I have had the pleasure of attending and addressing the annual NES conferences for more years than I would like to count. My job at these conferences is to alert you to what is possibly coming down the pipeline in terms of litigation trends in education. This is a serious and somewhat frightening topic for so early in the morning, but this year the good news is that the litigation trends I will talk about are not ones that challenge teacher competency testing, but ones that actually support it.

Background

To talk about where we are today with the testing movement from a litigation perspective and where we are likely to be going for the next few years, we have to go back in time to the early 1980s. Most of the pressure toward high-stakes testing, student achievement testing, and teacher competency and certification testing really began then, with a wake-up call that shook most of the education, business, and political establishments with the challenge that American education was not where it should be. The Nation At Risk report from the National Commission on Excellence in Education warned of the rising wave of mediocrity. It said that if a hostile power wanted to undermine our civilization, they could not have done a better job than to infiltrate the education system and impose on us the types of educational institutions that we had in the 1980s. So with that declaration of crisis by a presidential commission, that we were a “nation at risk,” we started getting some fervent responses which took the form of increasing graduation requirements and forcing children to take more courses. I consider this the first phase of getting to where we are now.

Michael Rebell
The movement for student minimum competency testing raised a lot of attention and led to a number of litigations in the 1980s, but in retrospect it was a very quickly passing phenomenon. However, we saw an increased emphasis on teacher competency testing and teacher certification, presumably to upgrade the quality of education in our schools and to get us in a better position to compete in the global marketplace, something very much in the consciousness of our nation’s leaders at the time. I think that that initial response to the Nation at Risk report, to that initial wake-up call, matured and moved along in the late 1980s and early 1990s and took a much more systematized form with the advent of the National Goals 2000 and the standards-based reform movement.

National Goals 2000 developed out of a landmark event in 1989 when President George H. Bush convened a major summit meeting in Virginia, attended by all fifty governors and many of the corporate leaders of the nation. The meeting was co-hosted by then Governor Clinton. The result of that meeting was the birth of the standards-based reform movement, which has taken in hold in 49 of the 50 states. The concepts behind standards-based reform are quite thoroughgoing. It is probably the most comprehensive and intensive attempt at systemic reform in the history of American education. The idea was first to set challenging standards for what students should accomplish, what they should know at various points in their education, and especially what they should know when they graduate from high school, and then to reform every aspect of a state’s education system to conform to these content standards. What that means in theory is that under standards-based reform, the education that is provided to future teachers at teacher-training institutions should be moving lockstep with the new standards that the state has promulgated.

**Responding to the Wake-Up Call**

How do we know that newly trained teachers are prepared to teach the standards-based curricula? Teacher certification tests must test candidates’ ability and knowledge to actually teach the content of those standards to students in a variety of classrooms. Curricula, books, actual classroom presentations, and the assessment of students at the end of the process should all be linked with the basic standards. It is a challenging reform that has led to marked improvement in the area of teacher certification. Forty-three of the fifty states now require some kind of testing for entry-level teachers. Efforts have been made to improve the curricula at teacher-training institutions and, with a nudge from the reporting requirements in federal Title II, there is real
pressure for teacher-training institutions to track and improve the pass rate of their students on state certification exams. This systematized response to the perceived crisis in American education is what I call the second phase.

From Rhetoric To Requirements

The third phase, which is where I would say we are now, is the implementation of standards-based reform by approaching it not just as a theory, but as a mandatory requirement in all of the states. Pressure to implement reform has taken two forms. One form has been in litigation. A wave of lawsuits has focused on the basic premise of standards-based reform, namely that all children can learn at the challenging levels set by most states if they are given the opportunity, which in many instances means the basic resources to meet those standards. In the wave of litigation since 1989, lawsuits have occurred in about half the states in the country, most of which have been won by plaintiffs. I have been very involved in a major legal challenge of this type in New York State. Over the last ten or twelve years, as I am sure many of you who are from New Hampshire, Vermont, Ohio, Wyoming, and a whole range of other states can testify, litigation has brought forth major initiatives, which tend to be based on clauses in state constitutions that guarantee students some minimum, basic level of education. The phrases differ from state to state. In New Jersey and Ohio it is thorough and efficient education. In New York and North Carolina it is a sound basic education. The words may vary but the concept is the same, that students are entitled to some basic level of education.

