Classification of the Educable Mentally Retarded by Intelligence Testing: A Discriminatory Effect

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CLASSIFICATION OF THE EDUCABLE MENTALLY RETARDED BY INTELLIGENCE TESTING: A DISCRIMINATORY EFFECT

Nearly 3.5 million American school children participate in special education programs. Recent enrollment figures indicate that black students nationwide are more often assigned to special education classes than are any other racial or ethnic group. Of the four categories of handicapped children served by special education classes, black students form the

1. L. Hayes & J. Loewen, The Rights of School Children 5 (1980) (unpublished manuscript prepared for the Office of Civil Rights, U.S. Department of Education) [hereinafter cited as The Rights of School Children]. Only six percent of the children receiving special education are affected by physical impairments such as deafness, blindness, and orthopedic disabilities. The majority of special education students are enrolled in programs for educational handicaps, including programs for speech disabilities, specific learning disabilities, emotional disorders, and mental retardation. Id. at 6. Until recently, states were under no obligation to provide public educational benefits for handicapped children. In 1972, two court cases laid the groundwork for handicapped children's right to an education. The first, Pennsylvania Ass'n for Mentally Retarded Children v. Pennsylvania (P.A.R.C.), 343 F. Supp. 279 (E.D. Pa. 1972), was a class action claiming that a state statute which excluded mentally retarded children from public schools violated the fourteenth amendment. In a consent decree, the state agreed to provide equal access to appropriate education to all children and to provide procedural safeguards for the classification of children as mentally retarded. In the second case, Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972), held that the exclusion of physically, mentally, and emotionally disturbed children from public schools violated the fourteenth amendment guarantees of equal protection and due process. After these two decisions, 46 similar cases were instituted in 28 states, H.R. REP. No. 332, 94th Cong., 1st Sess. 3 (1975).

2. As of 1978, 8.4% of all black school children were in special education programs, as compared to 7.53% of American Indians, 5.88% of whites, 5.83% of Hispanics, and 3.7% of Asian Americans. The Rights of School Children, supra note 1, at 25.

3. Under the regulations for the Education for All Handicapped Children Act (EHA), 20 U.S.C. §§ 1401-1461 (1976) there are four categories of educational handicaps: (1)"Speech impaired" means a communication disorder such as stuttering, impaired articulation, or a voice or language disorder which adversely affects educational performance, 45 C.F.R. § 121a.5(10) (1979); (2)"Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language that can manifest itself in an inability to listen, spell, think, read, write, or do mathematical calculations. This term does not include children who have learning problems that result primarily from visual, hearing or motor handicaps, mental retardation, emotional distur-
The greatest percentage of the two types of mental retardation: the educable mentally retarded (EMR) and the trainable mentally retarded (TMR). Most black special education students are in EMR classes. In fact, the percentage of the total black student population assigned to EMR is almost twice that of any other racial or ethnic group.

Traditionally, intelligence quotient (I.Q.) tests were the primary, and sometimes the sole method, used to determine mental retardation. Now, federal regulations prohibit the exclusive use of I.Q. tests. While I.Q. tests are generally still considered relevant, there is disagreement concerning their reliability in classifying children as mentally retarded. The use of I.Q. tests for the placement of black children in special education classes.

4. Of the 8.4% of all black public school children who are in special education programs, about 3.45% are in EMR classes. The Rights of School Children, supra note 1, at 20.

5. The percentage breakdown for national EMR placement of other racial and ethnic groups are American Indian, 1.7%; white, 1.06%; Hispanic, .97%; and Asian American, .37%. Id.


8. There are basically three perspectives on the relevancy of I.Q. tests. Some proponents assert that the test score differences between blacks and whites reflect an innate difference in the intellectual capacities of the races. See Jensen, How Much Can We Boost I.Q. and Scholastic Achievement?, 39 HARV. EDUC. REV. 1 (1969), and Hernstein, I.Q., The Atlantic Monthly, Sept. 1971, at 43.

Others believe that properly used I.Q. tests are reasonably accurate predictors of current intellectual functioning and serve a beneficial if not necessary purpose in the educational setting. See Alsheuler, Education for the Handicapped, 7 J.L. AND EDUC. 523 (1978); Kirp, Schools as Sorters: The Constitutional and Policy Implications of Student Classifications, 121 U. PA. L. REV. 705 (1973).

The third position asserts that all measured differences in intelligence between social classes and races are due to cultural biases in the tests or testing situations. See Garcia, I.Q.: The Conspiracy, 6 PSYCHOLOGY TODAY 40 (1972); Comment, Segregation of Poor and Minority Children into Classes for the Mentally Retarded by the Use of I.Q. Tests, 71 MICH. L. REV. 1212 (1973).
for the mentally retarded is particularly controversial because blacks have traditionally scored one standard deviation below the norm on standardized intelligence tests. Thus, use of the tests to determine mental retardation impacts more harshly on blacks than whites. Such a disproportionate impact, therefore, suggests that their use may be racially discriminatory.

The question of discrimination in the use of I.Q. tests to classify black children as EMR was recently discussed in the opinions of two federal district courts. In *Larry P. v. Riles*, black California school children charged that the state's use of I.Q. tests was racially and culturally biased because it resulted in blacks comprising a greater percentage of EMR students than of the total student body. According to the plaintiffs, this disparate impact violated their rights under the fourteenth amendment, Title VI of the Civil Rights Act of 1964, and the Education for All Handicapped Children Act (EHA). Furthermore, the plaintiffs asserted that the I.Q. tests had not been validated as sufficiently accurate methods for classifying children as EMR, as required by both the EHA and the Rehabilitation Act of 1973 regulations. The *Larry P.* court found that the current I.Q. tests were racially and culturally biased and held for the plaintiffs on each legal theory.

A case factually similar to *Larry P.* was litigated in a federal court in Illinois. In *Parents in Action on Special Education v. Hannon (P.A.S.E.)*, plaintiffs brought a class action alleging discrimination in the Chicago school system, where black school children constituted twenty percent more of the EMR program than of the total student body. The plaintiffs claimed that the I.Q. tests used in the school district's classification process were racially and culturally biased and thereby violated their rights under Title VI of the Civil Rights Act of 1964, the Equal Educational Opportunities Act of 1974, and the EHA. As in *Larry P.*, the plaintiffs also charged that the use of I.Q. tests violated federal regulations because the

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11. Id. at 297.
12. U.S. Const. amend. XIV.
15. 45 C.F.R. §§ 84.35(b)(1), 121a.532(2) (1979).
17. Id. at 552:109. Illinois school systems use the term "educable mentally handicapped" instead of the more common term, EMR.
20. Id. § 1412(5)(c) (1976).
tests had not been properly validated. In *P.A.S.E.*, however, the court, using a single method of analyzing individualized test items, found that the plaintiffs failed to prove that the overrepresentation in EMR classes was the result of I.Q. tests or racial discrimination.

Since the constitutional ramifications of intelligence testing have been discussed at length elsewhere, this Note will focus only on the application of the Title VI and the EHA antidiscrimination provisions to in-

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22. See Kirp, supra note 8; Shea, An Educational Perspective of the Legality of Intelligence Testing and Ability Grouping, 6 J.L. AND EDUC. 137 (1977); Comment, Equal Protection and Intelligence Classification, 26 STAN. L. REV. 647 (1974); Comment, supra note 8; Note, The Legal Implications of Cultural Bias in the Intelligence Testing of Disadvantaged School Children, 61 GEO. L. REV. 1027 (1973).


