Equal Educational Opportunity and Nondiscrimination for Minority Students: Federal Enforcement of Title VI in Ability Grouping Practices

Equal Educational Opportunity Project Series
Volume IV

September 1999

A Report of the United States Commission on Civil Rights

U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is an independent, bipartisan agency first established by Congress in 1957 and reestablished in 1983. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices;
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin;
- Submit reports, findings, and recommendations to the President and Congress;
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

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A Report of the United States Commission on Civil Rights

Letter of Transmittal

The President
The President of the Senate
The Speaker of the House of Representatives

Sirs:

The United States Commission on Civil Rights transmits this report, *Equal Educational Opportunity and Nondiscrimination for Minority Students: Federal Enforcement of Title VI in Ability Grouping Practices*, pursuant to Public Law 103-419. This report is the result of the Commission's long-standing commitment to ensuring that the Nation's public schools are free of discrimination and that all children in this country are afforded equal educational opportunity. The purpose of this report is to evaluate the efforts of the U.S. Department of Education and its Office for Civil Rights (OCR) to enforce title VI of the Civil Rights Act of 1964 in public elementary and secondary education programs based on ability grouping and tracking practices.

The first report of the *Equal Educational Opportunity Project* series evaluated and analyzed OCR's history, performance, regulations, policies, and activities, setting the stage for the remaining reports. The second report, *Equal Educational Opportunity and Nondiscrimination for Students with Disabilities: Federal Enforcement of Section 504*, evaluated and analyzed OCR's Section 504 performance, regulations, policies, and activities specifically relating to the development of individualized education programs for and placement of students with mental retardation, learning disabilities, behavioral disabilities, or serious emotional disturbance. The third report, *Equal Educational Opportunity and Nondiscrimination for Students with Limited English Proficiency: Federal Enforcement of Title VI and* Lau v. Nichols, evaluated and analyzed the title VI performance, regulations, policies, and activities of OCR in the context of students with limited English proficiency.

With this report, the Commission specifically focused on issues relating to the development and implementation of education programs for and placement of minority students in education programs based on ability grouping and tracking practices. It examines, within the context of educational practices, some of the present-day barriers and inequities that prevent students with limited English proficiency from having an equal opportunity to participate in education programs, to maximize their learning potential, and to enhance their education and career opportunities.

This report evaluates and analyzes OCR's implementation, compliance, and enforcement efforts for title VI in education programs based on ability grouping and tracking practices. It discusses other Federal laws affecting minority students in public elementary and secondary education, such as the Magnet Schools Assistance Act, to the extent they relate to civil rights enforcement by the Office for Civil Rights. Finally, the report describes several strategies and programs that address and affect school policy, classroom organization, education curriculum (i.e., content, substance, and depth of subject matter), methods of instruction, parental participation, division of resources, and responsibilities of school personnel. These educational practices and innovative approaches can be developed and implemented to: (a) reduce the potential barriers associated with ability grouping practices, (b) assign students appropriately to classes, and (c) maximize educational equity and student learning. In addition, various innovative practices specifically aim to address the disparities among students with respect to their participation and achievement in advanced academic courses and ability groups.

It is OCR's responsibility to enforce title VI by evaluating ability grouping practices, particularly practices that result in different treatment or disproportionate representation of minority students, to ensure (1) the practices are educationally necessary, (2) the practices used are the least likely to cause a disproportionate representation of minority students, and (3) the practices achieve their intended goals.

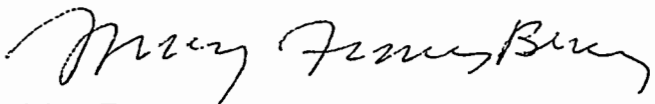
The report contains specific recommendations for further improving and strengthening OCR's title VI ability grouping program and promoting nondiscrimination and equal educational opportunity for minority students in public elementary and secondary education programs based on ability grouping and tracking practices. The Commission finds OCR has recognized the importance of ensuring nondiscrimination in ability grouping and tracking by adopting the issue as one of the priority issues in its Strategic Plan. However, OCR's title VI implementation, compliance and enforcement program, while generally well-developed and sound, has significant gaps, particularly relating to within-school ability grouping practices. For example, OCR has not issued formal or final policy guidance on title VI enforcement of this issue, thereby failing to clarify for school administrators, teachers, parents, and students, as well as for its investigators, the standards for ensuring compliance with title VI in the ability grouping context.

The Commission's major recommendations in this report include that the U.S. Department of Education, through its Office for Civil Rights and the Office of Elementary and Secondary Education, should work with State and local education agencies to ensure ability grouping practices comply with title VI nondiscrimination provisions and provide minority students with equal access to and meaningful participation in education programs. In addition, the Commission recommends that OCR strengthen and improve its civil rights implementation, compliance, and enforcement efforts by emphasizing five principles identified by the Commission as fundamentally important in developing education programs. Finally, the Commission recommends OCR should continue vigorous title VI ability grouping enforcement to ensure effective participation in and meaningful access to all education programs for minority students.

For nondiscrimination and equal educational opportunity to be assured in our Nation's public schools, it is essential that the Department of Education work hand in hand with school administrators, teachers, students, parents, and the community at large. The Commission's intention, with this report, is to assist the Department of Education in its efforts to strengthen its partnership with all of these groups and thereby enhance the Department's title VI ability grouping civil rights enforcement program.

Respectfully,

For the Commissioners



Mary Frances Berry
Chairperson

Preface

This report is the fourth report to be published as part of the Commission's Equal Educational Opportunity Project. The project reports focus on the opportunities available to students in American public elementary and secondary education. The purpose of this project is to evaluate the efforts of the U.S. Department of Education (DOEd) and its Office for Civil Rights (OCR) to enforce laws mandating equal educational opportunity, with particular attention to the education offered children with limited English proficiency; to programs provided to children with disabilities; to the mathematics and science education of girls; and to ability grouping of minority children.[1] In conducting the project, the Commission intends to evaluate educational practices and policies as they relate to DOEd's civil rights enforcement efforts and to focus on areas that improve the quality and distribution of educational opportunities. The Commission has undertaken this project to produce reports benefiting a variety of audiences, including the President, Congress, DOEd, State and local education agencies, the general public, parents, and, most importantly, students in America's public elementary and secondary schools.

The Commission has sought to identify key issues faced by students within public schools and classrooms.[2] In meeting this task, the Commission has focused on four issues for this project:

1. Development of individualized education programs for and placement of students classified as mentally retarded, students with learning disabilities, students with behavioral disabilities, and students with serious emotional disturbance.
2. Development of education programs for and placement of students with limited English proficiency.
3. The difficulties faced by female students in gaining equal access to advanced mathematics and science courses and programs.
4. Ability grouping of minority students.

These issues encompass educational practices that exist currently in America's schools. They serve as avenues for exploring some of the present-day barriers and inequities faced by students. It is these barriers and inequities, that prevent all students from having an equal opportunity to participate in education programs, to maximize their learning potential, and to enhance their educational and career opportunities. These issues are of great concern to parents and students, and they form the basis of discrimination complaints filed by individuals throughout the country.[3] Moreover, in the early 1990s and continuing to the present,

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[1] The Equal Educational Opportunity Project addresses the following civil rights and program statutes: (1) title VI of the Civil Rights Act of 1964; (2) title IX of the Education Amendments of 1972; (3) section 504 of the Rehabilitation Act of 1973; (4) Equal Educational Opportunity Act of 1974 (EEOA); and (5) Education for All Handicapped Children Act of 1975 (renamed the Individuals with Disabilities Education Act (IDEA)). The Commission recognizes that OCR does not have responsibility for enforcing the EEOA or the IDEA. The project reports discuss these laws only as they relate to OCR's responsibilities.

[2] Although private schools have a long tradition in the United States, this report's focus is on public elementary and secondary schools.

[3] From 1993 to 1995, the U.S. Department of Education's Office for Civil Rights (OCR) received a total of 11,484 elementary and secondary education complaints classified under one of the following bases: race, national origin, sex, or disability. *See* U.S. Commission on Civil Rights, *Equal Educational Opportunity Project Series, Volume I*, 1996, chap. 5, table 5. Of the issues raised in elementary and secondary complaints received from 1993 to 1995, 1,700 involved either the assignment of students with limited English proficiency, special education for LEP students, ability grouping or tracking, underrepresentation in math and science, or assignment of students with physical and mental impairments in which learning disabilities or mental retardation were a specified basis. *See* ibid., table 9. This figure does not include issues on the assignment of students with physical and mental impairments in

DOEd and OCR have chosen to focus on many of these issues as priority topics in conducting education research and performing civil rights compliance and enforcement activities.

Based on a review of literature, law, and policies, the Commission has identified five major principles that affect equal access to a quality education:

1. Structuring education programs to serve a diverse student population by reevaluating and regrouping students periodically to reflect differential ability in various subjects and changes in achievement and performance.
2. Using neutral and nondiscriminatory screening and diagnostic procedures when placing students in education programs.
3. Providing parental notification and ensuring that institutional programs facilitate and encourage the involvement of parents and communities in their children's education.
4. Evaluating and allocating teachers, counselors, facilities, and other resources prior to the development and during the implementation of all education programs.
5. Eliminating barriers and maximizing each student's potential through innovative approaches in the development and implementation of education programs.

Research groups, educators, and other professionals have conducted studies and published articles on many of these issues and principles. However, to date, no one project has addressed all in a comprehensive and integrated fashion. As an independent, bipartisan agency, the Commission has undertaken this project to study these topics and present its findings and recommendations in comprehensive enforcement reports. The reports discuss steps taken by the Federal Government, State and local education agencies, and schools to prevent discrimination and to eliminate barriers to equal educational opportunity. Furthermore, the Commission's reports strive to promote nondiscrimination and equal educational opportunity by discussing criteria for evaluating educational practices from a civil rights perspective. By providing information on civil rights principles to consider when developing and implementing education programs, the Commission hopes to support the efforts of the Federal Government, States, local schools, parents, teachers, and students as they work together to promote equal educational opportunities for all students.

Throughout the Equal Educational Opportunity Project the Commission has evaluated OCR's implementation, compliance, and enforcement efforts at the headquarters and regional levels. The Commission has undertaken the following activities in conducting the project: (1) at the regional level, the Commission interviewed selected OCR regional staff members;[4] (2) the Commission assessed OCR's procedures at the headquarters and regional levels to determine whether they are sufficient and effective for the enforcement of civil rights laws in the project's focus areas; (3) the Commission reviewed OCR's policies and regulations implementing civil rights laws; (4) the Commission determined the extent to which these policies and regulations conform with civil rights laws; and (5) the Commission reviewed OCR's efforts in conducting compliance reviews, complaint investigations, monitoring, and providing technical assistance, outreach, education, and training for the project's focus issues.

The first report, *Equal Educational Opportunity Project Series, Volume I*, published in December 1996, set the stage for the remaining reports, and provided findings and recommendations on DOEd's civil rights enforcement activities generally. Because the civil rights laws addressed in this project cover DOEd's Federal financial assistance programs, this re-

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which behavioral disabilities or serious emotional disturbance was a specified basis. OCR does list these types of disabilities as specific bases. *See* U.S. Department of Education, Office for Civil Rights, *Using OCR's Case Information System for Windows (CIS II)*, p. SB–1.

[4] The Commission conducted onsite and telephone interviews with staff members at OCR's Region IV office in Atlanta, GA. It conducted telephone interviews with staff members of the following OCR regional offices: Region II: New York, NY; Region III: Philadelphia, PA; Region VI: Dallas, TX; Region VII: Kansas City, MO; Region VIII: Denver, CO; Region IX: San Francisco, CA; and Region X: Seattle, WA.

port also provided a summary of DOEd's programs to inform the reader of the specific education programs covered by the civil rights laws. *Volume I* also discussed national trends in education generally and trends relevant to issues discussed in the project. The report also evaluated and analyzed the history, performance, regulations, policies, and activities of OCR. The Commission offered its initial enforcement report with findings and recommendations relating to the overall implementation, compliance, and enforcement efforts of OCR relating to the four focus issues in public elementary and secondary schools.

The present report, *Equal Educational Opportunity and Nondiscrimination for Minority Students: Federal Enforcement of Title VI in Ability Grouping Practices* focuses on the educational opportunities afforded to minority students as they relate to the development and implementation of education programs and appropriate grouping practices. The second report, *Equal Educational Opportunity and Nondiscrimination for Students with Disabilities: Federal Enforcement of Section 504*, focused on the development of individualized education programs for and placement of students classified as mentally retarded, students with learning disabilities, students with behavioral disabilities, and students with serious emotional disturbance. The third report, *Equal Educational Opportunity and Nondiscrimination for Students with Limited English Proficiency: Federal Enforcement of Title VI and* Lau v. Nichols, addressed the educational opportunities afforded to students with limited English proficiency as they relate to the development and implementation of education programs and appropriate student placement. The fifth report, *Equal Educational Opportunity and Nondiscrimination: Federal Enforcement of Title IX and Advanced Mathematics, Technology, and Science Education*, will focus on the difficulties faced by female students in gaining equal access to advanced mathematics and science courses and "high tech" studies such as computer programming.

With *Equal Educational Opportunity and Nondiscrimination: Federal Enforcement of Title VI and Ability Grouping Practices*, the Commission takes a closer look at title VI, OCR's implementation, compliance, and enforcement of that law, and the regulation requirement to provide equal educational opportunities for minorities in ability grouping practices and programs. The report's purpose is to evaluate Federal enforcement of title VI as it relates to educational opportunities for minorities in advanced courses and gifted and talented programs.

This report does not examine OCR's general process for civil rights implementation, compliance, and enforcement (i.e., OCR's organization, budget, staffing levels, and complaints and compliance procedures). These civil rights areas were examined in *Equal Educational Opportunity Project Series, Volume I,* the initial statutory enforcement report. Instead the report analyzes civil rights enforcement from a civil rights policy perspective. Including the present report, these four reports also serve as statutory enforcement reports, offering findings and recommendations on the specific activities of DOEd's OCR relating to each issue. They each discuss the educational and civil rights perspectives on the issues and principles. They summarize the works of education experts addressing their theories, research, assessments, and opinions. They also describe the educational practices and present a wide range of viewpoints held by educators and other professionals. To the extent that DOEd or OCR has encouraged or recommended certain educational practices as consistent with civil rights initiatives, the reports discuss DOEd's and OCR's activities to support the practices. The reports then assess the implementation, compliance, and enforcement of civil rights laws by OCR. The reports focus on activities at OCR's headquarters and regional levels to determine the extent and quality of its efforts. The reports also assess the standards created by OCR to ensure and promote nondiscrimination in federally assisted education programs. By integrating an understanding of both educational practices and civil rights enforcement within the body of these reports, the Commission emphasizes the importance of providing both educational equity *and* educational excellence to all students regardless of race, color, national origin, gender, or disability.

This report focuses on the civil rights implications of ability grouping practices, particularly their impact on ensuring equal educational opportunities and nondiscrimination for mi-

nority students. Specifically, within-school ability grouping practices are the primary focus of this report. For purposes of this report, the term "within-school ability grouping" is used to encompass a wide range of programs and practices that divide students within a school, grade, and/or classroom. These include ability grouping, tracking, advanced placement programs, honors programs, special education, gifted and talented programs, magnet programs, remedial programs, and/or multi-level reading or mathematics groups within a single classroom. Primarily, placement in an ability group is based on one, or a combination of, the following criteria: (1) performance on intelligence tests, (2) scores on achievement tests, (3) past academic performance in the classroom, (4) teacher evaluations or recommendations, and (5) parent or student choice.[5]

The term "ability grouping" is often used interchangeably with the term "tracking." However, for purposes of clarity in this report, tracking is used to describe the placement of secondary education students in specific, fixed curriculum programs, such as general, vocational, business, or college preparatory curricula. As with ability grouping, placement in tracks may be based on intelligence tests, achievement tests, past performance, teacher judgments, or a combination of these factors.

The Commission intends to use the report that follows to ensure that school districts develop appropriate education programs and grouping and placement practices for all students; that minority students are not grouped disproportionately in classrooms without a substantial educational justification; and that minority students no longer will be denied access to gifted and talented programs, advanced courses, or other opportunities for education and advancement because of their race, color, or national origin.

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[5] Joseph E. Bryson and Charles P. Bentley, *Ability Grouping of Public School Students: Legal Aspects of Classification and Tracking Methods* (Charlottesville, VA: The Michie Co., 1980), pp. 8–9; Edward L. Dejnozka and David E. Kapel, *American Educators' Encyclopedia* (New York: Greenwood Press, 1991), p. 577. In some contexts, distinctions have been made between ability grouping and achievement grouping. *See* Bryson and Bentley, *Ability Grouping of Public School Students*, pp. 8–9. However, for the purposes of this report, the Commission considers ability grouping as a practice that encompasses both ability and achievement grouping.

Acknowledgments

This report was prepared under the direction and supervision of Frederick D. Isler, Assistant Staff Director for Civil Rights Evaluation. The report was written by the staff of the Office for Civil Rights Evaluation, including Michelle Leigh Avery, Civil Rights Analyst;* Andrea Baird, Social Scientist;* David Chambers, Civil Rights Analyst; Wanda Johnson, Civil Rights Analyst; Eric Mann, Civil Rights Analyst;* Tami Trost, Civil Rights Analyst;* and Nadja Zalokar, Supervisory Civil Rights Analyst.* Ilona Turner, Equal Opportunity Assistant assisted with research for this report. Eileen E. Rudert, Statistician, generated the tables. Barbara Fontana and Vanessa Williamson also assisted in obtaining research materials. Dorothy Pearson-Canty and Latrice D. Foshee provided administrative support for the project. The legal review was performed by Peter Reilly, Attorney Advisor, and Deborah A. Reid, Attorney Advisor. Editorial review was provided by Barbara Brooks,* Marc Pentino, and Tinalouise Martin. Dawn Sweet provided editorial assistance and supervised the production of the report, under the direction of Carol-Lee Hurley.

* No longer with the Commission

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Chapter 1

Introduction

Is it not better for the grand aggregate of human society, as well as for individuals, that all children should mingle together and learn to know each other? . . . At the common schools, where both sexes and all kinds of children mingle together, we have the great world in miniature; there they may learn human nature in all its phases, with all its emotions, passions, and feelings, its loves and hates, its hopes and fears, its impulses and sensibilities; . . . But on the other hand, persons by isolation may become strangers even in their own country; and by being strangers, will be of but little benefit either to themselves or to society. As a rule, people cannot afford to be ignorant of the society which surrounds them; and as all kinds of people must live together in the same society, it would seem to be better that all should be taught in the same schools.[1]

The stated mission of the U.S. Department of Education (DOEd) is to "ensure equal access to education and to promote educational excellence throughout the Nation."[2] DOEd's mission represents an integration of several equally valuable components that are essential to a successful education system. This mission balances civil rights and legal issues with innovations and advances in educational theory and practice that strive to improve the quality of education and promote equal educational opportunity. The importance of this mission is illustrated by the experiences of minority students in the American education system.

For centuries, members of minority racial and ethnic groups have struggled to secure a quality public education. This quest began with the pursuit of physically integrated schools and the abolition of separate schools based on race, particularly in southern States. Today, this battle is fought not only for physical integration, particularly between urban and suburban school districts in the North, but also over barriers within physically integrated schools that exist throughout the country. For example, in Illinois 62 percent of African American students attended predominantly minority schools, and in New York 57 percent of African American students attended predominantly minority schools during the 1994–95 school year.[3] Similarly, 57 percent of Latino students in New York and 43 percent of Latino students in New Jersey attended predominantly minority schools during the 1994–95 school year.[4] In June 1999, the Civil Rights Project at Harvard University released a study which revealed that, particularly in the South, the Nation's schools are rapidly "resegregating."[5] According to the report, although most minorities attend schools with a diversity of students, white students attend schools with primarily white students.[6] This racial isolation also manifests itself in racially identifiable classrooms within integrated public schools. Thus, to receive the full benefits of integrated school systems, it is critical for the education system to ensure equal access to the education programs and activities available within each public school.

In the past 20 years, the U.S. Commission on Civil Rights has investigated Federal, State, and local efforts to provide equal educational opportunity to students in America's schools. The Commission has studied Federal, State, and lo-

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[1] Ottawa v. Tinnon, 26 Kan. 1, 19 (1881).

[2] U.S. Department of Education, "Strategic Plan for the U.S. Department of Education," working document, December 1994, p. 2.

[3] Gary Orfield, Mark D. Bachmeier, David R. James, and Tamela Eitle, "Deepening Segregation in American Public Schools," Harvard Project on School Desegregation, Apr. 5, 1997, p. 28.

[4] Ibid., p. 35.

[5] *See generally* Harvard University, Civil Rights Project, "Resegregation in American Schools," by Gary Orfield and John T. Yun, June 1999 <http://www.law.harvard.edu/civilrights>.

[6] Ibid.

cal activities and enforcement efforts to achieve school desegregation. The Commission compiled findings in numerous reports, such as *Racial Isolation in Public Schools* (1967), *Federal Enforcement of Schools Desegregation* (1969), and *Title IV and School Desegregation* (1973). In 1975 the Commission published a series of reports, which included a volume on equality of educational opportunity, as a commemoration of the 20th anniversary of the Supreme Court's decision *in Brown v. Board of Education (Brown I).*[7] That report, *Twenty Years After Brown,* traced the historical evolution of equal educational opportunity from the pre-*Brown* era to the 1954 Supreme Court decision, and it presented findings and recommendations on post-*Brown* school desegregation efforts.

In 1991 the General Accounting Office (GAO) published a report to Congress evaluating DOEd's Office for Civil Rights (OCR) enforcement of title VI as it relates to within-school discrimination. The GAO report found that many of the Nation's public schools practice ability grouping in a potentially discriminatory manner by failing to regroup students to reflect differential ability in various subjects.[8] Moreover, GAO found that, because of an absence of internal policy guidance, OCR regional offices had been inconsistent in determining if certain types of ability grouping practices violate title VI.[9]

In its 1994 Strategic Plan, OCR identified the effect of ability grouping practices on minority students as a priority enforcement issue. OCR stated that it intended to dedicate proactive resources to addressing overrepresentation of "minorities in special education and low track courses" and underrepresentation of "minorities in math and science and high track courses."[10] For these reasons, the Commission has undertaken its first report in more than 22 years addressing the issue of within-school discrimination.

The separation of students by age, grade level, and ability within each school is a nearly universal characteristic of the traditional American public education system.[11] However, the effectiveness of this system has been a source of continuous debate among education researchers for more than 75 years, particularly in relationship to the impact of these grouping practices on minority students.[12] In February of 1996, the Assistant Secretary for Civil Rights described the persistence of discrimination and inequity in education by stating, "Illegal tracking and exclusion from gifted and talented programs and challenging mathematics and science courses remain a serious threat to minority students."[13] To assess these within-school grouping practices, it is important to understand the variety and prevalence of grouping practices, the intent and methodology of the research designed to test the effectiveness of these practices, the content of educational theories and policies that attempt to improve the quality of education, and civil rights enforcement efforts intended to eliminate barriers and promote equal educational opportunity. These elements not only frame the debate, but also influence opinions on the purpose of the American education system.

In 1972 the Congressional Committee on Equal Educational Opportunity held hearings on the issue of ability grouping. The Committee concluded that ability grouping placements were often made on the basis of discipline problems, social status, and race.[14] The Committee found that once students were placed in low ability groups, they were likely to remain there for the duration of their school careers. The Committee determined that educational inequality was the result of groupings created by lower teacher expectations, limited curriculum, and negative self-concepts that students developed as a result of being placed in low ability groups.[15]

Research findings also demonstrate clear differences in educational experiences based on ability grouping. Generally, students in high

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[7] 347 U.S. 483 (1954).

[8] United States General Accounting Office, *Within-School Discrimination: Inadequate Title VI Enforcement by the Office for Civil Rights* (GAO/HRD–91–85) (July 1991), p. 3.

[9] Ibid., p. 4.

[10] U.S. Department of Education, Office for Civil Rights, Draft "Strategic Plan," July 22, 1994, p. 2.

[11] *See* Jeannie Oakes, "Grouping Students for Instruction," in *Encyclopedia of Educational Research* (New York: MacMillan Press, 1992), p. 562; Educational Testing Service, "A Long Track Record," in *Education Issues of the 1990s* (1993), p. 9.

[12] Jay Mathews, "To Track or Not to Track," *Washington Post Education Review,* Apr. 7, 1996.

[13] "Norma Cantú Appraises Civil Rights in Education," *QEM Network News,* June 1996, p. 3.

[14] U.S. Congress, Senate, Select Committee on Equal Educational Opportunity, *Toward Equal Educational Opportunity,* 92d Cong., 2d sess., 1970, S. Rept. 92–000, p. 134.

[15] Ibid., p. 135.

level ability groups are exposed to more complex and challenging material and the most advanced school resources.[16] Students in high ability classes tend to be more enthusiastic and have greater self-confidence.[17] Placement in a high ability group provides students with greater advantages in future educational and employment opportunities, such as college admissions and professional careers.

Moreover, there is evidence that teachers of low ability mathematics and science classes typically have less experience, are less likely to be certified in math or science, hold fewer degrees in these areas, and have less training in the use of computers.[18] These problems in teaching assignments are more prevalent in schools having large minority and low income populations. "In such schools, low track students are frequently taught math and science by teachers who are not certified to teach those subjects, if they are certified at all."[19] Thus, in effect, teachers, as well as students, are placed based on ability grouping practices.

