

# 85-2579

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

UNITED STATES,

Plaintiff-Appellant

LULAC, et al.,

Plaintiffs-Appellees

v.

STATE OF TEXAS, et al.,

Defendants-Appellants

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS

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BRIEF FOR THE UNITED STATES

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STATEMENT REGARDING ORAL ARGUMENT

The United States requests oral argument. This case raises important questions concerning the authority of states to require college students to pass a test on basic skills as a condition of entry into teacher education programs. It also raises an important question concerning whether a federal court can assume jurisdiction over a challenge to such a requirement under its authority to enforce an outstanding decree involving the desegregation of elementary and secondary schools. This Court's resolution of these issues would benefit from oral argument.

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BRIEF FOR THE UNITED STATES

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STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1292(a)(1).

QUESTIONS PRESENTED

1. Whether the district court lacked jurisdiction?
2. Whether the district court erred in holding that appellees were likely to prevail on their claims under the Equal Protection Clause, the Due Process Clause, Title VI of the Civil Rights Act of 1964, and the Equal Educational Opportunities Act of 1974.

STATEMENT

A. Background

In 1981, the Texas Legislature enacted a law that requires students to pass a test on basic skills as a condition of admission into a State approved teacher education program (Texas Education Code, Section 13.032). In January 1982, the State Board of Education adopted a rule specifying that this requirement would take effect on May 1, 1984 (Veselka Dep. 18).<sup>1/</sup> In the summer of 1982, the State Board decided that the basic skills tested should include reading, writing, and arithmetic and that the Pre-Professional Skills Test (PPST) should be used to measure these skills provided that it could be validated for this purpose (id. at 19-20).

In October 1982, the State Board contracted with IOX Associates to perform such a validation study (id. at 23). One year later, IOX issued its final report concluding that the PPST was valid (id. at 24). In February 1984, the State Board formally approved the use of the PPST and established the scores that would be necessary to pass the test (id. at 24-25). In March 1984, the test was given for the first time (id. at 25).

Under the Board's regulations, the test is given three times every year, and students are permitted to take the test as many times as they wish (id. at 27, 29). If a student fails any one of

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<sup>1/</sup> "Dep." refers to Deposition; "Mem." refers to the district court's Memorandum Opinion; "Tr." refers to Transcript; "Ex." refers to Exhibit.



the sections of the test, however, he can take no more than six credits of education courses until he passes the test (id. at 79). Students generally begin taking education courses in their junior year.

The PPST is designed to test basic skills at the 12th grade level (Tr. 1182-1183). During the first year of its use, 73% of the whites, 34% of the Hispanics, and 23% of the blacks who took the test passed it (Pltfs, Ex. 10).

B. Proceedings in the district court

In July 1985, appellees (LULAC, GI Forum, NAACP, and a number of Hispanic and black college students) filed a motion to enforce the statewide desegregation decree in United States v. State of Texas, 447 F.2d 441 (5th Cir. 1971) (Motion to Enforce Decree filed on July 19, 1985). That case began in 1971 as a suit to desegregate nine all-black school districts. The case was then expanded and resulted in a decree requiring the State to assume responsibility for the desegregation of public schools throughout Texas.

In their motion, appellees alleged that the State's use of the PPST violated provisions in the decree that required the State to provide Hispanic and black students in the public schools with access to minority teachers (id. at 1-2). In addition, appellees alleged that the use of the test violated the rights of students seeking admission into teacher education programs under the Equal Protection Clause, the Due Process Clause, Title VI of the Civil

Rights Act of 1964 (42 U.S.C. 2000d), the Equal Educational Opportunities Act (20 U.S.C. 1703), and the contract between the United States and the State of Texas guaranteeing equal education opportunity in higher education (id. at 2-3).

Appellees immediately moved for a preliminary injunction preventing the State from using the test as a barrier to admission to teacher education programs. After a hearing, the district court granted this motion (Memorandum Opinion filed on August 27, 1985).

C. The district court's decision

1. Jurisdiction

The court first determined that its authority to enforce the decree in United States v. State of Texas gave it jurisdiction to resolve appellees' motion. The court acknowledged that its previous orders "did not deal specifically with the adoption of the PPST" (Mem. 14). The court concluded, however, that the State's use of the PPST could frustrate the purpose of that decree. According to the court, the purpose of the decree was to enforce the State's obligation to create a unitary system and this obligation includes a duty to provide minority children with "minority role models" (id. at 14-16). Since the court found "[a]mple evidence" that the use of the PPST would "greatly diminish[]" the number of minority teachers, the court was convinced that it had jurisdiction to consider the merits of appellees' attack on it (id. at 16-17).

The court also concluded that the PPST issue fell within the confines of its previous order requiring local school districts to use "non-racial, non-ethnic criteria in hiring" (id. at 17). The court pointed out that if a local school district had adopted the PPST as a prerequisite to hiring, the court clearly would have had jurisdiction to consider whether the local district had violated this provision (id. at 18-19). The court reasoned it should make no difference for purposes of jurisdiction that the PPST requirement is State rather than locally imposed (id. at 19).

Based on this analysis, the court not only assumed jurisdiction over appellees' claim that the State had violated the terms of the decree, it also assumed jurisdiction over appellees' claims under the Equal Protection Clause, the Due Process Clause, Title VI, and the Equal Educational Opportunities Act (id. at 19). The court refused to consider appellees' claim that the State had violated its agreement to provide equal education opportunity in higher education, however (id. at 19). The court explained that "[t]he progress of the State of Texas in ensuring equal educational opportunity in colleges and universities is, jurisdictionally speaking, not a concern of this court" (id. at 20).

2. The merits of the motion

In deciding to grant a preliminary injunction against use of the PPST, the court considered four factors: (1) the harm to appellees in denying an injunction; (2) the harm to the State in

granting an injunction; (3) the public interest; and (4) the probability that appellees would prevail on the merits (id. at 20 citing Camenisch v. University of Texas, 616 F.2d 127, 130 (5th Cir. 1980)).

The court first found that unless an injunction were issued, many students would have to postpone completion of their education courses for at least six months to one year (id. at 21). This, in turn, would deprive students in public schools of minority teachers "at a time when the state is experiencing a significant teacher shortage" (ibid.). For this reason, the court concluded, appellees had established irreparable harm (id. at 22).

