Segregation of Poor and Minority Children into Classes for the Mentally Retarded by the Use of IQ Tests*
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I. AN OVERVIEW

According to Lloyd A. Dunn, past president of the Council for Exceptional Children, about sixty to eighty per cent of the students in the nation's mentally retarded classes are "children from low status backgrounds—including Afro-Americans, American Indians, Mexicans, and Puerto Rican Americans; those from non-standard English speaking, broken, disorganized and inadequate homes; [and] children from other non-middle class environments."1

His estimate is supported by several empirical studies. In California, Mexican-American children comprise only thirteen per cent of the state's school population, but in 1967, they accounted for almost thirty per cent of the special education students.2 Similarly, a recent survey of eleven Missouri school districts disclosed that learning disability (LD) programs, which are remedial in nature, are predominantly filled with white, middle- and upper-class children, while educable mentally retarded (EMR) programs, which are compensatory in nature, have disproportionate numbers of black children.3 Specifically, while white children comprised 96.78 per cent of the students in LD classes, in the EMR classes blacks constituted 34.21 per cent of the enrollment.4 Disproportionate numbers of blacks and other minority students in EMR classes seem to be the rule rather than the exception.5

In most schools, intelligence tests are the sole—or at least the predominant—criterion used by officials in labeling students mentally retarded and in relegating them to EMR classes.6 There has been mounting criticism in educational circles of the use of these

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1. Dunn, Special Education for the Mildly Retarded—Is Much of It Justifiable?, 35 Exceptional Children 5, 6 (1968).


4. Id. at 587.

5. For example, in Ann Arbor, Michigan, where blacks constitute only 11.1 per cent of the total school enrollment, they presently make up 40 per cent of the city's EMR classes. Figures provided by Ruth Zweifler, Ann Arbor Special Education Department, Advisory Commission on Special Educational Needs.

standardized intelligence tests as EMR placement determinants for minority children. For example, Dr. Henry S. Dyer, former vice-president of the Educational Testing Service, feels that IQ and grade-equivalent scores are "psychological and statistical monstrosities." He also feels that, while both IQ and grade equivalency scores are purported to be based on a representative national sampling of students, they actually are not. Test makers fail to sample many different kinds of schools, and the sampling upon which the "average" is based is frequently biased against blacks because test makers do not use data from black schools.\textsuperscript{7}

This Comment deals with the inadequacies of IQ tests as devices for identifying those children who are to be relegated to classes for the mentally retarded and with the constitutional ramifications of these inadequacies. The present use of standardized tests may violate due process and equal protection guarantees. Additionally, certain procedural due process requirements, heretofore ignored in this context, may apply to the placement process.

At the outset certain definitional problems must be examined. First, within the field of mental retardation a controversy exists over what abilities should be included in a definition of mental retardation,\textsuperscript{8} just as there is disagreement over the definition of intelligence in general.\textsuperscript{9} Second, a controversy revolves around whether it is possible or necessary to evaluate intellectual factors independently of emotional factors. Some psychological theorists, such as L.M. Terman and Maud A. Merrill, have attempted to measure a child's optimal intellectual level as independently as possible from his general personality adjustment. Their tests, the Stanford-Binet Intelligence Scales, were designed to encourage the test taker to minimize his personality handicaps and respond with the best intellectual capacity he has developed.\textsuperscript{10} On the other hand, David Wechsler, author of the Wechsler Intelligence Scale for Children (WISC), proposed a more global view of intelligence, which includes a somewhat greater proportion of what is ordinarily labeled "personality."\textsuperscript{11} Third, there remains some disagreement over whether a definition of mental retardation should refer to potential ability or to present functioning ability. The general agreement seems to be that esti-

\textsuperscript{7} Telephone conversation with Dr. Henry S. Dyer, June 7, 1973.


\textsuperscript{9} Id.

\textsuperscript{10} Teague, Educational Information, in MENTAL RETARDATION, DIAGNOSIS AND TREATMENT 53, 56 (D. Poser ed. 1969).

\textsuperscript{11} Id. One commentator has pointed out, "These two popular approaches to individual intelligence testing differ subtly: for example, speed is a more important factor in Wechsler's tests than in the Stanford-Binet, . . . and the child who is cautious . . . and wants to be certain of his answer may be penalized on the Wechsler scale." H. ROBINSON & N. ROBINSON, supra note 8, at 28-29.
mates of potential ability are subject to serious error. In addition, it is now agreed that a useful definition of mental retardation must rest upon estimates of the present abilities of the child. However, those who still define mental retardation as incurable tend to place greater emphasis on an estimate of potential growth.

These problems of definition are most troublesome in dealing with the placement of the educable mentally retarded, since “the intellectual handicaps of these children are not so great as to determine their level of adjustment in every sphere.” In contrast, in the case of severely retarded children, most of whom have neurological difficulties, it matters little whether mental retardation is considered in terms of capacity to learn, knowledge possessed, social adaptation, or personal adjustment, since these children have greatly limited capacities in all these areas.

From a legal standpoint, however, these controversies need not be definitively resolved. First, regardless of what definition of mental retardation is employed, the fact remains that tests purporting to measure intelligence are being used to a significant degree as a basis for the placement of minority group children into EMR classes. These tests may have built-in cultural and social biases that could result in the discriminatory and unfair placement of minority group children into such classes. Second, regardless of the theoretical controversy surrounding intelligence and mental retardation, it appears that the de facto basis for placing children in EMR classes, as reflected in the general practice of those engaged in the placement decisions, is potential ability. The remedial (LD) class is designed for

12. H. Robinson & N. Robinson, supra note 8, at 29.
13. Id.
14. Id.
15. Id. at 27.
16. Id. at 27-28.
17. See notes 22-28 infra and accompanying text.
18. This proposition is extremely difficult to support by reference to the educational literature, not because there exists a great deal of material supporting a contrary view—in fact, there appears to be none—but because this proposition has been such a basic assumption since EMR classes were first instituted in the United States that the educational writers have seldom needed to restate it. The comments of at least one writer, however, are revealing. He writes:

The theory behind the homogenous placement of children into a special class and the labelling of the class as special, is that the goals of the teacher would be geared to not only the group's present functioning, but also each student's potential functioning. This functioning is seen as limited at the retarded level on almost all of their special abilities. Only those children who are functionally retarded in the present and are expected to be functionally retarded in the future, no matter what experiences they have in school, should be candidates for these special classes. However, . . . this is not the current practice in many school districts, even though the four most commonly used individual intelligence tests are designed to indicate present overall functioning ability and also future potential.

children who have learning disabilities, such as speech defects, reading problems, or the like, that cause them to achieve at a lower level than regular children but can be corrected.\textsuperscript{19} EMR classes, however, are designed for children who have the capacity to learn only up to a certain undefined point, a point always decidedly lower than the corresponding point for regular children.\textsuperscript{20} This discussion is concerned with only the latter type of class, regardless of its local name.

The standardized tests used to place children into these classes are subject to at least three inadequacies. The first is that the two tests most widely used throughout the country\textsuperscript{21}—the Stanford-Binet Intelligence Scale\textsuperscript{22} and the Wechsler Intelligence Scale for Children\textsuperscript{23}—do not provide sufficiently meaningful information about the learning capability of the minority students tested to permit their use in so critical a decision as EMR placement. The Stanford-Binet test was originally standardized in 1937 by giving the test to 3,184 subjects, every one of whom was a white, native-born American;\textsuperscript{24} the revision in 1960 again included only whites.\textsuperscript{25} Also,\textsuperscript{26}

\textsuperscript{19} The proposition that the disabilities of LD children can be corrected is substantiated by reference to the educational literature. Typical among statements found is the following: "A learning disability refers to a retardation, disorder, or delayed development in one or more of the processes of speech, language, reading, writing, arithmetic, or other school subjects resulting from a psychological handicap caused by a possible cerebral dysfunction and/or emotional or behavioral disturbances. It is not the result of mental retardation, sensory deprivation, or cultural or instructional factors." Kirk \& Bateman, \textit{Diagnosis and Remediation of Learning Disabilities, 29 Exceptional Children 73} (1962). \textit{See also} Bateman, \textit{Learning Disabilities—Yesterday, Today and Tomorrow}, in \textit{Problems and Issues in the Education of Exceptional Children} 292 (R. Jones ed. 1971).

\textsuperscript{20} See note 18 \textit{supra}. EMR children are thought to develop at roughly one half to three fourths the rate of normal children and usually score between 50 and 75 on a standardized intelligence test, where an IQ score of 100 ostensibly indicates average intelligence. \textit{See G. Kimble \& N. Garfady, Principles of General Psychology 511-12} (3d ed. 1968).

\textsuperscript{21} Teague, \textit{supra} note 10, at 56-57.

\textsuperscript{22} The scale is an intelligence scale designed to cover the levels of mental development from age two to adult. Levels are graduated in difficulty. Below the six-year mental age level most test items are of the performance (nonverbal) type—for example, matching and reproducing figures. From age six to adult, test items become more verbal and abstractly based and require skills in verbal reasoning power, word definitions, and deductive-inductive reasoning. Standardization of the Binet test has been extensive. \textit{See generally L. Terman \& M. Merrill, Stanford-Binet Intelligence Scale: Manual for the Third Revision} (1960).

\textsuperscript{23} The WISC, like the Stanford-Binet test, is based on the theory that psychometric (intelligence testing) evaluation should provide a measure of general mental ability. Generally, the instrument is used to evaluate students between eight and fifteen years of age, although the test's lower limits extend below this range. Items are not grouped by difficulty level. The WISC's ten subtests are classified as either verbal or performance scale tests. Scores are provided for each major classification in addition to a total or Full Scale IQ score. Like the Binet, the WISC has been subjected to extensive research. Standardization procedures have also been extensive. \textit{See generally D. Wechsler, Wechsler Intelligence Scale for Children: Manual} (1949).

\textsuperscript{24} L. Terman \& M. Merrill, \textit{supra} note 22, at 9.

\textsuperscript{25} The 1937 Stanford-Binet was in use 23 years before being replaced by what
children were excluded if their father did not live in the home or was unemployed. In addition to a racial bias, these factors indicate a probable economic bias in the standardization, for poor children often come from families with absent or unemployed fathers. The WISC test is similarly racially suspect in that it was standardized by testing 2,200 subjects, all of whom were white.

