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DISCRIMINATION LAW—STANDARDIZED TESTING: WHAT STANDARD IS STANDARD? PASE v. Hannon, 3 EHLR 552:108 (1980)

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DISCRIMINATION LAW—STANDARDIZED TESTING IN E.M.H. PLACEMENT: WHAT STANDARD IS STANDARD? *PASE v. Hannon*, 3 EHLR 552:108 (1980).

I. INTRODUCTION

Standardized tests have become familiar to American youth, and much of a young person's future is predicated upon scores achieved on these examinations. Standardized tests may be administered by public or private schools,[1] professional organizations,[2] testing centers,[3] or personnel offices.[4] Examination scores frequently determine the extent and type of educational opportunities an individual will have, the type of job he is qualified to perform, or the salary he may receive. Until recently, most Americans have allowed these test scores to determine the course of their lives.[5]

In *Parents in Action on Special Education v. Hannon*[6] (*PASE*) the use of three standardized tests was challenged when the test results were used to establish school placement classifications for children. Parents in Action on Special Education (PASE) brought suit in the United States District Court for the Northern District of Illinois, claiming that the use of the Wechsler Intelligence Scale for Children (WISC),[7] the Wechsler Intelligence Scale for Children-

1. Wechsler Scales, Stanford-Binet, and other IQ, ability, or achievement tests are administered by public or private schools.

2. Passing scores on bar examinations, teacher certification examinations, and other competency tests are required for membership within various professions.

3. The Scholastic Aptitude Test (SAT), Law School Admission Test (LSAT), and Graduate Record Exam (GRE) are examples of tests administered by the Educational Testing Service of Princeton, New Jersey, one center for standardized test development and evaluation.

4. Wechsler Scales, Miller Analogy Test, and various other interest inventories and aptitude tests occasionally are administered by personnel offices prior to placement of employees into particular jobs.

5. Such scores undoubtedly continue to affect those who take standardized tests. Recently, the Freedom of Information Act, 5 U.S.C. § 552 (1976 & West Cum. Supp. 1981), has provided avenues through which test takers may challenge the use of test scores that determine their future. Although not perfect solutions to the problems generated by testing programs, such laws encourage a more considered use of tests and test scores.

6. 3 EHLR 552:108 (1980) (memorandum opinion).

7. The Wechsler Intelligence Scale for Children (1949) [hereinafter referred to as WISC] is a frequently used individual intelligence test. WISC consists of eleven subparts which test general comprehension, arithmetic, similarities, vocabulary, digit span, picture completion, picture arrangement, block design, object assembly,

Revised (WISC-R),[8] and the Stanford-Binet[9] tests had a discriminatory impact upon black children within the Chicago school system.[10] The tests were used by the Chicago school administration as a means to assist[11] them in placing children in classes for the educable mentally handicapped (EMH).[12] When two black children with learning disabilities were misdiagnosed and classified as educable mentally handicapped, PASE alleged violations of the equal protection clause of the fourteenth amendment,[13] Title VI of the Civil Rights Act of 1964,[14] the Education of All Handicapped Children Act of 1975,[15] and section 504 of the Rehabilitation Act of 1973.[16]

Judge John F. Grady, in a detailed opinion,[17] examined each question on the three tests and determined that few of the items were discriminatory.[18] The judge made this finding by considering

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coding, and mazes. *See* D. WECHSLER, WECHSLER INTELLIGENCE SCALE FOR CHILDREN, MANUAL 9 (1949).

8. The Wechsler Intelligence Scale for Children-Revised (1972) [hereinafter referred to as WISC-R] subtests are identical to WISC, except that mazes have been eliminated and some of the questions have been updated to reflect current education concepts. *See* note 39 *infra*. In addition, the population sample used to standardize the test has been changed.

9. The Stanford-Binet test attempts to discern whether a child is performing at his age level. If a child's performance is below the mean for his age group he is said to have a "mental age" below his chronological age. *See* 3 EHLR at 552:108. The most recent revision of this test was completed in 1960.

10. PASE alleged that a statistically significant number of black children were placed into Educable Mentally Retarded [hereinafter referred to as EMH] classes due to poor scores on the standardized tests. PASE also alleged that the tests were racially or culturally biased. The use of such tests, therefore, had a discriminatory impact upon black children. 3 EHLR at 552:110 n.2.

11. *See* Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1404 (1976), which mandates that a standardized test score cannot be the sole criteria for placement of students into special education classes. *See also* 3 EHLR at 552:137.

12. *See* text accompanying notes 56-58 *infra*.

13. U.S. CONST. amend. XIV, § 1.

14. 42 U.S.C. § 2000d (1970).

15. Education of the Handicapped Act, 20 U.S.C. § 1401, was amended by the Education for All Handicapped Children Act of 1975, Pub. L. 94-142, 89 Stat. 773 (1975). Both versions contain requirements that school districts must meet in order to obtain federal funding of programs for handicapped children.

16. 29 U.S.C. § 794 (Supp. 1980).

17. The opinion examines all test questions on the WISC, WISC-R, and Stanford-Binet tests. Judge Grady's opinions about the test questions and the expert testimony are included in the decision.

18. 3 EHLR 552:108. Judge Grady found one item on the Stanford-Binet test and eight items on the WISC and WISC-R tests which he believed were culturally biased against black children or sufficiently suspect to be inappropriate. *Id. See also* note 123 *infra*.

both parties' expert witness testimony. Judge Grady, independent of that testimony, determined that the tests were not racially biased.[19] Without reaching the legal issues of discriminatory impact or intentional discriminatory treatment, Judge Grady entered judgment for defendant. Judge Grady believed that the controversy was in essence a factual one and that it was unnecessary to reach the legal issues. Since he did not believe that the tests were racially biased, plaintiffs were unable to prevail on any of their theories.

The fact that a significantly larger number of black children were placed into EMH classes provided the judge with undisputed evidence that the classification program had a disproportionately greater impact upon the black student population. Courts must look to the effect of classification programs to determine whether the scheme used by the school system has an impact that is disproportionately greater upon one group than upon others.

Part II of this note presents an overview of testing and school classification systems. This section examines the various concepts of intelligence that have been considered in developing standardized tests, the legal reaction to pupil classification schemes, and the education available to children within EMH classes. Part III surveys the cases that developed the theories of disparate treatment and disparate impact and then explains when each of these theories should be applied. The constitutional and statutory theories presented by PASE will be analyzed in part IV of this note. Part V considers the way Judge Grady framed the question before him and the way he disposed of the issue.