As the placement of both teachers and students based on ability grouping indicates, ability grouping is a prevalent practice in public elementary and secondary education. Indeed, it is a practice with a long history and much support among educators; although it remains the subject of controversy in the education community. Advocates of ability grouping contend that schools do not create academic differences in students, but attempt to accommodate them.[20] It is further argued that the assumption of all students having the same ability and treating students as such will only guarantee unequal experiences for all. Addressing the issue of differences in grouping methods, supporters of ability grouping will point to the need to differentiate "good" from "bad" practices. The preferred grouping strategy is to ensure that low ability-grouped students experience curricula that have high expectations and do not deny them access to high levels of knowledge. Other proponents of ability grouping have pointed to the deficiencies, inconsistencies, and contradictions in research studies that have criticized ability grouping.[21] Conversely, some critics of ability grouping contend that grouping limits interaction and creates stigma, producing adverse academic effects on the students.[22] By creating group stereotypes, grouping schemes subvert that which they are supposed to promote—providing for individual differences and ensuring equal educational opportunities for all students.[23]

Although there is no easy consensus on the value of ability grouping practices, it is clear that rigid practices can be altered to address the concerns of people on all sides of the debate.[24] Ability grouping can be educationally justified if an accurate test for placement is devised, if effective compensatory education is provided, and if the grouping schemes remain flexible.[25] However, these changes cannot occur until practitioners and parents are confident that the altered ability grouping will contribute to a better school organization and increase the probability of higher student achievement.[26]

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[16] Jeannie Oakes, "Can Tracking Research Inform Practice? Technical, Normative, and Political Considerations," *Educational Researcher*, vol. 21, no. 4 (May 1992), pp. 12–21.

[17] *See* ibid., p. 14; Chen-Lin C. Kulik and James A. Kulik, "Effects of Ability Grouping on Secondary School Students: A Meta-Analysis of Evaluation Findings," *American Educational Research Journal*, vol. 19, no. 3 (Fall 1982), p. 416.

[18] *See* Oakes, "Can Tracking Research Inform Practice?" p. 15; Anne Wheelock, *Crossing the Tracks: How "Untracking" Can Save America's Schools* (New York: The New Press, 1992), p. 9.

[19] Oakes, "Can Tracking Research Inform Practice?" p. 15.

[20] *See, e.g.*, Charles Nevi, "In Defense of Tracking," *Educational Leadership*, March 1987, pp. 24–26

[21] James A. Kulik, *An Analysis of the Research on Ability Grouping: Historical and Contemporary Perspectives* (Storrs, CT: The National Research Center on the Gifted and Talented, 1992), p. 42.

[22] *See, e.g.*, Oakes, "Can Tracking Research Inform Practice?" p. 13; James E. Rosenbaum, *Making Inequality: The Hidden Curriculum of High School Tracking* (New York: John Wiley and Sons, 1976), pp. 8–9.

[23] Joseph E. Bryson and Charles P. Bentley, *Ability Grouping of Public School Students: Legal Aspects of Classification and Tracking Methods* (Charlottesville, VA: The Michie Co., 1980), p. 45.

[24] Jeffrey M. Schneider, "Tracking: A National Perspective," *Equity and Choice*, Fall 1989, p. 16.

[25] Merle McClung, *The Problems of the Due Process Exclusion*, Classification Materials, Center for Law and Education, 13 (Cambridge, MA: Harvard University Press, 1973).

[26] Schneider, "Tracking: A National Perspective," p. 16.

Chapter 2

Background

One of the most controversial issues of ability grouping involves its effects on minority students, which are particularly significant today. First, ability grouping is used by a majority of school systems in the United States.[1] Second, throughout the history of ability grouping, African American, Native American, and Hispanic students have been overrepresented in lower ability groups.[2] Third, by the turn of the century, nearly 40 percent of the Nation's public school children will be minorities.[3]

Much of the controversy regarding ability grouping has focused on the different ways it is designed and implemented. In its broadest sense, ability grouping is the practice of grouping students in a particular instructional setting according to their estimated capacity to learn or perform.[4] One principal educational function of within-school grouping practices is to provide compensatory or enriched instruction so students may maximize their learning potential and education. The process may be misused, however, when practices designed as temporary or compensatory programs become continuing and permanent, unfairly locking students into inappropriate placements.[5]

To understand ability grouping practices from a civil rights perspective, it is necessary to examine the historical and social context surrounding grouping practices and their impact on minority students. These elements not only frame the debate, but also reflect on the purpose and legitimacy of ability grouping within the American education system.

Modern grouping practices emerged from two important and related historical influences: the development of common schools[6] and the debate over racial and ethnic integration.[7] As American society grappled with racial and ethnic integration in general, this debate greatly influenced how officials structured the Nation's schools.

Evolution of Comprehensive Schools

Until the end of the 19th century, few American children attended secondary school, and those who did were drawn primarily from the upper socioeconomic classes. In 1890 fewer than

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[1] *See* chap. 4 generally for a discussion of the prevalence of ability grouping.

[2] *See* appendix generally for a discussion of enrollment patterns in schools practicing ability grouping.

[3] Lamar P. Miller, "A *Brown*-Out Since 1954?" *Teachers College Record*, vol. 96 (Summer 1995), p. 611. *See also* Charles B. Vergon, "Brown at the Threshold of the 21st Century: Enduring or Withering Legacy?" *Journal of Negro Education*, vol. 63, no. 3 (1994), pp. 488–89 (discussion of evolving minority demographics affecting schools).

[4] *See* U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress, Fiscal Year 1991*, p. 19. Despite the prevalence of within-school grouping practices, no uniform definitions exist to clarify the distinctions among various types of grouping practices. *See* Adria Steinberg, "The Tracking Wars: Is Anyone Winning?" in *The Challenge of Detracking*, ed. James Bellanca and Elizabeth Swartz (Palatine, IL: IRI/Skylight Pub. Co., 1993), p. 28. *See also* Richarde W. Donelan, Gerald A. Neal, and Deneese L. Jones, "The Promise of *Brown* and the Reality of Academic Grouping: The Tracks of My Tears," *Journal of Negro Education*, vol. 63, no. 3 (1994), p. 377 (hereafter cited as Donelan et al., "The Promise of *Brown* and the Reality of Academic Tracking"). Moreover, terms defined specifically by one source often are used interchangeably by another. *See* Edward L. Dejnozka and David E. Kapel, *American Educators' Encyclopedia* (New York: Greenwood Press, 1991), p. 577.

[5] *See* Thomas E. Shea, "An Educational Perspective of the Legality of Intelligence and Ability Grouping," *Journal of Law and Education*, vol. 6, no. 2 (1977), pp. 137–38.

[6] *See* Jeannie Oakes, *Keeping Track: How Schools Structure Inequality* (New Haven, CT: Yale University Press, 1985), pp. 15–39 (hereafter cited as Oakes, *Keeping Track*); Donelan et al., "The Promise of *Brown* and the Reality of Academic Grouping," p. 379.

[7] Derrick A. Bell, Jr., *Race, Racism and American Law* (Boston: Little, Brown and Company, 1980), p. 364 (hereafter cited as Bell, Jr., *Race*).

10 percent of children between the ages of 14 and 17 attended secondary schools. However, by 1920, 60 percent of 14- to 17-year-old children were enrolled in high school.[8] These students represented a broad spectrum of the population, not just children from the wealthiest socioeconomic classes. Notably, at the turn of the century, large numbers of immigrant children of southern and eastern European descent entered American schools. These students spoke different languages and had little familiarity with American customs and traditions.[9]

As the number of immigrant students in schools increased, "Americanization" of immigrant students was seen as an important school purpose. Between the 1890s and the 1920s, the American education system responded to these changes by developing grouping practices and comprehensive high schools designed to meet the needs of the diverse students entering high school. Schools across the country developed and organized comprehensive Americanization programs for children, and often their parents as well. In addition to English language instruction, these programs included training in personal hygiene and middle-class values, and, in many cases, encouragement to abandon their native language, culture, and traditions.[10]

In 1892 the National Education Association convened a "Committee of Ten on Secondary Studies," chaired by Charles Eliot, president of Harvard University, to develop a standardized curriculum for students preparing for higher education. Guided by Eliot's belief that most students were capable of learning at a high level, the Committee of Ten developed several standard curricula for college-bound high school students, but emphasized that these curricula should be completed by *all* students attending high school, not just those intending to pursue higher education. Thus, the Committee of Ten advocated secondary school curricula that were not based exclusively on ability.[11]

By 1918, in response to the growing number of immigrants and other students with diverse cultural, social, and academic backgrounds, the vision of the Committee of Ten was replaced by a new concept of secondary education that relied heavily on the separation of students into different educational tracks within a single, comprehensive high school. That year, the National Education Association released a report, *The Cardinal Principles of Secondary Education*. The *Cardinal Principles* report called for comprehensive high schools offering specialized curricula, including vocational curricula in areas such as agriculture, clerical work, industrial arts, fine arts, and household occupations. The comprehensive high school was intended to unify American students by placing them in a common school, while also allowing them to receive specialized education designed to meet the needs of their individual future careers.

Ability grouping became a key component of the *Cardinal Principles* report as a method for helping students adjust to the newly proposed curriculum of public education at the elementary and secondary levels.[12] Before these reforms, the typical curriculum consisted of subjects designed to prepare students for postsecondary education, such as mathematics, foreign languages, science, and English. Reformers designed the new curriculum to address topics such as health, citizenship, ethics, and other nonacademic issues,[13] particularly for children of immigrants who specifically needed vocational education, practical courses, and studies with direct utility in the job market. In some cities, separate high schools with special programs were established—vocational high schools for immigrant children and children from the lower socioeconomic classes, and academic high schools with college preparation for students from the middle and upper socioeconomic classes.[14] The most typical arrangement in many cities was the comprehensive high school to meet the needs of the variety of students who attended. One of the integral

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[8] Oakes, *Keeping Track*, pp. 15–19.

[9] Ibid., pp. 19–20.

[10] Lawrence A. Cremin, *American Education: The Metropolitan Experience 1876–1980* (New York: Harper and Row, 1988), p. 237). This version of the "Americanization Movement" was not adopted by all educators. For example, John Dewey, one of the founders of the Progressive Movement, urged his colleagues to redefine Americanism so that it would not require the abandonment of cultural identity, but instead would combine a person's diverse identities.

[11] *See* Oakes, *Keeping Track*, pp. 17–19.

[12] Cremin, *American Education*, pp. 232–33.

[13] Ibid.

[14] *See* Anne Wheelock, *Crossing the Tracks: How "Untracking" Can Save America's Schools* (New York: The New Press, 1992) (foreword by Jeannie Oakes), pp. ix, 8.

components of comprehensive high schools was the separation of students within these schools into groups for different kinds of instruction.

The transformation in the National Education Association's policies between 1892 and 1918 reflects a number of socioeconomic trends and the emergence of the Progressive Movement. The Progressive Movement proposed a broad range of educational reforms to address the increasing cultural diversity of the student population. For example, the Progressive Movement introduced the principle of student-centered learning. Members of the Progressive Movement also emphasized that schools should assist in remedying the ills of society.[15] According to the leaders of the movement, this could be accomplished by focusing attention on child growth and development, and by teaching the ideals of democracy, self-directed learning, and rational problem solving.[16] They called for schools to take on new social functions and serve as social service agencies that would solve the problem of alienation in urban industrial society. Following the progressive philosophy, schools began including kindergartens, adding playgrounds, hiring school nurses, and incorporating extracurricular activities.[17]

The practice of grouping students into different curricula gained support, in part, as a result of the emergence of psychological testing after the turn of the century.[18] Initially placing students in tracks or groups based on their family background, educators soon began assigning students to groups based on "objective" measures of their "ability," such as intelligence tests. In the early 1900s, various intelligence and achievement tests were developed, partially to create a "science" of education. Educators subsequently began to place students based on their proficiency in areas such as reading, writing, and language ability: By the 1920s, testing was widely used in schools across the country.[19] Although educators originally used these tests primarily for individualizing instruction, the tests were later used, and continue to be used, as diagnostic instruments for determining a child's placement in different classes. Thus, educators used testing in American schools to classify children, group them within classrooms, and assign them to one school program or another. Progressive critics of ability grouping as an educational practice argued it was undemocratic and led to a decline in children's self-esteem and leadership skills.[20]

Education of Minority Children Before *Brown*

The continuous quest for effective schooling for minority students has raised debates over the relative values of integrated schools and separate schools.[21] Throughout much of American history, policymakers and educators believed children of various ethnic and racial minorities, as well as children from lower socioeconomic classes, should be schooled separately from white middle- to upper-class children.[22] Educational policy in the 1800s generally rested on two basic tenets for educating Native American, Hispanic, Asian, and African American children: to instill "American" culture and values, and to provide the minimal training necessary for future employment in low-wage jobs.[23]

Native Americans and Manifest Destiny

In the 1800s and early 1900s, United States educational policy toward Native Americans centered on one primary goal: the inculcation of American culture and values, including understanding and use of English. It was widely believed among whites that Native Americans were inferior and needed to be "civilized" to assimilate successfully into U.S. culture.[24] As the Nation expanded westward, educators and policymakers strove to Americanize Native Americans as quickly as possible. U.S. authorities employed drastic measures for achieving this rapid transformation. First, entire tribes were forced to migrate from their historical homelands to

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[15] Ibid., p. 173.

[16] The two key leaders of the Progressive Movement were Francis W. Parker of the University of Chicago and John Dewey of Columbia University. Ibid.

[17] Joel Spring, *The American School,1642–1993*, 3rd ed. (New York: McGraw-Hill, 1994), pp. 189–98.

[18] For a more comprehensive discussion of intelligence testing and ability grouping, *see* chap. 5.

[19] Oakes, *Keeping Track*, pp. 36–38; Spring, *The American School*, pp. 260–66; Cremin, *American Education*, pp. 233–36.

[20] Oakes, *Keeping Track*, p. 33.

[21] Bell, Jr., *Race*, p. 364.

[22] *See generally* Spring, *The American School.*

[23] Ibid.

[24] Spring, *The American School*, p. 130.

reservations, where they were expected to adopt whites' social customs. When this method did not bring the quick assimilation anticipated by whites, authorities implemented a new policy of removing Native American children from their families: sending them to boarding schools designed solely to promote American culture and values.[25]

Americanization of Immigrant Children

After United States military conquests in Puerto Rico and northern Mexico (modern-day Texas) in the 19th century, American authorities controlled the education of children there. In Puerto Rico the main purpose of U.S. educational policy centered on deemphasizing students' native language and culture and teaching English and American culture.[26] In Texas school authorities in the 1920s enforced school attendance policies for white children but not for children of Mexican heritage. This may explain partly why in one Texas county a survey revealed only 30 percent of school-age Hispanic children were attending school.[27] Mexican children who did attend school were segregated and instructed with a curriculum designed to Americanize them by replacing their native language and customs with more acceptable American ones.[28] Wealthy Texas landowners were reluctant to provide too much education to Mexican Americans, so as not to lose the supply of cheap labor to work their fields.[29] There was an important distinction between the Americanization experienced by European and Mexican immigrants: European immigrants were educated in common schools with white students, but Mexican immigrants were segregated into different schools entirely.[30] This distinction, which occurred in California and other States, including Texas, is attributed to generally unfavorable perceptions of Mexican culture (relative to European cultures) held by U.S. citizens at that time.[31]

[25] Ibid., p. 142.

[26] Ibid., pp. 150–56.

[27] Ibid., p. 181.

[28] Ibid.

[29] Ibid., p. 180.

[30] Ibid., p. 182 (citing Gilbert Gonzalez).

[31] Ibid.

Asian Segregation in California

Although comprehensive schools were designed to meet the needs of an increasingly diversified student body, unlike immigrant children from European countries, children of Asian immigrants to the United States were not allowed to attend these schools. Cities in California, such as San Francisco and Sacramento, created separate schools for students of Chinese heritage in the late 19th century.[32] Later, in the early 20th century, Japanese immigrant children faced the same discriminatory segregation. In 1906, when education authorities in San Francisco directed Japanese, Korean, and Chinese children to attend a separate school, Japanese parents boycotted the school and prevailed on the Government of Japan to protest the discriminatory treatment.[33] Due to the ensuing international pressure, President Theodore Roosevelt informed San Francisco education authorities he would take Federal action against the school system if the discrimination did not cease.[34]

African Americans and the Struggle for Equality

Before the Civil War, only 2 percent of the more than 1 million African American children in the United States were enrolled in public schools. The African American students who did attend public schools were freed slaves who attended segregated schools scattered across the North. By 1870, 10 percent of African American children attended public schools, and by 1900, 33 percent of African American children attended public schools.[35]

Although some public schools in northern cities neither barred nor segregated black students, increasing racial prejudice effectively eliminated equal educational opportunities for black children who attended schools with white children. For example, in Boston in the late 1700s students attended integrated schools. However, many black community leaders sought the creation of separate "African" schools because of the racial insults and mistreatment to

[32] Ibid., p. 163.

[33] Ibid., p. 164.

[34] Ibid.

[35] Charles B. Vergon, "The Evolution of the School Desegregation Movement: Implications for Equity and Excellence," *Equity and Excellence*, vol. 24, no. 1 (1991), p. 26.

which black students were subjected.[36] By 1806 the Boston School Committee established a separate school for African American children. Although separate schools were established with the intent of improving education for African American students, the poor quality of instruction and poor conditions in the schools for these children caused community leaders to seek integrated schools again in 1850.[37]

For example, in an 1850 Massachusetts State court case, *Roberts v. City of Boston*,[38] the plaintiffs argued schools for African American children were inferior to schools for white children. Although the court rejected the plaintiffs' arguments, the case is significant because it raised concerns about inferior equipment and staffing and inconvenient locations[39] that would later be addressed by the Supreme Court in the 1954 case of *Brown v. Board of Education (Brown I)*.[40] School segregation based on race received official judicial sanction with the 1896 Supreme Court decision in *Plessy v. Ferguson*.[41] The Court, relying on the decision in *Roberts*, held that providing for "separate-but-equal" facilities for both whites and blacks was constitutional.[42]

Three years later, in *Cumming v. Richmond County Board of Education*,[43] the Court thwarted expectations it would enforce the "equal" part of its "separate-but-equal" standard established by the decision in *Plessy*.[44] A Georgia law required the provision of "separate-but-equal" public education facilities for children of both races. However, the local school board ceased operation of the high school serving 60 black students while continuing to support a high school for white girls and a high school for white boys.[45] The school board claimed the high school was closed due to insufficient funding for elementary schools for black children.

The Court held an absence of sufficient funding was a constitutionally permissible reason for a school district to provide a high school education for white children but not for black children.[46] *Cumming* is significant because it demonstrated the Court's reluctance to repudiate the "separate-but-equal" standard and its failure to establish standards for the degree of equality to satisfy the standard.[47]

Brown and the Era of Desegregation

In the early years of the 20th century, many States spent an average of two to three times more money educating white children than they did educating black children.[48] By the 1950s, this difference rose to an average spending on white students that was five times greater than spending for black students. This disparity showed in schools for black students that had substandard physical facilities, an inadequate supply of textbooks, poorly trained teachers, and the absence of athletic facilities or equipment.[49]

This inequality was increasingly challenged by the National Association for the Advancement

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[36] Bell, Jr., *Race*, p. 365.

[37] Ibid., p. 366.

[38] 59 Mass. 198, 5 Cush. 198 (1849).

[39] 59 Mass. at 201–04.

[40] 347 U.S. 483 (1954).

[41] 163 U.S. 537 (1896), *overruled by*, Brown v. Board of Educ., 347 U.S. 483 (1954).

[42] *Plessy*, 163 U.S. at 544–45, 550–51.

[43] 175 U.S. 528 (1899).

[44] Bell, Jr., *Race*, p. 371; Donald W. Jackson, *Even the Children of Strangers* (Lawrence, KS: University Press of Kansas, 1992), pp. 76–82.

[45] 175 U.S. at 533.

[46] The Court reasoned:

> [the state court] rejected the suggestion that the Board [of Education] proceeded in bad faith or had abused the discretion with which it was invested by the statute under which it proceeded or had acted in hostility to the colored race. Under the circumstances disclosed, we cannot say that this action of the state court was, within the meaning of the Fourteenth Amendment, a denial by the state to the plaintiff and to those associated with them as citizens of the United States. . . .We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any such interference on the part of the Federal authority with the management of such schools cannot be justified except in the case of clear and unmistakable disregard of rights secured by the supreme law of the land.

Id. at 545.

[47] Bell, Jr., *Race*, p. 372. *See also* Perry A. Zirkel, Sharon Nalbone Richardson, and Steven S. Goldberg, *A Digest of Supreme Court Decisions Affecting Education* (Bloomington, IN: Phi Delta Kappa Educational Foundation), pp. 96–97 (hereafter cited as Zirkel et al., *A Digest of Supreme Court Decisions Affecting Education*).

[48] Vergon, "The Evolution of the School Desegregation Movement," p. 27.

[49] Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* (New York: Vintage Books, 1975), p. 88.

of Colored People (NAACP). The NAACP, during several decades before and after World War II, used a two-pronged strategy to challenge segregated schools. First, the NAACP filed lawsuits calling for the abolition of dual school systems and the establishment of integrated schools. Second, the NAACP pursued desegregation in higher education, where integrated schools appeared to meet the least resistance.[50] The NAACP won several important court victories that addressed not only tangible educational inequities, such as school facilities, but also intangible factors, such as staff quality and prestige.[51] Although these favorable decisions did not nullify segregation as an educational practice, the decisions did establish a context for future school desegregation cases.

In the early 1950s, the NAACP filed several desegregation cases in South Carolina, Delaware, Kansas, Virginia, and the District of Columbia arguing not only that black schools in these localities were inferior to their white school counterparts, but also that legally sanctioned segregation violated the "equal protection of the laws" guaranteed by the 14th amendment of the Constitution. These five cases were consolidated in the 1954 landmark decision in *Brown v. Board of Education of Topeka, Kansas*, in which a unanimous Supreme Court overruled the "separate but equal" doctrine as it applied to education.[52] The Court not only struck down discriminatory laws mandating segregation, but also held States have a constitutional duty to provide equal educational opportunity in public schools, a duty grounded in the equal protection clause of the Constitution.[53] The Court emphasized:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education . . . . Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[54]

The Court relied in part on a crucial strategy pursued by the NAACP that demonstrated the pernicious effects of segregation on the psychological well-being of black children. Using research from a team of social scientists, the NAACP successfully demonstrated the damage caused to children by segregated education. The Supreme Court stated:

> education is perhaps the most important function of state and local governments. . . . Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of minority groups of equal educational opportunities? We believe that it does.[55]

From those words came an understanding that equal educational opportunity means more than equal facilities, teachers, textbooks, curricula, and other "tangible" factors. Equal educational opportunity also encompasses some sense of psychological well-being because, according to the Court, "[t]o separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[56] Thus, as the words of Chief Justice Earl Warren made evident:

> in the field of public education the doctrine of "separate but equal" has no place. Separated educational facilities are inherently unequal. Therefore we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, *by rea-*

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[50] Donald G. Nieman, *Promises to Keep* (New York: Oxford University Press, 1991), p. 136; Rosemary C. Salomone, *Equal Education Under Law* (New York: St. Martin's Press, 1986), p. 41.

[51] *See, e.g.*, Missouri *ex rel* Gaines v. Canada, 305 U.S. 337 (1938) (State's provision of legal education to whites while not providing legal education to African Americans violated the equal protection clause of the 14th amendment); Alston v. School Board, 112 F.2d 992 (4th Cir. 1940)(payment of fixed lower salaries to African American public school teachers of equal qualifications, experience, and responsibilities as white teachers, on the sole basis of race or color, violated the due process and equal protection clauses of the 14th amendment); Mills v. Board of Educ., 30 F. Supp. 245 (D. Md. 1939) (where evidence proved racial discrimination determined lower minimum salaries listed for African American teachers in a county schedule of salaries, an African American teacher was entitled to an injunction against the continuing discrimination).

[52] *Brown I*, 347 U.S. at 495. *See* Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by*, Brown v. Board of Educ., 347 U.S. 483 (1954). *See also* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (applying *Brown I* to the Federal Government).

[53] *Brown I*, 347 U.S. at 493–94. *See also* U.S. CONST. amend. XIV, § 5.

[54] 347 U.S. at 493.

[55] *Id.* at 493.

[56] *Id.* at 494.

son of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[57]

In rejecting segregated educational facilities, the Court implicitly approved the race-conscious remedy of integration.[58]

One year after the *Brown I* decision, the Supreme Court considered the proper scope of relief to remedy the effects of school segregation.[59] In *Brown II*,[60] the Court established a standard for implementing desegregation of schools. The Court ordered school boards to comply with the mandate of *Brown I* and directed them to undertake affirmative efforts to effectuate equal protection with "all deliberate speed" under the jurisdiction of Federal district courts.[61]

The *Brown* decisions did not prescribe remedies for States to follow in desegregating their schools. In the absence of specific guidelines, many States sought to circumvent the Court's mandate. Their methods ranged from dilatory administrative policies, such as requiring minorities to register at specified offices their intent to transfer to a white school, to hostile defiance, as white segregationists openly threatened black students and physically blocked their attempts to enter previously all-white schools. When the Federal Government demonstrated its commitment to uphold the *Brown* rulings by use of force if necessary, segregationists developed new, more subtle tactics to avoid integration.[62] Many jurisdictions began to rely on ability grouping practices as a key strategy in avoiding the Court's order to implement school desegregation.[63]

Ability grouping also grew in importance for American educators during the 1950s, in part as a result of the launching of the Soviet satellite Sputnik and the accompanying cold war. Americans reacted to the launching of Sputnik by assuming American schools must be inferior to Soviet schools. As a result, a major focus for education policy in the 1950s and early 1960s was to identify talented students, especially in mathematics and science, who could be trained as future scientists and ensure the United States dominated science and space technology.[64] These students were grouped apart from other students and participated in special programs to nurture their talents.

At the same time, criticism of ability grouping increased after the Supreme Court's 1954 decision in *Brown I*.[65] Although educators ostensibly developed ability grouping in the early 20th century as a general educational practice,[66] many school districts did not institute ability grouping systems until soon after the Supreme Court ordered the desegregation of public schools in *Brown I*.[67] Many States used methods such as ability grouping as an attempt to block racial integration.[68] Such schools divided their course enrollments in such a way that white pupils were enrolled predominately in advanced (or college preparatory) classes, while minority children were assigned primarily to basic, vocational, or remedial classes. Thus, although ability grouping practices existed well before the *Brown* decisions, the way many school districts subsequently developed and implemented this educational practice was influenced by the Court's ruling.

During the mid- and late 1950s, 10 southern States introduced so-called "pupil assignment laws."[69] These laws purported to assign students

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[57] *Id.* at 495 (emphasis added).

[58] U.S. Commission on Civil Rights, *Briefing Paper for the U.S. Commission on Civil Rights Legislative, Executive, and Judicial Development of Affirmative Action* (July 1995), p. 21.