In both *Larry P.* and *P.A.S.E.*, the plaintiffs alleged that the failure to validate the I.Q. tests violated § 504 regulations. The *Larry P.* court ruled for the plaintiffs; the *P.A.S.E.* court dismissed the suit without ruling on the issue. Since the language of the § 504 regulation, 45 C.F.R. § 84.35(b)(1) (1979), is identical to that of the Education for All Handi-
stances of disproportionate racial impact resulting from I.Q. testing for EMR placement. The Note will examine theories of prima facie discrimination under Title VI and the EHA, as defined by Larry P., P.A.S.E., and other recent case law, and will propose an effects-test theory for discerning prima facie discrimination under the EHA based on an analogous statutory analysis employed by the Supreme Court.

I. AN HISTORICAL PERSPECTIVE ON EDUCATIONAL TESTING AND DISCRIMINATION

A. Constitutional Origins

The potential discriminatory effect of the use of intelligence tests to classify school children as EMR has been a frequent source of legal controversy. After Brown v. Board of Education prohibited de jure public school segregation, courts initially gave great deference to the school districts' use of intelligence tests. Courts allowed school districts discretion to use tests which resulted in the de facto segregation of white and black children if the decision to use the tests were based on a legitimate educational purpose.

Later, a series of cases arose in the Fifth Circuit charging school districts with thwarting court-ordered desegregation by using intelligence tests to resegregate students. In these cases, the court considered whether the de facto segregation in the school districts using intelligence tests was discriminatory and balanced the educational justification for intelligence testing against the resulting discriminatory impact. While the Fifth Circuit never ruled that intelligence tests were invalid as classification tools per se, it
suspended their use until it was shown that the tests were not discriminatory.²⁹

Perhaps the most celebrated educational testing case is Hobson v. Hansen.³⁰ In Hobson, the United States District Court for the District of Columbia ruled that the four-tiered tracking system used by the Washington, D.C. public school system violated the fifth amendment right of black and poor school children to equal educational opportunity.³¹ The Hobson court found that blacks were significantly overrepresented in the lower tracks which focused on self-help and vocational training.³² Since there was little movement from the slower tracks into the faster tracks initial classification acted as an essentially permanent limitation on educational opportunities.³³ This result, according to the court, made the use of placement procedures that were accurate measures of the maximum potential of school children critical to the validity of the teaching system.³⁴

Ability grouping in Hobson was based on student scores on various intelligence tests.³⁵ According to the court, these tests were standardized on may be valid, but should not be employed unless the school district had operated as a unitary system for a minimum of several years); Singleton v. Jackson Mun. School Dist., 419 F.2d 1211, 1219 (5th Cir. 1969) (per curiam), rev'd per curiam on other grounds sub nom., Carter v. West Feliciana Parish School Bd., 396 U.S. 226 (1970) (no ruling on test validity until unitary school system is established). But see Moses v. Washington Parish School Bd., 330 F. Supp. 1340, 1345 (E.D. La. 1971), aff'd, 456 F.2d 1285 (5th Cir.), cert. denied, 409 U.S. 1013 (1972) (where the educational tracking policy began the same year as total integration and where compensatory education was nonexistent, a permanent injunction against using I.Q. tests to make classroom assignments was justified).

²⁹. McNeal v. Tate County School Dist., 508 F.2d 1017, 1020-21 (5th Cir. 1975) (classroom assignment by intelligence testing resulting in racial segregation barred until the district had operated without a tracking system for long enough to assure that slower tracked students were not suffering from the effects of prior educational discrimination).


³¹. 269 F. Supp. at 443.

³². The court considered figures showing that the district-wide ratio of blacks to whites in the slowest track in elementary schools was approximately 95 to 5. Id. at 456-57. Racial data on the composition of the other tracks was not kept. Figures showed, however, that there were significantly more slower tracks and fewer honors programs in black schools than in predominantly white schools. Id. at 451-52. The court also found that a high correlation between lower socio-economic status and placement in the slower tracks did not negate the finding of racial discrimination. Instead, it provided an alternative basis for equitable relief. Id. at 513. Cf. notes 121-26 and accompanying text infra.

³³. 269 F. Supp. at 463.

³⁴. Id. at 475.

³⁵. Among the tests used were the Metropolitan Readiness and Achievement Tests, Sequential Tests of Educational Progress (STEP), School and College Ability Tests (SCAT), Standford Achievement Tests (SAT), Otis Quick-Scoring Mental Ability, Beta, Tests of General Ability (TOGA), Tests of Educational Ability, and Flanagan Aptitude Classifica-
white middle-class students, making them unreliable methods of evaluating the intellectual capacity of those outside the white middle-class culture. The court also pointed out that significant environmental and psychological factors operated adversely on disadvantaged children during testing. As a result, many students were classified on the basis of cultural background rather than intellectual levels, the purported basis of the tracking system. The court therefore concluded that the tests were not rationally related to the objective of proper classification.

The first cases challenging the use of I.Q. tests in EMR placement were brought in the early 1970's. In each case, minority school children erroneously classified EMR, filed class actions against school districts having a significantly higher percentage of minorities in the EMR program than in the general school population. The plaintiffs charged that the I.Q. tests were racially and culturally biased against minorities and that their use constituted a violation of the fourteenth amendment. Although these suits resulted in consent agreements providing due process protection for both students and parents, no agreements to discontinue or specifically limit the use of I.Q. tests were made.

36. Id. at 518-19. 37. Id. at 479, "Standardization" is to arrange or order component items of a test so that the probability of their eliciting a designated class of response correlates with some quantifiable psychological or behavioral attribute of the child. WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1976). For a discussion of the standardization of I.Q. tests, see notes 74-75 infra.

38. Id. at 480-82. Among the factors identified by the court were non-familiarity with proper English, crowded living conditions, and lack of educational stimulation at an early age. The court also found that disadvantaged children are also more prone to low self-esteem and test anxiety. Id.

39. Id. at 513. Hobson has been criticized for its wholesale condemnation of educational tracking when it should have addressed the narrower issue of the tracking system's abuse. See Kirp, supra note 8, at 721-22; Shea, supra note 22, at 151-52.

40. In Diana v. State Bd. of Educ., Civil No. C-70-37 RFR (N.D. Cal., filed Jan. 1970), Mexican-American children classified as EMR charged that the I.Q. tests used were prejudicial because they were standardization on predominantly white, middle class language and culture. The plaintiffs were able to show a disproportionate enrollment of Mexican-Americans in the district's EMR classes. Furthermore, when retested in their primary language, seven of the nine plaintiffs tested out of EMR. The consent decree required that the school district give I.Q. tests in the children's primary language and that it send an explanatory report to the state department of education when a disparity occurred between the percentages of Mexican-Americans in EMR classes and in the regular school population. For a summary of this suit, see Weintraub & Abeson, Appropriate Education for All Handicapped Children: A Growing Issue, 23 SYRACUSE L. REV. 1037, 1052-53 (1971-72).