It is important to note that the test score is a statement of how an individual student compares with the mean score of the norming group; the mean is supposed to reflect an average ability to learn, while a score above or below it indicates superior or inferior ability. A critical assumption is that the individual tested is fairly comparable with the norming group in terms of environmental background and psychological make-up; to the extent that the individual is not comparable, the test score may reflect those differences rather than the student’s capabilities. Indeed, the creator of the WISC clearly perceived the limitations of tests normed only on whites:

We have eliminated the “colored” v. “white” factor by admitting at the outset that our norms cannot be used for the colored population of the United States. Though we have tested a large number of colored persons, our standardization is based upon white subjects only. We omitted the colored population from our first standardization because we did not feel that norms derived by mixing the populations could be interpreted without special provisos and reservations.

Dr. Robert Williams has termed “its racist twin”—the 1960 Form L-M Revision. The latter used 4498 subjects in the normative sample, none of whom were black. See Williams, From Dehumanization to Black Intellectual Genocide: A Rejoinder, CLINICAL CHILD PSYCHOLOGY NEWSLETTER, Fall 1970, at 6.

27. D. Wechsler, supra note 23, at 7. There has been no restandardization.

Additionally, many researchers have written extensively on the biases inherent in the IQ tests that should preclude their appropriateness for comparing racial groups. For example, Garcia pointed out several biases that are summarized as follows: (1) Test items are generally from the school curriculum (reading, writing, and arithmetic) and exclude musical, artistic, mechanical, and other abilities. Thus, he concludes that the Stanford-Binet is actually a measure of scholastic-performance ability, not general intelligence. (2) IQ tests are so tied to school curriculum that after about age 17 raw IQ falls gradually, indicating that unless one is in constant contact with school curriculum, school-related items become more difficult and scores decline. However, scores of those who remain in the academic world increase. (3) Although IQ scores generally decline over time, ability to get along in nonacademic social settings often improves. This aspect of intelligence is not incorporated into IQ tests. (4) For preschoolers, test items relate to ability to recognize toys, items from the home environment which are more likely to be found in middle- and upper-class homes. (5) Although there is adequate precedent for constructing IQ tests that consider the cultural environment of minority group children, such construction has not been done. The precedent for such construction comes from the following: When males and females were shown to perform differently on specified subjects—males better on speed and coordination, females better on verbal tests—the constructors of the Stanford-Binet and other IQ tests omitted any test item that strongly favored one sex and balanced the items that slightly favored
The second inadequacy is that environmental, psychological, and socioeconomic factors have a significant effect on the test results. With respect to environmental factors, a major handicap is that the language forms spoken in black and lower-class environments are alien to the standard English used in the intelligence tests. There is also less exposure in these environments to books and other educational materials. Consequently, both the content and verbal style of the test may be foreign to the minority child. With respect to psychological and socioeconomic factors, disadvantaged children, whether black or white, are likely to suffer from low self-esteem and lack of self-confidence in the schoolroom setting. Black children are often imbued with a sense of worthlessness, inferiority, fear, and despair, transmitted to them at an early age by their parents and reinforced by experiences in the community.


Research by Jane Mercer of the University of California at Riverside has also provided significant evidence of the cultural bias of IQ tests. Her most recent research has shown that the relationship between socioeconomic factors and IQ is such that by knowing the cultural background and socioeconomic status of a child, one can predict IQ scores for an average group. Using a sample of more than 1500 children, Mercer found specific characteristics that were significantly more likely to be present in those children who did better on IQ tests.

She found, for example, that black children with the highest IQ's came from families where the mothers wanted the children to be educated beyond high school, the parents were married and homeowners, there were fewer than three children, and other white, middle-class phenomenon were present. After selecting the five characteristics most strongly related to IQ for blacks and another five for chicanos and after giving a score to each of the 578 chicanos and 339 black children according to the number of white, middle-class characteristics his family manifested, she found that the more white and middle-class characteristics possessed by the family, the higher the child's IQ. The average black child's IQ, without controlling for cultural factors, was 90.5; when the black child's family matched none or one white, middle-class characteristic, the average IQ was 82.7; and when it matched on all five characteristics, the average IQ was 99.5, the national norm. Thus, Mercer concluded that when socioeconomic status and cultural background are controlled, there are no differences in intelligence between the groups. See J. Mercer, Pluralistic Diagnosis in the Evaluation of Black and Chicoa Children: A Procedure for Taking Socio-cultural Variables into Account in Clinical Assessment, Paper Presented at American Psychological Association Annual Convention, Sept. 3-7, 1971 (available on Educational Resources Information Center (ERIC) microfiche Ed No. 055 145).


30. R. Hurley, supra note 29, at 82-83.

31. A few sample test questions illustrate the problem that the minority and/or lower-class child encounters with respect to content. The General Information Section of the WISC test, for example, asks "Who wrote Romeo and Juliet?" and "What is the color of rubies?" The General Comprehension Section asks, "Why is it better to pay a bill by check than by cash?"—a very difficult question for a child whose parents have never had a bank account. The test also asks children to identify "C.O.D.," "Hieroglyphic," and "Genghis Khan." D. Wechsler, supra note 23, at 62-63.

32. A number of psychological studies provide evidence of the low self-esteem of blacks. For example, Kenneth B. Clark found that black children preferred white dolls and rejected black dolls when asked to choose which they would like to play with,
Third, many variables in the testing situation may contaminate the score. These variables, unrelated to intelligence, depress the measured performance of black and lower-class children. For example, in contrast to middle-class children, lower-class children will tend to be less verbal, more fearful of strangers, less motivated toward academic achievement, bilingual, less knowledgeable about the world outside their neighborhood, and more likely to attend inadequate schools. These factors may contribute to a reaction known as "test anxiety." The disadvantaged child, apprehensive about his ability to score well and fearful of what others may see in the test score, may react to the testing situation in a self-defeating manner: He may become highly nervous, or he may withdraw. Either reaction could lower his test score. The disadvantaged child is likely to be under greater psychological stress than a middle-class white child in a testing situation, and this stress is likely to affect test performance. Additionally, a black child may lack rapport with a white examiner, a factor that could substantially affect his performance.

As a result of the above factors, there is a high degree of correlation between test scores on the standardized intelligence tests and the socioeconomic and racial status of the child. The more disad-

which were bad, which were nice, and which were a nice color. Clark & Clark, Racial Identification and Preference in Negro Children in READINGS IN SOCIAL PSYCHOLOGY 551, 557 (2d ed. G. Swanson, T. Newcombe & E. Hartley 1952). Results of the same type have been obtained in a variety of settings. See Asher & Allen, Racial Preference and Social Comparison Processes, 25 J. SOCIAL ISSUES 157 (1969).

The implications of these findings for the testing situation are illustrated by a study showing that the black testees demonstrated a greater lack of self-confidence on personality tests than did the whites and that these personality variables correlated more highly with intelligence test scores in blacks than in whites. See Roen, Personality and Negro-White Intelligence, 61 J. ABNORMAL & SOCIAL PSYCHOLOGY 148 (1959). Additionally, evidence has revealed that black students do better on tests when they expect to be compared to other blacks rather than to whites. See Katz, Roberts & Robinson, Effects of Task Difficulty, Race of Administrator, and Instructions on Digit-Symbol Performance of Negroes, 2 J. PERSONALITY & SOCIAL PSYCHOLOGY 53 (1965).

34. Interview with Dr. William C. Rhodes, Professor of Psychology and Program Director, Institute for the Study of Mental Retardation and Related Disabilities, University of Michigan, Feb. 4, 1973.
35. Id. "Withdrawal" in this situation means the failure to respond to either the testing material or the tester.
36. See G. Kimble & N. Garmezy, supra note 20, at 559-60.
37. In a recent study blacks were tested by both black and white examiners. Under nonthreatening conditions, in which the test was described as one involving eye-hand coordination, blacks worked most efficiently when tested by a white adult. When the black subjects, however, were told that the test was one of intellectual ability, performance was markedly lowered when the examiner was white, and it was slightly elevated when the examiner was black. Katz, Review of Evidence Relating to Effects of Desegregation on the Intellectual Performance of Negroes, 18 AM. PSYCHOLOGIST 381 (1969).
38. Among the studies demonstrating that social class and race both operate as
vantaged the child, the lower his test score will be. Race operates in the same way. Usually the tests themselves are not constructed to allow for these factors, and no appropriate adjustment of the test scores is made.

The inadequacies of the intelligence tests harm the misplaced minority child in several ways. One is by damaging the self-image of the child. In psychological terms, to identify a child as retarded is to relegate him to a mental prison, where the sentence of retardation becomes a perpetual, self-fulfilling prophecy, limiting the child's capabilities and opportunities. Studies indicate that once labeled and committed to classes for the retarded a child will act out the stigmatized role of a mentally retarded person; he comes to see himself as others see him. A second harm resulting from misplacement is due to the societal stigma attached to the label "mental retardate." Third, misplacement into EMR classes may deprive a child of a

This evidence is interpreted in a variety of different ways, however. On the one end of the spectrum is the idea that, since no type of intelligence test has ever been able to eliminate these measured differences, there must indeed be innate differences in intelligence between blacks and whites and between social classes. This is the view subscribed to by Arthur Jensen, the noted Berkeley psychologist who has written the most controversial article published to date on this proposition. See Jensen, supra. In this article Jensen concluded that intelligence is attributable primarily to genetics (80 per cent) and only secondarily to other factors (20 per cent) and that blacks as a group are genetically less endowed with intelligence than whites. Other writers supporting this view are H. Eysenck, The IQ Argument (1971) and Herrnstein, I.Q., Atlantic, Sept. 1971, at 43.

A less harsh interpretation is made by what would probably be a majority of psychologists. This group generally assumes that intelligence tests, when used properly, are relatively accurate indicators of the current level of intellectual functioning. Most would probably say that racial differences in innate levels of intelligence have not been demonstrated and probably do not exist. They would be somewhat more willing to say that the differences in functioning level are due either entirely to environmental difference or deprivation, or to a combination (in unspecifiable proportions) of environment interacting with innate intelligence. See generally E. Baughman & W. Dahlstrom, supra; Dreger & Miller, supra.

Finally, on the other end of the spectrum are those who contend that all measured differences in intelligence between social classes and racial groups are due to cultural bias in the tests themselves and in the testing situation. See K. ELLS, A. DAVIS, R. HAVIGHURST, V. HERRICK & R. TYLER, supra; J. Mercer, supra note 28; Garcia, supra note 28.