On the other hand, the court found that the State would not suffer irreparable harm if a preliminary injunction were granted. The State argued that an injunction would permit students without the necessary skills to take courses, would negatively affect public perception, and would be unfair to students who take courses only to find out later that they must still pass the PPST (id. at 22). In the court's view, "none of these 'harms' [was] persuasive" (id. at 23). The court found that students who failed the PPST would be able to learn the material in their courses, that negative public perception was irrelevant, and that students could make an informed choice on whether to take education courses knowing that they still might have to pass the PPST (id. at 23-24).

The court concluded that the public interest also weighed in favor of granting an injunction. The court explained that since its injunction would only permit students to enroll in courses and would not permit them to become certified, the public's interest in competent teachers was not implicated (id. at 24-25). In contrast, the court found that the public's interest in alleviating the teacher shortage would be served by granting an injunction (id. at 25).

The court finally determined that appellees were likely to prevail on the merits. The court recognized that to prevail on their Equal Protection claim, appellees were required to show that the State had adopted the PPST with a racially discriminatory purpose (id. at 26). In the court's view, however, "the most reliable way to determine discriminatory intent in a school desegregation case is to look at the reasonably foreseeable results of the actions being challenged" (id. at 32). The court therefore viewed the State's awareness that the PPST would have a disproportionate impact on black and Hispanic students as proof of discriminatory intent (id. at 27, 32).

The court also relied on several other factors as evidence of discriminatory intent. The court found that "the historical background of [the] decision [was] one of repeated and recent instances of intentional segregation, particularly in areas of South Texas where there is a substantial Mexican-American population" (id. at 27). The court also found it significant that the State had failed

to attempt "to discover whether the test itself was the source of the impact or whether alternative tests existed" (ibid.). The court was especially critical of the State's failure to "organize any sort of remediation program specifically directed at preparing minority students for the PPST" (id. at 27-28). In the court's view, "[t]he state's passivity seem[ed] particularly callous in the face of the almost heroic efforts made by colleges and universities with heavy minority concentrations hastily to devise makeshift remediation programs of their own" (id. at 31-32).

In addition, the court found it "[p]articularly disturbing" that the State had instituted an alternative certification procedure in response to teacher shortages resulting from the PPST (id. at 29). Under this procedure, those graduating from college and passing the PPST will be allowed to teach without any courses in teacher education. According to the court, "[t]he choice to sacrifice the requirement of two years of training specifically directed at being a teacher, \* \* \* rather than change the PPST preclusionary scores or petition the Legislature to allow waiver of the PPST requirement, was one of the strongest indications of racial intent presented at the hearing" (id. at 29).

As the court viewed the testimony of the State's witnesses, the State's conduct seemed to have "sprung from an attitude that minority students were themselves to blame for their poor performance" (id. at 30-31). That attitude, the court found, was evidence of discriminatory intent (id. at 31). Finally, the court found it

"extremely significant" that the State Board was composed of 27 members, with only one black and three Hispanic members (id. at 32-33). As the court saw it, "[t]his factor adds weight to [appellees'] claims of intentional discrimination, for these minority members could get no more response to their concerns about minority impact than the appointment of an apparently powerless committee which met once and dissolved" (id. at 33). The court concluded that the evidence "strongly suggests" that the State acted with discriminatory intent in adopting the PPST and that appellees were therefore likely to prevail on their claim under the Equal Protection Clause (id. at 34).

The court also held that appellees were likely to prevail on their Due Process claim. The court understood that to establish a violation of the Due Process Clause, appellees were required to establish a protected liberty or property interest (id. at 34). The court found it unlikely that appellees would be able to establish a protected property interest (ibid.). The court held that since colleges and universities have always had a large measure of discretion to determine their own admission and certification standards, the State had not created any property interest in becoming certified as a teacher (id. at 35). The court concluded, however, that the students did have a constitutionally protected liberty interest "in being able to pursue the occupation of their choice" and that this interest was implicated since the "[f]ailure to pass the PPST unequivocally deprives a student of the opportunity to teach in Texas" (id. at 35-36).

The court held that although the scope of this Due Process right was unclear, it necessarily included a right to "reasonable notice of the state's requirement" (id. at 36). The court found that "the students and teacher education programs were given very little notice of the PPST requirement and the proposed preclusionary scores," and "no materials to help prepare for the PPST beyond a pamphlet" (id. at 37). For this reason, the court concluded that appellees were "likely to prove that the [State] deprived them of their right to teach in Texas, without sufficient notice concerning the nature and imminence of the PPST" (id. at 38).

The court held that the Due Process Clause also required the State to show that "students in Texas had been taught the materials covered in the PPST" (ibid. citing Debra P. v. Turlington, 644 F.2d 397, 404 (5th Cir. 1981)). After reviewing the State's effort to make this showing, as well as appellees' criticisms of that attempt, the court concluded that "insufficient evidence ha[d] been presented on which to decide the likelihood of [appellees'] success on [this issue]" (id. at 38-41).

The court next considered appellees' claim that the use of the PPST violated the prohibition in Title VI against discrimination in federally assisted programs. The court held that since the teacher education programs receive federal financial assistance and Title VI affords individuals a private right of action, appellees could attack the PPST under Title VI (id. at 41-45). After noting



that appellees had shown a likelihood of success on their constitutional claim, the court held that "this likelihood extends to their cause of action under [Title VI]" (id. at 45).

Finally, the court considered appellees' claim that the State had failed "to take affirmative steps \* \* \* to remove the vestiges of a dual school system" as required by the Equal Educational Opportunities Act (ibid.). As the court understood this provision, the State could not use the PPST to prevent students who still suffered the effects of the dual system from entering teacher education programs (id. at 46-47). The court found that the limited evidence introduced at the hearing on this issue indicated that the test was being applied to such students (id. at 47). The court therefore concluded that appellees had shown "a substantial likelihood of success on the merits of this claim" (id. at 46-47).

Based on its findings under the four factors (harm to appellees, harm to the State, the public interest, and likelihood of success), the district court issued a preliminary injunction requiring the State to "permit colleges and universities in the State of Texas to admit those students, regardless of race, to courses in their Education Departments who would have been qualified to enroll in those courses but for their failing the [PPST]" (Preliminary Injunction filed on August 27, 1985). From this order, the State of Texas and the United States have appealed.

SUMMARY OF ARGUMENT

Appellees have challenged the State's authority to use a basic skills test (the PPST) as a condition of admission into teacher education programs. After a hearing, the district court granted appellees' motion for a preliminary injunction against further use of the test. We believe the district court erred in two important ways.

