RETHINKING "BILL 82": A CRITICAL EXAMINATION OF MANDATORY SPECIAL EDUCATION LEGISLATION IN ONTARIO

*William F. Elkin**

I. INTRODUCTION

On 2 December 1980 the Ontario Legislature gave final reading to The Education Amendment Act, 1980,[1] commonly known as "Bill 82", which received Royal Assent on 12 December 1980. The Act is an interesting and complex piece of legislation relating to the identification of "exceptional children" and the provision of "special education services"[2] in this province. The declared purpose of the legislation is to "ensure that every exceptional pupil in the province of Ontario receives an education suited to his or her needs and abilities"[3] (although the Act itself is not expressed in these generous terms). "Bill 82" was designed to remedy deficiencies in the Education Act, 1974,[4] which made the provision of educational services to exceptional children optional or permissive. Under the 1974 Act any school board could, if it wished, make available to exceptional students some form of special education program. The 1980 Act does away with the permissive status of special education and places upon every board of education in the province a moral responsibility and, more importantly, a legal duty to provide special education services.[5]

"Bill 82" is claimed by its proponents to be a major victory for children (and for the parents of children) with severe physical or mental disabilities in that it ensures unrestricted access for all school-aged children to a publicly supported education regardless of a pupil's handicap. In fact, "Bill 82" *does* represent a significant legal advancement for severely disabled children in Ontario for two reasons. First, it places a legal duty on all school boards to accept all exceptional

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* Faculty of Education, Queen's University.

[1] S.O. 1980, c. 61 (*amending* S.O. 1974, c. 109). *Now* R.S.O. 1980, c. 129.

[2] Specific definitions of "exceptional" children and "special education services" as provided for in the Act can be found at p. 000 *infra*.

[3] A GUIDE TO BILL 82: A BILL ON SPECIAL EDUCATION (Ontario Ministry of Education 1980).

[4] S.O. 1974, c. 109.

[5] S. 2 (*adding* subs. (1*a*) to s. 8 of the principal Act). *Now* R.S.O. 1980, c. 129, subs. 8(2).

children upon presentation by the parent: a severe handicap is no longer sufficient reason for turning away such children. This policy is usually referred to as universal access or, to employ the less elegant language of the literature on exceptional children, as "zero reject". Secondly, the legislation attempts to do more than guarantee that a disabled student gets into school — it tries to ensure that while in school he or she will receive something worthwhile, that is, "an education suited to his or her needs and abilities".[6] This has the effect of decreasing the discretion of school authorities by making them legally accountable for what is done to and for the child in school.

"Bill 82" appears, at first blush, to be a major advancement in the movement for "normalization", "integration" or "mainstreaming" (as it is variously called) of handicapped or disabled children. Children who would once have been excluded from schools are now to be legally assured access and the schools' immunity from judicial criticism has been diminished. All in all, these would seem to represent major and laudable accomplishments coming, appropriately enough, during the "International Year of the Disabled".

There is no doubt that "Bill 82" does represent a progressive policy as it applies to severely disabled children. However, even if it can be supposed that the motivation of those responsible for the legislation was a genuine desire to assist handicapped children in obtaining a worthwhile educational experience, The Education Amendment Act, 1980 is not without serious defects, many of which have escaped the attention of proponents of the Act and of Ministry of Education officials. Perhaps the packaging and presentation of the legislation as a vehicle for broadening the educational opportunities of the disabled has prevented many of the less attractive provisions of "Bill 82" from receiving wide public attention and militated against serious criticism and scrutiny of these provisions in the legislature. From a civil liberties perspective, the implications of "Bill 82" are dramatic and, perhaps, alarming. Briefly, there are three major criticisms of the Act which warrant attention.

First, through the process of identifying and placing *exceptional* children, "Bill 82" will impose upon *all* school-aged children in this province a regime of sorting and selection — all children will be subjected to various screening procedures involving standardized testing, teacher observations and judgments, and "informal measures".[7] The legislation makes no provision for parents to opt out of the variety of evaluations and assessments which will be performed on every child (although it does provide mechanisms by which a parent may appeal or request a review of a placement decision). It is contended that the mandatory imposition of early identification procedures represents a serious and unwarranted intrusion into the lives of school children and parents alike.

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[6] A GUIDE TO BILL 82: A BILL ON SPECIAL EDUCATION, *supra* note 3, at 1

[7] I. Davidson, H. Silverman & M. Hughes, Learning Abilities: Early Identification and Intervention Practice in Ontario, at 18.

Secondly, "Bill 82" threatens seriously to restrict the rights of parents and children in this province to exercise discretion in making educational choices and decisions. The same provisions which call for early identification of student exceptionalities also prescribe "ongoing" assessment, monitoring and placement or programming of individuals. Traditionally, parents and students in Ontario have enjoyed a degree of latitude in making important personal decisions about school programs at critical junctures in a student's educational biography. "Bill 82" represents a significant change from this policy for it allows a school principal and special education committees to make continuous decisions regarding the appropriateness of an educational program and about the needs of individual students. This aspect of the legislation has been virtually ignored in the popular press and in the legislature but has not escaped the attention of school authorities and teachers, many of whom see it as a particularly attractive provision of the legislation. Under the 1980 Act, teacher and school board authority to place individuals is greatly enhanced, while parental and student discretion and the ability to resist or refuse ministerial prescriptions of appropriate programs is dramatically diminished.

Finally, "Bill 82" may represent a major invasion of the rights of working class parents and students to obtain equality of educational opportunity in Ontario. The best available Canadian and American data on the identification of learning exceptionalities or problems demonstrate a disproportionate representation of children of lower socio-economic status in special education programs.[8] More importantly, the efficacy of such programs in remedying educational or behavioural differences has been seriously challenged. Many thoughtful observers argue that such programs, although well-intentioned, have the unwitting effect of creating negative labels and self-fulfilling prophesies, thus crystallizing and exacerbating differences among groups within the school. The end result is a decline in educational attainment for negatively labelled groups and a consequent restriction of social mobility in the school and society. Like so many well-intentioned efforts in public education, the provisions of "Bill 82" may produce an iatrogenic effect — the cure may be much worse than the illness.

It is the aim of this paper to elaborate the criticisms of "Bill 82" identified above and to explore further some of the potentially serious pitfalls of the legislation. More specifically, the goals of this research are:

(1) to outline the major provisions of The Education Amendment Act, 1980 with particular attention to the aims of the legislation, the policies and procedures for identification and placement, and the provisions for review and appeal;
(2) to discuss the implications of "Bill 82" for civil liberties in Ontario with reference to the impact of the legislation on student and parental discretion in educational decision-making; and

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[8] *See* notes 54-60 and accompanying text *infra*.

(3) to elaborate on the danger in the Act of social class bias and to discuss the legal implications of this potential bias, drawing on American case law related to student classification in public schools.