This note will demonstrate that the courts must go beyond a lengthy evaluation of specific test items in their attempt to eliminate discriminatory placement of children. Plaintiff need not prove that intentional discrimination has occurred. When disparate impact upon a protected group by any classification scheme is proved, an injunction should issue against use of that scheme and the courts should require the school system to develop a nondiscriminatory means of classification.

II. BACKGROUND

The courts historically have been reluctant to intrude into the realm of educational policymaking. Courts have felt that educa-

19. 3 EHLR at 552:110. Judge Grady chose to disregard certain expert testimony relating to the bias of test questions. Instead, he used his personal knowledge as a basis for ruling on the questions he considered to be suspect. *Id.* at 552:111. *See also* note 123 *infra*.

tional policy is the province of educators rather than of jurists. When educational policy appears to violate the United States Constitution or a federal statute,[20] however, the courts' reluctance is overcome by judicial resolve to protect this most important phase of American life. The United States Supreme Court has spoken of education as "perhaps the most important function of state and local governments."[21] Chief Justice Warren, in *Brown v. Board of Education*,[22] wrote: "[i]n these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[23] Chief Justice Warren's statement is as true today as it was in 1954.

Once a state has established a system of free public education it must maintain that system in a manner that does not deny its children their constitutionally protected rights.[24] Any classification scheme which places students into discrete groups by virtue of some characteristic must withstand constitutional scrutiny.[25] When a fundamental right is not at stake[26] or when a suspect class is not involved,[27] the court applies a rational relation test.[28] Under this test the state merely needs to show that the action it has taken is rationally related to the legitimate goals it hopes to accomplish.[29]

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20. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483, 493 (1954) (segregated schools deny students equal protection of the law even though tangible facilities may be equal); United States v. Sunflower County School Dist., 430 F.2d 839, 841 (5th Cir. 1970) (use of achievement test scores to assign students was not permissible when schools were being operated as a dual school system, even though a marked racial imbalance existed within the school system); United States v. Tunica County School Dist., 421 F.2d 1236, 1237 (5th Cir.), *cert. denied*, 398 U.S. 951 (1970) (court disallowed the use of achievement test scores to reassign pupils to schools after desegregation was ordered); Singleton v. Jackson Mun. Separate School Dist., 419 F.2d 1211, 1216 (5th Cir. 1969), *cert. denied*, 402 U.S. 944 (1971) (dissolution of segregated school systems and court order for integrated unitary schools); Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501, 521 (C.D. Cal. 1970) (racial imbalance among students and faculty, the use of a neighborhood school policy, and a policy against busing were held to violate the fourteenth amendment and indicated the need for affirmative integration of the school system).

21. Brown v. Board of Education, 347 U.S. 483, 493 (1954).

22. 347 U.S. 483 (1954).

23. *Id.* at 493.

24. Goss v. Lopez, 419 U.S. 565, 573-74 (1975).

25. *Id.*

26. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33-35 (1972) (education is not considered a fundamental right by the Supreme Court; rather, the provision of education is legislatively mandated by the states. *Id.* at 33-38).

27. *Id.* at 22-28.

28. *Id.* at 40.

29. Cuyahoga County Ass'n for Retarded Children & Adults v. Essex, 411 F. Supp. 46, 50 (N.D. Ohio 1976).

The state is responsible for the development and implementation of an educational system. If a mechanism within that system classifies students, it will be subject to judicial scrutiny.[30] The Chicago school system categorized students according to scores achieved on standardized intelligence tests. Instead of looking to the actual classification system, Judge Grady only looked to the tests used by the Chicago schools. Rather than examining the impact of the school system's use of the tests on the black student population, the judge focused upon the form of the tests. When a classification system is challenged on an equal protection clause basis, as it was in *PASE*, the courts apply a rational relation test. When the action of a school system is rationally related to the ends which it hopes to achieve, the courts are not likely to forbid the action. Courts support legislative enactments that do not infringe upon fundamental rights or suspect classes.[31]

The following section will explore the educational and psychological concepts underlying the Chicago school system's classification scheme. First, students were grouped according to intelligence as measured by scores achieved on standardized tests. Students were then placed into homogeneous groups with students who achieved similar test scores. The group of students receiving the lowest scores was placed into a curriculum designed for the educable mentally handicapped. PASE questioned the validity of the educational policy underlying the EMH program. Intelligence and intelligence testing and student tracking are crucial components of the EMH system.

A. *Intelligence*

In the early twentieth century intelligence tests purported to measure the fixed, innate ability of individuals.[32] The theory underlying this concept was that intelligence was purely hereditary: genes were considered to be determinative of intelligence.[33] This "genotype" concept of intelligence takes into account only innate genetic potential. It disregards environmental influences that inter-

30. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). Justice Powell, writing for the Court, said that racial and ethnic distinctions of all sorts are inherently suspect and thus call for the most exacting judicial examination. *Id.* at 292.

31. 411 U.S. at 40.

32. J. FINCHER, HUMAN INTELLIGENCE 185 (1976).

33. *See generally* J. GUILFORD, THE NATURE OF HUMAN INTELLIGENCE 349-59 (1967); D. WECHSLER, WECHSLER'S MEASUREMENT AND APPRAISAL OF ADULT INTELLIGENCE (4th ed. 1978).

act with genes. A number of broad studies have attempted to prove that genetic factors, rather than environmental factors, control individuals' intelligence.[34] The genetic construct of intelligence, however, generally has been rejected.[35] The "phenotype" construct factors environmental influences into the concept of intelligence. Influences upon the fetus during the developmental stages within the mother's womb as well as external environmental influences upon the child following birth thus are included.[36]

Most intelligence tests do not purport to measure either genotype or phenotype intelligence but to evaluate "ordinary" intelligence.[37] These tests simply measure intelligence from the child's behavior and responses to the test questions and tasks he is asked to perform. The child is presented with a wide variety of tasks that are presumed to be an adequate sampling of important intellectual functions. The child's ability to respond to this sample then is determined to be reflective of his general level of intellectual functioning.[38] Intelligence tests normally provide a single score, such as an intelligence quotient (IQ), which indicates the child's intellectual level based upon that specific test. The manual supplied with the WISC-R states that "the intelligence which [the] test purports to measure is the overall capacity of an individual to understand and cope with the world around him. Such capacity is inferred from the ways ability is manifested."[39]

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34. *See generally* J. HUNT, INTELLIGENCE AND EXPERIENCE (1961); INTELLIGENCE: GENETIC AND ENVIRONMENTAL INFLUENCES (R. Cancro, ed. 1971); A. JENSEN, GENETICS AND EDUCATION (1972); L. KAMIN, THE SCIENCE AND POLITICS OF I.Q. (1974); RACE AND IQ (A. Montagu, ed. 1975); A. SHUEY, THE TESTING OF NEGRO INTELLIGENCE (1958). These studies do not provide any guidance for the measurement of innate intelligence. Rather, race or some other genetic determinant is considered to proscribe the limits of intelligence for the majority of that genetic type. Geneticists argue that blacks have a lower basis of intelligence due to natural selection. Although exceptions can be demonstrated, the intelligence curve of blacks will fall one standard deviation below whites. *See* Larry P. v. Riles, 3 EHLR 551:295 (1979). It does not appear possible to develop an intelligence test that is culture free or free from other environmental influences. Thus, measurement of pure genetic intelligence is impossible.

