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ABSTRACT

Traditionally, local school boards have had the power to assign students to classes and to set standards for promotion and graduation; with this authority has gone the discretion to decide what role pupil testing will play in the local schools. Courts have been reluctant to interfere with school board decisions on methodology, of which they consider testing to be a part. They will intervene, however, when a constitutional right is affected by board policy or practice. They have done so consistently where racial or ethnic discrimination was involved in pupil testing. Children are given standarized tests on numerous occasions throughout their public school careers. In addition to standardized tests, teachers prepare and administer tests in various subjects. However, this paper is concerned primarily with standardized tests, since it is they that have been attacked in the courts. Each type of test that has been dealt with in court cases is treated here. Specifically, they are: group and individually administered intelligence, aptitude, and achievement tests. (Author/DEP)

Pupil Testing: A Legal View[1]

by

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Pupil Testing: A Legal View

I. Introduction

Traditionally, local school boards have had the power to assign students to classes and to set standards for promotion and graduation;[1] with this authority has gone the discretion to decide what role pupil testing will play in the local schools. Courts have been reluctant to interfere with school board decisions on methodology, of which they consider testing to be a part. They will intervene, however, when a constitutional right is affected by board policy or practice. They have done so consistently where racial or ethnic discrimination was involved in pupil testing.[2]

Although very few cases that in some way challenged pupil testing lack racial overtones,[3] the existing court decisions nevertheless circumscribe all schools in their use of testing to a significant degree. It is the purpose of this paper to spell out the court-imposed limitations on the various kinds of tests commonly used in the public schools.

II. The Legal Limits of Testing in the Public Schools

Children are given standardized tests on numerous occasions throughout their public school careers. The tests are generally categorized as aptitude or achievement tests.[4] Most of them are group tests, but a few are administered individually. In addition to standardized tests, teachers prepare and administer tests in particular subjects. This paper is concerned primarily with standardized tests, since it is they that have commonly been attacked in the courts. Each type of test that has been dealt with in court cases will be treated here, roughly in the order in which a child would tend to be exposed to it as he or she progressed through school.

Individual I.Q. and Psychological Tests

Psychological tests, such as the Goodenough Draw-A-Man test, are frequently given as prerequisites to entrance into school at the kindergarten or first-grade level. Individually administered I.Q. tests (most notably the Stanford-Binet and the Wechsler Intelligence Scale for Children [WISC] are sometimes given when a child is registered for school, particularly when he or she is suspected to be mentally retarded. Both psychological and intelligence tests may be given later in a student's school career, commonly when a teacher finds some evidence that suggests mental retardation or emotional disturbance. The test scores may be used as the primary basis for excluding a child from school altogether or for assigning him or her to a special education class—either a class for the educable mentally retarded (hereafter EMR) or a class or school[5] for emotionally disturbed (ED) children.[6]

Exclusion from School: Two important cases were concerned primarily with the exclusion of children from school. Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania (hereinafter PARC) dealt with children who were excluded under a Pennsylvania statute as "uneducable and untrainable."[7] Mills v. Board of Education of District of Columbia was broader in scope, concerning a number of categories of children who had been excluded from school, including mentally retarded and emotionally disturbed children.[8] As a result of these cases, school authorities in Pennsylvania and the District of Columbia can no longer deny an education to such children. Neither case examined any tests given to children prior to their exclusion, nor did the courts specify how tests should be used in the future.

Clearly, they cannot be used to exclude children. Indeed, both cases implicitly envision the continued use of tests for placement of children in special education classes; however, they create safeguards in advance by giving parents a full panoply of procedural rights, including the right to examine the tests and other data on which the proposed placement is based, the right to a hearing to contest the proposed placement, and the right to present evidence from expert witnesses of independent medical, psychological, and educational evaluations. These guarantees suggest that the school authorities' interpretation of test results, and even the validity of the particular tests used, are open to challenge and will be closely scrutinized by a hearing officer.[9]

Placement in EMR Classes: It is apparent from the foregoing analysis of PARC and Mills that these cases touch on the use of tests to place children in special education classes. The overlap between exclusion and placement cases is even more apparent in Lebanks v. Spears,[10] a Louisiana case in which the court entered an order closely paralleling the PARC and Mills orders. In addition, the court imposed specific requirements concerning the use of tests in one kind of placement. Under the Lebanks order, placement in classes for the mentally retarded cannot be made unless the I.Q., as measured by an individually administered test, is 69 or below, the child's adaptive behavior is subnormal, and the effects of the child's sociocultural background are found not to affect the rating.