II. "BILL 82" — AN OVERVIEW

In order to gain a clear understanding of the implications of "Bill 82", it is important to examine the major provisions of the legislation including the goals of the legislation and the definitions of key terms. As previously noted, the objectives of the 1980 Act are to provide every exceptional child with an appropriate education and to assure universal access to the public school system. Section 2 of "Bill 82" sets out amendments to the 1974 Act which express the general intent and purposes of the legislation, and adds to section 8 of the principal Act the following:

> (1*a*) The Minister shall ensure that all exceptional children in Ontario have available to them, in accordance with this Act and the regulations, appropriate special education programs and special education services without payment of fees by parents or guardians resident in Ontario. . . .[9]

In order to meet the objectives of the legislation, the powers of the Minister under "Bill 82" include the power to make regulations:

> governing the provision, establishment, organization and administration of,
> (i) special education programs,
> (ii) special education services, and
> (iii) committees to identify exceptional pupils and to make and review placements of exceptional pupils.[10]

as well as the power to determine the date by which the services and programs described in the legislation will be in place and operating.

III. DEFINITIONS OF KEY TERMS

Definitions of the central terms of the legislation are set out in section 1 of the 1980 Act. The concept of "exceptional pupil" is seen to encompass five distinct categories of disability. Under the new legislation an "exceptional pupil" is defined as:

> a pupil whose behavioural, communicational, intellectual, physical or multiple exceptionalities are such that he is considered to need placement in a special education program by a committee established under subparagraph iii of paragraph 5 of subsection 1 of section 10 [of the principal Act]. . . .[11]

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[9] *Now* R.S.O. 1980, c. 129, para. 10(1)5.

[10] Subs. 3(1) (*repealing and replacing* para. 10(1)5 of the principal Act). *Now* R.S.O. 1980, c. 129, para. 10(1)5.

[11] Subs. 1(1) (*adding* para. 20*a* to subs. 1(1) of the principal Act). *Now* R.S.O. 1980, c. 129, para. 1(1)2.

A "special education program" according to The Education Amendment Act, 1980, is

> in respect of an exceptional pupil, an educational program that is based on and modified by the results of continuous assessment and evaluation and that includes a plan containing specific objectives and an outline of educational services. . . .[12]

The term "special education services" is defined as:

> facilities and resources, including support personnel and equipment, necessary for developing and implementing a special education program.[13]

Thus, under "Bill 82", pupils who are identified as being significantly different from other students in terms of behaviour, communication, intelligence, physical factors, or some combination of these disabilities, will have made available to them special programs and special services. While it is not expressly set out in the legislation, one may infer that the goal of such programs and services is to remedy the problems of the exceptional child.[14]

The procedures by which children are to be classified as exceptional are also spelled out in the legislation. The 1980 Act declares that in order to carry out the aims and intention of the legislation, the Minister of Education shall

> require school boards to implement procedures for early and *ongoing* identification of the learning abilities and needs of pupils, and shall prescribe standards in accordance with which such procedures be implemented. . . .[15]

It is interesting to observe that the identification procedures called for in the 1980 Act do not address the problem of locating *disabilities* but, rather, of assessing learning *abilities* and needs. The significance of this particular clause will be explored further in the examination of the implications of "Bill 82".

Classification procedures are detailed further under the 1980 Act, empowering the Minister to issue regulations which

> *define* exceptionalities of pupils, and *prescribe classes, groups or categories* of exceptional pupils, and *require* boards to employ such definitions or use such prescriptions as established under this clause.[16]

It should be noted that by virtue of subsection 8(1*a*) and other sections in the amended Act, broad powers are conferred upon the Minister to

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[12] Subs. 1(1) (*adding* para. 62*a* to subs. 1(1) of the principal Act). *Now* R.S.O. 1980, c. 129, para. 1(1)63.

[13] Subs. 1(1) (*adding* para. 62*b* to subs. 1(1) of the principal Act). *Now* R.S.O. 1980, c. 129, para. 1(1)64.

[14] LEG. ONT. DEB., 31st Leg., 4th Sess., No. 115, at 4392, 4394 (1980) [hereafter cited as DEBATES].

[15] S. 2 (*adding* para. (1*a*)(*a*) to s. 8 of the principal Act). *Now* R.S.O. 1980, c. 129, para. 8(2)(*a*) (emphasis added).

[16] S. 2 (*adding* para. (1*a*)(*b*) to s. 8 of the principal Act). *Now* R.S.O. 1980, c. 129, para. 8(2)(*b*).

develop detailed regulations governing the implementation of the Act. These regulations constitute a kind of secondary legislation. As "Bill 82" is such new legislation, many of the regulations relating to the Act have been issued only recently while still others remain in the validation stage and have not yet been approved and filed.[17]

The regulations governing special education identification, placement and review committees and appeals, issued 21 August 1981,[18] elaborate the early and ongoing identification procedures and set out, in considerable detail, the process by which a child will come to be known as "exceptional". Only children classified by a special education committee will receive the "benefits" of the legislation (the provision of special programs and services), but all students in the province who attain school age will be subject to the early identification procedures outlined in the new paragraph 8(1*a*)(*a*).

The Ministry of Education has been encouraging the development of early identification procedures for a number of years and more recently has required that

> each board in the province shall approve a specific procedure to determine the child's learning needs and abilities when the child is first enrolled or at least by the time the child is beginning a program of studies immediately following kindergarten.[19]

These early identification screening procedures have yet to be specifically spelled out in the regulations accompanying the 1980 Act. According to the Ministry of Education, these regulations are presently in the validation stage. Most boards of education in the province do have some form of early identification procedures in place,[20] although these procedures are not nearly as comprehensive in sweep as those that will be mandated under "Bill 82". Existing identification procedures generally involve a variety of instruments and techniques including standardized testing, teacher rating scales and inventories, and "informal measures".[21]

The procedures specified by the Ministry of Education in anticipation of final approval of the regulations to accompany "Bill 82" include confidential information gathering in the form of a health and/or social history, parent-teacher interviews concerning the child's background and multi-disciplinary assessments (including health, behaviour, psychological and physical function assessments), as well as educational assess-

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[17] The regulations governing special education which have been approved to date are: O. Reg. 553/81, "Special Education Programs and Devices", *amending* R.R.O 1980, Reg. 274; O. Reg. 554/81, "Special Education Identification Placement and Review Committees and Appeals". A regulation outlining provisions with respect to the establishment of Regional Tribunals is presently in preparation.

[18] O. Reg. 554/81.

[19] EARLY IDENTIFICATION OF CHILDRENS' LEARNING NEEDS (Ontario Ministry of Education, Memorandum 1978-79:15, 27 Dec. 1978).

[20] I. Davidson, H. Silverman & M. Hughes, *supra* note 7, at 18.

[21] *Id.* at 16.

ments administered by a teacher, including measures of language and numerical proficiency and achievement.[22] All information gathered is to form part of the child's permanent record, a document known in this province as the Ontario Scholastic Record or O.S.R. card.

It is through this comprehensive program of screening that some children will be identified as "at risk" or "high risk" cases. Once a child has been identified as exceptional by a teacher, a referral is made to the principal who may then refer the child to a Special Education Identification, Placement and Review Committee for assessment. The principal must provide the parent in such a case with written notice of the decision to refer the child to the committee. The function of the committee is to identify formally or label the child as an exceptional pupil and to determine the appropriate placement for the child. In assessing and classifying the child, the committee must obtain an educational assessment of the child (most probably the O.S.R. card) and may request, with the written permission of the parent, a psychological and health assessment. The committee may also interview the pupil (with the consent of the parent) and is expected to interview the parent. Final responsibility for making a determination as to whether the child is exceptional rests with the committee.