How do the courts know what that basic level of education is? In some instances they examine what the framers who wrote the state constitutions in the nineteenth or the eighteenth century meant. But what is much more practical and useful to the courts is looking at the standards that the states have now set forth in most of their standards-based reform initiatives. There is a growing link between the articulation of standards by state education departments and legislatures and the remedies that courts are providing, which gives an extra and important impetus to the implementation of these reforms. So litigation is one area where serious pressure to fully implement standards-based reform is being applied.

The other area prompting implementation is the major federal legislation that was passed in 2001 known as the No Child Left Behind Act. No Child Left Behind is based on the same philosophy as the standards-based reform movement, which is that all children can indeed learn at the levels set by
the states’ own educational standards if there is sufficient will, resources, and seriousness of purpose. The requirement under *No Child Left Behind* is probably more demanding than any education goal ever set forth in any legislation in the history of this country. That goal is that literally every child is going to learn at the levels required by the particular state’s standards-based reform, or else. And there is a strong “or else,” which is, theoretically, a loss of federal funding. States are given a phase-in period of twelve years, which seems like an incredibly long time to get to this goal of universal student achievement. But even though that goal is in the far future, the act calls for yearly progress in percentages that are much more demanding than anything that states traditionally have been able to accomplish. Results are analyzed in terms of a disaggregation of achievement scores by racial and ethnic groups and by gender and income levels, so states must show progress not only in their overall performance toward the goal of every child achieving at the level of state standards, but progress in terms of each of these disaggregated groups. So, *No Child Left Behind* is an implementation tool that includes a reporting requirement and yearly sanctions that give students the right to leave the failing schools and attend other schools. The rhetoric that has gone along with standards-based reform is being replaced by an enforceable plan to actually achieve those results.

**Teachers: Our Most Significant Resource**

What implications do these two movements, the adequacy litigation that is brought to state courts and the federal *No Child Left Behind* Act, have for teacher certification testing? One of the interesting results of these state-based litigations is that when research focuses on the resources that children need to learn at high levels, results show that the most significant factor in student achievement is the quality of the teachers in the classroom. In New York, where we had a seven-month trial and dug in detail into every aspect of children’s education, the primary issue was the quality of teachers. In New York City we have had as much as 14 percent of the teachers uncertified. But we dug deeper than that. We compared the initial testing performance of those teachers who eventually passed the certification test and wound up in New York City classrooms with the performance of teachers in other districts. The bottom line was that New York, like other major urban areas in our state and around the country, was getting teachers from the bottom of the barrel. To put this in statistical terms, among the cohort of all teachers that had been appointed to teach in New York City over the past ten years, 35 percent of them had initially failed the state teacher certification test, and
many of these people had failed it four or five times. We thought it was significant that people who eventually got through had such difficulty passing an examination that was not generally considered to be overly difficult. The judge did too, especially when looking at subject areas like mathematics, where 42 percent of the cohort of teachers failed at least one time in their attempt to pass the state exam.

**A Court’s Definition of Qualified**

All this has led to the judge’s decision in the New York case that students were entitled to have qualified teachers in the classroom, a decision that explained what was meant by *qualified*. Because the decision in the New York case has been at least temporarily overturned by an intermediate appeals court (we are on track to go to the highest court in the state to get the decision reinstated), I want to take the definition of what a court means by “qualified” from another state. The case of *Hoke v. North Carolina* dealt with similar issues about the kinds of qualifications that teachers need to meet state standards. Last year, the judge issued this requirement in the case: *Every classroom must be staffed with a competent, certified, well-trained teacher who is teaching the standard curriculum by implementing effective educational methods that provide differentiated individualized instruction, assessment, and remediation.* This says more than that teachers must pass an examination. It says that we have to show that the teachers are teaching students in actual classrooms, effectively and in accordance with the expectations of the state standards. That is the logic of the whole standards-based reform movement. Standards-based reform is a comprehensive, integrated approach to education reform that includes not only implementing demanding standards, but reforming every aspect of the system, especially teacher training and teacher certification, to meet those standards. That approach is being taken seriously by reformers, advocates, and litigators around the country.