40. See S. Guskin, Social Psychologies of Mental Deficiency, in Handbook of Mental Deficiency 225 (N. Ellis ed. 1963); Clark, Children's Perception of a Special Class for Educable Mentally Retarded Children, 30 Exceptional Children 289 (1964).
meaningful educational opportunity\(^1\) and its concomitant economic and social remunerations.\(^2\) As previously discussed, the assumption underlying EMR classes is that the students in them can learn only up to a certain level. The student is deprived of the educational increment above that level. Additionally, in a curriculum for the mentally retarded improperly labeled children may not receive the intensive, individualized remedial training needed to eradicate their cultural and lingual deficiencies. It should be noted that even if a student labeled retarded is left in the regular classroom, harm may still occur from the labeling in that the teacher is often aware of his label and treats him accordingly.\(^3\)

41. Most of the studies on the efficacy of special classes for the mentally retarded have found that mentally retarded children in regular classes are superior in academic achievement to mentally retarded children in special classes. See, e.g., T. Thurstone, *An Evaluation of Educating Mentally Handicapped Children in Special Classes and in Regular Grades* (1959); Elenbogen, *A Comparative Study of Some Aspects of Academic and Social Adjustment of Two Groups of Mentally Retarded Children in Special Classes and in Regular Grades*, 17 Dissertation Abstracts 2496 (1957). This suggests that children who are misdiagnosed as mentally retarded and misplaced into special classes will also regress educationally. This finding has sometimes been attributed to the fact that those children who remain in regular classes on waiting lists for special classes are less needy than those immediately placed. H. Goldstein, J. Moss & L. Jordan, *The Efficacy of Special Class Training on Development of Mentally Retarded Children* 105-07 (1965). However, with the proliferation of classes and the decline of waiting lists, this finding may have less to do with differences in the children and more to do with differences in programs.

42. A number of studies have been directed at the occupational placement of former students of special education classes. These studies reveal that the level of unemployment among these subjects is greater than might be expected among workers of unselected mentality, and that they tend to be clustered in the semiskilled and unskilled employment categories. See Bobroff, *Economic Adjustment of 121 Adults, Formerly Students in Classes for Mental Retardates*, 60 Am. J. Mental Deficiency 525 (1956).

43. One team of researchers writes: “One of the most important sources of teachers’ expectations about their pupils’ intellectual competence comes from standardized tests of intelligence and achievement. Even when the administration of one of these tests is more or less appropriate and valid, the results may influence the teacher’s prophecy about the child’s subsequent intellectual performance.” R. Rosenthal & L. Jacobson, *Pygmalion in the Classroom* 55 (1968). These same authors, in a study they call the Oak School Experiment, established teacher expectations for certain randomly selected children. Teachers were told to expect these children to be academic “spurters.” When compared with a control group the experimental group showed significantly greater IQ gains (on Flanagan’s Tests of General Ability) and significantly greater gains in report-card reading grades. *Id.* at 61-71.

The Rosenthal study has been subject to the criticism that it was concerned solely with expectations of good performance. See Wikoff, *Danger: Attacks on Testing Unfair, Clinical Child Psychology Newsletter*, Fall 1970, at 3. Nevertheless, another study dealing with the effect of teacher expectations upon the performance of borderline children has confirmed the “Rosenthal Effect.” Teachers were assigned to tutor a child in a specific task. Unknown to the teachers, the children had been randomly divided into a “low” or “high” ability group; the assignments had no relation to true ability. Teachers receiving a child from the “low” group got a “professional” profile that characterized the child as having a poor academic prognosis due to severe cultural disadvantages. Profiles on “high” ability children provided a good prognosis in spite of cultural disadvantages. After tutoring individual children in a simple sign-
With respect to deprivation of educational opportunity some psychologists and educators argue that a class for the educable mentally retarded is merely another type of remedial class in which certain children are placed because their present skills in reading, abstract reasoning, and the like, are below the norm. Likewise, they argue that the term “intelligence” test is a misnomer for instruments that in actuality are another form of “achievement” tests used to separate a broad class of students who, for various reasons, do not possess the same measure of skills as the great majority of the children tested. But evidence to the contrary includes: (1) the fact that so-called intelligence tests are used as the basis of placement, rather than achievement tests; (2) the existence of other classes, where the label “mentally retarded” is not applied, for children whose present level of functioning is below average; (3) state administrative rules that regulate the weight to be given to intelligence tests scores in the placement process and state laws that define the term “educable mentally retarded” in such a way as to make clear that EMR classes are based on estimates of potential intellectual capability; and (4) the fact that the estimated low potential learning ability for those enrolled is the premise underlying the existence of the EMR class.

II. THE LEGAL BACKGROUND

The relatively small number of cases in which courts have dealt with the EMR placement of minority children may be attributed to several factors. First, the parents of children who are placed into EMR classes may generally defer to the professionals who make these decisions. Significant differences were found between the learning task scores of “high” and “low” groups; the scores paralleled the teachers’ estimates of the participants’ intelligence. The children’s true IQs bore no relationship either to learning scores or to estimates of intelligence. See W. Hurder, OVERVIEW OF RESEARCH AND EDUCATION OF HANDICAPPED CHILDREN: THE U.S.A. IN THE SIXTIES 153-54 (1970). See generally Mazer, Effects of Social-Class Stereotyping on Teacher Expectations, 8 PSYCHOLOGY IN THE SCHOOLS 373 (1971); Palardy, What Teachers Believe—What Children Achieve, 69 ELEMENTARY SCHOOL J. 370 (1969).

44. See, e.g., Wikoff, supra note 43, at 4.
46. See text accompanying note 6 supra.
47. See Garrison & Hamill, Who Are the Retarded?, 38 EXCEPTIONAL CHILDREN 13 (1971).
48. E.g., CONN. GEN. STAT. ANN. § 10-76a (Supp. 1975) defines an educable mentally retarded child as “one who at maturity cannot be expected to attain a level of intellectual functioning greater than that commonly expected from a child of twelve years of age but who can be expected to attain a level of intellectual functioning greater than that of a seven year-old child.” Thus, in Connecticut the de jure premise behind classes for the educable mentally retarded is low estimated intellectual potential.
49. See notes 18-20 supra and accompanying text.
decisions. Second, even when presented with a complaint by a parent, an attorney may simply not have enough knowledge about the structure of intelligence tests and the nature and efficacy of classes for the educable mentally retarded, or the time to pursue the interdisciplinary studies necessary to educate himself in order to determine if his client has a valid claim. Moreover, to present such a case effectively requires a large expenditure of funds, which is usually beyond the financial resources of the parents of minority children and may be prohibitive for an attorney otherwise willing to donate his time.

Third, lawyers are usually aware that historically the courts have adopted a hands-off approach toward the teacher-student relationship. They are also aware that courts have adhered to the conviction that educational placement based on the academic abilities of children is a matter of administrative discretion best left to school officials. Courts, despite their activism in the school integration struggle, or perhaps because of it, simply do not want to enthrone themselves as “super boards of education,” charged with overseeing the complex, and often picayune, details of a school’s internal operations.

Finally, an almost sacred validity is assigned by some educators and by society as a whole to gadgetry and paraphernalia that promise “scientific” results by “scientific” methods. Although there are educators who deal professionally with the various IQ tests on a regular basis, many school systems permit poorly trained personnel to play a substantial role in the labeling and placement of students as mentally retarded. Such personnel are inclined to treat test results as miraculous “short-cuts” to an otherwise complicated diagnosis. As a result, there has been little controversy in local educational communities over the procedures employed and, therefore, little litigation.

The first of the few decisions dealing with the use of standardized tests and the educational placement of minority children was the landmark case of Hobson v. Hansen. Judge Skelly Wright found the

50. Schools have been looked upon as having plenary parental power over pupils while they are in school. See, e.g., Richardson v. Braham, 125 Neb. 142, 249 N.W. 557 (1933); McLean Indep. School Dist. v. Andrews, 333 S.W.2d 886 (Tex. Civ. App. 1960); Goldstein, The Scope and Sources of School Board Authority To Regulate Student Conduct and Status: A Nonconstitutional Analysis, 117 U. Pa. L. Rev. 373, 377-78 (1969).


52. See Ross, DeYoung & Cohen, Confrontation: Special Education Placement and the Law, 378 Exceptional Children 5, 6 (1971).

“tracking system” of educational placement in the Washington, D.C., public schools violative of the equal protection guarantee implicit in the due process clause of the fifth amendment.\(^54\) The “tracking system” was a system of ability grouping in which students were placed into “accelerated,” “general,” or “slow” classes on the basis of their performance on standardized achievement tests and scholastic aptitude tests. The achievement tests, unlike the District of Columbia aptitude tests or the IQ tests discussed throughout this Comment, only purported to measure a student’s present level of skills in a given academic area; no inferences were made about his over-all intellectual capacity. Yet, the court found that both types of tests discriminate against black and lower-class children, for a disproportionate number of such children were assigned to lower tracks. In reaching his decision, Judge Wright found that “[b]ecause these aptitude and achievement tests are standardized primarily on and are relevant to a white middle class group of students, they produce inaccurate and misleading test scores when given to lower class and Negro students.”\(^55\) The decision was affirmed on appeal to the United States Court of Appeals for the District of Columbia.\(^56\)

Following Hobson, a number of articles dealing with the equal protection aspects of the case appeared.\(^57\) Several lawsuits relying on Hobson were instituted around the nation. Many of these culminated in out-of-court settlements favorable to the plaintiffs;\(^58\) others

\(^{54}\) 269 F. Supp. at 443, 511.

\(^{55}\) 269 F. Supp. at 514.

\(^{56}\) Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc).


\(^{58}\) Covarrubias v. San Diego Unified Sch. Dist., Civil No. 70-394-S (S.D. Cal., Aug. 21, 1972), a class action on behalf of black and Mexican-American children, alleged racial, cultural, and linguistic bias in IQ tests used for EMR placement. Both injunctive and monetary relief were sought. The case was settled on Aug. 21, 1972, on terms extremely favorable to plaintiffs; monetary relief, however, was limited to nominal damages.

Guadalupe Organization, Inc. v. Tempe Elementary School Dist. No. 3, Civil No. 71-435-Px (D. Ariz., Jan. 25, 1972), a class action filed on behalf of Mexican-Americans and Yaqui Indians, alleged that EMR placement on the basis of tests given in English to students more accustomed to other languages violated the fourteenth amendment. This case was settled out of court with a stipulated agreement on January 25, 1972, the terms of which were comparable to those set out in Diana v. State Bd. of Educ., Civil No. C-70 37 RFP (N.D. Cal., Feb. 5, 1970, reopened Oct. 31, 1972).

Diana was a class action on behalf of all Mexican-American children and all others similarly situated who had been placed into EMR classes as a result of their scores on the Stanford-Binet and Wechsler intelligence tests. These tests were written solely in English, while the children to whom they were given spoke primarily Spanish. After a retesting in their native language, many of the children no longer
are not yet settled. The question of whether other courts would follow Hobson remained speculative.

