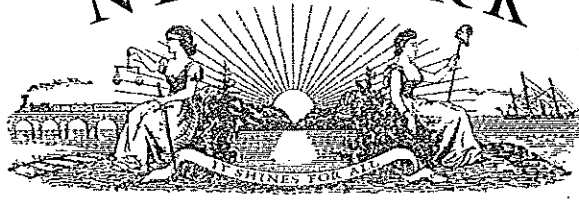


# The

NEW YORK



# Sun

WEDNESDAY, AUGUST 23, 2006

## BIAS SUIT ON TEST FOR TEACHERS GETS BIG BOOST

*Appeal Ruling Could Make City  
Pay Millions to Those Who Failed*

By JOSEPH GOLDSTEIN  
Staff Reporter of the Sun

A federal appeals court has revived a 10-year-old lawsuit that alleges the basic test New York City public school teachers must pass is discriminatory against blacks and Hispanics.

The decision reversed a 2003 verdict by a judge who had ruled that the teaching exam was "job related" and was therefore legal. The plaintiffs have argued since 1996 that there is not enough evidence to show the exam accurately tests teaching ability and that the data shows it has disproportionately excluded blacks and Hispanics from teaching in city schools.

In a 48-page decision, a panel for the 2nd U.S. Circuit Court of Appeals ruled that the trial judge made a mistake in finding how the test was scored and used the wrong legal standard when ruling that the exam was "job related."

The latest decision does not find outright that the exam violates the law. But the appellate court ruled that the trial judge had used too loose a legal threshold in deciding that the exam was legal even when it disproportionately failed minority teachers. The pan-

el of judges ordered that a judge look again at the exam, but this time with a higher level of scrutiny.

As it stands now, the decision instructs that the case be returned to U.S. District Court in Manhattan, where a new federal judge will inquire if there is missing evidence.

That alone throws back into question the future of the test that all teachers across the state must pass before they can spend a career before the classroom. If the new judge rules for the plaintiffs, it raises the possibility that the city will be forced to pay tens of millions of dollars in back pay to be distributed among thousands of former teachers.

A spokeswoman for the city's law department said, in an e-mailed statement, "the City is reviewing the decision and considering its legal options."

"This is a huge deal because the court

# Court Revives Suit Alleging Test for City Teachers Is Discriminatory

*TEST continued from page 1*  
is saying the judge had made a mistake in deciding whether this particular test is job-related," the president of United Federation of Teachers, Randi Weingarten, said in a telephone interview.

The test, the Liberal Arts and Sciences Test, is commonly referred to as the LAST exam, and was designed by a company, National Evaluation Systems. The state Board of Education first began using the test in 1993, according to the decision. Since then, all teachers, both old and new, are required to pass the exam to receive their state certification, according to a spokeswoman for the state's Department of Education.

The evidence from the 1990s that was introduced in trial showed that test takers who were white, had a pass rate of 91% to 94%. Black and Hispanic test takers had pass rates that were between one third and one half lower.

The lawyer who filed the lawsuit in 1996, Barbara Olshansky, said she estimates there are between 5,000 and 8,000 black and Hispanic current and former teachers who are represented in the lawsuit.

Lawyers for the plaintiffs noted that teachers in New York State are re-

quired to hold a master's degree and take a wide battery of exams that ensure they are qualified. They said they had no objection to demanding that teachers take exams or produce writing samples to become certified. But they contend that the existing exam is a failed product.

"The objection we have is that there is a science to developing tests and that they are using a test here that was not properly developed and is not reliable for producing any meaningful information about the test-taker's ability," one attorney representing the plaintiffs, Joshua Sohn, said.

At the trial, the exam questions — which consist of both multiple choice and essay questions — were placed under court seal because the questions are reused on future exams. But Ms. Olshansky said that the questions were often "culturally and generationally bound" and led to many qualified teachers being terminated. Ms. Olshansky said one multiple-choice exam question that is no longer in use asked test-takers to answer what Andy Warhol meant to convey in one of his most famous paintings.

The district judge who presided over the lower court trial, Constance Baker

Motley, ruled that the test was legal under Title VII of the 1964 Civil Rights Act because the essay section of the exam was clearly job related and was given the most weight in grading the exam.

The panel of judges found that graders did not give the essay as much emphasis as Judge Motley had found. The judges on the appellate panel are Judges Keena Raggi, Richard Wesley, and Christopher Droney.

Ms. Olshansky said yesterday that in many instances highly specialized teachers of service to New York lost their jobs on account of the test. She said one teacher who was demoted after failing the test taught in American Sign Language and that the lead plaintiff, Elsa Gulino, who has since died, taught disabled children in Spanish.

Generally the teachers who were demoted or terminated after failing the LAST exam have either retired, become substitute teachers, taken jobs in private schools, or gone to work in school systems in other states, Ms. Olshansky, who is the deputy legal director at the Center for Constitutional Rights, said. The lawsuit demands that the plaintiffs receive back pay and be compensated for lost pension benefits.

Those claims amount to "tens of millions of dollars," she said.

Both sides have substantial motivations to settle at this point. The ruling last week removed the State of New York from being a defendant, leaving the city to defend the case alone. The court found that although the state administrators the test, the city is the employer of the teachers. The original trial was long, lasting five months, and cumbersome, with the transcript running for 3,600 pages, the recent decision states.

The trial judge, Constance Baker Motley, died in 2005. Before becoming the first black woman to serve as a federal judge, she was one of the most celebrated civil rights attorneys of the 20th century. She wrote the legal complaint in the landmark *Brown v. Board of Education* case.

The appellate judges are careful to reverse Judge Motley's decision as graciously as possible. In one footnote the decision reads: "We are, of course, mindful that our esteemed departed colleague, the Honorable Constance Baker Motley, brought unparalleled experience to the task of evaluating discrimination claims."