These settlement provisions were later codified. CAL. EDUC. CODE § 56506 (West 1977). In 1976, the legislature extended the monitoring of disproportionate student enrollment to
B. Statutory Prohibitions on Educational Testing Discrimination

1. Education for All Handicapped Children Act: Uncertainty Surrounding the Standards of Proof

In 1975, Congress passed the Education for All Handicapped Children Act (EHA). The EHA provided funding for local special education programs in states that had submitted to the U.S. Department of Education special education plans which complied with the Act's eligibility provisions. The EHA contains an antidiscrimination clause requiring that testing and evaluative materials used to classify handicapped children "be selected and administered so as not to be racially or culturally discriminatory." Under EHA regulations, these classifying procedures must also be validated, or shown to be sufficiently accurate mechanisms in fulfilling the purpose for which they are used. The standards of proof for these two EHA provisions are not specified by statute and were not litigated prior to *Larry P.* and *P.A.S.E.*

the racial composition of special education classes. *Id.* § 56509. Similarly, *Stewart v. Philip*, Civil No. 70-1199-F (D. Mass., filed Sept. 14, 1971), was a class action brought by seven erroneously classified black children challenging the use of I.Q. scores in EMR placement. They sought to enjoin testing until a commission was established to oversee testing and classification. A subsequent retesting of "mentally retarded" minority children in the Boston area showed that 50% had been erroneously classified. For a summary of the suit, see *Note, supra* note 23, at 1056 n.158. Shortly after *Stewart* was settled, Massachusetts passed a law establishing due process rights for parents and children during the classification process, but did not make specific references to the use of I.Q. tests. *See Mass. Ann. Laws ch. 15, § 1M (1974).*


42. 20 U.S.C. § 1412 (1976). In 1979, the U.S. Dept. of Health, Education, and Welfare was eliminated and the U.S. Dept. of Health and Human Services and the U.S. Dept. of Education were created. *Id.* §§ 3508, 3411. HEW's Office of Education and the educational functions of HEW's Office of Civil Rights were transferred to the new U.S. Dept. of Education. *Id.* § 3441(2)(3).

43. *Id.* § 1412(5)(c) (1976). The Act requires states to have: procedures to assure that testing and evaluative materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it is clearly not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

44. 45 C.F.R. § 121a.532 (1979).

45. The only mention of a standard of proof in the EHA is in 20 U.S.C. § 1415 (1976),
2. Title VI: What Standard of Proof for Disparate Racial Impact?

Each school receiving EHA funding is also subject to Title VI of the Civil Rights Act of 1964, which prohibits discrimination in federally assisted projects. Title VI's implementing regulations prohibit the use of "criteria or methods of administration which have the effect of subjecting an individual to discrimination because of race." While no court has ruled that a disproportionate enrollment of minorities in EMR classes constitutes a violation of Title VI, at least one federal agency charged with enforcing Title VI has indicated that this statute is subject to such an interpretation.

Case law is unclear as to whether a showing of disparate racial impact is sufficient to establish a prima facie violation of Title VI or whether additional proof of discriminatory intent is necessary. In 1974, the Supreme Court ruled in *Lau v. Nichols* that the San Francisco School District's refusal to provide remedial English classes for children of Chinese ancestry violated Title VI implementing regulations. The Court held that lack of language training had an adverse impact on non-English speaking Chinese-American students and denied them "a meaningful opportunity to which establishes mandatory due process procedures to safeguard the rights of parents and children during the classification process. A party contesting the placement decision can bring suit in federal court, and bears the burden of proving by a preponderance of the evidence that the placement decision was erroneous. *Id.* § 1415(e)(2). These procedural safeguards must be part of the state's plan in order to qualify for federal funds. *Id.* § 1412 (1979). However, the standard of proof required by § 1415 does not necessarily apply to all eligibility clauses or to the EHA regulations. See Board of Educ. v. Harris, 444 U.S. 130 (1979) (different clauses in the eligibility provisions of the Emergency School Aid Act incorporate different standards of proof of discrimination).

47. Section § 2000d states: "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."
51. *Id.* at 563-69. See 45 C.F.R. §§ 80.3(b)(1), (2); 80.5(b) (1979).
participate in the educational program." 52 In defining the elements of a prima facie violation of Title VI, the Court held that "discrimination is barred which has that effect, even though no purposeful design is present. . . ." 53 The Court rested its finding of discrimination on HEW's guidelines for Title VI. These guidelines place an affirmative duty on school districts receiving federal aid to "rectify the language deficiency of its students." 54 Thus, in Lau, the Supreme Court appeared to set a standard of discriminatory effect for Title VI cases. 55

The strength of the Lau precedent, however, is uncertain in light of subsequent Supreme Court action. In a 1978 decision, Regents of the University of California v. Bakke, 56 the Supreme Court held that special admissions programs are not unconstitutional per se, but that the University of California's race conscious special admissions program was unlawful. 57 The court opinion, written by Justice Powell, also held that Title VI proscribes only those racial classifications that would violate the constitution. 58 Although Bakke concerned an explicit racial classification 59 rather than a disparate impact, four justices indicated that for all purposes Title VI and the fourteenth amendment were coextensive and that Title VI incorporated the constitutional standard of proof of discrimination announced in Washington v. Davis. 60 Under the Davis standard, discriminatory impact alone is insufficient to establish a prima facie viola-

52. 414 U.S. at 568.
53. Id.
54. 35 Fed. Reg. 11,595 (1970). Three justices expressed doubt whether, standing alone, "this laissez-faire attitude on the part of the school administrators" would constitute a Title VI violation, but found for the plaintiff on the basis that the interpretive guidelines published by HEW did not exceed the agency's authorized enforcement powers. 414 U.S. at 570-71.
55. After Lau, several courts held that no intent was necessary to constitute a Title VI violation. See, e.g., Serna v. Portales Mun. Schools, 499 F.2d 1147, 1154 (10th Cir. 1974) (failure to provide bilingual education); Pabon v. Levine, 70 F.R.D. 674, 677 (S.D.N.Y. 1976) (employment); Soria v. Oxnard School Dist. Bd. of Trustees, 386 F. Supp. 539, 545 (C.D. Cal. 1974) (desegregation).
57. Justice Powell was joined in a concurring opinion by Justices Brennan, Marshall, White, and Blackmun in holding that race-conscious admission programs are not unconstitutional per se. Id. at 324 (Brennan, J., concurring). Justice Powell's ruling to affirm the enjoining of the University of California's program was joined by Justices Stevens, Stewart, Rehnquist and Chief Justice Burger in a separate opinion. Id. at 408 (Stevens, J., concurring).
58. Id. at 287.
59. The special admissions program at the Medical School of the University of California at Davis never offered admission to disadvantaged whites and at one point explicitly excluded whites from consideration. Id. at 274-76.
60. Id. at 352.
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of the fourteenth amendment. Purposeful or intentional discrimination must be shown.\textsuperscript{61}

Justice Powell, however, carefully distinguished \textit{Lau} and its intent requirements. He noted that \textit{Lau} rested solely on Title VI, which had in turn been interpreted by HEW to reach the discriminatory effect of certain educational practices.\textsuperscript{62} Moreover, the preference given the petitioners in \textit{Lau} did not result in a “denial of a relevant benefit” to others.\textsuperscript{63} While the other four justices expressed doubts as to the vitality of \textit{Lau}, they did not expressly overrule the decision.\textsuperscript{64} They did limit its impact, however, to permitting agencies administering Title VI to require recipients “to be cognizant of the impact of their actions on racial minorities.”\textsuperscript{65}

Although the \textit{Bakke} intent standard for Title VI is only dicta and the Court has since reiterated that the issue is still unresolved,\textsuperscript{66} since 1978 lower federal courts generally have interpreted \textit{Bakke} to require Title VI claimants to prove discriminatory intent.\textsuperscript{67} This past year, however, \textit{Lau} may have received new life from the Supreme Court in \textit{Fullilove v. Kluczynski}.\textsuperscript{68}