Whereas in Lebanks, PARC and Mills, the plaintiff class was made up of children excluded from school altogether, a number of suits have been brought

by children who were in EMR classes as the result of an alleged misclassification. In Diana v. California State Board of Education,[11] the plaintiffs included Mexican-American children who had been placed in an EMR class on the basis of Stanford-Binet test scores ranging from 68 to 52. The crucial fact in this case was the difference in the children's scores when they were retested by a bilingual psychologist and permitted to answer in English or Spanish: They gained, on the average, 15 points. (There was also evidence that the children performed significantly better, by 10 or 11 points, on the nonverbal section of the WISC test than on the verbal section.) These facts were brought out in the complaint, as were facts concerning the methods by which the Stanford-Binet and WISC tests were standardized (on white Anglo-Americans) and concerning the disproportionate percentages of Hispanic students in EMR classes throughout California.

The case never went to trial. The parties stipulated that future testing of non-Anglo-American children for the purpose of special education placement was to utilize both the child's primary language and English. Moreover, only tests or sections of tests not dependent on vocabulary, general information, and other unfair verbal questions could be used. State psychologists were to develop and standardize an I.Q. test that would be appropriate for Mexican-American and other non-English-speaking Californians.

Diana had a significant effect on the use of individually administered I.Q. tests for EMR placement. In California, legislation to prevent over-reliance on test scores followed.[12] According to the new statutes, scores must be substantiated through a complete evaluation of the child's developmental history, cultural background, and academic achievement. In Arizona, when a

suit similar to Diana was brought in 1972, a federal court ordered the same kinds of requirement specified by the California legislature.[13] Diana also led to an HEW memorandum to the effect that schools throughout the United States may not assign non-English-speaking children to EMR classes on the basis of tests that measure English-language skills.[14] The memorandum noted that such assignments may be in violation of Title VI of the Civil Rights Act of 1964, as amended.

Diana brought out the problem of linguistic bias in individually administered I.Q. tests. Another significant California case, Larry P. v. Riles,[15] focused on the tests' cultural bias against black children. Again a key element was the retesting of the plaintiffs, black San Francisco elementary school children who had been placed in EMR classes because they scored below 75 on the I.Q. tests used by the school district. The evidence showed that when the children were given the same tests by black psychologists who made

> special attempts to establish rapport with the test-takers, to overcome the plantiffs' defeatism and easy distraction, to reword items in terms more consistent with the plaintiffs' cultural background, and to give credit for non-standard answers which nevertheless showed an intelligent approach to problems in the context of that background, [all of the plantiffs] scored significantly above the cut-off point of 75.[16]

Again, there was statistical evidence showing that a disproportionately high number of children from the plaintiff class—black students—were in the school district's EMR classes. But the statute was enacted after Diana was in effect, and the schools maintained that I.Q. test results were only one of a number of bases for determining whether a student was to be placed in an

EMR class. The court found, however, that I.Q. test scores remained "a most important consideration in making assignments to EMR classes."[17] It issued an injunction prohibiting the school authorities from placing black students in EMR classes "on the basis of criteria which place primary reliance on the results of I.Q. tests as they are currently administered," if the classes that resulted were racially imbalanced.[18]

Group I.Q., Reading Readiness, and Aptitude Tests

Group I.Q. and reading readiness tests are generally given to children early in their schooling, at the end of kindergarten or the beginning of first grade. The I.Q. tests are usually given again, perhaps several times, during the child's school career. In some schools, the scores on group I.Q. tests are used to place children in EMR classes.[19] Scores on reading readiness tests, which are also group tests, are used to determine whether children can benefit from formal reading instruction. On the basis of his or her score on this test, the child is placed in one of several groups; the lowest group is usually not given formal instruction in reading.[20] In some instances, the group may be the equivalent of a "track."[21] Group I.Q. tests may also play a role in assigning children to tracks.[22] These uses of reading readiness and group I.Q. tests have been addressed in two important cases.