[59] *See* Brown v. Board of Educ., 349 U.S. 294 (1955) (*Brown II*).

[60] *See id.* at 300–01

[61] *Id.* at 300–01.

[62] Vergon, "The Evolution of the School Desegregation Movement," pp. 26–35.

[63] *See generally* James A. Kulik, *An Analysis of the Research on Ability Grouping: Historical and Contemporary Perspectives* (Storrs, CT: The National Research Center on the Gifted and Talented, 1992) (hereafter cited as Kulik, *Research on Ability Grouping*). *See also* William M. Gordon, "The Implementation of Desegregation Plans Since *Brown*," *Journal of Negro Education*, vol. 63, no. 3 (1994), p. 310; Donelan et al., "The Promise of *Brown* and the Reality of Academic Grouping," pp. 376–87.

[64] Donelan et al., "The Promise of *Brown* and the Reality of Academic Grouping," p. 380; Oakes, *Keeping Track*, p. 39.

[65] 347 U.S. 483 (1954) (*Brown I*).

[66] David L. Kirp, "Schools as Sorters: The Constitutional and Policy Implementations of Student Classification," *University of Pennsylvania Law Review*, vol. 121 (1973), pp. 705, 715.

[67] *See generally* Kulik, *Research on Ability Grouping. See also* Gordon, "The Implementation of Desegregation Plans Since *Brown*," p. 310; Donelan et al., "The Promise of *Brown* and the Reality of Academic Tracking," pp. 376–87.

[68] Ibid.

[69] Vergon, "The Evolution of the School Desegregation Movement," p. 27.

to schools on the basis of criteria and characteristics other than race.[70] In practice, however, these laws served to entrench racial segregation of public schools by "employing selection criteria that were frequently only thinly disguised surrogates for student race."[71]

Largely as a result of such pupil assignment laws, which used ability grouping as a pretext for unlawful discrimination based on race, "the desegregation of southern school districts was not characterized by speed, deliberate or otherwise. . . . The fact is that most of the putative beneficiaries of the legal principle declared in *Brown* [were] frustrated in the vindication of their rights."[72]

Policies and practices relating to desegregation and immigration issues continue to have a major impact on the education of all American children in general and minority group children in particular. These historical events and trends inform the understanding of contemporary problems associated with ability grouping practices. The legacy of the pupil assignment laws enacted after *Brown* to avoid desegregation has been the continued overrepresentation of low income and minority students in lower level ability groupings.[73] The question remains today to what extent the sorting of students into high and low tracks may continue to operate as a limitation on the educational and occupational futures of low income and minority students.

Statutory Desegregation

Since *Brown I* and *II*, various events have strengthened the concept of equal educational opportunity, and the Federal Government has played a key role in promoting those changes. Congress has created protections for all individuals regardless of race, color, national origin, disability, or gender. The primary civil rights statutes assuring equal access to education programs for minority students are title IV of the Civil Rights Act of 1964, which prohibits segregation in public schools,[74] and title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin in any federally assisted program or activity, including public and private schools.[75]

Specific Federal programs have also sought to ensure equal educational opportunity. For example, as part of title IV of the Civil Rights Act of 1964, Congress created the Desegregation Assistance Program. This program provides technical assistance and training services to school districts to assist with the transition to desegregated schools based on race, sex, and national origin.[76]

To assist in desegregating schools, Congress passed the Equal Education Opportunities Act of 1974 (EEOA) prohibiting States from denying equal educational opportunity to an individual on account of race, color, sex, or national origin.[77] The act states:

(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and
(2) the neighborhood is the appropriate basis for determining public school assignments.[78]

In addition, Congress developed the Magnet Schools Assistance program to provide grants to eligible local education agencies for use in magnet schools that are part of approved desegregation plans and that are designed to bring together students from different social, economic, racial, and ethnic backgrounds.[79] These and other Federal programs have operated with an

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[70] Mark G. Yudof, David L. Kirp, and Betsy Levin, *Educational Policy and the Law* (St. Paul, MN: West Pub. Co., 1992), p. 479 (hereafter cited as Yudof et al., *Educational Policy and the Law*).

[71] Vergon, "The Evolution of the School Desegregation Movement," p. 28.

[72] Yudof et al., *Educational Policy and the Law*, p. 479 (citing H. Horowitz and K. Karst, *Law, Lawyers, and Social Change* (1969), pp. 239–40).

[73] *See generally* Kulik, *Research on Ability Grouping. See also* Gordon, "The Implementation of Desegregation Plans Since *Brown*," p. 310; Donelan et al., "The Promise of *Brown* and the Reality of Academic Grouping," pp. 376–87; Vergon, "The Evolution of the School Desegregation Movement," pp. 27–28.

[74] 42 U.S.C. § 2000c (1997).

[75] 42 U.S.C. § 2000d (1997).

[76] *See* Elsa Walsh, "Civil Rights Aid to Schools May Be Lost," *Washington Post*, Aug. 25, 1983, p. B–1 (article describes how eliminating Federal funding could dismantle desegregation assistance programs and offices managing equal opportunity programs).

[77] 20 U.S.C. § 1703 (1997).

[78] 20 U.S.C. § 1701(a) (1988).

[79] *See* Virginia Mansfield, "U.S. Denies Magnet School Funding in Alexandria," *Washington Post*, Aug. 24, 1989, p. V–3.

intent to promote equal educational opportunities for economically disadvantaged students.[80]

Despite the existence of these programs, segregation continues across school districts and within schools and classrooms. Poor students, many of whom are minority students, often find themselves in low track classes with limited educational options due, in part, to the misuse of ability grouping practices. As the U.S. Commission on Civil Rights observed in its report *Twenty Years After Brown*, "[i]ntegration, however, has not been realized in most schools with racially heterogeneous enrollments—[such as] schools which may have segregated educational programs [and] use conventional ability grouping . . . ."[81]

Desegregation and Ability Grouping

Addressing Past Discrimination

Many school systems remain segregated notwithstanding the judicial mandate of *Brown* and its progeny and Federal statutory initiatives. After decades of litigation to dismantle the effects of prior segregation, in 1992 the Supreme Court found in *United States v. Fordice* that a State had not met its affirmative duty to eliminate, "root and branch," all vestiges of past de jure segregation.[82] The good faith adoption and implementation of race-neutral policies were insufficient to satisfy the State's burden of proving it had abandoned its prior dual education system when policies traceable to the old system were still enforced and continued to produce discriminatory effects.[83] Practices such as ability grouping may continue to isolate students according to their race and prevent meaningful interaction among minority children and white children.[84]

Early desegregation cases and more recent ability grouping cases handled by the Department of Education's Office for Civil Rights (OCR) both involve the civil rights issues of equal access and nondiscrimination on the basis of race in student assignment practices. In both desegregation cases and ability grouping cases, primary analysis focuses on the specific criteria used by schools to evaluate and place students in education programs. The courts and OCR have analyzed the policies and procedures of these placement factors to determine whether they tend to create racial segregation. The connection between the early desegregation cases and contemporary civil rights issues relating to ability grouping practices may be seen very clearly in post-*Brown* court decisions on ability grouping.

Since the Supreme Court overruled the "separate-but-equal" standard of *Plessy* by its 1954 ruling in *Brown*, lower courts consistently have held schools may not separate students based on race, but they may separate students based on ability.[85] In the 1967 case of *Hobson v. Hansen*,[86] the plaintiffs challenged the Washington, D.C., school district practice of relying on standard aptitude and IQ tests in assessing the intelligence of individual students and as a means of determining students' assignment to ability groups (for all academic courses) and program level tracks.[87] At trial, the District of Columbia District Court found the school system deprived blacks and poor public school children of their right to equal educational opportunity relative to their white and more affluent peers.[88]

The *Hobson* court determined the tracking system in Washington, D.C., public schools violated the equal protection clause of the Constitution, created "suspect" classifications of economically impoverished and minority students, and operated questionable maximum educational opportunities for students of all ability levels.[89]

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[80] Other programs include the Family Literacy Program, the Family Partnership Program, the Star Schools Program, the Eisenhower Mathematics and Science National and State Programs, and the Jacob K. Javits Gifted and Talented Students Program.

[81] U.S. Commission on Civil Rights, *Twenty Years After Brown* (1975), p. 56.

[82] 505 U.S. 717 (1992). *Id.* at 732–43.

[83] *Id.* at 727–32.

[84] Yudof et al., *Educational Policy and the Law*, p. 562.

[85] Elia V. Gallardo, Comment, "Hierarchy and Discrimination: Tracking in Public Schools," *Chicano-Latino Law Review*, vol. 15 (1994), pp. 74, 81.

[86] 269 F. Supp. 401, 476 (D.D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969 en banc).

[87] 269 F. Supp. at 476–80, 511–14.

[88] 269 F. Supp. at 514.

[89] *Id.* at 514–16. *See also* Oakes, *Keeping Track*, p. 184. One interpretation of the equal protection clause is that any governmental action cannot discriminate against similarly circumstanced individuals unless the differential treatment can demonstrate that a valid government objective is achieved. Ibid., p. 180 (citing T. Shannon, "Chief Justice Wright, the California Supreme Court and School Finance: Has the Fourteenth Done it Again?" *Nolpe School Law Journal*, vol. 3 (Spring 1973) pp. 1–14).

In particular, the court found the track system violated the constitutional rights of black and economically deprived students to equal access to education, since these students were assigned to academically lower tracks based on their scores on intelligence tests standardized exclusively on white, middle-class children.[90] Because the tests used terms and hypothetical situations unfamiliar to blacks and economically disadvantaged children, pupil assignments based on scores resulting from these tests placed blacks and economically disadvantaged students in programs with "reduced curricula" and inadequate remedial and compensatory education.[91] Furthermore, the court determined the District of Columbia Public School System's tracking practices imputed stigmatizing labels on students in the lowest level ability groups.[92]

Another case illustrating the similarity between desegregation issues and within-school ability grouping practices[93] is *Moses v. Washington Parish School Board.*[94] In that case, the plaintiffs sued a Louisiana school system that before desegregation had used verbal and mathematical ability tests to group students. After the school system was desegregated, the school district placed students based solely on their verbal test scores. The court found this means of evaluation and placement violated the equal protection clause because of its racially segregative effects and ordered the school system to stop segregating students based on this factor.[95]

In *Keyes v. School District No. 1,*[96] the Supreme Court affirmed the use of race-conscious remedies in the context of school desegregation even when statutorily imposed segregation had not existed before. Although the Denver, Colorado, school system had never been operated under a State constitutional provision or law that mandated or permitted school segregation, many of the city's schools were segregated.[97] The segregation arose from various techniques used by the Denver school board, including manipulation of attendance zones, teacher assignments, and school site selection, that resulted in racially and ethnically segregated schools.[98]

The Supreme Court observed that proof of segregation in a substantial portion of a school district would support a finding of a dual system, thus imposing an "affirmative duty" on school authorities "to effectuate a transition to a racially nondiscriminatory school system."[99] *Keyes* created a presumption of unconstitutional discrimination in certain situations. The Court recognized:

> where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of students, schools, teachers and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system.[100]

The Court also determined that a finding of segregative intent in a significant portion of a school system's policies "creates a presumption that other segregated schooling within the system is not adventitious."[101] This connection establishes a prima facie case of unlawful segregation and shifts to the school authorities the bur-

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[90] 269 F. Supp. at 406–07.

[91] *Id.* at 478–83 ("For example, one defense witness, a principal of a low-income Negro elementary school, told of how most of the children had never been more than a few blocks from home; they had never been downtown . . . they did not know what an escalator was . . . had not been to a zoo. These experiences, common in the subject matter of tests and textbooks, were alien to the lives of these children." *Id.* at 481).

[92] *Id.* at 491–92. Oakes, *Keeping Track,* p. 184. As shown above, stigmatizing labels can hinder students' self-perceptions and have other psychological consequences. Ibid., p. 176. The "stigmatization of lower track students can especially hinder those who were misassigned due to a haphazard or inappropriate classification process." Ibid., p. 177. Issues related to the impact of stigma and labeling were examined by the Supreme Court in a precedent-setting case, *Wisconsin v. Constantineau,* in which the Chief Justice ruled that a due process hearing would be required prior to the imputation of a stigmatizing government-affixed label such as "drunkard." Ibid, p. 178. Public labeling and potential stigmatizing of students based on their purported ability is prohibited. *See* Paul S. George, "Tracking and Ability Grouping in Middle School: Ten Tentative Truths," *Middle School Journal,* March 1993, p. 23.

[93] *See also* chap. 5.

[94] 330 F. Supp. 1340 (E.D. La. 1971), *aff'd,* 456 F.2d 1285 (5th Cir. 1973 per curiam) *cert. denied,* 409 U.S. 1013 (1972).

[95] *Id.*

[96] 413 U.S. 189 (1973).

[97] *Id.* at 191.

[98] *Keyes,* 413 U.S. at 191.

[99] *Id.* at 200 (citing *Brown II,* 349 U.S. at 301).

[100] *Keyes,* 413 U.S. at 201.

[101] *Id.* at 208. This is generally referred to as the *Keyes* presumption.

den of proving the other segregative situations were not intentional.[102]

The Court in *Keyes* indicated that segregative intent could be established not only by segregation as it had existed in the South (i.e., segregation created by State statutory or constitutional law), but also by the presentation of evidence of race-conscious acts or omission that approximate the force of law.[103] Therefore, although the Court explicitly recognized the requirement for an intent standard under the equal protection clause, it established a specific meaning for "intent" that went beyond State-sanctioned segregative action to include "race-conscious acts of omissions" that tended to create segregation on the basis of race or ethnicity.[104] This prohibition logically would include within-school racial isolation.

A Fifth Circuit Court of Appeals ruling in the case of *McNeal v. Tate County School District*[105] discussed ability grouping practices in a school district that had formerly operated a racially segregated school system. The court observed:

> Ability grouping, like any other non-racial method of student assignment, is not constitutionally forbidden. Certainly educators are in a better position than courts to appreciate the educational advantages or disadvantages of such a system in a particular school or district. School districts ought to be, and are, free to use such grouping whenever it does not have a racially discriminatory effect.[106]

The court noted further that if ability grouping "does cause segregation, whether in classrooms or in schools," the school district must demonstrate "its assignment method is not based on the present results of past discrimination."[107] For the school system in *McNeal*, the court stated that it would review the school district's plan for student assignment with "a punctilious care" to ensure that the plan of student assignment "does not result in perpetuating the effects of past discrimination."[108]

[102] 413 U.S. at 208.

[103] *Id.* at 227.

[104] *See id.* at 207–13.

[105] 508 F.2d 1017 (5th Cir. 1975).

[106] *Id.* at 1020.

[107] 508 F.2d at 1020.

[108] *Id.* at 1020.

OCR and Ability Grouping Practices

OCR has reviewed ability grouping practices and compliance with title VI's nondiscrimination provision in much the same manner as the courts have interpreted the equal protection clause in seeking to remedy racial segregation. In both desegregation cases and cases involving within-school ability grouping, the relevant issues have been the presence of racial segregation and the proper remedies to apply where it is the result of discrimination.

According to the Supreme Court's 1977 ruling in *Milliken v. Bradley*[109] (*Milliken II*), Federal courts have authority to order remedies beyond simply moving students from one school or class to another.[110] Approving a lower court's desegregation order that required, in addition to student reassignment, such components as multicultural and bilingual education, inservice training of staff, and student counseling services, the Supreme Court determined:

> The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal court decrees must directly address and relate to the constitutional violation itself. . . . Discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual system founded on racial discrimination. Federal courts . . . cannot close their eyes to inequalities . . . which flow from a longstanding segregated system. . . . Pupil assignment alone does not automatically remedy the impact of previous unlawful educational isolation; the consequences linger and can be dealt with only by independent measures.[111]

In this explicit acceptance of the role of education programs to complement student reassignment, *Milliken II* established the remedial nature of desegregation orders to address past effects of discrimination.[112]

OCR has set forth specific guidelines addressing these issues in ability grouping practices that implicate title VI compliance issues. In seeking to reduce racial isolation where it occurs, OCR has issued findings banning certain practices that have tended to create racial segre-

[109] 433 U.S. 267 (1977).

[110] *Id.* at 286–88.

[111] *Id.* at 281–87.

[112] Vergon, "The Evolution of the School Desegregation Movement," pp. 31–32; Zirkel et al., *A Digest of Supreme Court Decisions Affecting Education*, pp. 124–26.

gation. For example, OCR has stated it is inappropriate for a pupil to be placed in an academic track where all subjects are offered at the same ability level based solely on the total score of his or her placement tests.[113] Elsewhere, OCR has stated that for an ability grouping system that results in "racially identifiable"[114] classes to be considered bona fide, it must meet the following conditions: (1) the grouping must be based on nondiscriminatory, objective standards of measurement that are educationally relevant to the purpose of such grouping; (2) the grouping must be determined by the nondiscriminatory application of objective standards of measurement; and (3) the grouping must be validated by test scores or other reliable evidence indicating the educational benefits of such grouping.[115]

OCR's title VI compliance reviews and complaint investigations are based on reasoning very similar to the equal protection analysis applied by the *Hobson* court.[116] OCR has focused on the presence of statistical disparities between white and black student enrollment in specific programs as part of its discrimination analysis. For example, in a recent compliance review of the Rochester City School District in New York, OCR found:

> OCR's review of minority participation in upper track courses revealed that during the 1994–95 school year, the District offered the Major Achievement Program (MAP) at six elementary schools and the six comprehensive middle schools. According to the District, MAP is a differentiated program for high achieving students offered to students at the beginning of the fourth grade. MAP is designed to accelerate the academic curricula of the students who are determined eligible. OCR analyzed the criteria for enrollment into MAP, the validity of the criteria and the manner in which the criteria were evaluated. OCR determined that black, Hispanic, and LEP students were underrepresented in MAP to a statistically significant degree.
>
> OCR determined that honors, Advanced Placement (A.P.), and high level sequential mathematics courses offered by the District at the high school level constituted the District's offering of upper level courses. OCR analyzed the criteria for enrollment into these courses, and the placement into honors courses of students, by race, who had similar grades in similar courses. OCR also examined the District's procedures for ensuring that LEP students had the opportunity to enroll in upper level courses. OCR further examined the role which guidance counselors, teachers, parents, and the students, themselves, played in student placement into honors courses. OCR determined that black, Hispanic and LEP students were underrepresented in all these courses. . . .[117]

In this case, OCR negotiated a resolution agreement with the school district, which agreed to revise its evaluation and placement procedures to address the statistical disparities.[118]

Ability Grouping: The Current Debate

The fundamental premise of ability grouping is that the differential treatment of students with different needs will promote equal educational opportunities for all students.[119] Numerous researchers have challenged this premise, claiming the practices of ability grouping and tracking in fact decrease students' educational opportunity.[120]

Commentators have identified three grounds upon which allegations of diminished or denied educational opportunity may be based:

1. Students placed in certain classes or programs receive fewer resources than students placed in other programs.
2. Certain classes or programs, because of their structural rigidity or inefficacy, place limita-

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[113] Office for Civil Rights, U.S. Department of Education, "Statement of Findings for Dillon County School District No. 2, South Carolina," October 1979 (hereafter cited as "Statement of Findings").

[114] OCR defines this term as referring to classes in which "the ration of black to white students deviates twenty percent, plus or minus, from the ration of black to white students in each grade level or subject area at each school." "Statement of Findings," n. 32.

[115] *See* Harry Singleton, Assistant Secretary for Civil Rights, memorandum to William Thomas, regional director (Region IV), Nov. 9, 1983. *See also* Office for Civil Rights, U.S. Department of Education, Statement of Findings for Barnwell School Dist. No. 45, Barnwell, SC, May 1980, p. 1; chap. 3.

[116] Hobson v. Hansen, 269 F. Supp. 401 (1967). For more detailed information regarding OCR's policies and procedures in ability grouping cases, *see* chap. 3.

[117] *See* Helen N. Whitney, enforcement director, New York Enforcement Office, Office for Civil Rights, U.S. Department of Education, letter to Clifford B. Janey, superintendent, Rochester City School District, Rochester, NY, re: Case No. 02–96–5003, Nov. 27, 1996, pp. 2–3.

[118] Ibid., p. 4.

[119] Yudof et al., *Educational Policy and the Law*, p. 566.

[120] Ibid. *See also* Donelan et al., "The Promise of *Brown* and the Reality of Ability Grouping," pp. 378, 382; Gallardo, "Hierarchy and Discrimination," pp. 74, 81.

tions on the educational potential of students in those classes or programs.

3. Certain programs unnecessarily stigmatize students.[121]

Despite the documented occurrence of these particular circumstances, a study by the National Education Association (NEA) found ability grouping and tracking practices are used in a majority of elementary and secondary schools by 63 percent of all teachers.[122] Opposing sides of the ability grouping debate characterize it in markedly divergent terms. Supporters view it as a nondiscriminatory, educationally justified practice that maximizes the learning potential of students, collectively and independently. At least one researcher has concluded the elimination of ability grouping practices from the American education system would be detrimental to students of all ability levels.[123] Opponents perceive the practice as a thinly veiled discriminatory device used to perpetuate racial inequality. Moreover, critics point to the continuing overrepresentation of minorities in lower ability groups.

Immigration, one of the primary causes for the instigation and proliferation of ability grouping earlier this century, is again a salient factor in the practice of ability grouping. Segregation appears to be on the rise[124] at a time when minority student enrollment is also increasing. Although retrospective accounts of desegregation and integration necessarily focus on the experiences of African Americans, contemporary discussions of segregation and equal educational opportunity should not overlook discriminatory obstacles encountered by the large numbers of Hispanics and Asian Americans affected by ability grouping.

An educational practice, especially one as prevalent as ability grouping, that (by design or implementation) separates students according to race has serious implications for *all* students. Children of color and lower socioeconomic backgrounds may be denied equal educational opportunity in ways discussed throughout this report. White children from middle-class and affluent families also are harmed if they are isolated and denied the educational benefits of social interaction with their peers from diverse racial, ethnic, and socioeconomic backgrounds.[125]

Ability Grouping and Equal Opportunity

The U.S. Department of Education's (DOEd) Office for Civil Rights enforces title VI of the Civil Rights Act of 1964 to eliminate barriers based on race, color, or national origin in all federally assisted programs funded by DOEd.[126] Title VI and its implementing regulations and policies are invaluable tools for improving equal access to quality education programs. However, the promotion of equal access to a quality education cannot be achieved through civil rights laws alone.

In providing all students with equal educational opportunities, it is imperative to strive for the highest quality education attainable. The application of education research, theories, and innovative practices, together with civil rights laws and policies, is essential for creating a quality education system accessible to all students. Attaining this goal means focusing on quality in each aspect of education programs, including ability grouping, to ensure all students have highly trained and effective teachers; involved, informed, and engaged parents; objective, bias-free, and educationally effective screening and diagnostic procedures; racially and ethnically diverse classrooms; equal access to all programs that a school has to offer; and a school environment that cultivates every child's academic potential to its fullest.

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[121] Yudof et al., *Educational Policy and the Law*, p. 566.

[122] Ibid., p. 572 (citing *Academic Tracking*, Report of the NEA Subcommittee on Academic Tracking (1990)). *See also* Wheelock, *Crossing the Tracks*, pp. 8–9.

[123] Kulik, *Research on Ability Grouping*, p. 3. *But see* Oakes, *Keeping Track*.

[124] *See generally* Gary Orfield, Mark D. Bachmeier, David R. James, and Tamela Eitle, "Deepening Segregation in American Public Schools," Harvard Project on School Desegregation, Apr. 5, 1997.

[125] U.S. Commission on Civil Rights, *Twenty Years After Brown* (1975), p. 56.

[126] 42 U.S.C. §§ 2000d to 2000d–7 (1994).

Chapter 3

Office for Civil Rights Compliance and Enforcement Efforts

The basis in law for OCR's civil rights compliance and enforcement efforts is title VI of the Civil Rights Act of 1964, which prohibits race, color, and national origin discrimination in any federally assisted program or activity, including public schools.[1] This prohibition against discrimination forms the foundation and the starting point for OCR's work in ensuring that school districts across the country protect the civil rights of all students in the Nation's public school system. In addition, OCR helps implement civil rights provisions in title V, part A, of the Elementary and Secondary Education Act, the Magnet Schools Assistance Program.[2]

Title VI: Scope and Prohibitions

Title VI states: "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[3] The objective of title VI is to prohibit recipients of Federal funds from discriminating against the intended beneficiaries of those funds. As applied to programs operated by the U.S. Department of Education (DOEd), title VI requires DOEd to administer and enforce title VI through the issuance of rules, regulations, or orders establishing the standards for compliance.[4] DOEd's rules, regulations, and orders must be "consistent with the achievement of the objectives" of the program or activity for which the financial assistance is being extended.[5] DOEd's rules, regulations, and orders also must be approved by the President.[6] Executive Order 12250 provides the Attorney General with the authority vested in the President by title VI to approve all agency rules, regulations, and orders.[7]

Effective enforcement of title VI should convince a DOEd recipient that DOEd will withhold Federal financial assistance if discrimination exists in its program, or if discrimination elsewhere in its operations affects the program,[8] unless the recipient agrees to remedy the discrimination.

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[1] 42 U.S.C. § 2000d (1994).

[2] 20 U.S.C. §§ 7201–7213 (1994).

[3] 42 U.S.C. § 2000d (1994).

[4] 42 U.S.C. § 2000d–1 (1994).

[5] *Id.*

[6] *Id.*

[7] Exec. Order No. 12250, § 1–101, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d–1 (1994). The authority and responsibility for coordinating title VI implementation and enforcement among all the agencies with title VI responsibility is vested in the Attorney General under Executive Order 12250. This order also applies to title IX of the Higher Education Amendments Act of 1972, section 504 of the Rehabilitation Act of 1973, and "any other provision of Federal statutory law which provides . . . that no person in the United States shall, on the ground of race, color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." Exec. Order No. 12250, § 1–101, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d–1 (1994). For a further discussion of the Attorney General's title VI responsibility, *see* U.S. Commission on Civil Rights, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs* (June 1996), chap. 3 (hereafter cited as USCCR, *Federal Title VI Enforcement*). *See also* Brian K. Landsberg, "The Federal Government and the Promise of *Brown*," *Teachers College Record,* vol. 96, no. 4 (Summer 1995), pp. 627–36.