\textit{Fullilove} upheld the constitutionality of the 1977 Public Works Employment Act provision requiring ten percent of the Act’s four billion dollar funding be set aside for minority-owned business enterprises (MBE’s).\textsuperscript{69} The plurality opinion, authored by Chief Justice Burger, held that Congress had the constitutional authority to create explicit racial classifications for the purpose of remedying past discrimination, whether or not that dis-

\begin{itemize}
\item \textsuperscript{61} 426 U.S. 229, 239 (1976). \textit{See also} note 20 \textit{supra}.
\item \textsuperscript{62} 438 U.S. 265, 303-05 (1978).
\item \textsuperscript{63} \textit{Id}. at 304.
\item \textsuperscript{64} \textit{Id}. at 352.
\item \textsuperscript{65} \textit{Id}. at 351.
\item \textsuperscript{66} Board of Educ. v. Harris, 444 U.S. 130, 150 (1979) (proof of a Title VI violation might differ from the discriminatory effects standard applicable to the Emergency School Aid Act).
\item \textsuperscript{68} 100 S. Ct. 2758 (1980). One federal court, in dicta, has cited \textit{Fullilove} as upholding an effects test for Title VI regulatory violations. \textit{See} Bryan v. Koch, 627 F.2d 612, 616 (2d Cir. 1980).
\item \textsuperscript{69} 42 U.S.C. § 6705(f)(2) (Supp. II 1976).
\end{itemize}
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Discrimination stemmed from purposeful state action. According to the Court, *Lau* served as the basis for concluding that Congress has the constitutional authority to regulate "state action in the use of federal funds voluntarily sought and accepted by grantees subject to statutory and administrative conditions."  

II. *Larry P. and P.A.S.E.: At Odds on Discrimination*

A. *Larry P.: A Broad Definition of Discrimination*

In 1971, black students who had been erroneously classified as EMR brought a class action against the San Francisco United School District. The students alleged that the school district's use of I.Q. tests resulted in a disproportionate impact on blacks and that the defendants had not rebutted the evidence that the tests were biased. Judge Peckham issued a temporary injunction prohibiting use of I.Q. tests for placement as long as there was a racial imbalance in the EMR classes. The injunction was later extended to cover the entire state of California. In 1977, the petitioners amended their complaint to include violations of Title VI of the Civil Rights Act of 1964, the Education for All Handicapped Children Act (EHA), and the Rehabilitation Act of 1973, and sued for a total and permanent injunction against using I.Q. tests in EMR placement. The court permanently enjoined use of I.Q. tests to place black children without court approval.

Following the five-month trial of the case, Judge Peckham again found that the impact of I.Q. tests was discriminatory. His decision rested on

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70. 100 S. Ct. at 2774.
71. Id. at 2775.
73. Id. at 1308.
74. Id. at 1314-15.
77. [1979] 3 EHLR at 551:337-38. To secure court permission to resume use of standardized I.Q. tests, the State Board of Education had to submit its written determinations that the tests were not racially or culturally discriminatory, were not administered so as to have a discriminatory impact on black children, and had been validated for use in EMR placement. The Board would have to support its findings with statistics showing the average black and white student test scores, data supporting a finding of test validation, and proof of public hearings on the reimplementation of testing. The school districts had to monitor the EMR placement rates for white and black students and establish a three-year plan to eliminate the disparity between white and black student enrollment in EMR. The defendants would also have to notify the court of any district failing to remedy the racial imbalance after the three-year period. Id.
four factual findings. He determined that I.Q. test scores played a predom-
inant role in the procedure used to classify students as EMR. Since
twenty-three percent of California’s EMR students were black while only
ten percent of the general student body was black, he held that the use of
I.Q. tests had a disproportionate racial impact. In addition, he stated
that erroneous EMR classification could severely restrict a student’s educa-
tional advancement because the EMR curriculum included only those ba-
sic academic skills necessary to make children socially adjusted and
economically productive, and because few EMR students ever returned
to the regular curriculum. Finally, the court, implicitly employing a
broad definition of test bias, determined that the I.Q. tests were cultur-
ally biased against blacks. According to the court, the two most widely
used intelligence tests had not been designed for use on blacks; the word-

78. Id. at 551:311.
79. Id. at 551:305-07. In the 20 districts accounting for the 80% of the black enrollment
in California public schools, black students comprised 27.5% of the student population and
62% of the EMR population.
80. Id. at 551:304 (quoting STATE DEPARTMENT OF EDUCATION, PROGRAMS FOR THE
EDUCABLE MENTALLY RETARDED 27 (1974)).
81. Id. at 551:305.
82. A test may be labeled culturally biased if: (1) the results are used unfairly; (2) a
distinct cultural bias exists in the test content or in the use of the test; (3) a systematic differ-
ence in the test scores exists among groups; or (4) items within the test are especially difficult
for one group relative to another. McClung, Competency Testing Programs: Legal and Edu-
84. Id. at 551:315. Both the Larry P. and P.A.S.E. courts specifically considered the
Wechsler Intelligence Scale for Children (WISC) and its revision (WISC-R), as well as the
Standford-Binet test. The WISC and the WISC-R are divided into 12 sub-tests of verbal
and visual skills, consisting of similar items that increase in difficulty. An examiner begins
questioning a child at a suggested starting point in each category that corresponds with the
child’s chronological age. If the child answers the initial question correctly, he is given
credit for all previous test items. If the child fails to respond correctly, the examiner asks
questions of decreasing difficulty. To establish the I.Q. score, the number of points a child
scores on each sub-test is totaled and scaled. The Standford-Binet test consists of 18 sub-
tests, each geared to a chronological age level. Examiners begin questioning at a level where
the child is likely to respond correctly, but with some difficulty. From that point, the exam-
iner attempts to establish a basal level (the point just below the first mistake) and a ceiling
level (the point where all questions are missed). The difference will usually span several
sub-tests. A “mental age” is established by taking the basal age and adding all the credit the
Neither the WISC nor the Standford-Binet tests were designed for use on non-whites.
The designer of WISC once stated that his test would be inappropriate for use on blacks.
The WISC was revised in the early 1970’s to eliminate a few questions that were viewed
universally as racially and culturally biased. The scoring norm of the revised test was also
restandardized on populations including minorities. The Standford-Binet test, designed in
1916, was standardized on only whites. Early users believed that the lower scores of minori-
ties reflected innate racial differences in intellectual capacity. In 1972, the test was
ing of several individual test questions tended to discriminate against blacks, and a direct relationship existed between higher black test scores and a greater exposure to white culture and language. The court noted that the defendants could defeat a finding of discrimination if they could prove that the disparity between white and black test scores was attributable to educationally relevant differences between the two groups. The defendants claimed that the tests were not racially or culturally discriminatory but biased only against the poor. The court rejected the defense since there was no showing of a direct causal relationship between poverty and mental retardation. The court rejected the defense on the basis of evidence that the risk of mental illness attributable to the physical risks of poverty, such as malnutrition, could not alone account for the racial disparity in the EMR classroom.

Alternatively, the defendants argued that culturally biased tests are legitimate evaluative tools, indicative of the minority child's ability to compete in the dominant culture. Judge Peckham also rejected this defense, noting that exclusion from the majority culture could not justify a label of mental retardation.