Judge Skelly Wright's opinion in Hobson v. Hansen[23] remains the most thorough judicial investigation of the use of standardized tests to assign students to tracks. The case dealt, among other issues, with the effects of the track system employed by the District of Columbia school system, a system

under which students were placed in different curriculum levels "according to the school's assessment of each student's ability to learn."[24] This assessment was made through the use of a number of standardized tests given at different grade levels. A reading readiness test was given prior to entry into first grade. On the basis of a child's score on this test, he or she was placed in first grade or in "junior primary," a class between kindergarten and first grade, where the student's skills were ostensibly to be brought up to regular first grade level. Thereafter, group aptitude tests were given, at a minimum, in the fourth, sixth, ninth, and eleventh grades. The schools relied heavily on the scores from these tests to place the students, on the elementary and junior high school levels, in one of three tracks—Honors, General, and Special Academic (Basic) — and on the senior level, in one of four tracks—Honors, Regular, General, and Special Academic. Although only one of the tests produced an I.Q. score (the Otis Quick Scoring Mental Ability Test: Beta, given in sixth grade), the I.Q. level was one of the criteria for placement in all of the tracks (with the exception of Honors).[25]

The court found that the opportunities provided to children assigned to the lower tracks were "decidedly inferior" to those for students in the upper tracks. Further, based on exhaustive statistical evidence, it found that

> ...Those who are being consigned to the lower tracks are the poor and the Negroes, whereas the upper tracks are the provinces of the more affluent and the whites.[26]

This phenomenon the court held to be directly linked to the use of aptitude tests standardized on a white middle-class group of students, tests

which produced "inaccurate and misleading test scores when given to lower class and Negro students."[27]

Because Judge Wright found that the track system in practice discriminated against disadvantaged children, particularly Negroes, he ordered it abolished. He did so in large part because he found that the basic premise of the tracking system--the assumption that innate ability can be reliably determined--had not been sustained.[28] Judge Wright's order effectively invalidated the use of all reading readiness, intelligence, and aptitude tests for the purpose of tracking. The Court of Appeals for the D.C. Circuit made it possible for the schools to revive the tests, however. On appeal, the court affirmed Wright's decision but limited his abolition of tracking to the track system as it existed at the time of his decree,[29] thus permitting the board of education to reinstitute ability grouping in some other form. Clearly, however, the use of tests which produced racially discriminatory results would not be permitted.

In Moses v. Washington Parish School Board,[30] a federal district court in Louisiana was faced with a recently desegregated elementary school in which students were being assigned to homogeneous ability groups based on their scores on standardized tests. In the first grade, children were grouped on one of four levels according to their scores on a group I.Q. test (the Primary Mental Abilities Test) and on the Ginn Reading Readiness Test. Other than for these four groups, achievement test scores were used to place the students. As a result of these practices, predictable racial patterns emerged. The court heard testimony as to the reasons for these patterns, as well as to the effects on minority groups of homogeneous grouping. Although

it expressed agreement with the plaintiffs' position, the court nevertheless did not rule on the validity of the tests themselves. Instead it relied on a rule evolved in the wake of desegregation cases in the Fifth Circuit, to the effect that testing will not be permitted as the basis for student assignments in recently desegregated schools.[31] In Lemon v. Bossier Parish School Board,[32] the Court of Appeals had ruled that such a school system would have to operate as a unitary system for several years before testing could be used. The rationale behind this ruling was that black children had received an inferior education in segregated schools and would therefore perform less well than white students on tests.

Standardized Achievement Tests

Scores on standardized achievement tests given in the public schools are used both for internal and external purposes.[33] They may be used internally to ascertain whether a student's performance meets academic standards for promotion or graduation. Similarly, they may be used to determine what track a student should be placed in or whether he should be permitted to take a special "honors" course. More and more, however, they are also being used for purposes external to the student himself, most notably assessment of a school or a particular teacher.

