Debra P. v. Turlington: An Aid or a Hinderance to Quality, Equal Education

In *Debra P. v. Turlington,*[1] the Fifth Circuit Court of Appeals held that a state may not deprive its senior high school students of the benefits of a diploma by means of a functional literacy test until the state demonstrates that such a test is based on what is taught in its classrooms and that any racially discriminatory impact of such a test is not attributable to the educational deprivation that occurred in the "dual school" years.[2] The court further held that Florida had created an expectation in the students that they would receive a diploma if they passed the required classes and that this expectation "is a property interest as that term is used constitutionally."[3]

Debra P. was a class action suit brought on behalf of all Florida high school students who had failed, or would in the future fail, the Florida State Student Assessment Test. The test was designed to measure functional literacy, and students were required to pass this test in order to receive their high school diploma. The United States District Court for the Middle District of Florida found the use of the test for withholding a diploma unconstitutional and put a four year injunction on the use of this test for purposes of earning a diploma.[4] This four year hiatus would screen any student who had attended segregated schools from taking the test for purposes of receiving a diploma. Appeals and cross-appeals were

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1. 644 F.2d 397 (5th Cir. 1981).
2. *Id.* at 408. The record showed the disparity of results of the tests by stating:
   At the time of the trial of this lawsuit, the examination, the SSAT II, had been administered three times. The failure statistics showed a greater impact on black students than on white students. In the Fall, 1977 administration, 78% of the black students taking the exam failed one or more sections of the test as compared with 25% of the white students. Of the 4,480 black students taking the test for the second time in Fall, 1978, 74% failed one or both sections. Twenty-five percent of the whites retaking the test failed. On the mathematics section alone, 46% of the blacks retaking the test failed. The results of the third administration in Spring, 1978, which were released during trial, indicated that 60% of the blacks taking the mathematics exam for the third time failed as compared with 36% of the whites. In May, 1979, of the approximately 91,000 high school seniors in Florida public schools, 3,466, or 20.049% of the black students, had not passed the test as compared with 1,342, or 1.9% of the white students. *Id.* at 401.
3. *Id.* at 404.
4. Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979).

taken. Defendants[5] contended that the test did not violate the due process requirement of the United States Constitution because there was adequate notice and there was no property right involved. Defendants also contended that the test did not violate the equal protection clause of the United States Constitution.[6] In their cross-appeal, plaintiffs claimed the court erred in limiting the injunction to four years and in upholding the validity of the test for remediation purposes.[7]

In the early years of the United States, education was not a function of the government but was usually provided by the private and sectarian sectors.[8] Once the government became involved, however, the courts viewed education as a significant responsibility. In the landmark case of *Brown v. Board of Education*,[9] the Supreme Court stated, "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society."[10] The Court also recognized the importance of education as a state function in *Wisconsin v. Yoder*,[11] but noted that a state is required to balance its need for an educated citizenry against individual rights.[12]

After the Court recognized education as an important governmental function, it attempted to define what type of constitutional right a citizen had to education. In *San Antonio Independent School District v. Rodriquez*,[13] the Court refused to call this right to education a fundamental

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5. The named defendants were: Commissioner of Education Ralph D. Turlington; the Florida State Board of Education; Governor of Florida Bob Graham; Secretary of State George Firestone; Attorney General Jim Smith; Comptroller General Gerald A. Lewis; Treasurer William Gunter; Commissioner of Agriculture Doyle Conner; the Florida Department of Education; Superintendent of Schools of Hillsborough County Raymond O. Shelton; and the School Board of Hillsborough County, Florida, which consisted of Roland H. Lewis, Cecile W. Essrig, Carl Carpenter, Jr., Ben H. Hill, Jr., and A. Leon Lowrey. All defendants were sued in their individual and official capacities. 644 F.2d at 401-02 n.3.

6. *Id.* at 402.

7. *Id.*

8. Lemon v. Kurtzman, 403 U.S. 602, 645 (1971). *See also* E. P. CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES (1919).

9. 347 U.S. 483 (1954) (segregated schools deny black children equal protection of the laws guaranteed by the fourteenth amendment).