Under The Education Amendment Act, 1980, two major categories of special children are defined. The first, and by far the largest classification, is the "exceptional pupil",[23] while the second category of student is referred to as "hard to serve".[24] Paragraph 34(1)(*b*) of the amended Act defines a "hard to serve child" as a "pupil who . . . is determined to be unable to profit by instruction offered by a board due to a mental handicap or a mental and one or more additional handicaps. . .". In contrast to "exceptional pupils so found", whose identification and placement are the focus of this paper, "hard to serve" students are severely disabled children who will be excluded from the school entirely, once deemed unable to profit from instruction and for whom alternative arrangements will be made (usually custodial care in another type of institution). In point of fact, there will probably be only a small number of hard to serve students. This distinction is notable, for, as will be discussed next, the provisions for parents to criticize the classification and placement of a child are dramatically different depending on whether a child is deemed "exceptional" or "hard to serve".

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[22] EARLY IDENTIFICATION OF CHILDRENS' LEARNING NEEDS, *supra* note 19, at 1.

[23] Subs. 1(1). *Now* R.S.O. 1980, c. 129, para. 1(1)21.

[24] S. 7 (*repealing and replacing* para. 34(1)(*b*) of the principal Act.) *Now* R.S.O. 1980, c. 129, para. 34(1)(*b*).

IV. APPEAL PROCEDURES UNDER "BILL 82"

This paper has stressed the fact that parents and students do not have the option of refraining from participation in the early identification evaluation procedures which will be carried out on all school-aged children. It may be asked, then, what sort of recourse or remedy a parent has who feels his or her child has been incorrectly identified and placed.

Under the legislation and accompanying regulations there are substantial rights, including judicial review, for parents of children who fall into the "hard to serve" category. This is perhaps because the number of children so classified is likely to be small and because the policy of excluding such children from schools is so severe. The same significant rights of appeal, however, do not accrue to students who have been found to be "exceptional". Still, a parent may appeal a placement decision (either inclusion or exclusion from the category "exceptional") under subsection 34*b*(1) of The Education Amendment Act, 1980:

> Where a parent or guardian of a pupil has exhausted all rights of appeal under the regulations in respect of the identification or placement of the pupil as an exceptional pupil and is dissatisfied with the decision in respect of the identification or placement, the parent or guardian may apply to the secretary of a Special Educational Tribunal for a hearing for leave to appeal to a regional tribunal established by the Minister under subsection 2 in respect of the identification or placement.[25]

The rights of appeal referred to in subsection 34*b*(1) which a parent must first have exhausted before invoking the subsection are those rights spelled out in Ontario Regulation 554/81, "Special Education Identification Placement and Review Committees and Appeals". These procedures include an initial review and discussion with the committee making the determination, and then, at the request of the parent, referral to an Appeal Board appointed by the board of education involved.

A parent who has received a written notification by an Identification and Placement Committee of its determination that their child is exceptional and in need of placement may, under the regulations, request a meeting with the committee to discuss its decision. A parent seeking such a discussion must first give written notice to the school principal involved. As a consequence of this discussion, a committee may vary or reaffirm its decision, but, in either case notification of the final decision must be sent to the board of education.

A parent who is not satisfied with the decision of the committee may then submit a written notice of appeal to the board of education, which must then appoint an Appeal Board. Initiating appeal procedures serves to stay the implementation of a committee's determination regarding placement. However, if a parent refuses to consent to the placement recommended by a committee or fails to give notice of appeal (or fails to

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[25] *Now* R.S.O. 1980, c. 129, subs. 36(1).

give notice within the specified time limit), the board of education "may direct the appropriate principal to place the exceptional pupil as recommended by the committee and to notify a parent of the pupil of the action that has been taken".[26]

Where an appeal is brought in respect of a pupil, the Appeal Board will arrange a convenient time and place for a discussion of the disagreement which shall be conducted in an informal manner. At the discretion of the Appeal Board, any persons having relevant information to contribute to the discussion shall be invited to attend. The Board has the further discretion to determine whether specific information shall be received and considered by the Board and to determine when the Board shall adjourn the discussion. The Appeal Board may dismiss the appeal, refer the matter back to the original committee or set aside the committee's decision.

The composition of the original committee is noteworthy. It is to consist of three members, all appointed by the board of education, one of whom shall be a supervisor or principal and none of whom may be members of the board or trustees. The composition of the Appeal Board is slightly different. Again, it is a three member board whose chairperson is to be appointed by the board of education and one of whose members must have the status of supervisory officer. The final member of the Appeal Board may be a member of the local community or a member of a local association and may be nominated by the appealing parent.

The regulations call for a "discussion of the disagreement in an informal manner".[27] The regulations provide the Appeal Board with discretion over who may appear before the Board, and over adjournment of the proceedings. Parents may not be represented by legal counsel, may not call witnesses, cross-examine witnesses nor subpoena documents — in short, there are few procedural safeguards to ensure a fair hearing for a parent. In fact, the procedure is not a hearing in any legal sense, but rather an informal discussion.

Finally, where a parent has exhausted all appeal procedures under the regulations but remains dissatisfied with the decision of the Appeal Board, application can be made under subsection 34*b*(1) of the amended Act to the Special Education Tribunal (a standing tribunal established under the Act) for permission to appeal to a regional tribunal (an *ad hoc* tribunal established by the Minister to deal with final appeals in respect of identification and placement).[28] The powers of both the Special Education Tribunal and regional tribunal include the power to dismiss the appeal or grant the appeal, and make such order as it considers necessary. The decision of either tribunal is final and binding upon all parties.

The regulations governing the practice and procedures of the tribunal have not yet been filed but, judging from the provisions of the

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[26] O. Reg. 554/81, subs. 6(2).
[27] O. Reg. 554/81, subs. 7(8).
[28] *Now* R.S.O. 1980, c. 129, subs. 36(1).

Act, parents should not expect to find elaborate mechanisms of due process enshrined in the regulations. Whereas the Act makes provision for the award to parents of costs incurred in connection with the referral to and hearing by a tribunal under the "hard to serve" category, no such provision is made in the Act governing appeals of the "exceptional" category. It can be inferred from this that in all likelihood parents will not be able to be represented by legal counsel in their appeal. Subsection 34(15)[29] of the amended Act, governing "hard to serve" students, provides that a pupil, his parent or the school board may apply for judicial review under The Judicial Review Procedure Act, 1971,[30] and that the determination of the "hard to serve" tribunal may be set aside by the courts. In stark contrast to this provision, section 34*b*, governing appeals of "exceptional" students, contains a kind of privative clause:

> (5) The decision of a Special Education Tribunal or a regional tribunal under this section is final and binding upon the parties to any such decision.[31]

In the opinion of Professor J.A. Clarence Smith, of the University of Ottawa Faculty of Law, the phrase "shuts out the courts without actually saying so".[32]

The rights of parents under "Bill 82" to appeal committee decisions concerning the identification and placement of a child appear to be, at best, dubious. What is clear, however, is that the appeal process will be awkward, protracted, almost exclusively board-controlled and, perhaps, expensive for many parents. Although one can only speculate at the moment, as no cases have yet gone to appeal, there should be serious concern that the appeal rights guaranteed to parents in the legislation may prove to be illusory. It is a sad comment from a civil libertarian perspective that those unsatisfactory appeal procedures which do exist were wrung from the government by the opposition during heated debates[33] in the legislature. The existing appeal mechanisms were seen by the government as a major compromise and concession to "parents' rights" advocates. The government, when first drafting the legislation, was opposed to including any such rights.