Recently, however, in P. v. Riles, a federal district court issued a preliminary injunction against the placement of black students into EMR classes primarily on the basis of the results of IQ tests if such criteria resulted in a racial imbalance in those classes. The court found that there was a disproportionate number of blacks in the EMR classes, that the IQ tests utilized as the primary basis for placement, among which was the Stanford-Binet, were biased tested as retarded. The case was settled without a decision on the merits pursuant to a stipulated agreement between the parties, which was adopted by the court as its order on Feb. 5, 1970. The agreement included the following concessions to the plaintiffs: (1) All children whose primary home language is other than English must be tested in both the primary language and in English. (2) Children must be tested only with tests or sections of tests that do not depend on such things as vocabulary, general information, or other similarly unfair verbal questions. (3) Mexican-American and Chinese children already in classes for the mentally retarded must be retested in their primary language and reevaluated only in terms of their achievement on nonverbal tests or sections of tests. (4) Every school district must submit to the state before the next school year a summary of retesting and reevaluation and a plan listing special supplemental individual training that would be provided to help each student return to the regular school classes. (5) School psychologists must norm a new or revised I.Q. test to reflect Mexican-American culture. This test would be normed only on California Mexican-Americans, so that Mexican-American children tested could be judged only on how they compared to the performance of their peers, not to the performance of the population as a whole. (6) School districts that had a sufficient disparity between the percentage of Mexican-American students in regular classes and classes for the retarded must submit an explanation. (7) Competent school psychologists should administer individual intelligence tests in the primary language or seek out an interpreter who may be either a psychology trainee or intern or some other employee of the school district. The case was recently re-opened to perfect the settlement.

Since the time of the settlement, the California Education Code was revised to reflect the above stipulations. See Cal. Educ. Code §§ 6902.06-.095 (West Supp. 1973).

59. Stewart v. Phillips, Civil No. 70-1199 F (D. Mass., filed Sept. 14, 1970), was a class action on behalf of all black or poor Boston public school students who were not mentally retarded but who were misplaced into EMR classes on the basis of their scores on standardized intelligence tests, and on behalf of their parents, who were denied an opportunity to participate in the placement decision. The complaint alleged misclassification and misplacement due to the culture bias of the tests used. This case has not yet come to trial, nor has it been settled in the interim.

Areola v. Board of Educ., Civil No. 160-577 (Orange County, Cal., Super. Ct., filed June 7, 1968), also a class action filed on behalf of Mexican-American children, raised the same issues as the Diana suit. Although the case has not yet been settled, it appears to be moot in light of the recent changes in the California Education Code described in note 58 supra.


60. 343 F. Supp. 1306 (N.D. Cal. 1972). See also Moses v. Washington Parish School Bd., 330 F. Supp. 1340 (E.D. La. 1971), affd. per curiam, 455 F.2d 1285 (5th Cir.) cert. denied, 409 U.S. 1013 (1972) (school district cannot assign students in recently desegregated school to classrooms on basis of ability and achievement tests where the effect of tests is to perpetuate segregation within the school).

61. 343 F. Supp. at 1311.

62. The name of the test used by the school district was furnished by one of the
against blacks, and, ultimately, that the use of the tests constituted a denial of equal protection.

These decisions centered on the equal protection aspect of EMR placement. Although this aspect is important, the recent Supreme Court decision in San Antonio Independent School District v. Rodriguez limits the application of the equal protection clause in the education area. Although the following discussion will include the equal protection aspect, the limitations imposed by Rodriguez make the due process aspects of EMR placement more significant.

The Hobson decision, which dealt with the concept of tracking, raises questions broader than EMR placement: Is tracking, even when the IQ tests used to group children accurately reflect present ability, constitutionally or socially unacceptable? Are remedial (not EMR) classes for minority children constitutionally mandated? This Comment will not discuss these larger issues, but will deal only with the placement of minority children into EMR classes on the basis of standardized IQ tests.

III. LEGAL ARGUMENTS

A threshold issue is whether courts should involve themselves in school board matters at all. Recent cases still reflect the historical reluctance of courts to act in the areas of school testing, curriculum, and student placement. The courts are concerned that problems of such educational complexity may not be suitable for judicial resolution. It is clear, however, that where school administrative policy affects important constitutional rights, the federal courts, including attorneys of record. Telephone interview with Armondo M. Menocal III, San Francisco Neighborhood Legal Assistance Foundation, March 14, 1973.

63. 343 F. Supp. at 1313.
64. 343 F. Supp. at 1314.
68. See text accompanying notes 50-51 supra.
the Supreme Court, will act despite the complexity of the educational or administrative problem involved.\textsuperscript{71}

\section*{A. The Use of IQ Tests}

\subsection*{1. Due Process}

Although the state action required by the due process clause of the fourteenth amendment includes action taken by local governmental or quasi-governmental bodies such as school boards,\textsuperscript{72} at first glance misplacement into an EMR class would not appear to deny a child the “life, liberty, or property” protected by the due process clause. The Supreme Court has, however, defined these terms loosely and looked toward the importance of the specific individual interest at stake without requiring that they be classifiable as either “life,” “liberty,” or “property.” Under this approach, the clause applies whenever the state deals with an individual, so long as the interests threatened are not wholly frivolous.\textsuperscript{73}

An individual’s interest\textsuperscript{74} in an education has been held to be important enough to warrant the protection of the due process clause.\textsuperscript{75} Additionally, the labeling of a child as mentally retarded may infringe upon his interest in freedom from “badges of infamy.”\textsuperscript{76}


\textsuperscript{74} The term “interest” seems accurate as there no longer appears to be any vitality left in the right-privilege distinction. See Board of Regents v. Roth, 408 U.S. 564, 571 (1972).


\textsuperscript{76} In \textit{In re Winship}, 397 U.S. 358, 363 (1970), the Supreme Court, in holding that proof beyond a reasonable doubt is required to establish guilt in juvenile delinquency proceedings where the juvenile is charged with an act that would constitute a crime if committed by an adult, stressed the stigma involved: “The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.”
A fundamental requirement of due process in some circumstances is that any evidence used to determine whether adverse state action should be taken against an individual must be reasonably related to proving the appropriateness of the action. In the present context, the adverse action is the placement of children into classes for the educable mentally retarded. The methods employed to determine if this action should be taken are the standardized intelligence tests. To the extent that these tests are untrustworthy indicators of mental retardation in minority children, their use with respect to these children may violate due process.

There are three lines of cases that support this contention. The first relevant body of law deals with the constitutionality of certain "identification" procedures. In Foster v. California, the use of police "lineup" procedures, in which the defendant was exhibited to witnesses for identification prior to trial, was challenged. The Court concluded that, due to a number of factors in that case, it was "all but inevitable" that the robbery victim would identify the defendant as the robber, whether or not he was "in fact" guilty. In reversing the conviction, the Court reiterated a principle established in earlier cases: The conduct of identification procedures must not be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to create a serious likelihood that an innocent person could be convicted. Such procedures, according to the Court's decisions, must be evaluated in light of the totality of surrounding circumstances and require consideration of both the necessity for the particular procedures used and the chance that they might lead to an erroneous identification.


78. 394 U.S. at 448. The factors were (1) the defendant was placed in a lineup with two other men who were considerably shorter than he; (2) he was the only one who wore a jacket similar to the one the witness believed the robber had worn; (3) when an initial lineup did not lead to positive identification, the police permitted a one-to-one confrontation; and (4) when the witness remained uncertain, some days later another lineup was arranged in which the defendant was the only person who had also appeared at the first. 394 U.S. at 441-42.

80. 394 U.S. at 442.

The second line of cases involves the use of coerced confessions. Beginning with Brown v. Mississippi, the Supreme Court has held that the use of such confessions violates due process. Three factors underlie these decisions. The first is the desire to deter improper police conduct. The second is the fear that coerced confessions may unduly influence the jury. The third is a belief that they lack an assurance of reliability.

The third line of cases deals with constitutional limitations on the creation and effect of certain presumptions. In Tot v. United States, the Court stated the basic tests to be used in determining the constitutionality of statutory presumptions in criminal laws. In Tot, the defendants were convicted under a provision of the Federal Firearms Act that made it "unlawful for any person convicted of a crime of violence . . . to receive any firearm . . . which [had] been shipped . . . in interstate . . . commerce" and further provided that "the possession of a firearm . . . by any such person [is] presumptive evidence that such firearm . . . was . . . received by such person in violation of [the] Act." In holding that the presumption violated due process, the Court stated that "a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." The Court noted that, although state laws might make acquisition difficult, it did not follow from proof of mere possession that the firearms must have been received by the defendants in interstate, as opposed to intrastate, commerce subsequent to the adoption of the federal statute.

In a later case, Turner v. United States, the Court seems to have gone beyond the requirement that the proved fact must tend to prove the presumed fact rationally. It seems to have adopted the standard that the presumed fact must actually exist beyond a reason-
able doubt. Although the decided cases to date have dealt only with statutory presumptions, one noted authority is clearly of the opinion that "theoretically due process problems may arise with regard to any presumption [upon which the state relies] . . . ." 94

Undoubtedly, distinctions can be drawn between these three lines of cases and the use of culturally and/or racially biased IQ tests in labeling a child mentally retarded and assigning him to a mentally retarded class or track. The criminal lineup and confession cases involve infringement of greater interests—freedom from physical incarceration and criminal stigma—than are at stake in the retardation cases. Labeling a child mentally retarded and relegating him to a special class or track does not result in physical incarceration, except to the extent that he is segregated physically from his mental peers in a separate classroom. The Tot group of cases are also distinguishable from the EMR cases in that they too deal with criminal proceedings, although the principle of the Tot group has once been applied to a civil presumption. 95

But the stigma attached to mental retardation, which equals or exceeds in some cases the stigma of a criminal conviction (especially a conviction for a trivial misdemeanor), the deprivation of a meaningful education and its concomitant rewards, and the irremedial psychological damage done to a child by false labeling indicate that interests of comparable weight are involved in EMR cases.