[8] The Civil Rights Restoration Act of 1987 amended the definition of program or activity as it applies to the scope and coverage of title VI, and the act's legislative history confirms the reach of the fund termination remedy. 42 U.S.C. § 2000d–4a (1994); U.S. Congress, Senate, Committee on Labor and Human resources, *Civil Rights Restoration Act of 1987,* 100th Cong., 2d sess., S. Rep. No. 64, p. 20, *reprinted in* 1988 U.S.C.C.A.N. 3, 22. For a further discussion of the effects of the Civil Rights Restoration Act, *see* USCCR, *Federal Title VI Enforcement,* chap. 2.

The Magnet Schools Assistance Act

The Magnet Schools Assistance Act is a Federal education program statute that has civil rights provisions OCR helps to implement. Congress has included among its findings in the Magnet Schools Assistance Act the following:

- magnet schools are a significant part of our Nation's effort to achieve voluntary desegregation in our Nation's schools;[9]
- consistent with desegregation guidelines, local educational agencies must seek to enable participation in magnet school programs by students who reside in the neighborhoods where the programs operate;[10]
- it is in the best interest of the Federal Government to continue the Federal Government's support of school districts implementing court-ordered desegregation plans and school districts seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education; ensure that all students have equitable access to quality education that will prepare such students to function well in a culturally diverse, technologically oriented, and highly competitive, global community;[11]

The act states as one of its main purposes: "the elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority students."[12] The statute authorizes grants to establish magnet schools or public elementary and secondary schools or centers that offer a special curriculum capable of attracting substantial numbers of students of different racial backgrounds.[13] Such schools should be "designed to bring students from different social, economic, ethnic and racial backgrounds together."[14]

OCR works with the Office of Elementary and Secondary Education, which administers the act, to implement the civil rights provisions of the Magnet Schools Assistance Program.[15] These provisions state that all grantees receiving Federal funds under the Magnet Schools Assistance Program will provide to the Secretary of Education an application that includes a written assurance that they will "not engage in discrimination based on race, religion, color, national origin, sex, or disability in . . . the assignment of students to schools, or courses of instruction within the school, of such agency, except to carry out the approved plan."[16] In addition, no application can be approved "unless the Assistant Secretary of Education for Civil Rights determines that the assurances described [in the above section] will be met."[17] OCR conducts preaward reviews for the Magnet School Assistance Program. The statute and regulations for the program require OCR to review applications to determine plan eligibility and evaluate the compliance status of applicants.[18]

OCR's Title VI Regulations

Congress used only a very few words in the title VI statute to bar discrimination. The executive branch of the Federal Government, which enforces Congress' laws, has developed regulations to provide detailed instructions and guidelines for helping school districts to establish practices and procedures consistent with the principles of equal protection and nondiscrimination in education programs.

OCR's regulations ensure broad, institution-wide application of title VI. The title VI regulations prohibit generally all racial discrimination or segregation in federally funded programs.[19] These prohibitions include denying an individual any service or benefit of the program; providing any service or benefit that is different, or provided in a different manner, from that provided to others; restricting an individual's enjoyment of any advantage or privilege enjoyed by others receiving the same service or benefit; or denying an individual an opportunity to participate in the program or provide him or her an opportunity to do so which is different from that afforded to others based on race, color, or national origin.[20]

OCR has set forth provisions in the title VI regulation applicable to ability grouping prac-

[9] 20 U.S.C. § 7201(1) (1994).

[10] 20 U.S.C. § 7201(4)(D) (1994).

[11] 20 U.S.C. § 7201(5)(A), (B) (1994).

[12] 20 U.S.C. § 7202(1) (1994).

[13] 20 U.S.C. § 7204 (1994).

[14] 20 U.S.C. § 7203(2) (1994).

[15] U.S. Department of Education, Office for Civil Rights, FY 1994 Annual Report, app. A, p. 3.

[16] 20 U.S.C. § 7206(b)(2)(C)(ii) (1994).

[17] 20 U.S.C. § 7206(c) (1994).

[18] 34 C.F.R. Part 280 (1996).

[19] 34 C.F.R. § 100.3(a), (b)(1)(ii), (b)(1)(iii), and b(2) (1998).

[20] *Id.*

tices in a 1989 policy guidance. This guidance states:

> The Department of Education's regulations implementing Title VI are found at 34 C.F.R. Part 100. In pertinent part, they state:
>
> 100.3 Discrimination Prohibited
>
> (a) General. No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.
>
> (b) Specific discriminatory actions prohibited. (1) A recipient under any program to which this part applies may not, directly or through contractual arrangements, on the ground of race, color, or national origin:
>
> (i) Deny an individual any service, financial aid, or other benefit provided under the program; . . .
>
> (iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program; . . .
>
> (v) Treat an individual differently from others in determining whether he satisfied any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program...
>
> (6) (i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of past discrimination.
>
> (ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin. . . .
>
> 100.5 Illustrative application
>
> (i) Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups not then being adequately served. . . .[21]

Another provision of significance relating to OCR's enforcement efforts with respect to ability grouping practices is 100 C.F.R. § 100.3(b)(2). This provision addresses the issue of discrimination based on adverse effects. It states:

> A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which *have the effect* of subjecting individuals to discrimination because of their race, color, or national origin, or *have the effect* of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin. . . .

In addition, the regulations prohibit discrimination throughout an entire agency or institution, if any part of that agency or institution receives Federal financial assistance.[22] For example, if any part of a local school district receives Federal funding, then all programs and activities in each school in that district are covered by title VI.[23] Further, the title VI regulations require OCR to investigate civil rights complaints from parents and other concerned persons, and to conduct self-initiated investigations called compliance reviews, particularly when it has information about a school district's possible noncompliance.[24]

OCR's Title VI Ability Grouping Policy

In addition to the title VI regulations, OCR relies on policies and procedures it has developed to conduct its work in ensuring nondiscrimination in education programs. These poli-

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[21] William L. Smith, Acting Assistant Secretary for Civil Rights, memorandum to Gary D. Jackson, regional civil rights director, Region X, Office for Civil Rights, U.S. Department of Education, re: Request for Policy Guidance—Seattle School District, OCR Case No. 10–85–1063, Dec. 6, 1989 (citing 34 C.F.R. § 100.3 (1989)).

[22] 42 U.S.C. §§ 2000d–4a, 6107 (1994).

[23] *See* 42 U.S.C. § 2000d–4a (1994). *See* USCCR, *Federal Title VI Enforcement*, chap. 2, pp. 36–40, for a further discussion of the definition of program or activity and its importance to title VI enforcement.

[24] *See* 34 C.F.R. § 100.7(a) (1998). This section permits OCR to conduct periodic compliance reviews of recipients to determine whether they are in compliance with the regulation.

cies and procedures derive from legal theories of how best to determine the presence of discrimination and remedy discrimination where it occurs. Following civil rights case precedent in the Federal courts, OCR primarily relies on two theories of discrimination, disparate treatment and disparate impact, in ensuring compliance with title VI in the context of ability grouping and tracking practices. These two theories provide OCR legal and investigative staff with a broad analytical framework for title VI compliance and enforcement activities. In addition, these two theories can provide laypersons with a basic understanding of the analytical underpinnings for OCR's actual investigative work, as it is reflected in OCR investigative plans, which set forth the investigative process undertaken by OCR.

Disparate Treatment

Under title VI, a complainant who alleges intentional discrimination may initially establish a prima facie case of discrimination by demonstrating each of four key elements.[25] First, the complainant must demonstrate that he or she is a member of a protected class based on either race, color, or national origin. Second, the complainant must show that he or she was qualified to receive the benefits, aid, or services of the federally assisted program. This element may be satisfied by a variety of activities that demonstrate opportunity, such as meeting eligibility requirements or completing appropriate applications. Next, the complainant must demonstrate that he or she was either denied an opportunity to participate, limited in his or her ability to participate, denied access to benefits or services, or rejected from participating in the federally assisted program. Finally, the complainant must show that the benefits, aid, or services of the federally assisted program remained available or accessible to others.[26]

Although the complainant's initial burden in disparate treatment cases under both title VII and title VI has remained consistent, the courts have continued to debate what role the initial burden has in ultimately proving intentional discrimination.[27] Using the presumption established by the Supreme Court in *Keyes v. School Disrict. No. 1*,[28] complainants challenging

[25] In OCR compliance reviews and complaint investigations, it is OCR, as the investigating agency, that carries the burden of making the showing necessary to establish a prima facie case in taking a recipient to enforcement. The above discussion refers generically to the "complainant" as the person seeking relief under title VI.

[26] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). "This four part *McDonnell Douglas* adaptation need not be satisfied when you have direct evidence of intent." Deval L. Patrick, assistant attorney general, Civil Rights Division, U.S. Department of Justice, letter to Mary Frances Berry, chairperson, U.S. Commission on Civil Rights, July 13, 1994, attachment, p. 1 (hereafter cited as DOJ comments, attachment).

[27] In a 1993 title VII case, the Supreme Court clarified the respective burdens of complainants and respondents once the prima facie case is established. In *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993), the Supreme Court revisited the precedents established in *McDonnell Douglas Corp. v. Green* and *Texas Dept. of Community Affairs v. Burdine.*

Justice Scalia, writing for the five-justice majority in *Hicks*, held that if the complainant successfully demonstrates a prima facie case of intentional discrimination by direct or circumstantial evidence, a rebuttable presumption of intentional discrimination is created. Hicks v. St. Mary's Honor Center, 113 S. Ct. 2742, 2747 (1993). According to the Court, the presumption is merely a court-created procedural device that allows a conclusion to be drawn from the asserted facts and shifts the burden of producing evidence to the respondent. Hicks v. St. Mary's Honor Center, 113 S. Ct. 2742, 2747 (1993). However, the complainant always maintains the ultimate burden of persuading the trier of fact that the respondent intentionally discriminated. Hicks v. St. Mary's Honor Center, 113 S. Ct. 2742, 2747–48 (1993).

Once the presumption of intentional discrimination is established, the respondent must produce evidence of a legitimate, nondiscriminatory explanation for the adverse action, and that evidence must rebut the presumption. Hicks v. St. Mary's Honor Center, 113 S. Ct. 2742, 2747 (1993). The respondent need only present evidence of a legitimate reason, and need not demonstrate that he or she was actually motivated by the nondiscriminatory reasons offered. Hicks v. St. Mary's Honor Center, 113 S. Ct. 2742, 2749 (1993). If the respondent produces such evidence, then the complainant must be able to show that the nondiscriminatory reasons offered by the respondent were merely a pretext for intentional discrimination. Hicks v. St. Mary's Honor Center, 113 S. Ct. 2742, 2747 (1993). According to a majority of the Supreme Court, a complainant cannot demonstrate that the nondiscriminatory reasons were mere pretext unless he or she proves "*both* that the reason was false, *and* that discrimination was the real reason" for the adverse action. Hicks v. St. Mary's Honor Center, 113 S. Ct. 2742, 2752 (1993). To date, the Federal courts have not cited *Hicks* in a title VI or an education case. However, because the earlier disparate treatment cases have been applied consistently to title VI, it appears that the Federal courts will likely follow the recent clarifications.

[28] 413 U.S. 189, 208 (1973). In *Keyes*, the Court affirmed the use of race-conscious remedies in the context of school desegregation even when statutorily imposed segregation had not existed before. Although the Denver, Colorado, school system had never been operated under a State constitutional provision or law that mandated or permitted school

within-school grouping practices under a disparate treatment analysis may argue successfully that vestiges of past discrimination presumptively invalidate a current system that perpetuates the effects of the prior intentional segregation. Thus, the existence of the continuing effects of prior discrimination establishes a prima facie case that shifts the burden of proof to the school district.[29] The standard under the equal protection clause creates an inference of current intent based on the continuation of the effects of past intentional discrimination. For example, plaintiffs may show a causal link between past discrimination and present ability grouping practices.

The different treatment approach may be effective in identifying possible discrimination in the referral process. For example, title VI concerns in a different treatment framework would be raised if a school district tries various prereferral strategies for nonminority students but does not attempt such strategies for minority students. Similarly, school districts are not permitted to refer minority students based on criteria that are not applied to nonminority students or refer minority students based on race or limited English proficiency. Where different treatment in referrals has been found and cannot be explained by the school district, the remedies may include, among others, adoption of new and more precise instructions to staff, staff training, reconsideration of the referral of students, and notices to parents, with reporting to and monitoring by OCR.

Disparate Impact

According to OCR draft guidance on ability grouping investigative procedures, where a facially neutral practice results in a racially disproportionate effect or segregative effect, on the basis of race, color, or national origin, the school district must provide a "substantial educational justification" for the practice.[30] Ability grouping and tracking practices can be a disparate impact issue under title VI where assignment to classes on the basis of ability or achievement is a facially neutral practice that results in a racially disproportionate effect. Where this occurs, a legal case based on disparate impact for a violation of title VI may be established.[31]

segregation, many of the city's schools were segregated. In 1969 the school board adopted a voluntary plan for the desegregation of the predominantly black Park Hill section of the city. A new school board election resulted in a majority of the members opposed to the plan. Subsequently the district court, finding that the segregation in Park Hill had resulted from prior school board actions, ordered the desegregation of the Park Hill section. Those favoring integration sought desegregation orders for the remaining schools in the district and the counting of Hispanic, as well as of black children, as minority students. The Supreme Court held that proof of segregation in a substantial portion of a school district would support a finding of a dual system, thus imposing an affirmative duty on school authorities "to effectuate a transition to a racially nondiscriminatory school system." 413 U.S. at 189. *Keyes* created a presumption of unconstitutional discrimination in situations where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of students within the school system. 413 U.S. at 201. The Court also created the presumption, now generally referred to as the *Keyes* presumption, that a finding of segregative intent in a meaningful portion of a school system "creates a presumption that other segregated schooling within the system is not adventitious." 413 U.S. at 208. This connection establishes a prima facie case of unlawful segregation and shifts to the school authorities the burden of proving that the other segregative situations were not intentional.

[29] Keyes v. School Dist. No. 1, 413 U.S. 189, 207 (1973).

[30] *See* Richard D. Komer, Deputy Assistant Secretary for Policy, Office for Civil Rights, U.S. Department of Education, memorandum to OCR regional civil rights directors, Draft "Ability Grouping Investigative Procedures Guidance," Mar. 14, 1991, p. 4 (hereafter cited as OCR, Draft "Ability Grouping Investigative Procedures Guidance"). While the guidance advances the "educational justification" standard, OCR instead should articulate the "educational necessity" standard in finalized guidance on ability grouping. *See* discussion below on "educational necessity."

With respect to citations to this investigative procedures guidance, which remains in draft form, DOEd's Office of General Counsel has informed the Commission that "[a] 'draft,' per se, is not this agency's position. Some of the same concerns the Commission has with respect to the draft ability grouping guidance are reasons why the document was not finalized. The discussion of this draft guidance in the Commission's report [on ability grouping practices] does not ultimately reflect OCR's position on the issue of ability grouping." Karl Lahring, assistant general counsel, Office of General Counsel, U.S. Department of Education, Note to Frederick D. Isler, assistant staff director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Sept. 9, 1997, p. 2 (hereafter cited as Lahring, Note to Frederick D. Isler). Despite this statement, the Commission's evaluation indicates that, in practice, DOEd's regional civil rights offices rely on this draft document for guidance on investigative procedures relating to ability grouping cases.

[31] *See* OCR, Draft "Ability Grouping Investigative Procedures Guidance," p. 2, n. 2. The draft guidance states "[t]he Supreme Court upheld a disparate impact under the Title VI regulation in Guardians Association v. Civil Service Commission of New York, 463 U.S. 582, 103 S. Ct. 3221, 3235 n. 27 (1983). In *Matter of Maywood School Dist. #89*, the Secretary of Education recently relied on *Guardians* to uphold an administrative law judge's application of a disparate impact

According to a draft guidance on ability grouping investigative procedures:

> ability grouping practices that have a segregative effect may violate the Title VI regulation in the following situations:
>
> (1) when the recipient is unable to proffer an educational justification for its system;
> (2) when the recipient's practices do not substantially serve its legitimate educational goals;
> (3) when the criteria by which a student is assigned to a specific ability-grouped class do not adequately measure the student's abilities in that subject;
> (4) when the recipient has not applied its criteria for ability grouping consistently to all students, the inconsistent application has significantly increased segregation, and the recipient does not provide a legitimate educational justification, supported by the evidence, for the inconsistent application of its standards; or
> (5) when the recipient is using subjective measures for placement (such as teacher recommendations) which have a significant segregative effect, the recipient has not provided standards to guide the exercise of the decision maker's judgment, and the recipient cannot show that individual placements were appropriate.[32]

Even when a school district provides a substantial educational justification for an ability grouping practice, OCR may still find a violation of title VI. OCR may determine the justification is a pretext for discrimination, or merely that the district has an equally effective alternative that would result in less racial disproportionality. For example, if a recipient school system argues that its ability grouping system is designed to serve a particular educational goal such as increasing student achievement but cannot substantiate this with evidence showing how well its ability grouping system is achieving that goal, then OCR may find a title VI violation.[33] The draft guidance states that "[i]n such cases, the recipient's system may well be a pretext for discrimination, unless the system is producing educational benefit."[34] Each step in the disparate impact analysis is described in greater detail below.

Racial Identifiability and Statistical Significance

OCR states further in the draft guidance on ability grouping that it determines whether classes are racially identifiable by first using a "20 percent rule of thumb" to evaluate classroom composition.[35] Under this rule, a school is identified for further investigation if the percentage of children from any minority group in the class differs by more than 20 percentage points from that group's representation in the grade as a whole.[36] In disparate impact cases, the draft guidance indicates that a violation of title VI may occur where there is a racially disproportionate or significant segregative effect.[37]

The draft guidance indicates that "a prima facie case is established when a facially neutral practice, such as assignment to classes on the basis of ability or achievement, has a racially disproportionate effect."[38] The draft guidance makes clear the statistical method OCR investigative staff should use in determining whether the number of racially identifiable classes in a school amounts to a showing of a racially disproportionate effect. However, the draft guidance fails to identify the varying merits of different methodologies, specifically their applicability in making the determination of a racially disproportionate effect.[39]

Moreover, the recitation of case law in the draft guidance is too brief and cursory for effectively informing legal and investigative staff about the disparate impact standards it dis-

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standard in a Title VI administrative enforcement proceeding. Because of *Maywood*, OCR will use a disparate impact standard in determining whether a recipient's ability grouping practices violate the Title VI regulation." Ibid.

[32] OCR, Draft "Ability Grouping Investigative Procedures Guidance," p. 8.

[33] Ibid.

[34] Ibid.

[35] DOEd's Office of General Counsel has stated: "The '20 percent rule of thumb' is merely an investigative trigger, a means of targeting districts for review. OCR uses a variety of statistical tests, depending on the size of the universe and the sampling, to determine whether the number of such classes/groups is statistically significant." Lahring, Note to Frederick D. Isler, p. 3.

[36] Ibid., p. 2.

[37] Ibid. (citing Guardians Association v. Civil Service Commission of New York, 463 U.S. 582, 103 S. Ct. 3221, 3235 n. 27 (1983) in which the Supreme Court upheld a disparate impact standard under the title VI regulation).

[38] Ibid. DOEd's Office of General Counsel has stated that, depending on the district, OCR may take a schoolwide approach, a classroom-by-classroom approach, or both. Lahring, Note to Frederick D. Isler, p. 4.

[39] Ibid.

cusses. For example, the draft guidance observes:

> In Matter of Maywood School Dist. #89 [a school attendance zone case], the Secretary of Education found that a school is racially identifiable if there is a statistically significant difference between the percentage of students of a particular race in the school and the percentage of such students in the district. The Secretary held that this rule applies even if the difference in percentages is less than 20% as long as the difference is statistically significant.[40]

There is no explanation or further discussion on the Secretary's use of the school/school district comparison. The draft guidance should explain in greater detail and with other case examples the investigative implications of the Secretary's ruling that racial differences of less than 20 percent should be reviewed. The draft guidance fails to explain why that standard was applied in that case and whether this standard should be applied uniformly in other ability grouping cases. The guidance does not clarify whether the standard used for determining statistically significant racial disparities will depend on other considerations.

The draft guidance further discusses the standards used for determining statistical significance in other cases but again fails to provide explanation or detailed discussion about the differing standards used in these cases. For example, immediately after the citation to the *Maywood* case, the draft guidance states:

> The *prima facie* case was established in a different way in *Montgomery v. Starkville Municipal Separate School District*, 665 F. Supp. 487 (N.D. Miss. 1987), aff'd, 854 F.2d 127 (5th Cir. 1988). In *Starkville*, achievement grouping in elementary and junior high schools was challenged. While the student population was equally divided between black and white children . . . whites were assigned to high groups 1.6 times their representation in the grades as whole. . . . On the other hand, in *Morales v. Shannon*, 516 F.2d 411, 414 (5th Cir. 1975), a court found "a dearth of proof" as to discriminatory effect where high ability junior high school classes contained about 1.5 times as many Anglos as were enrolled in the grades as a whole.[41]

It seems the draft guidance is attempting to show various ways that courts and administrative authorities have ruled on the determination of statistical significance that establishes the prima facie case. However, as a summary of the case law, this discussion is insufficient to provide clear guidance to investigative staff conducting title VI ability grouping compliance reviews. The details of the fact patterns and the cases themselves may be useful to include in a more comprehensive policy guidance for OCR legal and investigative staff.

The draft guidance does not include a thorough discussion addressing the reasons for these different interpretations in the courts and for the use of different statistical analyses. The draft guidance does not explain why different courts used different standards, whether these standards are all equally valid in disparate impact cases, or whether certain factual circumstances would trigger the use of one statistical analysis over another.

DOEd has stated that "OCR uses a variety a statistical tests, depending on the size of the universe and the sampling, to determine whether the number of such classes/groups is statistically significant."[42] If differing circumstances require the use of differing statistical analyses, then OCR should explicitly state this and provide a detailed discussion with examples of specific fact patterns to illustrate. If there is no one best standard, the guidance should state explicitly that the standard must be determined on a case-by-case basis using the appropriate standard for the appropriate set of facts.

Along these lines, DOEd's Office of General Counsel has stated that "U.S. Supreme Court case law under title VII has virtual black letter law on this topic, which OCR correctly uses."[43] However, OCR's draft guidance does not discuss or even refer to this important case law. Inclusion of such a discussion in a finalized version of the guidance is crucial to ensuring that OCR investigative staff as well as school districts themselves, particularly school administrators and other key staff, have a clear understanding of the basis of OCR's statistical analysis and how it is applied in specific cases.

In addition, the draft guidance refers to the use of "more complex statistical techniques to show that the racially identifiable classes were

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[40] Ibid.

[41] Ibid., p. 3.

[42] Ibid.

[43] Ibid., p. 4.

unlikely to have occurred by chance."[44] But these techniques are never explained clearly in the draft guidance. The discussion assumes too much technical statistical knowledge on the part of those intended to benefit from it, primarily legal and investigative staff. This weakens the draft guidance as a means of assisting investigative staff in conducting their compliance reviews and complaint investigations. The discussion would be far stronger as guidance if it stated explicitly how knowledge of the differing standards used in these cases can benefit investigative staff in informing their understanding of how and what statistical analyses they should apply when developing a disparate impact case.

Isolation of Factors Causing Disparate Impact

Using a disparate impact analysis, once a determination of a racially disproportionate or statistically significant effect is made, regardless of the measurement for making this determination, OCR must determine the source of the statistical significance. There are a number of practices and procedures that can result in creating the statistical difference. Some may be permissible, while others provide the basis for a violation of title VI.

OCR has included in its draft policy guidance a thorough discussion summarizing the law relating to the isolation of factors that might cause a disparate impact. Although the draft guidance, written in 1991, requires updating, the information contained is well-presented and thoughtful. For example, the draft guidance notes that the Supreme Court in *Ward's Cove Packing Company v. Atonio* [45] held that a prima facie case under disparate impact must isolate the particular factors (objective or subjective) that have caused a disparate impact.[46] The draft guidance notes further, however, that school districts, unlike the defendant employer in *Ward's Cove*, are "not required to maintain information that would disclose the impact that their ability grouping practices and placement criteria have on students of different races."[47]

Although stating that OCR will attempt, whenever possible, to isolate particular factors responsible for a discriminatory effect, the draft guidance quotes from a concurring opinion of Justice Blackmun in *Watson v. Fort Worth Bank and Trust,*[48] who stated that the requirement that a plaintiff must isolate criteria responsible for discriminatory effect cannot "be turned around to shield from liability an employer whose selection process is so poorly defined that no specific criterion can be identified with any certainty, let alone connected to the disparate impact."[49] This serves as a useful analogy in clarifying for OCR investigative staff the burden it is responsible for meeting in establishing evidence of disparate impact. It also suggests the need for careful, thorough investigative work without total reliance on the records provided by the school district. The language, therefore, reflects a sound and appropriate standard for OCR to follow in evaluating the criteria a school district uses in placing students in ability groupings.

In cases where minority students are disproportionately represented in an ability group, the data may suggest that the source of the disproportion is the referral process. There are various ways in which the treatment of minority students before and during referral may constitute discrimination under title VI. Of particular concern are the different application of criteria and the failure to follow a consistent and coherent referral system.

OCR's investigations will often require review of data at the classroom or school screening team level. OCR determines whether the preliminary data permit the investigation to be narrowed. For example, the data may enable OCR to identify particular schools or particular referring teachers that appear to be the primary source of the disproportionate referral rates. The type of data that OCR reviews includes explanations on referral records, teacher notes, grades, and student disciplinary records.

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[44] Ibid.

[45] 109 S. Ct. 2115 (1989). After the *Wards Cove* decision, the Civil Rights Act of 1991 altered the requirement that the plaintiff isolate particular factors that cause a disparate impact, allowing them, when "the elements of the respondent's decisionmaking process are not capable of separation for analysis" to show that the respondent's entire process causes a disparate impact. Pub. L. 102–166, 105 Stat. 1071 (codified at scattered sections of 42 U.S.C.).