Internal Purpose - Tracking: Some of the courts have considered the use of scores on reading readiness, group I.Q., and aptitude tests in tracking students have also dealt with the use of achievement test scores for that purpose. In Hobson, plaintiffs did not attack the use of achievement test scores, "except to the extent test scores tend to reinforce already erroneous

decisions" based on reading readiness, group I.Q., and aptitude tests.[34] Thus, Judge Wright did not have to rule on the use of achievement tests in tracking. However, his analysis of aptitude tests suggests that they are not very different from achievement tests, since in reality the former "test a student's present level of learning in certain skills."[35] It is thus doubtful that reliance on achievement test scores alone would have saved the D.C. tracking system.

In Moses, the use of achievement test scores was under attack, along with the use of scores on "intelligence" and reading readiness tests. The achievement tests that had been used for tracking were the S.R.A. Achievement Test and the Ginn Reading Achievement Test. Essentially, grouping was based entirely on reading achievement and ability, whereas expert witnesses agreed that (1) grouping for all subjects on the basis of test scores in one subject "can often retard the child's progress in other subject areas,"[36] and (2) blacks tend to score lower on reading and verbal skills than on math and science tests. One of the ways in which achievement test scores can be misused is apparent in this case. The court did not rule on the validity of the tests, but it was undoubtedly apparent that scores on achievement tests were just as suspect in the context of recently desegregated schools as scores on group I.Q. tests. Indeed, one of the cases invalidating the use of testing in these situations which the court relied on, Lemon v. Bossier Parish School Board,[37] involved the use of scores on the California Achievement Test to assign children to one of two schools.

Teacher and School Accountability: As individuals and citizens' groups have pressed the schools to justify their curricula and methodology, legislatures have turned to the use of standardized tests to ascertain how well students are performing in one school as compared with others throughout a given state. Laws requiring that such tests be given in certain grades have been passed in many states.[38] Teachers and administrators tend to oppose the use of scores on these tests as an evaluative device, arguing that many factors other than curricula and teacher performance are responsible for the scores. In New Jersey, the statewide teachers' association has sought to enjoin publication of test results.[39] The attempt has been unsuccessful thus far.

In Iowa, the employment of a teacher was terminated on the grounds that the low scholastic accomplishment of her students, as measured by the Iowa Tests of Basic Skills and the Iowa Tests of Educational Development, indicated her professional incompetence. In Scheelhaase v. Woodbury Central Community School District,[40] a federal district court held that the teacher had been denied due process of law, concluding that the reasons for termination must have a basis in fact and that the test scores of her students were not sufficient to determine her competence. However, this ruling was reversed by the Eighth Circuit Court of Appeals, which ordered the district court to dismiss the case on the grounds that no constitutional right was involved. The court held that it had no power over the administration of the internal affairs of the school district.

> ...Such matters as the competence of teachers, and the standards of its measurement are not, without more,

> matters of constitutional dimension. They are peculiarly appropriate to state and local administration.[41]

The plaintiff in Scheelhaase did not allege that the defendant school board had used the test scores to discriminate against her on the basis of her race, ethnic background, or sex. But teachers have successfully challenged the racially discriminatory use of scores on tests that they were required to take.[42] Thus, members of minority groups who can prove that the test scores of their students are being used discriminatorily to terminate their employment are likely to be successful in court. Scheelhaase is probably not the last word from the judiciary on this use of achievement test scores.

An unusual approach to the use of pupil test scores for accountability purposes is represented by Serna v. Portales Municipal Schools.[43] In this class action, the Spanish-speaking plaintiffs used the scores from group I.Q. tests given to first graders and fifth graders in the district to show that they were being denied equal educational opportunity. The student population of one of the four elementary schools, Lindsey, was heavily Spanish-speaking, whereas students at the other three schools were primarily Anglo-American. Test scores of the fifth graders at Lindsey were, on the average, 8 to 13 percent lower than fifth grade scores from the other elementary schools. Of the first graders in the four schools, those at Lindsey scored lowest.

Although no specific figures were given, evidence based on reading tests and other achievement tests was also admitted. Expert testimony attributed the test score differentials to language problems. The court

concluded that the test performance of the children at Lindsey was inadequate and that the school district was responsible. Holding that the "promulgation and institution of a program...which ignores the needs of...[Hispanic] students does constitute state action" and is a violation of the Fourteenth Amendment, the court directed the school administrators to reassess and enlarge the program for Spanish-speaking children in all of the schools.[44]

Nonstandardized Tests

Although tests prepared by teachers or institutions are used much more frequently than standardized tests at all grade levels, they have seldom been challenged in the courts. Recent attempts to do so have occurred where the use of such tests has an important impact on an individual's future and where discrimination on the basis of sex and/or race is alleged.