Turning to the legal theories of discrimination, the court ruled that the use of I.Q. tests constituted a violation of Title VI. Specifically, I.Q. test-

restandardized on populations including minorities, but there was no effort to determine which questions were answered differently by blacks and whites. In 1937, both the WISC and Stanford-Binet tests were redesigned to eliminate disparities in scores between males and females. Test items impacting more harshly on women were removed to insure identical median scores for men and women. See generally Larry P. v. Riles, 3 EHLR at 551:315-16; P.A.S.E. v. Hannon, 3 EHLR at 552:118, 123-24; Amicus Curiae, Post-Trial Memoranda of the United States Government at 7-13, Larry P. v. Riles, [1979] 3 EHLR 551:295 (N.D. Cal.). No similar effort was ever made, however, to remove test questions yielding great disparities between black and white test scores. The Larry P. court held that broadening the test population without a systematic attempt to validate the individual test questions did not eliminate the inherent cultural bias. [1979] 3 EHLR at 551:316 n.64 & 65. The P.A.S.E. court, however, suggested that a restandardization of I.Q. tests similar to the restandardizing of the tests for women would eliminate the utility of the test. [1979] 3 EHLR at 552:139.

86. Id. at 551:316.
87. Id. at 551:314.
88. Id. at 551:315.
89. Id.
90. Id.
91. Id. at 551:318.
92. Id. This conclusion is alluded to and later confirmed in the court's rejection of the defendants' argument that I.Q. tests are good predictors of academic success. Mental retardation, not potential success in society, was the question before the Larry P. court. Id. at 551:325.
93. Id. at 551:322.
ing violated the Title VI implementing regulation prohibiting the use of “criteria or methods of administration which have the effect of subjecting an individual to discrimination because of their [sic] race.” Relying on *Lau v. Nichols*, the court found that the showing of disparate impact was sufficient to establish a prima facie case of discrimination under Title VI. Judge Peckham analogized *Lau* to the *Larry P.* facts, noting that erroneous classification into the restricted EMR curriculum could deny a child a meaningful educational opportunity. As in *Lau*, the *Larry P.* court gave great deference to an interpretive memorandum published by HEW which essentially stated that failure to use classification procedures selected and administered in a manner that is nondiscriminatory in its impact might constitute a Title VI violation. Thus, under the *Lau* effects-test standard, the plaintiffs in *Larry P.* established a prima facie case of discrimination. Judge Peckham then shifted to the school district the burden of rebutting the inference that its actions were a substantial cause of the racial disparity. To rebut the inference, the school district had to prove either that the disproportionate enrollment of blacks reflected a higher incidence of mental retardation in blacks, or that the I.Q. tests had been validated as classification tools for EMR placement. The defendants, however, failed to prove either fact.

In considering the claims under the Education for All Handicapped Children Act (EHA), the *Larry P.* court again applied an effects-test rather than a discriminatory intent analysis. Citing the EHA antidiscrimination provision, the court implied that it should be interpreted in a manner similar to Title VI's antidiscrimination provisions. The opinion, however, focused primarily on the EHA regulation requiring that classification methods be validated for the specific purpose for which it is being used.

The court in *Larry P.* suggested that since the issue of I.Q. test validation for EMR placement was one of first impression, the allocation of the

94. 45 C.F.R. § 803(b)2 (1978).
96. *Id.*
97. *Id.* (citing *M. GERRY*, supra note 49, at 3).
98. The court specifically rested its decision to shift the burden of proof to the defendant on *Lora v. Board of Educ.*, 456 F. Supp. 1211 (1978), which applied a discriminatory effects test to a Title VI violation. *Id.* at 1277. Since *Larry P.*, however, the Second Circuit has expressly reversed the *Lora* holding and specified a discriminatory intent standard for Title VI violations. *Lora v. Board of Educ.*, 623 F.2d 248 (2d Cir. 1980).
100. *Id.*
102. [1979] 3 EHLR at 551:323.
103. 45 C.F.R. § 121a.532(a) (1979).
burden proof for EHA test validation claims should be analogized to the Title VII effects-test analysis first enunciated in *Griggs v. Duke Power Co.* Applying the analysis outlined by Judge Peckham, the burden of showing that the tests had a “manifest relationship” with EMR placement would shift to the school district once a disproportionate impact by I.Q. testing is demonstrated. Once the school district has established that the tests were validated, the plaintiffs could show an alternative selection process which would reduce the adverse impact on minorities but still serve the school district’s legitimate interests.

Judge Peckham continuing the analogy with Title VII, applying the federal guidelines governing nondiscriminatory employment selection to determine whether I.Q. tests had been sufficiently validated. Rejecting the defendant’s claim that the tests were valid because they could predict future academic performance, the court concluded that construct validity

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104. [1979] 3 EHLR at 551:324. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court held that employment tests which operate to disqualify a disproportionate number of minorities violate Title VII of the 1964 Civil Rights Act unless justified by “business necessity.” Under *Griggs*, once plaintiffs establish that the tests adversely affect minorities, the burden of proving “business necessity” shifts to the employer. *Id.* at 432. In requiring that the tests be validated, the Court gave great deference to Equal Employment Opportunity Commission (EEOC) guidelines. *Id.* at 434. Subsequent decisions have not uniformly required that employers follow EEOC Title VII technical guidelines for test validation in Title VII cases. See *Note, The Uniform Guidelines on Employee Selection Procedures: Compromise and Controversy*, 28 CATH. U.L. REV. 605, 614-19 (1979). The Supreme Court further refined the *Griggs* test in *Abermarle Co. v. Moody*, 422 U.S. 405 (1975), by holding that a plaintiff may counter a “business necessity” defense by showing a less burdensome alternative. *Id.* at 425. See *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Blake v. City of Los Angeles*, 595 F.2d 1367, 1372-83 (9th Cir. 1979).


106. *Id.* at 551:327.

107. *Id.* at 551:325. *Cf.* 29 C.F.R. §§ 1607.8, 1607.4(b), 1607.5(b)(5) (1979). There are three standards of test validation: predictive, content, and construct. Predictive validity refers to how well test items predict the future performance of test takers. Content validation assesses how well test items represent the knowledge which the test purported to measure, i.e., a typing test for a typist position. Construct validity tests the domain of skills that comprise mental ability. See McClung, *supra* note 82, at 666-67.

appeared appropriate. Attempting to avoid a head-on collision with the educational controversy of whether I.Q. tests generally have construct validity, the court noted that the important validation issue was “establishing the relationship between I.Q. test scores of black children and the characteristics justifying their placement in special EMR classes.”

Judge Peckham then ruled that the defendants had to demonstrate that the tests were differentially validated, that is, valid for each minority group upon which they were used. The courts concluded that the I.Q. tests were not differentially validated for black EMR placement, based on the facts that I.Q. tests were not designed for use on blacks and that the tests had never been examined to determine whether the disparity between white and black scores could be eliminated through a redesign of the tests.

B. Parents in Action on Special Education v. Hannon: No Racial or Cultural Bias in I.Q. Tests

Less than ten months after the Larry P. decision, the District Court for the Northern District of Illinois ruled that the use of I.Q. tests in determining EMR placement in the Chicago public school system was not discriminatory despite evidence that blacks comprised eighty-two percent of the EMR student population and only sixty-two percent of the total student

said that categorizing a child as EMR because of questionable predictions of poor academic performance is unfair because the limited EMR curriculum limits a child’s future academic development. [1979] 3 EHLR at 551:324-25. Since some of the evidence of predictive validity indicated that the tests more accurately predicted the achievements of whites than blacks, Judge Peckham ruled that the I.Q. tests would have to be differentially validated, that is, validated for both white and black students. Id. at 551:326.

109. [1979] 3 EHLR at 551:325 n.84.

