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STUDENT COMPETENCY TESTING IN TEXAS

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I. INTRODUCTION

With the passage of House Bill No. 72 (H.B. 72),[1] Texas joined the large number of states that have instituted the use of competency testing in elementary and secondary education.[2] Generally, "competency testing" refers to the use of tests to measure student performance relative to some level of achievement that is deemed minimally competent in one or more skill areas.[3] Unlike student aptitude tests, such as the

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1. Act of July 13, 1984, ch. 28, 1984 Tex. Sess. Law Serv. 269 (Vernon).

2. *See* M. LAZARUS, GOODBYE TO EXCELLENCE 3 (1981). At least 38 states require competency tests in basic skills; of these, 16 require passage of such a test as a prerequisite to graduation. *See id.* at 3.

3. *See* Hambleton & Eignor, *Competency Test Development, Validation, and Standard Setting,* in MINIMUM COMPETENCY ACHIEVEMENT TESTING: MOTIVES, MODELS, MEASURES, AND CONSEQUENCES 367, 369 (R. Jaeger & C. Tittle ed. 1980). The skills that are measured vary from program to program. Most states use the tests to measure skill levels in

Scholastic Aptitude Test,[4] a competency test is aimed primarily not at the measurement of an aptitude or potential, but at assessing a level of achievement.[5] And unlike the teacher-drafted tests taken by students in the course of an ordinary school year, a competency test is administered to many or all students at a certain educational level by a centralized agency or authority.[6] The goal of the competency tests is to discover whether students have reached a pre-specified degree of proficiency in the skill area being measured.[7]

Competency tests are a key component of a larger educational reform: an increased emphasis on ensuring that students master designated competencies on a system-wide basis.[8] The term "competency-

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reading and arithmetic; a few examine knowledge of government. The tests have also been used to test ability in "life skills," which may denote practical applications of school skills. *See* M. LAZARUS, GOODBYE TO EXCELLENCE 5-6 (1981); Thomson, *Competency-Based Education and Secondary Schools: Current Practice and Some Implications,* in COMPETENCY-BASED EDUCATION 176, 193 (R. Nickse & L. McClure ed. 1981).

4. *See* M. LAZARUS, GOODBYE TO EXCELLENCE 33 (1981). The test is administered by the College Entrance Exam Board and is mandatory for applicants to most undergraduate colleges. *See id.* at 33.

5. *See id.* at 32-33. In much testing literature, "achievement tests" are distinguished from "aptitude tests." The former term refers to tests that measure a past level of achievement; the latter applies to tests that measure a student's capacity for future performance. *See id.* at 32-33. This distinction arguably reflects a difference in use rather than in test structure, for the reason that both types of tests measure some degree of achievement and aptitude. *See id.* at 33. Nonetheless, the overwhelming use of competency tests is for the measurement of achievement. *See* Schalock, *How Can Competencies Be Assessed?,* in COMPETENCY-BASED EDUCATION 148, 152 (R. Nickse & L. McClure ed. 1981). Competency tests are also generally considered to be "criterion-referenced" rather than "norm-referenced." *See* M. LAZARUS, GOODBYE TO EXCELLENCE 39 (1981). The former term applies to tests that examine performance against a fixed standard or criterion; the latter term refers to tests that measure a student's performance relative to a larger, and usually standardized, group. *See id.* at 35-40. The distinction between these two terms is blurred: use of a criterion-referenced test requires some fixed standard, and to be meaningful the standard must ultimately be norm-referenced to some extent. *See id.* at 39-40.

6. The formulation and administration of the tests may be at the state level, at the district level, or at both levels to some degree. *See* Baratz, *Policy Implications of Minimum Competency Testing,* in MINIMUM COMPETENCY ACHIEVEMENT TESTING: MOTIVES, MODELS, MEASURES, AND CONSEQUENCES 49, 54-55 (R. Jaeger & C. Tittle ed. 1980).

7. *See* Hambleton & Eignor, *Competency Test Development, Validation, and Standard Setting,* in MINIMUM COMPETENCY ACHIEVEMENT TESTING: MOTIVES, MODELS, MEASURES, AND CONSEQUENCES 367, 369 (R. Jaeger & C. Tittle ed. 1980).

8. *See* M. LAZARUS, GOODBYE TO EXCELLENCE 32-33 (1981); Baratz, *Policy Implications of Minimum Competency Testing,* in MINIMUM COMPETENCY ACHIEVEMENT TESTING: MOTIVES, MODELS, MEASURES, AND CONSEQUENCES 49, 54-55 (R. Jaeger & C. Tittle ed. 1980). *See generally* H. MCASHAN, COMPETENCY-BASED EDUCATION AND BEHAVIORAL OBJECTIVES 29-45 (1979) (analysis and comparison of education based on competency and performance).

based education" often attaches to reforms with this emphasis. Within such a program, a state may use the tests for many purposes, such as identifying students who need remedial education or assessing the overall level of performance for a school or district.[9] In some states, as under the new Texas legislation, successful performance on the tests is also a prerequisite to high school graduation.[10]

Competency tests, particularly when used as a prerequisite to graduation, present significant and complex legal questions that have been the subject of substantial litigation and commentary.[11] The leading case on the issue, *Debra P. v. Turlington,*[12] laid out in considerable detail the legal principles that apply to such legislation. But the full scope and application of those principles are not settled. And, because competency testing programs vary in details with important legal consequences, those segments of the new Texas legislation warrant individual examination. The aim of this article, then, is both to examine the relevant legal principles and to discuss how they apply to the new Texas law.

In doing so, the article will try to appreciate the interplay between the legal and empirical implications of the tests. Because a legal analysis of the tests begins with the legislature's policy choice as a given, that analysis is more narrow, and certain of its component parts are more defined, than the educators' debate, which is highly empirical

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9. *See* Baratz, *Policy Implications of Minimum Competency Testing,* in MINIMUM COMPETENCY ACHIEVEMENT TESTING: MOTIVES, MODELS, MEASURES, AND CONSEQUENCES 49, 54-62 (R. Jaeger & C. Tittle ed. 1980). Competency testing programs in different states vary widely in their scope and application. A program may use a statewide requirement of competency, or may allow local school districts to establish minimum requirements. States also differ in whether and to what degree they provide remedial schooling in response to unsatisfactory test scores; likewise, states vary in their use of aggregate test data. *See id.* at 54-62.

10. *See* M. LAZARUS, GOODBYE TO EXCELLENCE 3 (1981). As of 1981, at least 16 states used the tests as a graduation requirement. *See id.* at 3.

11. *See* Brookhart v. Illinois State Bd. of Educ., 697 F.2d 179, 183 (7th Cir. 1983) (competency tests for handicapped children not violation of Education for All Handicapped Children Act); Board of Educ. v. Ambach, 436 N.Y.S.2d 564, 568 (Sup. Ct. 1981) (school authorities have power to require competency tests for high school diploma); Benjes, Herbert & O'Brien, *The Legality of Minimum Competency Test Programs Under Title VI of the Civil Rights Act of 1964,* 15 HARV. C.R.-C.L. L. REV. 537, 541-42 (1980) (analysis of civil rights issues raised by tests).

12. 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, vacated in part,* 644 F.2d 397 (5th Cir. 1981). The factual issues determined on remand indicated that the test measured material actually taught and no causal connection existed between "present effect of past discrimination" and black children's disproportionate failure rate. *See* Debra P. v. Turlington, 564 F. Supp. 177, 179 (M.D. Fla. 1983), *aff'd,* 730 F.2d 1405 (11th Cir. 1984).

and unresolved.[13] For example, although disbelievers in competency-based education fear that it will exalt curricular uniformity and minimal achievement over diversity and individual excellence,[14] this issue has no role in the legal debate. But the legal questions that the tests raise inevitably converge with some portions of the empirical debate; the difficulty of defining "competency," for example, has legal as well as policy consequences. When examining the tests in a legal light, then, this article will try to identify and explore the links between the legal and practical issues raised by the tests. Because the most satisfactory legal conclusions are those that rest on principles broader than a particular empirical choice,[15] this effort should aid not only in reaching legal conclusions, but in understanding how firmly grounded they are.

Part II describes the Texas legislation pertaining to competency testing. Because the many legal requirements that apply to the tests originate in the concepts of due process and equal protection, parts III and IV will examine the legal requirements that reflect, respectively, the mandates of due process and equal protection. In particular, part III will discuss the requirements of test validity, test content, test timing, and the selection of a passing level. Part IV will touch briefly on the subject of present intentional discrimination, and then will discuss in detail an aspect of equal protection law that relates forcefully to the use of competency tests: past discrimination resulting in present adverse effects on minorities.