V. Implications of "Bill 82" — A Civil Libertarian Perspective

A. *Implications of Identification and Classification*

One of the first and most critical implications of "Bill 82" is the imposition of identification and screening procedures on all children in

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[29] *Now* R.S.O. 1980, c. 129, subs. 34(15).

[30] S.O. 1971, Vol. 2, c. 48. *Now* R.S.O. 1980, c. 224.

[31] *Now* R.S.O. 1980, c. 129, subs. 36(5).

[32] Clarence Smith, THE EDUCATION AMENDMENT ACT, 1980, 13 OTTAWA L. REV. 199, at 207 (1981).

[33] *Id.* at 206.

the province, procedures out of which parents may not opt. Making early identification screening compulsory is problematic for a variety of reasons, not the least of which is that even experts in the field of special education are not certain how to define or measure, let alone remedy, learning exceptionalities. Almost every definition of an exceptional student tends toward tautology[34] (including that in the legislation). Exceptional children are often defined as those who need special education while special education is described as a program made available to exceptional children. Including in a definition the notion that an exceptional child "deviates from the average or normal child"[35] does not save the definition but merely raises the further problem of defining "average and normal".

In the end, all definitions of the exceptional child merely serve as tools for distinguishing among a population of school children for a variety of ends. The goal of such distinctions may be administrative (relating to staffing or funding) or it may be political (pressures from parents for special programs for "gifted" children) or, in the best instances, it may be altruistic (a genuine desire to help children who seem to be different and to need help).

Why professional educators (even those who wish to "help" children) should be interested in sorting and selecting out "exceptional" children from the remaining "normal" population is itself not clear. There is virtually no data to suggest that segregated children learn better in homogeneous groups.[36] In fact, most data on ability grouping suggests that children perform better, both scholastically and socially, when they are not selected out and classified as different.[37] There is, of course, the serious problem of inter-rater reliability in the classification of students as exceptional. Lacking specific and common definitions of what constitutes a particular disability, even highly trained specialists such as psychologists have great difficulty in agreeing on which labels should

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[34] For example, one definition states: "Exceptional children are those who require special education and related services": Kendall, *Developmental Processes and Educational Programs for Exceptional Children*, in THE EXCEPTIONAL CHILD IN CANADIAN EDUCATION — CANADIAN SOCIETY FOR STUDIES IN EDUCATION, 7 Y.B. 13, at 13 (1980).

[35] *Id.* at 14.

[36] W. SCHAFER & C. OLEXA, TRACKING AND OPPORTUNITY 11 (1971). For a more recent assessment of the value of homogeneous ability grouping, *see* A. JENSEN, BIAS IN MENTAL TESTING 719 (1980). Jensen argues that "[r]ecent reviews of the research on the effects of ability grouping come to largely negative or at best ambiguous and noncommittal conclusions."

[37] Howe & Lauter, *How the School System is Rigged for Failure*, THE NEW YORK REVIEW OF BOOKS (13 Jun. 1970). *See also* A. JENSEN, *supra* note 36, at 719. Jensen observes that "[g]rouping into separate classes on the basis of either IQ or achievement test scores not only stigmatizes the pupils in some classes as slow learners, but limits the educational aspirations and opportunities of those children placed in the slow groups, making it still more difficult to catch up or keep up with their age-mates. . . ."

apply and to whom.[38] This problem is greatly compounded when one leaves the field of manifest physical defects and enters the difficult territory of "learning disabilities", "behavioural dysfunction" or even "intelligence" classifications.

Even if it were possible to specify precisely who is exceptional and why, and to obtain absolute accuracy and reliability among classifications, one would still need to ask why one would *want* to classify. There are simply no agreed upon prescriptive implications resulting from the making of a classification. Put differently, there is no evidence that special children learn differently or should be taught differently from other children. Keogh notes:

> [W]ith the possible exception of children with sensory deficits or severe physical conditions, where modification of curricular materials is required to enhance availability of information, there is little evidence that exceptional children learn differently from normal children, or that they require dramatically modified instructional techniques.[39]

When we examine the definition of exceptionality employed in "Bill 82" we note that it is not only physically disabled children who are sought to be identified but also children whose *behaviour* is felt to be exceptional. Interestingly enough, although "Bill 82" appears to speak to the needs of the severely physically or mentally disabled child (and particularly the child who has been denied access to the public schools), the number of such children is surprisingly low. According to Ministry of Education figures there are 1,500 children in Ontario with specific problems and learning handicaps who attend private schools or learning clinics and receive government support.[40] The total number of children in Ontario who do not receive *any* schooling is estimated at 150.[41] These relatively low numbers must be contrasted with the total population of school-aged children in this province which approaches two million, about 1,400,000 of whom are in elementary schools.[42]

Is it conceivable that the government has chosen to impose screening procedures on all school-aged children in this province (at the time of entrance into the system) in order to sort out the relatively low (but in no way insignificant) number of severely disabled children? The simple answer is, probably not. Teachers, principals and administrators alike are much more concerned about the marginal categories of supposed disabilities — categories such as the learning disabled (L.D.)

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[38] W. SCHAFER & C. OLEXA, *supra* note 36, at 14. More recently, *see* Rist, *On Understanding the Processes of Schooling: The Contributions of Labelling Theory*, in POWER AND IDEOLOGY IN EDUCATION, at 292-305 (J. Karabel & A. Halsey eds. 1977).

[39] Keogh, *Social and Ethical Assumptions about Special Education*, in ORIENTATIONS IN SPECIAL EDUCATION (D. Wedell ed. 1975).

[40] Keeton, *Special Education: A Right or Privilege in Ontario?*, 10:3 INTERCHANGE 77, at 83 (1979-80).

[41] *Id.* at 66.

[42] O. HALL & R. CARLTON, BASIC SKILLS AT SCHOOL AND AT WORK, *Occasional Paper 1* 90 (Ontario Economic Council 1977).

child and the behaviourally dysfunctional child. Sorting out such children and classifying them may not do a great deal as far as remedying their problems or eliminating their differences, but it does provide teachers and schools with a medically-oriented understanding of and rationale for the educational failures of such children. It also allows the school to impose its definition of the situation on "bad" children under the cloak of a scientific model of diagnosis and prescription. Under "Bill 82" children will in all likelihood be referred for assessment if they are in danger of failing, are frequently truant, are expelled or suspended, or are generally hard to handle or otherwise recalcitrant.

It is in fact the difficult categories of behavioural problems and learning disabilities which will tend to swell the ranks of special education programs in Ontario in the future, judging from past experience.[43] While most experts place the number of exceptional children of all varieties at from seven to ten per cent of the school population,[44] the early identification procedures in place in pilot boards in Ontario have caught as many as eighteen per cent of all students screened.[45] Many educators feel that this number under-represents the problem of exceptional students and some educators' estimates of the proportion of the school population suffering from exceptionalities of all sorts go as high as forty per cent.[46] One thing that is clear as a result of "Bill 82" is that all children will be screened and large numbers are likely to be identified as exceptional.

While the definitions of exceptionalities are decidedly unscientific and shaky, the negative implications of labelling children as having behavioural or learning problems have been clearly established in the research literature.[47] Almost all labels applied to children who are different take on a pejorative connotation (in particular those quasi-medical terms which emphasize deficit, not difference) and most programs developed to help a child, once labelled, seem to exacerbate the problem.[48] This is a common phenomenon in schools and one need

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[43] *Kendall*, *supra* note 34, at 16.

