.¹⁰⁶ In *Debra P.*, the court referred to this standard with approval but found that present intent to discriminate was absent. The court thus returned to the use of past purposeful segregation to sustain the plaintiffs' claims.¹⁰⁷

V. TESTING AND CULTURAL BIAS

Cultural bias¹⁰⁸ in testing is an aspect of both due process and equal

104. *Id.* at 2293. The Court stated that a discriminatory intent is necessary to invalidate a classification. In a footnote to the opinion, however, the Court found that:

[t]his is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law are as inevitable as the gender-based discrimination of ch. 31, § 23, a strong inference that the adverse effects were desired can reasonably be drawn.

Id. at 2296. This leaves the ambiguity which was present in the earlier decisions. The weight which can be given to the predictability of the impact and its relationship to the intent requirement is still unclear.

105. The Supreme Court used a similar approach in *Castaneda v. Partida*, 430 U.S. 482 (1977) (racial discrimination in jury selection). However, the Court disfavored this "effects" test in *Jefferson v. Hackney*, 406 U.S. 535 (1972) (differences in benefits of government benefits). For federal court application of this test see *United States v. Board of Comm.*, 573 F.2d 400, 410-13 (7th Cir. 1978), *upon remand from* 429 U.S. 1068 (1977), *vacating*, 541 F.2d 1211 (7th Cir. 1976), *cert. denied*, 99 S. Ct. 93 (1978); *Arthur v. Nyquist*, 573 F.2d 134, 142-43 (2nd Cir.), *cert. denied*, 99 S. Ct. 179 (1978); *United States v. School Dist. of Omaha*, 565 F.2d 127, 128 (8th Cir.) *upon remand from* 433 U.S. 607 (1977), *vacating*, 541 F.2d 708 (8th Cir. 1976), *cert. denied*, 434 U.S. 1068 (1978); *Oliver v. Michigan State Bd. of Educ.*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). See Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977); Note, *Intent to Segregate; The Omaha Presumption*, 44 GEO. WASH. L. REV. 775 (1976); Note, *Reading the Mind of the School Board; Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317 (1976).

106. 12 HARV. C.R.-C.L.L. REV. 725, 735 (1977).

107. 474 F. Supp. at 254-55.

108. Cultural bias can result when tests are "normed on one population and used to test people from another population." H. AVERCH, S. CARROLL, T. DONALDSON, H. KIESLING, & J. PINCUS, *HOW EFFECTIVE IS SCHOOLING?* 22 (1972). There may also be a problem when "standardized tests involve questions that require knowledge of information more familiar to one cultural group than to another." White, *Culturally Biased Testing and Predictive Invalid-*

protection. If the tests themselves are unfair or inaccurate they deprive the student of a right without sufficient procedural safeguards. The tests and the testing program may also cause harmful or unwarranted classifications to be made.

Cultural bias may be one reason that a disproportionate number of minority students have failed the competency tests. The problem of standardized test use was recognized in *Hobson*. Judge Wright stated that the tests are "essentially a test of the student's command of standard English and grammar."¹⁰⁹ Minority students may have had little opportunity to develop the necessary verbal skills to complete successfully such a test. Many minority students live in an environment where books are not readily available and where communication is often in the form of "black english." They also may not have been able to travel beyond their immediate neighborhoods, and thus their exposure to situations which might appear on the tests is limited.¹¹⁰ It is recognized therefore that tests given to minority students are often "less precise and less accurate — so much so that test scores become practically meaningless. . . . [I]t is virtually impossible to tell whether the test score reflects lack of ability or lack of opportunity."¹¹¹

The resolution of the cultural bias problem may be viewed as necessitating the development of culture-fair or culture-free tests.¹¹² Absolute fairness, however, may be an impossibility.¹¹³ There also could be arguments that minority students should be given special tests which would take their cultural differences into account or which contain questions which reflect all cultural groups.¹¹⁴ It may be sufficient for the tests to be

ity: *Putting Them on Record*, 14 HARV. C.R.-C.L.L. REV. 89, 108 (1979).

109. 269 F. Supp. at 478. See Lazarus, *Coming to Terms With Testing*, 54 NAT'L ELEMENTARY PRIN. 24, 28 (July-Aug. 1975). See also W. SEDLACEK & G. BROOKS, *RACISM IN AMERICAN EDUCATION: A MODEL FOR CHANGE* (1976)(teachers usually judge students on their fluency in standard English, and misdiagnosis of ability can result).

110. *Id.* at 480-81.

111. *Id.* at 485.

112. See Darlington, *Another Look at Culture Fairness*, 8 J. OF EDUC. MEAS. 71 (1971)(recommending constructing of test with optimum level of cultural discrimination); Thorndike, *Concepts of Culture Fairness*, 8 J. OF EDUC. MEAS. 63 (1971).

