

State-Mandated Performance Testing: Legislation and Litigation

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ABSTRACT

Given mandatory testing provisions in the *No Child Left Behind Act of 2001*, statewide performance testing is likely to continue. Statewide proficiency testing programs will likely generate additional litigation in federal and state courts. In this article, I examine legislation and litigation concerning state-mandated performance testing.

Legislation

The state has the authority to establish standards for promotion and graduation. In recent years, states have begun to rely heavily on the standardized test as a criterion to determine students' proficiency in core subject areas (English, 2011; Popham, 2012; Walberg, 2011). For example, in the mid-1970s, only a few states had enacted testing legislation pertaining to students' academic proficiency. Now all states have laws or administrative regulations regarding statewide performance testing, and most states require passage of a test as a condition of graduation.

As long as such measures of academic attainment are reasonable and nondiscriminatory, the courts will not interfere. Courts have traditionally given teachers and administrators wide latitude in deciding on appropriate academic requirements. This position of nonintervention was adopted by the courts as early as 1913 in *Bernard v. Inhabitants of Shelburne* (1913). The court said "So long as the school committee acts in good faith, their conduct in formulating and applying standards and making decisions touching this matter is not subject to review by any other tribunal." The United States Supreme Court reiterated this precedent in *Board of Curators v. Horowitz* (1978), when it said that "Courts are particularly ill-equipped to evaluate academic performance."

Statewide performance testing is strongly supported by the federal government. The No Child Left Behind Act of 2001 mandates annual testing in grades 3 through 8 in reading and mathematics and in science and social studies at selected grades; and ties federal assistance and sanctions for schools to student test scores. High-stakes testing

shape the instructional program, and states increasingly are evaluating teachers' and principals' performance based on their students' test scores.

The American Evaluation Association (AEA) issued a statement opposing the use of tests as the sole or primary criterion for making decisions with serious negative consequences for students, educators, and schools. AEA joins a number of other professional organizations (e.g. American Educational Research Association, International Reading Association, National Council for Teachers of English, National Council for Teachers of Mathematics, National Council for the Social Studies, and National Education Association) in opposing the inappropriate use of tests to make high-stakes decisions. And claims have been made that teachers are limiting the curriculum to material covered on the tests (McNeil, 2000; Ravitch, 2011).

Litigation

The major source of litigation regarding statewide performance testing stems from the movement of many states to competency tests as minimal criteria for awarding a high school diploma. The high school diploma represents a measure of attainment. Thus, the diploma is of special interest to the student. The diploma, therefore, meets the criteria for a property interest under the due process clause of the Fourteenth Amendment, enunciated by the United States Supreme Court in *Board of Regents v. Roth* (1972). The Court stated that "to have a property interest is a benefit, a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it." A high school diploma is a benefit that everyone needs, and when a student progresses academically for twelve years, one may assume that the diploma will be expected, contingent on the student's normal academic progress.

Litigation may occur when the competency tests used cause a risk of nonreceipt of the diploma and are the result of tests that do not measure the content they are supposed to measure. If tests do not measure the content they are supposed to measure, then the tests lack validity. Another important test concept is reliability, which requires that the test must yield consistent results.

These issues of due process and validity and reliability became the foci of the court in *Debra P. v. Turlington* (1981), a case still widely cited as establishing the legal precedent pertaining to student proficiency tests. The court held that the property interest in receipt of a diploma necessitated sufficient notice of conditions attached to high school graduation and an opportunity to satisfy the standards before a diploma can be withheld were not met (due process). Furthermore, the court held that the state may have administered an unfair test in that the content of the test did not match the material taught in the schools (validity). The state was enjoined from using the test as a diploma prerequisite for four years to provide time for the effects of prior school desegregation to be removed and to ensure that all minority students subjected to the test requirement started first grade under desegregated conditions. On remand, *Debra P. v. Turlington* (1983), affirmed (1984), the district court ruled to lift the injunction, and the appeals court affirmed this decision. The state presented substantial evidence to the judiciary that the test was valid. Data also showed significant improvement among African American

students during the six years the test had been administered. Thus, the testing program could help remedy the effects of past racial discrimination.

Other courts have relied on *Debra P* as precedent. A Texas federal district court, in *GI Forum v. Texas Education Agency* (2000), struck down challenges to the Texas Assessment of Academic Skills (TAAS) test that had been administered to all Texas students from 1990 to 2000. The court held that the test was valid in that the content of the test was congruent with the material taught in the schools, and students received adequate notice of the test requirement. The court noted that there was evidence of higher minority failure rates but that the passing-rate gap was narrowing and that the testing and remediation programs were addressing the effects of prior discrimination (Texas Education Agency, 1994, 2000).

Two Texas federal district courts ruled differently with regard to students being allowed to participate in graduation exercises contingent on their passing the statewide proficiency test. In *Williams v. Austin Independent School District* (1992), the Court ruled that students who failed the state's proficiency test have no constitutional right to participate in the graduation ceremony, since they had been given adequate notice of the test and provided the required courses to prepare for the test. In *Crump v. Gilmer Independent School District* (1992), the court struck down a school district's attempt to prevent students who had failed the state's proficiency test, but satisfied other graduation requirements, from participating in the graduation ceremony. The court reasoned that allowing students to graduate would provide no possible harm to the district from their participation, because their diplomas would be withheld until students passed the proficiency test. In another Texas federal district court case, *Hubbard v. Buffalo Independent School District* (1998), the court upheld a school district's requirement that all students who transfer from nonaccredited schools must take the state's proficiency test at their own expense.

Students with mental disabilities may be given a waiver from taking a proficiency test if the individualized education program (IEP) team agrees that the child is not likely to master the material covered on the test. And students with disabilities may be entitled to special accommodations in the administration of tests to ensure that their knowledge, rather than their disability, is being tested. The specific nature of the accommodations remains controversial.

Conclusion

Given mandatory testing provisions in the No Child Left Behind Act of 2001, statewide performance testing is likely to continue. Statewide proficiency testing programs will likely generate additional litigation in federal and state courts. School administrators can take steps to minimize legal challenges by ensuring that (a) the proficiency tests are aligned with both curriculum and instruction, (b) students are advised upon entrance into high school that passage of the proficiency test is a prerequisite to receipt of a diploma, (c) tests are not intentionally discriminatory and do not perpetuate the vestiges of past school segregation, (d) students who fail the proficiency test are provided remediation and opportunities to retake the test, and (e)

students with disabilities are provided with appropriate accommodations (Thomas, Cambron-McCabe, & McCarthy, 2009).

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