1. Most fundamentally, the district court lacked jurisdiction over appellees' challenge. Appellees asserted jurisdiction under the statewide desegregation decree in United States v. State of Texas, and the district court assumed jurisdiction entirely on that basis. The State of Texas decree only requires the State to take responsibility for the desegregation of elementary and secondary schools, however. It does not limit the State's authority in the field of higher education. Since the PPST is used in colleges and universities and not in the elementary and secondary schools, the State of Texas decree did not give the district court jurisdiction to review appellees' challenge to it.

The district court held that minority students in the elementary and secondary schools have a constitutional right to minority teachers and that the PPST indirectly affects that right. But this Court has repeatedly held that minority students have no such right. And while it is true that the PPST may ultimately affect the number of minority teachers, that is not a basis for exercising jurisdiction over a claim of discrimination in college admissions. School desegregation remedies are necessarily limited

to eliminating discrimination that actually occurs in the public schools. They cannot embrace State action that occurs elsewhere simply because it may indirectly affect the students in those schools.

2. The district court also erred in holding that appellees were likely to prevail on the merits. To establish a violation of Equal Protection, appellees were required to prove that the State's use of the PPST was motivated by racially discriminatory intent. While the district court purported to follow this principle, it held that the most reliable way to determine intent was to examine the reasonably foreseeable results of the State's action. That standard is inconsistent with controlling Supreme Court decisions which hold that it is improper to equate intent with foreseeability.

The available evidence does not permit an inference of discriminatory intent. The State legislation requiring competency testing of basic skills was designed to improve teacher quality, not to diminish the number of minority teachers. And the State Board's adoption and implementation of the PPST was motivated by an intent to faithfully carry out the legislative mandate. Indeed, the State Board did not finally approve the use of the PPST until it received a report that the test was a valid measure of the skills needed for success in teacher training and for success as a teacher. The evidence cited by the district court merely shows that the State knew that the PPST would have a disproportionate impact and that it decided to use it anyway. That is not a sufficient basis for an inference of discriminatory intent.

The court's holding that appellees were likely to show that the State deprived them of their liberty interest in pursuing the occupation of their choice without adequate notice is also in error. This Court has held that general standards of uniform application do not ordinarily trigger any requirement of individual notice and opportunity to be heard. Moreover, this Court has held that procedural Due Process, although applicable to university decisions concerning student misconduct, is not fully applicable to academic decisions. Finally, this Court has held that while there is a liberty interest in pursuing an occupation, that interest is not significantly implicated when there is an opportunity to retake the test. Although requirements that are wholly arbitrary or capricious violate Due Process, the district court failed to articulate why it would be arbitrary or capricious to give college students a test on 12th grade level basic skills without prior notice. In any event, the legislation itself, the Board's regulations implementing the statute, and the colleges' catalogues all gave notice of the testing requirement long before the test was first given.

The district court also erred in holding that appellees were likely to prevail on their Title VI claim. The court's Title VI holding is based entirely on its prior finding of a probable Equal Protection violation. Since the court's Title VI analysis tracks its Equal Protection analysis, it suffers from the same errors.

Finally, the district court erred in holding that appellees were likely to prevail on their claim under the Equal Educational Opportunities Act ("EEOA"). The EEOA's remedial obligations extend only to elementary and secondary schools. While 20 U.S.C. 1703(b), on which the court relied, requires the dismantling of dual systems "root and branch," it imposes no duty upon higher educational authorities to compensate students for the academic deficiencies which may be vestiges of past segregation in the first twelve grades. Indeed, colleges and universities are not required, either by the Constitution or by the EEOA, to lower their entrance standards to accommodate those students whose failure to meet minimum standards may be, in part, a consequence of past discrimination in elementary or secondary education.

The court's reliance on Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981), is misplaced. In that case, this Court held that students who complete a high school course to the satisfaction of their own schools are normally entitled to expect to receive a diploma. For this reason, this Court concluded, the state that practiced segregation during the school-life of these students should not permit the consequences of that segregation to stand between the students and their diplomas. But this has no bearing on the present case.

Entrance into a professional school is not part of the normal expectations of all students who complete high school. Moreover, if the district court's logic were accepted, it would mean that any state that practiced segregation in the past could not set minimum standards for entry into any profession. All such standards could be said to penalize the victims of prior segregation.

The application of Debra P. to professional standards for teachers is particularly inappropriate. Here what arguably may be fair to would-be teachers is unfair to those who will be taught. If the state is required to accept into the teaching profession those who cannot satisfy minimum standards, it will not remedy but perpetuate the effects of past discrimination (if any) by allowing academic deficiency to be passed from one generation to the next.

In any event, there is no evidence from which a court could conclude that there has been widespread school segregation in Texas upon which current academic deficiencies could be blamed. And even if there were, Debra P. held that a test having disparate impact traceable to past discrimination can be justified if it has a remedial function. Where students are spurred by the test to upgrade their skills, the test vindicates its usefulness. That is ultimately what happened in Debra P.; there is ample evidence that the same is true in the present case.

#### ARGUMENT

##### I

#### THE DISTRICT COURT LACKED JURISDICTION TO CONSIDER APPELLEES' CHALLENGE TO THE STATE'S USE OF THE PPST

Appellees have challenged the State's use of the PPST as a condition of admission into teacher education programs. Appellees did not file a complaint attacking the State's requirement, however. Instead, they filed a motion to enforce the state-wide desegregation decree in United States v. State of Texas. The district court concluded that appellees' motion fell within its

authority to enforce that decree and assumed jurisdiction over appellees' claims entirely on that basis. As we argued below, appellees' challenge to the State's use of the PPST does not implicate the decree in United States v. State of Texas. The district court should therefore have dismissed appellees' motion for lack of jurisdiction.

As this Court recently explained, United States v. State of Texas began as a suit to desegregate nine all-black school districts (680 F.2d 356, 358 (1982)). The case was then expanded and resulted in a decree directing the State to assume responsibility for the desegregation of public schools throughout Texas (ibid.). While this decree is undeniably broad, it is limited to curing the violation identified in that case -- racial segregation in the elementary and secondary schools throughout the State. United States v. State of Texas did not involve allegations of discrimination against black and Hispanic students in colleges and universities, and the decree therefore does not purport to circumscribe the State's authority in that area. Nor could it. Under well established principles, judicial remedial authority can "extend no farther than required by the nature and extent of th[e] violation." General Building Contractors Ass'n. v. Pennsylvania, 458 U.S. 375, 399 (1982). Since the violation identified in United States v. State of Texas concerned the elementary and secondary schools, the remedy was required to be similarly limited.