10. *Id.* at 493.

11. 406 U.S. 205 (1972) (compulsory school attendance law violated Amish children's first amendment right to free exercise of religion).

12. The individual right concerned in *Yoder* was the freedom to exercise the religion of the citizen's choice. The right to freedom of religion was won in *Yoder* but the Court stated, "There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." 46 U.S. at 213.

13. 411 U.S. 1 (1973).

right. In *Rodriquez,* plaintiffs challenged the manner in which Texas financed its educational system. Texas relied on local property taxes to finance its school and thus the schools in the low tax base areas did not receive as much funding as the schools in the affluent areas. The Court stated that this system, though imperfect, did not violate the equal protection clause of the fourteenth amendment. Only three years later, however, the Court again addressed what "type of right" the right to education is in *Goss v. Lopez.*[14] This case dealt with a high school student who was suspended from class for misconduct without a hearing. In holding that the suspension was unconstitutional, the court stated:

> The authority possessed by the State to prescribe and enforce standards of conduct in its schools although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a *property interest* which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.[15]

Therefore, in *Goss* the Court recognized the right to education as a property interest protected by the due process clause.

This "property interest" was further defined in *Board of Regents of State Colleges v. Roth.*[16] In *Roth,* the Court decided that a nontenured teacher had no property right to continued employment. The Court stated: "Rather, [property rights] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[17] The Court then used welfare recipients whose claims were grounded in a statute defining their eligibility as an example of a situation fulfilling its test for a property right.[18]

In more recent cases, however, courts seem to have adopted a more deferential policy toward regulating state education. In *Board of Curators v. Horowitz,*[19] in which a medical student was dismissed after she failed examinations, the Court decided that dismissals for academic reasons do not raise the same constitutional analysis that dismissals for disciplinary reasons raise. The Court pointed out that *Goss* had dealt with disciplinary actions, which inhibit a student's *access* to education and thus re-

14. 419 U.S. 565 (1975).
15. *Id.* at 574 (emphasis added).
16. 408 U.S. 564 (1972).
17. *Id.* at 577.
18. *Id.*; *see* Goldberg v. Kelly, 397 U.S. 254 (1970).
19. 435 U.S. 78 (1978).

quired a strict due process analysis.[20] The Court also noted that, "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities."[21] Also, in *Mahavongsanan v. Hall*,[22] the Fifth Circuit held that a university could require students to pass a comprehensive examination before receiving a masters degree. The court stressed that learning institutions have "wide latitude and discretion . . . in framing their academic degree requirements."[23] This conclusion was reached even though the examination in question tested materials not necessarily covered in the students' courses.[24] The court also stressed the difference between the court's power to review *disciplinary* actions as opposed to *academic* decisions, and noted that due process requirements of notice and hearing had been limited only to disciplinary decisions.[25]

In *Debra P.*, the majority based its holding on two conclusions. The first dealt with the deprivation of property rights without adequate notice. The court noted that Florida, by setting up a system of free education with mandatory school attendance, had created an "expectation" in the students.[26] This "expectation" was that if a student received the required number of hours credit, the student would receive a diploma.[27] The court relied on *Goss*[28] to find that this expectation in a diploma was a property interest.[29] The majority then stated that "[t]his expectation can be viewed as a state-created 'understanding' "[30] that the student would receive benefits and that the student had a right to those benefits.[31] After elevating this "expectation" to a constitutionally protected property right, the court noted that the state of Florida did not give its students adequate notice of the test (which could deprive them of their property rights) to fulfill their due process rights.[32] After making this de-

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20. *Id.* at 88-89.

21. *Id.* at 91 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

22. 529 F.2d 448 (5th Cir. 1976).

23. *Id.* at 450.

24. Mahavongsanan v. Hall, 401 F. Supp. 381, 383 (N.D. Ga. 1975), *rev'd*, 529 F.2d 448 (5th Cir. 1976).

25. 529 F.2d at 449. *See generally* Gaspar v. Bruton, 513 F.2d 843 (10th Cir. 1975); Wright v. Texas S. Univ., 392 F.2d 728 (5th Cir. 1968); Mustell v. Rose, 282 Ala. 358, 211 So. 2d 489, *cert. denied*, 393 U.S. 936 (1968).