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13. The subjects of the debate include, but certainly are not limited to, the difficulty of defining the areas in which competency should be required, the selection of the standard that denotes competence, the efficiency of the tests in promoting competence, the wisdom of standardizing curriculum and gearing it to the achievement of minimums rather than individual excellence, and the many fairness issues raised by the tests. *See generally* MINIMUM COMPETENCY ACHIEVEMENT TESTING: MOTIVES, MODELS, MEASURES, AND CONSEQUENCES 5-382 (R. Jaeger & C. Tittle ed. 1980) (in-depth analysis of competency testing based on presentations at the Conference on Minimum Competency Achievement Testing, sponsored by the American Educational Research Association, held in Washington, D.C., on October 12-14, 1978).

14. *See* M. LAZARUS, GOODBYE TO EXCELLENCE 15 (1981); Britell, *Competence and Excellence: The Search for an Egalitarian Standard, the Demand for a Universal Guarantee,* in MINIMUM COMPETENCY ACHIEVEMENT TESTING: MOTIVES, MODELS, MEASURES, AND CONSEQUENCES 23, 26-35 (R. Jaeger & C. Tittle ed. 1980).

15. *See* Yudof, *Equal Educational Opportunity and the Courts,* 51 TEXAS L. REV. 411, 419 (1973).

II. THE TEXAS ACT

The new Texas legislation, H.B. 72,[16] requires the Central Education Agency (CEA) to adopt "appropriate criterion referenced assessment instruments . . . in reading, writing, and mathematics for all pupils at the first, third, fifth, seventh, and ninth grade levels and in mathematics and English language arts for all pupils at the 12th grade level."[17] The CEA is also to "adopt secondary exit level assessment instruments designed to assess mathematics and English language arts competencies for pupils at the 12th grade level."[18]

Both the exit-level tests and those administered at earlier junctures are competency-assessment tests. But because the exit-level tests are a prerequisite to high school graduation, different and more detailed procedures govern their application. First, the State Board of Education is to "administer" the exit-level tests; no similarly explicit limitation appears as to those who may administer the other tests.[19] Second, the exit-level tests must be administered to all pupils at the eleventh grade level.[20] Any student performing unsatisfactorily at that point must receive additional chances to retake the test during the eleventh and twelfth grades.[21] Apparently these further attempts are unlimited in number; the Act even directs that the test may be retaken as late as the last month of a pupil's twelfth grade year.[22]

The Act also makes clear that no pupil is to receive a high school diploma until he or she has performed "satisfactorily" on all sections of the test.[23] No penalty attaches to failure one or several times; a student who has been denied a diploma for test failure is entitled to one when he or she passes the test upon retaking it.[24] The Act delegates to the State Board of Education the task of "determin[ing] the level of performance considered to be satisfactory on the assessment instruments."[25]

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16. Act of July 13, 1984, ch. 28, 1984 Tex. Sess. Law Serv. 269 (Vernon).

17. TEX. EDUC. CODE ANN. § 21.551(a) (Vernon Supp. 1985). The CEA is composed of the State Board of Education, the State Board for Vocational Education, the State Commissioner of Education, and the State Department of Education. *See id.* § 11.01 (Vernon 1972).

18. *Id.* § 21.551(b) (Vernon Supp. 1985).

19. *See id.* § 21.551(b).

20. *See id.* § 21.551(c).

21. *See id.* § 21.551(c).

22. *See id.* § 21.551(c).

23. *See id.* § 21.553(a).

24. *See id.* § 21.553(c).

25. *See id.* § 21.552.

The tests adopted by the CEA are not the only competency tests for which the Act allows. Local school districts may also "adopt and administer criterion and/or norm-referenced assessment instruments at any grade level."[26] It seems doubtful that this permission extends to the adoption and administration of additional exit-level tests, given the firm procedural requirements, described above, for such tests. Hence, the local school districts may expand on the task of assessment, but they are most likely powerless to alter either the Board-mandated level of graduation competence or the CEA-administered tests used for that purpose. The Act shields as confidential the results of an individual's performance on any of the assessment tests, but allows compilation of and access to aggregate statistics about overall student performance.[27]

Central to the Act's testing scheme are the provisions relating to remedial education. Each school district is to use the data gathered from test results to design and implement compensatory and remedial instruction.[28] More particularly, each district is required to provide remedial instruction to a student who fails the exit-level test, and this instruction must conform to standards issued by the Board.[29]

The Act is clear as to timing.[30] The CEA is to adopt the assessment instruments by September 1, 1985, and the Board is to begin administering them by the 1985-86 school year.[31]

III. DUE PROCESS

Many of the legal requirements relating to competency tests, though greatly distinct in practice, originate in the concept of due process.[32] Courts have had no difficulty ruling that a state's institution of public schooling and attendance requirements creates a legiti-

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26. *See id.* § 21.554.
27. *See id.* § 21.556(b).
28. *See id.* § 21.557(a).
29. *See id.* § 21.557(b).
30. *See* Act of July 13, 1984, ch. 28, § 2, 1984 Tex. Sess. Law Serv. 269, 429 (Vernon).
31. *See id.*
32. *See* Debra P. v. Turlington, 644 F.2d 397, 403 (5th Cir. 1981). One court has emphasized that "[s]tudents do not shed their constitutional rights, including those of substantive and procedural due process, at the schoolhouse gate." Petrey v. Flaugher, 505 F. Supp. 1087, 1090 (E.D. Ky. 1981); *see also* Lewis, *Certifying Functional Literacy: Competency Testing and Implications for Due Process and Equal Educational Opportunity,* 8 J.L. & EDUC. 145, 153 (1979) (due process mandates "a student have the 'opportunity to be heard' in the determination of her academic achievement").

mate expectation of class advancement and graduation in students who successfully complete the requirements set forth by the state.[33] As a corollary, students have a legitimate expectation that the state or district will use rational and nonarbitrary criteria in determining class placement and graduation.[34] Such legitimate expectations constitute a property interest, a state-created understanding that "secures certain benefits and supports claims of entitlements to those benefits."[35]

Not all uses of competency tests implicate this property interest to the same degree. For example, a school's administration of competency tests simply for the purpose of aggregating data about the school's achievement level has no adverse consequence on any individual student's placement. But when test results form the basis of an official decision about a pupil's advancement or graduation, due process sets constraints on the tests and their administration.[36] Schools, then, must conform to what constitutes due process with respect to the use of tests for placement and graduation decisions.[37] Because the failure to obtain a high school diploma is the severest result of the tests' use, stricter due process requirements generally apply to the use of exit-level tests.[38]

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33. *See* Debra P. v. Turlington, 644 F.2d 397, 403-04 (5th Cir. 1981). It is important to realize that students do not have a legitimate expectation of entitlement to graduation simply by attendance at school despite inadequate performance. *See* Bester v. Tuscaloosa City Bd. of Educ., 722 F.2d 1514, 1516 (5th Cir. 1984) (students have no legitimate expectation that schools will promote students who perform in a substandard manner).

34. *See* Debra P. v. Turlington, 644 F.2d 397, 404 (5th Cir. 1981). When there exists a legitimate expectation of entitlement, reliance on that expectation "must not be arbitrarily undermined." *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

35. *See* Debra P. v. Turlington, 644 F.2d 397, 404 (5th Cir. 1981) (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). Denial of a diploma may also effect a deprivation of a "liberty" interest, because failure to obtain a diploma may stigmatize a student and his reputation. *See* Brookhart v. Illinois State Bd. of Educ., 697 F.2d 179, 184-85 (7th Cir. 1983).

36. *See* Debra P. v. Turlington, 644 F.2d 397, 403-04 (5th Cir. 1981).

37. *See id.* at 403-04. The United States Supreme Court has explained that identifying the requisite level of due process depends on consideration of three factors: "[1] the private interest . . . affected by the official action; . . . [2] the risk of an erroneous deprivation of such interest through the procedures used. . .; and . . . [3] the Government's interest, including . . . the fiscal and administration burdens [of] . . . additional . . . procedural requirement[s]." *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976). In addition, while the legislature's actions primarily determine the existence of an entitlement, the courts determine the level of process due. *See* Easterbrook, *Substance and Due Process,* 1982 SUP. CT. REV. 85, 88-89.

38. *Cf.* Debra P. v. Turlington, 474 F. Supp. 244, 249 (M.D. Fla. 1979) (remanded 1981) (some consequences of diploma denial include decrease of employment and college opportunities). The United States Supreme Court has made it clear that the level of due process required

A. *Test Validity*

The mandate of due process gives rise to the demand that the tests be acceptably accurate measures of the skills they purport to measure.[39] Both judicial authority and legal commentary substantially agree that this demand translates, at a minimum, into a requirement that competency tests be "valid."[40] Some explanation of this term will help in understanding the requirement of validity as applied to competency tests.

In professional testing parlance, the term "validity" equates with the notion of test accuracy.[41] A test is considered valid if it measures to an acceptable degree what it is used to measure.[42] Whether a test is valid, then, depends on how it is used; a test that is valid for one use may be invalid for another.[43] The term "validation" refers to the professional techniques for measuring the validity of a test.[44]

Under standards established in the educational and psychological testing areas, three basic validation techniques exist: content valida-

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may vary with the magnitude of the private interest affected. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

39. *See* Debra P. v. Turlington, 474 F. Supp. 244, 261 (M.D. Fla. 1979), *aff'd in part, vacated in part,* 644 F.2d 397 (5th Cir. 1981).