It should not matter, moreover, that due process traditionally has required greater procedural safeguards in the criminal context. 96 Recent Supreme Court decisions have looked past this antiquated criminal-civil dichotomy to the nature of the interests involved. 97

At least under circumstances similar to those in Foster, Brown, and Tot, it is clear that evidence that is the basis of adverse state action against an individual must be reasonably related to establishing the appropriateness of the action. In the EMR context, if it can be demonstrated that IQ scores are the sole or predominant criterion utilized in the labeling process, that the decision maker is influenced unduly by the scientific aura surrounding IQ tests, and that such tests, as administered to poor and minority students, are culturally biased, thus labeling some students as mentally retarded who are not so in fact, it follows that the use of such tests as indicators of mental

94. C. MCCORMICK, supra note 93, § 844, at 811.
95. Western & A. R.R. v. Henderson, 279 U.S. 639 (1929). Doubt has been cast on the vitality of this case, however, because of changes in the law of negligence. See Fed. R. Evid. 801, Advisory Committee's Note.
96. See, e.g., In re Gault, 387 U.S. 1, 59-60 (1967) (Black, J., concurring).
97. See, e.g., cases cited in note 75 supra.
retardation is not reasonably related to the proper placement of minority children. What is unclear, however, is the willingness of courts to extend the Foster-Brown-Tot principle beyond its present criminal context to EMR placement.

2. Equal Protection

Under the traditional equal protection standard, a state generally retains discretion to classify people so long as the classification bears a rational relationship to a legitimate state purpose. The state is not required to classify people with "mathematical precision," and classifications made by the state bear a presumption of validity. However, if the classification infringes upon fundamental rights or is "suspect," it must be tailored precisely to accomplish its purpose, less drastic means must not be available to accomplish its objective, and, ultimately, the interests furthered must be justified by a compelling interest.

The first step in applying the traditional test is to identify the classification involved. The criterion purportedly used by school authorities to classify students is learning ability as measured by standardized intelligence tests. Ostensibly, this criterion separates students into only two broad classes: (1) a class of students who possess the skills measured by these tests and therefore remain in regular classes where they can perform to the best of their abilities; and (2) a class of students who do not and cannot possess the skills measured by these tests, who are in reality educably mentally retarded, and who are placed in special classes where they, like the regular students, can perform at their maximum level. However, the criterion, as applied, appears to create in addition a third broad class of students who are black, Indian, chicano, and/or poor, who, although not presently possessing the skills measured by the tests, are capable of acquiring them but are nonetheless placed in special classes that are not conducive to educating them to perform to the full extent of their capabilities.

Once the affected classes have been identified, under the tradi-

100. See, e.g., Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-80 (1911).
tional equal protection test the question then becomes whether the discrimination among the classes is "reasonable." Specifically, the issue is whether placement through the use of standardized intelligence tests is reasonably related to a proper governmental objective. It could be argued that the use of IQ tests bears no rational relationship to the placement of minority children because of the defects in the tests. This irrationality is twofold: The children are not properly tested for placement into regular classes, and they are not properly tested for placement into LD rather than EMR classes. If the school in question has only one class for abnormal children, it could be argued that a refusal to draw a distinction between the LD and EMR classes where the circumstances manifestly justify the distinction violates the equal protection clause.106

However, a system of ability grouping is rationally related to one legitimate state objective—educating those most capable of learning—in that the "normal" children are separated from those students who, for whatever reason, are unable to maintain the pace of the normal curriculum. That the instruments, that is, intelligence tests, used to make this division do not further subdivide those students who are unable to compete in the normal curriculum into the truly mentally retarded and the socio-culturally deprived does not detract from the fact that the division accomplished is related to a legitimate governmental objective. Thus, it would appear that an attack on the placement of minority children into EMR classes under the traditional equal protection test would be unsuccessful, for under that test one reasonable basis for a discriminatory classification is sufficient, regardless of other injurious consequences.107

There is a possible variation of the traditional test that should be discussed. Recent court decisions striking down state requirements while voicing the traditional test have cast doubt on the permissiveness of the traditional standard.108 Minimal rationality of means may no longer be sufficient to justify a classification,109 and a


108. State classifications are overturned under this standard only when "no grounds can be conceived to justify them." McDonald v. Board of Election Comrs., 394 U.S. 802, 809 (1969).

court may no longer accept just any legitimate purpose.\textsuperscript{110} However, in \textit{San Antonio School District v. Rodriguez}\textsuperscript{111} the Supreme Court, upholding the Texas property tax system of financing public education, refused to adopt this approach and thus cast doubt upon the applicability of these recent decisions to the area of education.\textsuperscript{112}

There is a second variation of the traditional standard that may apply. The district court in \textit{P. v. Riles}\textsuperscript{113} explicitly stated that it was rejecting that part of the traditional equal protection test that places the burden on the plaintiff to prove that no rational relationship exists between the method of classification used and the outcome of the classification.\textsuperscript{114} The court accepted in its place the plaintiff's theory that once a racial imbalance in EMR classes is demonstrated the burden of proof shifts to the defendant school authorities to demonstrate the rationality of the mode of classification. The court cited cases holding that if a job qualification test excludes a greatly disproportionate number of blacks, the burden shifts to the employer to demonstrate that the test is valid for purposes of selecting employees;\textsuperscript{115} that when qualification tests for jury service lead to disproportionately low numbers of blacks on juries, the burden shifts to the state to explain why passing such a test indicates that one will be an effective juror;\textsuperscript{116} and that when a school district's methods for delineating school boundaries result in student bodies of predominately one race or another, the burden shifts to the school district to demonstrate that its methods serve valid and educationally relevant purposes.\textsuperscript{117} As a rationale for its rejection of the more traditional approach to burden of proof, the \textit{Riles} court stated:

\begin{quote}
Insofar as the cases which have shifted the burden of proof rely for their support on this general distrust of classifications which harm blacks as an identifiable group, then this Court feels compelled to shift the burden in the instant case if plaintiffs can demonstrate
\end{quote}


\textsuperscript{112.} 41 U.S.L.W. at 4424. Justices Marshall, 41 U.S.L.W. at 4437, 4445, and White, 41 U.S.L.W. at 4427, however, in their dissents disagreed with the Court's rigid approach to equal protection.

\textsuperscript{113.} \textit{See} text accompanying note 60 supra.

\textsuperscript{114.} 343 F. Supp. at 1308-09.


\textsuperscript{116.} 343 F. Supp. at 1309, \textit{citing} \textit{Carmical v. Craven}, 457 F.2d 582 (9th Cir. 1971) (Hufstedler, J.).

that I.Q. tests are in fact the primary basis for placing students in EMR classes and that in fact there is a disproportionately high number of black students in the EMR classes.\(^{118}\)

The court found that the evidence introduced by plaintiffs established the above mentioned facts; it then shifted to the school authorities the burden of proof, which they failed to meet.

One difficulty with the \textit{Riles} case lies in the court's failure to consider fully one of three elements of the case that had to be present to establish an equal protection violation under the traditional test. The three elements were (1) that there was a causal relation between the use of the tests and the racial imbalances in the EMR classes; (2) that the tests were not rationally related to the state purpose for which they were being used, that is, determining the intellectual capacity of black and poor children; and (3) that the use of the tests for black and poor children was not rationally related to any other legitimate educational purpose. The court failed to consider fully the third element; the administration of the biased IQ tests may have been related to one legitimate educational purpose—specifically, separation of "fast" learners from "slow" learners.\(^{119}\)

Furthermore, it is questionable whether the \textit{Riles} court should have shifted the burden of proof at all. In \textit{Jefferson v. Hackney},\(^{120}\) blacks and Mexican-Americans brought an action challenging Texas' administration of its welfare program. Persons receiving welfare under the category of Aid to Families with Dependent Children (AFDC) received less than persons receiving aid under other categories, such as aid to the aged and aid to the totally disabled. The AFDC program was funded at seventy-five per cent of recognized need, while the other programs were funded at ninety-five per cent and one hundred per cent of recognized need, and there was a larger percentage of

\(^{118}\) 343 F. Supp. at 1309. The courts in the jury selection cases did not have to consider other legitimate governmental objectives that might have been served by the qualification tests given to prospective jurors, since there could be no other legitimate objective than the selection of competent jurors. This was also true in the employment cases. Either an employment test was related to determining if a person would perform a particular job competently, or it was not. Nor was there a need to reach the problem of other valid government purposes in the desegregation case relied on by the \textit{Riles} court, because in that case—United States v. School Dist. 151, 286 F. Supp. 786 (N.D. Ill.), \textit{aff'd}, 404 F.2d 1125 (7th Cir. 1968), \textit{cert. denied}, 402 U.S. 943 (1971)—there had been prior intentional racial discrimination in the school district, and the court found that present pupil assignment practices were being intentionally utilized to maintain that discrimination.

\(^{119}\) The court did consider the possibility that the IQ tests segregated students according to their ability to learn in regular classes; however, it limited its consideration to the effects on black children, 343 F. Supp. at 1315-14. It failed to consider the possibility that the tests might have separated those students best capable of learning from those unable to maintain the pace of the normal curriculum regardless of whether the latter were black or white. Under the traditional test if this purpose were met the classification would be upheld. \textit{See} text accompanying notes 106-07 \textit{supra}.

\(^{120}\) 406 U.S. 535 (1972).
blacks and Mexican-Americans in AFDC (eighty-seven per cent) than in the other programs, where whites were sixty per cent and fifty-three per cent of the recipients.\textsuperscript{121} Despite the fact that blacks and Mexican-Americans overwhelmingly populated the program receiving the least aid, the Supreme Court applied the traditional equal protection test, refused to shift the burden of proof to the state, and upheld the practice.

There are also problems with respect to the more stringent, compelling interest version of the equal protection test. In \textit{Hobson v. Hansen},\textsuperscript{122} which held that the "tracking system" used in District of Columbia schools violated the equal protection clause, the court indicated that both suspect classifications and a fundamental right were involved.\textsuperscript{123} Since the tests employed were standardized largely on white and middle-class persons\textsuperscript{124} and since they contained language forms and vocabularies alien to black and poor students, the court concluded that the students were being classified on suspect racial and economic grounds, rather than on ability to learn.\textsuperscript{125} Likewise, the court seemed to assume, without lengthy explanation, that equal educational opportunity was a fundamental right.

\textit{San Antonio School District v. Rodriguez}\textsuperscript{126} has ended the long debate over the proper equal protection characterization of the interest in education. The Court explicitly found that education was not a fundamental right.\textsuperscript{127} Therefore, if the compelling interest test is to be applied, it must be because a suspect classification is involved.