26. 644 F.2d at 403-04.

27. *Id.* at 404.

28. *See* notes 14-15 *supra* and accompanying text.

29. 644 F.2d at 404.

30. *Id.* This refers to a statement in *Roth*, 408 U.S. at 577. See notes 16-17 *supra* and accompanying text.

31. 644 F.2d at 404.

32. *Id.*

cision, however, the court went further to state that:

> The due process violation potentially goes deeper than deprivation of property rights without adequate notice. . . . We believe that the state administered a test that was, at least on the record before us, fundamentally unfair in that it *may* have covered matters not taught in the schools of the state.[33]

The court held that giving a functional literacy examination to senior high school students had a rational relation to a valid state interest,[34] but concluded that the test given was not valid because of its content.[35] To reach this conclusion the court of appeals overruled the lower court's decision that the content of the test was valid[36] and stated that the holding of the lower court clearly was erroneous on the record.[37] The court of appeals agreed with the lower court that the test checked for things that the student should know, but not what was actually taught.[38] The court noted that there were no formal studies to ascertain whether all the matters tested were actually taught in the Florida schools,[39] and stated that the books put into evidence by the state were not enough proof because "at least one teacher . . . testified that he did not cover the whole book in class."[40]

The court, therefore, put the burden of proof on the state to show that any examination given by the state tested only for material taught in its schools.[41] The court noted that a state has a right to predicate the award of a diploma on the student passing a test provided the test covers only material taught in the classroom,[42] and compared this to an individual classroom situation by stating: "Just as a teacher in a particular class gives the final exam on what he or she has taught, so should the state give its final exam on what has been taught in its classrooms."[43] Therefore, although a fair test bears a rational relation to a valid state interest, the court stated, "If the test is *not* fair, it cannot be said to be rationally related to a state interest,"[44] and, as previously noted, the panel's definition of fair means that the examination can test only for things actually

33. *Id.* (emphasis in original).
34. *Id.* at 406.
35. *Id.* at 405.
36. 474 F. Supp. at 261.
37. 644 F.2d at 405.
38. *Id.* at 405 n.11.
39. *Id.* at 405.
40. *Id.* at 406.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* (emphasis added).

taught in the schools.

The court also affirmed the trial court's finding that the test did no violate due process or equal protection just because it was given only i public schools.[45] The court noted that a state can correct educatio problems a step at a time and that a state has a stronger interest in a educational system supported by taxes.[46]

The Fifth Circuit next addressed the appellee's equal protection claim The court stated that in order to decide this claim, it had to consider th impact of the legislative action, the historical background, and the se quence of events leading to the legislation.[47] Florida had operated a segre gated school system until 1967, and during the years 1967 to 1971, ves tiges of this segregated system persisted. The black schools had bot inferior physical facilities and educational materials. Appellant admitte that the higher failure rate of blacks could be attributed in part to th unequal education they received during those years.[48]

The court did not, however, find a present intent to discriminate (th law was not enacted at least in part because of its impact on the minorit student),[49] but found that Florida did not carry the burden required t justify the use of an examination that had such an unequal impact on th races.[50] The court applied the test set forth in *McNeal v. Tate Count School District*,[51] which prohibited a school system from grouping chil dren by ability, if this grouping would produce segregated classes, unti enough time passed to assure that this disparity in ability was not cause by the difference in the quality of education received by the students dur ing the segregated school system years. The court in *McNeal* stated tha unintentional segregation could be allowed if the results (disproportionat failure of blacks) were not due to past segregation or if such a metho (testing to receive the diploma) would remedy the results through bette educational opportunities.[52] The court in *Debra P.* held, however, that i the test were a fair reexamination of materials taught in the schools, it use as a requirement for graduation would not violate Title VI,[53] and tha

45. *Id.*

46. *Id.* at 406-07; *see* Ambach v. Norwick, 441 U.S. 68, 77 (1979).