40. *See id.* at 261 (proof of validity required). In remanding the case, the Fifth Circuit also made clear that such proof was necessary. *See* Debra P. v. Turlington, 644 F.2d 397, 404-06 (5th Cir. 1981). Legal commentators have also agreed on the need for a validation requirement. *See* Benjes, Herbert & O'Brien, *The Legality of Minimum Competency Test Programs Under Title VI of the Civil Rights Act of 1964,* 15 HARV. C.R.-C.L. L. REV. 537, 570-71 (1980); McClung, *Competency Testing Programs: Legal and Educational Issues,* 47 FORDHAM L. REV. 651, 683 (1979).

41. *See* AMERICAN PSYCHOLOGICAL ASS'N, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS 25 (1974). Aside from validity, two other testing concepts relate to test accuracy, but play a less important role: objectivity and reliability. *See* M. LAZARUS, GOODBYE TO EXCELLENCE 40-43 (1981). An objective test is one to which standardized grading procedures apply and one that each student takes under conditions similar to those that apply to other students. In practice, the requirement of objectivity is satisfied by heavy reliance on multiple choice questions. *See id.* at 41. Test reliability means that the test is a consistent measure of what it is being used to measure. For example, if a student could take the same test a second time without acquiring any further knowledge relevant to the test, any variance between the resulting test scores would reflect the degree of unreliability. *See id.* at 42. As with validation, procedures exist in the testing field for measuring levels of reliability. *See* AMERICAN PSYCHOLOGICAL ASS'N, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS 48-49 (1974).

42. *See* AMERICAN PSYCHOLOGICAL ASS'N, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS 25 (1974).

43. *Cf. id.* at 25-26.

44. *See id.* at 25.

tion, criterion validation, and construct validation.[45] Because test validity depends in part on the use of a test, each of these techniques corresponds roughly to a certain type of test usage. Therefore, an understanding of validation requires first an awareness of the three basic uses to which tests are commonly put.

First, the test-giver (tester) may wish to determine the test-taker's present knowledge of or ability in the specific skill or material contained in the test.[46] For example, the tester might administer a math and vocabulary test in order to determine the test-taker's knowledge of those two fields. The test, then, is simply a more limited sample of the field concerning which the tester is measuring.[47]

Content validation is the validation technique that applies to this first test usage.[48] The technique consists of demonstrating how well the content of the tests represents the broader subject matter that the test is used to measure.[49] Since the technique essentially requires an objective correlation of test items with the tested-for ability or field, it usually requires no statistical correlation.[50] Instead, a test may be proven valid if, in the judgment of experts in the field of the tested-for skill, the test constitutes an adequately representative sample of the tested-for ability.[51]

Second, the tester may wish to predict the test-taker's future performance on or present knowledge of skills or materials that differ from the actual content of the test.[52] For example, the tester might give a math test in order to predict or measure the test-taker's chances of faring well in more advanced math classes or in a math-oriented profession.

Criterion validation applies to this second test usage. The technique correlates test scores to some other measure (criterion) of the

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45. *See id.* at 26. The American Psychological Association notes that inferences may not properly be based on "the mere appearance of validity." *See id.* at 26.

46. *See id.* at 28.

47. *See* A. JENSEN, BIAS IN MENTAL TESTING 297 (1980).

48. *See* AMERICAN PSYCHOLOGICAL ASS'N, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS 28 (1974).

49. *See id.* at 28; A. JENSEN, BIAS IN MENTAL TESTING 297 (1980).

50. *Cf.* A. JENSEN, BIAS IN MENTAL TESTING 297 (1980) ("judgment . . . based on a consensus of experts").

51. *See id.* at 297.

52. *See* AMERICAN PSYCHOLOGICAL ASS'N, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS 26 (1974).

tested-for ability.[53] For example, in the employment testing area, an employment test is valid if an acceptable statistical correlation exists between test scores and a job performance criterion,[54] such as units produced per hour. Criterion validation, then, unlike content validation, is marked by the use of statistical correlation.[55]

Third, the tester may use the test to infer a quality or potential that is not directly measurable and that is, instead, a hypothetical explanation of what the tests purport to measure.[56] The tested-for quality is termed a "construct" because it is simply a theoretical or "constructed" explanation of what the test scores represent.[57] An example of such a construct is innate, or genetic, intelligence.[58]

Construct validation applies to tests that are used to measure constructs.[59] More complex and less conclusive than the other techniques,[60] it essentially tries to determine whether the "construct" that the tests are used to measure adequately explains the test scores. This requires the formulation of hypotheses about how people with different levels of test scores will perform in other situations.[61] If experience bears out these hypotheses, an argument can be made that the construct explains the test scores and that, as a result, the test is construct valid.[62]

A competency test, whether used for purely assessment purposes or as a graduation requirement, falls into the first category of use described above:[63] its objective is to measure the pupil's knowledge of

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53. *See id.* at 26.

54. *See* Wilson, *A Second Look at Griggs v. Duke Power Company: Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts,* 58 VA. L. REV. 844, 872 (1972). The Equal Employment Opportunity Commission has promulgated guidelines setting forth standards for employment test validation. *See* 29 C.F.R. § 1607.1-.17 (1984). The guidelines express a preference for criterion validation. *See id.* § 1607.14(D)(4).

55. *See* A. JENSEN, BIAS IN MENTAL TESTING 298 (1980).

56. *See* AMERICAN PSYCHOLOGICAL ASS'N, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS 29 (1974).

57. *See id.* at 29.

58. *Cf. id.* at 29.

59. *See id.* at 29.

60. *See* Anastasi, *Some Current Developments in the Measurement and Interpretation of Test Validity,* in TESTING PROBLEMS IN PERSPECTIVE 307, 308-09 (A. Anastasi ed. 1966).

61. *See* AMERICAN PSYCHOLOGICAL ASS'N, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS 30 (1974).

62. *See id.* at 30.

63. *See* Hambleton & Eignor, *Competency Test Development, Validation, and Standard Setting,* in MINIMUM COMPETENCY ACHIEVEMENT TESTING: MOTIVES, MODELS, MEASURES, AND CONSEQUENCES 367, 369 (R. Jaeger & C. Tittle ed. 1980).

the very skills that are the subject of the tests.[64] Ensuring accuracy in that effort requires the use of content validation.[65] Consequently, the CEA could satisfy the due process validity mandate by requiring in advance that any tests it adopts be demonstrably content valid.[66]

The possibility remains, however, that future plaintiffs challenging the Texas act might argue for the additional requirements of construct validity or criterion validity. In the *Debra P. v. Turlington*[67] case, the plaintiffs argued that the tests had to satisfy standards of construct validity as well as content validity.[68] The Florida legislation challenged in *Debra P.* called for the adoption of tests to measure "functional literacy," and the court analyzed the tests in accordance with that end.[69] Arguably, then, Florida was purporting to use the tests as measures of a construct rather than simply as measures of a particular skill area. By contrast, the Texas legislation refers to the exit-level tests as "designed to assess mathematics and English language arts competencies."[70] The purported aim of the tests is simply to measure a level of existing skill, a usage to which content validation squarely applies.[71] As to the Texas law, then, to argue persuasively for a construct-validity requirement, or a criterion-validity requirement, would be difficult.

B. *Adequate Learning Opportunity*

A demonstration of test accuracy does not satisfy all the due process concerns that competency tests may raise. As explained earlier, students have a legitimate expectation of class advancement and grad-

64. *See id.* at 369.

65. *See id.* at 369.

66. There are recognized techniques for such validation. *See id.* at 371 (measurement specialists would agree that "an adequate technology is available for developing and validating competency tests"). Two methods used in content validation are "the judgment of test items by content specialists. . . . [and the] use of empirical techniques to examine performance data in much the same way empirical techniques are applied in norm-referenced test development." *See id.* at 376.

67. Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, vacated in part,* 644 F.2d 397 (5th Cir. 1981).

68. *See id.* at 261. The trial court did not expressly state that construct validation was necessary, but did hold that the test had adequate construct validity. *See id.* at 261.

69. *See id.* at 260-61.

70. *See* TEX. EDUC. CODE ANN. § 21.551(b) (Vernon Supp. 1985).