A suspect classification is one the Supreme Court has labeled "suspect" and has subjected to the stringent compelling interest standard.\textsuperscript{128} These classifications have been defined by the Court as referring to "discrete and insular" minorities.\textsuperscript{129} To date, only race,\textsuperscript{130} ancestry,\textsuperscript{131} and alienage\textsuperscript{132} have been found to be "discrete and insular."

\begin{footnotes}
\item[121] 406 U.S. at 548.
\item[122] \textit{See} text accompanying notes 53-56 \textit{supra}.
\item[123] The reasoning of the opinion is criticized in Comment, \textit{supra} note 57.
\item[124] Significantly, in the test used in the District of Columbia placement process possibly only 60 per cent of the standardized group were white and middle-class. 269 F. Supp. at 479.
\item[125] 269 F. Supp. at 514.
\item[127] 41 U.S.L.W. at 4418. The argument that education is a fundamental right may still be viable under state constitutions, however. \textit{See} \textit{Serrano v. Priest}, 5 Cal. 2d 584, 597 n.11, 487 P.2d 1241, 1249 n.11, 96 Cal. Rptr. 691, 695 n.11 (1972) (state constitutional provision as alternative ground).
\item[128] \textit{See}, \textit{e.g.}, \textit{Loving v. Virginia}, 338 U.S. 1, 9, 11 (1967).
\item[132] \textit{Graham v. Richardson}, 403 U.S. 305 (1971).
\end{footnotes}
The courts may find classification on the basis of IQ tests suspect because of the possibility that students are grouped, not according to their ability to learn, but according to their racial, social and economic status. While all students are given the same tests, a seemingly fair procedure, these tests are standardized only as to white, middle-class students and heavily emphasize verbal skills. Thus, the results may be valid indicators of mental retardation only for white, middle-class students.\[133\]

The difficulty with this argument is that the standardized tests do not on their face set apart blacks and the poor for discriminatory treatment. The disproportionate effect on blacks, other minorities, and the poor is, arguably, merely a by-product of a legitimate system of ability grouping. That a governmental program has different impacts on different races or economic groups does not necessarily make it constitutionally “suspect.” For example, assume that approximately thirty per cent—or any other percentage larger than that of blacks in the U.S.—of the persons arrested nationwide for armed robbery are black. This would not make the armed robbery statutes “suspect.” More directly on point is the school segregation that results from segregated neighborhoods, a by-product of the effort to provide neighborhood schools. Although the Court may soon find these de facto school segregation schemes unconstitutional, the issue is presently an open one.\[134\] In any case, EMR placement appears to be different from either of these two examples. Although both the armed robbery statute and the requirement that children attend neighborhood schools result in disproportionate numbers of blacks and poor being adversely affected, this result does not stem from any intrinsic defect in the statute or rule applied. IQ tests, however, are intrinsically defective in that they are normed to white children but used to measure the abilities of nonwhites. In this sense EMR placement seems more akin to de jure segregation, such as that resulting from purposeful exclusion of blacks by gerrymandering school districts, than to de facto segregation. Both gerrymandered school dis-

\[133\]. See notes 1-49 supra and accompanying text.

\[134\]. Although the Supreme Court has prohibited educational discrimination under color of law, e.g., Brown v. Board of Educ., 347 U.S. 483 (1954), it has never directly addressed itself to the problem of de facto segregation. In one recent case an equally divided (4-4) Court, without opinion, affirmed a court of appeals decision allowing racially segregated schools that resulted from racially segregated neighborhoods. Bradley v. Virginia State Bd. of Educ., 41 U.S.L.W. 4685 (U.S., May 21, 1973), affirining 462 F.2d 1058 (4th Cir. 1972). The Court had previously declined to rule on similar schemes. E.g., United States v. School Dist. 151, 402 U.S. 943 (1971), denying cert. to 392 F.2d 1147 (7th Cir. 1967); Deal v. Cincinnati Bd. of Educ., 389 U.S. 847 (1967), denying cert. to 369 F.2d 55 (6th Cir. 1966); Downs v. Board of Educ., 368 U.S. 914 (1965), denying cert. to 336 F.2d 988 (10th Cir. 1964); Taylor v. Board of Educ., 368 U.S. 940 (1961). In its most recent decision on this subject, Keyes v. School Dist. No. 1, 41 U.S.L.W. 5002 (U.S., June 21, 1973), the Supreme Court held that the mere assertion of a “neighborhood school policy” is insufficient if there is evidence that the school authorities “have practiced de jure segregation in a meaningful portion of the school system . . . .” 41 U.S.L.W. at 5068.
Districts and EMR placement by the use of IQ tests are specifically designed in ways that affect blacks adversely—that is, discrimination is, by definition, a necessary result of the process. Gerrymandered districts have been held to be defined improperly;\(^{135}\) it can be argued that the EMR groups have similarly been defined improperly.

A court may also be disposed to consider the classification here in question suspect because it involves a group of defenseless victims—both poor and young—traditionally favored by the courts.\(^{136}\) However, the Court in *Rodriguez* dealt with a classification that adversely affected a similar group and did not find it suspect.\(^{137}\)

A third possibility is that the class "mentally retarded" may be suspect. Support for this approach can be found in recent decisions in which the Supreme Court has held that classifications dealing with aliens are suspect\(^{138}\) and in which it has looked closely at the classification "illegitimate children."\(^{139}\) (In the latter case, however, it is not clear whether a compelling interest analysis or a balancing of interests was used.\(^{140}\)) The common characteristics of both these classifications seem to be group stigmatization, a history of discrimination, political impotence, and ready identifiability. These characteristics would appear also to apply to the mentally retarded. However, the present Court appears to be reluctant to expand the parameters of equal protection to include new suspect classifications.\(^ {141}\)

If a suspect classification does exist and, therefore, the compelling interest standard is used, school boards would fare poorly. Classification based primarily on IQ tests lacks the surgical precision required by the compelling interest standard.\(^ {142}\) Additionally, it is extremely

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137. 41 U.S.L.W. at 4412-15.


142. See text accompanying note 108 supra.
doubtful whether any of the educational goals for IQ testing espoused by school authorities are compelling; few state goals have ever met this requirement.143

B. Procedural Protection for Families of Children Placed into EMR Classes

If, despite the arguments raised above, the use of present-day IQ tests is allowed in the labeling-placement decision, students and parents may nevertheless be entitled to some protection against improper placement procedures under the due process clause. The most common procedural due process requirement is that the individual be given adequate notice and an opportunity to be heard before adverse governmental action is taken against him.144 In some situations, such as criminal trials, due process requires more: the opportunity to confront and cross-examine adverse witnesses,145 the right to be represented by counsel (including assigned counsel if the individual is too poor to hire an attorney),146 and the right against self-incrimination.147 But not all of these procedural safeguards are constitutionally required in all proceedings;148 until relatively recently, most of them were available only in criminal proceedings.149 In addition to this criminal-civil dichotomy, the courts had also recognized a judicial-administrative (or judicial-legislative) dichotomy, rather inflexibly refusing to sanction procedural safeguards in those proceedings labeled "civil," "administrative," or "legislative."150

Today these mechanical distinctions have eroded, and the Su-

143. For the few interests that have been found to be compelling, see Marston v. Lewis, 41 U.S.L.W. 3498 (U.S., March 19, 1973) (integrity of voting process); Roe v. Wade, 410 U.S. 113 (1973) (life of mother and fetus); Korematsu v. United States, 323 U.S. 214 (1944) (national security in time of war). See also Abate v. Mundt, 403 U.S. 182, 185-87 (1970).


148. See, e.g., McKevier v. Pennsylvania, 403 U.S. 528 (1971) (no right to trial by jury in juvenile delinquency proceedings); Madera v. Board of Educ., 386 F.2d 777 (2d Cir. 1967), cert. denied, 390 U.S. 1008 (1968) (no right to have attorney present at conference that could result in placement in a school for the maladjusted or in permanent suspension from school).

149. For an explanation of the historical and functional considerations that in the past severely limited the application of due process standards to noncriminal areas, see Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 HARV. L. REV. 1439 (1968).

Supreme Court has made it clear that where sufficiently important interests are at stake or where the threatened adverse action is particularly harsh, certain due process safeguards must be applied.\(^{151}\) In general, what satisfies the requirements of due process in any given circumstance turns upon the nature of the proceedings involved and the interests, both governmental and private, affected by these proceedings. As the Supreme Court succinctly stated in *Hannah v. Larche*:\(^{152}\)

"Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

Traditionally, fewer procedural safeguards have been required where children are involved because the state, out of its solicitude for the welfare of minors, did not want to subject them to the harsher adult processes. This argument, based on the time-worn concept of *parens patriae*,\(^ {153} \) is now outmoded. In the landmark decision of *In re Gault*,\(^ {154} \) the Supreme Court held that, in juvenile proceedings that may result in commitment to an institution, the child or his parents must be (1) given notice sufficient to permit preparation of a defense to the charges; (2) given notice of the child's right to be represented by counsel (including assigned counsel if the parents cannot afford to pay); and (3) afforded the right against self-incrimination and the rights of confrontation and cross-examination. The Court broke with tradition in extending these procedural rights, traditionally applied only in the criminal law area, to an area that had been previously classified as civil,\(^ {155} \) thus discounting the criminal-civil and adult-child dichotomies.\(^ {156} \) Of paramount concern to

\(^{151}\) See notes 156-59 infra and accompanying text.

\(^{152}\) 363 U.S. 420, 442 (1960).

\(^{153}\) The doctrine of *parens patriae*, the cornerstone of the juvenile justice system of every state, is that the state, as a substitute parent, will act in the best interests of the child and will competently control and rear the child. See, e.g., *Pee v. United States*, 274 F.2d 56 (D.C. Cir. 1959); Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 Wis. L. Rev. 7, 10.

\(^{154}\) 387 U.S. 1 (1967).

\(^{155}\) See 387 U.S. at 59-60 (Black, J., concurring).

\(^{156}\) 387 U.S. at 16-27.
the Court were the practical consequences stemming from the adjudication of a minor as a juvenile delinquent, that is the possibility of incarceration for a period of years far in excess of the adult penalty for the equivalent crime and the resultant stigmatization.

Similarly, in *Heryford v. Parker*, a habeas corpus action brought by a mother on behalf of her mentally deficient son who had been committed to a state training school for the feebleminded and epileptic, the plaintiff, relying on *Gault*, alleged that the child had been denied his constitutional right to counsel and confrontation at his commitment hearing. Attempting to distinguish *Gault*, the state argued that *Gault* was concerned with commitment for correction or rehabilitation of juveniles, while the present proceeding was concerned solely with commitment for teaching and training the mentally deficient. Dismissing the state's argument, the court of appeals stated, "The overriding consideration of the [Gault] court was that in either case the determination carried with it the 'awesome prospect of incarceration in a state institution.' " While rejecting the civil-criminal dichotomy and emphasizing the incarcerative consequences of juvenile adjudications, the *Heryford* court also greatly reduced the use of the concept of *parens patriae* as an excuse for denying procedural rights.