47. 644 F.2d at 407; *see* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S 252, 266-68 (1977).

48. 644 F.2d at 407.

49. *Id.* This was the test that was set out in Personnel Adm'r v. Feeney, 442 U.S. 25 (1979).

50. 644 F.2d at 407.

51. 508 F.2d 1017 (5th Cir. 1975).

52. *Id.* at 1020.

53. 644 F.2d at 407-08. 42 U.S.C. § 2000d provides: "No person in the United State shall, on the ground of race, color, or national origin, be excluded from participation in, b denied the benefits of, or be subjected to discrimination under any program or activity re

the schools could use the test for remediation decisions.[54]

There was no dissent in this case, but when the court of appeals denied rehearing en banc of *Debra P. v. Turlington*,[55] two strong and lengthy dissents were registered that are worthy of examination. The first dissenter, Judge Tjoflat, began by stating that the panel's decision tells "Florida that it is *constitutionally* required to award diplomas to students who are functionally illiterate,"[56] and that it is "constitutionally impermissible for the State of Florida to presently require the same level of functional literacy from black and white high school students."[57] After these introductory statements, Judge Tjoflat further supported his views in a two part opinion.

The first part of his dissent concerned the panel's due process analysis.

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ceiving Federal financial assistance."

54. 644 F.2d at 408.

55. Debra P. v. Turlington, 654 F.2d 1079 (5th Cir. 1981). The majority felt compelled to respond to these dissenters and wrote a commentary discussing the opinion. The majority of the Fifth Circuit Court of Appeals sitting en banc stated that the panel which wrote the decision did not:

a) Forbid a state from providing quality education.

b) Decree that the aim of public education is to confer a diploma and not to educate.

c) Find that black children were not ready for quality education.

d) Order any educational requirements (high or low) for a state school system.

e) Inject itself in any way in the curriculum of the state school system.

f) Suggest that black students be treated differently from white students.

Id. at 1079. The majority stated that the panel did hold:

a) That a diploma has a unique value in the market place.

b) That the State of Florida requires attendance in school between certain ages.

c) That the State of Florida has established a public school system.

d) That if certain attendance requirements are met and if specified courses of study are satisfactorily completed (passed)—a diploma will be awarded.

e) That mutual expectations are thus created between the state and the students.

f) That *if* a student complies with the established requirements and *if* he or she has satisfactorily passed these required courses of study, there is a property right in the expectation of a diploma.

g) That if a state is going to impose as a condition for receipt of a diploma a functional literacy test over and above whatever tests, examinations or grading requirements exist for specific single classes (world history, business mathematics, etc.), that test must be a fair test of material presented within those required courses of study.

h) That the State of Florida is to be commended for its concern over the quality of the *education* being furnished by its public school system.

i) That the State of Florida may utilize a functional literacy examination for both remedial purposes and as a condition for the awarding of a diploma.

Id. at 1080 (emphasis in original).

56. *Id.* at 1080 (Tjoflat, J., dissenting) (emphasis in original).

57. *Id.* at 1081.

He stated that the panel was incorrect when it identified the receipt of diploma as a property interest since the panel had relied on *Goss*,[58] whic was limited to disciplinary actions and not to purely academic decisions He felt this was made expressly clear in *Horowitz*,[59] in which the Su preme Court stated:

> In *Goss*, this Court concluded that the value of some form of hearing in a disciplinary context outweighs any resulting harm to the academic environment. Influencing this conclusion was clearly the belief that disciplinary proceedings, in which the teacher must decide whether to punish a student for disruptive or insubordinate behavior, may automatically bring an adversary flavor to the normal student-teacher relationship. The same conclusion does not follow in the academic context. We decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship.[60]

Judge Tjoflat then mentioned that *Mahavongsanan*[61] also pointed out th difference in the court's role when involving itself in disciplinary rathe than academic decisions.[62] From these cases he concluded that "*educa tion*, not receipt of a diploma, is a property interest deserving of rigorou due process protection."[63]

Judge Tjoflat then addressed what he considered the more "trouble some" decision of the panel. This was the panel's inquiry into the fairnes of the examination.[64] As he pointed out, the district court had found tha the examination tested the practical application of basic educationa skills to everyday life,[65] but that the examination was constitutionally un fair since the state could not demonstrate that the tested material wa taught adequately in the classroom.[66] He further noted that this is ver difficult for the state to prove, and he addressed at least three apparen difficulties. First, the state would have to prove all the material covere by the examination was taught adequately, while at the same time justify

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58. 419 U.S. 565 (1975).