1. Admission to Specialized School

In Bray v. Lee,[45] the plaintiffs were seventh grade female students who had taken an examination for admission to the Boston Girls' Latin School. Because Boston's Boys' Latin School seated twice as many students as did the Girls' Latin School, fewer seventh grade places were available to girls than to boys. The school authorities solved this problem by creating a higher cutoff point in the test scores for girls than for boys. Only girls who scored 134 or more of 200 possible points were admitted, whereas boys who scored 120 were able to enter the Latin School. Without analyzing the constitutional right involved in any depth, a federal district court held that

> ...The use of separate and different standards to evaluate the examination results to determine the admissibility of boys

> and girls to the Boston Latin Schools constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment, the plain effect of which is to prohibit prejudicial disparities before the law. This means prejudicial disparities between all citizens, including women or girls.[46]

A recent California case, Berkelman v. San Francisco Unified School District,[47] buttresses the decision in Bray v. Lee, although the use of test scores was not, at least directly, at issue. In Berkelman students were admitted to a specialized academic high school on the basis of their junior high school grade-point averages in four college preparatory subjects. (These averages must, of course, have been at least partially the result of numerous teacher-prepared tests.) In order to equalize the number of male and female students at the school, the district set a higher cutoff point for girls than for boys. The court held this practice to be a denial of equal protection to female students, since the district had not proved that "a balance of the sexes furthers the goal of better academic education."[48] Although the court rested its holding on the Fourteenth Amendment, it noted that the differential admission standards would have constituted an illegal discrimination under Title IX of the Education Amendments of 1972 (20 U.S.C. §1681) had they been applied in the admission of students to advanced courses within a single school. The court analyzed the Congressional intent behind the statute and found that it bore on the situation in this case.

The plaintiffs in Berkelman also alleged that use of grade-point averages for admission purposes discriminated against black, Spanish-speaking, and low-income students. In dealing with this issue, the court

used reasoning similar to that in Hobson v. Hansen,[49] but concluded that the use of a specialized high school does not constitute "tracking." It pointed out that students not admitted to the specialized school were not denied "a quality education," since they could attend a comprehensive high school where college preparatory courses were available. Further,

> Unlike a "tracking" system in which the challenged classifications are "predictive" and isolate students of "less promising" ability, the classification here is based upon past achievement impartially measured.[50]

Issue could be taken with this conclusion; as Judge Wright's analysis in Hobson implied, achievement tests may, in fact, assess the same skills that aptitude tests evaluate and may, thus, not be as impartial as they seem. But the court in Berkelman did not look behind the grade-point averages to the tests on which they were based.

Graduation Requirements: Unlike Bray and Berkelman, a recent decision of the New Jersey Commissioner of Education involving sex discrimination does not rely on the Fourteenth Amendment. The petitioner in this case, Pinkham v. Board of Education of South River[51] challenged the policy of a local school board in regard to the use of test scores in physical education classes. Under this policy, only female students were given written examinations in this subject, whereas male students were graded solely on the basis of their participation and attitude, and tests of their physical skills. The petitioner failed physical education in her senior year and thus was denied a diploma at graduation. After a hearing to determine the facts, the hearing examiner found that she would have passed if her grades on the written tests had not been averaged with her

grades for participation, attitude, and physical skills.

The Commissioner held that the case was moot, since the student had subsequently been awarded a diploma after attending summer school. He nevertheless went on to state that the school board had acted inappropriately and beyond its authority in mandating written tests for female students only. According to the Commissioner, local boards of education can issue guidelines concerning assessment programs, but teachers have discretion to develop specific procedures for assessing the progress of pupils in their courses. Further, the Commissioner concluded that an assessment program created by a teacher is not per se discriminatory because it is used for students of one sex in one class and not for those of the opposite sex in another class. Unless it can be shown that such a testing program is an abuse of the teacher's discretion, the Commissioner will not intervene.