[46] OCR, Draft "Ability Grouping Investigative Procedures Guidance," p. 3.

[47] Ibid.

[48] 108 S. Ct. 2777 (1988).

[49] *Id.* at 2797 n. 10 (Blackmun, J., concurring).

The disparate impact theory may also be useful in identifying discrimination in the referral process. If OCR has identified a disproportionate referral rate of minority students generally or in referral for evaluation for specific categories of disability, the district must justify the criteria or method leading to this result. If possible, OCR focuses on the specific practices that lead to the disproportions. However, if OCR cannot pinpoint the specific facet of the referral process that led to the disproportion, the district may have to justify the referral process in its entirety.

One type of disparate impact violation that may be identified is where the district's implementation of its method of referral is not coherent or consistent.[50] In such cases, OCR may take the position that the district has failed to justify the system that has led to disparity in referral rates.[51] The types of information that may be relevant in this situation include criteria for referral used in different schools, evidence of actual practices in various classes and various schools, and evidence on the rates of referral to determine the extent to which schools with similar student populations are referring students at disparate rates.

However, this approach may be difficult to use if the recipient uses different methods in different schools. In cases where there is a disproportionate referral rate and the methods of referral are so dissimilar or irregular that they cannot be considered part of the same process, OCR considers whether to pursue a pattern and practice different treatment approach.

A disparate impact approach that may be used where a district has a coherent and consistent practice and the district's criteria can be shown to be educationally necessary is to establish that there are alternative methods of referral that are known to result in a lower level of disproportion than the district's methods. To make this type of case, OCR relies on evidence demonstrating that such alternative methods exist.

A disparate impact violation may need to be remedied by changes in policies, practices, procedures, training, and comprehensive notices, with reporting to and monitoring by OCR. The recipient may also be required to reconsider some of its referrals. Put simply, OCR's general policy is that if there is an alternative ability grouping procedure that has a less segregative impact, yet achieves the same goals (e.g., raising students' achievement test scores), then a district must use it.[52]

Assessing Recipients' Claims

OCR addresses issues relating to the determination of "substantial educational justification" in its draft investigative guidance.[53] Here, OCR's summary of case law is far more useful than its case law summary on statistical significance. The recitation of cases provides a thorough, detailed investigative approach with supporting examples of its application in specific cases. For example, the draft guidance indicates that in *Starkville*, the "court found that grouping was acceptable for the purpose of assisting students' ability to learn where it occurred in grades one through six for only forty percent of the student's school day, was limited to mathematics and language arts, and was based on tests of mastery in the specific subject in which the grouping occurred."[54]

Starkville offers one example of the principles on which OCR bases its guidance for determining educational justification. Primarily, OCR's focus seems to be on ensuring that the practice is narrowly tailored to the district's stated purpose. Specifically, OCR seems to prefer ability groupings that are limited in the length of the time of the school day and the courses in which it occurs.[55] The cases briefed in this draft guidance favored ability groupings "based on tests of mastery in the specific subject in which the grouping

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[50] *See* Alton Community Unit School District #11, 05–93–5005 (July 1, 1994). In Alton, OCR found that the district's overrepresentation of minority students in special education was caused by the district's referral system, and that the referral system was so inconsistent that it could not be justified by legitimate educational goals. OCR and the district reached a settlement agreement to resolve the compliance problem.

[51] This analytical approach can also be described as a method of administration violation.

[52] Lahring, Note to Frederick D. Isler, p. 4.

[53] OCR, Draft "Ability Grouping Investigative Procedures Guidance," pp. 4–6. As mentioned above, OCR should articulate an "educational necessity" standard in finalized guidance on ability grouping. *See* discussion below on "educational necessity."

[54] Ibid., p. 5.

[55] *See* ibid., pp. 4–6.

occurred."[56] Other factors noted by court opinions briefed in the draft guidance as reasons why courts found ability groupings educationally justified include: retesting on request; "considerable evidence of mobility from the lowest group"; and "impressive movement among achievement levels during the school year as a result of test scores, classroom achievement, and parent requests."[57] The draft guidance also mentions an OCR case in which an administrative law judge found that a district had proffered a sufficient nondiscriminatory justification. The case cited as its educational justification for an ability grouping program the following: manageability, facilitating teaching and learning through a reduced range of ability levels and more student time and attention, upward mobility, and favorable statewide testing results in the district as a whole.[58]

Taken together, the recitation of cases in this discussion in the draft guidance seems to indicate sufficiently well the most important themes from ability grouping case law, through 1990, on the kinds of showings that OCR and the courts look on favorably in finding substantial educational justification for an ability grouping practice. The summary of cases here in the draft guidance is useful both to investigative staff and ultimately to school officials because it uses practical examples to illustrate complex legal standards.[59]

However, the Ability Grouping Investigative Procedures Guidance has never been updated or finalized and remains in draft form.[60] An important reason why OCR should finalize this guidance is that it should refer to the more rigorous "educational necessity," standard, rather than "substantial educational justification." Important changes in the law since 1991, when this draft guidance was prepared, indicate that the "educational necessity" standard is more appropriate for thorough assessment of recipient reasons for practices resulting in an adverse impact on the basis of race, color, or national origin. Given that this draft guidance document is now very outdated, it can not address the evolution in the law relating to title VI disparate impact discrimination. For example, while discrimination analyses under title VI have been informed by jurisprudence interpreting title VII of the Civil Rights Act of 1964[61] and Congress has amended title VII in important ways, the guidance does not refer to these changes.[62] In particular, the guidance does not address the definition of "business necessity" set forth by Congress in the Civil Rights Act of 1991,[63] which amended title VII.[64] This standard informs a DOEd OCR analysis of disparate impact under title VI because it may be analogized to "educational necessity."[65] Moreover, in more recent draft guidance, OCR itself states that the appropriate standard for assessing the presence of disparate impact discrimination in the educational testing context is "educational necessity" rather than "educational justification."[66]

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[56] Ibid., p. 5.

[57] Ibid.

[58] Ibid.

[59] *See* ibid., pp. 4–6.

[60] *See* p. X. *See also* Becky Hoover, Office for Civil Rights, U.S. Department of Education, telephone interview, June 21, 1991, p. 1.

[61] Pub. L. No. 88–352, title VII, § 701, 78 Stat. 253 (codified as amended at 2000e–2000e–17 (1994)).

[62] *See* New York Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) ("[c]ourts considering claims under analogous Title VI regulations have looked to Title VII disparate impact cases for guidance"). *See also* Sidney D. Watson, "Reinvigorating Title VI: Defending Health Care Discrimination—It Shouldn't be so Easy," *Fordham Law Review*, vol. 58 (1990), p. 955; Stan Dorn, Michael A. Dowell, and Jane Perkins, "Anti-discrimination Provisions and Health Care Access: New Slants on Old Approaches," *Clearinghouse Review* (Summer 1986), pp. 439–53 ("[e]mployment discrimination cases under Title VII of the Civil Rights Act, 42 U.S. §§ 2000e et seq., have precedential value for Title VI cases," p. 44, n. 61). These commentators also stated that "[a]dvocates should cite helpful Title VII cases from their circuits holding that defendants have a heavy burden in proving 'business necessity' for practices shown to have a disparate impact on minorities." Ibid.

[63] Pub. L. No. 102–166, §§ 105(a), 106, 107(a), 108, 105 Stat. 1074–1076) (42 U.S.C. 2000e–2(k) (1994)).

[64] 42 U.S.C. 2000e–2(k) (1994) (codifying the business necessity evidentiary framework that was created in Griggs v. Duke Power, 401 U.S. 424 (1971) and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)).

[65] *See* Larry P. by Lucille P. v. Riles, 793 F.2d 969 (9th Cir. 1986) (applying the title VII burden-shifting framework to a title VI case in the education context); Bd. of Educ. v. Harris, 444 U.S. 130, 151 (1979) (in disparate impact cases in the education context, defendants are required to show an educational necessity).

[66] *See* U.S. Department of Education, Office for Civil Rights, Draft "Nondiscrimination in High-Stakes Testing: A Resource Guide" (undated); Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, draft memorandum to all OCR staff, Mar. 14, 1995 (re: Fairness in Testing), pp. 5–6, Tab A, "Steps for Establishing Disparate Impact." *See also* chap. 5 for a discussion of these draft

Pretext

OCR stated in its 1991 draft guidance that "an ability grouping system violates Title VI if there is an equally effective alternative educational practice which results in less racial disproportionality, or if the justification proffered is shown to be a pretext for discrimination."[67] This standard has strong support in case law and seems wholly appropriate as a basis for a title VI compliance standard.[68]

The draft guidance notes further that "an alternative practice frequently suggested" is that of placing students in ability groups by subject, rather than placing each student in a single ability group each day. This is an important principle consistent with legal theory and practice relating to title VI compliance issues in ability grouping practices.[69] OCR should emphasize the usefulness of this principle in other OCR documents, including its policy guidance, and particularly resource guidance and technical assistance documents.

One example of how pretext may play a role in a plaintiff's case in the ability grouping context relates to full magnet schools as compared with partial magnet schools and their respective abilities to achieve desegregation and other goals. For example, in *People Who Care v. Rockford Board of Education*,[70] the plaintiffs argued that a magnet program for gifted and talented students intended to integrate white and black students in classrooms was having the opposite effect. The plaintiffs therefore characterized the partial magnet program as a pretext for maintaining racial segregation within school classrooms.

In the case before the district court the plaintiffs stated: "Despite their purported 'desegregation' purpose, the alternative programs were an abysmal failure. . . . These programs created virtually all-white enclaves within black schools —independent curriculums that were totally separate from the regular academic pursuits of these predominantly black schools."[71] The appeals court in the case stated: "The plaintiffs' argument is . . . that it [the school district] misused tracking, twisting the criteria to achieve greater segregation than objective tracking alone would have done . . . The school district should be enjoined from doing this. . . ."[72]

The legal and policy issues here are complex. They have a direct bearing on OCR's work related to ability grouping and tracking practices under title VI and also the work OCR does in ensuring that applicants for Federal grants under the Magnet Schools Assistance Act meet compliance standards. OCR should consider issuing a policy guidance on the title VI compliance issues relating to the policy debate over full magnet schools and partial magnet schools.

Diversity

OCR has developed guidance addressing the Seattle School District's gifted and talented program. This guidance specifically addresses the issue of diversity in the selection of students for admission and placement into education programs. In reviewing the Seattle School District's admissions process for its gifted programs, OCR determined that the system operated by the district is consistent with the title VI regulations, established case law, and OCR policy.[73] The Seattle School District used a combination of factors in selecting students for placement in its gifted programs, based on the goal of promoting diversity and recognizing that "students with outstanding intellectual and academic strengths

guidelines and their treatment of the "educational necessity" standard.

[67] Ibid., p. 6.

[68] *See* Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126–27 (1989) (stating that refusal to adopt an equally effective alternative practice "would belie a claim . . . that their incumbent practices are being employed in a nondiscriminatory way"); Georgia State Conference of Branches of NAACP v. State of Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985).

[69] *See* 775 F.2d 1403, 1419 (stating, consistent with this principle of differential grouping to reflect differential abilities across various subjects, "the criteria by which students are assigned to a specific class must adequately measure the student's abilities in that subject").

[70] 851 F. Supp. 905 (N.D. Ill. 1994), *subsequent appeal*, 68 F.3d 172 (7th Cir. 1995), *summ. judgment denied*, 1996 U.S. Dist. LEXIS 9530 (N.D. Ill. Jan. 26, 1996), *remanded*, 90 F.3d 1307 (7th Cir. 1996), *and aff'd in part, rev'd in part, remanded*, 111 F.3d 528 (7th Cir. 1997), *subsequent appeal*, 171 F.3d 1083 (7th Cir. 1999).

[71] 851 F. Supp. 905, 913–14.

[72] 111 F.3d 528, 556 (7th Cir. 1997).

[73] William L. Smith, Acting Assistant Secretary, Office for Civil Rights, U.S. Department of Education, memorandum to Gary D. Jackson, regional civil rights director, Region X, Office for Civil Rights, U.S. Department of Education, "Request for Policy Guidance—Seattle School District, OCR Case No. 10–85–1063," Dec. 6, 1989, p. 12.

are found in every cultural, ethnic, and socioeconomic group."[74]

After accepting nominations from any source, including teachers, parents, and students, the nominated students received scores based on a battery of assessments, including standardized tests and standardized creativity evaluations.[75] The district then added a specified number of points based on socioeconomic factors to each student's assessment scores. For example, the district added 10 points if the student was a member of a racial or ethnic group that was underrepresented in the previous year's gifted program, 10 points if the student participated in the school lunch program, and 4 points if the student was from a single-parent household. The district then ranked the students based on both their composite test scores and their overall score. In making the final selection, consideration was given to the representation of the student's particular racial or ethnic group, but spaces in the program were not designated or allocated based on a strict numerical quota.[76]

OCR found that the district's admissions process, permissibly aimed at promoting cultural diversity, provided for open nominations of students, the addition of credit for certain socioeconomic factors not based solely on race, and for the use of criteria not based solely on academic criteria or on a predetermined racial quota.[77] In interpreting its title VI regulations, OCR allows institutions to:

> Consider race, color, or national origin as a positive factor, with other factors, such as geographic or economic circumstance, in selecting from among qualified candidates. The relative weight granted to each factor is properly determined by institution officials; race, color, or national origin may be accorded greater weight than other factors.[78]

Thus, OCR's policy guidance supports the position that among similarly situated applicants, race may be used as a plus factor in making admissions and placement decisions.

OCR's Enforcement Activities

Strategic Plan

OCR begins the process of working to ensure ability grouping and tracking practices comply with title VI by developing an investigative strategy. In July 1994, OCR completed work on a draft Strategic Plan in which it identified its priorities and a broad outline of its planned methodologies for compliance and enforcement activities.[79]

With this Strategic Plan, OCR took another notable step to increase its emphasis on proactive civil rights enforcement. OCR adopted in this Strategic Plan a focus on streamlining OCR's civil rights implementation and enforcement activities to fulfill OCR's mission, which is "to ensure equal access to education and to promote educational excellence throughout the Nation through vigorous enforcement of civil rights." The Strategic Plan sets forth three major goals for OCR:

1. Impact on students' lives.
2. Empowerment of students and parents.
3. Investment in people.[80]

OCR's fiscal year 1996 budget request to Congress indicated that OCR would continue pursuing its strategy to find ways that the office can respond to complaints and at the same time to adopt a balanced enforcement approach that targets resources for maximum impact.[81] As part of that effort, OCR announced that it would target its proactive enforcement activities to the following priority areas:

- Possible discrimination in admissions/testing/assessment.
- Overrepresentation of minorities in special education and low track courses.
- Underrepresentation of women, girls, and minorities in math, science and high track courses.

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[74] Ibid., p. 1.

[75] Ibid., pp. 2–3. "To increase equality of opportunity, nominations forms and parent creativity checklists are available in languages other than English." Ibid., p. 2.

[76] Ibid., pp. 3–4.

[77] Ibid., p. 11.

[78] Ibid., p. 8 (citing U.S. Department of Education, Office for Civil Rights, Policy Interpretation Number 1, Oct. 2, 1979, p. 5).

[79] U.S. Department of Education, Office for Civil Rights, Draft "Strategic Plan," July 1994 (hereafter cited as OCR, Draft "Strategic Plan").

[80] Ibid.

[81] U.S. Department of Education, Office for Civil Rights, FY 1996 Budget Request, p. Z–13.

- Access to programs for limited-English-proficient students.
- Racial and sexual harassment.
- Gender equity in athletics.
- Higher education and elementary and secondary desegregation.[82]

The Strategic Plan calls for OCR to use issue area teams with substantive expertise in top priority areas to further its goals. Under the plan, the issue area teams are to serve several purposes. They are to facilitate the development of strong remedial plans; develop and disseminate policy in top priority areas; and disseminate "models that work"—models that are educationally vouched for, transferable, and systemic and preventive in nature.[83]

According to the budget request, OCR planned to expend at least 40 percent of its resources doing compliance reviews and technical assistance related to these priority issues.[84] Within these priority areas, OCR views all civil rights issues as equally important[85] and tries to achieve a national balance of its work in civil rights issues. OCR's greatest success is its traditional enforcement activities, and its most frequent source of complaints has been in the area of disabilities, section 504.[86] Overrepresentation of minority students in special education and low ability groupings, however, is an area that has been neglected through traditional enforcement. To balance the issues, OCR has brought more attention to the overrepresentation issue through proactive activities.[87]

Compliance Reviews and Complaint Investigations

Each year, each OCR component prepares a proposed enforcement docket for review by the Assistant Secretary. In March 1995, Assistant Secretary Norma V. Cantú sent a memorandum to OCR senior staff providing instructions for the development of the fiscal year 1996 enforcement docket.[88] The memorandum instructed OCR components to propose a docket of proactive enforcement activities, including compliance reviews to be initiated.[89] Information on each proposed case should discuss the targeted student population and the nature of the civil rights problems they face, the approach to developing a strong educationally sound remedy, and how OCR will ensure that the results are achieved.[90] The docket also is to provide a summary analysis of the office's proposed staff usage by issue area and by activity.[91] OCR has set a goal of targeting 40 percent of its resources to proactive enforcement activities.[92] If an office proposes to allocate more or less than 40 percent of its resources to proactive activities, the proposed enforcement docket should explain why.[93] The docket also should include a summary discussion of cases expected to go to enforcement, open proactive enforcement activities, and other cases, including complaints over 365 days old and particularly sensitive cases.[94]

According to the Assistant Secretary for Civil Rights, the Strategic Plan is "a living document that is updated continuously."[95] OCR actively uses the Strategic Plan in the annual enforcement docket process for budget and resource allocation, for human resources and labor-management issues, and for training.[96] OCR assesses the impact of the Strategic Plan through information gathered locally.[97] There is no indication, however, that OCR involves the program offices in the development of its Strategic Plan. Although OCR circulates its proposed regulations and policies to program offices to "ensure[ ]

[82] Ibid.

[83] OCR, Draft "Strategic Plan," pp. 2–5.

[84] OCR, FY 1996 Budget Request, pp. 2–13. *See also* U.S. Department of Education, Office for Civil Rights, FY 1996 Enforcement Docket, p. 3.

[85] Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, interview in Washington, DC, July 30, 1996, p. 2 (hereafter cited as Cantú interview).

[86] Ibid., pp. 2–3 (OCR receives over 3,000 section 504 complaints primarily in the area of testing. In fact, although OCR has very few cases pending before administrative judges, all of the cases in the hearing process are section 504 complaints.) Ibid.

[87] Ibid., p. 2.

[88] OCR, FY 1996 Enforcement Docket.

[89] Ibid.

[90] Ibid., pp. 7–8.

[91] Ibid., p. 3.

[92] Ibid. Although data are incomplete, it appears OCR completed more compliance reviews in 1995 than in previous years. However, OCR appears to have initiated fewer compliance reviews in 1995 than in 1994. *See* table 2.

[93] OCR, FY 1996 Enforcement Docket, p. 3.

[94] Ibid., p. 4.

[95] Cantú interview, p. 1.

[96] Ibid.

[97] Cantú interview, p. 2.

Table 1
Issues Related to Assignment of Students that Are Raised in OCR Complaints Involving Elementary and Secondary Schools, FY 1993–1995

	Complaints Received			
Category and Issue	**1993**	**1994**	**1995**	**Total**
Assignment of Students	1,023	1,944	1,983	4,950
Special programs for gifted and talented	39	87	91	217
Assignment within schools	35	74	64	173
Placement criteria	20	22	15	57
Ability grouping	8	26	7	41
Tracking	5	7	6	18
Underrepresentation in math/science	–	–	–	
Other assignment within schools	–	–	–	
Other student assignment	949	1,783	1,828	4,560

	Complaints Resolved			
Category and Issue	**1993**	**1994**	**1995**	**Total**
Assignment of Students	461	2,207	2,101	4,769
Special programs for gifted and talented	8	94	118	220
Assignment within schools	12	102	82	196
Placement criteria	9	31	22	62
Ability grouping	1	47	12	60
Tracking	2	11	14	27
Underrepresentation in math/science	–	–	–	
Other assignment within schools	–	–	–	
Other student assignment	411	2,011	1,901	4,353

SOURCE: U.S. Department of Education, Office for Civil Rights, Case Information System Database. Note: "–" indicates too few cases of a particular issue to determine precise number. Also, numbers may not total due to estimation and rounding. A total for FY 1993–FY 1995 is not calculated for issues with too few cases reported during any of the 3 years.

that programmatic concerns are fully considered in the development of civil rights policy guidance,"[98] it does not similarly ensure that programmatic concerns are considered in OCR's strategic planning.

Background

Since OCR has announced the assignment of students based on ability grouping practices as one of its targeted priority issues, it follows that there should have been an increase in the number of compliance reviews conducted to determine the presence of title VI compliance violations in ability grouping and tracking practices. However, a descriptive summary of the data obtained from OCR's Case Information System (CIS) database, which includes information on complaints and compliance reviews handled by OCR between fiscal years 1993 and 1995, reveals that OCR has not conducted noticeably more compliance reviews or complaint investigations related to ability grouping and tracking since the 1994 draft Strategic Plan.

In fiscal year 1995, OCR received 3,136 complaints and initiated 82 compliance reviews involving elementary schools.[99] Complaints and compliance reviews can raise multiple issues, and OCR's database maintains separate data on each issue raised in a complaint. The discussion below focuses on issues raised in complaints and

[98] Susan Craig, assistant general counsel, Division of Educational Equity and Research, Office of the General Counsel, U.S. Department of Education, to Frederick D. Isler, assistant staff director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, response to U.S. Commission on Civil Rights' Request for Information, Feb. 1, 1996, General Attachment No. 1.

[99] U.S. Department of Education, Office for Civil Rights, Case Information System Database.

Table 2
Issues Related to Assignment of Students that Are Raised in OCR Compliance Reviews Involving Elementary and Secondary Schools, FY 1993–1995

	Compliance Reviews Initiated			
Category and Issue	**1993**	**1994**	**1995**	**Total**
Assignment of Students	311	612	437	1,360
Special programs for gifted and talented	5	28	26	59
Assignment within schools	13	31	36	80
Placement criteria	8	8	4	20
Ability grouping	3	3	6	12
Tracking	1	2	6	9
Underrepresentation in math/science	–	9	12	21
Other assignment within schools	–	9	8	17
Other student assignment	293	553	375	1,221

	Compliance Reviews Completed			
Category and Issue	**1993**	**1994**	**1995**	**Total**
Assignment of Students	197	316	716	1,229
Special programs for gifted and talented	1	–	45	46
Assignment within schools	5	11	52	68
Placement criteria	4	4	10	18
Ability grouping	1	3	14	18
Tracking	–	1	6	7
Underrepresentation in math/science	–	–	14	14
Other assignment within schools	–	–	8	8
Other student assignment	191	305	619	1,115

SOURCE: U.S. Department of Education, Office for Civil Rights, Case Information System Database. Note: "–" indicates too few cases of a particular issue to determine precise number. Also, numbers may not total due to estimation and rounding. A total for FY 1993–FY 1995 is not calculated for issues with too few cases reported during any of the 3 years.

compliance reviews. The specific issues examined are restricted to the area of student assignment: (a) assignment of students to gifted and talented programs; and (b) assignment within schools, including criteria for assignment within school, ability grouping, tracking, and underrepresentation in mathematics and science.[100]

Complaints Received

In both FY 1994 and 1995, more than 6,200 issues were raised in the elementary and secondary school complaints OCR received, and almost 2,000 (or 30 percent) addressed student assignment.[101] Similarly, more than 7,500 issues were raised in the complaints OCR resolved, with more than 2,000 (or 28 percent) relating to student assignment each year.[102]

Assignment within Schools. With respect to OCR's received complaints between 1993 and 1995, 173 assignment of student issues were specifically related to assignment within schools.[103] Of these issues, 57 addressed placement criteria, 41 related to ability grouping, and 18 focused on tracking.[104] Almost 200 assignment of student issues were raised in OCR's

[100] Ibid.

[101] Ibid.

[102] Ibid.

[103] Ibid. *See* table 1.

[104] Ibid. Possible additional issues related to assignment within schools, which may or may not have been raised in complaints received and resolved by OCR, include annexes/temporary classrooms, underrepresentation in math and science programs, and other assignment within school issues. *See* U.S. Department of Education, Office for Civil Rights, *Issue Code Book.*

resolved complaints involving elementary schools during this time period, and placement criteria and ability grouping were the most represented concerns.[105]

Gifted and Talented Programs. Between 1993 and 1995, approximately 220 student assignment issues related to programs for gifted and talented students were raised in OCR's received and resolved complaints that involved elementary and secondary students.[106]

Compliance Reviews Closed

In 1995, 437 (approximately 88 percent) of the almost 500 issues raised in initiated compliance reviews involving elementary and secondary schools addressed assignment of students.[107]

Assignment within Schools. From 1993 to 1995, in OCR's initiated compliance reviews, 80 assignment of student issues were specifically based on assignment within schools. Of these issues, 20 and 12 were, respectively, related to placement criteria and ability grouping.[108] With respect to completed compliance reviews, slightly fewer (68) assignment within-schools issues were raised.[109] However, similar to initiated reviews, concerns related to student placement criteria and ability grouping were the most frequently addressed areas.[110]

Gifted and Talented Programs. Between 1993 and 1995, approximately 4 percent of student assignment issues raised in OCR's compliance reviews involving elementary and secondary students related to gifted and talented programs.[111]

[105] U.S. Department of Education, Office for Civil Rights, Case Information System Database. *See* table 1.

[106] Ibid.

[107] Ibid. *See* table 2.

[108] Ibid.

[109] Ibid.

[110] Ibid. Possible additional issues related to assignment within schools, which may or may not have been raised in compliance reviews initiated and closed by OCR, include annexes/temporary classrooms, underrepresentation in math and science programs, and other assignment within school issues. *See* U.S. Department of Education, Office for Civil Rights, *Issue Code Book.*

[111] U.S. Department of Education, Office for Civil Rights, Case Information System Database. *See* table 2.