59. 435 U.S. 78 (1978). See the discussion of *Horowitz* at notes 19-21 *supra* and accompanying text.

60. *Id.* at 90.

61. 529 F.2d 448 (5th Cir. 1976). See the discussion of *Mahavongsanan* at notes 22-25 *supra* and accompanying text. The only mention of *Mahavongsanan* in the panel's decision occurs in a footnote to *Debra P.*, 644 F.2d at 404 n.9, in which the court stated that *Mahavongsanan* is distinguishable because "[t]he expectations of college and high school students would certainly be different."

62. 654 F.2d at 1080, 1082 (Tjoflat, J., dissenting).

63. *Id.* (emphasis in original).

64. *Id.*

65. *Id.*

66. *Id.* at 1083.

ing any failures on the examination.[67] Second, the state would have to carry this burden for every student and every class.[68] Third, since the functional literacy examination tests to see if a student can apply certain skills to everyday life, the state would have to prove the link between teaching these basic skills and the application of these skills and would have to prove the methods used conveyed this link to the students.[69]

Furthermore, Judge Tjoflat believed that the panel's opinion not only exposes the state to a large amount of litigation by making every student a potential plaintiff, but it also "demonstrat[es] the very intrusiveness into state educational concerns that the Supreme Court has so clearly denounced."[70] He concluded his due process analysis in one brief statement: "In sum, the panel has misidentified a property interest and consequently has applied an entirely inappropriate, because both incongruent and excessively instrusive, constitutional analysis to the facts of this case."[71]

Judge Tjoflat next discussed the case under an equal protection analysis. He noted that there was evidence in the record that supported the proposition that the higher incidence of black failure may be attributable in part to the unequal education received by blacks during the "dual schools" years.[72] He stated, "at least partly because of racial segregation, black students in Florida are ending their high school years as functional illiterates."[73] He further noted that blacks "have a right to an equal education,"[74] and that Florida's system did not provide this equal education. Judge Tjoflat recognized that Florida had tried to correct this disparity by instituting a functional literacy examination, which a student had to pass in order to receive a diploma. The statutory authority for this examination pointed out Florida's concern.[75] Judge Tjoflat felt this decision to withhold a diploma until the examination was passed would provide an

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67. *Id.*

68. *Id.* Here the dissent introduced the question of what to do with transfer students and (relying on a statement in *Debra P.*, 644 F.2d at 406) asked if the examination will fail just because one teacher did not cover the entire book in class. These two simple hypotheticals point out the great potential for litigation.

69. 654 F.2d at 1080, 1083 (Tjoflat, J., dissenting).

70. *Id.* Judge Tjoflat relied on several Supreme Court opinions, including, San Antonio School Dist. v. Rodriquez, 411 U.S. 1 (1972), which stated, "[T]he judiciary is well advised to refrain from imposing on the states inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems. *Id.* at 43.

71. 654 F.2d at 1080, 1084 (Tjoflat, J., dissenting).

72. *Id.* at 1085.

