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Debra P. v. Turlington: Due Process Enters the Classroom, But How Far?

LEE D. GUNN*

Florida twelfth grade public school students brought a class action suit¹ in federal district court challenging the Florida State Student Assessment Test, Part II (SSAT II)² on constitutional and statutory grounds.³ In an effort to increase educational accountability,⁴ the State of Florida made passage of the test a mandatory requirement for receipt of a diploma beginning in the 1978-1979 school year.⁵ The

* University of Florida Law School, class of 1982.

¹ *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D. Fla. 1979). The court certified three classes of plaintiffs:

"Class A are all present and future twelfth grade public school students in the State of Florida who have failed or who hereafter fail the SSAT II.

"Class B are all present and future twelfth grade black public school students in the State of Florida who have failed or who hereafter fail the SSAT II.

"Class C are all present and future twelfth grade black public school students in Hillsborough County, Florida, who have failed or who hereafter fail the SSAT II." *Id.* at 246. The defendant, Ralph Turlington, was the Florida Commissioner of Education.

² The SSAT II was originally called the Florida Functional Literacy Examination. Because failure of a test so named lead to connotations of "functional illiteracy," the State Board of Education adopted the name: State Student Assessment Test II (SSAT II). *Id.* at 258-59.

The SSAT II is designed to measure satisfactory application of the basic skills of reading, writing and arithmetic to practical situations of everyday life. Rules and Regulations of the State of Florida, Chapter 6A-1.942(2)(a) (1978) *reprinted in* 474 F. Supp. at 259 n.22.

³ Plaintiffs-Appellees based their challenge on three claims. The first was that Defendants have either designed or implemented a test which is racially biased and therefore violative of either the equal protection clause of the fourteenth amendment, 20 U.S.C. § 1703 Equal Education Opportunities Act (EEOC), 42 U.S.C. § 2000d Title VI, or any combination thereof. The first claim related to all classes.

The second claim contended Defendants provided inadequate notice of the SSAT II as condition precedent to award of a diploma in violation of the Fourteenth Amendment. The second claim related to all classes.

The third claim asserted that use of the SSAT II in conjunction with FLA. STAT. § 236.088 (remedial class requirement) operated to desegregate the schools in violation of the Fourteenth Amendment, EEOC, and Title VI. *Id.* at 246-47.

⁴ *Debra P. Turlington*, 644 F.2d 397, 400 (5th Cir. 1981).

⁵ FLA. STAT. ANN. § 232.246 (West Supp. 1980) is set out in its entirety in n.1 of *Debra P. v. Turlington*, 644 F.2d 397, 400 (5th Cir. 1981).

The statute sets out three requirements for high school graduation: mastery of minimum

district court found a consistently disproportionate failure rate among black students.⁶ The district court held the passage requirement, as applied, unconstitutional and violative of federal statutes,⁷ enjoining use of such a requirement until the 1982-1983 school term.⁸ The Fifth Circuit Court of Appeals affirmed in part, vacated and remanded in part, and held that a test used as grounds for diploma denial must satisfy due process by being curricularly valid.⁹

In its broadest sense the due process clause has been interpreted to require governmental entities dealing with legally recognized liberty or property interests to adhere to fundamental fairness by providing procedural protection in the form of notice and hearing.¹⁰ The constitutional standard for applying fifth and fourteenth amendment due process considerations was clarified by the United States Supreme

performance standards in reading, writing, and mathematics for the 11th grade, completion of a minimum number of credits, and passage of a functional literacy examination.

* The SSAT II was first administered Fall, 1977. The results of the test showed 78% of the black students taking the exam failed one or both parts as compared to 25% of the white students failing. In the Fall of 1978, 74% of the black students retaking the test failed while only 25% of the white students failed a second time. In May, 1979, the number of black seniors that had failed to pass the test was ten times greater than that of white students. 644 F.2d 397, 401 (5th Cir. 1981).

⁷ The district court found no present intent to discriminate. 474 F. Supp. at 254. The court did find the defendants to have failed to rebut the fact that the disproportionate impact on the black student was not the result of past discrimination. *Id.* at 256. This failure was the basis for a finding of violations of the Fourteenth Amendment, 42 U.S.C. § 2000d (Title VI), and 20 U.S.C. § 1703 (EEOA). *Id.* at 257. The district court also found the thirteen month instructional period prior to invocation of a diploma sanction to be violative of due process. *Id.* at 267.