71. *See* A. JENSEN, BIAS IN MENTAL TESTING 297 (1980).

uation upon the satisfactory completion of schooling requirements.[72] A state would unjustifiably undermine this expectation if the exit-level tests required knowledge of skills never actually taught to students, or taught in such a way that the students had no meaningful opportunity to learn them. This general principle gives rise to requirements relating to the content of the tests and the time period for implementing them.[73]

1. Test Content

The state cannot administer a competency test unless the specific skills measured have in fact been taught in the schools.[74] In the *Debra P.* case, the United States Court of Appeals for the Fifth Circuit referred to this requirement as "curricular validity,"[75] reflecting the fact that a test may have content validity and yet lack curricular validity. Consider, for example, a test that purports to measure knowledge of basic geometry materials. The test will be content valid for that purpose if the test items constitute an adequate and representative sample of basic geometrical skills.[76] Yet, if the test is given to a group of seventh-graders who have never been taught geometry, it will lack curricular validity as to that purpose. A curricular-validity requirement does not mean that students must be exposed to the actual form of the test items themselves. But correspondence must exist as to the details of the educational objectives reflected in the tests.[77] For example, assume that a test contained an item requiring fractional multipli-

72. *See* Board of Regents v. Roth, 408 U.S. 564, 576-78 (1971); Debra P. v. Turlington, 644 F.2d 397, 403-04 (5th Cir. 1981).

73. *See* Debra P. v. Turlington, 644 F.2d 397, 404-06 (5th Cir. 1981) (test content); Debra P. v. Turlington, 474 F. Supp. 244, 263-67 (M.D. Fla. 1979) (test timing), *aff'd in part, vacated in part,* 644 F.2d 397 (5th Cir. 1981).

74. *See* Debra P. v. Turlington, 644 F.2d 397, 404-06 (5th Cir. 1981). The Fifth Circuit remanded the case to the trial court on the ground that the appellate record cast doubt on whether the Florida tests had covered only materials actually taught in the schools. The court held that to test students on items not covered in class would be fundamentally unfair. *See id.* at 404. Educators also acknowledge the importance of meeting this condition. *See* ASSESSMENT OF STUDENT COMPETENCE IN THE PUBLIC SCHOOLS 136 (R. Ingle, M. Carroll & W. Gephart ed. 1978) (in developing a competency test, "care should be taken to insure that the test reflects the instructional program and does not diverge to the extent that substantial curriculum revisions are required").

75. *See* Debra P. v. Turlington, 644 F.2d 397, 405 (5th Cir. 1981).

76. *Cf.* AMERICAN PSYCHOLOGICAL ASS'N, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS 28 (1974); A. JENSEN, BIAS IN MENTAL TESTING 297-98 (1980).

77. *See* Debra P. v. Turlington, 644 F.2d 397, 406 (5th Cir. 1981).

cation. The school need not have taught pupils to multiply the particular fractions used in the item, but the school must actually have covered fractional multiplication in class.[78]

A lack of curricular validity may result for two reasons. First, those charged with formulating the test might not adequately match test items to the curriculum in which pupils should have been instructed by the time they take the test.[79] This type of invalidity is usually termed "curricular invalidity." Second, the test may correspond to materials that should be taught, but not to those that are, in fact, taught in various schools.[80] This type of invalidity is termed "instructional invalidity." In other words, if individual classes or schools stray from the curricular content on which the test is based, the deviance may be substantial enough to render the tests curricular invalid for such schools.[81] The two types of curricular invalidity could each form the basis of a legal challenge to the test in that respect.

The two types of claims could differ greatly. The former would be more narrowly defined in time and object: it would criticize the actions, during a fixed period of time (the formulation period), of the official body adopting the tests. Essentially, the procedure for resolving such a claim would be similar to a court's inquiry into the existence of content validation.[82] The court would first inquire whether the CEA had undertaken any formal or informal study of curricular validity; second, the court would examine expert testimony as to the existence of curricular validity.[83]

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78. *Cf. id.* at 406.

79. *See* McClung, *Competency Testing Programs: Legal and Educational Issues,* 47 FORDHAM L. REV. 651, 682-83 (1979). The *Debra P.* court indicated that, in this respect, Florida had made efforts to meet the requirement of curricular validity. The court noted that Florida had taken care to match the tests to the schools' teaching objectives, and that, as a result, "the test was probably a good test of what the students *should* know." *See* Debra P. v. Turlington, 644 F.2d 397, 405 n.11 (5th Cir. 1981) (emphasis in original).

80. *See* McClung, *Competency Testing Programs: Legal and Educational Issues,* 47 FORDHAM L. REV. 651, 682-83 (1979) (concept designated "instructional" invalidity). In *Debra P.,* the appellate court criticized the Florida testing program in this respect, noting the parties' stipulation that the Florida Department of Education made no formal studies concerning "whether or not the skills measured on the test were in fact taught." *See* Debra P. v. Turlington, 644 F.2d 397, 405 (5th Cir. 1981). On remand, the district court held that the state had shown adequate instructional validity. *See* Debra P. v. Turlington, 564 F. Supp. 177, 179-86 (M.D. Fla. 1983).

81. *See* McClung, *Competency Testing Programs: Legal and Educational Issues,* 47 FORDHAM L. REV. 651, 682-84 (1979).

82. *Cf.* Debra P. v. Turlington, 644 F.2d 397, 405 (5th Cir. 1981).

83. *Cf. id.* at 405.

The second type of challenge would be more difficult to formulate and resolve. Because any variance between the curriculum as planned and as taught presumably would result from events such as time constraints or individual teacher preference; no formal selection or conscious system-wide choice would distinguish the intended curriculum from the curriculum actually taught. Hence, a formal school-conducted analysis of instructional validity would be more difficult to obtain. The court would have to rely on expert testimony as to the significance of the variance.[84]

Despite these greater proof problems, the same principle justifying a court's review of validity at the formulation stage supports a court's inquiry into validity at the administration stage. But there is an important limitation on this inquiry. A student might allege instructional invalidity not because certain curricular items were not taught, but because such items, though covered in class, were not taught efficaciously. Although such a claim appears to be only one step removed from, and akin in principle to, a challenge to curricular variance, there is a fundamental difference between them. A claim based on instructional invalidity would require the courts to assess pedagogical results, a task for which they are ill-suited.[85] When addressing issues of curricular validity, then, a court should look no further than what curriculum was intended and actually taught.

Either version of a curricular-invalidity claim will likely raise an imposing obstacle to implementation of competency tests in Texas by 1985-86, the date set forth in the Texas act.[86] Until the recent passage of the competency-based legislation, state-imposed guidelines on curricular content were essentially general. For example, before 1981,

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84. The district court's opinion on remand in *Debra P.* illustrates this point. By the time of the remanded trial, the state had commissioned a private consulting firm to develop a method for studying the existence of curricular validity. The resulting study, which was complex and extensive, included surveys of each teacher in Florida, a survey of given schools, site visits to various schools, and a student survey. *See* Debra P. v. Turlington, 564 F. Supp. 177, 180-81 (M.D. Fla. 1983), *aff'd,* 730 F.2d 1405 (11th Cir. 1984). At the trial, the state met its burden of proving curricular validity by offering the testimony of three expert witnesses, all of whom relied to some degree on data garnered in the study. *See id.* at 181-82. In its discussion, the court made clear that proof need not be presented as to what education each student has in fact been taught. *See id.* at 185. The burden of such a requirement, as the court pointed out, would render it impossible ever to prove instructional validity. *See id.* at 186.

85. *See* Yudof, *Equal Educational Opportunity and the Courts,* 51 TEXAS L. REV. 411, 413, 422 (1973) (courts are not equipped to measure schooling outcomes).

86. *See* Act of July 13, 1984, ch. 28, § 2, 1984 Tex. Sess. Law Serv. 269, 429 (Vernon).

districts were required to offer courses in "English grammar, reading in English, orthography, penmanship, composition, arithmetic, mental arithmetic, United States history, Texas history, modern geography, civil government, physiology and hygiene, physical education, [and] . . . the effects of alcohol and narcotics."[87] In 1981, this list of subjects was modified, but, as before, state law set out few detailed requirements as to the content or scope of these general subjects.[88]

With the passage of the competency testing legislation, the legislature made provision for more detailed state-imposed uniform requirements for curricular content. To the list of mandatory subjects has been added the provision that "[t]he State Board of Education by rule shall designate the essential elements of each subject listed . . . and shall require each district to provide instruction in these elements at appropriate grade levels."[89]

Until the implementation of this more recent mandate, the inevitable district-by-district variation in curriculum will likely make it difficult or impossible for the CEA to ensure that competency tests administered in 1985 will reflect the curriculum either as intended or as actually taught. In time, one likely and intended result of the recent legislation will be a curriculum geared state-wide to the teaching of at least the types and levels of skills measured by the tests.[90] Once that transitional period has passed, the requirement of curricular validity will be more easily satisfied.[91] Until that point, however, the

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87. *See* TEX. EDUC. CODE ANN. § 21.101 (Vernon 1972) (amended 1981, 1984).

88. *See id.* § 21.101 (Vernon Supp. 1985) (superseded effective June 1, 1985).

89. *See id.* § 21.101(c) (effective June 1, 1985).

90. The recent legislation, effective June 1, 1985, requires the State Board of Education to "designate the essential elements of each subject" that is required to be taught in public schools. To receive accreditation, a school district must provide instruction in these essential elements at appropriate levels. *See id.* § 21.101(c) (effective June 1, 1985). Although the legislation also expresses the view that "[d]istricts are encouraged to exceed minimum requirements of the law," *id.* § 21.101(d), educational critics of such testing programs predict that in practice "[s]chools will teach to the tests." *See* M. LAZARUS, GOODBYE TO EXCELLENCE 80 (1981).