OCR's Investigative Process

Despite the topical nature of discrimination issues in ability grouping practices and OCR's announcement that it had made ability grouping a targeted title VI compliance issue, to date OCR has not produced a single, coherent, and cohesive policy guidance document or investigative manual for use by staff working on title VI ability grouping compliance reviews and complaint investigations. Due to the lack of such a document, discerning OCR's investigative methods requires reliance on a single draft policy guidance written in 1991 and never formally issued and disseminated to regional staff. OCR accompanied its draft investigative guidance on ability grouping with a never issued "Investigative Plan Ability Grouping Compliance Review," also in draft form. Together, these two documents provide an outline of the investigative process for identifying and addressing title VI violations in ability grouping practices and the legal framework on which this process is based.

The draft investigative plan begins by informing OCR investigative staff of the principles that "should be kept in mind when doing an ability grouping investigation."[112] The preface briefly identifies and describes the stages of evaluation through which investigative staff should move in doing their disparate impact analyses during investigations. In addition, it indicates in a footnote that "[t]his investigative plan is primarily designed to examine ability grouping at the elementary school level."[113] The plan, therefore, is not designed and may not be as useful to staff investigating ability grouping and tracking at the middle, junior, and high school levels. In addition, the draft plan sets forth another important disclaimer that states:

> This investigative plan is intended only as a guide to be used in conducting investigations. The basic three-part test (disparate impact, educational justification, and pretext) is the standard for determining whether a recipient is [in] compliance with the Title VI regulation, but the investigative model is only one method for obtaining and analyzing the data necessary to make a determination. If the steps outlined below

[112] U.S. Department of Education, Office for Civil Rights, Draft "Investigative Plan Ability Grouping Compliance Review," p. 1 (hereafter cited as OCR, Draft "Investigative Plan").

[113] Ibid., p. 1, fn. 1.

seem inapplicable to a particular case, the investigative plan should be modified accordingly.[114]

Although the statement in this disclaimer is useful and informative for OCR investigative staff, a review of OCR investigative materials shows no other OCR documents with specific and detailed guidance on alternative steps to take if the draft investigative plan is inapplicable.

The discussion below describes the investigative plan outlined in the draft document and addresses the procedural aspects of OCR investigative work in compliance reviews and complaint investigations.

Initial Evaluation Stages

The discussion provided in the draft investigative plan is divided into several sections that carry investigative staff through an outline of the investigative process. It begins by identifying the stages of the disparate impact analysis in the context of an actual investigation. The three investigative stages are set forth below.

First Stage: OCR Determines Whether Assignment Practice Has a Segregative Effect (i.e., Whether Practice Results in a Statistically Significant Number of Racially Identifiable Classrooms)

OCR's disparate impact investigations involve three stages. First, OCR determines whether a school's within-school grouping or placement practices have a racially disproportionate effect.[115] To make this determination, OCR evaluates whether any of the recipient's ability-grouped classes are racially identifiable. OCR not only looks at racially identifiable classes, but also at racially identifiable groups.

According to the draft investigative plan, OCR determines if classrooms, or other within-school groupings are racially identifiable by using a "20 percent rule of thumb." Thus, if the racial composition of a classroom deviates from the composition of the entire *grade or grades* by 20 percent or more, the classroom is considered racially identifiable.[116] However, if the student population is small, or other factors are involved, OCR investigators may find a racially identifiable classroom at a 10 percent deviation level or by using a z-test.[117] OCR then uses statistical techniques to show that the racially identifiable classroom is unlikely to have occurred by chance, i.e., is statistically significant.[118]

However, on this crucial step in the investigative analysis, neither the draft investigative guidance nor the draft investigative plan seems to provide investigative staff with a clear approach for making the determination of statistical significance. In fact, the investigative plan merely states that "several cases have used different standards to find a racially disproportionate effect. . . . If these standards seem more appropriate in a particular case, feel free to use them."[119] It does not provide any further discussion of these cases, their fact patterns, the statistical analyses on which their findings were based, or hypothetical examples of the kinds of cases in which these cases might be useful in conducting compliance investigations.

Second Stage: OCR Determines Whether the Assignment Practice Can be Educationally Justified

Generally, OCR terminates its investigation of ability grouping practices under title VI if it finds that no significant statistical disparity exists between the representation of a particular minority group in a school's total enrollment and in their representation in the particular course or subject under investigation, or if the practice does not result in racially identifiable classrooms or groups.[120]

OCR only reaches the second stage of its investigation if it first makes a finding of statistical disparity. In the second stage of OCR's analysis, the investigator determines whether the grouping or placement practice is education-

[114] Ibid., p. 2.

[115] Ibid., p. 1.

[116] OCR, Draft "Ability Grouping Investigative Procedures Guidance," p. 2.

[117] Ibid. *See also* Greg Martonik, equal opportunity specialist, Office for Civil Rights, Region III, U.S. Department of Education, telephone interview, June 18, 1996.

[118] OCR, Draft "Ability Grouping Investigative Procedures Guidance," p. 2. OCR uses a statistical technique known as chi-square analysis to determine the probability that a racially identifiable classroom did not occur by chance.

[119] OCR, Draft "Investigative Plan," p. 1.

[120] *See, e.g.*, OCR, Draft "Ability Grouping Investigative Procedures Guidance," p. 8; OCR, *Investigative Manual: Underrepresentation of Females and Minorities in Mathematics and Science*, pp. 6–7; Newport-Mesa letter of finding; Santa Barbara letter of finding.

ally justified.[121] OCR has stated that for a grouping system that results in racially identifiable classes[122] to be considered educationally justified, or bona fide, it must meet a standard based on three main criteria or conditions.[123] First, the grouping practice must be based on nondiscriminatory, objective measures that are educationally relevant for the purpose of the grouping. The questions OCR asks to determine if the assignment practice is based on nondiscriminatory, objective measures that are educationally relevant for the purpose of the grouping are the following:

- Does the grouping practice treat minority and majority students equally?
- Does the grouping practice provide an objective assessment of student achievement level?
- Does the grouping practice pertain to the subject areas in which the students are ability grouped?

The second main criterion or condition that must be met in determining whether a racially identifiable class has a legitimate educational justification is whether the objective measures are applied in a nondiscriminatory manner, so that, for example, students with the same test scores are grouped at the same level.[124] Thus, in determining whether the second condition is being met, OCR seeks to ensure that the school district is relying on groupings determined by the *nondiscriminatory application* of the measures.

In determining compliance with title VI, OCR evaluates whether the school has used groupings based on validated test scores. If not, the school must provide OCR with other reliable and objective evidence that demonstrates the educational benefits of the grouping practice. These educational benefits may include improved academic achievement or mobility to higher level classes, particularly for the students in the lower groups. Social justifications, such as block ability grouping makes children feel more comfortable because they are with a single teacher throughout the day, are not legally sufficient justifications. If the recipient has no legitimate educational justification for its grouping system, and that system has a racially disproportionate impact, then the recipient is in violation of title VI.[125]

Third Stage: OCR Determines Whether a Legitimate Educational Justification Is a Pretext for Discrimination

If OCR determines that the recipient has a legitimate educational justification, specifically an educational benefit, for its practice, OCR must evaluate whether this justification, or benefit, is a pretext for discrimination. In practice the pretext determination is closely linked to the educational justification analysis. OCR will find a recipient's justification pretextual usually under one or more of the following conditions:

1) the recipient's practices do not substantially serve its legitimate educational goals;
2) the recipient uses subjective measures for placement, such as teacher recommendations, which have a significant segregative effect, the recipient has not provided standards to guide the exercise of the decisionmaker's judgment, and the recipient cannot show that its placement decisions were appropriate; and/or
3) the recipient has inconsistently applied its ability grouping criteria, the inconsistent application has significantly increased segregation, and there is no legitimate educational justification for the inconsistent application of its standards.[126]

OCR also may find that the recipient's justification is pretextual when the recipient states that the practice is designed to serve a particular educational goal, such as increasing student achievement, but the recipient cannot substantiate the success of the practice in achieving that goal. OCR can find a violation of title VI if the practice is not producing an educational benefit.

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[121] OCR, Draft "Ability Grouping Investigative Procedures Guidance."

[122] OCR defines this term as those in which "the ratio of black to white students deviates twenty percent, plus or minus, from the ratio of black to white students in each grade level or subject area at each school" according to its Statement of Findings for the Dillon School District, at note 32.

[123] *See* Harry Singleton, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to William Thomas, regional director, Region IV, Nov. 9, 1983.

[124] OCR, Draft "Ability Grouping Investigative Procedures Guidance."

[125] Ibid., p. 4.

[126] Ibid.

In addition, OCR's draft investigative plan states:

> In disparate impact cases, "pretext" also means that there are alternative educational practices that serve the recipient's goals equally effectively with less discriminatory impact. For example, OCR will generally find a violation based on the existence of equally effective practices that result in less disproportionality, when the criteria by which a student is assigned to a specific ability-grouped class do not adequately measure the student's abilities in that subject, and assigning students to classes in a particular subject based on their scores in that subject alone would significantly decrease racial segregation.[127]

Compliance Decisions and Remedies

Letters of Finding. OCR communicates its findings on whether a school district is meeting title VI compliance standards through written letters of finding addressed to the school district superintendent.[128] These letters of finding give school districts an explanation of the standards on which OCR relies in determining the presence or absence of discriminatory treatment or impact.

After reviewing available case letters, it appears that OCR applies consistently the legal standards described in the draft guidance in determining school district compliance with title VI in the ability grouping context.[129] From the perspective of evaluating OCR's civil rights enforcement efforts, the most important aspects of the findings that OCR writes for school districts to help them meet compliance standards under title VI are the specific criteria that OCR uses in making its determinations of racial identifiability and educational justification. Again, from an enforcement evaluation perspective, the effectiveness of OCR's findings in enforcing the nondiscrimination provisions of the title VI statute and its regulation must be evaluated on how well the compliance decisions reflected in the findings comport with title VI statutory, regulatory, and judicial case law. Specifically, two aspects of OCR's findings in its case letters and the analyses on which these findings are based need to be evaluated: (1) the overall soundness of OCR's disparate impact analysis in determining statistically significant racial disproportions and making findings on educational justification and pretext; and (2) the consistency with which this analysis is applied from case to case and across regions.

Additionally, OCR's letters of finding must be evaluated to determine whether they provide school districts with a clear understanding of the civil rights analysis used in making compliance determinations. For the letters of finding, the method for evaluating OCR's effectiveness is an examination of the text to determine whether it is sufficiently precise, clear, detailed, and thorough to provide the school district with the best, most complete understanding of OCR's civil rights analysis and the schools' legal obligations under title VI law.

The U.S. Commission on Civil Rights has sought to address several important title VI implementation, compliance, and enforcement issues in assessing the soundness of OCR's approach to initial evaluation issues in its investigative approach. For example, OCR must rely on uniform standards for comparison as set forth in policy guidance and relevant case law. The principal method for evaluating OCR's effectiveness in enforcing title VI in ability grouping practices is an examination of the standard of comparison it relies on in determining statistical significance and its guidance on the legal concept of substantial educational justification.

The first of these issues is whether OCR (specifically, its regional offices) has a precise, uniform methodology for determining the presence of statistically significant racial disproportions or segregative effects. OCR begins its inquiry into the presence of statistical significance by addressing the issue of racial identifiability. A review of OCR letters of finding, or case letters, from 1977 to 1998 reveals OCR uniformly ap-

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[127] Ibid., p. 2.

[128] *See, e.g.*, John F. Stephens, compliance team leader, Region VI, Office for Civil Rights, U.S. Department of Education, letter to Lynn Hale, superintendent, Arlington Independent School District, Arlington, TX, re: 06951091, July 3, 1995; Charles J. Nowell, regional director, Region VII, OCR, DOEd, letter to Robert Fritz, superintendent, Ferguson-Florissant R–II School District, Florissant, MO, re: 07921131, Mar. 5, 1993; Gary D. Jackson, regional director, Region X, OCR, DOEd, letter to Dr. Brian Cram, superintendent, Clark County School District, Las Vegas, NV, re: 10921141, Mar. 5, 1993; Archie B. Meyer, Sr., regional director, Region IV, OCR, DOEd, letter to DeWayne W. Key, superintendent, Lawrence County School District, Moulton, AL, re: 04921493, Nov. 6, 1992; Taylor D. August, regional director, Region VI, OCR, DOEd, letter to Jeff Heverling, superintendent, Bald Knob School District, Bald Knob, AZ, re: 06911309, June 19, 1992.

[129] Note discussion of OCR's title VI compliance standards in the previous section.

plies the "20 percent rule of thumb" and statistical significance as the standards of comparison for determining racial identifiability among the various regions.[130] However, OCR letters of finding, which are the primary means of communication with school districts, do not clearly explain the application of statistical techniques in a manner that is easily understood by school district personnel. A review of OCR's letters of finding reveals that quite frequently the letters do not fully or clearly explain to the school districts its terminology or methodology in determining statistical significance. This review shows that often letters of finding omit important information about statistical methodology and state only the conclusion drawn by OCR investigative staff on whether a racial disparity occurred. Considering the importance of these statistical analyses in conducting a disparate impact case, especially in building a prima facie case of disparate impact, it seems important for schools to understand the statistical basis on which OCR is relying.

For example, OCR conducted a title VI compliance review on a Missouri school district "to determine whether the District discriminates against students on the basis of race, color, or national origin in its ability grouping practices."[131] The review focused on the district's practice for the selection of junior high school students into the district's gifted and talented program during the 1991–92 school year.[132] OCR found that all of the above classes were racially identifiable using the 20 percent definition described above. In addition, OCR conducted a chi-square statistical test, which showed that the underrepresentation of minority students was unlikely to have occurred by chance.[133] Throughout this letter of finding, OCR refers to the use of the chi-square test and the unlikelihood of the disparity having occurred by chance,[134] but it never describes the chi-square methodology for the school district or makes clear in specific, detailed language why the test results showed that there was a likelihood against chance. Moreover, the letter repeatedly states because OCR found classes were racially identifiable using the 20 percent rule, it had established a prima facie case.[135] However, a prima facie case is not shown until a racially identifiable grouping is statistically significant "using more complex statistical techniques to show that the racially identifiable classes were unlikely to have occurred by chance."[136]

In another example, OCR informed an Oklahoma school district of the following:

> OCR statistical analysis of general student enrollment as compared to enrollment in the G/T [i.e., gifted and talented] program revealed a significant under-representation of minority students in the G/T program. There were two elementary schools that had no significant under-representation of minority students in the G/T program. However, 12 of the 36 elementary schools, three of the four junior high schools, and all three high schools in the [school district] had significant under-representation of minority students in the G/T program.[137]

Here again, OCR informed a school district about a finding on statistical significance with only a brief statement in the text that fails to provide sufficient detail on how OCR investigative staff made this determination. Specifically, this letter of finding does not inform the school district of the actual numbers of students OCR considered a significant underrepresentation or its definition of the term significant.

These analyses provide the foundation on which OCR determines whether a potential title VI violation is based. It seems insufficient for

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[130] *See, e.g.*, Taylor D. August, regional director, Region VI, Office for Civil Rights, U.S. Department of Education, letter to superintendent, Starkville School District, Starkville, MS, re: 06945011, Sept. 29, 1995; Taylor D. August, regional director, Region VI, OCR, DOEd, letter to Darrell L. Garrison, superintendent, Brenham Independent School District, Brenham, TX, re: 06935009, Mar. 15, 1995; Cathy H. Lewis, regional director, Region VIII, OCR, DOEd, letter to Dr. Howard Conley, superintendent, Chandler Unified School District #80, Chandler, AZ, re: 08921044, Feb. 16, 1993 (hereafter cited as "Lewis LOF, re: 08921044"); Charles J. Nowell, regional director, Region VII, OCR, DOEd, letter to Ray Feltner, superintendent, Center #58 School District, Kansas City, MO, re: 07915011, Apr. 13, 1993 (hereafter referred to as "Nowell LOF, re: 07915011").

[131] Nowell LOF, re: 07915011, p. 1.

[132] Ibid.

[133] Ibid., p. 2.

[134] *See* ibid., pp. 3, 8.

[135] *See* ibid., pp. 5, 7.

[136] *See* OCR, Draft "Ability Grouping Investigative Procedures Guidance," p. 2.

[137] Taylor D. August, regional director, Region VI, Office for Civil Rights, U.S. Department of Education, letter to superintendent, Lawton Public Schools, Lawton, OK, re: 06955009.RES, Oct. 11, 1995, p. 3.

OCR's draft investigative plan to state only that "[s]everal cases have used different standards to find a racially disproportionate effect. . . If these standards seem more appropriate in a particular case, feel free to use them."[138] The investigative plan provides no further detail, either through the use of hypothetical examples or more precise explanatory language, in guiding investigative staff. This seems a serious weakness in the guidance provided in the draft investigative plan, and this weakness seems to have affected the quality of the letters of finding written by OCR staff. The letter of finding is an important document that serves to create a factual record of the case, and therefore the information included in the letters should be full and complete. The methodology used is important information and OCR should ensure that the precise basis for the determination of statistical disparity is carefully laid out in detailed language in the letter of finding.

Monitoring or Resolution Agreements. After OCR has issued a letter of finding, OCR regional offices conduct monitoring of school districts that are undertaking corrective action plans. The monitoring process continues until OCR either verifies that an approved corrective action plan has been fully implemented or confirms that the corrective action plan has been successful in remedying title VI violations found by OCR investigative staff.[139] In addition, in accordance with title VI regulation and State Memoranda of Administration (MOA), each State is required to monitor the recipients of its funding, such as local governments, for compliance with title VI.[140]

Monitoring activities are a crucial part of civil rights compliance and enforcement. However, a report by the U.S. General Accounting Office on OCR's title VI enforcement found that the quality of OCR's monitoring has suffered due to a failure of OCR investigative staff to complete monitoring in a timely and complete fashion.[141] The report stated that "[w]ithout timely and complete monitoring, OCR cannot determine if school districts' corrective actions are sufficient to correct identified discriminatory practices. Ineffective monitoring jeopardizes OCR's ability to enforce school districts' compliance with federal civil rights laws and regulations."[142]

Based on a review of available OCR resolution agreements, it appears that OCR staff, working in conjunction with State and local school officials, negotiate thorough, effective plans for resolving title VI compliance problems relating to ability grouping practices.[143] For example, a resolution agreement signed by OCR and a school district in Chicago requires the school district to address a number of important issues and provide written progress.[144] Among the important issues addressed in this resolution agreement are student screening, reporting and recordkeeping, teacher training and professional growth, and access to the district's gifted and talented program.[145] This resolution agreement also requires the school district to provide written self-assessment analyses for 2 years after the close of the compliance review.[146]

Technical Assistance, Outreach, and Education

OCR also seeks to assist school districts with title VI compliance through technical assistance, outreach, and education efforts. Under title IV of the Civil Rights Act of 1964, the Department is required to provide any school board, State, municipality, school district, or other governmental unit responsible for operating a public school or schools, technical assistance in the preparation,

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[138] OCR, Draft "Ability Grouping Investigative Procedures Guidance," p. 1.

[139] *See* U.S. Department of Education, "Case Resolution Manual" (December 1993); Harry M. Singleton, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to regional civil rights directors, Regions I–X, "Revision of Methods of Administration Documents to Resolve Compliance Problems," Aug. 13, 1985, p. 2; Alicia Coro, Acting Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to regional civil rights directors, Regions I–X, "*Adams* Time Frames: Tolling Provisions," Mar. 25, 1987, pp. 2, 11. *See also* U.S. General Accounting Office, *Within-School Discrimination: Inadequate Title VI Enforcement by the Office for Civil Rights* (July 1991), p. 17.

[140] *See* 34 C.F.R. § 100.4 (1998). *See also* Harry M. Singleton, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to regional civil rights directors, Regions I–X, "Continuation of the Methods of Administration Cycle for the Next Five Years," June 12, 1985, p. 1.

[141] Ibid., p. 5.

[142] Ibid.

[143] *See, e.g.,* Office for Civil Rights, U.S. Department of Education and Mount Vernon City Schools, "Resolution Agreement, re: 05965015."

[144] Ibid., pp. 7–8.

[145] Ibid., pp. 1–8.

[146] Ibid., p. 7.

adoption, and implementation of plans for desegregation.[147] Technical assistance includes making available to such agencies information on effective methods of addressing special educational problems occasioned by desegregation, as well as making available personnel of the Department or other persons to advise and assist them in coping with such problems.[148]

In its title VI enforcement report, the U.S. Commission on Civil Rights concluded that the Office for Civil Rights has an "active" technical assistance program targeted at State and local education agencies, postsecondary education institutions, program beneficiaries, and professional associations. The Office for Civil Rights proactively provides technical assistance in the form of training to its recipients on numerous issues, including lower ability groups or tracks, and underrepresentation of minorities in mathematics and science programs, and gifted and talented programs. OCR regional offices provide technical assistance to recipients, generally in the form of workshops. In some cases, the interaction fostered by technical assistance results in the discovery of noncompliance in recipients' programs and, in turn, the negotiation of compliance agreements.[149]

Technical assistance materials prepared by OCR provide a variety of useful information to States and local school districts on ability grouping and tracking programs as they relate to title VI compliance. Such materials are prepared by both headquarters and regional OCR offices. These materials support OCR efforts in conducting title VI compliance reviews and monitoring.[150] In addition, OCR relies on such materials in conducting proactive activities such as conferences, workshops, and meetings.[151] These efforts provide an opportunity for OCR to engage in information sharing on this topic with a variety of key individuals, including education experts and representatives from civil rights advocacy and parent groups.[152]

Among the specific technical assistance duties performed by OCR staff during compliance reviews and complaint investigations are the following:

- Provide information and other services designed to inform beneficiaries (i.e., parents and parent groups, State and local advocates, education experts inside or outside of the Department of Education, and other stakeholders of Federal education programs) of their rights to facilitate voluntary compliance with civil rights laws and other responsibilities consistent with statutory and regulatory requirements.[153]
- Initiate outreach efforts with recipients of Department of Education programs and activities to (a) address recurring compliance problems and unique regional needs and (b) assist individuals in understanding their rights consistent with statutory provisions.[154]
- Issue memoranda of understanding and other formal agreements with State education and human rights agencies designed to facilitate meeting mutual civil rights compliance objectives.[155]

Although OCR seeks voluntary compliance with Federal laws, DOEd can withhold funding to a grantee who violates antidiscrimination laws.[156] Grantees receiving funds from the Department of Education must comply with the title VI statute to receive their awarded funds in a timely fashion. OCR provides technical assistance to grantees, beneficiaries, the public, and

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[147] Pub. L. 88–352, title IV, § 403, (July 2, 1964), 78 Stat. 294 (codified at 42 U.S.C. § 2000–2 (1994)).

[148] *Id.*

[149] USCCR, *Federal Title VI Enforcement,* p. 204.

[150] Alice Wender, program manager, D.C. Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, July 19, 1996, p. 5.

[151] Ibid., p. 5.

[152] Ibid.

[153] Hearings on Appropriations before the Subcommittee on the Departments of Labor, Health and Human Services, Education, and Related Agencies of the House Appropriations Committee, 104th Cong., 1st Sess. 67 (1995), p. 1526; Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to senior staff, "Development of the FY 1996 Enforcement Docket," Mar. 1, 1995, p. 3, submitted as part of Department of Education/OCR Response, folder C.

[154] U.S. Department of Education, Office for Civil Rights, *1992 Mission Manual OCR/IO,* p. 2; OCR FY 1996 Budget Request, p. Z–13.

[155] OCR FY 1996 Budget Request, p. Z–13.

[156] Stephen Sniegoski, *Know Your Government: The Department of Education* (New York: Chelsea House, 1988), p. 68.

other organizations in an attempt to obtain voluntary compliance with civil rights laws.[157]

Resource Guidance Documents

OCR has generated numerous resource guidance documents, which are included in a collection of documents and materials accessible to OCR staff through its electronic library database. Issues related to ability grouping are addressed in documents that provide helpful resource material for OCR investigative staff. For example, one document on the overrepresentation of minority students in special education provides a capsule discussion of a number of different perspectives that should inform a civil rights analysis: law, educational theory, concept and practice, and compliance-related issues.[158] It covers the history of student assignment and ability grouping practices as an issue in civil rights law beginning with *Brown v. Board of Education.* This resource guidance document contains a section on Federal statutory and regulatory laws, OCR policy guidance and other documents, a summary of case law, a listing of OCR case letters, and a bibliography with selected educational and legal references.[159] A document designed in a manner similar to this but developed on a more thorough, comprehensive scale serves effectively as a formal policy/investigative guidance on the overrepresentation of minority students in special education for use by OCR legal and investigative staff.[160]

Desegregation Assistance Centers

In conducting its ability grouping technical assistance activities, OCR has effective assistance in the form of desegregation assistance centers across the United States that provide professional technical assistance and outreach and education to schools in meeting their legal responsibilities to comply with title VI.[161] Assistant Secretary Cantú noted "in conjunction with the federally funded Desegregation Assistance Center, [OCR] provides advice and resources to parents, teachers and administrators that help identify workable solutions to the district's problems with their ability grouping practices."[162]

Training sessions and/or technical assistance visits are designed to meet individual district needs. For instance, the title IV program at the New Mexico State Department of Education works closely with the Desegregation Assistance Center-South Central Collaborative, the Region VI Desegregation Assistance Center located at the Intercultural Development Research Center in San Antonio, Texas, and can secure services from this center as well. All title IV services are provided on a first-come, first-served basis, and the level of assistance is subject to the availability of Federal funds.[163] In 1994–95, title IV desegregation assistance services were provided by the New Mexico State Department of Education to representatives of 45 of the State's 89 school districts. These districts have a combined student population of 237,862.

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[157] OCR FY 1996 Budget Request, p. Z–12.

[158] U.S. Department of Education, Office for Civil Rights, Section 626, "Minority Students in Special Education" (undated).

[159] *See generally* ibid.

[160] Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, memorandum to all staff, "Minority Students and Special Education," July 6, 1995.

[161] The desegregation assistance centers are funded and administered by DOEd's Office of Elementary and Secondary Education.

[162] Norma Cantú, Assistant Secretary for Civil Rights, "Second Annual Civil Rights Summit," Kansas City, MO, Sept. 8, 1995.

[163] New Mexico State Department of Education, Final Report (Title IV Desegregation Assistance), 1994–1995.