The Commissioner's decision may ultimately have little bearing on testing practices such as the one challenged in this case, since the use of separate classes for male and female students is no longer permitted under Title IX of the Education Amendments of 1972, as well as under a New Jersey statute.[52] And the conclusion regarding teachers' discretion over testing programs may simply reflect the reluctance of quasi-judicial administrative officers, as well as courts, to interfere with those they regard as having expertise in a specialized field. Further, since this case did not involve teacher discretion, the Commissioner may have considered it unnecessary to discuss the relationship between such discretion and the constitutional rights of students. When a teacher's exercise of discretion invades a constitutional right, however, courts are not likely to hesitate to intervene.

III. Conclusion

Most of the cases that have thus far dealt directly with pupil testing have been limited by their facts to situations in which tests were allegedly biased against, or test scores were allegedly used in a discriminatory fashion against, minority groups and females. These cases have been so limited because they focused upon the alleged denial of equal educational opportunity. The courts analyzed the facts in terms traditionally utilized in cases that arise under the Equal Protection Clause of the Fourteenth Amendment. To prove a denial of Equal Protection, it is necessary to demonstrate that the State, or its agent, has invidiously discriminated against a class of persons. In the usual case, the State can defend by showing that its differential treatment has a rational basis; that is, that it reasonably furthers some legitimate public interest. Using tests to identify students who require or can benefit from special educational programs may, in many cases, be consistent with the rational-basis approach, and the courts will be reluctant to superimpose their views upon those of school administrators. However, a more stringent approach, imposing a far heavier burden of justification upon the State, has been used in cases involving either a "fundamental interest" or a "suspect classification." In such cases, the State must show that the differential treatment is supported by a compelling need. The argument that the right to education is a "fundamental interest" has been rejected by the United State Supreme Court,[53] but race and ethnic background are clearly "suspect classifications."

Poverty and sex are other likely candidates for that category. Thus, when courts have been confronted with evidence that pupil testing has the effect of causing differential treatment along racial, ethnic, sex, and perhaps economic lines, they have tended to place a heavy burden of justification on the school authorities. The burden has virtually never been met, and reliance on the pupil tests for that purpose has been limited or barred.

Important as those cases are, the PARC and Mills cases[54] point the way to a broader attack on pupil testing. The plaintiffs in these cases claimed that they were denied due process of law: They did not have to show that they belonged to a class that was being discriminated against but only that the practices they complained of were irrational, and hence fundamentally unfair to them, and that they were being deprived of a liberty or property interest by the use of the tests.

The plaintiffs' evidence in PARC demonstrated that the assumption underlying the practice of excluding mentally retarded children from school—that they could not benefit from education—was totally unfounded, and that the exclusion denied them a constitutionally protected interest. The same conclusion applied in Mills, but there the court stressed another consideration: the stigmatization of children who are assigned to special education classes. This factor was important to its holding that procedural due process must be extended before children are placed in these classes. It cited the Supreme Court's decision in Wisconsin v. Constantineau,[55] where the Court demonstrated its sensitivity to official action that stigmatizes individuals.

The stigma connected with placement in low tracks as well as in special education classes has been widely recognized. Where placement in low tracks is based on inaccurate measures of ability, it would seem that pupils are deprived of the education to which they are entitled, just as they are deprived when they are placed in special education classes as the result of misclassification. Thus, future challenges to all forms of tracking as well as to special education placements may successfully invoke the constitutional guarantee of due process of law. The consequences of such an approach may well prove to be far broader, in terms of the future uses of pupil testing in the schools, than the implications of the equal protection approach, which dominates most of the testing cases decided thus far.

Both approaches provide a clear message to those who construct and use pupil tests: They must exercise greater care and sensitivity in evaluating the educational potential and needs of students and in acting upon those evaluations. If they do not do so on their own initiative, the courts will stand increasingly ready to impose such a requirement.