35. *See* note 33 *supra*. *See also* Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691, 692-93 (1968); Note, *The Legal Implications of Cultural Bias in the Intelligence Testing of Disadvantaged School Children*, 61 GEO. L. J. 1027, 1029 n.9 (1973).

36. *See* note 33 *supra*.

37. *Id.*

38. *See* A. ANASTASI, PSYCHOLOGICAL TESTING 188 (3d ed. 1968).

39. WISC-R Manual, 5 (1974). Ten categories of ability are measured by the WISC-R: General information, general comprehension, arithmetic, similarities, vocabulary, picture completion, block design, object assembly, and coding. *Id.* at 8.

A child's intelligence may be measured accurately through the use of standardized tests only if the testing instrument is standardized upon a large, representative sample of children. If such standardization does not occur, the test cannot be considered a valid indicator of intellectual functioning.[40] Intelligence tests generally, and the Stanford-Binet and Wechsler Scales specifically, have been standardized through national samples of school children.[41]

Validation studies[42] demonstrate that the test measures what it purports to measure. When validation studies are complete, a test that is valid for the purpose it was designed to achieve may be used solely to examine that for which it was validated.[43] The three tests litigated in *PASE* were not validated for the purpose of placing students into specific classifications within the Chicago schools.

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40. The standardization sample used by Wechsler for the WISC-R included 200 children in each of 11 age groups, or a total of 2,200 school children ranging in age from six and one half years to 16½ years. One hundred boys and 100 girls were included at each age level. The racial percentages were 85% white and 15% nonwhite. The nonwhite category included Black, Chicano, Puerto Rican, Oriental, and American Indian children. The standardization sample used by Wechsler accurately reflected urban and rural populations and the occupational group of the head of household. The occupational groups used included: (1) Professional/technical; (2) managers, officials, proprietors, clerical, and sales; (3) craftsmen and foremen; (4) operatives, service workers, farmers, and farm managers; (5) laborers, farm laborers, farm foremen.

The original WISC did not categorize by race within its standardization sample. The occupational base was for the father of the children sampled rather than for the head of household as on the WISC-R. Like the newer version, the original did not include children from homes of the unemployed within its standardization sample. D. WECHSLER, WECHSLER INTELLIGENCE SCALE FOR CHILDREN, MANUAL 7-9, (1949). *See also* note 130 *infra*.

41. *See* note 40 *supra*.

42. There are three methods by which to validate a test: Criterion validity, which correlates scores achieved on tests with ability to cope with the world; construct validity, which identifies the psychological trait that underlies successful performance; and content validity, which representatively samples significant parts of what the child has learned. *See generally* A. ANASTASI, PSYCHOLOGICAL TESTING, 100-119 (3d ed. 1961). Validation studies determine how a test may be used. *See, e.g.* Larry P. v. Riles, 3 EHLR at 551:324. For example, a test validated as an indicator of students' school achievement must not be used as an indicator of students' intelligence. Similarly, the results of such an achievement test administered to school children must not be used to determine the capability of the teacher. *See also* 45 C.F.R. § 84.35(b)(1) (1980); 45 C.F.R. § 121a.532(a)(2) (1980).

43. It is interesting to note that the authors of the tests and those who develop the standardization samples have a preconceived notion that males' and females' scores will not vary because of sex while it is noted that scores of whites and nonwhites vary an average of 15 points, or one standard deviation, from the mean. In fact, the Stanford-Binet was modified at one time because the test yielded different scores for boys and girls and the test makers felt that such differences were unacceptable. *See* 3 EHLR at 551:314.

B. *Classification or Tracking of Students*

In public schools standardized tests are used primarily to place students into homogeneous classifications[44] or "tracks." "Tracking" has become a widely accepted educational practice.[45] Academic ability is a relevant criterion for the placement of students simply due to the academic differences between students.[46] The equal treatment required by the equal protection clause does not prohibit the state or its schools from distinguishing among its citizens.[47]

Hobson v. Hanson[48] involved the impact of tracking on minority pupils. The track system consisted of four levels designed to meet the individual differences among students in the Washington, D.C. school system. The four levels included the intellectually gifted, the above average, the average, and the retarded. Each level of students was assigned to a self-contained curriculum.[49] The "special" track for retarded students provided limited, basic instruction.

The court found that the track system deprived blacks and poor pupils of the right to an education equal to that afforded to affluent students. The court dissolved the track system, basing its

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44. The United States Supreme Court noted in Carrington v. Rash, 380 U.S. 89 (1965) that "mere classification . . . does not of itself deprive a group of equal protection." *Id.* at 92. Although *Carrington* involved a fundamental right, the case is instructive because the Court allowed states to impose reasonable requirements but not to deny citizens of equal protection merely because of a particular classification.

45. *See generally* Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *cert. dismissed*, 393 U.S. 801 (1968).

46. Hobson v. Hansen, 269 F. Supp. 401, 511-13 (D.D.C. 1967).

47. *Id.* at 511.

48. 269 F. Supp. 401 (D.D.C. 1967). This case involved the placement of black children into the lowest tracks in the Washington, D.C. school system. Judge Wright's 118-page opinion is recognized as the landmark case about school tracking systems. The track system as administered by the Washington, D.C. schools grouped students according to socio-economic and racial status rather than intellectual ability. Many black children were deprived of an education equal to that afforded more affluent students. The tracking system was not flexible; students who entered the lowest tracks rarely were able to move into the higher tracks. Judge Wright held that the track system voided any rationality that might exist in homogeneous grouping. He ordered the track system abolished because it discriminated against the disadvantaged child, particularly the black child.