The district court's assumption of jurisdiction is inconsistent with this understanding of the United States v. State of Texas decree. Appellees' challenge to the State's use of the PPST threatens the State's authority over colleges and universities, not its authority over the public schools. The PPST is used as a condition of admission into college and university education programs; it is not used in the State's elementary and secondary schools. If the State's use of the PPST violates anyone's rights, it is the rights of college students seeking admission into teacher education programs, not those of students attending elementary and secondary schools. In these circumstances, the district court had no basis for asserting jurisdiction under the United States v. State of Texas decree.

In reaching a contrary conclusion, the district court held that the State's use of the PPST might undermine one of the purposes of its decree. According to the court, one purpose of its decree was to enforce the State's constitutional obligation to provide minority children with "minority role models" (Mem. 14-16). Since the court found that the PPST would have the effect of diminishing the number of minority teachers, it felt compelled to consider appellees' attack on it.

This reasoning is fundamentally flawed. To be sure, this Court has held that discrimination in the assignment and hiring of teachers violates the constitutional rights of students, and has insisted that desegregation remedies include a prohibition against that kind of discrimination. See Singleton v. Jackson



Municipal Separate School District, 419 F.2d 1211, 1218 (1970).

But this Court has repeatedly held that students do not have a constitutional right to minority teachers per se. Fort Bend Independent School District v. Stafford, 651 F.2d 1133, 1139-1140 (1981) (citing cases). And it has never come close to suggesting that students in the public schools have a constitutional right to have college students admitted into teacher education programs on a nondiscriminatory basis. To take that leap now would stretch the principle involved in Singleton beyond recognition.

It is true that if minority students are excluded from teacher education programs in disproportionate numbers, it may reduce the number of minority teachers in the public schools and this, in turn, may affect the minority students attending those schools. But that is not a proper basis for exercising jurisdiction over appellees' claims. The remedy in a school desegregation case must be designed to eliminate racial discrimination that actually occurs in the public schools. Dayton Board of Education v. Brinkman, 433 U.S. 406, 419-420 (1977) (Dayton I). School desegregation cases are not general forums for reviewing all claims of racial discrimination that can be said to have some effect on students attending those schools.

Indeed, in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 22 (1971), the Supreme Court expressly rejected that kind of expansive notion of the role of a federal court in a school

desegregation case. The Court explained that (id. at 22):

We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from Brown I to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes \* \* \*. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of Brown I to seek to use school desegregation cases for purposes beyond their scope.

The Court went on to stress that the objective in a school desegregation case "is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools. Id. at 23 (emphasis added).

The principles established in Swann are controlling here. At its core, appellees' complaint is that the State's use of the PPST violates the rights of college students seeking admission into teacher education programs. The State's policy will admittedly have an indirect effect on minority students attending public schools. But this fact alone cannot transform a higher education case into a public school desegregation case.

At one point, the district court recognized that it had no authority over the State's activities in the field of higher education. In refusing to exercise jurisdiction over appellees'

claim that the State's use of the PPST violated its agreement to provide equal education opportunity in higher education, the court explained that "[t]he progress of the State of Texas in ensuring equal educational opportunity in colleges and universities is, jurisdictionally speaking, not a concern of this court" (Mem. 20). This statement is exactly right. Rather than simply leading the court to refuse jurisdiction over appellees' claim that the State had breached its higher education agreement, however, it should have led the court to decline jurisdiction over all of appellees' claims.

This Court has recently noted that under the authority of the United States v State of Texas decree, the district court has engaged in a "general undertaking to supervise broad aspects of Texas' educational system and policy." United States v. State of Texas, supra, 680 F.2d at 358. While this Court approved the court's authority to continue to enforce outstanding orders, it cautioned the district court to avoid extending its authority into new areas that do not come within the specific terms of the decree. Id. at 374. The district court failed to heed this caution.

In sum, the district court's authority to enforce its decree in United States v. State of Texas did not give it jurisdiction to decide the merits of appellees' attack on the State's use of the PPST. This Court should therefore vacate the district court's preliminary injunction and remand with directions to dismiss

appellees' motion to enforce the decree.<sup>2/</sup>

II

THE DISTRICT COURT ERRED IN HOLDING THAT  
APPELLEES WERE LIKELY TO PREVAIL ON THE  
MERITS

Even assuming the district court had jurisdiction, it should not have granted appellees' motion for preliminary relief. To prevail on their motion, appellees were required to show: (1) a substantial likelihood that they would prevail on the merits; (2) that they would suffer irreparable injury; (3) that this injury outweighed any harm to the State; and (4) that a preliminary injunction would serve the public interest. Canal Authority of the State of Florida v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974). Whether or not appellees carried their burden on the other factors, they most assuredly did not establish a likelihood of success on the merits. While the district court held that appellees had shown probable violations of the Equal Protection Clause, the Due Process Clause, Title VI, and the Equal Educational Opportunities Act, those holdings are in error.

<sup>2/</sup> As an alternative ground for assuming jurisdiction, the district court held that the PPST issue fell within its order requiring non-racial, non-ethnic criteria to be used in hiring (Mem. 17). This conclusion is incorrect. The order referred to by the court simply directs the State to "require each county or local educational agency [applying for State funds] to include \* \* \* a list of objective, non-racial, and non-ethnic criteria \* \* \* by which it will judge prospective employees for faculty and staff positions." State of Texas, supra, 447 F.2d at 446. The order thus concerns the kind of criteria local districts must use in making hiring decisions. It has nothing to do with the kind of criteria the State must use in formulating college admission standards.

A. The district court erred in holding that appellees were likely to prevail on their claim under the Equal Protection Clause

In the first year of its administration, 73% of the whites, 34% of the Hispanics, and 23% of the blacks who took the PPST passed it. These statistics lie at the heart of appellees' claim that the State's use of PPST violates the Equal Protection Clause.<sup>3/</sup>

Of course, it is now well established that a law or other official act will not be held unconstitutional solely because it has a racially disproportionate impact. Personnel Administrator v. Feeney, 442 U.S. 256 (1979); Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229, 239 (1976). A violation of equal protection can be found only if the impact "can be traced to a racially discriminatory purpose." Feeney, supra, 442 U.S. at 272. In Davis, the Supreme Court upheld a police department's employment test, even though it screened out four times as many blacks as whites. In Arlington Heights, the Court upheld a municipality's zoning decision even though it tended to perpetuate racially segregated housing patterns. And in Feeney, a case involving an allegation of sex rather than race discrimination, the Court upheld a state's veterans preference even though it made all but 2% of the women in the state ineligible for state civil service jobs.