[44] I. Davidson, H. Silverman & M. Hughes, *supra* note 7, at 24.

[45] The Windsor Board of Education Early Identification Program (Pilot Project), *id.*

[46] S. ZEITLIN, KINDERGARTEN SCREENING: EARLY IDENTIFICATION OF POTENTIAL HIGH RISK LEARNERS 5 (1976). *See also* Bell, *14 per cent of children between 6 and 12 called hyperactive*, The Globe and Mail (Toronto), 8 Feb. 1978, at 11, col. 3. This article reports on a study by Dr. R.L. Trites which found that "14.2 children [*sic*] were described by their teachers as hyperactive, 13.8 per cent as inattentive-passive, 6.5 per cent as tense and anxious and 2.9 per cent as conduct problems." Dr. Trites goes on to say that while psychiatrists had estimated the incidence of hyperactivity in the school age population to be from 4 to 10 per cent, teachers have, in contrast, put the figure at from 15 to 20 per cent.

[47] P. SEXTON, EDUCATION AND INCOME (1961). More recently, *see* A. JENSEN, *supra* note 36, at 45-46, 719-20; Rist, *supra* note 38, at 292-305.

[48] R. ROSENTHAL & L. JACOBSEN, PYGMALION IN THE CLASSROOM (1968). *See also* P. SCHRAG & D. DIVOKY, THE MYTH OF THE HYPERACTIVE CHILD (1975); Rist, *supra* note 38, at 292-305.

only think of "remedial" reading or "opportunity classes" to appreciate how school programs often, unwittingly, subvert the goals they profess. Most such programs become dead-end categories[49] while the labels applied to children crystallize into self-fulfilling prophecies which colour teachers' perceptions of students' performance and diminish scholastic achievement as students come to conform to the negative expectations implicit in the labels.[50]

Whether teachers will attempt to "track" students into separate "streams" under the legislation of "Bill 82" or will simply use classifications and placements within school classes, the potential exists for great violence to be done to powerless school children in the name of helping the exceptional child.

B. *Standardized Testing Under "Bill 82"*

A further serious implication of "Bill 82" is the increase in standardized testing that will undoubtedly occur as boards struggle to develop mass screening instruments to deal with the volume of children who must be processed. At present, about sixty-two per cent of all boards in Ontario employ standardized testing[51] as an element of early identification procedures but not all children are presently screened. In a recent article in the *Globe and Mail*, Professor Joel Klein, of the Institute of Child Study at the University of Toronto, stated that "Bill 82 is going to result in much more testing, but also more mindless testing."[52]

The difficulties of standardized intelligence testing and the legal implications based on the experience of the United States are developed in more detail later in this paper. It is this writer's argument that "Bill 82" represents regressive legislation from a civil libertarian perspective, for it subjects individuals to potentially damaging and discriminatory testing and screening with no provision for a child or parent to resist or refuse such evaluations.

C. *Implications for Parental Discretion*

Another major implication of "Bill 82" is that it greatly reduces parents' and students' rights to exercise discretion and make choices about the programs *they* feel are appropriate for them. Because of the ongoing nature of the identification and placement mechanisms under the Act, school principals and placement committees will assume dramatic

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[49] W. SCHAFER & C. OLEXA, *supra* note 36.

[50] R. ROSENTHAL & L. JACOBSEN, *supra* note 48. *See also* Rist, *supra* note 38, at 292-305; Williams, *Teacher Prophecies and the Inheritance of Inequality*, 49 SOC EDUC. 223 (1976).

[51] I. Davidson, H. Silverman & M. Hughes, *supra* note 7, at 18

[52] Haslett, *The Testers*, The Globe and Mail (Toronto), 31 Oct. 1981, Fanfare, at 8, col. 2.

new powers to place individuals, not just at the beginning of their educational careers, but throughout.[53] In practical terms this means that where a student or his or her parent could once decide which high school program a child should take and could ignore the recommendations and counselling of the school authorities, this parental discretion has potentially been eliminated by the legislation. If a principal feels a parent or student is being unreasonable in his or her choice of a program, that principal now has the power to refer the matter to the Identification and Placement Committee. The committee, in turn, can impose a program on a student. Again, parents cannot opt out of this process but must avail themselves of the cumbersome appeal provisions if they object to the placement.

This particular aspect of the legislation has not received broad public attention. Yet, from the perspective of civil liberties, it is an important concern in that it dramatically reduces the discretion of parents and students. The choices a child or parent makes in school have a major impact on the options available to that child in later life. Any program which seriously restricts the opportunities of individuals to make critical personal decisions must be viewed as problematic and as warranting reconsideration.

D. *Social Class Implications of School Classifications*

A final implication of "Bill 82" of concern here is the prospect of social class bias and discrimination in schools which the legislation threatens to compound. The notion that a student's socio-economic background has important implications for educational achievement is hardly novel.[54] There is a strong positive correlation between socio-economic status (S.E.S.) and educational success. Children with high S.E.S. backgrounds tend to perform much better on the kinds of tests which the school employs to measure educational achievement. In recent years, researchers have developed considerable information on the relationship between a student's S.E.S. background and his or her placement in school programs.[55] The data which have emerged are not encouraging from the perspective of those who embrace the ideal of equality of educational opportunity. The research rather consistently demonstrates that S.E.S. is a major factor in determining initial placement in school programs such as school tracks or streams, remedial programs and ability groupings. Howe and Lauter urge that the nature of the tracking system in schools is such that it "clearly favours those who manage at an early age to be placed in the higher tracks, and it is

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[53] The Education Amendment Act, 1980, s. 2 (*adding* para. (1*a*)(*a*) to s. 8 of the principal Act). *Now* R.S.O. 1980, c. 129, para. 8(2)(*a*).

[54] P. SEXTON, *supra* note 47.

[55] W. SCHAFER & C. OLEXA, *supra* note 36.

precisely children from the more affluent homes who have the initial advantages in placement".[56]

Because special education is such a relatively new development in schools, a large body of research literature on the relationship of student background, identification of children as exceptional, and placement in special education programs has not yet been developed. However, the Canadian data that do exist suggest there is cause for concern. In a recent article, *Special Education and Inequality*, Professor B. Kitchen of York University argues:

> [S]pecial education is one of those fashionable concepts with an aura of righteous sentiment, which has become dear to the supporters of the consensus model of society, but with little rigorous analysis of its possible application. It presupposes an educational solution to the political problem of equality of educational opportunity.[57]

Kitchen provides data to indicate that students from lower socio-economic groups are over-represented in special education programs. Kitchen claims that many educators explain the phenomenon by reference to theories of biological deficit — students of lower S.E.S. backgrounds are in such programs not because of any inherent biases in screening instruments and selection processes, but because they just happen to be less intelligent and to have a greater share of behavioural and learning disorders.