49. Three tracks were provided for students within the elementary schools: "Basic," or "special academic," for retarded children; "general" for average and above average children; and "honors" for gifted pupils. At the high school level the "regular" track was added to allow the above average student to be prepared for college. For a full explanation of the track system as used in the Washington, D.C. schools at the time of this litigation, *see* 269 F. Supp. at 442-50.

decision on the large number of blacks in this "special" track as compared with the number of blacks in other, higher tracks. Several other factors also persuaded Judge Wright to enjoin the track system: The lack of movement among tracks in spite of the purported flexibility of the system;[50] the failure of the schools to provide remedial programs for retarded and emotionally handicapped children;[51] and the use of standardized tests found to be culturally and racially biased.[52] The court held that the deprivation of equal educational opportunity violated both the equal protection and due process clauses of the fourteenth amendment.[53] Judge Wright, however, expressed the opinion that ability grouping could be reasonably related to the purpose of public education and that differential treatment is not offensive per se. Although courts traditionally have avoided determinations of educational policy, they have become active when such policies foster educational practices resulting in disparate classification by race.[54]

The Chicago schools use standardized test scores to place students into homogeneous tracks. Unlike Judge Wright, Judge Grady examined only the tests, disregarding other factors that might have warranted dissolution of the track system. He did not discuss the lack of student movement among the tracks or the nonexistence of remedial programs. Most importantly, he gave little weight to the disproportionate number of black children placed in the EMH track.[55]

C. *Educable Mentally Handicapped*

The Illinois school code mandates special classes for the educable mentally handicapped.[56] The curriculum for the EMH students

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50. 269 F. Supp. at 445, 464.

51. *Id.* at 468, 469-73.

52. *Id.* at 476-85.

53. *Id.* at 511-12.

54. *See, e.g.*, 347 U.S. 483 (1954) (separate but equal is inherently unequal); Moses v. Washington Parish School Bd., 330 F. Supp. 1340 (E.D. La. 1971), *aff'd*, 456 F.2d 1285 (5th Cir. 1972), *cert. denied*, 409 U.S. 1013 (1972) (assigning black children into homogeneous groups in recently desegregated school on basis of standardized ability and achievement tests violated the childrens' fourteenth amendment right to be treated equally, especially when blacks recently had been educated in inferior schools). *See* notes 60 and 61 *infra* and accompanying text for discussion of disparate impact and disparate treatment theories.

55. 3 EHLR at 552:109.

56. Educable Mentally Handicapped is defined as:

[C]hildren between the ages of 3 and 21 years who because of retarded intellectual development as determined by individual psychological evalua-

is designed for children who are unable to benefit from the program of instruction offered in the regular classroom. Material is presented to these handicapped children at a slower pace than in the normal classroom. Emphasis is placed on teaching the skills that are necessary for independent living. The subject matter is oriented toward socialization, language skills, and vocational training. Academic subjects are taught on an elementary level with the objective of helping the child become economically independent.[57]

The label "mentally retarded" will remain with the child as a part of his permanent school record. A child placed into a class for the mentally handicapped usually will not be transferred to a regular class. Children who graduate from EMH programs in the Chicago school system are awarded special diplomas that do not qualify them to go on to college.[58] A child who is placed erroneously into such a program thus is deprived of the benefits that otherwise would have been available to him during his school years. The child also is deprived of those opportunities normally available after graduation.

III. Role of the Courts in Educational Testing

Equal educational opportunity cases are brought under legal theories that originate in the equal employment field, specifically Title VII of the Civil Rights Act of 1964.[59] The two primary theories of discrimination created by title VII are disparate treatment[60] and disparate impact.[61] Disparate treatment occurs when similarly situated individuals or classes are treated differently because of

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tion are incapable of being educated profitably and effectively through ordinary classroom instruction but who may be expected to benefit from special education facilities designed to make them economically useful and socially adjusted.

ILL. REV. STAT. ch. 122, § 14-1.04 (1977) (repealed 1979). "[S]pecial Education means specially designed instruction . . . to meet the unique needs . . . [of handicapped children]." 45 C.F.R. § 121a.14 (1980). Mentally retarded children are included among the handicapped. 45 C.F.R. § 84.3(j) (1980). Classes for mentally handicapped children are appropriate when the children have "significant subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance." 45 C.F.R. § 121a.5(b)(4) (1980).

57. Larry P. v. Riles, 3 EHLR 551:295 (1979).

58. 3 EHLR 552:109.

59. 42 U.S.C. §§ 2000e to 2000e-16 (1970).

60. *See* Martin v. Chrysler Corp., 10 FEP 329 (E.D. Mich. 1974); Slack v. Havens, 7 FEP 885 (S.D. Cal. 1973).

61. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

race. *McDonnell-Douglas Corp. v. Green*[62] held that a prima facie case of disparate treatment is shown when: The plaintiff is a member of a racial minority; he applied for a job; he had the requisite qualifications; he was denied employment; and the job remained open after his application was rejected.[63] The burden of proof then shifts to the defendant employer to articulate a nondiscriminatory reason for denying the plaintiff employment.[64] The plaintiff then must demonstrate that the employer's explanation was merely a pretext and that it was the employer's *intent* to preclude a minority from employment. Plaintiff will lose unless he proves that the employer's nondiscriminatory reason was a pretext.[65] Proof of intent to discriminate, therefore, is crucial to a disparate treatment claim.[66]

The theory of disparate impact, as articulated by the United States Supreme Court in *Griggs v. Duke Power Co.*,[67] is the second ground for suit under title VII. Establishing a prima facie case of discriminatory impact, however, requires more proof than is needed under the disparate treatment theory. Plaintiffs usually use statistical evidence to establish a prima facie case.[68] A showing that a protected class[69] suffers from a statistically significant discriminatory impact is sufficient to establish the prima facie case. It is very difficult to establish a clear showing of disparate impact. Such a showing may be disputed through use of a differing range of statistics which indicates no significant impact.[70] If, however, the plaintiff is able to establish a prima facie case, the burden then shifts to the defendant to prove that the act which resulted in disparate impact was based upon a business necessity or was job related.[71]

Washington v. Davis[72] involved the validity of a standardized

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62. 411 U.S. 792 (1973).
63. *Id.* at 802.
64. *Id.*
65. *Id.* at 804.
66. *Id.* at 805.
67. 401 U.S. 424 (1971). *See also* Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); Larry P. v. Riles, 3 EHLR 551:295 (1979).
68. Albemarle Paper Co. v. Moody, 422 U.S. 405, 428-36 (1975). *See also* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); Keyes v. School Dist. No. One, 413 U.S. 189 (1972).
69. *See* note 24 *supra* and accompanying text.
70. For an extended look at the use of statistical evidence by both parties, *see* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).
71. 401 U.S. 424, 431 (1971).
72. 426 U.S. 229 (1976).

test[73] used to predict candidates' potential for success as police officers in Washington, D.C. The test allegedly excluded a disproportionately large number of black applicants and was challenged as a discriminatory device violative of the fifth amendment[74] and of 42 U.S.C. § 1981.[75] The Court resolved *Davis* under a constitutional theory of equal protection and held that the fourteenth amendment required plaintiffs to prove defendant's intent to discriminate; a showing of discriminatory impact was inadequate.[76]