* In order to allow proper notice and to remove the remaining taint of prior dual school systems, the district court enjoined the state from employing the SSAT II as a diploma requirement until the 1982-1983 school term. 474 F. Supp. at 269.

* 644 F.2d 397, 408. The court relied on expert testimony in defining curricular validity as a measurement of what was actually taught. *Id.* at 405. In n.10, 644 F.2d at 405 the court cites McClung, *Competency Testing Programs: Legal and Educational Issues*, 47 FORDHAM L. REV. 651, 683 (1974) [hereinafter cited as McClung, *Competency Testing*], as providing discussion of the American Psychological Association, *Standards for Education and Psychological Test* (1974) [hereinafter cited as APA *Standards*]. McClung defines validity determinations of materials actually taught as being instructional validity. Curricular validity, on the other hand, is defined as a measure of how well test items represent the objectives of the curriculum. The court's use of curricular validity more closely fits McClung's use of instructional validity and the terms should not be confused. The APA has no definition of validity as a measure of material actually taught. McClung, *Competency Testing*, at 683 n.155.

The court of appeals also upheld the district court's finding that the use of the test for remediation does not violate the EEOA, 20 U.S.C. § 1703 (1976). 644 F.2d at 408. The use of the test in public but not private high schools was similarly upheld. *Id.* at 406-07.

¹⁰ *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950); *Grannis v. Ordean*, 234 U.S. 385 (1914). The due process clause is interpreted to be a flexible legal conception. *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 121, 162 (1941) (Frankfurter, J., concurring).

Court in *Board of Regents v. Roth*.¹¹ In *Roth* a college professor was denied continuation of employment after a contractually specified one year term.¹² In deciding Roth was not entitled to notice and hearing,¹³ the Court emphasized that the fourteenth amendment safeguards an existing liberty or property interest but is not a vehicle for creating such interests.¹⁴ The Court defined due process as protecting only those liberty or property interests which were accompanied by a legitimate claim of entitlement.¹⁵ This claim arises from rights constitutionally, statutorily,¹⁶ or contractually created.¹⁷ Roth claimed his employment contract created a constitutionally protected interest in continued employment.¹⁸ The Court rejected his contention based upon the employment contract's express limitation to a one year term and a discretionary rehiring provision.¹⁹

In *Goss v. Lopez*,²⁰ the Supreme Court applied the *Roth* claim of entitlement test²¹ to a due process challenge of high school suspensions.²² Pursuant to the statutory provision of free education and compulsory attendance²³ the Court found the students to have a legitimate claim of entitlement to public education.²⁴ Finding a protected interest, the Court directed attention to the measures necessary to insure constitutional fairness.²⁵ This determination involved a

¹¹ 408 U.S. 564 (1972).

¹² *Id.* at 566.

¹³ *Id.* at 579.

¹⁴ *Id.* at 577.

¹⁵ *Id.* The Court recognized that to have a protected benefit an individual "must have more than an abstract need or desire for it." Any expectations must not merely flow from the individual to the state but must be conferred by the state. This conference by the state gives rise to a legitimate claim of entitlement. *Id.*

¹⁶ *Id.* at 577; *Bill v. Burson*, 402 U.S. 535 (1971).

¹⁷ 408 U.S. at 577; *Perry v. Sinderman*, 408 U.S. 593, 601 (1972). The *Perry* Court also recognized the possibility of an implied claim of entitlement based upon the language of the contract and the conduct in light of the surrounding circumstances. *Id.* at 602.

¹⁸ 404 U.S. at 568.

¹⁹ 408 U.S. at 578.

²⁰ 419 U.S. 565 (1975).

²¹ For a discussion on the various methods for applying the entitlement doctrine, see Racine and Spinello, *From Goss to Bishop: The Demise of the Entitlement Doctrine*, 5 PEPPERDINE L. REV. 523-46 (1978).

²² 419 U.S. at 567.

²³ *Id.* OHIO REV. CODE ANN. §§ 3313.48 and 3313.64 (1972 and Supp. 1973) provide for free education for all residents ages five through twenty-one. OHIO REV. CODE ANN. § 3321.04 (1972) requires compulsory attendance for 32 weeks per school year.

²⁴ 419 U.S. at 573. The Court further reiterated its language in *Brown v. Bd. of Education*, 347 U.S. 483, 493 (1954), in stressing education as perhaps the most important role of state and local governments.