Footnotes

1. Reutter and Hamilton, The Law of Public Education, 116-120.

2. The earliest attacks on the use of test scores came when previously segregated schools attempted to avoid the impact of desegregation orders by assigning students to schools or classes on the basis of test scores. A line of cases in the Fifth Circuit Court of Appeals invalidated this use of testing. (E.g., Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5th Cir. 1969), revised in part on other grounds, 396 U.S. 290 (1970); Lemon v. Bossier Parish School Board, 444 F.2d 1400 (5th Cir. 1971) (per curiam); Moses v. Washington Parish School Board., 330 F. Supp. 1340 (E.D. La. 1971), aff'd., 456 F.2d 1285 (5th Cir. 1972) (per curiam), cert. denied, 409 U.S. 1013 (1972); Singleton v. Anson County Board of Education, Civ. No. 3259 (W.D.N.C 1971). Moses is discussed in the text at p.9. Other testing cases arose where the uses to which test scores were put resulted in racial imbalance or virtual segregation in particular classes or curricula. (E.g., Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972), discussed in text at 5-6; Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), aff'd. sub. nom. Smuck v. Hobson, 408 F.2d 175 (D.C.Cir. 1969), discussed in text at 7-8.)

3. These cases are limited to two types: exclusion of handicapped children from school and discriminatory use of tests in relation to sex. The exclusion cases are discussed in the text at pp. 2,3; the sex discrimination cases, at pp. 14-17.

4. Aptitude tests are used for predictive purposes; they purport to indicate how well a given student will perform future academic tasks. Achievement tests, on the other hand, purport to assess what the student has already learned. In fact, both types of tests measure achievement; in the case of aptitude tests, what is measured is "a kind of general academic achievement in standard English." Weber, Uses and Abuses of Standardized Testing in the Schools, 1974.

5. See Realy v. Caine, 230 N.Y.S.2d 453 (1962).

6. Such test scores may also be used to postpone entrance into school for a child who is rated immature.

7. 343 F. Supp. 279, 282 (E.D.Pa. 1972). A statute which gives local authorities discretion as to whether to provide classes for such children is under attack in California Ass'n for the Retarded v. Board of Education, Civ. No. 237-227 (Sacramento Super. Ct., filed July 27, 1973).

8. 348 F. Supp. 866 (D.D.C. 1972).

9. For an assessment of the effectiveness of such hearings, see Kirp, Buss, and Kuriloff, The Project on Student Classification and the Law, 62 Calif. L. Rev. 40 (1974).

10. Civ. No. 71-2897 (E.D. La., order issued April 24, 1973). The plaintiffs also alleged racial discrimination.

11. Civ. No. C-7037 RFR (N.D. Cal., filed Jan. 1970).

12. Cal. Educ. Code 6902.06, .07, .085, .095 (West. Supp. 1972). A case similar to Diana, Covarrubias v. San Diego Unified School Dist., Civ. No. 70-394-S (S.D. Cal., filed Aug. 21, 1972) was settled on the basis of these statutues in their then proposed form, although the complaint alleged racial as well as linguistic bias in the tests. See discussion of this and similar cases in Note: The Legal Implications of Cultural Bias in the Intelligence Testing of Disadvantaged School Children, 61 Geo. L.J. 1027 (1972-73).

13. Guadalupe Org., Inc. v. Tempe School Dist. No. 3, Civ. No. 71-435 (D. Ariz., "filed" May 9, 1972).

14. 35 Fed. Reg. 11,595 (1970).

15. See note 2, supra.

16. 343 F. Supp. at 1308. The plaintiffs showed an average gain of 26.5 points when retested.

17. Id. at 1313. The court concluded that the language of the statute suggested that an I.Q. score was "the primary standard." Id. at 1312. Further, it relied on evidence that I.Q. scores influence teacher evaluation of student ability, citing Rosenthal and Jacobsen's Pygmalion in the Classroom (1968) and the Examiner's Manual for the Lorge-Thorndike group I.Q. test.

18. 343 F. Supp. at 1315. Copeland v. School Board of City of Portsmouth, Va., 464 F.2d 932 (4th Cir. 1972) was a desegregation case in which plaintiffs contested the establishment of specialized schools for mentally retarded children and children with learning problems, where 75% of the children assigned were black. Unlike the plaintiffs in Larry P., the plaintiffs here offered no evidence concerning the tests on which assignments were based. The court held that racial imbalance was not of itself a sufficient reason to discontinue the schools. However, it remanded the case to the District Court to ascertain whether the tests were "relevant, reliable and free of discrimination." Id. at 934.