The correlation between special education and social class is not so new if one abandons the quasi-medical language of "special education" (diagnosis, prognosis, etiology, incidence, learning clinics, teacher-diagnostician, "high-risk" individuals, amelioration) and returns to the old terminology of the public school. Lower S.E.S. children have, traditionally, been found in large numbers in "the dumb class" while higher S.E.S. students have been disproportionately represented in "the bright class". In 1971 Wolfe reported that "the children of labourers in Toronto [were] twenty-one times more likely to be [placed] in 'opportunity' classes [meaning classes for those of limited ability or promise] than children of professionals."[58]

Perhaps the most comprehensive Canadian data on student background and program placement, to date, is the Toronto Board of Education's "Every Student Survey" carried out in 1970 and again in 1975.[59] Both studies document the fact that lower S.E.S. children (as determined by indices such as occupation and income) were dramatically over-represented in special education programs in Toronto schools. The

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[56] Howe & Lauter, *supra* note 37, at 230.

[57] 10:3 INTERCHANGE 77, at 83 (1979-80).

[58] Wolfe, *The Case Against Education*, SATURDAY NIGHT, Aug. 1971, at 29.

[59] R. Deosaran, E. Wright & T. Kone, The 1975 Every Student Survey. Student Background and its Relation to Program Placement (Toronto Board of Education Jun. 1976).

research of Janis Gershman on special education "flow through" has since confirmed the findings of the "Every Student Survey".[60]

Many people will reject Professor Kitchen's contention that learning difficulties should not be seen as "reducible to the particular and special problems of a child", but rather as "structural problems that come from a heavy concentration of deprivations and disadvantages upon specific social groups".[61] The political implications of this argument are fairly clear. However, even the strongest proponent of special education should well ask whether we really want to impose upon Ontario school children mandatory procedures for identification, placement and programming in light of the information available on program placement and social class. Given the crude technologies for sorting and selecting, the questionable efficacy of programs, and the manifest social class bias in the allocative process in schools, one must at least conclude that mandatory legislation is premature and, perhaps, call into question the very concept of mandatory legislation.

VI. ANTICIPATING LITIGATION UNDER "BILL 82"

That there has been virtually no significant litigation in Ontario, and in most provinces in Canada, concerning the educational rights of students, is not surprising when one closely considers precisely what rights students have. Professor J.A. Clarence Smith argues that, in fact, there is no actual right of a child in Ontario to attend school, but rather a duty on parents to send the child to school.[62] The obligation on the parents, Clarence Smith argues, "is not imposed on them primarily in the child's interest (though this would usually be claimed), but in the public interest"[63] — that interest being the socialization of new members of society and childhood being the point at which such socialization is most effectively accomplished. The legal duty of the parent, Clarence Smith holds, does not necessarily create a correlative right in the child to education.

Whether there is a legal right to attend school is perhaps a contentious issue. But clearly, there is no provision in most provincial education legislation giving every child a right to receive something worthwhile at school.[64] At present, there exists no legal obligation upon school authorities to educate all persons to the limits of their capacities or to provide an adequate or appropriate education. Thus, school officials in

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[60] Student Flow-Through in Special Education (Toronto Board of Education 1975).

[61] Kitchen, *supra* note 57, at 79.

[62] Clarence Smith, *The Right to an Appropriate Education: A Comparative Study*, 12 OTTAWA L. REV. 367, at 369-71 (1980).

[63] *Id.* at 371.

[64] *Id.* at 373.

Canada have enjoyed a degree of immunity from judicial accountability of which other public institutions, such as hospitals, are extremely envious.

It was to be expected that in drafting "Bill 82" the legislature should turn its mind to the possibility that schools would be held accountable for their claim to provide every exceptional child with an education suited to his or her needs and abilities. In fact, the spectre of opening the floodgates of litigation seems to have informed the progress of the "Bill" through the legislature and, perhaps, explains the attempt to exclude the courts from aspects of "Bill 82", such as the appeals procedures.[65]

There are generally two kinds of potential litigation which might have concerned the draftsmen of "Bill 82". The most obvious is a suit brought for failure on the part of the school to meet its new statutory duty to provide an appropriate education to an exceptional child. However, the exact provision in the legislation is to ensure that all exceptional children "*have available to them*" appropriate special education programs.[66] It is possible that the duty of the school ends with the *provision* of a program. Moreover, the determination of who qualifies as exceptional is firmly in the hands of the identification committee appointed by the board of education. A child must be "considered"[67] to need placement by the committee in order to meet the definition of exceptional. It is not clear, then, what sort of recourse will be available to parents and students who *want* special education but cannot get it (by virtue of failure to qualify as exceptional in the eyes of the committee).

The major concern of this paper, however, has been with the plight of individuals who may not wish to receive the benefits of the legislation. Will these individuals have any sort of action against the school for infringing their rights to make choices, for misplacing them in categories which close off opportunities, for imposing, against their wishes, testing instruments of dubious value? Up until the recent patriation of the Canadian Constitution and the entrenchment of the Canadian Charter of Rights and Freedoms,[68] the legal options available to those who find the effects of "Bill 82" oppressive and discriminatory have been very limited. This is simply because there were no provisions in the B.N.A. Act, nor are there any such provisions in other federal[69] or provincial legislation, guaranteeing equal protection or equal benefit of education,

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[65] DEBATES, *supra* note 14, at 4394.

[66] The Education Amendment Act, 1980, subs. 3(1) (*repealing and replacing* para. 10(1)5 of the principal Act). *Now* R.S.O. 1980, c. 129, para. 10(1)5

[67] Subs. 1(1) (*adding* para. 20*a* to subs. 1(1) of the principal Act) *Now* R.S.O. 1980, c. 129, para. 1(1)21.

[68] Constitution Act, 1982, Part I, *enacted by* Canada Act, 1982, U.K. 1982, c. 11.

[69] The Canadian Bill of Rights, R.S.C. 1970, App. III, of course is a statute which applies only to federal legislation and is thus inapplicable to provincial legislation concerning education.

such as those which exist in the United States. American school children are afforded the benefits of the equal benefit clause of the fourteenth amendment as well as the equal protection guarantee implicit in the due process clause of the fifth amendment. These provisions in the American Constitution have been used to mount successful litigation aimed at challenging the use of I.Q. testing in the identification and labelling of children as well as school practices of classification such as ability grouping and tracking. The American experience in this area is illuminating and it is useful to consider, briefly, the case law related to the constitutionality of school classification processes.

VII. CHALLENGES TO SCHOOL CLASSIFICATION: THE AMERICAN EXPERIENCE

Concern over school classification practices and procedures has been considerably greater in the United States than in Canada.[70] Briefly, there are three interrelated reasons for this greater American interest and concern. First, classification schemes in American schools have invariably produced racial imbalances and *de facto* segregation. The history of opposition to standardized testing and programmatic placement of students (such as tracking and streaming, or special classes) has closely paralleled the American civil rights movement and can be seen as part of the larger effort to end racial discrimination.[71]

Secondly, American courts have become sensitive to the problems of using measurement and evaluation devices in distributing social benefits in contexts other than the school, particularly in the area of employment discrimination. The use of standardized testing as a means of selecting among job applicants came under strong attack in the early seventies by opponents who demonstrated that such testing resulted in white applicants getting jobs more readily than blacks. A landmark decision in this area was the case of *Griggs v. Duke Power Co.*,[72] which severely restricted the legality of using standardized testing in hiring procedures which could not be shown to be related to job performance. In the *Griggs* case, the employer had screened applicants for the job of coal handler (an unskilled occupation) with verbal ability tests requiring an individual to distinguish between such words as "censor" and "censure". Black applicants, who scored consistently lower on these tests, were passed over in favour of white, higher-scoring applicants. The Court held that unless the skills which the test purported to measure could be unequivocally demonstrated to bear a functional and reasonable

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[70] Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. PA. L. REV. 705 (1973).