²⁵ 419 U.S. at 577.

weighing of interests.³⁶ The student's interest in having suspensions based on accurate facts and being allowed the opportunity to be heard by presenting his view of the incident³⁷ was balanced with the school's need for efficiency and discipline³⁸ to determine the form of notice and hearing. The Court held the student's interest in education to require an informal hearing.³⁹ The Court expressed concern with imposing an onerous burden on school administrators but felt an informal hearing to be a minor imposition.⁴⁰ The *Goss* Court set forth the principle that school administrators must deal with a student's educational property interest in a manner which entails fundamentally fair procedures.⁴¹

The Supreme Court, in *Board of Curators, University of Missouri v. Horowitz*,⁴² further defined due process in the educational arena.⁴³ In rejecting a due process challenge to the academic dismissal of a final year medical student,⁴⁴ the Court bypassed any determination of whether the student had a liberty or property interest, assuming *arguendo* the existence of a protected interest.⁴⁵ The Court took notice of the extensive evaluation procedures exercised by the medical

³⁶ *Id.* at 579. The Court cites *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961) (Interest in national security great enough to warrant military commander's revocation of worker's security badge without prior hearing); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (Interest in parole revocation great enough to require prior preliminary hearing).

³⁷ 419 U.S. at 579.

³⁸ *Id.* at 580.

³⁹ *Id.* at 581. In the case of a suspension of 10 days or less a student must be given oral or written notice and if denied, the opportunity to explain his side of the circumstances. *Id.*

⁴⁰ *Id.* at 583. The Court compared the notice and hearing requirements to those any "fair-minded principal" would impose upon himself. *Id.* The Court recognized that suspensions did not require the opportunity to secure counsel since the administrative strain would be too great. *Id.*

⁴¹ *Id.* at 580. As a precursor to the imposition of notice and hearing, the Court cites an earlier case: *Joint Anti-Facist Committee v. McGrath*, 341 U.S. 123, 170 (1951); "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . ." *Id.*

⁴² 435 U.S. 78 (1978).

⁴³ After the *Goss* decision legal commentators expressed diverse views on the ramifications of the opinion on educational administration. In *Wood v. Strickland*, 420 U.S. 308 (1975), decided one month after *Goss*, the Supreme Court affirmed its position of affording due process protection to high school students. The Court applied a willful and wanton standard of liability to educational administrators who are sued for wrongful suspensions. *Id.* at 320. The combinant effect of *Goss* and *Wood* lead to the publication of several articles in the *Journal of Law and Education*. See generally Buss, *Implications of Goss v. Lopez and Wood v. Strickland for Professional Discretion and Liability in Schools*, 4 J.L. AND EDUC. 567 (1975); Levine, *Reflections on Goss v. Lopez*, 4 J.L. AND EDUC. 479 (1975); Kola, *Hard Choices in School Discipline and the Hardening of the Due Process Mold*, 4 J.L. AND EDUC. 583 (1975).

⁴⁴ 435 U.S. at 92.

⁴⁵ *Id.* at 94-95. In so doing the Supreme Court failed to answer the question of whether a university student has a protected interest in receipt of a degree. See, Veron, *Due Process Flexibility In Academic Dismissals: Horowitz and Beyond*, 8 J.L. AND EDUC. 45, 47-51 (1979).

school administration and faculty³⁶ and deemed any due process required to have been met.³⁷ The Court, in dicta, factually distinguished *Goss* by contrasting the academic standards involved in *Horowitz* with the conduct dismissals in *Goss*.³⁸ The Court noted that the subjective nature of the faculty evaluations³⁹ and the history of state controlled education⁴⁰ dictated a limited review of the school's actions.⁴¹

The instant court noted the history of state independence in the area of public education as a preface to consideration of the student's challenge to the SSAT II.⁴² The court recognized this independence as not being absolute in nature and subject to limitations placed upon the states by the due process clause of the Federal Constitution.⁴³ The court assessed due process in terms of its protection of property interests.⁴⁴ The court applied the *Goss* rationale⁴⁵ and reasoned that by statutorily providing for free public education and re-

³⁶ Ms. Horowitz received dissatisfactory evaluations from several faculty members in the Spring of her first year. *Id.* at 80. After continued negative evaluations and several opportunities for Ms. Horowitz to exhibit improvement in her clinic performance, patient support, and personal hygiene, she was expelled weeks prior to scheduled graduation. *Id.* at 81-82.