91. The remanded proceedings in the *Debra P.* case highlight the likely difficulty of showing curricular validity in Texas for at least several years. The Florida legislation was passed in 1976, but the district court on remand noted that only since 1979 were school administrators and teachers "well aware of the minimum performance standards imposed by the state and their duty to teach these skills." *See* Debra P. v. Turlington, 564 F. Supp. 177, 184 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (11th Cir. 1984). This made it possible for the district court, by the time of trial in February 1983, to conclude that curricular validity existed. A key basis of this holding was the state-commissioned study of the variance between the material tested and the materials taught. *See id.* at 180-81. In addition, the court pointed out that districts no longer

implementation of the exit-level tests will be subject to serious challenge on the ground of curricular invalidity.

2. Test Timing

Even if the exit-level tests adopted and implemented by the 1985-86 school year were shown to correlate to material taught in each district, a problem would arise as to the sufficiency of the notice given to those high school seniors faced immediately with an additional graduation requirement. The court in *Debra P.* recognized and explained this problem.[92] Just as students must receive instruction in the actual knowledge areas covered by the tests, so students must receive that instruction, at least for some period of time, with the awareness of the exit-level test and within the context of preparing for the test.[93] Without an adequate period of time for such instruction, the exit-level test would present a sudden requirement for which pupils have not had sufficient opportunity to prepare.[94] The *Debra P.* court accepted expert testimony that, as to the Florida legislation, the necessary time period for this acclimation was at least four years.[95] Again, then, the 1985-86 implementation date set out in the Texas act seems difficult to reconcile with a timing principle reflecting due process requirements.

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had discretion not to teach certain defined minimum skills. *See id.* at 184. In short, the court's findings on remand are dependent on extensive factual findings relating to curricular correspondence, findings that would not have been available immediately after the passage of the Florida act.

92. *See* Debra P. v. Turlington, 644 F.2d 397, 404 (5th Cir. 1981). The district court, in *Debra P.*, explained that "instruction in previous years took place in an atmosphere without the specific objectives now present and without the diploma sanction." Debra P. v. Turlington, 474 F. Supp. 244, 264 (M.D. Fla. 1979), *aff'd in part, vacated in part,* 644 F.2d 397 (5th Cir. 1981).

93. *See* Debra P. v. Turlington, 644 F.2d 397, 404 (5th Cir. 1981) (citing TASK FORCE ON EDUCATIONAL ASSESSMENT PROGRAMS, COMPETENCY TESTING IN FLORIDA REPORT TO THE FLORIDA CABINET pt. 1, at 4 (1979)).

94. *See* Debra P. v. Turlington, 644 F.2d 397, 404 (5th Cir. 1981).

95. Because expert testimony indicated that "four to six years should intervene between the announcement of the objectives and the implementation of the diploma sanction," the court enjoined use of the diploma sanction for four years. *See* Debra P. v. Turlington, 474 F. Supp. 244, 267, 269 (M.D. Fla. 1979), *aff'd in part, vacated in part,* 644 F.2d 397 (5th Cir. 1981). The appellate court generally accepted the trial court's criticism of the notice period, but gave no specific injunctive time period because it also held that lack of curricular validity required suspension of the diploma sanction until the school district cured the problem. *See* Debra P. v. Turlington, 644 F.2d 397, 404, 408 (5th Cir. 1981). In *Brookhart v. Illinois State Bd. of Educ.*, the court held that one and one-half years was a constitutionally inadequate notice period for the administration of competency tests as a diploma requirement to handicapped students. *See* 697 F.2d 179, 187-88 (7th Cir. 1983).

C. *Selection of Passing Level*

How to define a satisfactory performance level on the competency tests is a question that has received much attention in the educational literature.[96] The due process clause lends to this question a legal dimension that remains little explored. As noted earlier, the state may not arbitrarily undermine a student's property or liberty interest in class advancement and graduation after successful completion of the state's requirements. When any placement decision—particularly the graduation decision—rests in part on how a pupil performs relative to a pre-defined standard, that standard must not be an arbitrary method for measuring adequate performance.[97] Even this general due process guideline sets some constraints on the selection of the performance standard.[98] Some understanding of the selection process itself explains why.

The choice of the passing level is in effect a statement that a failing grade connotes lack of minimum competence in the tested-for subject area.[99] In contrast to the area of test validation, there is great variation in, and little agreement on, the proper methods for judging the competency level.[100] Instead, a number of methods have been used to make that judgment.[101] Each of the methods can be the subject of dispute about its efficacy and its superiority or inferiority to other techniques. Such empirical debate alone does not invalidate the methods under a due process analysis.[102] But some methods have a deeper

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96. *See, e.g.*, M. LAZARUS, GOODBYE TO EXCELLENCE 55-75 (1981) (criteria for successful testing vary); Hambleton & Eignor, *Competency Test Development, Validation, and Standard Setting*, in MINIMUM COMPETENCY ACHIEVEMENT TESTING: MOTIVES, MODELS, MEASURES, AND CONSEQUENCES 367, 382 (R. Jaeger & C. Tittle ed. 1980) (methods include those based on empirical data, evaluations of experts in field, or combination of "empirical" and "judgmental" methods); Schalock, *How Can Competencies Be Assessed?*, in COMPETENCY-BASED EDUCATION 150, 165-68 (R. Nickse & L. McClure ed. 1981) (standard definition is complex task).

97. *See* Debra P. v. Turlington, 644 F.2d 397, 404 (5th Cir. 1981).

98. *See id.* at 404.

99. The Act states that "[t]he State Board of Education shall determine the level of performance considered to be satisfactory on the assessment instruments." TEX. EDUC. CODE ANN. § 21.552 (Vernon Supp. 1985). *See generally* Chicering & Claxton, *What is Competence?*, in COMPETENCY-BASED EDUCATION 8, 8-39 (R. Nickse & L. McClure ed. 1981) (analysis of meaning of "competence").

100. *See* Hambleton & Eignor, *Competency Test Development, Validation, and Standard Setting*, in MINIMUM COMPETENCY ACHIEVEMENT TESTING: MOTIVES, MODELS, MEASURES, AND CONSEQUENCES 367, 379 (R. Jaeger & C. Tittle ed. 1980).

101. *See id.* at 379-93 (all methods are, to some degree, arbitrary).

102. An educator notes that "nearly every contributor to the area" of standard-setting

flaw: an absence of any conceptual relation between the method and the existence of minimum competency. A more detailed look at the methods will help clarify this problem.

The first and most troublesome technique is to allow political or economic factors to determine the performance standard.[103] For example, school authorities, preferring to avoid failure rates above a certain level for political reasons, might choose a passing level that would give effect to that preference.[104] Similarly, the unavailability of sufficient remedial education funds might be an economic incentive for the same kind of choice.[105] One would not expect, of course, to see the State Board of Education make explicit use of political or economic factors in setting the performance standard. But if the Board's use of such reasons could be proven, the standard could not withstand a due process challenge.

A second method for setting standards is to select a norm based solely on distribution of test scores.[106] For example, school authorities might give the test to a sample group of students and then simply select as the "passing" level the score below which a certain percentage of pupils performed. Under such a purely "norm-based" method, whether or not a student passed would depend wholly on his or her

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has acknowledged that all the methods are "arbitrary." *See id.* at 379. But "arbitrary" under the educators' definition is not the same as "arbitrary" under a due process examination. As to the former, "arbitrary" is a label that applies because all the methods involve judgments and choices. *See id.* at 379. But, as the following discussion will explain, a method should be considered arbitrary under the due process clause only if it bears no theoretical relationship to the existence of minimum competency.

103. *See* Mehrens, *The Technology of Competency Measurement,* in THE ASSESSMENT OF STUDENT COMPETENCE IN THE PUBLIC SCHOOLS 39, 48 (R. Ingle, M. Carroll & W. Gephart ed. 1978).

104. *See id.* at 48. Educators do not advocate use of such a standard, but they acknowledge the practical possibility of its use. In the words of one discussion,

> So, admittedly, setting the standard is arbitrary. Further, it is politically and economically influenced. If the standards are too high and too many students fail, then there will surely be a public outcry about the quality of the schools and the unreasonableness of the standards. Further, if one is committed to remediation, the costs of remediation could be very high. If the standards are set too low then the program becomes meaningless, and if the public becomes aware of the ridiculously low standards, they will again present an outcry about the quality of the schools. The standard-setters will be damned either way.

See id. at 48.

105. *See id.* at 48.

106. *See* Hambleton & Eignor, *Competency Test Development, Validation, and Standard Setting,* in MINIMUM COMPETENCY ACHIEVEMENT TESTING: MOTIVES, MODELS, MEASURES, AND CONSEQUENCES 367, 381-82 (R. Jaeger & C. Tittle ed. 1980).

performance relative to other students.[107] A court could decide that such a method is conceptually arbitrary as to the state's interest in identifying students with inadequate levels of competence. Such a decision would have a firm foundation, because it would rest not on the empirical inadequacy of the method, but on the theoretical irrelevance of the method to the stated purpose of the tests.