<sup>3/</sup> During the past year, there has been significant improvement in black and Hispanic pass rates (Tr. 827, 1516). This trend can be expected to continue. Indeed, one educator from a predominantly minority institution predicted that 70% of this year's freshmen would eventually pass the test (Tr. 828). Thus, while the PPST may continue to have a disparate effect for some time, the statistics cited above considerably overstate the likely magnitude of that effect.

The district court purported to follow the principle involved in these cases. Thus, the district court stated that "[i]n order to prevail on their claim that the imposition of the PPST and the determination of preclusionary scores violated the Equal Protection clause [appellees] must show that [the State] acted with discriminatory intent or purpose" (Mem. 26). The district court went on to hold, however, "that the most reliable way to determine discriminatory intent in a school desegregation case is to look at the reasonably foreseeable results of the actions being challenged" (id. at 32).

This holding is inconsistent with the Supreme Court's decision in Feeney. In that case, the lower court, relying on the same foreseeability standard applied by the district court here, found that the state's veterans preference reflected intentional discrimination against women. The Supreme Court reversed, holding that the lower court had applied the wrong legal standard. The Court explained that discriminatory purpose "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker \* \* \* selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." 442 U.S. at 279.

In adopting a foreseeability standard for determining discriminatory intent, the district court relied on this Court's decision in United States v. Texas Education Agency, 579 F.2d 910 913-914 (1978). That decision, however, came before the Supreme Court's decision in Feeney. To the extent that language in that

opinion suggests that it would be appropriate to equate intent with foreseeability, it is inconsistent with Feeney and should not be followed.

Appellees appear to suggest that Feeney does not apply to race discrimination cases (Response to Stay Motion 11). But in Feeney itself, the Court made clear that the same standard of intent governs both sex and race discrimination cases. 442 U.S. at 273-274. And the Court has since applied the Feeney test of intent in a race discrimination case. Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 471 (1982).

The decisions in Columbus Board of Education v. Penick, 443 U.S. 449 (1979) and Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) (Dayton II), cited by appellees, are not contrary. Indeed, in Dayton II, the Court expressly rejected the Sixth Circuit's holding that a presumption of segregative purpose arises from proof that actions have had a foreseeably segregative effect. 443 U.S. at 536 n.9. The Court explained that (ibid.):

[w]e have never held that as a general proposition the foreseeability of segregative consequences makes out a prima facie case of purposeful racial discrimination and shifts the burden of producing evidence to the defendants if they are to escape judgment; and even more clearly there is no warrant in our cases for holding that such foreseeability routinely shifts the burden of persuasion to the defendants.

Of course, as the Supreme Court has made clear, foreseeability of disparate impact is one kind of relevant evidence on the issue of discriminatory purpose. Dayton II, 443 U.S. at 536 n.9;

Columbus, 443 U.S. at 464-465. But that is far different from saying, as the district court did, that foreseeability is tantamount to, or is the most reliable way to determine, discriminatory intent.

Thus, to establish a violation of the Equal Protection Clause, appellees were required to show that the State adopted and implemented the PPST "because of" rather than merely "in spite of" its effect on black and Hispanic students seeking admission into teacher education programs. The fact that the State knew from its pilot testing that the PPST would have a disproportionate impact on black and Hispanic students, while relevant on this issue, is far from proof of such a purpose.

The district court never found that appellees were likely to show that the State's use of the PPST reflected intentional discrimination in the sense demanded by Feeney. Nor is such a finding possible.

The State Board's adoption of the PPST was a direct response to legislation requiring that students pass a test on basic skills as a condition of admission into teacher education programs. The legislature acted against the background of reports that the quality of students entering the teaching profession had been declining over time and that many now lacked the basic skills necessary to perform satisfactorily as teachers (Kirby Dep. 8-9). By requiring competency testing, the legislature sought to reverse this trend and to insure that the State's future teachers would have the necessary basic skills (ibid.). The legislature's rationale for requiring students to pass the test before entering teacher education



programs was that students not only need basic skills to become successful teachers, they also need them to profit from teacher education courses (id. at 18-19). The legitimacy of these legislative judgments is beyond dispute.

Appellees have never suggested otherwise. Instead, appellees claim that while the legislature's decision to impose competency testing may have been motivated by a legitimate desire to improve teacher quality, the State Board's adoption and implementation of the PPST was motivated by an intent to diminish the number of minority teachers. The record does not support this claim.

The undisputed evidence shows that the State Board responded to the legislature's mandate as follows: The Board first determined that the basic skills tested should include reading, writing and arithmetic (Veselka Dep. 19). After considering a number of possible tests to measure these skills (id. at 19-20), the Board tentatively selected the PPST because it was the only test on the market specifically designed to test these skills at the level needed for entry into teacher education programs (id. at 60-61). Thereafter, the Board hired IOX Associates to determine whether the PPST was valid for its intended purpose (id. at 23). After IOX Associates issued a detailed report concluding that the PPST did measure skills needed for successful training and job performance, the Board formally approved its use (id. at 24-25; Pltfs. Ex. 1, pp. 24-27). At the same time, the Board adopted passing scores of 51% for the math section, 55% for the reading section, and 58%

for the writing section (Pltfs. Ex. 4;). Finally, the Board established a rule that students could take the test an unlimited number of times (Veselka Dep. 28-29). Nothing in this sequence of events remotely suggests that the Board's actions were governed by a desire to prevent blacks and Hispanics from becoming teachers.

The district court found that the historical background of the decision was one of "repeated and recent instances of intentional segregation, particularly in areas of South Texas where there is a substantial Mexican-American population" (Mem. 27). The court did not cite any evidence, however, to support this finding. The court did cite two of this Court's decisions as support for its conclusion: United States v. Texas Education Agency, 679 F.2d 1104 (5th Cir. 1982) (Port Arthur) and United States v. Texas Education Agency 647 F.2d 504 (5th Cir. 1981) (South Park). But these cases involved allegations that local school districts had failed to fully desegregate their black students: Neither of these cases involved allegations of purposeful segregation against Mexican-Americans and neither case implicated the State in any way. The district court's finding on this point is therefore clearly erroneous.