³⁷ 435 U.S. at 84. While the decision that Ms. Horowitz received all process due was upheld 9-0, the case elicited five opinions. Rehnquist, writing for a plurality, indicated in dicta that academic dismissals require no hearing. *Id.* at 89-90. Justices Stewart and Stevens, as well as Chief Justice Burger joined the Rehnquist opinion. *Id.*

Justice White, however, stated that ". . . assuming a protected interest; respondent was at least entitled to be informed of the reasons for her dismissal, and to an opportunity personally to state her side of the story." *Id.* at 97.

Justice Marshall was compelled to state disagreement with the plurality opinion's indication that no hearing was required. *Id.* at 97. Marshall preferred a balancing of the private and public interests involved as was illuminated in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Justices Blackmun and Brennan agreed with the holding of at least any minimum of due process met and therefore refrained from indulging in dictum attempting to establish a set standard. *Id.* at 109.

Justice Powell joined the plurality opinion because he read it "as upholding the District Court's view that respondent was dismissed for academic deficiencies . . ." *Id.* at 92. Powell's swing vote still leaves unanswered whether a hearing is required of academic dismissals.

³⁸ *Id.* at 86-88. The plurality relied on lower court decisions which apply discriminating standards to academic and conduct dismissals. *Id.* One such case is *Mahavongsann v. Hall*, 529 F.2d 448 (5th Cir. 1976). In *Hall* the Fifth Circuit exhibited its sensitivity to the varying issues raised by the more subjective aspects of the purely academic operations of educational institutions. 529 F.2d at 449-50.

³⁹ 435 U.S. at 89-90.

⁴⁰ *Id.* at 90.

⁴¹ *Id.* at 91.

⁴² *Id.* at 402-03. The Tenth Amendment provides states with plenary power over education. *Id.* Florida receives its authorization to provide public education in the Florida Constitution of 1968, Art. IX § 1-5. *Id.* at n.6.

⁴³ *Id.* at 403.

⁴⁴ *Id.* at 403.

⁴⁵ See note 24 and accompanying text *supra*.

quiring mandatory attendance,⁴⁶ the state of Florida had created a legally recognized claim of entitlement in the student's receipt of a diploma.⁴⁷ This claim of entitlement was classified as an implied property interest protected by constitutional safeguards.⁴⁸

Having established the student's property entitlement, the instant court examined the administrative procedures followed prior to implementation of the SSAT II as a graduation requirement.⁴⁹ It affirmed the trial court's finding that the test implementation schedule violated due process by not providing students with adequate notice prior to establishment of the test passage requirement.⁵⁰ The court further examined due process concepts of fundamental fairness⁵¹ and found that the SSAT II must cover materials actually taught in Florida schools.⁵² Curricular validity was prescribed as the measuring device for determining whether the test covered materials actually taught.⁵³ The lower court's finding of validity was declared clearly erroneous and the record insufficient on the matter.⁵⁴ The court, therefore, remanded the issue of validity for a factual determination.⁵⁵

⁴⁶ *Id.* at 404. FLA. STAT. ANN. § 232.01 (West Supp. 1981) Provides mandatory school attendance requirements for children age 6 to 16. *Id.* at n.8.

⁴⁷ *Id.* "This expectation can be viewed as a State created 'understanding' . . . Board of Regents v. Roth, 408 U.S. 564, 577 (1972)." *Id.*

⁴⁸ *Id.* Prior to the SSAT II, a diploma was the "logical extension" of attendance and successful credit completion. *Id.* See generally Brief of Plaintiffs/Cross-Appellants at 52.

⁴⁹ *Id.*

⁵⁰ *Id.* An obvious basis for the instant court's affirmance was the findings of the Task Force on Educational Assessment Programs, Competency Testing in Florida Report of the Florida Cabinet (Part I) 4 (1979). The task force expressed the view that the state had attempted to do too much in too little time. It noted that the content of the test was presumed to have been taught, but may not have been. *Id.*

⁵¹ *Id.* For an overview of substantive due process as it relates to education, see McClung, *The Problem of the Due Process Exclusion: Do Schools Have a Continuing Responsibility to Educate Children with Behavior Problems?*, 3 J.L. AND EDUC. 491, 495-501 (1974).

⁵² *Id.*

⁵³ *Id.* at 405.

⁵⁴ *Id.* The district court followed the APA definition of content validity, which is: "the behaviors demonstrated in testing constitute a representative sample of behaviors to be exhibited in a desired performance domain." 474 F. Supp. at 261, citing APA standards at 28 (1974) (In an adult proficiency test such as the SSAT II, content validity is how well the test estimates an individual's ability to function in the everyday tasks of modern society). See Lewis, *Certifying Functional Literacy: Competency Testing and Implications for Due Process and Equal Educational Opportunity*, 8 J. OF LAW & EDUC. 145, 161, n.111 (1979) [hereinafter, Lewis].