73. *Id.*

74. *Id.*

75. FLA. STAT. ANN. § 232.246 (Supp. 1981).

"added incentive" to students to obtain basic skills.[76] Thus, he felt tha the second part of the test that the panel quoted from *McNeal* had bee met.[77] He believed that "the denial of a diploma is a necessary and en tirely reasonable means to remedy the evil, indeed, the badge of slaver which is black functional illiteracy."[78] He concluded that he "cannot be lieve that the fourteenth amendment requires us to force a state to aban don a rational scheme designed to correct the palpable heritage of segre gated, inherently unequal education in favor of mandatory stat certification of illiterate students."[79]

After this attack on the panel's decision by Judge Tjoflat, Judge Hi began his dissent.[80] He felt that the panel had mandated that the stat must continue to hand out meaningless diplomas to black students. Afte summarizing his view of the panel's holding,[81] he then discussed the anal ysis used by the panel in reaching its decision. Judge Hill stated that th entire decision in *Debra P.* was based on the wrong premise. He state that the starting point of the panel's decision was that the emphasi should be on the diploma.[82] He pointed out, however, that before *Brown* the main problem was that diplomas were being awarded to minority chil dren even though they were not receiving adequate educations.[83] H stated that the importance in *Brown* was placed not on *diplomas,* but o *education.* He noted that, "It is undoubtedly true that the appearance c having been educated may be accomplished by the conferring of a di ploma. Nevertheless, if the child has received no learning, even the mos emphatic judgment and order of the most diligent court cannot suppl

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76. 654 F.2d at 1080, 1085 (Tjoflat, J., dissenting).

77. *Id.; see* notes 51-52 *supra* and accompanying text.

78. 654 F.2d at 1085.

79. *Id.*

80. *Id.* at 1086 (Hill, J., dissenting).

81. *Id.* at 1087. This summarization of the panel's decision was in five points and these five points appeared in the dissent as follows:

> 1) The Constitution forbids a state from providing quality education to, and requiring a modicum of learning by, the children in its public school system.
>
> 2) The aim of public education must, under law, be to confer a diploma and must not be to provide an education.
>
> 3) By operating a public school system, a constitutionally protected expectation is created in the attendee that he or she will receive a diploma, not an education.
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> 4) That, at the time of the Supreme Court's decision in *Brown v. Board of Education,* . . . the black children of this land were not ready for non-segregated education in schools providing a quality education and requiring some minimal level of attainment for graduation.
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> 5) *Because black children are a part of the student body,* educational requirements of a state school system must be kept at a low level!

Id. (emphasis in original).

82. *Id.*

83. *Id.*

it."[84]

Judge Hill further attacked the intrusion this case would cause into the educational policy of the states. Like Judge Tjoflat, he pointed out the difference between the court's power to intrude in the educational process when dealing with disciplinary decisions rather than academic determinations.[85] And also like Judge Tjoflat, he noted that *Goss* dealt with denial of *participation* in the education process for disciplinary reasons, and that *Horowitz* and *Mahavongsanan* showed that the courts had refrained from intervention into academic decisions in the past.[86] Judge Hill then concluded by stating, "In sum, there is a bright line of demarcation between extending minimal due process safeguards to protect a student's access to learning, . . . and using the Due Process Clause to make decisions regarding the quality of education for the State of Florida."[87]

The panel in *Debra P.* made a justifiable attempt to remedy what it saw as a wrong. It attempted to stop Florida from denying a diploma to students by means of a functional literacy examination because more minority students failed than did white students. This approach may, however, actually hinder the states in attempting to provide a quality education not only to minority students, but to all students.

The panel's holding was twofold. It held that Florida could not deny a diploma by use of a test until it demonstrated that: 1) it was a fair test of what is taught in the classroom and 2) the racially discriminatory impact of the test was not caused by educational deprivation during the segregated years.[88] Thus, both parts of the test had to be met before the state could use the proposed examination.

The first part of this two part test puts an almost impossible burden on the states. This was noted in Judge Tjoflat's dissent.[89] The decision may thus create disincentives for the states that try to improve their educational procedures.[90] Faced with this high burden of proof, the states simply may leave well enough alone.