Plaintiffs were able to demonstrate disproportionate impact, but this showing was insufficient to sustain plaintiffs' cause of action because the case originally was brought under a constitutional theory, not under title VII. The Court explained that the strict scrutiny test normally applied in racial classification cases is not invoked when mere discriminatory impact is shown. Rather, intentional or purposeful discriminatory treatment triggers the strict scrutiny test.[77] "Disproportionate impact is not irrelevant, but it is not the sole touchstone of invidious racial discrimination forbidden by the Constitution."[78] The Constitution did not require the Court to infer discrimination from disparate impact. To uphold the *Davis* testing scheme, therefore, the Court merely needed to find a rational relation between the test and the ends it purported to achieve. "The test is neutral on its face and rationally may be said to serve a purpose the government is Constitutionally empowered to pursue."[79]

The Supreme Court in *Davis* said, however, that when title

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73. Test 21 was used by the District of Columbia as an objective measurement standard for police recruits. The test was validated to show likelihood of success at the police academy; it was not validated to show the candidate's chance of success as a police officer. *Id.* at 235.

74. "[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." *Id.* at 239.

75. 42 U.S.C. § 1981 (1970) provides in part, "All persons within the jurisdiction of the United States shall have the same right in every state and territory . . . to the full and equal benefit of all laws . . . as enjoyed by white citizens. . . ."

76. 426 U.S. at 238-39. In a concurring opinion in *Davis*, Justice Stevens conceded that:

> [f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision making and of mixed motivation.

Id. at 253.

77. *Id.* at 242.

78. *Id.*

79. *Id.* at 246.

VII is applicable and when disproportionate impact is demonstrated by the plaintiff, it is not enough for the defendant employer to show a rational basis for the challenged practice; he also must validate[80] the practice.[81] The Court thus has shifted the burden of proof in title VII cases from the plaintiff who demonstrates disproportionate impact to the defendant employer who must validate the test against an acceptable standard.[82]

In *Larry P. v. Riles*,[83] the district court invalidated California's system of classifying black children for Educable Mentally Retarded (EMR)[84] classes. The court held that the use of standardized intelligence tests[85] that are racially and culturally biased and that have not been validated[86] for the purpose of placing children into EMR classes violated the California Constitution, the United States Constitution, and United States statutes.[87] The court, in an exhaustive analysis of standardized testing, cultural bias, test administration procedures, and EMR placement, permanently enjoined the State of California from using standardized tests to place children permanently into EMR classes.[88] Plaintiffs in *PASE* relied strongly on *Larry P.* because the cases shared similar facts.

IV. CONSTITUTIONAL AND STATUTORY ANALYSIS OF EDUCATIONAL TESTING

PASE embodies constitutional as well as statutory issues. This section will explore the constitutional questions that arise under

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80. *See* note 42 *supra*.

81. 426 U.S. at 246-47.

82. Acceptable standards include: Job relatedness, achievement, proficiency, and academic success. Equal Employment Opportunity Commission regulations require that the "validity of a job qualification test be proven by empirical data demonstrating that the test is predictive or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." *Id.* at 264 (Brennan, J., dissenting) (quoting 29 C.F.R. § 1607.4(c) (1975)).

83. 3 EHLR at 551:295.

84. Educable mentally retarded is synonymous with educable mentally handicapped and is simply the designation used in California.

85. The same three intelligence tests used by the Chicago school system were used in the California system. They are discussed throughout *Larry P.*

86. *See* note 42 *supra*.

87. 3 EHLR at 551:336. *Larry P.* challenged the California schools under the fourteenth amendment equal protection clause, section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1970), the Education for All Handicapped Children Act, 20 U.S.C. § 1401 (1970), Title VI of the Civil Rights Act, 42 U.S.C. § 2000(d) (1970), and the Equal Educational Opportunity Act, 20 U.S.C. § 1703 (1976).

88. *Larry P.* is a 125-page opinion discussing each of these areas. The district court concluded that the California school system was discriminating on the basis of race. 3 EHLR at 551:339.

equal protection clause claims and then will examine the issues that arise under the various federal statutes.

As noted in *Davis*, plaintiffs' equal protection claim will succeed only if they can prove intent to discriminate. A demonstration of discriminatory impact is insufficient. To develop a cause of action under the fourteenth amendment in education cases, a plaintiff must prove that the defendant school board intended to create and use a racial classification.[89] PASE apparently was able to demonstrate a racially discriminatory impact by showing that eighty-two percent of the students in EMH classes were black while only sixty-two percent of the school population was black.[90] Judge Grady's opinion indicates that PASE had no evidence that the school intended to use these standardized tests for a discriminatory purpose. If the plaintiff fails to prove intent or if the defendant adequately rebuts the proof, the court then is required to evaluate the classification on the basis of a rational relation test.

The constitutionality of classifications based on standardized test scores also is judged by a rational relation test.[91] The classification method must be rationally related to the goals to be achieved. To invalidate a classification scheme under the rational relation test, plaintiff must show that the classification is arbitrary, that it does not have a fair and substantial relation to the object of the legislation, or that the legislation is not supported by a legitimate state interest.[92] When the constitutionality of a state-imposed classification system based upon intelligence is at issue, equal protection analysis focuses upon whether the method of classification promotes legitimate state interests.[93]

A rational relation is easy to demonstrate in these situations. "[E]ducators almost universally favor ability grouping of students."[94] Testing devices are used to discover special learning problems. If such problems exist and are not discovered, the child may lose his ability to cope within the regular classroom. He may

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89. United States v. South Carolina, 445 F. Supp. 1094 (D.C.S.C. 1977), *aff'd sub nom.* National Educ. Ass'n v. South Carolina, 434 U.S. 1026 (1978).

90. 3 EHLR at 552:109.

91. *See* Goss v. Lopez, 419 U.S. 565 (1975); United States v. South Carolina, 445 F. Supp. 1094 (D.C.S.C. 1977); Cuyahoga County Ass'n for Retarded Children & Adults v. Essex, 411 F. Supp. 46 (N.D. Ohio 1976).

92. Cuyahoga County Ass'n for Retarded Children & Adults v. Essex, 411 F. Supp. 46, 50 (N.D. Ohio 1976).

93. *See* Yudof, *Equal Educational Opportunity and the Courts*, 51 TEXAS L. REV. 411 (1973); J. Coleman, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966).