⁵⁵ *Id.* at 405. The instant court shifted the focus from content validity, whether the test estimates ability, to curricular validity, whether the test covers materials actually taught. *Id.*

The court took note of the state's pre-trial stipulations numbers 114 and 117. In 114 the state stipulated that it made efforts to ensure performance standards were actually taught in Florida public schools. Number 117 provided that no formal studies were conducted by the Florida Department of Education to establish that skills tested were taught. *Id.*

The *Debra P.* decision was the first judicial attempt to answer issues raised by state diploma denial.⁵⁶ The similarities in the Ohio and Florida education statutes prompted application of the *Goss* rationale to the determination of a student's due process right to a diploma.⁵⁷ The court recognized the state's rights⁵⁸ and the history of judicial abstention from interference with state education⁵⁹ as requiring an affirmation of Florida's right to dictate diploma requirements.⁶⁰ Despite these policies, the student's legally recognized interest in a diploma prompted the instant court to scrutinize the requirement of competency test passage.⁶¹

In assessing implications of the test's validity, the court found an invalid test would violate equal protection. The court reasoned that a test on materials never taught is unfair and cannot be rationally related to a state interest. *Id.* at 406.

⁵⁶ While no prior court decision exists, several states are involved with competency testing. As of July 1, 1979, thirty-nine states had some form of competency test. Of these, twenty-one states were either using or planning to use a competency test as a graduation requirement. Phippo, State Activity Minimal Competency Testing, July 1, 1979, reprinted in Brief for the National Education Association and the Florida Teaching Profession-NEA as Amici Curiae at app. A, *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981).

⁵⁷ 644 F.2d at 404. Both Ohio and Florida provide free secondary education and mandate school attendance. See note 23 *supra* and FLA. STAT. ANN. § 232.01 (West Supp. 1981) (mandates attendance by children ages 6 to 16).

⁵⁸ *Id.* at 402. The court stated Florida's plenary power over education stems from the Tenth Amendment. *Id.* Florida's Constitution provides that the state shall establish a school system and that the system be free. FLORIDA CONSTITUTION OF 1968, Art. IX, §§ 1-5. 644 F.2d at 402 n.6.

An increased trend in State's rights recognition has been evidenced in two Supreme Court cases involving economic regulation; *National League of Cities v. Usery*, 426 U.S. 833 (1976) (Held, Congress may not enact a statute subjecting states to employment wage and hour guidelines); *Fry v. United States*, 421 U.S. 541 (1975) (Emergency nature of Economic Stabilization Act made for allowable intrusion on states). See generally McGuinness, *An Affirmative Constitutional Right: The Tenth Amendment and the Resolution of Federalism Conflicts*, 13 SAN DIEGO L. REV. 876 (1976) [hereinafter cited as McGuinness]; Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977) [hereinafter cited as Choper].

⁵⁹ 644 F.2d at 403. The historic nature of judicial non-interference also played a role in the Supreme Court's plurality opinion in *Horowitz*, 435 U.S. at 82-83. The Court quoted *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) as authority for limiting judicial interposition in the administration of public schools. The *Epperson* quote further provided that primary control of schools is placed in state and local authorities. *Id.* See *Goss v. Lopez*, 419 U.S. 565, 574 (1975); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1971); *Epperson v. Arkansas*, 373 U.S. 97, 104 (1968); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *Cumming v. Bd. of Educ.*, 175 U.S. 528, 545 (1899).

⁶⁰ 644 F.2d at 406. Prior to the 1900's, education was primarily private and sectarian. *Lemon v. Kurtzman*, 403 U.S. 602, 645-47 (1976). The instant court refused to question Florida's right to require competency test passage prior to receipt of a diploma, so long as the test was fair. See note 69, *infra*.

⁶¹ *Id.* at 403. The power of a state to control its schools is tempered by any constitutional safeguards. See *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 506 (1969). Education, however, has not been labeled a fundamental right triggering strict scrutiny of state actions. See

The court's scrutiny of the SSAT II was guided by the fundamental fairness principle delineated in *Goss*.⁶² The resultant requirement of curricular validity⁶³ indicates the court equated fairness with the right of a student to be heard⁶⁴ through an accurate test.⁶⁵ A curricularly valid examination protects the student's right to be heard by accurately assessing the individual student's understanding of materials actually presented.⁶⁶ Accurate individual student assessment, therefore, appears to be the crux of the court's application of fundamental fairness principles.⁶⁷

San Antonio v. Rodriguez, 411 U.S. 1, 23 (1972).