[71] Thornton, *Limiting the Use of Standardized Intelligence Tests for Ability Grouping in Public Schools*, 51 N.C.L. REV. 1564 (1973).

[72] 401 U.S. 424 (1971).

relationship to the tasks involved in the job, such test scores could not be used to select among candidates.

Finally, American concern over school classification practices has been more evident simply because Americans could turn to their constitutionally entrenched guarantees of equal benefit and due process in mounting a challenge to school policies which they perceived as discriminatory. In this respect the guarantees of the fifth and fourteenth amendments have been extremely significant.

The major legal challenge to the identification and labelling of school children has taken the form of a critique of intelligence testing.[73] It should be noted, however, that the concepts of intelligence and intelligence testing have been given extremely broad interpretations by American courts. Intelligence has not been strictly or narrowly defined, but has been held to encompass measures of achievement as well as innate capacity and aptitude. Testing has, similarly, been seen as being very broad in scope ranging from formal, purportedly objective tests to extremely informal, subjective and unstructured measures such as teacher evaluations. As such, constitutional objections have been raised to a variety of devices and methods by which individuals have been classified and categorized and to programs which select individuals on the basis of achievement as well as ability.[74]

Standardized testing such as intelligence and achievement tests have come under heavy criticism during the past decade.[75] Many critics deny entirely the validity of such tests, while others object to the uses to which the tests are put. The major criticism of testing (and of informal evaluation by teachers) is that it reflects the values and biases of white middle class Americans, the group upon which the tests are standardized. When black, immigrant, or poor children are subjected to testing, they tend to score approximately two standard deviations below the mean score of white, affluent students. More important is the fact that test scores are often the basis for a series of judgments and decisions made in relation to a student's educational career. A high initial test score is a major advantage to a child in school while a poor test score dramatically limits the options and possibilities open to a child. Inasmuch as school is a major mechanism for the distribution of social and economic benefits in American society, a great deal can be seen to turn on the fairness of testing as an initial sorting and selecting device.

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[73] Wechstein, *Legal Challenges to Educational Testing Practices*, 15 INEQUALITY IN EDUCATION 92, at 92 (1973).

[74] Rhodes, Comment, 71 MICH. L. REV. 1212 (1973).

[75] Dick, *Equal Protection and Intelligence Classifications*, 26 STAN. L. REV. 647 (1974). More recently, *see* N. BLOCK & G. DWORKIN, THE IQ CONTROVERSY (1976); C. HURN, THE LIMITS AND POSSIBILITIES OF SCHOOLING 128-38 (1978); Bowles & Herbert, *I.Q. in the U.S. Class Structure*, in POWER AND IDEOLOGY IN EDUCATION, *supra* note 38, at 215-32. The most eloquent and comprehensive recent critique of standardized testing is to be found in S. GOULD, THE MISMEASURE OF MAN (1981).

The reason that opponents of school classification have focussed their criticism on intelligence testing can be found in the "influence argument" set out in another landmark American decision, *Hobson v. Hansen*.[76] In that decision, Judge Wright held that the tracking system in use in Washington, D.C. was unconstitutional because it violated the equal protection guarantees of the fifth and fourteenth amendments. Judge Wright accepted the argument that the single most important factor in tainting the tracking system was the use of standardized testing for identification and placement purposes. He held that intelligence tests influence all the other evaluations which school officials make about pupils. A poor score on an initial I.Q. identification test virtually assures that subsequent decisions about the child's educational career will be negative. In accepting the influence argument, Judge Wright reversed the court's traditional hands-off approach to schools, which had been to leave educational placement to the discretion of educational administrators and authorities as a purely educational matter.[77]

To appreciate the significance of the ruling in *Hobson v. Hansen*, it is necessary briefly to trace the historical development of judicial decisions related to educational testing and placement. It has been noted previously that these decisions closely approximate the movement toward racial equality. As such, it is appropriate to go back to the watershed decision in *Brown v. Board of Education*.[78] This 1954 case was the original desegregation decision which recognized *de jure* discrimination as a result of segregation. Until the judgment in *Brown*, the policy of "separate but equal" had prevailed with the rationale that segregation did not contribute to discrimination and was not inherently unjust or illegal. *Brown* overturned this notion, recognizing that separate implied unequal, and holding that racial segregation of any sort was discriminatory and thus illegal. The decision in *Brown* ushered in a new era of reform and social reconstruction in American politics and education.

While *Brown* stood for the principle that *de jure* discrimination was illegal, it did not address the problem of *de facto* discrimination. Four years after *Brown*, the Alabama District Court upheld the right of school authorities to separate school children on the basis of learning ability in *Shuttlesworth v. Birmingham Board of Education*.[79] The fact that most of the children judged less able were black while those identified as more able were white was not considered significant as long as the identification and placement decision had been based on ability rather than race. The correlations between race, social class and test scores which seem self-evident today were not so commonly understood in 1958.

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[76] 269 F. Supp. 401 (D.D.C. 1967).
[77] *Id.* at 443.
[78] 347 U.S. 483 (1953).
[79] 162 F. Supp. 372 (N.D. Ala. 1958).

In 1960, the decision in *Jones v. School Board*[80] similarly held that I.Q. testing and the practices of sorting and selecting students were not unconstitutional *per se*, but cautioned school authorities against using racial factors in making allocative decisions. The judgment in *Miller v. School District Number 2*[81] in 1966, confirmed this line of reasoning suggesting that the concern of the court was with preventing racial discrimination but that the practice of separating students into fast and slow ability groups was an educational issue and to be left in the hands of educators.

In these earlier decisions, the concern of American courts lay in achieving school integration while countering blatant forms of segregation — specifically, the refusal to admit black students. The finer issue of intra-school segregation as a consequence of educational policies, such as intelligence testing and ability grouping, did not attract the interest of the court as long as race was not an overt criterion of selection. In this respect the courts seemed insensitive to the possibility of *de facto* discrimination resulting from school testing and placement policies.

The momentous 1967 decision in *Hobson v. Hansen* was the first major American case to deal directly with the question of educational placement and with the related issues of educational testing, teacher expectation and self-fulfilling prophecy. In *Hobson*, Judge Wright directly addressed the under-education of black children as a consequence of poor test scores and negative labels, thus raising for the first time the argument that in-house school placement policies and practices could be just as damaging and demeaning as blatant and overt discrimination. In recognizing the *de facto* discrimination in the school system, Judge Wright criticized not only the formal system of tracking in place in Washington, but also the use of achievement tests (not intelligence tests) in screening and allocating children. His Honour found that these tests had been standardized on white, middle class norms and that they produced inaccurate and misleading score results when administered to black or to economically disadvantaged students.[82] In an unprecedented move, Judge Wright ordered that the tracking system in Washington, D.C. be dismantled.[83]

The *Hobson* decision is illustrative of the constitutional principles involved in the critique of school classification mechanisms. *Hobson* was decided on the equal protection provision of the fourteenth amendment (that no State shall deny to any person within its jurisdiction the equal protection of the laws) and the Court applied the traditional equal protection test of rationality.[84] The rationality test allows the state discretion to classify as long as a rational link between test and placement

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[80] 278 F. 2d 72 (4th Cir. 1960).
[81] 256 F. Supp. 370 (D.S.C. 1966).
[82] *Supra* note 76, at 443.
[83] *Id.* at 517.
[84] *Id.* at 511.

can be demonstrated.[85] Traditionally, the burden of proof has rested upon those seeking to impugn a classification to demonstrate the absence of a rational connection between test and category.[86]

In *Hobson*, Judge Wright departed from this traditional approach and shifted the burden to the defendant school board to justify its classification system. This shifting of the burden has become the standard test in employment discrimination cases once a *prima facie* case of discrimination has been presented. If a party seeking to challenge an employer's hiring practices can show a greater number of individuals from one group hired over another, his responsibility is discharged and the employer is compelled to produce evidence of a rational reason for the disproportionate hiring of a preferred group.[87] *Hobson*, then, raises the threshold which a state must meet in implementing discriminatory school policies from the previous minimum rationality test.