Several standard-setting methods are defined as "judgmental" because they make use of judgments about how a minimally competent pupil should handle given test items.[108] Other methods are based on information about how students with perceived levels of ability perform on test items.[109] Unlike political, economic, or purely norm-referenced methods, these techniques are conceptually linked to the goal of defining minimum competence.

If faced with a challenge to the performance standard, then, a court could make a meaningful due process inquiry without rendering a purely empirical decision. The court could ensure that three conditions had been met: that the State Board of Education had made use of some method or technique for selecting the passing level; that the method chosen was conceptually relevant to the identification of minimum competence; and that the Board had taken the procedural steps necessary to carry out this method. Under this analysis, the court would not be judging the efficacy of the methods, but would ensure that the process for selecting a passing level had been non-arbitrary and had been carried out meaningfully.

IV. Discrimination and Test Performance

A. *Antidiscrimination*

Past experience with competency tests suggests that disproportionately low minority scores will result when Texas makes use of the tests.[110] If decisions about class placement, such as advancement or

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107. *See id.* at 381-82.

108. *See id.* at 386-91. Under one version of such a method, judges are asked to examine each test item and ask themselves which answer options a minimally competent student should be able to identify as incorrect. *See id.* at 386. The method then averages these judges' answers and computes the standard deviation of the judges' standard. *See id.* at 386.

109. *See id.* at 391.

110. *Cf.* Debra P. v. Turlington, 474 F. Supp. 244, 248-49 (M.D. Fla. 1979), *aff'd in part, vacated in part,* 644 F.2d 397 (5th Cir. 1981). Upon initial administration of the Florida competency test, 78% of black students and 25% of white students failed one or both sections of the test. Among those retaking the test, 74% of the black students and 25% of the white

assignment to remedial classes, will rely in part on such scores, this likely disproportion may in turn translate into a re-segregative effect on class composition. Even more seriously, when diplomas are withheld from those who fail the tests, this expected test score disproportion will translate into a disproportionately high percentage of minorities who leave school without a diploma. These probable consequences implicate the concern with antidiscrimination that lies at the heart of the equal protection clause[111] and Title VI of the Civil Rights Act of 1964.[112]

Although controversial, the accepted rule is that such disproportionate impact alone violates neither the equal protection clause nor Title VI.[113] But the disproportion does give rise to two available theories of relief. The outcome of the first as applied to competency tests is fairly settled;[114] the outcome of the second is not.[115]

The first and more direct theory is to show that the competency testing legislation reflects intentionally discriminatory legislative ac-

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students failed one or both sections. Of those taking the test a third time, the rates of failure were 60% and 36%, respectively, for black and white students. Among the high school seniors, the failure rate of black students was 10 times that of white students. *See id.* at 248-49. One study of the sociodemographic consequences of competency tests concluded as follows: "Consistent with past studies, as well as with earlier reports from Florida and other states that have begun using minimum competency tests, most blacks fall into the lower three deciles on both [English and math] exams." *See* Eckland, *Sociodemographic Implications of Minimum Competency Testing,* in MINIMUM COMPETENCY ACHIEVEMENT TESTING: MOTIVES, MODELS, MEASURES, AND CONSEQUENCES 124, 127 (R. Jaeger & C. Tittle ed. 1980).

111. U.S. CONST. amend. XIV, § 1.

112. 42 U.S.C. §§ 2000d to 2000d-6 (1982); *see also* Brest, *In Defense of the Antidiscrimination Principle,* 90 HARV. L. REV. 1, 1 (1976).

113. *See, e.g.,* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (Title VI prohibits racial classifications which violate equal protection); Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 264-65 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause"); Washington v. Davis, 426 U.S. 229, 242 (1976) (discriminatory intent may "be inferred from the totality of relevant facts"). The debate over the propriety of an intent standard has been extensive. *See, e.g.,* Binion, *"Intent" and Equal Protection: A Reconsideration,* 1983 SUP. CT. REV. 397, 443 (intent requirements realign responsibility of state for its actions); Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication,* 52 N.Y.U. L. REV. 36, 171 (1977) (unlawful intent should apply only when constitutional right can be safeguarded in no other way); Note, *Intent or Impact: Proving Discrimination Under Title VI of the Civil Rights Act of 1964,* 80 MICH. L. REV. 1095, 1095 (1982) (debate over intent standard continues).

114. *Cf.* Washington v. Davis, 426 U.S. 229, 242 (1976) (inference of discriminatory intent from all relevant facts).

115. *See* Debra P. v. Turlington, 474 F. Supp. 244, 254-57 (M.D. Fla. 1979), *aff'd in part, vacated in part,* 644 F.2d 397 (5th Cir. 1981).

tion.[116] Such an argument would necessarily place heavy reliance on the fact that the tests' disproportionate impact on minorities was certainly foreseeable to those legislators adopting it. But even given the murky status of current intentional discrimination law, such a pure foreseeability argument falls short, particularly considering the well-recognized reform purpose of competency-based legislation.[117]

A second type of challenge is also linked to a showing of intentional discrimination, but in a more distant way. This second argument, like the first, views the disproportionate minority impact as the result of intentional discrimination.[118] But, under the second argument, the discrimination that is said to have produced this result is not the legislative passage of the testing provisions, but illegal segregation predating the tests' implementation.[119] Under this argument, the tests violate the nondiscrimination principle because they produce an adverse impact that is, to some degree, the continuing effect of past discrimination.[120]

This "present effects" principle, which emerged before the courts ever examined competency testing,[121] played a role in the *Debra P.* court's invalidation of the diploma sanction as to certain classes of pupils.[122] Although the outcome of the *Debra P.* litigation was to up-

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116. *See* Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) (objective evidence may often be most probative evidence of intent; "normally the actor is presumed to have intended the natural consequences of his deeds").

117. In *Personnel Administrator v. Feeney,* the United States Supreme Court made clear that discriminatory intent is not simply "intent as awareness of consequences," and that, rather, the notion means that the decisionmaker acted "at least in part 'because of,' not merely 'in spite of,' " a discriminatory effect. *See* 442 U.S. 256, 279 (1979). Given this definition, and given the reform objectives of the Florida legislation, the *Debra P.* court held that the competency testing legislation was not the product of present intentional discrimination. *See* Debra P. v. Turlington, 474 F. Supp. 244, 254 (M.D. Fla. 1979), *aff'd in part, vacated in part,* 644 F.2d 397 (5th Cir. 1981).

118. *See* Debra P. v. Turlington, 474 F. Supp. 244, 254-57 (M.D. Fla. 1979), *aff'd in part, vacated in part,* 644 F.2d 397 (5th Cir. 1981).

119. *See id.* at 255.

120. *See id.* at 255.

121. *See, e.g.,* Gaston County v. United States, 395 U.S. 285, 291 (1969) (voter qualification by literacy test perpetuated past discrimination); Louisiana v. United States, 380 U.S. 145, 154 (1965) (court has duty to eliminate past and future discrimination in voter qualification tests); Gwinn v. United States, 238 U.S. 347, 359 (1915) (state statute regarding voter-literacy test perpetuates situation 15th amendment designed to correct).

122. *See* Debra P. v. Turlington, 474 F. Supp. 244, 254-57 (M.D. Fla. 1979), *aff'd in part, vacated in part,* 644 F.2d 397 (5th Cir. 1981). The trial court held that the tests perpetuated the effects of past discrimination as to the black plaintiffs. *See id.* at 254-57. Classes B and C in the *Debra P.* case included "all present and future twelfth grade black public school students

hold the use of the diploma sanction given certain conditions, the holding is, to a significant degree, linked to the facts found in that case.[123] And, in other contexts, disagreement continues as to the meaning and result of the present effects principle.[124] Understanding competency testing in this light, then, requires a closer look at the present effects principle and how it should apply to such tests.

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in the State of Florida . . . and Hillsborough County, Florida, who have failed or who" will have failed the competency test. *See id.* at 246. At the time of the district court's first ruling, these classes contained plaintiffs who had begun their schooling in the first year after which Florida ceased operating a de jure segregated school system. As a result, the plaintiffs had attended schools that had been part of this dual school system. Only since 1971 could it be said that Florida schools had been physically unitary. *See id.* at 255. Hence, at that point in time, the court could, and did, readily conclude that use of the diploma sanction was impermissible because the system had not been unitary. *See id.* at 257. The original appellate opinion upheld this conclusion. But the court also noted on remand that, if the state satisfied the other objections to the test, such as curricular invalidity, then the district court would need to re-examine the past discrimination issue in order to fashion a remedy. *See* Debra P. v. Turlington, 644 F.2d 397, 408 n.19 (5th Cir. 1981). This did happen on remand. The district court accepted the state's proof of curricular validity, and so faced the need to define the period remaining, if any, during which use of the diploma sanction would violate the present effects principle. *See* Debra P. v. Turlington, 564 F. Supp. 177, 180-86 (M.D. Fla. 1983), *aff'd,* 730 F.2d 1405 (11th Cir. 1984). By the time the district court addressed this issue on remand, in April 1983, the high school seniors had completed their schooling within a unitary system. Hence, the court had to consider evidence of whether, nonetheless, harmful vestiges of past segregation continued to exist and hamper equal educational opportunity. The court ruled that any vestiges that still remained were not sufficiently significant, and added that, even if they were, the diploma sanction satisfied the requirement of serving a remedial purpose. *See id.* at 186-88. The holding was affirmed on appeal. *See* Debra P. v. Turlington, 730 F.2d 1405, 1415-16 (11th Cir. 1984).