94. Yudoff, *supra* note 93, at 425.

be ridiculed by his peers and feel that he is a failure. Allowing the constitutionality of testing programs to be judged by a rational relation standard places an insurmountable burden on the plaintiff. Proving a violation of a child's constitutional rights is virtually impossible under the rational relation test.

A. *Equal Educational Opportunity Act of 1974*

The Equal Educational Opportunity Act of 1974[95] requires the plaintiff to prove intent to discriminate. The Act itself reads: "no State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by—[a.] the *deliberate segregation* by an educational agency of students on the basis of race, color or national origin among or within schools. . . ."[96] The requirement of deliberate segregation demonstrates that the intent to segregate must be proven in order for the plaintiff to succeed under this Act. The recent district court case of *Otero v. Mesa County Valley School District*[97] held that the Act will not permit recovery when discriminatory impact has been established but when intent to discriminate has not.

Segregation of students on one of the bases noted in the statute would result in discrimination, thus deliberate segregation may be read as deliberate discrimination. Though the Equal Educational Opportunity Act does not specify the standard of scrutiny by which infractions will be judged, the stated intent requirement points to a mere rational relation test.

The intent requirement of the Equal Educational Opportunity Act of 1974 would require PASE to prove that the school system intended the classification to operate on a racial basis. The intent standard again would foreclose PASE from successfully suing under the Act.

B. *Title VI of the Civil Rights Act as Amended*

The issues involved in title VII cases are paralleled in title VI suits.[98] Title VI provides that: "[n]o person in the United States shall, on the ground of race, color, or national origins be excluded

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95. 20 U.S.C. § 1703 (1976).

96. 20 U.S.C. § 1703 (1976) (emphasis added).

97. 470 F. Supp. 326 (D.C. Colo. 1979).

98. *See* Lau v. Nichols, 414 U.S. 563 (1974); Serna v. Portales School Dist., 499 F.2d 1147 (10th Cir. 1974); Soria v. Oxnard School Dist. Bd. of Trustees, 386 F. Supp. 539 (C.D. Cal. 1974); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[99]

The purpose of the legislation was to protect, and provide effective means to enforce, the civil rights of persons within the jurisdiction of the United States.[100] Two of the legislation's objectives were to authorize the attorney general to initiate suits to desegregate public schools[101] and to prohibit discrimination in any financial assistance program.[102] The Code of Federal Regulations states:

> [a] recipient . . . [of federal aid], . . . may not . . . utilize criteria or methods of administration which have the *effect* of subjecting individuals to discrimination because of their race, color or national origin or have the *effect* of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.[103]

The Board of Education of the City of Chicago has received financial assistance from the federal government and therefore is legally required to comply with title VI. Since title VI applies to all aspects of the educational program,[104] Chicago's EMH program must comply or the city will lose federal financial assistance.

Defendant school board argued that a title VI challenge could not succeed without proof of intent to discriminate. Nothing in the language of title VI, however, requires proof of intent. The words "have the effect" merely imply that defendant's criteria resulted in a discriminatory impact.

Other civil rights statutes that reject an intent requirement should be influential in the interpretation of title VI. Cases interpreting title VII have held that even an unintended impact constitutes a violation.[105] Title VIII, regarding housing equality, also does not require a showing of intent to discriminate. Instead, it proscribes housing practices with racially segregative conse-

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99. 42 U.S.C. § 2000(d) (1976).

100. H.R. REP. NO. 914, 88th Cong., 2d Sess. 1964, *reprinted in* [1964] U.S. CODE CONG & AD. NEWS 2391, 2391.

101. *Id.*

102. *Id.*

103. 45 C.F.R. § 80.3(b)(2) (1980) (emphasis added).

104. Board of Pub. Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969).

105. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

quences.[106] Under both titles VII and VIII, proof of racial disparity constitutes a prima facie case.[107]

Plaintiffs in *PASE* showed that eighty-two percent of the students in EMH classes in Chicago were black and that sixty-two percent of the school population was black.[108] Plaintiffs established a prima facie case of racial discrimination by demonstrating that this disproportionate impact was caused by standardized tests not validated for EMH placement. When the plaintiff presents undisputed statistical evidence that a disproportionately large number of black students were placed in EMH classes, he has met his initial burden to make a prima facie showing. The burden of proof then shifts to the defendant to rebut this prima facie showing by demonstrating a substantial justification for the challenged policy.[109]

Lau v. Nichols,[110] which involved challenges under the Constitution and title VI, illustrates the mechanics of title VI. Plaintiffs sued the San Francisco school district to protest its refusal to provide bilingual education for Chinese students who did not speak English. Plaintiffs presented no proof of intent to discriminate.[111] The Court held that title VI prohibits discrimination "even though no purposeful design is present. . . ."[112] The disproportionate placement of black children into EMH classes in Chicago similarly penalizes black children. Like the children in *Lau*, they are deprived of a meaningful education.

Lora v. Board of Education of New York[113] is similar in many

106. Metropolitan Hous. Dev. Corp. v. Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), *cert. denied sub nom.* Whitman Area Improvement Council v. Resident Bd., 435 U.S. 908 (1978).

107. *See* notes 105 and 106 *supra*.

108. 3 EHLR at 552:108.

109. 411 U.S. at 802.

110. 414 U.S. 563 (1974).

111. *Id.* at 569 (Stewart, J., with Burger, C.J., & Blackmun, J., concurring).

112. *Id.* at 568.

113. 456 F. Supp. 1211 (E.D.N.Y. 1978), *vacated*, 623 F.2d 248 (2d Cir. 1980). The City of New York appealed and the Second Circuit vacated the district court judgment, concluding that intent, not mere impact, was necessary in a title VI claim. *Id.* at 250. The Second Circuit relied upon Board of Educ. v. Harris, 444 U.S. 130 (1979), but the Supreme Court in *Harris* expressly reserved opinion on the appropriate standard in title VI cases. *id.* at 149. *See also* HEW Regulations designed to implement title VI, 45 C.F.R. § 80.3(b)(1)-(3) (1980). A number of federal court cases also have held that a mere impact standard is appropriate under title VI, *e.g.* Lau v. Nichols, 414 U.S. at 568; Board of Educ. v. Califano, 584 F.2d 576 (2d Cir. 1978), *aff'd.* on other grounds *sub nom.* Board of Educ. v. Harris, 444 U.S. 130 (1979).

respects to *PASE*. The Federal District Court for the Eastern District of New York applied a discriminatory impact standard to claims brought by black children challenging placement into special day schools. Plaintiff argued that the tests were racially biased and that they were overemphasized as indicators of student ability. The defense claimed that the tests were merely a portion of a total evaluation process and that the diagnosticians were told to consider the "socio-economic pluralism" of the students.[114] The district court found a violation of title VI because plaintiff showed that defendant's conduct had a racially discriminatory effect. No intent to discriminate was needed.[115]

As noted in *Larry P.*, once the prima facie showing of disparate impact has been made, the defendant may rebut by showing that disproportionate enrollment in EMH classes actually reflects a greater incidence of mental retardation among black children.[116] In addition, if the defendants are able to show that the tests have been validated for the placement of black children into EMH classes, the tests then may be used in spite of their disproportionate impact.