The district court also found that the Board's failure to consider alternative tests after it learned that the PPST would have a disproportionate impact was evidence of discriminatory intent. But the proper inquiry is whether the test selected by the Board was prompted by a legitimate purpose. Having selected a test that was designed to measure the skills it thought necessary,

and having received a report that the test in fact measured those skills, the Board had no obligation to search for a test that would maximize the minority pass rate. See Furnco Const. Corp. v. Waters, 438 U.S. 567, 577-578 (1978). Moreover, the Board had already considered a wide range of alternative tests before adopting the PPST and had rejected them because they were not designed to measure the skills needed for entry into teacher education programs (Veselka Dep. 60-61). In any event, appellees introduced no evidence that there was another test in existence that could measure the skills the Board thought necessary without producing a similar disproportionate effect. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Thus, the Board's decision to proceed with the PPST, rather than considering other tests, clearly does not constitute proof of purposeful discrimination.

The district court also concluded that the State's failure to develop a remedial program specifically directed at preparing minority students for the PPST raised an inference of discriminatory purpose. The State's obligation under the Equal Protection Clause, however, is to establish legitimate standards that are adopted and administered without regard to race. It has no general duty to engage in affirmative action to help those who have been unable to satisfy those standards. A state may, of course, voluntarily undertake such efforts; to hold that its failure to do so raises an inference of discriminatory intent, however, would impose indirectly an obligation the court may not impose directly.

In any event, the State of Texas maintains a full network of junior colleges that offer remedial instruction in basic skills. While these programs were not specifically designed to help students pass the PPST, they do attempt to teach the basic skills that it tests. These programs may not be as effective as those devised by some of the senior colleges. But whatever their shortcomings, they are not evidence of discriminatory intent.

The district court found it "particularly disturbing" that in responding to a teacher shortage, the State decided to allow college graduates who pass the PPST to become teachers without having to take teacher training. The State could certainly conclude, however, that it was more important for prospective teachers to have basic skills than formal teacher training. Such a bona fide educational decision made by competent state officials cannot be evidence of discriminatory intent.

The district court found that the State had displayed an attitude that minorities had only themselves to blame for their poor performance. In support of this finding, the district court cited the testimony of Dr. Bergin, the Deputy Commissioner of Education. In her testimony, Dr. Bergin did not attempt to explain the reason for the disparity in performance among racial groups. Instead, she offered her views on why people of all races have failed the test (Tr. 1629). As the district court found, she gave three reasons: lack of intellectual ability, failure to work hard in class, and teachers' lack of basic skills (ibid.). These three reasons may not

exhaust the universe of possible explanations for failure on the test. But they certainly do not supply any reason to believe that Dr. Bergin's support for the PPST was motivated by discriminatory intent.

Finally, the district court found it "extremely significant" that at the time the Board adopted the PPST, it consisted of 27 members, only one of whom was black and only three of whom were Hispanic. There is no basis in law or logic, however, for presuming that a legislative or administrative body that is predominantly of one race has acted with discriminatory intent. Cf. Castaneda v. Partida, 430 U.S. 482, 499 (1977). Indeed, if the racial composition of a legislative or administrative body were a sufficient reason for an inference of discriminatory intent, few decisions could survive judicial review.

In sum, none of the evidence relied upon by the district court suggests that appellees will be able to show that the Board adopted and implemented the PPST requirement with discriminatory intent. The district court's finding that the evidence "strongly suggests" that the Board acted with discriminatory intent is based on an improper legal standard and is clearly erroneous.

B. The district court erred in holding that appellees were likely to prevail on their Due Process claim

To invoke the protection of the Due Process Clause, appellees were required to show that the State's use of the PPST deprived them of either a "liberty" or "property" interest. Board of Regents

v. Roth, 408 U.S. 564, 569 (1972). The district court held that appellees had a liberty interest in pursuing the occupation of their choice and that the State's use of the PPST deprived them of that interest. According to the court, appellees' liberty interest entitled them to adequate notice of the PPST requirement. Finding that the State had given appellees little notice and no materials on the nature of the requirement other than a pamphlet, the court concluded that appellees were likely to prevail on their Due Process claim. The court's analysis is seriously deficient.

To begin with, the district court's reasoning fails to take into account that when a state adopts a uniform standard of general applicability, such as a competency test of basic skills, it does not ordinarily trigger any requirement that procedural due process be accorded to each affected person individually. It is only when the standards are structured to require more individualized determinations in their application -- such as findings of good character -- that individual notice and an opportunity to be heard are required.

In Nolan v. Ramsey, 597 F.2d 577 (5th Cir. 1979), this Court applied this principle in rejecting a Due Process challenge to a state commission's decision to replace stenomask reporters with stenographers. This Court explained that procedural due process only applies "where an individual is singled out and denied the right to pursue a profession or occupation based upon personal characteristics." Id. at 580. Since the commission's decision applied uniformly to all stenomask reporters, this Court held, procedural Due Process was not required. Ibid.

Second, the district court's reasoning ignores the distinction this Court has drawn between "a court's power to review disciplinary actions by educational institutions on the one hand, and academic decisions on the other hand." Mahavongsanan v. Hall, 529 F.2d 448, 449 (1976). In Mahavongsanan, this Court expressly upheld a state university's decision to deny a master's degree to an individual who had failed a comprehensive examination, even though the university had failed to give her notice and an opportunity to be heard. This Court explained that while prior decisions recognized that students were entitled to certain procedural Due Process protections, those cases "have been carefully limited to disciplinary decisions." Id. at 449. The Court went on to state that "'[we] know of no case which holds that colleges and universities are subject to the supervision or review of the courts in the uniform application of their academic standards.'" Id. at 449-450 (quoting Wright v. Texas Southern University, 392 F.2d 728, 729 (5th Cir. 1968)).

Third, while this Court has held that "a person has a liberty interest in pursuing an occupation" (Phillips v. Vandygriff, 711 F.2d 1217, 1222 (5th Cir. 1983)(citing cases)), the PPST requirement does not significantly deprive appellees of this interest. As the district court found, students can retake the PPST an unlimited number of times. Accordingly, failure on the PPST does not absolutely deprive appellees of the opportunity to teach in Texas; it merely means that they must take the test again.<sup>4/</sup>

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<sup>4/</sup> Of course, some students may fail the test no matter how many times they take it. As to those students, however, notice is not an issue.