123. *See* Debra P. v. Turlington, 474 F. Supp. 244, 254-57 (M.D. Fla. 1979), *aff'd in part, vacated in part,* 644 F.2d 397 (5th Cir. 1981). The trial court expressly applied the tests set forth in McNeal v. Tate County School Dist., 508 F.2d 1017, 1020 (5th Cir. 1975). *See id.* at 254-57. As explained in more detail in ensuing text, the *McNeal* test consists both of a causation finding and a consideration of remedial factors. *See* McNeal v. Tate County School Dist., 508 F.2d 1017, 1020 (5th Cir. 1975). Since the plaintiff classes consisted in part of students who had attended Florida schools during the time when the unlawful dual system was in place, the court did not need to explore resolution of the causation issue in great detail. *See* Debra P. v. Turlington, 474 F. Supp. 244, 255-56 (M.D. Fla. 1979), *aff'd in part, vacated in part,* 644 F.2d 397 (5th Cir. 1981). In addition, the appellate court, in rejecting the school's remediation argument, concluded that the school had made no showing that "as presently used" the diploma sanction was necessary for remediation. *See* Debra P. v. Turlington, 644 F.2d 397, 407 (5th Cir. 1981). The qualification suggests that the court left open the possibility that the diploma sanction might in some circumstances satisfy the remediation requirement.

124. *See* Schnapper, *Perpetuation of Past Discrimination,* 96 HARV. L. REV. 828, 829 (1983).

B. *Present Effects of Past Discrimination*

The present effects principle has appeared most frequently and prominently in the school desegregation cases.[125] The United States Supreme Court relied on it when explaining why, in *Green v. County School Board*,[126] the school board's freedom-of-choice plan fell short of the desegregation mandate announced in the *Brown*[127] decisions. The freedom-of-choice plan failed to reverse the effects of the earlier segregation laws: the "dismantling" of those effects was necessary.[128] Quoting from an earlier decision, the Court repeated that " 'the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' "[129] The Court has since reaffirmed that there is a "continuing duty to eradicate the effects" of the discriminatory schooling system.[130] A recent discussion of the present effects concept explains its justification: "Regardless whether those who caused an alleged injury acted recently and nearby or long ago and far away, if they acted for discriminatory purposes, effective deterrence and full redress require that the resulting injury be remedied."[131]

Deciding whether an official action is invalid under the present effects principle, then, raises initially an issue of causation. But application of the principle has another dimension. Although in theory there is complete judicial power to reverse the effects of past discrimination, in practice other principles and realities constrain the exercise of this power.[132] In many situations, correction of an adverse present effect

125. *See, e.g.*, Raney v. Board of Educ., 391 U.S. 443, 449 (1968) (court should supervise desegregation that corrects past injustice); Green v. County School Bd., 391 U.S. 430, 439 (1968) (effective desegregation plan must consider present circumstances); Goss v. Board of Educ., 373 U.S. 683, 689 (1963) (desegregation plans must correct dual school system).

126. 391 U.S. 430 (1968).

127. Brown v. Board of Educ., 349 U.S. 294 (1955); Brown v. Board of Educ., 347 U.S. 483 (1954).

128. *See* Green v. County School Bd., 391 U.S. 430, 437 (1968).

129. *Id.* at 438 n.4 (quoting Louisiana v. United States, 380 U.S. 145, 154 (1965)).

130. *See* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 537 (1979).

131. *See* Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828, 834 (1983).

132. *See id.* at 846-49. This author argues that remedial efforts should be moderated only when the government cost of avoiding perpetuation is "grossly disproportionate" to the harm suffered, and that when innocent third parties are involved, the courts should distribute the burden as equitably as possible. *See id.* at 846. In this respect, the present effects principle raises an issue encountered in other contexts: when and how the judicial remedial power

will directly intrude on the rights of others who may have had no affiliation with the original discriminatory act. Or, at other times, corrective action may have administrative and practical costs that burden the discriminated-against class in other ways.[133] These realities form the heart of the complex debate over the propriety of affirmative action and busing. A judicial decision to remedy a present effect, then, rests first on a causation finding and second on some consideration of the other remedial factors that may be relevant to the situation.

One of the first applications of this logic in an educational context similar to the testing area was the Fifth Circuit's decision in *McNeal v. Tate County School District.*[134] In *McNeal,* a group of black students had challenged, on equal protection grounds, the district's use of "ability grouping"—the assignment of students to classes on the basis of measured ability. The resulting class composition had been significantly more segregated than that existing before such grouping.[135] This segregative effect, the court held, was constitutionally allowable only if the school had reached unitary status and one of two conditions had been met: (1) that the school district had demonstrated that the segregative effect was not the present result of past discrimination, or (2) that the school proved that the assignment method would help remedy the segregative effects through better educational opportunity.[136] In further explanation of the first condition, the court reasoned that the school must have operated "as an unitary system without such assignments for a sufficient period of time to assure that the underachievement of the slower groups is not due to yesterday's educational disparities."[137]

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should be limited by consideration of practicalities or rights other than those being adjudicated. For a discussion of this general issue, see Gewirtz, *Remedies and Resistance,* 92 YALE L.J. 585, 585-681 (1983).

133. *See* Brest, *In Defense of the Antidiscrimination Principle,* 90 HARV. L. REV. 1, 36-43 (1976). For example, busing can adversely affect, by disruption of schedules and way of life, families who never participated in discrimination. *See id.* at 36. In addition, "racially preferential hiring quotas and preferential protection from reverse discrimination may . . . frustrate the reasonable expectations of dispreferred parties." *See id.* at 41; *see also* Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action,* 131 U. PA. L. REV. 907, 928 (1983) (relationships and self-concept may suffer).

134. 508 F.2d 1017 (5th Cir. 1975).

135. *See id.* at 1018-19.

136. *See id.* at 1020.

137. *See id.* at 1021.

In setting forth conditions under which present effects of past discrimination are constitutionally tolerable, *McNeal* reflects the reality, discussed above, that other factors may counsel against the court's exercise of its remedial power.[138] Specifically, *McNeal* allows the existence of certain practices if they would help the attainment of equal educational opportunity. Practices that do not fall within this exception and yet perpetuate the effects of past discrimination are invalid under *McNeal.* Because both causation issues and policy factors play a role in the principle's application, the following discussion will take up each consideration separately.

1. Causation

Applying the present effects principle requires a showing that past discrimination has produced an identifiable harm that is, in turn, the cause of a present adverse result.[139] In the competency testing area, then, past discrimination must be shown to have produced current inferior education to minorities. This showing is not hard to make when a district is found to have engaged in discriminatory practices and yet has not been declared unitary. In such a district, the education received by minority students in attendance at any grade level is presumptively inferior.[140] A court could soundly conclude that any disproportionately low minority test scores in such a district were the direct result of that inferior education.

The same question—when poor minority scores reflect the present result of past discrimination—becomes more difficult once unitary status has been declared. One fairly clear guideline exists. A child who has been a pupil for any, even a short, time before the achievement of unitary status has received a presumptively inferior education for at least that period of time.[141] Hence, a strong argument emerges that a casual link exists between past discrimination and the inade-

138. *See id.* at 1020.

139. *See* Schnapper, *Perpetuation of Past Discrimination,* 96 HARV. L. REV. 828, 859-60 (1983).

140. *See* Note, *Bilingual Education and Desegregation,* 127 U. PA. L. REV. 1564, 1595 n.181 (1979) (courts' general failure to evaluate adverse effects of segregation in cases after *Brown* may reflect presumption that such harm exists).

141. This was the situation in *Debra P.* The black plaintiffs had begun their public school education in 1967-68; until 1967, the Florida public school system was segregated by law. The plaintiffs, therefore, had begun their education in schools wholly segregated. *See* Debra P. v. Turlington, 474 F. Supp. 244, 250-51 (M.D. Fla. 1979), *aff'd in part, vacated in part,* 644 F.2d 397 (5th Cir. 1981).

quate score of any minority student who has been a pupil for any period of time in a non-unitary system. Absent a policy reason favoring use of the tests despite this link, the present effects principle supports suspension of the tests for twelve years after the achievement of unitary status.