Perhaps an underlying basis for this court's examination of the SSAT II was its adverse impact on black students. See notes 2 and 6 and accompanying text *supra*. Where an adverse effect is inflicted upon a racial class, the judiciary has seen its role to be the voice of individuals not adequately represented by the political processes. See Choper, *supra* note 58 at n.17 and accompanying text (Minorities need judicial protection because not represented politically), See e.g., C. BLACK, *THE PEOPLE AND THE COURT* 103-04 (1960) ("Those who need the Bill of Rights need it because they cannot prevail in the 'political process' . . ."); T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 31-35 (1966) ("[I]n the legislative struggles of the great pressure groups there is none which represents as such the more general . . . interest in preserving fundamental but less immediate values.").

⁶² *Id.* at 403-404. See note 30 and accompanying text *supra*.

⁶³ *Id.* at 404-405. See McClung, Competency Testing, note 9 *supra*, at 683 n.155.

⁶⁴ See note 10 and accompanying text *supra*. The right to be heard is considered a primary component of due process. The court's equation of fairness and the right to be heard follows Supreme Court precedent. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 579 (1975); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950).

⁶⁵ The Supreme Court emphasized the role of due process to protect against erroneous loss of entitlements in *Mathews v. Eldridge* 424 U.S. 317 (1976). In fact, the *Eldridge* Court has been criticized for placing too high a value on accuracy, at the expense of personal inputs to decision-making. Mashaw, *The Supreme Court's Due Process Calculus For Administrative Adjudication in Mathews v. Eldridge: Three Factors In Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 48 (1976).

⁶⁶ Unless a test is an accurate assessment, a student's right to be heard is shrouded in a cloak of misunderstanding. See, Lewis, note 54 *supra*, at 159.

⁶⁷ The court's concern for individual student assessment is evidenced when the court cites *St. Ann. v. Palisi*, 495 F.2d 423, 425 n.5 (5th Cir. 1974). In *St. Ann*, two children were suspended from a private school because their mother struck a school official. The Fifth Circuit Court considered the suspensions to violate due process. The court stated that "[f]reedom from punishment in the absence of personal guilt is a fundamental concept in the American scheme of justice." *Id.* at 425.

The Supreme Court has emphasized the individual nature of due process in a number of cases: *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 319 n.53 (1978) (" . . . underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual."); *Phiphus v. Carey*, 435 U.S. 247, 262 (1978) ("a purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests."); *Levy v. Louisiana*, 391 U.S. 68 (1968) (Illegitimate children have a right to recover under wrongful death statute. To hold otherwise would punish children for mother's indiscretions); *Scales v. United States*, 367 U.S. 203 (1961) (To be guilty of violation of the membership clause of the Smith Act an individual must be personally guilty of proscribed wrongs). Cf. *Griggs v. Duke Power*

While the court in this case expressed a desire for individual accountability, it failed to provide adequate guidelines describing the degree of accountability required. The court's proscription of curricular validity remained a relative term, one capable of varying degrees.⁶⁸ The opinion discussed factors which might impact the degree of validity but failed to identify any as controlling.⁶⁹ The court's analogy to a final exam concept,⁷⁰ if intended to control, could require validity as per the curriculum of individual classrooms.⁷¹ The court could have set a validity standard by applying a balancing of interests approach similar to the approach taken in *Goss v. Lopez*.⁷² Properly applied, the student's interest in receipt of a diploma would be weighed against the state's purpose in requiring SSAT II passage.⁷³ Because the receipt of a diploma is an extreme student inter-

Co., 401 U.S. 424, 436 (1971) (The Supreme Court has interpreted Title VII to mandate employment tests which . . . "measure the person for the job and not the person in the abstract").

⁶⁸ In *United States v. Georgia Power Company*, 474 F.2d 906, 912 (5th Cir. 1977), the Fifth Circuit recognized the relative nature of test validity while deciding an employment test under Title VII. The court expressed the opinion that, ". . . a test is not valid or invalid *per se*, but must be evaluated in the setting in which it is used."