This Court's decision in Tyler v. Vickery, 517 F.2d 1089 (1975), demonstrates the importance of this distinction. In that case, this Court held that although "[t]he safeguards of the due process clause are \* \* \* available to a failing bar applicant," a state is not required to give such an applicant a hearing. Id. at 1103. In reaching this conclusion, this Court attached critical significance to the fact that the state gave those who failed the exam an unqualified right to retake it six months later. Id. at 1103-1105. The Court specifically explained its decision as follows (id. at 1104-1105):

[F]ailure on a bar examination does not stigmatize an individual as 'incompetent,' but merely indicates that he did not demonstrate minimal competence on a particular examination. Upon reexamination, such an individual is entitled to have his paper graded by the same standards as those of everyone else, and if he passes, to be admitted on precisely the same basis as an applicant who had not previously taken the examination.

For these reasons, this Court concluded, "the 'liberty interest' a failing examinee has at stake [is] a minor, if not a non-existent one." Id. at 1105.

This Court held in Mahavongsanan, 529 F.2d at 449, that a court may review decisions concerning academic standards if they are "shown to be clearly arbitrary or capricious." But as the Supreme Court indicated in Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, 92 (1978), courts "are particularly ill-equipped to evaluate [such decisions]" and this consideration "warn[s] against any such judicial intrusion into academic decisionmaking." Here, the district court never identified precisely why it would



be arbitrary or capricious for a state to give college students a 12th grade level test on basic skills without advance notice, particularly since the state gives those students an unlimited opportunity to retake the test. After all, the purpose of this test is to determine whether college students possess basic skills at the high school level.

In any event, the legislation passed in 1981 expressly provided that students seeking admission into teacher education programs would have to pass a test on "basic skills" (Texas Education Code, Section 13.032). In January 1982, the State Board published a rule specifying that this requirement would take effect on May 1, 1984 and sent copies of the rule to all colleges and universities (Veselka Dep. 18, 96). In the same year, the State Board required all colleges and universities to include notice of the testing requirement in their catalogues (Tr. 1163). Thus, even assuming the Due Process Clause required some kind of notice of the testing requirement, the State fulfilled this requirement.

Moreover, in the spring of 1983, the State Board sent a pamphlet to all college students notifying them of the testing requirement (id. at 95-96; Deft. Ex. 10). That pamphlet explained that the test would cover basic skills in reading, writing and arithmetic, and gave descriptions of the content that would be covered on each section (Deft. Ex. 10). It also informed students to contact their local institutions or the Texas Education Agency for additional information about the test (ibid.). While we do not believe these additional steps were required, they surely refute any possible suggestion that the State failed to provide appellees with adequate notice.

The district court apparently believed that the State should have given students additional preparation materials, such as sample test questions and a more detailed list of the skill areas covered by the test.<sup>5/</sup> Obviously, information of this kind would have been helpful. But it would trivialize the Due Process Clause to hold that a state is constitutionally precluded from giving college students a 12th grade level test on basic skills in reading, writing, and arithmetic unless it provides them with sample test questions first.

In sum, appellees are unlikely to prevail on their claim that the State's imposition of the PPST requirement violated their rights under the Due Process Clause. The district court's contrary holding is based on a misapplication of the governing legal standards.<sup>6/</sup>

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<sup>5/</sup> The State did supply this kind of material upon request to some students and many institutions (Tr. 1171; Veselka Dep. 96-98, 100-102; Deft. Ex. 11). It did not systematically provide such information to all students and all institutions, however (Veselka Dep. 98).

<sup>6/</sup> Appellees also claim that the PPST violates Due Process because it tests material they have not been taught. Citing this Court's decision in Debra P. v. Turlington, 644 F.2d 397, 404 (1981), the district court held that if the PPST tests skills the State has not taught, its use would violate Due Process (Mem. 38). The court found, however, that insufficient evidence had been presented to decide the likelihood of appellees' prevailing on this factual issue. The district court erred in extrapolating from Debra P. a universal rule that a test covering material not previously taught violates Due Process. Debra P. dealt with a high school graduation test. Nothing in Debra P. suggests that this principle applies to tests used for admission into professional schools and ultimately into the profession itself. A state has a legitimate interest in preventing those who lack basic skills from becoming teachers. That interest does not disappear simply because the reason particular individuals lack basic skills is that they have not been taught them. It may seem unfair to test students on material they have not been taught. It is more unfair, however, to impose on young children teachers who lack basic skills. Because the district court premised its finding of a probable Due Process violation on lack of adequate notice and did not reach appellees' alternative Due Process claim, this Court need not decide this issue now.

C. The district court erred in holding that appellees were likely to prevail on their Title VI claim

The district court held that appellees were also likely to prevail on their claim under Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d), which prohibits discrimination in federally assisted programs. The district court premised this holding entirely on its previous conclusion that appellees were likely to prevail on their claim that the State's use of the PPST was motivated by discriminatory intent in violation of the Equal Protection Clause.

As we have discussed, the district court's finding on intent is based on an improper legal standard and is clearly erroneous. Since the court's analysis under Title VI simply tracks its analysis under the Equal Protection Clause, it suffers from precisely the same errors.<sup>7/</sup>

7/Appellees claim that the State's use of the PPST also violates a Title VI regulation that prohibits a recipient of federal financial assistance from using "criteria or methods of administration which have the effect of subjecting individuals to discrimination \* \* \*." 34 C.F.R. 100.3(b)(2). Because the district court refrained from addressing whether appellees were likely to prevail on this claim, that issue is not before this Court on this appeal.

D. The district court erred in holding that appellees were likely to prevail on their claim under the Equal Educational Opportunity Act

The district court held (Mem. 45-47) that there is a substantial likelihood that appellees will prevail on their claim that the PPST violates the Equal Educational Opportunities Act of 1974 (EEOA). Specifically, the court relied upon the section which provides that no State shall deny equal educational opportunity by its failure to "take affirmative steps \* \* \* to remove the vestiges of a dual school system" (20 U.S.C. 1703(b)). Taking "judicial notice of its own findings regarding the nature of the Texas school systems over the years \* \* \*" (Mem. 46), the court reasoned that many students now seeking to become teachers must have received some years of their education in imperfectly-desegregated schools. It follows, the court held, that the disproportionate failure rate was, itself, a vestige of past discrimination. This analysis is fundamentally flawed for several reasons.