This part of the test also may lead to judicial interference with what has been up to now a state's concern.[91] Both dissenting judges pointed out that the panel has expanded *Goss* while ignoring *Horowitz* and *Mahavongsanan*,[92] and that the subsequent intrusion will tend to frus-

84. *Id.* at 1088.
85. *Id.*
86. *Id.* at 1088-89. *See also* notes 58-71 *supra* and accompanying text.
87. *Id.* at 1089. *See also Horowitz*, 435 U.S. at 84-91 (1978).
88. 644 F.2d at 408.
89. 654 F.2d at 1080, 1083 (Tjoflat, J., dissenting). *See also* notes 67-69 *supra* and accompanying text.
90. *Id.*
91. *Id.* at 1083-84, 1088-89.
92. *Id.* at 1081-82, 1088-89.

trate any action taken by states to improve their educational systems.[93]

There is also a problem concerning the practical burden of proving tha the examination tests only information actually taught in the schools. A Judge Tjoflat noted, the state must carry this burden for every student,[9 and this raises the question of what to do with transfer students. Can o must they be tested? Also, the panel compared the state administerin the functional literacy test with an individual teacher administering a examination and noted that both should test only for material taught i their class.[95] This analogy is not good. An individual teacher knows wha was taught in his or her classroom, but a state cannot possibly know wha was taught in each classroom or how well it was taught. Again the deci sion places a high burden upon the state.

The second part of the test puts another very difficult burden upon th state. The state must show that any discriminatory impact is not caused by any educational deprivation during the "dual school" years.[96] Th lower court only postponed the giving of the exam for four years. Appar ently, this was to allow any students who had attended school durin those dual school years to graduate. The panel held, however, that th test could not deprive the student of a diploma until the state prove that any unequal impact on the races was not caused by unequal educa tional opportunities during the years in which the schools were segre

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93. Judge Tjoflat expressed his concern by stating:

> This circuit has given the state a choice between escaping expensive, time-consuming and demoralizing litigation and fighting an expensive two-front war: attempting to improve education while looking over its shoulder to assure that everything possible is being done to prepare for the inevitable onslaught of due process actions founded upon the most arcane of alleged educational deficiencies. . . . In one step the panel has removed the state incentive to provide quality education, for each state attempt to demand academic proficiency will be subject to the same eviscerating analysis used to reject Florida's attempt to demand functional literacy from its public school graduates. We have only ourselves to blame if Florida abandons its present policy and reverts to the old, admittedly deficient system of social promotion, graduation and certification. Moreover, we should not be surprised if other states in this circuit heed the panel's signal and avoid even attempting a reformation of their educational policies. The transitory impact of the state gesture will simply not be worth the subsequent sting of federal intervention.

Id. at 1084.

Judge Hill saw this intrusion leading to even more far reaching effects. He expressed concern that the courts eventually may take over the states' educational systems. He stated "The fact remains, however, that the panel has established a constitutional basis for the judiciary to assume the role of state educators." *Id.* at 1086, 1088 (Hill, J., dissenting).

94. *Id.* at 1080, 1083 (Tjoflat, J., dissenting).

95. 644 F.2d at 406.

96. *Id.* at 408.

gated.[97] The question remains, however, how this can be proven, and how long it will take until the "vestiges" of the dual school years are erased.[98] Will this decision cause the states' school systems to revert to the pre-*Brown* practice of granting diplomas to blacks, but not providing them with educations?[99]

Ultimately, *Debra P.* may greatly slow any educational reforms by the states. It establishes a two prong test that the states must meet in order to award diplomas based on functional literacy examinations. Both of these prongs place a great burden on the states and thus the states may respond simply by returning to the status quo.

WILLIAM R. JOHNSON

97. *Id.*

98. This concerned both dissenters. Judge Tjoflat asked, "[H]ow long will it take before the heritage of educational segregation is eradicated? Furthermore, how much litigation will it take before the federal courts determine that *each* school district in the Fifth Circuit, with its unique history and demography, has outlasted the effects of segregation?" 654 F.2d at 1080, 1086 (Tjoflat, J., dissenting) (emphasis in original).

Judge Hill was even more concerned. He stated, "In short, this case at least suggests that minority race children shall not be subjected to and afforded quality education until history has been repealed and the fact that there was segregation be no longer a fact." *Id.* at 1086, 1089 (Hill, J., dissenting).

99. Judge Hill stated, "The goal of the civil rights movement, that minority race children be provided quality education, are [sic] frustrated by this holding." 654 F.2d at 1086, 1087 (Hill, J., dissenting).