⁶⁹ *Id.* at 402-404. The basic policy question is how much the judiciary ought to intrude upon the state's control of public education. The instant court displays the dichotomy when citing *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1972) (Supreme Court sustained Texas' property tax-based school finance system despite gross inequities between predominately white and predominately minority school districts) and *Goss v. Lopez*, 419 U.S. 565 (1975) (Student suspensions held subject to prior hearing).

⁷⁰ 644 F.2d at 406.

⁷¹ The only way to ensure every student's exposure to materials tested would be to require the logging of materials covered in each teacher's lesson book, an administrative nightmare to the educational practitioner. McClung suggests sampling curriculum guides and lesson plans to evidence instructional (curricular) validity. McClung, *Competency Testing*, note 8 *supra*, at 707-708. This sampling method is followed by a comparison of test questions and test items and altering test and curriculum until curricular validity is achieved. *Id.* This way almost certainly inhibits the scope of the state's curriculum, despite the instant court's confidence that a validity requirement would not interfere with curriculum additions. 644 F.2d at 406.

⁷² 419 U.S. at 579. "It also appears from our cases . . . nature of the hearing will depend on appropriate accommodation of the comprising interests involved." *Id.*

The leading Supreme Court case utilizing the balancing of interest approach is *Mathews v. Eldridge*, 424 U.S. 319 (1976). The *Eldridge* Court identified three distinct factors to be considered: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administration burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

⁷³ The State of Florida exhibits its objectives in the "Educational Accountability Act of 1976." LAWS OF FLORIDA 1976, vol. 1, chapter 76-223, 491-91. Competency testing was to provide: geographic equalization by result comparisons, information for educational decisionmakers, cost effectiveness data, guarantees to students that at least minimal educational standards were met by their school system, and public information about Florida's school system.

est⁷⁴ the result of a balancing test may require the SSAT II to possess an inordinate degree of curricular validity.⁷⁵ The ability of any competency test to attain a high level of validity is claimed by many experts to be beyond today's testing capabilities.⁷⁶ Thus, the court's failure to set a standard of validity avoids an issue which may ultimately require abandonment of competency test based diploma denial.⁷⁷

The court's decision to require some degree of validity is not in

See Brief for the National Education Association and the Florida Teaching Profession-NEA as Amici Curiae, *Debra P. v. Turlington* (1980) at 14-16. (The brief outlines four possible state objectives: accountability, increased status of a diploma in eyes of public, to stimulate students to learn and to eliminate social promotion).

Some commentators have questioned whether diploma sanctions are necessary or even useful in meeting objectives such as these. See, e.g., McClung, *Competency Testing*, *supra* note 8 at 665-672.

⁷⁴ The district court examined the effect of diploma denial in terms of job and educational opportunity. 474 F. Supp. at 249. The State of Florida Career Service Department employs 10% of its work force from non-diploma personnel. Those 10% are of a menial variety. A certificate of completion will not suffice as a diploma for employment purposes. *Id.*

Further, the State University System requires a diploma for admissions. According to testimony of an expert witness at trial, as of the second SSAT II, the black failure rate indicated a potential 20% decline in black attendance at state universities. *Id.* at n.6.

⁷⁵ See, *Merriken v. Cressman*, 364 F. Supp. 913, 920 (E.D. Pa. 1973) (School's drug survey resulted in some students being labeled drug users. The federal district judge stated in dicta that a strong result adverse to a protected interest must involve almost no error).

⁷⁶ In McClung, *Competency Testing*, *supra* note 8, a report by the National Academy of Education Committee on Testing and Basic Skills is cited to support the insufficiencies of competency tests. The report was prepared at the request of HEW Secretary Joseph Califano and chaired by Stephen K. Bailey of the Harvard Graduate School of Education. The following is quoted in McClung: "Any setting of state-wide minimum competency standards for awarding the high school diploma—however understandable the public clamor which has produced the current movement and expectation—is basically unworkable, exceeds the present measurement arts of the teaching profession, and will create more social problems than it can conceivably solve.

. . . The effort to determine and assure minimum competency standards for high school graduation will . . . fall of its own weight, for the scaffolding of existing test designs is too weak to carry such an emotionally-laden and ambiguous burden. Continuing extensive efforts and funds in this direction is wasteful and takes attention away from the major tasks of improving our schools." National Academy of Education Committee on Testing and Basic Skills, Report to the Assistant Secretary of Education: Improving Education Achievement 9 (1978).

The Supreme Court recognized the limitations of competency exams in *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971): "The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality."