**Recommendations from the Education Trust**

A recent report from the Education Trust in Washington, D.C., a major advocate for educational improvement, especially of minority students in inner cities, analyzed the content and the significance of a sample of teacher certification tests (English/language arts, mathematics, and science) around the country. Their premise was that while we dramatically ratcheted up our standards for students, we did not insist on a commensurate increase in standards for teachers. This a chilling indictment of all of us K–12 leaders, policy makers, higher educators, and advocates. Looking at the range of
teacher certification tests, they said, “existing mechanisms are not even close to adequate for assuring teacher quality.” Seven states have no licensing examinations for teachers. The remaining 43 plus the District of Columbia require examinations, but the combination of content levels that are too low and passing scores that are too low renders these systems effective in excluding only the weakest of the weak. So, taking standards-based reform seriously in terms of teacher certification means not just testing for minimum competency, but testing for adequate skills to effectively teach mandatory requirements in the classroom. According to the Education Trust, the key question that should be asked of a cut score panel in putting together a teacher certification test is not, “What percentage of beginning teachers are able to answer this question correctly?” but “What should teachers know and be able to do to teach these new standards to their students?” To be effective in the classroom, teachers must perform not at minimal levels, but at the levels required by demanding initiatives like the No Child Left Behind Act.

**Efforts of the States: Some Examples**

I think that the understanding of what is required by standards-based reform is beginning to permeate teacher-training institutions, the policy-making community, and the legal community. Many states have revised legislation regulating teacher certification testing. For example, I noticed that a few years ago Oklahoma’s education department passed a new requirement for teacher certification testing that states that “the teacher understands and is able to develop instructional strategies and plans based on the state core curriculum.” So that is saying the purpose of the exam is not to test minimum competency, but to demonstrate the link between the standards and the classroom achievement of students. Massachusetts has made a similar revision in their approach to teacher certification testing. Massachusetts takes the content from the students’ standard requirements and puts it into the regulations for teacher certification testing. In New York in 1998, two years after the Regents put their new learning standards into effect as a mandatory requirement for all students, the state education department, working with NES, undertook a review of the major liberal arts test, the LAST, to see if it tracked the new academic requirements. Their conclusion was that the test tracked them pretty well, but that the cut scores needed to be raised a substantial degree to provide some assurance that the teachers who were being certified were in fact capable of teaching the new standards. I am not sure whether all of the decisions to increase cut scores have actually been put into effect, but there has been a significant movement in that direction. Probably the best example of a serious attempt to move certification testing toward a complementary
close fit with the new requirements for student achievement is California’s requirement for the reading improvement test. That assessment, put into effect a few years ago, requires all incoming multiple-subject teachers to show that they have the knowledge and skills to teach reading. The requirement was based on a very thorough process of examining the skills and knowledge that are needed to teach reading and then aligning the curriculum and assessment instruments in teacher-training institutions with the required methodologies and outcomes.

The Future of No Child Left Behind

Although we see a number of states moving in the direction of standards-based reform, does that mean that in the future all states will be required to take these standards seriously? According to Rod Paige, the Secretary of Education, the congressional intent behind the No Child Left Behind Act was that high-objective, uniform state standards of evaluation would be aligned with challenging state academic content and student achievement standards. His understanding of what is required for teacher certification testing under the No Child Left Behind Act is very similar to the recommendations of the Education Trust and to the approach used in developing the California reading test. Now, is his statement of congressional intent reflected in the new draft regulations that the Department of Education has put out to enforce the No Child Left Behind Act? Actually, there is quite a gap between the stated intent and what the federal government is actually demanding. Although the new regulations have not been put into final effect, it looks like the direction in which they are heading is something of a cop-out, because this act is advertising a lot more than it delivers. It makes challenging demands on school districts, sets up high expectations for students, and uses phrases like every child must have a highly qualified teacher and effective this year all new teachers must be highly qualified. It has essentially banned the use of temporary teacher certifications that are not based on the full range of certification requirements.

While the demands of No Child Left Behind seem to relate to the strong statement of congressional intent that Rod Paige mentioned, there are some big loopholes. One is that the actual definition of a highly qualified teacher is essentially: somebody who has passed whatever the state certification requirements are. There is no substantive requirement that the states’ certification exams be at any uniform level. And beyond that, there is a further loophole allowing alternative certification approaches, without any defined requirements. These loopholes result from the compromise
between federal oversight under this law and local control which allows states to continue to have their range of different requirements. One possible negative outcome of this parallels what many people fear is happening with the requirements for student achievement testing under the *No Child Left Behind* Act. Achievement testing requires students to be making progress toward actual achievement at the levels required by state standards, but there is no national understanding of what minimums or what substance there should be to those state standards. Recently, states like Michigan that have very demanding standards are finding a large number of their schools listed as failing schools under the new federal requirements because they have not made sufficient progress. Other states that have very low standards have almost no failing schools because their standards do not demand much. And one might see a parallel to that with teacher certification testing; we use brave rhetoric like *highly qualified teachers*, but if there are no demands on states about the content of their certification exams, where is this all leading?