Chapter 4

Structuring Education to Serve a Diverse Student Population

In seeking to ensure equal educational opportunity and nondiscrimination and providing a high quality education for all students, schools must remain committed to meeting all students' individual educational needs and recognizing the unique talents and abilities of each student. It is crucial for schools to develop and implement education programs to accommodate the wide variety of individual strengths and weaknesses reflected in every student population.

Where schools rely on ability grouping practices as a main element to structure education programs, the use of three techniques may help to ensure that ability grouping is done consistently with the goals of equal educational opportunity and nondiscrimination, while enhancing the quality of education. First, schools should implement specific measures of achievement and ensure that all students are meeting high academic standards, and are achieving at the highest level based on each students' individual talents and abilities. Second, schools should group students to reflect differential abilities in various subjects. Third, schools should require periodic reevaluations of students to reflect changes in abilities or achievement. These three techniques, when implemented properly, may prevent such potentially damaging and inequitable practices as locking students into lower track courses or failing to observe positive changes in their achievement that would indicate placement in a higher ability group and may help ensure equal access and opportunity to all programs.

Current placement strategies and mechanisms often lead to an overrepresentation of poor and minority students in lower level ability groups and may result in a denial of equal educational opportunity. Educators have worked with policymakers and researchers to advance the use of appropriate ability grouping based on measuring achievement, maintaining high standards, ensuring high achievement levels, considering students' individual needs and abilities, and reevaluating and regrouping all students periodically.

For students in elementary and secondary education, the traditional regular education program has typically included an academic curriculum initially based on the study of English language, including grammar, vocabulary, and spelling; arithmetic; basic science; and history. As students move into secondary school, the curriculum builds on these basic elements. By the end of their studies in secondary school, American students have studied world literature; history and civics; mathematics, including algebra, geometry, trigonometry, and calculus; and the sciences, including biology, chemistry, and physics. Overall, the academic curriculum spans a wide breadth of knowledge that exposes students to a variety of fields of study.

Quite naturally, students possess differing degrees of ability across this varied curriculum. Some students are proficient in history and English while less successful in mathematics and science classes. Other students may be proficient in mathematics while lacking in language skills. Regardless of the area in which a student excels the most, there can be no question that the vast majority of students exhibit both strengths and weaknesses academically. Thus, schools need to develop and implement ability grouping practices that promote equal educational opportunities and incorporate nondiscriminatory principles by responding to individual student's educational needs, talents, and abilities.

At both the elementary and secondary education levels, teachers face an array of students with different cognitive abilities, achievement levels in various subjects, and education needs. To reduce disparities and potentially make instruction more effective, some schools divide students into class-size groups or subgroups

within a class, based on some measure of their perceived ability, prior achievement, or subject mastery.[1] A survey by the National Middle School Association revealed that some teachers and administrators stress that teaching cannot be effective if the range of student ability and achievement in one classroom is too heterogeneous.[2] Therefore, appropriate ability grouping practices may have potential educational benefits, by providing classes more appropriate for each student's individual educational needs.

For ability grouping practices to be effective and educationally sound, it is essential to (a) assess the organizational and structural characteristics of current methods of assigning pupils to classes; (b) determine the school- and classroom-related factors that can promote the other intended advantages of sorting students by measures of ability and achievement; and (c) identify the potential barriers that can hinder the operation of effective, educationally sound ability grouping practices. For school districts to have the most effective and educationally sound methods of assigning all students to classes, various strategies or approaches can be recommended to maximize the intended objectives of an ability grouping system (as an alternative to full-day heterogeneous grouping of students) to address the potential barriers associated with ability grouping, and overall, to promote equal access, educational opportunity and equity, student learning, and high achievement.

Ability Grouping Practices

The two principal types of pupil sorting arrangements are between-class and within-class.[3] The latter type of ability grouping is "virtually universal" in elementary reading instruction and prevalent in mathematics. Students in a self-contained, heterogeneous (mixed-ability) classroom are assigned to homogeneous subgroups (based on some measure of cognitive ability or subject competency) for instruction. Each subgroup receives lessons at its own level and progresses at its own rate. Within-class ability grouping is rarely used at the secondary school level.[4] Rather, middle/junior and senior high schools tend to use between-class grouping,[5] with students assigned to courses based on some combination of prior achievement, prior course completion, standardized test scores, motivation or interest, and teacher judgments.[6] The curriculum and instructional approaches are tailored to a homogeneous group of students' aptitude in a particular subject area.[7] Between-class ability groups can vary in scope, such that groups can be subject specific or full scale/whole class (e.g., honors, basic, remedial track).[8] Ability level tracks sort students and schedule them for subjects, for most of their day, according to those levels.[9]

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[1] Paul S. George, "What's the Truth About Tracking and Ability Grouping Really? An Explanation for Teachers and Parents" in James Bellanca and Elizabeth Swartz, eds., *The Challenge of Detracking: A Collection* (Palatine, IL: IRI/Skyline Publishing, 1993), p. 255 (hereafter cited as George, "Truth About Tracking"); Robert E. Slavin, "Synthesis of Research on Grouping in Elementary and Secondary Schools," *Educational Leadership*, September 1988, pp. 68, 73.

[2] Paul S. George, "Tracking and Ability Grouping in Middle School: Ten Tentative Truths," *Middle School Journal*, March 1993, p. 17.

[3] Maureen Hallinan, "The Organization of Students for Instruction in the Middle School," *Sociology of Education*, vol. 65 (April 1992), p. 114; Slavin, "Synthesis of Research on Grouping in Elementary and Secondary Schools," p. 68.

[4] Slavin, "Synthesis of Research on Grouping in Elementary and Secondary Schools," p. 73.

[5] Robert E. Slavin, "Achievement Effects of Ability Grouping in Secondary Schools: A Best-Evidence Synthesis," *Review of Educational Research*, vol. 60, no. 3 (Summer 1993), pp. 471–72 (citing J. McPartland, J.R. Coldiron, and J.H. Braddock, *School Structures and Classroom Practices in Elementary, Middle, and Secondary Schools* (Baltimore: Johns Hopkins University Press, 1987)) (hereafter cited as McPartland et al., *School Structures and Classromm Practices*).

[6] Ibid., p. 472 (citing McPartland et al., Sch*ool Structures and Classroom Practices);* Paul O. Rogne, "Reflections on the Research," *G.C.T.*, January/February 1993, pp. 8–14.

[7] Rogne, "Reflections on the Research," p. 9. Ability grouping usually involves higher and lower sections of the same course, but can also consist of assignment to different courses within a sequence, as when "higher ability" ninth graders enroll in algebra I, compared with others who enroll in general mathematics. *See* Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 472.

[8] Rogne, "Reflections on the Research," pp. 9–10; James A. Kulik, "An Analysis of the Research on Ability Grouping: Historical and Contemporary Perspectives," *Ability Grouping Research-Based Decision Making Series*, no. 9204 (February 1992), p. 2.

[9] Hallinan, "The Organization of Students for Instruction in the Middle School," p. 114; Rogne, "Reflections on the Research," p. 9.

Ability Grouping in Elementary School

At the elementary level, schools assign students to classrooms in various ways, such as:

- *Whole-day/full-scale ability grouping for elementary students:* Students are grouped in a single self-contained classroom for the full day based on general achievement or aptitude without any net academic benefit for the children.[10]
- *Regrouping students within a specific grade:*[11] Students are grouped by their ability level for reading and mathematics instruction, enabling them to remain in a self-contained, heterogeneous class for the duration of the school day. Regrouping within a grade can be an effective educational practice if (a) the level and pace of instruction are tailored to the achievement or subject mastery level of the regrouped class and (b) students are not regrouped for more than two courses.[12]
- *Joplin Plan:* This educational practice is a flexible, cross-grade strategy that brings students of different ages together for appropriately tailored levels of curricular content and instructional approaches in specific courses, such as mathematics or reading.[13] The resulting class is heterogeneous in the sense that younger, accelerated students can be placed with older, lower or average achievers.[14] Because the entire class-size group of students is virtually at the same skill, learning, or performance level for the particular subject, teachers are able to use more whole-class, teacher-directed instruction and reduce the concern about unsupervised students doing their classwork (a concern raised about within-class groupings).[15]

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[10] Robert E. Slavin, *Ability Grouping and Student Achievement in Elementary Schools: A Best-Evidence Synthesis*, Report No. 1 (Baltimore, MD: Johns Hopkins University, Center for Research on Elementary and Middle Schools, June 1986), p. 74. Note: Given the extensive availability of sound quality research on whole-class/full-day ability grouping, any significant impact of this practice on elementary school children overall would have been detected. Ibid., p. 31. Several earlier reviews (prior to the late 1980s) had claimed that ability grouping practices had a positive impact on high level students and negatively affected low level students, which would create greater inequity between pupils at both ends of a class' distribution of achievement. *See* Maureen T. Hallinan, "Ability Grouping and Student Learning," pp. 41–69, in Maureen T. Hallinan, ed., *The Social Organization of Schools: New Conceptualizations of the Learning Process* (New York: Plenum Press, 1987), p. 62 (hereafter cited as Hallinan, "Student Learning"). *See also* Slavin, *Ability Grouping and Student Achievement in Elementary Schools*, p. 31 (citing M.J. Eash, "Grouping: What Have We Learned?" *Educational Leadership* vol. 18, pp. 429–34); D. Esposito, "Homogeneous and Heterogeneous Ability Grouping: Principal Findings and Implications for Evaluating and Designing More Effective Educational Environments," *Review of Educational Research*, vol. 43, pp. 163–79; E.G. Begle, *Ability Grouping for Mathematics Instruction: A Review of Empirical Literature*, ERIC No. ED 116 938 (Stanford, CA: Stanford University, 1975)). However more recent research (since the late 1980s) on full-day ability-grouped classes at the elementary level, does not support this earlier evidence. Previously conducted reviews of ability grouping studies included an assessment of special programs for the gifted and learning disabled. Including these studies would erroneously give the impression that ability grouping is beneficial for high achievers and detrimental for students in lower ability groups. Slavin, *Ability Grouping and Student Achievement in Elementary Schools*, p. 31.

In studies conducted in the 1960s and 1970s, the specific effects of specialized programs were confounded with the effects on students due to the actual practice of ability grouping. Studies of special programs for the gifted tended to show achievement benefits for these students; whereas studies comparing inclusion practices (relative to special education) for disabled students tended to favor placement in the regular classroom. Ibid., p. 31. Overall, previous reviewers of ability grouping research studies (who aimed to determine the achievement effects on students), combined elementary and secondary research and studies on between- and within-class ability grouping; examined studies on specialized programs for the gifted and learning disabled; and included results of ability grouping practices that were derived from biased studies. Ibid., p. 60.

[11] For each heterogeneous "homeroom" class in a particular grade, students change classes temporarily to be with peers who are in the same grade but in a different heterogeneous homeroom. The "regrouped" students would be relatively at the same skill competency/subject-mastery level for the subject (such as reading) being taught.

[12] Slavin, *Ability Grouping and Student Achievement in Elementary Schools*, p. 74.

[13] Rogne, "Reflections on the Research," p. 10; Slavin, "Synthesis of Research on Grouping in Elementary and Secondary Schools," p. 70.

[14] Margaret Dawson, "Best Practices in Promoting Alternatives in Ability Grouping," in Alex Thomas and Jeff Grimes, eds., *Best Practices in School Psychology–III* (Washington, DC: National Association of School Psychologists, 1995), p. 351 (hereafter cited as Dawson, "Best Practices"). A reading class at the fifth grade level can include high achieving fourth graders, average fifth graders, and lower achieving sixth graders. *See* Slavin, *Ability Grouping and Student Achievement in Elementary Schools*, pp. 5–6.

[15] Slavin, "Synthesis of Research on Grouping in Elementary and Secondary Schools," p. 70; Nancy Karweit, "Diversity, Equity, and Student Classroom Processes," in Hallinan, *The Social Organization of Schools*, p. 101.

In within-class ability grouping, schools assign students to homogeneous subgroups of students for instruction within the heterogeneous classroom; and theoretically, each subgroup receives its lessons (usually for reading, but common for mathematics as well) at an appropriately tailored pace and comprehension level (based on the curricular content).[16]

Ability Grouping in Secondary School

Within-class ability grouping, although frequently used in elementary schools for reading and mathematics, is rarely used by secondary schools,[17] which tend to use between-class grouping.[18] Students are assigned based on some combination of previous achievement in specific subjects, standardized test scores, motivation, maturity, prior course completion, and teacher judgments.[19] Between-class ability groups can vary in scope, such that groups can be subject specific or full scale/whole class.[20]

Students can be assigned to separate course sections (or ability levels) for the same course. In addition, pupils can enroll in distinct courses within a curricular sequence.[21] In an ability-grouped course, the curriculum and instructional approaches are tailored to a homogeneous group of students' aptitude and/or interest in a particular subject area.[22]

In secondary schools that assign students to certain or all (core) courses based on some measure(s) of ability, students can potentially experience a variety of combinations of peers throughout the school day.[23] However, despite the possibility that students can be placed in a high ranking group for one subject and a lower ranking group for another, in practice, scheduling conflicts often result in a grouping plan in which all of a student's core courses are taken within the same ability level track.[24] Therefore, although students may be assigned to each academic course on an individual basis, students whose abilities tend to be consistent across various subjects may spend the majority of their school day together, which can result in "de facto tracking."[25]

In contrast, whole-class/full-day ability grouping occurs when a school assesses students' general abilities and deliberately (in contrast to "de facto tracking") sorts them into class schedules for most of the day based on those attributes.[26] For instance, homogeneous groups of students can be assigned to advanced, basic, or remedial tracks.[27] Students with similar interests can enroll in academic, vocational, or general program tracks.[28]

Between-class homogeneous grouping of students can assume several forms, including the following:

- Full-day/curricular program tracks (e.g., academic, vocational, general).[29]
- Full-day/comprehensive ability level tracks (e.g., advanced, basic/standard, remedial).[30]

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[16] Slavin, "Synthesis of Research on Grouping in Elementary and Secondary Schools," p. 73.

[17] Ibid.

[18] Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," pp. 471–72 (citing McPartland et al., *School Structures and Classroom Practices*).

[19] Ibid., p. 472 (citing McPartland et al., *School Structures and Classroom Practices*); Rogne, "Reflections on the Research," p. 9; Hallinan, "Student Learning"; Hallinan, "Organization of Students for Instruction in the Middle School," pp. 114–27; Joseph E. Bryson and Charles P. Bentley, *Ability Grouping of Public School Students* (Charlottesville, VA: Michie Co., 1980).

[20] Rogne, "Reflections on the Research," pp. 9–10; Kulik, "An Analysis of the Research on Ability Grouping," p. 2.

[21] Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 472.

[22] Rogne, "Reflections on the Research," p. 9.

[23] Ibid.

[24] Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 472.

[25] Rogne, "Reflections on the Research," p. 9.

[26] Ibid.; James A. Kulik, *An Analysis of the Research on Ability Grouping: Historical and Contemporary Perspectives* (Storrs, CT: The National Research Center on the Gifted and Talented, 1992), p. 2 (hereafter cited as Kulik, *Research on Ability Grouping*).

[27] Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 472.

[28] Ibid.

[29] Jomills Braddock II, *Tracking: Implications for Student Race-Ethnic Subgroups*: Report No. 1 (Baltimore, MD: Johns Hopkins University Center for Effective Schooling for Disadvantaged Students, 1990), p. 1 (hereafter cited as Braddock, *Tracking Implications*); Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," pp. 471–99. Curricular tracking is not addressed in this chapter.

[30] This form of ability grouping class assignment, where students spend all or most of the day with one homogeneous group of students, is also known as "block scheduling." *See* Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 472; Robert E. Slavin, "Ability Grouping in

- Separate, subject-specific ability-grouped classes (e.g., sophomore/introductory biology taught at a basic level, compared with an accelerated/honors sophomore/introductory class that is more rigorous, indepth, and requires students to learn at a faster pace) with students, assigned to the higher or lower course sections based on assessments of their cognitive aptitude (as measured by scores on standardized proficiency tests such as NAEP), prior accomplishments, and academic performance (which can be measured by previous course grades), and other objective cognitive factors.[31]
- Separate, distinct, sequential classes[32] that enroll students based on their achievements, such as academic preparation (i.e., having completed the prerequisites in a sequence of related classes).[33]

Particularly at the high school level, ability grouping can consist of pupil assignments to distinct courses. Accelerated ninth graders may be enrolled in algebra II, while their lower achieving peers may be taking general mathematics.[34] If high achievers are assigned to courses that are typically completed by older students, the enrollment pattern in these respective courses can reflect a multi-age, cross-grade grouping practice—a pupil sorting strategy that combines students of different ages but comparable levels of performance in a particular subject (i.e., similar mastery-competency level with respect to a specific skill, similar learning level in a particular subject).[35] Multi-age grouping at the high school level is frequently used for regular courses and electives; and the practice does not represent a "departure from the chronological age restrictions" that are traditionally used to determine elementary school pupil placement policies. One education researcher reported that numerous schools implement mixed-age grouping practices as the primary method of assigning students to classes.[36]

Types of Ability Grouping

Ability grouping practices typically differentiate between lower and higher level classrooms within an education program. When students are "tracked" within either a higher or lower level, they are assigned to all core courses at the same ability level.[37] In contrast, single-subject ability level grouping assigns students to each specific course according to academic performance or some measure of skill development related to a given course.[38] If students are trapped by assigning them to virtually all of their core courses based on some measure of overall achievement, then resulting course placement may be in a too high or too low ability level class, given a student's distinct level of performance for each specific subject.[39] Education research shows that it is essential for educators to recognize disparities in students' learning levels, aptitudes, and performance for diverse academic

Middle Grades," *The Elementary School Journal*, May 1993, p. 536.

[31] Braddock, *Tracking Implications*, p. 1; Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," pp. 471–99. Elective subjects, such as art or home economics, sometimes become "low track" classes because college preparatory students rarely have time in their schedules to take them. *See* Jeannie Oakes, "Keeping Track: Part I," *Phi Delta Kappan*, September 1986, p. 13.

[32] An example of a course sequence in mathematics is algebra I, geometry, algebra II, trigonometry, elementary functions, up to advanced placement calculus.

[33] Braddock, *Tracking Implications*, p. 1; Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," pp. 471–99. Mathematics and science classes can become labeled according to the performance levels of the students in them (e.g., advanced, average, remedial) or according to students' postsecondary destinations (e.g., college preparatory, vocational). *See* Oakes, "Keeping Track: Part I" p. 13.

[34] Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 472.

[35] Dawson, "Best Practices," p. 351; Slavin, "Synthesis of Research on Grouping in Elementary and Secondary Schools," p. 70; Rogne, "Reflections on the Research," p. 10; Karweit, "Diversity, Equity, and Student Classroom Processes," p. 101.

[36] Rogne, "Reflections on the Research," p. 10.

[37] Adam Gamoran, "The Variable Effects of High School Tracking," *American Sociological Review*, vol. 57 (December 1992), p. 817.

[38] Ibid. In school systems that implement single-subject ability grouping, not all courses will be ability grouped. Mathematics and English are the most common core courses to which pupils are assigned based on some measure of ability and/or achievement. The remaining subjects can be heterogeneous.

[39] Policies that place students in a particular course by their specific academic performance level related to the specific class are more likely than full-scale/comprehensive ability level tracking practices to provide students with appropriate educational opportunities in each specific academic subject.

subjects in order to effectively match educational opportunities to student strengths and needs.[40]

In some schools, students are rank ordered based on their overall achievement level (all core subjects combined) and assigned to their respective courses based on this index.[41] At the secondary school level, this form of tracking, in which students are assigned to most of their courses with homogeneous peers, is frequently implemented in middle/junior high schools.[42] Rather than being ability grouped for each specific core subject,[43] students remain in the same respective overall ability level group for at least most of their core courses.[44] By a school official's single decision, students can be formally placed into multiple core courses at the same achievement/ability level, and thereby "locked into one entire school program as a result of that track placement."[45]

Whole-day/full-scale ability grouping for elementary students homogeneously grouped based on general achievement or aptitude, in a self-contained classroom, receiving instruction together for each subject, has no net academic effect on children.[46] Regrouping students within a specific grade[47] by their ability level for reading and mathematics instruction, and enabling them to remain in a self-contained, heterogeneous class for the duration of the school day can be an effective educational practice if (a) the level and pace of instruction are tailored to the achievement/subject mastery level of the regrouped class and (b) students are not regrouped for more than two courses.[48]

At the high school level, based on 1993–94 data, approximately 71 percent of schools reported to the U.S. Department of Education (DOEd) that they offered differentiated courses, but gave students access to any course provided that they had taken the prerequisites.[49] In 15

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[40] Gamoran, "The Variable Effects of High School Tracking," p. 817.

[41] Slavin, *Ability Grouping and Student Achievement in Elementary Schools*, p. 294; Slavin, "Ability Grouping in Middle Grades," p. 537; Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 472; Braddock, *Tracking Implications*; Kulik, *Research on Ability Grouping*, p. 2.

[42] Slavin, "Ability Grouping in Middle Grades," p. 537; Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 472; Braddock, *Tracking Implications*; Jomills Henry Braddock II, "Tracking in the Middle Grades: National Patterns of Grouping for Instruction," *Phi Delta Kappan*, vol. 71, no. 6 (February 1990), pp. 446–47.

[43] At the middle school level, for instance, more than 20 percent of fifth through eighth graders are ability grouped for each specific class. *See* Braddock, "Tracking in the Middle Grades," pp. 446–47.

[44] If ability level tracking is not implemented as a grouping practice at a school, then it is possible (if a school operates a subject-specific ability grouping practice) that students can be placed in a high ranking group for one subject and a lower ranking group for another. However, in practice, schedules can often only accommodate a grouping plan in which all of a student's core courses are taken within the same ability-level track. *See* Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 472. Although students may be assigned to each academic course on an individual basis, students whose abilities tend to be consistent across various subjects may spend the majority of their school day together, which can result in "de facto tracking." *See* Rogne, "Reflections on the Research," p. 9.

In contrast to "de facto tracking," whole-class/full-day ability grouping occurs when a school assesses students' general abilities and deliberately sorts them into class schedules for most of the day based on those abilities. *See* Ibid., p. 9; Kulik, *Research on Ability Grouping*, p. 2. For instance, homogeneous groups of high schools students can be assigned to advanced, basic, or remedial tracks. *See* Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 472.

[45] Jeannie Oakes, *Keeping Track: How Schools Structure Inequality* (New Haven, CT: Yale University Press, 1985), p. 50 (hereafter cited as Oakes, *Keeping Track*). The extent to which a school's ability level tracks are homogeneous (i.e., the proportion/number of courses each student is assigned to that are of the same respective ability level) is a function of (a) the school's student body composition, (b) number of subject areas that are ability grouped, (c) policies/practices to assign students to classes (i.e., whether track assignments are based on each course or across all subjects). *See* Gamoran, "The Variable Effects of High School Tracking," p. 815; Oakes, *Keeping Track*. To implement comprehensive ability grouping as an educational practice, students are assigned to a particular track based on their overall academic achievement, rather than their academic performance in a particular subject area (such as mathematics or English) or their development of a specific skill.

[46] Slavin, *Ability Grouping and Student Achievement in Elementary Schools*, p. 74.

[47] For each heterogeneous "homeroom" class in a particular grade, students change classes temporarily to be with peers who are in the same grade but in a different heterogeneous homeroom. The "regrouped" students would be relatively at the same skill competency/subject-mastery level for the subject (such as reading) being taught.

[48] Slavin, *Ability Grouping and Student Achievement in Elementary Schools*, p. 74.

[49] National Center for Education Statistics, U.S. Department of Education, *Curricular Differentiation in Public High Schools* (Washington, DC: December 1994), p. 5 (hereafter cited as NCES, *Curricular Differentiation in Public High Schools*). The year 1993–94 is the most recent for data on

percent of the Nation's high schools, traditional tracking policies were implemented, with students grouped for a full day in the entire core curriculum.[50]

Effects on Students in Lower Ability Groups

Where schools track or group students based on lower academic abilities, educators and other commentators have identified many barriers to effective ability grouping practices. These barriers often result in a denial of equal educational opportunity and a low quality of education for students placed in the lower ability groups. For example, placement in lower ability groups often creates a stigma for the students in those classes which, in turn, can diminish their academic performance. In addition, where students are placed "across the board," or "locked in" to a lower ability group in every subject, it is often difficult for them to move into higher ability groups in subjects where they may have higher academic abilities.

Minority students (with the exception of Asian Americans) experience these barriers in disproportionately high numbers because they are often overrepresented in lower track and remedial education programs and underrepresented in gifted and talented programs.[51] A review of education literature shows that education researchers and practitioners have demonstrated, through both anecdotal and statistical evidence, the severity of this problem.

The barriers associated with comprehensive, full-scale ability groups are primarily the result of inequitable educational opportunities that prevent students in the lower groups from gaining access to curricula and resources that prepare students for higher education.[52] For example, if the quality of instruction is not consistent for students "along the levels of the grouping system," then ability grouping will benefit some students at the expense of others.[53] On average, the magnitude and quality of (tangible and intangible) educational resources tend to be allocated inequitably among the various ability level groups.[54] Students placed in higher ability tracks tend to be exposed to a more demanding and rigorous curriculum (especially in mathematics courses), which prepares them for the increasingly sophisticated instructional material presented in their later years of schooling.[55]

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percentages of the Nation's high schools that practice ability grouping in core academic subjects such as mathematics and science, or place students in sequential classes (e.g., algebra I, geometry, algebra II, up to calculus) based on their meeting the relevant course prerequisites.

[50] NCES, *Curricular Differentiation in Public High Schools*, p. 5. The year 1993–94 is the most recent for data on percentages of the Nation's high schools that practice full-day tracking of students across an entire curriculum of core courses such as mathematics or science.

[51] Asian Americans, in contrast to other minority students, tend to be overrepresented in high ability groups and underrepresented in low ability groups according to studies of high school students. *See* appendix. The academic success of Asian American students is in many ways counterbalanced, however, by a phenomenon in which they are stereotyped by school officials and other students as a "model minority" or "successful minority." This stereotype is detrimental to Asian Americans in two principle ways: It detracts attention away from the disadvantages and discrimination Asian Americans experience as a minority, and it can serve to preclude Asian Americans from programs intended specifically to assist minorities. *See* Kwang Chung Kim, "Asian Americans and the Successful Minority Myth," in Illinois Advisory Committee report to the United States Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in Metropolitan Chicago* (May 1995), pp. 87–97.