C. *Handicapped Persons and Section 504 of the Rehabilitation Act of 1973*

Section 504 of the Rehabilitation Act of 1973[117] was designed to eliminate discrimination on the basis of handicap in any program or activity receiving federal financial assistance.[118] A handicapped person is defined as "any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[119]

The Chicago schools receive money through federal assistance programs and thus are required to comply with section 504. Certain regulations implementing section 504[120] deal specifically with

114. 456 F. Supp. at 1243. People from varying cultural, social, or economic backgrounds are different; each pupil must be considered with his unique qualities in mind.

115. *Id.* at 1277. "A prima facie violation of Title VI would be established if it were shown that referrals and policies [and] practices . . . which have a racially discriminatory effect as evidenced by the overrepresentation of minority students in these schools." *Id.*

116. 3 EHLR at 551:322.

117. Pub. L. 93-112, 87 STAT. 355, 29 U.S.C. § 794 (1976), *as amended by* Pub. L. 95-602, 92 STAT. 2982, 29 U.S.C. § 794 (1978).

118. 45 C.F.R. § 84.1 (1980).

119. 45 C.F.R. § 84.3(j) (1980).

120. 45 C.F.R. § 84.34 (1980).

evaluation and placement[121] of handicapped students. The regulations specify criteria for evaluation procedures such as those for standardized tests:

> [a] recipient to which this subpart applies [public schools] shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need . . . special education or related services which ensure that:
> 1. Tests . . . have been validated for the specific purpose for which they are used . . .;
> 2. Tests and other evaluation material include those tailored to assess specific areas of educational need and are not merely those which are designed to provide a single general intelligence quotient.[122]

Neither the Stanford-Binet nor the Wechsler Scales have been validated for the purpose of classifying students into EMH classes. These tests have not not been tailored to assess specific areas of educational need but are designed to provide a general intelligence quotient. The Chicago school system's use of these tests, therefore, appears to violate section 504 of the Rehabilitation Act. Their use for the placement of handicapped children should be discontinued on that basis alone.

V. *PASE*

Judge John F. Grady, author of the *PASE* opinion, did not deal with any of the preceding legal theories or statutes. Instead, Judge Grady evaluated the individual test questions and concluded that eight questions on the WISC and WISC-R tests and one question on the Stanford-Binet test were culturally biased.[123] The judge used his own criteria to determine whether the questions were biased. Judge Grady, who believed that the expert testimony regarding bias was not conclusive, chose to disregard the testimony of the expert witnesses presented by the parties.[124]

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121. 45 C.F.R. § 84.35 (1980).

122. 45 C.F.R. § 84.35(b)(1), (b)(2) (1978).

123. 3 EHLR at 552:135. Judge Grady found the following questions to be racially biased: (1) What is the color of rubies?; (2) What does C.O.D. mean?; (3) Why is it better to pay bills by check than by cash?; (4) What would you do if you were sent to the store to buy a loaf of bread and the grocer said he didn't have any more?; (5) What does a stomach do?; (6) Why is it generally better to give money to an organized charity than to a street beggar?; (7) What are you supposed to do if you find someone's wallet or pocketbook in a store?; (8) What is the thing to do if a boy (girl) much smaller than yourself starts a fight with you? *Id.*

On the Stanford-Binet test, the one item which Judge Grady found to be biased was a question asking the four-and-one-half-year-old child to identify which of two persons, shown on cards, was prettier. *Id.*

124. Judge Grady cited Federal Rule of Evidence 702 regarding expert

Plaintiff's experts had participated in *Larry P.*,[125] which had been decided for plaintiff less than one year earlier. Plaintiff's counsel did not anticipate the judge's approach so they did not prepare their expert witnesses by reviewing each of the specific test items. Thus, the witnesses were unprepared to respond adequately to Judge Grady when he asked them about individual test questions.[126] Individual test questions were not examined in *Larry P.* because Judge Peckham of the California District Court did not find it necessary, choosing instead to deal with the legal issues.[127] Judge Peckham stated that the cultural bias of the tests was "hardly disputed in this litigation."[128]

Experts within the fields of education, psychology, and psychological testing have stated that the WISC and Stanford-Binet intelligence tests are culturally biased against blacks. Dr. David Wechsler conceded that the WISC was developed for an all-white population and that no attempts were made to validate the test for use by the black population.[129] The WISC-R was restandardized in 1972 to include a fifteen percent nonwhite population, but this restandardization was not an attempt to validate test items for minorities.[130] In *Larry P.* the court noted that black children raised in a cultural environment closer to the white middle-class mainstream tend to perform better on the tests and that early intervention programs such as Head Start improve test scores of black children.[131] In addition, it has been said that, "Each culture fosters and encourages the development of behavior that is adapted to its values and demands. When an individual must adjust to and compete within a culture or sub-culture other than that in which he

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witnesses. He stated that expert testimony is not conclusive. Rather, it is to help factfinders to understand complicated material. 3 EHLR at 552:110 n.3.

125. 3 EHLR at 551:295.

126. 3 EHLR at 552:111.

127. 3 EHLR at 551:318.

128. *Id.* at 551:317.

129. D. WECHSLER, MEASUREMENT OF INTELLIGENCE 107 (1944).

130. *See* note 40 *supra* and accompanying text regarding the standardization sample used in the WISC-R. The standardization sample for the Stanford-Binet in 1916 was on an all-white population of 1000 children and 400 adults. The 1937 revision of the standardization used 3000 all-white schoolchildren. No new standardization was made for the 1960 revision. In 1972 a new population sample was drawn from locales in California, Colorado, Connecticut, Indiana, Texas, and Utah. There probably were some black children tested within these locales but only to the extent of the proportion of blacks actually living within the test school districts. No identification by race was made by the examiners. 3 EHLR at 551:316 n.64.

131. 3 EHLR at 551:316.

was reared, then cultural difference is likely to become cultural disadvantage."[132]

Federal law prohibits the use of tests that result in racial imbalance within classification schemes.[133] One prior district court decision found the use of the WISC, WISC-R, and Stanford-Binet tests to have a disparate impact upon black children in EMH placement.[134] Rather than consider *Larry P.* as precedent, Judge Grady chose to review the individual test items and to disregard the legal issues raised by PASE. If Judge Grady had considered the issues and examined each one separately, PASE would have succeeded on some of its theories but would have failed on others.