110. Whether I.Q. tests have construct validity has also been debated. See A. JENSEN, BIAS IN MENTAL TESTING, 11 (1980) (I.Q. tests have construct validity). But see Mercer, “Test Validity,” “Bias” and “Fairness” An Analysis from the Perspective of the Sociology of Knowledge, 9 INTERCHANGE 1 (1978-79) (I.Q. tests do not have construct validity).

111. [1979] 3 EHLR 551:325 n.84. Judge Peckham was willing to assume, for the purposes of the case, that the tests could be used appropriately on white students. Id. See note 82 supra.

112. [1979] 3 EHLR 551:325. See note 145 infra. A concept of fairness underlies the theory of differential validity. According to this theory, those employing tests should try to identify potentially unfair influences that may inappropriately discriminate against the test taker. See AMERICAN PSYCHOLOGICAL ASSOCIATION, STANDARDS FOR EDUCATIONAL & PSYCHOLOGICAL TESTS 43 (1974). Cf. 29 C.F.R. §§ 1607.4(b), 1607.5(b)(5) (1979) (the federal guidelines on Uniform Employment Selection Procedures sometimes require an investigation into the fairness of employment criteria which have a harsher impact upon various subgroups on the basis of race, sex, or national origin).


114. Id. at 551:325. See also 45 C.F.R. § 121a.532 (1979).
In *Parents In Action on Special Education v. Hannon (P.A.S.E.)*, the court dismissed the plaintiffs various statutory claims of discrimination because they failed to prove racial or cultural test bias.¹¹¹ Cultural bias, according to Judge Grady, could be determined only by a judicial review of every question on the I.Q. tests used by the school district.¹¹² The court found little in the information required by the questions or in the language used which was peculiar to white culture.¹¹³ Although the court found nine culturally biased test items, Judge Grady determined that nine incorrect answers would not result in erroneous EMR placement.¹¹⁴

The *P.A.S.E.* court acknowledged that blacks generally score lower than whites on I.Q. tests,¹¹⁵ but found that disparate impact alone, without evidence that the tests caused the overrepresentation of blacks in EMR classes, was insufficient to raise an inference of discrimination. According to the court, no inference of test bias could be drawn if that could only be done by “ignoring the direct evidence of fairness” which the court had already found in the individual test items.¹¹⁶ The court accepted the defendant’s claim that the disparity between black and white test scores could be explained by the effects of poverty.¹¹⁷ It agreed with the defend-
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ant that lower test scores were caused by a delayed intellectual development resulting from a lack of cognitive stimulation at an early age.124 According to the court, this lack of stimulation was “often due to factors associated with economic poverty in the home,”125 and affected a greater number of black families than other families in Chicago.126 It observed further that the majority of EMR students came from the areas of Chicago with large populations of very poor blacks.127

As in Larry P., the P.A.S.E. plaintiffs also argued that the use of I.Q. tests was unlawful because the tests had not been validated for use in the EMR placement of black children.128 While Judge Grady did not directly address the separate issue of test validation, the court impliedly rejected a strict differential validation requirement for I.Q. tests.129 According to the court, redesigning the tests to prevent an adverse impact on blacks would be impossible since blacks generally score lower on almost every question.130

Relying on the EHA antidiscrimination clause, the plaintiffs argued that the defendants bore the burden of proving that the tests were fair.131 Judge Grady, however, refused to shift the burden of proof to the defendants because of a literal statutory interpretation. According to the court, finding nothing in the language of the clause required “that any single procedure . . . be affirmatively shown to be free from bias.”132 In fact, the court found that the very requirement of multiple evaluative procedures implied “a recognition that one procedure standing alone, could well result in bias.”133 By requiring the plaintiffs to bear the full burden of proving discrimination under the EHA, P.A.S.E. failed to follow its only precedent, Larry P.134

125. Id.
126. Id.
127. Id.
129. [1980] 3 EHLR 552:138-39. Specifically, the court rejected the contention that test items on which blacks scored lower be eliminated, a method previously used to standardize the test for women. See note 76 supra.
130. Id. at 139.
133. Id.
134. See notes 101-06 and accompanying text supra.
III. BEYOND LARRY P. AND P.A.S.E.: WHAT STANDARDS OF PROOF FOR DISPARATE RACIAL IMPACT?

Future courts faced with discrimination claims arising from the use of I.Q. tests will have to decide whether the disproportionate enrollment of blacks in EMR classes will constitute prima facie discrimination under Title VI and the Education for All Handicapped Children Act, meriting a shift of the burden of rebutting an inference of discrimination to the defendant. The conflicting conclusions and rationales of the Larry P. and the P.A.S.E. courts make their precedential value unclear.

Whether disparate impact alone can establish a prima facie case of discrimination under Title VI is an open, but much discussed, question. The Lau effects test survives but its application may be limited to areas of federal funding governed by specific, affirmative federal regulations. According to Bakke dicta, a Title VI effects-test standard may not exist when state action creates an explicit racial classification, except where federal regulations place an affirmative duty on federal aid recipients. Fullilove dicta indicates that voluntary federal funding may be subject to specific administrative restrictions designed to remedy the effects of prior discrimination.

Whether the use of I.Q. tests for EMR placement qualifies for an effects test analysis is unclear. In Lau, the Title VI enforcement agency (HEW) issued guidelines imposing a specific duty on school districts to supply remedial language instruction where the inability to speak English impaired participation in the educational program, a violation of Title VI regulations. The 1977 Public Works Employment Act mandated the MBE set-aside program at issue in Fullilove. In contrast, the HEW memorandum on special education, relied upon in Larry P., to strengthen Title VI non-discrimination regulations, imposes no affirmative duty to eliminate the use of evaluative devices causing discriminatory impact. Instead, the memorandum states that "additional or substitute materials or procedures which do not have such adverse impact must be employed." Thus, plaintiffs seeking the elimination of I.Q. testing under a Title VI effects-test theory may have the burden of proving that an affirmative duty to eliminate the tests exists, that is, that additional tests could not sufficiently reduce the adverse impact so as to be nondiscriminatory. Given the distinct

135. See notes 62-65 and accompanying text supra.
136. See notes 70-71 and accompanying text supra.
137. See notes 50-54 and accompanying text supra.
138. See note 97 and accompanying text supra.
139. See M. GERRY, supra note 49, at 3.
definitions of test bias employed by the *Larry P.* and *P.A.S.E.* courts and the *P.A.S.E.* adoption of a poverty explanation for lower black test scores, gaining a Title VI effects-test standard may be difficult.

Whether a demonstration of disparate racial impact is sufficient to shift the burden of proof to the defendant under the Education for All Handicapped Children Act (EHA) is, of course, a matter of statutory construction. The *P.A.S.E.* court examined the language of the EHA and concluded that nothing in the Act authorized the shifting of the burden of proof. In *Larry P.*, Judge Peckham decided to shift the burden of proof to the defendant based on an analogy to Title VII.

The *Larry P.* court’s reasoning is problematic for two reasons. First, the court suggested that the allocation of the burden of proof announced in *Griggs v. Duke Power Co.* be applied to *Larry P.* apparently on the basis that evaluative materials for both special education and employment must be validated according to federal regulations. The ruling in *Griggs* that a disparate racial impact caused by employment selection criteria can justify shifting the burden of rebutting an inference of discrimination to the defendant was not anchored on regulatory validation requirements. Rather, the linchpin of *Griggs* was the Congressional intent to prohibit employment discrimination occasioned by employment tests that are not job-related. Thus, the justification for applying an effects-test to a federal statute prohibiting discrimination appears to turn on the scope of the discrimination Congress intended to prohibit by the statute.