⁷⁷ This position is taken by the majority of legal commentators and educational specialists. See generally Lewis, *supra* note 54; McClung, *Competency Testing*, *supra* note 8.

conflict with *Horowitz*.⁷⁸ Although the *Horowitz* Court indicated that federal courts should not interfere with state academic affairs,⁷⁹ the case is factually distinguishable in at least two critical respects.⁸⁰ First, the higher education versus secondary education distinction presents interests differing in weight.⁸¹ The *Horowitz* court's arguendo approach to the determination of an existing legal entitlement to higher education failed to clarify if such an entitlement in fact exists.⁸² *Goss*, on the other hand, is clear precedent for a student's protected interest in secondary education.⁸³ If an entitlement to higher education does exist it is almost certainly afforded less protection than compulsory education.⁸⁴

The second factual distinction is the objective nature of the SSAT II.⁸⁵ Of primary concern to the Supreme Court was preventing judicial usurpation of expert evaluations in the educational setting.⁸⁶ The *Horowitz* Court found subjective academic evaluations unique and not readily susceptible to judicial scrutiny.⁸⁷ The Court contrasted academic evaluations with conduct dismissals⁸⁸ and found conduct dismissals to consist of factual determinations similar to those frequently encountered by courts.⁸⁹ The matching of the SSAT II with Florida's curriculum is an objective task, more akin to the factual determinations in *Goss* and thus susceptible to judicial scrutiny.⁹⁰

⁷⁸ See notes 34-41 and accompanying text *supra*.

⁷⁹ 435 U.S. at 82.

⁸⁰ McClung identifies the extent of the injury and the simple assessment nature of the SSAT II as additional bases for distinction. McClung, Competency Testing, *supra* note 8, at 662.

⁸¹ The term "weight" becomes important after establishing a due process entitlement. The weight of an interest determines the extent of procedural protection. 419 U.S. at 576-77.

⁸² See note 35 *supra*.

⁸³ *Goss* has been followed by the lower courts. See, *Ingraham v. Wright*, 525 F.2d 909, 917-18 (5th Cir. 1976) (Fifth Circuit recognized a high school students right to an education, but determined corporal punishment a trivial incident upon that right); *Muscare v. Guinn*, 520 F.2d 1212 (7th Cir. 1975) (Court extended *Goss* rationale in granting foreman's right to hearing prior to dismissal); *Gosper v. Bruton*, 513 F.2d 843 (10th Cir. 1975) (Student nurse entitled to prior notice of academic dismissal).

⁸⁴ In *Gasper v. Bruton*, *supra* note 83, the Tenth Circuit limited a student nurse's due process protection to only encompass academic dismissal which was unfair or arbitrary. In so doing the court implicitly recognized a lesser standard for higher education.

⁸⁵ See McClung, Competency Testing, *supra* note 8, at 663.

⁸⁶ 435 U.S. at 87. See also, 474 F. Supp. at 266 (District Court's evaluation of judgment issue).

⁸⁷ *Id.* at 90. The Court found the expert academic evaluations of educators "not readily adapted to the procedural tools of judicial or administrative decision-making."

⁸⁸ 435 U.S. at 87-91. When contrasted with *Goss* the Court could not find in academic evaluations the beneficial presentation of facts vital to the *Goss* holding. *Id.*

⁸⁹ 435 U.S. at 87.

⁹⁰ It would appear this objective task is more in line with the factual issues presented in the typical judicial setting. See note 87 *supra*.

The Fifth Circuit's validity requirement is both necessary to protect the student's interest and objective, thereby not in conflict with *Horowitz*.⁹¹

In conclusion, *Debra P. v. Turlington*⁹² begins what is likely to be a long line of judicial decisions in the area of competency testing. The court had an opportunity to set a clear due process standard to be met by tests used to deny diplomas. The court's finding of a property interest in a diploma, while vital to future decisions, adds little to what the Supreme Court had delineated in *Goss*. The court's failure to clarify the degree of curricular validity requires the district court to set a standard at a time when many of the several state's educators were looking to the Fifth Circuit for guidance. The court's indication that some degree of validity is required and affirmance of the district court's injunction until 1983 will prevent, at least in the short run, high school students from being unjustly deprived of what may be the keys to their future.

⁹¹ For further discussion on distinguishment of *Horowitz* see Lewis, *supra* note 54, at 164-65 and McClung, *Competency Testing supra* note 8, at 662-63.

⁹² 644 F.2d 397 (5th Cir. 1981).