In the period since *Hobson*, American courts have tended toward the more rigorous test of compelling state interest.[88] This test is applied if a classification employed is *prima facie* suspect (such as race or ethnicity), or if the classification infringes upon fundamental rights. In either of these cases, the burden is cast on the state to demonstrate that less drastic methods of achieving its end were not available and that the state's interest to be furthered is compelling. *Hobson* is an important case in marking a movement from a minimal reasonableness of classification approach to a compelling state interest approach.

The decision in *Hobson* was relied upon as the sole authority in *P. v. Riles*,[89] a case decided in 1972. The *Riles* case involved the use of I.Q. tests in the placement of children in special education classes in San Francisco. In *Riles*, the Court employed the more rigorous tests of *Hobson* and, as well, the influence argument set out in Judge Wright's decision.

Beyond the substantive challenge to school classification policy represented in the decision in *Hobson v. Hansen*, a variety of procedural challenges have also been raised.[90] Procedural criticisms stop short of denying the constitutionality of classification programs *per se* and aim instead at guaranteeing procedural safeguards in the application of labels with potentially important consequences. In the United States, these procedural safeguards emerge from the due process clauses of the fifth and fourteenth amendments. American courts no longer accept the distinction between rights and privileges but rather approach a case in terms of individual interests.[91] If the interests of the individual are

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[85] Rhodes, *supra* note 74, at 1230.

[86] *Id.* at 1232.

[87] *Supra* note 72.

[88] Rhodes, *supra* note 74, at 1230.

[89] 343 F. Supp. 1306 (N.D. Cal. 1972).

[90] McClung, *School Classification: Some Legal Approaches to Labels*, 14 INEQUALITY IN EDUCATION 17, at 17 (1973).

[91] Rhodes, *supra* note 74, at 1230.

seriously threatened by the state, the due process clause applies. Courts have tended to give broad application to the clause as long as the interests involved do not appear to be frivolous. An individual's interest in the educational process has been held to warrant the protection of procedural safeguards implicit in the due process clause.[92]

Many of the procedural safeguards for students in American public schools have arisen out of school discipline cases related to expulsion from school. It is now clear that in the United States there are at least some procedural safeguards which have application beyond discipline situations. An important decision in this regard was that of *Mills v. Board of Education*[93] which held that students should be afforded procedural protection before any major changes in their school status, such as assignment to a slower class or a special education program, were made. The decision in *Mills* applied to a variety of exceptional students and included not only physically and mentally handicapped students, but also students who had been identified as having behavioural problems. Procedural safeguards are seen as being critical because of the major effects that educational decisions have on the lives of children, because negative decisions can create life-long stigmatization, and because of the ever-present possibility of error and arbitrariness on the part of school authorities resulting in misplacement of individuals.

The major question concerning procedural protections in educational matters is no longer whether due process applies, but rather how much process is due.[94] The nature and extent of the kinds of safeguards which should be made available to students have become recurring legal considerations. At a minimum, the common requirements of adequate notice and an opportunity to be heard would seem to apply in virtually all cases.[95] The *Mills* case, however, provided for a full array of sophisticated procedural safeguards including the right to a hearing, the right to be represented by counsel, the right to examine any and all evidence including school records, and the right to confront and cross-examine witnesses.[96]

The importance of procedural safeguards may well be in their educative value for parents, students and teachers as well.[97] By focussing on the very serious consequences of negatively labelling a student, due process safeguards may make education authorities more cautious in assigning such labels. Alternatively, the knowledge that safeguards exist may encourage parents to challenge their child's classification if they feel the decision was arbitrary or inaccurate. The main advantage of the procedural approach, as American civil rights attorney Merle McClung points out, is that it is the most efficacious challenge to school

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[92] *Id.* at 1226.
[93] 348 F. Supp. 866 (D.D.C. 1972).
[94] Rhodes, *supra* note 74, at 1243.
[95] *Id.* at 1237.
[96] McClung, *supra* note 90, at 17.
[97] *Id.* at 24.

classification.[98] Issues such as the validity of testing and the value of ability grouping remain highly controversial and the courts have demonstrated a reluctance to involve themselves in areas they perceive to be the exclusive domain of the school. However, most courts are receptive to the argument that school classifications must be fair and open to challenge by those affected. It is, perhaps, in this last regard that the American experience, in challenging school classification policies, can provide guidance for those who would seek to impugn the procedures of Ontario's "Bill 82".

VIII. CONCLUSIONS

It was noted earlier that prior to entrenchment of the Charter of Rights in the Canadian Constitution, Canadians were simply not able to mount the kinds of substantive and procedural challenges to school classification which Americans have been able to mount by virtue of their constitutional guarantees. This situation has changed dramatically now that the Charter has become law in Canada. Legal challenges to "Bill 82" might well be made under the sections of the Charter dealing with equality rights and with due process. Still, the response of the Canadian courts, which have less often demonstrated the activist posture of their American counterparts, is difficult to predict. It is to be hoped that as standardized testing becomes increasingly important in the allocation of this society's benefits and rewards, the courts will evidence a concomitant increase in sensitivity to the difficult and controversial policy decisions which underlie classificatory schemes generally. A detailed analysis of the implications of the Charter exceeds the limits of the present paper and is the subject of a further article by this writer currently being prepared.

The present paper has attempted to alert readers to some of the real and substantial dangers inherent in the Ontario government's compulsory special education legislation. It has been the writer's concern to draw attention to the difficulties in the imposition of mandatory screening, to the problems of reduced parental and student discretion in decision-making, and to the related issue of inherent social class discrimination produced by school classification.

The approach taken in this paper is subject to the danger of throwing baby and bath water out together. For this reason it is worth repeating the opening argument of this paper that "Bill 82" is not *all* bad — that it does represent real gains for certain kinds of students in schools, particularly the severely physically and mentally disabled, who previously may have been denied access to the regular system. Perhaps the legislation could be substantially improved by providing, in the

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[98] *Id.*

regulations, a variety of real procedural safeguards (in contrast to the present appeal mechanisms) which would enable those adversely affected to challenge decisions and which might make school authorities more thoughtful in the decisions they render. In light of the serious defects and dangers implicit in "Bill 82", it is possible to conclude that significant judicial efforts may become necessary in the near future in order to protect school children from what one thoughtful observer has described as the "too often ill-considered, arbitrary and hurtful distinctions made by their elders".[99]

[99] Kirp, *supra* note 70, at 797.