Most difficult is presenting and resolving a challenge to the tests after the passage of this approximate twelve-year period. Once no child taking the test has been a pupil prior to unitary status, plaintiffs could not make use of the presumption of inferiority.

Theoretically, a plaintiff could still seek invalidation by arguing that the lower minority test scores continued to reflect the effects of past discrimination. The shape of this argument would depend in part on the meaning, in a given case, of "unitary" status. As to some districts, earlier desegregation litigation may have produced a judicial finding that the district is "unitary." The message of such a finding would be that, as of that point in time, the vestiges of the unlawful dual system had been eliminated.[142] Twelve years after such a declaration, and even before such time, a plaintiff would have difficulty formulating an argument as to the continuing harmful vestiges of earlier discrimination.

As to districts for which no such judicial declaration exists, the existence of unitary status would itself be a fact issue presented within the challenge to the tests themselves. Quite possibly, the court in such a context might make use of a less rigorous concept of unitary status than would a court presiding over desegregation litigation.[143]

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142. *See* Tasby v. Wright, 713 F.2d 90, 93-96 (5th Cir. 1983) (district court did not err in refusing to declare unitary status when Dallas Independent School District still reflected vestiges of past segregation); Ross v. Houston Indep. School Dist., 699 F.2d 218, 225 (5th Cir. 1983) (district may be declared unitary when state officials have achieved a school system clean of every residue of past official discrimination).

143. For example, the initial district court opinion in *Debra P.* seemed to identify 1971 as the year when unitary status was achieved, see Debra P. v. Turlington, 474 F. Supp. 244, 255 (M.D. Fla. 1979) ("Florida schools in the main have been physically unitary since 1971"), *aff'd in part, vacated in part,* 644 F.2d 397 (5th Cir. 1981), and seemed to mean by this conclusion that as of 1971 the system was no longer dual, see *id.* at 253 ("Until the school term 1971-1972, the condition of segregated schools persisted throughout the state."). By contrast, in desegregation litigation, courts at least in principle have defined unitary status as not merely the existence of integrated schools, but the elimination of the effects of segregated schools. *See* Tasby v. Wright, 713 F.2d 90, 93-96 (5th Cir. 1983); Ross v. Houston Indep. School Dist., 699 F.2d 218, 225 (1983). In the second appellate court opinion in *Debra P.*, the court expressed the view that "unitary" in the *McNeal* context does not denote the complete removal of all vestiges. *See* Debra P. v. Turlington, 730 F.2d 1405, 1414 n.14 (11th Cir. 1984).

After establishing the first point of proof—continuing inferiority of the education received by minority pupils—a plaintiff would need to show that such inferiority resulted from past segregation. Although this point appears to be a complex causation issue, proof of it might consist of demonstrating the absence of other explanations for the current relative inferiority. If the cause is not the lingering effect of past discrimination, then it would be difficult to find acceptable alternative explanations: any current actions resulting in relative inferiority in minority education would be difficult to sustain as nondiscriminatory. Hence, the causation point would be readily established once proof of relative inferiority had been made. The third point of proof would be demonstrating that the present inferiority had had a causal impact on relatively low minority test scores. As with the second point of proof, the third would follow fairly readily if the first were established. Again, the absence of acceptable alternative explanations could aid in satisfying this third requirement.

2. Remedial Considerations

As discussed earlier, policy arguments may counsel against corrective judicial action even if a present situation has been causally linked to past discrimination. *McNeal* and its application in later cases have helped cast light on these policy issues in the context of competency testing.[144] If a school district has not arrived at unitary status, the district cannot avail itself of policy arguments favoring use of the tests.[145] First, such a district would be unable to argue that remedial action (suspension of the tests) would penalize that district for the discrimination of a different entity. Second, those who would benefit from the remedial action—the minority pupils in such a district—would be themselves the victims of the discrimination whose correction was sought. In other words, an identity would exist between both the discriminating entity and the discrimination victims.[146]

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144. *See, e.g.,* Bester v. Tuscaloosa City Bd. of Educ., 722 F.2d 1514, 1517 (11th Cir. 1984) (applied *McNeal,* holding no violation since no resegregation); Morales v. Shannon, 516 F.2d 411, 413-14 (5th Cir. 1975) (*McNeal* applies in bilingual-bicultural context); McNeal v. Tate County School Dist., 508 F.2d 1017, 1021 (5th Cir. 1975) ("any racially neutral method of classroom assignment . . . [which is] educationally sound" may be used).

145. *See* McNeal v. Tate County School Dist., 508 F.2d 1017, 1020-21 (5th Cir. 1975).

146. When such identity is present, it supports the arguments that favor remediation of a present effect of past discrimination. *See* Schnapper, *Perpetuation of Past Discrimination,* 96 HARV. L. REV. 828, 846 (1983).

Once a school district has reached unitary status, the *McNeal* tests argue for the suspension of competency tests until the effects of discrimination have been eliminated or unless the tests serve a remedial purpose. The latter caveat reflects a policy consideration rather than a causal one; it makes clear that, when a remedial purpose exists, disproportionate impact may be allowable even when it results from past discrimination.

Before considering whether competency testing satisfies this condition of remediation, it is important to recall the two basic uses of the tests in Texas: as measurement devices for the purpose of identifying and responding to students with a need for additional learning opportunities, and as a condition to graduation.[147] The two uses are severable; one could be suspended while the other remained in effect.

For all uses of the tests other than as a graduation requirement, a strong case exists that the Texas legislation on its face meets the *McNeal* test of remediation. The assessment of individual competencies, and the provision of remedial education in response to those assessments, is a central purpose of the Texas act and of competency testing generally.[148] Whether such tests will effectively meet that goal will likely remain the subject of lively educational policy debate. But a court could soundly conclude that use of the tests for such a purpose is constitutionally proper on the condition that school districts, in fact, carry out the Act's mandate to provide remedial education.

The condition is an important one. Given a finding of a present effect of past discrimination, the requirement of remediation becomes not only state-mandated, but constitutionally mandated. Although a court should not undertake to review the pedagogical efficiency of such classes, it should ensure, under a more process-based review, that the district had devoted a sufficiently meaningful level of resources and planning to remedial education.

The use of the test as a condition to graduation is harder to justify under *McNeal's* reasoning. Because schools can use the tests for measurement and assessment purposes without the diploma condition, how the diploma sanction serves a remedial purpose is more difficult to see. Proponents of this use argue that the incentive it provides to students heightens the effectiveness of competency-based education, which itself arguably serves a corrective purpose by identifying and

147. *See* TEX. EDUC. CODE ANN. § 21.551(a), (b) (Vernon Supp. 1985).
148. *See id.;* M. LAZARUS, GOODBYE TO EXCELLENCE 3-5 (1981).

responding to students with learning deficiencies.[149] But this "incentive" argument, at least when used to fit the diploma sanction into the *McNeal* rationale, encounters serious problems.

The *McNeal* remediation concept reflects the reality that a disproportionate impact on minorities may represent a benefit to those disproportionately affected. *McNeal* acknowledged that, when properly instituted, ability-grouped classes could be an example of such a beneficial situation. What *McNeal* did not answer is how narrowly bounded the exception is. Can an institution satisfy the exception by contending that the challenged practice will, in time, benefit the class disproportionately impacted? Or must the institution demonstrate that the very individuals disproportionately affected at the present time also are the beneficiaries of the challenged practice? If the former applies—if no identity of interest is required between those disproportionately affected and those benefited—then the diploma sanction may fall within the *McNeal* exception. Because that sanction is said to promote the entire competency-based educational effort, a remedial benefit to some individuals over time arguably would flow from its use.

But if an identity of interest is required, the diploma sanction is harder to justify. If events in Texas follow the pattern seen in other states, a number of students will eventually fail to graduate as a result of the exit-level tests, and of that number, a disproportionate percentage will be minority students. For such students, the tests impose a heavy loss—absence of a diploma—that outweighs any beneficial or incentive effect of the tests as to such students.

V. CONCLUSION

Because the legal issues raised by competency testing are not fully settled, and because the Texas act contains some troublesome features, the Act seems likely, eventually, to receive judicial examination. Under the Act's structure, the Central Education Agency, when formulating the tests, will have the opportunity to satisfy in advance some of the questions that will inevitably be asked: the CEA can ensure that the tests meet professional and legal standards of content

149. *See* Debra P. v. Turlington, 564 F. Supp. 177, 188 (M.D. Fla. 1983), *aff'd,* 730 F.2d 1405 (11th Cir. 1984). This was the argument presented to and accepted by the court in the *Debra P.* litigation after the first remand. The district court, upon remand, accepted expert testimony as to the usefulness of the diploma sanction in motivating students. *See id.* at 188.

validity, and can adopt a theoretically relevant means of identifying the minimum level of performance. More difficult to satisfy will be the requirements of notice and curricular validity, given the early implementation date set out in the Act. Finally, as to those Texas school districts in which unitary status does not exist or has not existed for a sufficient period of time, application of the diploma sanction will raise antidiscrimination concerns that may require the suspension of this sanction for some time.