The claim that PASE brought under the fourteenth amendment's equal protection clause could not have succeeded. It is unlikely that such a claim would survive under a rational relation test. In *PASE*, the court undoubtedly would have found the school's use of these standardized tests to be rationally related to the ability grouping of students: A legitimate state goal. Similarly, the Equal Educational Opportunity Act claim would fail because the statute expressly requires intent, and *Otero* considered intent vital to a cause of action under the Act.[135]

Section 504 of the Rehabilitation Act of 1973, Title VI of the Civil Rights Act of 1964, as amended, and the Education of All Handicapped Children Act[136] are funding statutes. Section 504 prohibits discrimination against handicapped persons by programs receiving federal funding. Title VI prohibits racial discrimination in the administration of educational programs receiving federal funding. The Education of All Handicapped Children Act conditions receipt of federal funds on the use of tests and evaluation procedures which are neither racially nor culturally discriminatory. A finding for plaintiff based upon any one of these statutes should have been sufficient to warrant an injunction against use of the tests by the Chicago school system.

A disproportionate impact theory should be used to prove a violation of each of these funding statutes. Discriminatory impact was shown in *PASE*: eighty-two percent of the EMH population was

132. A. ANASTASI, PSYCHOLOGICAL TESTING 241 (3d ed. 1970).

133. *See* note 119 *supra* and accompanying text.

134. *Larry P.* specifically considered the three tests which were at issue in *PASE*. 3 EHLR at 551:295.

135. 470 F. Supp. at 331 (reference is made to 20 U.S.C. § 1703). *See also* text accompanying note 82 *supra*.

136. 20 U.S.C. § 1412(5)(c) (1976).

black while only sixty-two percent of the school population was black. This was sufficient to prove a prima facie case of race discrimination and to place the burden of proof upon the defense to demonstrate a substantial justification for the use of its testing criteria in the placement of students into EMH classes.

The three standardized tests discussed in Judge Grady's opinion may be fair in form. The tests consist of many sections and levels of competence and cover a wide variety of areas. After a thorough analysis of each question he found a total of nine biased questions. Yet a disproportionately large number of black children score poorly on the tests and, as a result of those scores, are placed into EMH classes.[137] If the questions themselves are not biased, some other portion of the placement procedure must affect black children adversely. Perhaps the high proportion of black children in EMH classes does accurately reflect the fact that there is a higher percentage of mentally handicapped black children in the Chicago schools. If some other portion of the placement procedure is causing the disproportionate impact, however, section 504 of the Rehabilitation Act is being violated. Section 504 states that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination . . . ."[138] The two children with learning disabilities represented by PASE were placed into EMH classes. Whether the placement was based upon poor test scores or on some other facet of the evaluative process, these two otherwise qualified pupils were, by reason of their handicap, excluded from participation in the regular school curriculum.

If the disproportion of blacks in EMH classes in Chicago is caused by natural forces, then the theories of intelligence discussed earlier need to be reevaluated.[139] If EMH classes were directed toward students with deficiencies in phenotype or ordinary intelligence, the educators would continuously evaluate the students and upgrade their expectations of the students because both theories of intelligence recognize that scores on intelligence tests can be improved.[140] By providing greater stimulation within the pupil's envi-

137. 3 EHLR at 552:138. The testimony of experts shows that the largest correlation between the placement program employed by the Chicago schools and the children actually placed into EMH classes is low test scores. *Id.*

138. 29 U.S.C. § 794 (1978).

139. *See* notes 32-38 *supra* and accompanying text.

140. *See* note 56 *supra*.

ronment and by teaching the pupil to cope effectively with the world around him, intelligence quotients, as measured by these tests, can be improved.[141] If children are placed into EMH classes based upon phenotype or ordinary intelligence, they should be able to improve their scores and return to the regular classroom. This would require a program of compensatory or remedial grouping[142] rather than continuous grouping,[143] the system used in Chicago's EMH program.

Judge Grady did not consider genetic intelligence to be an acceptable concept.[144] Purely genetic considerations of intelligence do not seem reasonable. The use of continuous grouping where neither the tests nor other evaluative material are considered biased leads, however, to the conclusion that the poor showing by blacks in the Chicago schools can be attributed to the existence of a larger percentage of mentally handicapped blacks. Although this conclusion seems neither realistic nor reasonable, it exists as one explanation for the significant difference in the percentage of blacks in Chicago's EMH classes as compared with the general school population in Chicago.

VI. CONCLUSION

The curriculum of the EMH program in the Chicago schools is inferior to that provided within the normal classroom. The suit brought by PASE requested an injunction against the Chicago schools to prevent the continued use of standardized tests as a tool for placing students into EMH classes. Low scores on standardized tests were the sole constant factor found for all children in the EMH program although the tests are only a portion of the placement process. Eighty-two percent of the EMH classes are black while only sixty-two percent of the school population is black. This allows a plaintiff to allege that the EMH placement process has a disproportionate impact upon the black population. Under a theory of disparate impact, PASE could have developed a prima facie showing of discrimination thereby shifting the burden to defendant to rebut such showing.

Title VI of the Civil Rights Act of 1964, section 504 of the Re-

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141. *See* note 48 and text accompanying notes 50-54 *supra*.

142. *See* notes 32-38 *supra* and accompanying text. Remedial grouping anticipates movement from lower to higher tracks through improvement in test scores.

143. Continuous grouping does not anticipate movement of students to higher tracks nor does it anticipate improvement in test scores.

144. 3 EHLR at 552:136.

habilitation Act, and the Education for All Handicapped Children Act all appear to have been violated by the Chicago schools. The "fair in form"[145] evaluation applied by the court to the tests short-circuits the legal questions. Each of the legal issues that were eliminated by Judge Grady's factual analysis are those which deal with federal financing. Although plaintiff sought merely declaratory and injunctive relief, it is likely that federal educational funds would have been affected by a decision adverse to the city schools. Judge Grady's decision, based upon the bias in individual test questions, prevented the interruption of federal funding to the Chicago school system.

The question that must be answered, and that should have been answered in *PASE*, is not whether these tests are racially biased but whether the test results have a discriminatory impact upon a protected population. To answer this question a court must consider statistical evidence presented by both parties, rather than examine individual test questions for racial or cultural bias.

Peter C. Sipperly

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145. 401 U.S. at 431 (1971). Chief Justice Burger, while addressing the impact of the Civil Rights Act of 1964 on employment, stated that, "[t]he Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation." *Id.*