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140. 401 U.S. 424 (1971). *See* notes 96-97 and accompanying text *supra.*
141. [1979] 3 EHRLR at 551:324. *Cf.* 42 C.F.R. § 121a.532(a)(2) (1979); 29 C.F.R. § 1607.4 (1979). The defendants argued that the constitutional standard of test validation enunciated in *Washington v. Davis*, 426 U.S. 229 (1976), should apply to I.Q. testing for EMR placement. In *Davis*, the Supreme Court held that, where employment discrimination via testing was alleged under the fourteenth amendment, the plaintiffs had to show discriminatory intent. The court also held that the defendants would not be held to the Title VII validation standard of job relatedness, but could rebut the inference of constitutional discrimination by proving that the employment test and the job were rationally related. *Id.* at 247. This constitutional standard also has been applied to Title VI claims alleging discrimination via testing when the statutory claim is linked with a constitutional one. *See* Baker v. City of St. Petersburg, 400 F.2d 294 (5th Cir. 1968); Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979); Valadez v. Graham, 474 F. Supp. 149 (M.D. Fla. 1979).

Judge Peckham recognized no difference between the *Davis* and *Griggs* standards, [1979] 3 EHRLR at 551:324, and thus never addressed the issue of whether a standard of discriminatory intent might be applicable to the EHA.

142. According to the *Griggs* court, Congress intended Title VII to address the consequences of employment discrimination and to place the burden on the employer to show that all job criteria are job-related. 401 U.S. at 432.
143. *Id.* at 430. *Accord.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 285 (an examination of the legislative intent behind Title VI indicates Title VI proscribes only those racial classifications that would violate the constitution).
After the Larry P. and P.A.S.E. decisions, it is also unclear what defenses can defeat a claim of discriminatory racial impact under Title VI or the EHA. The Larry P. court imposed a Griggs-like "educational necessity" defense and a differential validation requirement on I.Q. testing for EMR placement on the rationale that since federal regulations require the validation of special education classification tools and employment selection criteria, the same validation standards should be applied to special education. This appears to stretch the education-employment analogy too far. Strict differential validation is no longer a prerequisite to the lawful use of employment tests; only a standard of test fairness is required. In addition, courts and Congress have accorded great deference to the educational policy decisions of school authorities that may have a racially definable impact but which fall short of constitutional violations. On the other hand, P.A.S.E. would allow each judge to formulate his own definition of test validation or test bias. Such discretion to local judges would seem contrary to one of the purposes of the EHA, which is to encourage national uniformity in the procedural safeguards afforded students and parents in special education classification processes.

144. See notes 104-13 and accompanying text supra.

145. Under the 1970 interpretive guidelines issued by the Equal Employment Opportunity Commission, employment tests were required to be differently validated for each minority group involved when there was a sufficient number of minorities to make the validation technically feasible. 29 C.F.R. §§ 1607.4(b), 1607.5(b)(5) (1977). The burden of proving the absence of technical feasibility by positive evidence lay with the employer. 29 C.F.R. § 1607.4(b) (1977). In 1978, the EEOC, the Civil Service Commission, and the Departments of Labor and Justice adopted the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1 to 1607.18 (1979). Differential validation is no longer required for employment tests. Rather, the guidelines incorporate a concept of test fairness. 29 C.F.R. § 1607.14(B)(8) (1979). Employers must keep data on the test results of minorities, 29 C.F.R. §§ 1607.4(A) to 1607.4(B); 1607.15(A)(1) to 1607.15(A)(2) (1979). Where there is an adverse impact on minorities, employers must conduct fairness studies if there are sufficient numbers to make such studies technically feasible. 29 C.F.R. § 1607.14(B)(8)(e) (1979). Although the guidelines do not define fairness, they indicate that an adverse impact on minorities signals a need to investigate a test's fairness. Id. See Note, The Uniform Guidelines on Employer Selection Procedures: Compromises and Controversies, 28 Cath. U.L. Rev. 605, 612-19, 625-27 (1979).

146. Congress has stated that de facto racial imbalances are not unlawful with respect to school desegregation. See, e.g., Title VI of Civil Rights Act, 42 U.S.C. § 2000c-6 (1976); Equal Educational Opportunities Act, 20 U.S.C. §§ 1703, 1704, 1705, 1715, 1754 (1976). The courts have also shown great deference to the decisions of school authorities. See Monroe v. Board of Comm'n's, 505 F.2d 105 (6th Cir. 1974) (school closing); Ellis v. Board of Public Instruction, 465 F.2d 878 (5th Cir. 1972), cert. denied, 410 U.S. 966 (1973) (school closing); Board of Educ. v. Dowell, 375 F.2d 158 (10th Cir.), cert. denied, 387 U.S. 931 (1967) (courts' authority to review school board's actions is not regulatory); Griggs v. Cook, 272 F. Supp. 163 (N.D. Ga.), aff'd 384 F.2d 705 (5th Cir. 1967) (curriculum and operation of schools lies with school board).

147. The EHA establishes a system of minimal procedural safeguards for children and
Under present case law, it is uncertain whether Title VI or the EHA embodies an effects-test standard of discrimination. Unlike Title VI, however, no court has examined the congressional intent behind the EHA provision prohibiting the use of evaluative materials that are racially and culturally discriminatory. Such an examination might shed light on the appropriate analysis for charges of discriminatory impact under the EHA as well as on the defenses that can defeat such claims.

IV. A Discriminatory Effect Standard for the EHA?

Allegations that the use of I.Q. tests for EMR placement violates EHA's antidiscrimination provision poses the question of whether disparate racial impact alone can establish prima facie discrimination under the Act. A recent Supreme Court decision examined whether a discriminatory effects or intent standard should apply to another federal antidiscrimination statute, the Emergency School Aid Act (ESAA).148 In finding an effects-test appropriate, the Court set out a method of statutory analysis which might help to establish the proper interpretation of prima facie discrimination under the EHA.

In Board of Education v. Harris,149 the New York City School Board sought to enjoin HEW from terminating funds being received under the ESAA. HEW had decided to cut off funding after determining that the school board's method of assigning teachers was discriminatory and violated the Act.150 The school board charged that HEW could not eliminate funding because it failed to prove any discriminatory intent. The Supreme Court held that a statistical showing that black teachers were assigned
more often to predominantly black schools and less often to predominantly white schools was sufficient to establish a prima facie case of discrimination under the ESAA. The burden, therefore, shifted to the board to rebut the prima facie case by showing "educational necessity." According to the Court, the decision to apply a *Griggs* analysis was justified by the overall structure of the Act, the congressional statement of purpose and policy, the legislative history, and the context of the violated provision.