113. McClung, *supra* note 60, at 695.

114. *Id.* It has been shown that black students outperform white students when given tests which are designed to measure areas that are familiar to minority students. The Black Intelligence Test of Cultural Homogeneity (BITCH)-100. A Culture Specific Test is an example of such a test. Other tests which are culture specific include the Leitner International Performance Scale, Cattell's Culture-Fair Intelligence Test, and Raven's Progressive Matrices. Oakland and Matuszek, *Using Tests in Nondiscriminatory Assessment*, in *PSYCHOLOGICAL AND EDUCATIONAL ASSESSMENT OF MINORITY CHILDREN* 52, 62 (T. Oakland ed. 1977).

examined and validated by experts to the point that the cultural bias is de minimis. In *Debra P.*, the court found that there were items on the test which could be unfamiliar to some groups but that "this distraction is minimal and unpervasive."¹¹⁵ Pretesting could be used to evidence a lack of racial or ethnic partiality. Special instruction could also be offered to orient minority students with the basic majority culture attributes or experiences which may dominate the test.¹¹⁶

The main issue involved is the school's duty to remedy the cultural deprivation of minority students or to create a test which takes this into consideration.¹¹⁷ This issue is similar to the question in educational malpractice suits of the extent of the duty to educate.¹¹⁸ The school's duty in both of these areas is still uncertain, but litigation in education is increasing, and courts will have to work with educators in establishing a standard of responsibility.

VI. CONCLUSION

The enactment of accountability statutes and the concurrent institution of minimum competency testing evidence a legitimate national concern about the quality of American education. The statutes and the tests are legislative attempts to establish standards by which to measure the adequacy of a student's education. These attempts may result in litigation regarding the standards and their method of implementation, or they may be used as the basis for educational malpractice actions.

The use of minimum competency testing may be hailed as a return to

115. 474 F. Supp. at 262. The court found that the tests had been validated by the companies who designed them and also by committees of educators. The court concurred with these authorities that substantial cultural bias was not present in the Florida competency test.

116. McClung, *supra* note 60, at 696. For a discussion of compensatory education see note 52, *supra*.

117. *Id.* at 697. The schools could deny that bias in the test or testing procedure caused the low minority student scores and could argue that they owe no duty to alter the test. *See, e.g.,* Larry P. v. Riles, 343 F. Supp. 1306, 1310-11 (N.D. Cal. 1972), *aff'd per curiam*, 502 F.2d 963 (9th Cir. 1974) (claim by defendant that disproportionate number of black children in Educable Mentally Retarded classes was due to poor infant care, nutrition, etc.). *See* Jenson, *How Much Can We Boost IQ and Scholastic Achievement?*, 39 HARV. EDUC. REV. 123 (1969) (intelligence inherited); *Contra*, C. SILVERMAN, *CRISIS IN THE CLASSROOM* (1971).

118. Thus far, educational malpractice suits have been unsuccessful. *See* Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, ___ P.2d ___, 131 Cal. Rptr. 854 (1976). It has been urged, however, that by instituting minimum competency testing, the schools will be seen as guaranteeing that all graduates are competent. This arguably could be seen as fulfilling the duty element in the malpractice action, thus making it easier for the plaintiff to prove his case. *See* 14 TULSA L.J. 383, 408 (1978).

the emphasis on quality education,¹¹⁹ but the legal requirements of due process and equal protection cannot be overlooked in the state's zeal to begin testing. The actual due process and equal protection requirements are still uncertain. *Debra P.* is awaiting appeal, and there have been no other judicial decisions on point. The result of the appeal depends on the level of scrutiny and degree of proof required by the appeals court. The outcome of the appeal in *Debra P.* will affect the course which competency testing litigation will take. If the district court decision is upheld, there will be a proliferation of suits instituted, especially in the southern states.

Regardless of the result, however, *Debra P.* still has broken ground in the field of competency testing litigation, and further suits should follow. Since no two states have identical competency testing programs,¹²⁰ it is impossible to predict the outcome of future challenges. It is certain, however, that just as *Hobson* led the way for a mass of ability-grouping challenges so *Debra P.* will lead the way in attacking competency testing.

Mary G. Commander

119. Madaus and Airasian, *Issues in Evaluating Student Outcomes in Competency-Based Graduation Programs*, 10 J. OF RESEARCH AND DEVELOPMENT IN EDUC. 79 (Spring 1977).

120. Pipho, *Minimal Competency Testing: A Look at State Standards*, 34 EDUC. LEADERSHIP 516 (1977).