First, the EEOA does not impose any obligations upon higher education systems or authorities. It is limited in effect to the activities of state and local educational agencies at the elementary and secondary levels. See 20 U.S.C. 1720(a) and (b); 20 U.S.C. 881(f) and (k). Accordingly, the EEOA imposes no obligations, remedial or otherwise on the higher education system in Texas. Acceptance of the District Court's holding would constitute an unwarranted extension of the Debra P. rule

to govern admission to systems of higher education which receive some or most of their students from non-unitary systems. Such an extension of Debra P. conflicts with basic principles of federal remedial authority and Equal Protection analysis.

Higher education systems, even in formerly de jure states, have no constitutional or statutory obligation to suspend or lower perfectly valid academic standards to accommodate high school students who may be ill-prepared because of prior constitutional violations by local and elementary school systems. As previously noted, the Supreme Court cases delineating the fundamental limitations on federal remedial authority in desegregation cases make clear that imposing such an obligation on a higher education system would be impermissible because the scope of such remedies necessarily exceeds the "nature and extent of the violation," General Building Contractors Assn., supra, 458 U.S. at 399. Accord, Swann, supra, 402 U.S. at 22-23; Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424, 436 (1976); Milliken v. Bradley, 418 U.S. 717, 746-747 (1974) (Milliken I). The higher education entities in this case cannot be required to correct discrimination by other entities in Texas any more than the suburban school districts in Milliken I could be required to correct Detroit's segregative practices. To conclude otherwise would mean that a state that once practiced school segregation may not set minimum standards for any trade that involves state licensing -- even those not related to

education -- e.g., barbers and plumbers. All standard-setting, by this reckoning, superimposes penalties on the victims of past discrimination.

Moreover, wholly apart from the question of whether federal courts can require such "remedial" action, we submit that a prohibition against otherwise valid academic standards in this context does not, in any meaningful way, counteract the effects of past segregation -- indeed such a rule will serve to perpetuate such effects. No one disputes the unfortunate fact that past racial discrimination in public schools (and other areas) has adversely affected the educational achievement levels of minority students in formerly segregated (and other) schools. But it clearly makes no sense, from a constitutional perspective, to "solve" that problem by enjoining or fundamentally altering otherwise valuable academic programs that serve an essential educational function. It is difficult to conceive of what "advantage" is secured to the purported beneficiaries of a doctrine which prohibits universities from applying to them the same valid academic standards imposed on their colleagues. It is only a most otiose -- if not perverse -- notion of equality that prevents such neutral inquiry into whether students possess the basic school skills required of others in the professions they seek to enter. Any educational deficiencies suffered by minority students in elementary and secondary schools are not corrected by such a scheme, they are simply enshrined in

perpetuity. In short, adoption of such a doctrine would be to "celebrate and perpetuate the hollow certification that accompanied black graduation pre-Brown [v. Board of Education, 347 U.S. 483 (1954)]." Debra P. v. Turlington, 654 F.2d 1079, 1085 (5th Cir. 1981) (Tjoflat, J., dissenting from denial of rehearing en banc).

But even assuming the would-be teachers benefit from not being held to generally applicable academic requirements, such a rule surely will have no such beneficial effect on their future students. The state is surely not required to impose on future generations the stunting effects of past discrimination. Permitting people to teach who themselves lack basic skills would do exactly that. Moreover, far from supplying students with genuine "minority role models," disallowing an examination of whether minority teachers possess basic skills can only have a stigmatizing effect on them and a deleterious effect on those whom they teach. It is presumably for this reason that this Court has permitted school districts that are in the process of desegregating to utilize examinations among the objective and nonracial criteria for hiring, promotion, and demotion of teachers. 8/ Thus, the state's effort to upgrade its certified

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8/ See, e.g., Moore v. Tangipohoa Parish School Board, 594 F.2d 489 (5th Cir. 1979); Lee v. Macon County Bd. of Educ. (Sumter County), 463 F.2d 1174 (5th Cir. 1972). Of course, where the test is being used as one instrumentality of demonstrable racially discriminatory purpose, the court did not permit it. See, e.g., Baker v. Columbus Municipal Separate School District, 462 F.2d 1112 (5th Cir. 1972).

teachers is a legitimate measure to correct the effects of all those past practices that may have depressed the level of scholastic achievement in Texas.

Moreover, there is an additional reason why application of the Debra P. rule is inappropriate here. State action can only violate the EEOA if it directly affects some facet of elementary or secondary education. The student's "expectation" of a diploma may make the diploma an intrinsic perquisite or term and condition of secondary education. But entrance to a professional school is not part of the normal expectation of all students who complete a high school curriculum. On the contrary, one would think it assumed that not every high school graduate is qualified to become a teacher. Nor is it part of the implicit bargain between the state and its young people that completion of high school will render all of them qualified to enter any particular trade or institution of higher learning.

In any event, Debra P. would be inapposite even if it applied. There is no evidence in the record of this case that would support a finding that there has been widespread segregation in Texas' elementary and secondary schools in the past decade. The first order in this case was entered in 1971, and there is no basis for saying that there has been significant noncompliance with that order.

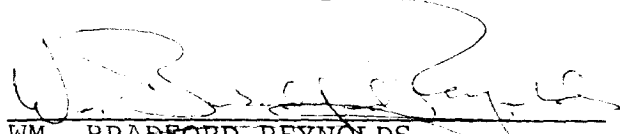


Finally, the court failed to take account of the evidence showing that the PPST is, in fact, serving a remedial purpose. The record reflects that there is ample provision for remedial education in the state's junior and community colleges. The district court itself found, moreover, that the students who failed the PPST have not given up, and have worked to improve their skills so that the proportion of those passing has greatly increased in the last year (Mem. 21, n. 15; Tr. 1516).

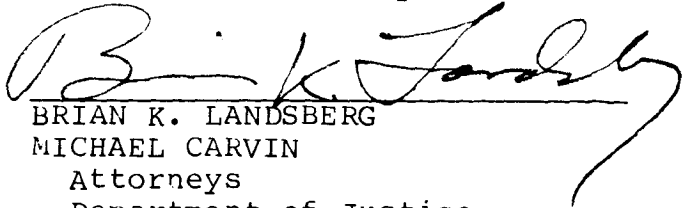
CONCLUSION

The district court's decision should be reversed and the case should be remanded with directions to dismiss appellees' motion for lack of jurisdiction. In the alternative, the district court's decision should be reversed.

Respectfully submitted,



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