The *Harris* decision is useful since it interprets a statute analogous to the EHA. Both the ESAA and the EHA are specialized acts designed to effectuate national policies through voluntary funding programs. The EHA's statement of findings and purpose, like ESAA's, demonstrates that Congress was concerned with the effect, not the intent, of educational policies. Congress found that it was in the national interest for the federal government to assist local and state authorities lacking adequate financial resources to provide special education programs in order to ensure equal protection of the law. The purpose of the EHA is to ensure an appropri-

151. 444 U.S. at 151.
152. *Id.* at 140-41.
153. Both the ESAA and the EHA are specific grant programs designed to encourage local educational programs under Title VI or § 504 of the 1973 Rehabilitation Act. A purpose of the ESAA is "to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary or secondary schools . . . ." 20 U.S.C. § 3192(b)(2) (Supp. III 1979). To effect this purpose, Congress has authorized $415 million in grants and contracts to educational authorities in 1980 and for three succeeding years. 20 U.S.C. § 3194 (Supp. III 1979). The requirements of the ESAA are incumbent only on participants and thus a violation of the act does not result in a cut-off of federal funding as would a Title VI violation. Board of Educ. v. Harris, 444 U.S. at 150 (1979). The EHA is similarly narrow in focus. Its purpose is to ensure "a free appropriate education" to all handicapped children. Pub. L. No. 91-230, § 601(c), 84 Stat. 121 (1970), as amended by Pub. L. No. 94-142, § 3(a), 89 Stat. 775 (1975). Congress provides each state participant additional funds based on the number of children served by the special education program and the yearly average per pupil cost in the United States. 20 U.S.C. § 1411(a) (1976). Presumably, a violation of the EHA would not affect standing to receive other federal funding.
154. According to the *Harris* court, the ESAA's purpose of reducing minority isolation and improving the quality of education for all children focused on actual effect. 444 U.S. at 141. Similarly, the purpose of the EHA is to affect conditions that did not exist prior to the Act. See note 148 infra.
155. Among the specific Congressional findings are that: (1) the special educational needs of handicapped children were not being fully met; (2) more than half of the handicapped children in the United States do not receive appropriate educational services permitting them full quality of opportunity; (3) state and local educational agencies have a responsibility to provide education for handicapped children, which they are unable to meet because of inadequate financial resources; and (4) it is in the national interest for the federal government to provide financial assistance to meet the educational needs of handicapped children. Pub. L. No. 91-230, § 601(b), 84 Stat. 121 (1970), as amended by Pub. L. No. 94-142, § 3(2), 89 Stat. 775 (1975).
ate education for handicapped children and to protect the rights of such children and their parents.\textsuperscript{156} In the EHA, as in the ESAA, one of the eligibility criteria prohibits discrimination.\textsuperscript{157}

A major congressional concern in drafting the EHA was to ensure that children with handicaps were properly classified by state authorities.\textsuperscript{158} This is reflected in the EHA's provisions requiring individualized educational programs for handicapped students,\textsuperscript{159} due process protections for the classification process,\textsuperscript{160} and placement of children in regular classrooms when possible.\textsuperscript{161} A specific congressional desire to avoid erroneous classification of children is manifest in the EHA requirement that testing and evaluative materials be "selected and administered so as not to be racially and culturally discriminatory."\textsuperscript{162} Congress adopted this language to effectuate the policy of providing full educational opportunities to all handicapped children.\textsuperscript{163}

The plain language of the provision indicates a congressional intent to guard against discriminatory impact. This conclusion is supported by statements of representatives who believed racial and ethnic factors might contribute to misclassification.\textsuperscript{164} Apparently, Congress never envisioned

\begin{itemize}
\item \textsuperscript{156} Id. § 601(c).
\item \textsuperscript{158} The Senate Committee on Labor and Public Welfare stated that it was "deeply concerned about practices and procedures which result in classifying children as having handicapping conditions when in fact they do not have such conditions." S. REP. No.168, 94th Cong., 1st Sess. 26, reprinted in [1975] U.S. CODE CONG. & AD. NEWS 1425, 1450. As a result of this concern, the Senate version of the EHA was designed to "focus directly on the problem of erroneous classification and labeling of children." S. REP. No. 168 at 10, reprinted in [1975] U.S. CODE CONG. & AD. NEWS at 1434.
\item \textsuperscript{159} 20 U.S.C. § 1412(4) (Supp. II 1978).
\item \textsuperscript{160} Id. § 1415.
\item \textsuperscript{161} Id. § 1412(5)(B).
\item \textsuperscript{162} Id. § 1412(5)(C). See note 43 supra.
\item \textsuperscript{163} The predecessor to the EHA was the Education of the Handicapped Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (1974). The Senate version of the bill contained the provision now codified at 20 U.S.C. § 1412(5)(C) (1976); the House version did not. In the Conference Committee, the Senate version was adopted, "changing the goal from providing an opportunity for free appropriate public education for all handicapped children to providing full educational opportunities to all handicapped children." CONG REP. No. 1026, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS, 4206, 4257.
\item \textsuperscript{164} One year prior to its consideration of the EHA, the Senate Committee on Labor and Public Welfare examined the 1974 amendments to the Rehabilitation Act of 1974, Pub. L. No. 93-516, 88 Stat. 1617 (1974), and noted that "racial and ethnic factors may contribute to misclassification as mentally retarded." S. REP. No.1297, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6373, 6389. This observation was reiterated during the House debates on the EHA. Representative Miller of California pointed out that some testing devices used to identify handicapped children were discriminatory because they were
that educators would intentionally use testing materials as instruments of discrimination. Rather, as the Senate Committee on Labor and Public Welfare noted, "the mechanistic ease of testing should not become so paramount . . . that the negative effects are overlooked."\[165\] Moreover, nothing in the legislative history demonstrates an intent to mitigate the effects test language or purpose of the EHA eligibility provision.

By analogy to the \textit{Harris} opinion and by review of legislative history, a prima facie case of discrimination under the EHA antidiscrimination provision will be found upon evidence of a disproportionate impact. Under this theory, if the plaintiffs can demonstrate that I.Q. tests have an adverse impact on minorities, the defendant school board will have the burden of proving that the use of I.Q. tests is an "educational necessity." Presumably, the Title VII analogy in \textit{Harris} would also encompass the plaintiff's Title VII right to foil an "educational necessity" defense with a showing of a less segregative alternative.\[166\]

\textbf{VI. CONCLUSION}

Erroneous misclassification as EMR may deny children valuable civil, economic, and educational opportunities. I.Q. testing that results in a disproportionate enrollment of minority children in EMR classes raises a specter of racial discrimination. Given the widespread use of I.Q. testing in educational fields, requiring proof of discriminatory intent could create an almost insurmountable barrier for plaintiffs. Thus, whether a showing of disparate racial impact establishes prima facie discrimination under applicable federal statutes is a crucial question. A Title VI effects test exists,

\[166\] A less burdensome alternative theory, although not addressed by the \textit{Harris} court, would be appropriate for the EHA. Not only would this theory be in keeping with the discriminatory effects standard evolving from \textit{Griggs}, see note 95 \textit{supra}, but it would also encourage local investigation into new and potentially improved evaluation devices that are certain to be developed as knowledge about mental retardation increases. Some experts in the special education field advocating the elimination of I.Q. tests have introduced substitute alternative assessment techniques that consider environment. \textit{See} J. Mercer, \textit{Psychological Assessment and the Rights of School Children, Issues in Classification} 6 (1975) (proposes multicultural pluralistic assessment procedures based on a child's cultural background); N. Hobbs, \textit{The Future of Children}, 4 (1975) (proposes a classification system based on the construction of profiles of the assets and liabilities of a child in particular settings to be used to set specific goals for the child in each setting). Proof that these alternatives to I.Q. tests are reliable and impact less harshly on minorities could result in the elimination of I.Q. testing.}
but its application is still unclear. To add to the confusion, *Larry P.* and *P.A.S.E.* are split on whether the EHA incorporates an effects test.

Recently, however, in *Harris v. Board of Education* the Supreme Court suggested a theory of statutory analysis for a federal antidiscrimination statute similar to Title VI. The criteria set forth in that case could logically be extended to analysis of EHA claims. Under this theory a discriminatory effects standard could be applied to claims under the EHA antidiscrimination provision. Such an analysis would support the congressional desire to guard against racially and culturally discriminatory classifications and guarantee minority school children the opportunity for appropriate education.

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