These cases, which were greatly concerned with the stigmatization attendant upon incarceration, indicate that a court may also view it as unreasonable to stigmatize children as mentally retarded without proper procedural safeguards. It is true that the juvenile delinquency cases involved physical incarceration, but it can be argued that there is an equivalent harm when a child is labeled mentally retarded in that he is involuntarily segregated, confined in a separate classroom, and locked into an inferior educational "track." Additionally, there is a figurative (but no less damaging) imprisonment of the child for the rest of his life within the world of the mentally retarded.

The interests accorded due process protection in recent nonincarceration cases do not appear to be more important than those

157. 396 F.2d 393 (10th Cir. 1968).
158. 396 F.2d at 395.
159. 396 F.2d at 395.
160. It matters not whether the proceedings be labeled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration—whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training as a feebleminded or mentally incompetent—which commands observance of the constitutional safeguards of due process. Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in *parens patriae*, it has the inescapable duty to vouchsafe due process, and this necessarily includes the duty to see that a subject of an involuntary commitment proceedings [sic] is afforded the opportunity to the guiding hand of legal counsel at every step of the proceedings . . . .
161. 396 F.2d at 396.
threatened by the retardation labeling-placement process. For example, in *Bell v. Burson*, the Court found as violative of due process a Georgia statute that required the suspension of a driver’s license without a hearing where a driver who had been involved in an accident failed to post security for damages claimed by the injured party. And in *Wisconsin v. Constantineau*, the Court upheld a challenge on due process grounds to a statute that authorized the public posting of the names of persons believed guilty of excessive drinking in order to prevent them from obtaining liquor. Since the statute made no provision for notice or hearing before posting, none was given. The Court held that the characterization of a person as an excessive drinker, though a mark of serious illness to some, is such a stigma or badge of disgrace to others that procedural due process requires notice and an opportunity to be heard. Although there is no formula by which the interests infringed in each of these cases can be quantified and mathematically measured against the interests in the present situation, it seems that the interests involved in the mental retardation labeling process—the interest in equal educational opportunity, the interest in being free from arbitrary racial and economic discrimination, and the interest in freedom from undeserved stigmatization—are sufficient to bring them within the recently expanded parameters of due process exemplified by these cases.

In cases dealing specifically with education, lower courts have held that a state college or university student suspended for a substantial period has a right to a hearing, to be advised at the hearing by counsel, to examine adverse statements on which the charges against him are based, and to be provided with an oral or written report on the facts to which each witness testifies. In the area of secondary education, lower courts have found that due process re-

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quires a hearing before a student can be expelled for any significant period; more specific requirements have not yet been spelled out.

An important common feature of the cases discussed above is that the hearings were deemed necessary in order to consider facts unique to the individual rather than facts determining general policy decisions. The courts found that the first category of facts should not be determined without giving adversely affected individuals an opportunity to know and confront unfavorable evidence. Although the decision to use IQ tests may be a general policy matter, individual placement clearly involves facts unique to the individual that can most appropriately be determined at a hearing.

There are interests that militate against requiring any hearings or full adversarial hearings in this setting. As previously discussed, the burden on the government must be balanced against the private interest affected by governmental action. One obvious cost to the government is monetary expense. Moreover, there may be a diversion of a school's nonmonetary resources and energies to the hearing process. However, these costs have not been considered prohibitive in establishing hearing requirements for other educational decisions involving a small number of individuals with important personal interests. For example, schools have been required to hold hearings when discharging some teachers and when expelling students. Additionally, the Supreme Court has held that where the interest in reducing expenses is the principle justification for a denial of due process, that interest is not dispositive.

There are other important government interests involved in EMR placement. First, a formal hearing might destroy informal relationships and set against one another people who are not truly adversaries; in the EMR context, informal counseling, between school diagnosticians and educators on the one hand and the parents on the other, constitutes an important aspect of the placement process. Implicit in this argument is the assumption that in most cases the diagnostician is making a proper determination that the child is retarded and is advising the parents on that basis. This may not be true with respect to minority group children. Since they populate the ranks of

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169. See Comment, supra note 168, at 362-68.


171. See text accompanying note 152 supra.

172. See Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972) (dictum).


the nation's EMR classes out of proportion to their number in the population as a whole, it may be fair to infer that diagnosticians have been wrong in a substantial number of cases involving minority children. Hearings may strengthen the fact-finding process by encouraging clinicians to make a more considered initial diagnosis and to place less reliance on tests and techniques that have not been validated with respect to minority group children.

A second concern is that the availability of formal proceedings might discourage special education personnel from making any but the most obvious placement decisions for fear of a professionally embarrassing reversal at a hearing. This risk seems far less serious than the harm that could be caused by misplacement.

A third concern is that the hearing process may cause an atrophy of internal educational initiative in vital areas. If left to their own devices, it has been argued, special education administrators, who best know both the needs of the children and the resources of the system, would eventually do a better job than the courts. In Goldberg v. Kelly the dissenters raised a similar argument that the Court should not act because the administrative agency involved was about to issue a ruling that would adequately meet the needs of all parties. But, as one commentator has pointed out, the agency dragged its feet on promulgation of the rule for several months and did not seem committed to the remedial procedures. Special educators also have moved slowly in changing placement practices even after the legal problems have been made clear. For example, an EMR placement suit recently reopened in California alleges that a school district is not following court-ordered EMR hearing procedures. In another example, special educators in Arizona continued to administer IQ tests written solely in English to Guadalupe Indian children, who spoke little or no English, months after a case challenging similar practices toward Mexican-American children was first instituted in California, despite the wide publicity that the case received in

175. See notes 1-5 supra and accompanying text.
176. There is other support for this conclusion. A study of 378 eleven-year-old children in EMR classes in the Philadelphia area, which used multiple criteria in the evaluative process, indicated that 25 per cent were misplaced. Garrison & Hammill, supra note 47, at 19.
178. 397 U.S. at 282-83. The proposed HEW regulation was, in fact, more generous than the Court's mandate in certain respects. It assured that welfare payments would continue until a statutory fair hearing took place, and the regulation's hearing included certain safeguards not demanded by the Court.
educational literature and despite the obvious unfairness of the testing procedure. Only after court review was sought in Arizona did the practice finally end. Thus, recent experience belies any optimism that the self-improving impulses of the administrative process will create procedural safeguards in the area of special education without court review.

Because the students' interests seem to outweigh the disadvantages to the school system of holding a hearing, it seems probable that procedural protections will be required for minority children facing placement into EMR classes. To say that the due process clause is applicable, however, does not necessarily mean that a full trial-type hearing is constitutionally required. The Supreme Court generally requires that the affected individual be provided, at the minimum, with a "meaningful" opportunity to have the crucial issue heard. In judging the adequacy of procedures, the courts consider "[t]he precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, . . . and the balance of hurt complained of and good accomplished . . . ." The essential and unanswered question is how much "process" is "due"—when and how elaborate must the hearing be.

With regard to the question of timing, there seems to be almost a general presumption that one who is constitutionally entitled to be heard should be heard before a drastic change in status occurs. Exception is made in those emergency situations where immediate action is required. In the present context, to the extent that a delay engendered by a hearing keeps the suspected mentally retarded child in the regular classroom, whatever effect his presence has in slowing down the "regular" children for this additional period of time is likely to be negligible. Therefore, there is no emergency present in the EMR labeling-placement context, and a hearing before transfer to an EMR class is appropriate.

Assuming for the moment that an adversary hearing is required at some point before EMR placement, it must be determined whether an adversary hearing is constitutionally required prior to the administration of an IQ test in order to determine if there exists sufficient evidence to warrant the administering of the test to a particular child. There is strong evidence that once a child is tested and scores in the EMR range, the regular teacher, aware of

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185. See, e.g., North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (action allowed before constitutionally required hearing where food was about to spoil).
his supposed handicap, tends to treat him accordingly, even if he is not placed into an EMR class. On balance, however, this harm is not sufficient to justify the requirement of an adversary hearing at this point. Such a requirement would result in the novelty of two full hearings; even in the area of criminal law, where the strictest due process safeguards are required, there is no requirement of an adversary hearing on the question of whether or not the state may employ a particular investigative measure in a criminal case.

In the criminal law field, however, due process does require a nonadversarial review of the existing evidence by an impartial tribunal before the police and prosecutorial authorities may engage in certain “drastic” evidence-gathering measures, such as a physical search of premises or wiretapping. The existing evidence must demonstrate that there is “probable cause” to believe that the evidence sought will be found at the place to be searched or “bugged.” With respect to regulatory searches, such as fire, health, or safety inspections, strict “probable cause” is not required, but some evidence short of this must be reviewed by an impartial tribunal before such a search may be conducted.

It is possible that an analogy can be drawn between the criminal investigative process of a search and the EMR diagnostic process of IQ testing; both are “searches” that involve inherent dangers. It can thus be argued that if due process requires a nonadversarial review of the existing evidence by an impartial tribunal before authorities can engage in the former search, then due process should require the same procedure for the analogous latter search. The pre-IQ testing evidence in the EMR setting is the data derived from personality tests, social adjustment tests, medical examinations, family background examinations, and personal observations by the diagnostician. The standard for granting permission to administer an IQ test could be something less than “probable cause” (the standard used in fire, health, and safety inspections). The impartial reviewing body could be the same one that reviews the actual placement decision. As in a criminal search case, the hearing need not be a full-blown adversarial trial.

It must be pointed out, however, that the requirement that police authorities apply for a search warrant derives from the fourth amendment, which “secures” persons “against unreasonable searches and seizures” and provides, in effect, that a search or seizure is unreasonable unless conducted upon a warrant based upon “probable cause” and obtained from a judicial officer who reviews the existing

186. See note 43 supra and accompanying text.
evidence. Nevertheless, Goldberg v. Kelly lends support to the proposition that the due process clause may require more than one type of hearing in a noncriminal context. In Kelly, regulations of an administrative agency (HEW) required a hearing after welfare benefits had been terminated. The Court held that a hearing must be held before the benefits could be terminated and thus in effect required a due process hearing before and a statutory hearing after termination. The court stated, however, that the preliminary hearing was required only if benefits were terminated prior to a hearing.

In the welfare cases harm to the individual can be avoided by delaying termination of benefits. Therefore, only one hearing need be required. In the EMR situation, however, harm may result solely from the administration of the IQ test, because the regular teacher, if aware of the student's low score, may treat him differently. Because of this initial, unavoidable harm it could be argued that Kelly and the criminal cases require two hearings in this situation, the first to be of the limited, nonadversarial type.