19. There is some indication in Larry P. v. Riles (see note 2, supra) that a group test may have been used in placing the plaintiff children. Reference is made to the Lorge-Thorndike test, which is a group I.Q. test. In Hobson v. Hansen (see note 2, supra), Judge Wright mentions that the District of Columbia had begun to use individually administered I.Q. tests to place children in the "Special Academic" track (evidently the equivalent of EMR classes) only in 1965. 269 F. Supp. at 475, n. 118.

20. Weber, p.7; see note 4, supra.

21. Tracks are curriculum levels, generally designed to accomodate children of similar ability.

22. Samuda, "Racial Discrimination Through Mental Testing: A Social Critic's Point of View," IRCD Bulletin No. 42 (May 1973), at 6.

23. See note 2, supra.

24. 269 F. Supp. at 442.

25. Although individually-administered tests were given, after 1965, to students who were to be placed in the Special Academic track, use of the group I.Q. test apparently continued for purposes of placement in other tracks.

26. 269 F. Supp. at 511.

27. Id. at 512.

28. Because the test scores were "inaccurate," lower class and black students were actually being classified "according to their socio-economic or racial status, or--more precisely--according to environmental and psychological factors which have nothing to do with innate ability." Id.

29. Smuck v. Hobson, 408 F.2d 175, 189 (D.C. Cir. 1969).

30. See note 2, supra.

31. Where a court in another judicial circuit found that segregation was increased by ability grouping based in part on scores on admittedly racially discriminatory achievement and "intelligence" tests, it nonetheless refused to rule on the issue, because of "the delicate educational nature of decision concerning grouping." Spangler v. Pasadena City Board of Education, 311 F. Supp. 501 (C.D. Calif. 1970). The court struck down other discriminatory practices, however.

32. See note 2, supra.

33. See Note: Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 68 Col. L. Rev. 691 (1968); 69 Col. L. Rev. 608 (1969).

34. 269 F. Supp. at 477.

35. Id. at 478.

36. 330 F. Supp. at 1343.

37. See note 2, supra.

38. See generally Hawthorne, Legislation by the States: Accountability and Assessment in Education (1973).

39. Chappell v. Commissioner of Educ., Civ. No. C-961-72 (Super. Ct. Ch. Div. N.J. 1972).

40. 349 F. Supp. 988 (D. Iowa 1972), rev'd., 488 F.2d 237 (8th Cir. 1973), cert. denied, 94 S.Ct. 3173 (1974).

41. 488 F.2d at 243-4.

42. See, e.g., Baker v. Columbus Municipal Separate School Dist., 329 F. Supp. 706 (N.D. Miss. 1971); Armstead v. Starkville Municipal Separate School Dist., 325 F. Supp. 560 (N.D. Miss. 1971). Supervisory personnel also mounted a successful challenge to such examinations. Chance v. Board of Examiners, 330 F. Supp. 203 (S.D.N.Y. 1971), aff'd., 458 F.2d 1167 (2d Cir. 1972). A suit similar to Chance instituted on behalf of teachers is now pending.

43. 351 F. Supp. 1279 (D.N.M. 1972).

44. Id. at 1283. In Morales v. Shannon, 366 F. Supp. 813 (W.D. Tex. 1973), the court specifically declined to follow Serna, holding that bilingual education is not a constitutional right. But in Lau v. Nichols, 413 U.S. 189 (1973), the United States Supreme Court held that Chinese-American children have a statutory right to instruction designed to rectify their language deficiency under S601 of the Civil Rights Act of 1964, 42 U.S.C. S2000 (d). The court found it unnecessary to reach the constitutional issue.

45. 337 F. Supp. 934 (D. Mass. 1972).

46. Id. at 937.

47. 501 F.2d 1264 (9th Cir. 1974).

48. Id. at 1269.

49. See note 2, supra.

50. 501 F. 2d at 1268.

51. ___ S.L.D.___ (November 27, 1974). The case is being appealed.

52. N.J.S.A. 18A:36-20.

53. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

54. See notes 7 and 8, supra.

55. 400 U.S. 433 (1971).