There is a possibility that the *No Child Left Behind* Act is going to be nothing more than rhetoric and propaganda when all is finished. I want to remind you, however, that when I gave the overview of coming directions, I talked about the *No Child Left Behind* Act, but I also talked about the state adequacy cases. These litigations are fueled by the perspective of advocates who see an opportunity here to focus on the needs of the students who have had the most difficulty in the past, the so-called at-risk kids who are furthest from achieving in accordance with standards. The adequacy cases take seriously the pledge that the states and the federal government have made that no child will indeed be left behind. We will soon see whether the federal government, through its regulations, is fully enforcing its own act. What that new law has done, what phrases like *highly qualified teachers having to be in every classroom* have done, is reinforce the logic behind the adequacy perspective. We will find more and more litigation in state courts and I think we will also see creative ways of bringing litigation into the federal courts to demand that state certification tests show the effectiveness of teachers in the classroom, not just their minimum competency.

**Results of Recent Litigation: Massachusetts and New York State**

The most recent example of how this issue arises in litigation is a federal case filed in Massachusetts which attacked the high-stakes outcome for students of their testing program. The thrust of the attack was that it is not fair to
hold the students to these very demanding requirements when you have not given them an opportunity to learn the new standards. And what are the allegations about the lack of resources that have treated students unfairly in Massachusetts for so many years? Paragraph 123 of the complaint says, “the state defendants have failed to ensure that the 71,900 teachers teaching in the public schools in the 371 school districts in the commonwealth have sufficient knowledge, skills, authority, and means to effectively align the curriculum being taught in their respective schools and classrooms with the curriculum frameworks for mathematics and English language arts.” So this case picks up the rhetoric that teachers are supposed to be knowledgeable and skilled in those standards and turns the rhetoric into reality. It says that if all 71,900 teachers are not qualified, then the students are not being given their constitutional rights and judicial enforcement will be required.

The Massachusetts case makes the statement that when new standards are put into effect, a new political movement is ignited that is going to be like an express train leaving the station. Words like highly qualified teachers, all children can learn, are on one level rhetoric. But on another level, when they become enmeshed in the public thinking and in the political culture, they take on a life of their own. Even if some of our public officials, like the Secretary of Education, have not yet taken the step of linking their rhetoric to their enforcement mechanisms, I believe that the course of events and the nature and logic of litigation will force them to do it.

The best example I can give you of the power of the education adequacy perspective is New York’s current challenge to the state education finance system. I mentioned to you that we won a great victory in the trial court. The trial judge ordered almost everything that we asked for, but when the case went up to an intermediate appeals court it got reversed. Without discussing all the legal reasons for what is going on, I can say I am confident that the trial court’s ruling is going to be put back in effect. Why am I so confident? Because the interesting twist here is that the governor, in bringing this appeal, got what he asked for, and found out that it was more than he could hold on to. The governor convinced four judges on the intermediate appeals court to accept a standard that said that students in the twenty-first century need no more than a sixth- to eighth-grade level education. This court actually came

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1 In fact, on June 26, 2003, the Court of Appeals, New York State’s highest court, did reverse the intermediate appeals court decision holding that all students are entitled to “a meaningful high school education.”
out with a holding that sound basic education under our state constitution meant that sixth-grade level math skills and eighth-grade level reading skills were sufficient. This created such a political storm in the midst of a gubernatorial campaign, that three weeks ago a phenomenon occurred that I have never witnessed in my 30 years in litigation. The prime defendant in the case, the governor, who won at the appeals court level, denounced the decision that he had won. He stood up and said, “I understand that this court has said children need only an eighth-grade level education. I disagree with the judges and I disagree with that decision.” It is incredible that a governor who fought so hard and got the result that he wanted could not hold on to it because the public uproar was so great.

**Conclusion**

The results of the kinds of litigation I have described hold a promise for students and their parents who have been denied adequate educational opportunities their whole lives. When that promise of actually obtaining an education that will allow them to meet demanding achievement levels and be prepared for competitive employment and productive lives is held out in a serious way, it becomes political dynamite. The rhetoric that is leading this charge will be taken seriously, and if it is not taken seriously by some of the policy makers, it will be taken seriously by the courts.