Since the due process safeguards that may be required before an IQ test is given have been examined, the remaining question is what safeguards are constitutionally mandated in the hearing required prior to placement. As a norm for this determination, the safeguards outlined by the Supreme Court for the pretermination hearing required in Kelly will be examined. The welfare hearing is chosen as a model because in this area the Supreme Court has extensively cataloged the due process requirements in a specific, civil context.

The first consideration is notice of the impending EMR placement. In dealing with welfare termination, the Supreme Court found that seven days' notice was sufficient, "although there may be cases where fairness would require that a longer time be given." A welfare recipient is likely to have most of the rebutting evidence readily at hand; the recipient himself would be the source of most of it. In the EMR placement context, however, the typical parent will have no familiarity with the type of evidence needed to contest the placement decision, nor would such evidence be readily available. A period of notice greater than seven days, it seems, could be required.

As to form of notice, both a letter and personal conference with a school official should be required. The parent of a minority child threatened with EMR placement, like a welfare recipient, is likely

189. U.S. Const. amend. IV.
191. 397 U.S. at 267. If the termination were delayed until after the statutory hearing, then the preliminary hearing would not have been required. 397 U.S. at 267 n.14.
192. 397 U.S. at 268.
to suffer from poor education and a lack of awareness. As the Supreme Court recognized in *Kelly*, the combination of a letter and conference “is probably the most effective method of communicating” with such persons.193

The right to counsel in the welfare context was limited to a right to be represented if the individual chose to retain counsel.194 Since the Supreme Court has never extended the right to appointed counsel to a situation where physical incarceration was not a possibility,195 due process probably does not require a right to appointed counsel in the EMR hearing, despite the figurative incarceration involved in EMR placement.

Due process might demand, as in *Kelly*,196 that the parents have a right to a personal appearance to state their position, rather than being limited to written submissions. As the Court recognized in *Kelly*, “[w]ritten submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance.”197 Moreover, the parents should, possibly, have the right to bring in the child, for the child himself will often be the best evidence that he is not retarded.

The requirement of an impartial hearing officer or body is the very essence of a meaningful opportunity to be heard. This principle is easier to state than apply, however, and three alternatives readily present themselves. One would require a court to be the hearing body.198 The second would require the school authorities to employ a hearing officer or officers whose sole function is to decide contested EMR placement cases.199 The third would allow the school authorities to choose competent hearing officers from among school personnel who are as far removed from the case as possible.200

The Court intimated in *Kelly* that not every prior involvement with the case would disqualify an individual from hearing a contested welfare case.201 Such language notwithstanding, it could be argued that regular school employees should have no part in the

193. 397 U.S. at 268.
194. 397 U.S. at 270.
195. See K. Davis, *supra* note 170, § 8.08, at 205-06.
196. 397 U.S. at 269.
197. 397 U.S. at 269.
201. The Court in *Kelly* found that the hearing body should be impartial but refused to apply a rigid rule of separation of functions that would disqualify every member of the agency staff who had some prior involvement with the case. 397 U.S. at 271.
hearing process. Justice Jackson once observed, “Men are . . . often bribed by their loyalties and ambitions . . . .” 202 Regular school personnel have vested interests in such matters as the validity and efficiency of the testing program. Moreover, they must continue to maintain retarded classes in order to receive the school district’s share of special funds for the handicapped. School personnel may also feel an obligation to the “normal” or “fast” students; they might not want to simplify the course content so as to enable the “slow” children to learn. 203

Although specially employed hearing officers would be less likely to be biased than regular school personnel, given the potential harm involved from misplacement it is submitted that due process might permit such special personnel to serve only at the hearings preliminary to giving an IQ test. Hearing officers, who would doubtless be psychologists or special educators, may be subject to bias in that they might hope to move from that position to a higher one within the school system. Therefore, only an outside tribunal could meet a stringent standard of impartiality. But Kelly, which dealt with an area of governmental disbursement that has been closely scrutinized by the Supreme Court, 204 did not impose these more stringent hearing requirements, so their application to the EMR setting may be found to be unwarranted.

As to a right of discovery, the Court was not very explicit in Kelly, although it did cite language from an earlier case that required disclosure. 205 In the EMR setting this may mean that due process requires that the parents or their representatives have an opportunity to examine all documents and records prior to the hearing, as well as during its course. Without such an opportunity, in many instances the presentation of the child’s case could be so hampered as to make the hearing almost meaningless.

In Kelly it was held that the welfare recipient had a right to confront and cross-examine adverse witnesses. 206 A recent Supreme Court decision, however, has held that the denial of a claim on the basis of reports by physicians who have examined a claimant for social security disability benefits will be upheld notwithstanding the absence of

203. In addition, as the court recognized in Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501, 519-20 (C.D. Cal. 1970), “evidence shows that at least at some schools there is a tendency among some . . . school personnel to assume that Negro students, particularly Negroes of poor socio-economic backgrounds, will achieve poorly and to make low assignments accordingly.”
206. 397 U.S. at 271. The Court did not appear to require a verbatim transcript of testimony.
cross-examination.207 This case may be distinguished from the instant situation because the Court relied on the fact that the claimant had a right under the Social Security Act208 to subpoena the physicians who made the reports but had failed to do so within the prescribed time.209 In the EMR context, cross-examination gives the parent and child the opportunity to contest the diagnosis in a meaningful way.

Finally, the Court in *Kelly* required that the decision maker state the reasons for this determination and indicate the evidence on which he relied; his statement did not, however, need to "amount to a full opinion or even formal findings of fact and conclusions of law."210 This requirement should also apply to EMR proceedings.

The foregoing discussion of a child's right to a hearing before placement into an EMR class has been predicated upon the assumption that commitment to EMR classes in a particular school system is involuntary. However, when the process of commitment is voluntary—that is, based upon parental consent—the traditional reasons for the due process safeguard of a hearing seem to vanish.

However, in many cases the "consent" of the parent or guardian may not be fully informed or meaningful.211 Although some educational systems undoubtedly require a school official to attempt to explain the import of the decision to place the child in the retarded class, it is questionable whether many parents or guardians have the education or perception to comprehend the immediate and long-range implications of this decision. Second, even in those systems where an explanation is required before consent, the official charged with this task might not divulge the kind of exhaustive, objective data needed by the parent in order to make a knowledgeable decision. Third, even where some explanation is required, it might be given only after the school authorities have concluded from IQ scores and other factors that the child is in fact retarded and should be placed in the retarded class. Given the awe with which many poor and minority parents view school authorities, their limited education, and the language difficulties especially present when dealing

210. 397 U.S. at 271.
211. In dealing with guilty pleas, the Supreme Court has stated: "[T]o be valid such a waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." Von Moltke v. Gilles, 332 U.S. 708, 724 (1947). This standard probably applies to waivers of consent in noncriminal cases. See, e.g., Overmyer Co. v. Frick Co., 405 U.S. 174, 185-86 (Blackmun, J.), 188-89 (Douglas, J., concurring) (1971).
with Mexican-American parents, grave doubts exist as to whether a knowledgeable and meaningful consent can really be given even after an explanation.

If consent is required for the placement of children into EMR classes, and the parents later contest that consent in court on the ground that it was not knowingly and intelligently given, the burden of proof might shift to the school authorities to demonstrate the constitutionality of the consent. Precedent is found in Swarb v. Lennox,\(^\text{212}\) where the court considered a study that implied that ninety-six per cent of the persons who had signed consumer contracts containing confession-of-judgment clauses had incomes under $10,000. Because of this study, the court shifted the burden of proof to the creditors to demonstrate that this class of consumers understood that such clauses waived their constitutional right to a trial and authorized their alleged creditors to “confess” the alleged debt.\(^\text{213}\)

Taking the consent issue even further, an argument can be made in the instant case that the interests of the parent or guardian may be entirely different from the interests of the minor child and that due process, therefore, requires an evaluation of the necessity of making the stigmatizing placement decision independent of parental consent. One example of how the interests of the child and parent may diverge is the parent’s possible interpretation of the child’s failure to perform well in school as a failure on his part as a parent. Such a parent may very well wish to have his child officially labeled mentally retarded because this labeling relieves the parent of his own guilt feelings; it transfers the “blame” to the child or to fate. The parent may also have an interest adverse to that of the child in a situation where the school authorities exert considerable pressure, either overtly or covertly, to compel the parent to consent to the placement for “the best interest of the child.” The child has an interest in an uncoerced and informed decision, while the parent—though he may rationalize his consent as in the child’s best interest—may be primarily concerned with cooperating with school officials who, to the parents, are authority figures.

Similar considerations have led to the recognition of parental inability to represent the child in another area of the law. Where the child has a cause of action for personal injury, selfish concerns may motivate a parent to accept a settlement. Therefore, the court will not allow the parent to serve as the child’s representative in handling the claim.\(^\text{214}\)

The final stage in the commitment process at which procedural safeguards may come into play occurs after a child has actually been


\(^{213}\) 314 F. Supp. at 1100-01.

placed into an EMR class. Because of the unreliability of methods used to determine mental retardation and because of the importance of the individual interests involved, the minimum that due process may require is periodic review of the initial placement decision. In Mills v. Board of Education, a federal district court so held.

IV. SUGGESTED SOLUTION

Although it is often stated that bias cannot be eliminated from IQ tests, there are practical ways to minimize their unreliability and thus meet possible constitutional objections to their use. For example, a court could, without impairing an EMR placement process, require that (1) whatever tests are given be administered in the child's primary language; (2) future tests be developed so as to minimize bias; (3) examiners of the child's race be used; (4) children who score higher than two standard deviations below the given test's norm not be placed into EMR classes unless there is cultural and adaptive behavior to supplement the test results; (5) before any placement of a minority child occurs because of low test scores there be an examination of the child's developmental history, cultural background and scholastic achievement; (6) there be a nonadversarial hearing before test administration and an adversarial hearing before placement; (7) parents consent to the placement in writing, and the nature of their consent be a subject of inquiry at the adversarial hearing; (8) there be an annual review of the capabilities of children placed into EMR classes. In fact, California has already adopted and Michigan is in the process of adopting similar schemes. Although not a panacea, these procedures, in due process terms, are reasonably related to proving the appropriateness of EMR placement for a minority child; in equal protection terms, these procedures are the most precise and least onerous means of placement. They do not institutionalize the misplacement of minority children as do the current procedures, and, moreover, they furnish minimum procedural safeguards.