In the education context, the stereotypical image of the successful Asian American student who excels in mathematics, science, and computer skills has tended to "pigeon-hole" them into this one area of a school's curriculum. This stereotypical image may significantly undermine equal educational opportunities for Asian American students by impeding their efforts to gain access to, participate in, and experience all of the other areas of curricular and extracurricular activities schools have to offer outside of the math-science-computer area. As the U.S. Commission on Civil Rights noted in its 1992 report, *Civil Rights Issues Facing Asian Americans in the 1990's*, "[e]ven those Asians who appear to be doing well by 'outcome' measures of socio-ecomonmic status may experience barriers to equal opportunity that keep them from achieving the full measure of their potential." U.S. Commission on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s* (February 1992), p. 16.

[52] Hallinan, "Student Learning," p. 62; Sophia Catsambis, "The Path to Math: Gender and Racial Ethnic Differences in Mathematics Participation from Middle School to High School," *Sociology of Education*, vol. 67 (July 1994), pp. 199–215; Oakes, "Keeping Track: Part I," p. 15; Gamoran, "The Variable Effects of High School Tracking," p. 106.

[53] Adam Gamoran, "Alternative Uses of Ability Grouping in Secondary Schools: Can We Bring High-Quality Instruction to Low-Ability Classes?" *American Journal of Education*, vol. 102 (November 1993), p. 4.

[54] Ibid.

[55] Hallinan, "Student Learning," p. 63; Catsambis, "The Path to Math," pp. 199–215. Evidence shows that instructional conditions tend to be better in higher level ability groups. *See* Gamoran, "Alternative Uses of Ability Grouping in Secondary Schools," p. 4.

In contrast, in lower level tracks, the depth and quality of instruction is usually modified.[56] For instance, some education research has shown that teachers are inclined to lead their lower level classes through less engaging and less stimulating forms of instruction, such as rote learning and memorization.[57] Rote methods foster dependency and inattentiveness among students, and can hinder inquisitiveness and initiative.[58]

In the late 1970s, one of the Nation's authorities on ability grouping practices led a comprehensive, interdisciplinary team of professionals, research assistants, and site coordinators on a multiyear empirical study titled *A Study of Schooling* in order to examine 38 of the Nation's elementary and secondary schools.[59] The research project included an examination of the educational impact of the tracking practices at 25 distinct secondary schools (sampled from a variety of the Nation's regions) whose composite would represent the diversity of America's schools.[60] Because the amount of instructional time devoted to a particular subject can be related to student learning, teachers at the sampled schools were asked directly to estimate the amount of class time devoted to instruction/learning activities, classroom management, and socialization.[61] On average, 82 percent and 71 percent of time was allocated to instruction in high and low track English classes, respectively. For mathematics, teachers estimated having used 77 percent and 63 percent of respective class time to instruct high and low ability-grouped students. The researchers translated the percentages of time into course hours over a 6-year period of secondary school (grades 7–12), based on the assumption that students' track placements would be stable and that there were 180 days in an average school year. Overall, on average, for students who participate in 6 years of English and mathematics,[62] the high ability tracked students would experience 240 additional hours of classroom instruction (for the two core subjects combined) than their lower ability-grouped peers during their secondary education. Since 240 hours can translate into 12 postsecondary units of study, this difference in instructional time is significant.[63]

One 1980s empirical study that examined 112 eighth and ninth grade English classes over a 2-year period (eighth graders in year one, ninth graders the following year) revealed that higher track English classes tended to use "standard" literature (i.e., classic works), while "young adult fiction" (i.e., short novels with themes about growing up designed to appeal to teenagers) was more common in lower level sections. Lower track classes frequently used fill-in-the-blank writing assignments, while more accelerated peers wrote extensive essays and had other expository assignments.[64]

National evidence (based on 300 English and mathematics classes) from the 1980s showed that the disparities in the quality of instruction between high and low level ability groups can be significant.[65] Students in the lower level/remedial English classes tended to be occupied by completing worksheets on English usage, basic skills exercises, and other assignments requiring lower levels of comprehension, as well as by writing simple paragraphs.[66] A sense of apathy and low expectations, in many cases, permeated the environment.[67] In contrast, at higher levels, stu-

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[56] Hallinan, "Student Learning," pp. 41, 42, 49; Charles Nevi, "In Defense of Tracking," *Educational Leadership*, March 1987, p. 25; George, "Truth About Tracking," p. 257; Slavin, "Synthesis of Research on Grouping in Elementary and Secondary Schools," p. 73. Grouping practices can facilitate the adaptation of curriculum and instructional techniques to the specific needs of the groups. *See* Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 473.

[57] "Teaching Inequality: The Problem of Public School Tracking," *Harvard Law Review*, vol. 102 (1989), pp. 1318, 1332 (hereafter cited as "Teaching Inequality"); Hallinan, "Student Learning," p. 59.

[58] Hallinan, "Student Learning," p. 59.

[59] John I. Goodlad, *A Place Called School* (New York: McGraw-Hill, 1984), pp. 20–23 and 375–82.

[60] Oakes, *Keeping Track*, p. 41.

[61] Ibid., pp. 97–98. The authors claim that the time estimates reflect a mix of teachers' perceptions of and intentions for the use of class time. Ibid., p. 98.

[62] Not all students enroll for 6 years of mathematics and English classes. *See* Oakes, *Keeping Track*, p. 99.

[63] Oakes, *Keeping Track*, p. 99.

[64] Gamoran, "Alternative Uses of Ability Grouping in Secondary Schools," pp. 7, 9, 19.

[65] Oakes, "Keeping Track: Part I"; Jeannie Oakes, "Keeping Track: Part II," *Phi Delta Kappan*, October 1986; Oakes, *Keeping Track*.

[66] Oakes, "Keeping Track: Part I," p. 15.

[67] Ibid., pp. 15–17. A positive academic climate dominated the higher ability level tracked courses. *See* Gamoran, "The Variable Effects of High School Tracking," p. 814 (citing Mary H. Metz, *Classrooms and Corridors: The Crisis of*

dents were offered challenging assignments such as reading classical literature, demonstrating literary analysis skills, and completing narrative writing assignments (e.g., thematic essays, research reports).[68]

It appears that the greater the extent to which students are placed in lower ability courses, the more likely participants in these groups will continuously fall behind their peers (in any given subject) who were placed (appropriately or not) in more average or accelerated level tracks—a situation that can perpetuate placement at this lower level (i.e., "lock" students in) and prevent movement to an alternate level group (i.e., "lock" students out).[69]

In addition, if students in a lower ability track are inappropriately assigned to any one particular course,[70] they may consequently be denied the access to acquire the knowledge and skills that they are academically capable of learning, and are also deprived of the chance to achieve and accomplish as much as possible.[71] Therefore, youngsters in lower level tracks, who tend to be exposed to more simplified instruction (through teachers' limiting content and reducing pace), may miss opportunities for learning a curriculum that may not be recouped unless students are advanced to higher ability level tracks.[72] According to one of the Nation's authorities on the educational effects of group placements, ability group mobility tends not to occur routinely.[73]

Racial/ethnic minority students, particularly African American students and Hispanic students, tend to participate in fewer advanced mathematics and science courses than their white peers, and they tend to be clustered in lower level ability groups.[74] From a technical perspective, the relationship between ethnicity and achievement in core courses is not random but correlated to academic placement and instruction.[75] Research shows that being black, Hispanic, or Native American, relative to being white, does not cause differences in academic outcome.[76] Rather, different course participation and classroom experiences cause academic outcome disparities.[77] It is thus essential for educators to learn more about the "negative influences" that may hinder students' access to educational opportunities (e.g., advanced coursework and higher ability groups in subjects such as mathematics), and determine effective strate-

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Authority in Desegregated Secondary Schools (Berkeley, CA: University of California Press, 1978) and Beth E. Vanfossen, James D. Jones, and Joan Z. Spade, "Curriculum Tracking and Status Maintenance," *Sociology of Education*, vol. 60 (1987), pp. 104–22). *See also* Oakes, *Keeping Track*.

[68] Oakes, "Keeping Track: Part I," p. 15.

[69] George, "Tracking and Ability Grouping in Middle School," p. 18; Rogne, "Reflections on the Research," p. 11. Students who are hindered from achieving their potential can, in the long-run, reduce their aptitude and readiness for more advanced learning. Hallinan, "Student Learning," pp. 61–63. Even slight differences in depth and breadth of content presented in instructional opportunities, at any one point, can add up over time. *See* Jeannie Oakes and Martin Lipton, "Tracking and Ability Grouping: A Structural Barrier to Access and Achievement," in Bellanca and Swartz, *A Challenge of Detracking*, pp. 14–15 (hereafter cited as Oakes and Lipton, "Tracking and Ability Grouping"). The impact of an inappropriately low ability group assignment is likely to be "cumulative and gather momentum." Ibid., p. 15.

[70] If students are assigned to all of their core courses based on overall achievement, then it is possible that a resulting course placement can be in a too high or too low ability level class, given a student's distinct level of performance for each specific subject.

[71] Hallinan, "Student Learning," p. 62.

[72] Ibid. If some students are denied access to advanced coursework in mathematics or sciences, for instance, then these students will have less knowledge and fewer skills than their peers who were able to participate in these classes, regardless if both groups of students had prior similar achievement levels. *See* Patricia B. Campbell, "What's a Nice Girl Like You Doing in a Math Class?" *Phi Delta Kappan*, March 1986, p. 516 (hereafter cited as Campbell, "Math Class").

[73] Hallinan, "Student Learning," p. 62. Note: The necessity to reassess pupils frequently in schools that implement ability groups to enable these youngsters to transfer (to higher or lower ability groups or courses) if their subject mastery and/or achievement level warrants to do so, is addressed below.

[74] Campbell, "Math Class," p. 516; Jomills Henry Braddock II and Marvin P. Dawkins, "Ability Grouping, Aspirations, and Attainments: Evidence from the National Educational Longitudinal Study of 1988," *Journal of Negro Education*, vol. 62, no. 3 (1993), p. 326 (hereafter cited as Braddock and Dawkins, "Ability Grouping: Evidence from NELS"); *Women, Minorities, and Persons with Disabilities in Science and Engineering: 1996.* (Arlington, VA: National Science Foundation, 1996) (NSF 96–311), p. 125, table 2–15 (hereafter cited as National Science Foundation, *Women, Science, and Engineering*). This tendency to cluster racial and ethnic minority students in lower level ability groups does not apply to Asian American students.

[75] Campbell, "Math Class," p. 517.

[76] Ibid.

[77] Ibid. *See* above discussion of teachers' tendency to reduce expectations in lower level ability groups.

gies to reduce particular attitudes, behaviors, and other barriers that create disparities among students.[78]

Education research has shown that students, particularly at the elementary school level, should interact with a wide variety of peers.[79] Students requiring a slower paced curriculum, who are placed in lower ability groups, can be deprived of the "peer effect" of more advanced students who could potentially stimulate and encourage them.[80] In higher ability groups, students are inclined to be more motivated and actively involved in the instructional process—attributes and behaviors that promote an environment conducive to learning. Overall, "the peer influences are supportive of academic behavior."[81]

Student role models (for appropriate attitudes and conduct in the classroom) are less likely to be placed in lower ability groups, where participants tend to find school work difficult and less rewarding.[82] In the lower ability groups, the peers who set norms and standards are prone to discouraging a positive approach toward studying and classes, and are likely to deride students who do study.[83] Discouraged students, when grouped together in their lower track classes, can act defensive and hostile, and resist putting forth the academic efforts that could promote mobility to higher level achievement groups.[84] The detachment of students who are perceived by school officials as less capable of mastering a rigorous curriculum from their academic environment and their instructional opportunities can promote disruptive behavior, which can distract an entire lower level group and hinder learning.[85] Teachers are likely to respond to misconduct and redirect students' attention from the lesson being presented.[86] The time diverted from the subject being taught in the lower level groups, to address disciplinary problems, can reduce the productivity of any instructional period.[87]

The stigma associated with lower course sections (e.g., basic biology I in contrast to accelerated biology I) and lower level classes (e.g., ninth grade remedial mathematics in contrast to geometry) can hinder student motivation and self-esteem.[88] By the high school level, some students

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[78] Ibid. "Negative influences" can include teachers' reduced expectations and lack of encouragement to pursue rigorous academic courses, particularly in mathematics and science. *See* above discussion of these barriers.

[79] Slavin, *Ability Grouping and Student Achievement in Elementary Schools*, p. 10.

[80] Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 473.

[81] Hallinan, "Student Learning," p. 62. Education research has shown that student motivation is prerequisite to the listening and concentration needed for learning to take place. Ibid., p. 48. Motivation enables students to make efforts to achieve. Ibid., p. 64.

[82] Ibid., p. 62.

[83] Ibid., pp. 52, 62. One of the limitations to ability grouping for "low achievers" is that they have few positive role models. *See* Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 473 (citing A. Gamoran, "Measuring Curriculum Differentiation," *American Journal of Education*, vol. 97, pp. 129–43; C.H. Persell, *Education and Inequality: A Theoretical and Empirical Synthesis*, (New York: Free Press, 1977); J.E. Rosenbaum, "Social Implications of Educational Grouping," *Review of Research in Education*, vol. 8 (1980), pp. 361–401). *See also* Oakes, *Keeping Track*. Research has shown that students who struggle academically can have more difficulty resisting influence of peers in the classroom. Therefore, whether they are surrounded by fellow students with a poor attitude toward scholastic endeavors or have high achievers as classmates, they are prone to emulate the dominant behavior. *See* George, "Truth About Tracking," p. 265.

Social relations among classmates in different ability level groups foster "differentiated attitudes and behaviors in school." *See* Gamoran, "The Variable Effects of High School Tracking," p. 814. In comparison to students in lower level groups, higher ability-grouped students tend to be academically motivated, place a high value on their school work, and set high performance standards for themselves. Ibid., p. 814. They convey these attributes to their similarly competent peers. Ibid., p. 814. Although students in standard and upper level ability groups are likely to have college-bound aspirations, participants in lower tiered tracks are not prone to prepare for postsecondary endeavors. *See* Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 473 (citing A. Gamoran, "The Stratification of High School Learning Opportunities," *Sociology of Education* vol. 60 (1987), pp. 135–55).

[84] George, "Tracking and Ability Grouping in Middle School," p. 22.

[85] Hallinan, "Student Learning," p. 62.

[86] Ibid., p. 63. In some cases, teachers, including those who do not have negative expectations of lower ability level students, can sense these students' alienation and poor attitude toward academics, and subsequently become defeated and unable to promote an effective academic environment. *See* George, "Tracking and Ability Grouping in Middle School," p. 22 (citing T. Good and J. Brophy, *Looking in Classrooms*, 4th ed. (New York: Harper and Row, 1987)).

[87] Hallinan, "Student Learning," p. 63.

[88] Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 473; George, "Truth About Tracking" p. 256.

who are considered by teachers and school administrators as less academically abled can feel "demoralized" if they negatively interpret instructors' deliberate efforts to restrain the pace and modify the curricular content to a more basic level, to appropriately meet lower track students' academic needs.[89] Some of these youngsters who may lack appropriate behavioral models and perceive that lower academic expectations are imposed on them, may be more prone to at-risk behavior, such as higher absenteeism and dropout rates.[90] If students placed in lower ability groups internalize the expectations and social practices associated with the groups into which they are placed, they can have less positive attitudes about themselves and their school experiences.[91] The higher dropout rates among lower tracked students can result from their sense of alienation from their educational endeavors.[92]

If students are homogeneously grouped for most of the academic day, ability level tracking may foster a vicious cycle that can perpetuate teachers' reduced expectations of lower tracked students.[93] Education research shows this self-perpetuating cycle can be difficult to interrupt.[94] However, placing a student in any one low track class is not necessarily ineffective,[95] particularly when there are similarities with regular level classes. Some studies have shown positive effects of lower level ability-grouped classes.[96] A study in the late 1980s found that some teachers are determined to provide an educationally rigorous curriculum to students in lower tiered classes.[97]

Teaching Approaches for Low Ability Groups

To promote equal educational opportunity and educational equity, to enable all students to reach high academic standards, and to optimize student learning, it is essential to have policies that assign pupils to courses based on their individual educational and other needs.[98]

Allocation of Instructional Time

If a self-contained, heterogeneous classroom operates a within-class ability grouping system, then teachers must allocate their time accordingly to the different level subgroups. Students have different learning needs and require varying amounts of instructional time to learn the same material. Equal allocation of instructional time across ability groups would not accommodate individual differences in learning rates. Students who may be slower at processing new information can be disadvantaged because they have less instructional time relative to the amount of time they require to learn than do their higher ability peers. In addition, students in low ability groups can be less self-directed and require more teacher input. However, structural or organizational characteristics of any classroom, "including physical space and scheduling considerations, may demand that instructional periods be of identical length for each subgroup."[99]

Small Subgroup Size

A meta-analysis of 34 classrooms grouped by ability for reading revealed that overall class size had no impact on student achievement.

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[89] Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 473. Because teachers typically cover less material in lower level classes, education researchers debate if this practice is an indication of poor quality or an appropriate pace of instruction. *See* ibid., p. 474.

[90] Ibid., p. 473.

[91] "Teaching Inequality," at 1333.

[92] Ibid. Barriers associated with "lower level" groups are addressed below.

[93] George, "Truth About Tracking," p. 263. Disparities in teacher expectations for high and lower ability-grouped students is addressed below.

[94] Ibid., p. 263 (citing, G.I. Maerhoff, "Withered Hopes, Stillborn Dreams: The Dismal Panorama of Urban Schools," *Phi Delta Kappan*, vol. 69 (1988), pp. 632–38); Oakes, "Keeping Track: Part I," pp. 15–17; Hallinan, "Student Learning," p. 62; George, "Tracking and Ability Grouping in Middle School," p. 1; Rogne, "Reflections on the Research," p. 11; Gamoran, "Alternative Uses of Ability Grouping in Secondary Schools," p. 5.

[95] Gamoran, "Alternative Uses of Ability Grouping in Secondary Schools," p. 6 (citing Reba N. Page, *Lower Track Classrooms: A Curricular and Cultural Perspective* (New York: Teachers College Press, 1991)).

[96] Gamoran, "Alternative Uses of Ability Grouping in Secondary Schools" (citing Slavin, "Achievement Effects of Ability Grouping in Secondary Schools").

[97] Gamoran, "Alternative Uses of Ability Grouping in Secondary Schools," p. 9 (citing Linda Valli, "A Curriculum of Effort: Tracking Students in a Catholic High School," in R. Page and L. Valli, eds., *Curriculum Differentiation: Interpretive Studies in US Secondary Schools* (Albany, New York: SUNY Press, 1990), p. 58).

[98] Jomills Henry Braddock II, "Tracking Implications for Student Race-Ethnic Subgroups," in Bellanca and Swartz, *The Challenge of Detracking*, p. 143.

[99] Hallinan, "Student Learning," p. 55.

However, the size of each reading subgroup appears to affect student progress, such that the larger the reading ability group the slower each student progresses.[100] Moreover, for within-class ability grouping, at least one expert recommends that the number of subgroups should be minimized so that each group may receive adequate, direct instruction from the teacher.[101] In addition, grouping students by ability level in no more than one or two subjects is preferable for students in elementary schools who remain all day in a heterogeneous, self-contained classroom, and for students in secondary schools who attend heterogeneous ability classes for the remainder of the day.[102] At the elementary level, in particular, students' primary identification should be with a heterogeneous classroom, which can reduce the labeling effect of full-day grouping.[103]

Appropriate Content and Pacing of Instruction

Grouping students according to similar abilities, motivation, conduct, and other educational and psychological factors can foster teachers' facility to target instruction more accurately to each student's aptitude and subject mastery level.[104] Appropriate curricular content and pacing of instruction[105] is essential; students' motivation to learn can be hindered if the instructional material is too advanced (for lower ability students) or too basic to engage accelerated students' interest.[106] Students' incentive to learn can also be hindered if the rate at which the instructional content is presented to them is not geared to their particular level of comprehension and preparation.[107] If the pace is too fast or too slow, students can become discouraged and/or bored, and subsequently detach themselves from the learning process.[108] Some researchers of ability grouping practices stress that if teachers adapt their level, pace, and method of instruction to match students' needs and academic abilities, then the practice of ability grouping can enable any student to acquire more knowledge, learn more content within a curriculum, and improve academic and cognitive skills.[109]

If ability grouping can maximize students' learning through instruction and standards that are geared to their capabilities and subject competency level, then differences in achievement levels can be attributed to "ability differences and socialization factors," rather than to the practice of ability grouping, per se.[110] The practice of ability grouping should not create or stress the disparities between students, but instead emphasize the aim to accommodate them.

It is essential to stress that, to have effective ability grouping practices, the modified curricular content and pace provided to students in lower level groups should not deprive the participants of their opportunities to access challenging course content and skills.[111] In fact, the provision of a differentiated curriculum for a group of students considered to be of lower ability may hinder these students' educational opportunities when school officials assume that these students are not capable of higher learn-

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[100] Ibid., p. 42 (citing Maureen Hallinan and Aage B. Sorensen, "Class Size, Ability Group Size, and Student Achievement," *American Journal of Education*, vol. 94, no. 1, pp. 71–89).

[101] Slavin, *Ability Grouping and Student Achievement in Elementary Schools*, p. 76.

[102] Ibid., abstract; Slavin, "Synthesis of Research on Grouping in Elementary and Secondary Schools," pp. 72–73; Nancy-Jo Hereford, "Making Sense of Ability Grouping," *Instructor*, May/June 1993, p. 52.

[103] Slavin, *Ability Grouping and Student Achievement in Elementary Schools*, p. 76. This is a critical element if a school is aiming to implement a Joplin Plan or within-grade regrouped classes for mathematics or reading instruction; Slavin, "Synthesis of Research on Grouping in Elementary and Secondary Schools," p. 69. As the number of regroupings increases, students move from teacher to teacher without identifying with any one group. Ibid., p. 70.

[104] George, "Truth About Tracking," p. 257; Hallinan, "Student Learning," in Hallinan, *The Social Organization of Schools*, p. 41. Grouping practices can facilitate the adaptation of curriculum and instructional techniques to the specific needs of the groups. *See* Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 473.

[105] Hallinan, "Student Learning," p. 49.

[106] Ibid., p. 49.

[107] Ibid.

[108] Ibid.

[109] Slavin, "Synthesis of Research on Grouping in Elementary and Secondary Schools," pp. 72–73; Hallinan, "Student Learning," in Hallinan, *The Social Organization of Schools*, p. 42.

[110] Hallinan, "Student Learning," p. 63.

[111] Nevi, "In Defense of Tracking," p. 26. *See also* Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 473. Because teachers typically cover less material in lower level classes, education researchers debate if this practice is an indication of poor quality or an appropriate pace of instruction. *See* ibid., p. 474.

ing.[112] Therefore, exposing students to the most challenging education, providing them with the most rigorous coursework that they can pursue, and enabling them to reach as high a standard as possible, as well as achieve as much as possible, can ensure that ability grouping will not deprive students of learning that they are capable of accomplishing.[113]

To prevent students from receiving instruction from a class that is above or below their respective ability levels, school officials should frequently and carefully assess students, and subsequently adjust track assignments, to allow for development of psychological and cognitive attributes that affect learning.[114] In addition, pupil placement policies should be sufficiently flexible to enable educators to adjust for inappropriate track assignments and changes in students' academic achievement or performance on standardized tests.[115] It is critical that each student have the opportunity to transfer into alternate ability groups that would more appropriately match his or her achievement level, academic ability, motivation, and/or particular subject level mastery.[116] Students should also be able to change to an alternate within-class subgroup.[117]

An education researcher who has examined empirical studies on ability grouping practices argues that changing assignment from a homogeneous, self-contained class can be difficult, even for a student who may have been misassigned or whose evident changes in academic performance merits doing so.[118] Similarly, an authority on the educational effects of group placements reports that ability level track mobility tends not to occur routinely.[119] A student whose performance level does not match the ability level of his or her track placement may miss opportunities to learn.[120] At the elementary school level, changes in ability level subgroups are the most readily made, to reflect a change in a student's competency in a particular subject.[121] Secondary schools that operate subject-specific ability grouping policies should be able to accommodate course transfers for students who have shown changes in academic performance.[122]

Minority Students and Ability Grouping

Overrepresentation in Low Ability Groups

Concerns about equal access and nondiscrimination in ability grouping are as compelling as concerns about the effects of ability grouping on student achievement.[123] One negative effect of ability grouping practices has been the continuing problem of overrepresentation of racial, color, and national origin minority students in lower level classes and subgroups.[124] Various education researchers have cited evidence that ability grouping practices can perpetuate persistent racial/ethnic inequities, due to the disproportionate placement of minority students in lower tiered tracks.[125]

Low socioeconomic status students, African American, and Hispanic students have been par-

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[112] Oakes, *Keeping Track*, p. 184 (citing Hobson v. Hansen, 269 F. Supp. 514 (1967)).

[113] Hallinan, "Student Learning," p. 63. Students who are hindered from achieving their potential can—in the long-run—reduce their aptitude and readiness for more advanced learning. Ibid., pp. 61–63,

[114] Gamoran, "The Variable Effects of High School Tracking," p. 817; Slavin, *Ability Grouping and Student Achievement in Elementary Schools*, pp. 6, 63–65. The placement of students for a particular subject should be periodically reviewed, so that students can be reassigned to a different level class if their performance warrants doing so. Ibid., p. 6.

[115] Slavin, *Ability Grouping and Student Achievement in Elementary Schools*, p. 63.

[116] Ibid., abstract.

[117] Slavin, "Synthesis of Research on Ability Grouping in Elementary and Secondary Schools," pp. 72–73.

[118] Slavin, *Ability Grouping and Student Achievement in Elementary Schools*, pp. 63–64.

[119] Hallinan, "Student Learning," p. 62.

[120] Ibid. Students who are hindered from achieving their potential can—in the long-run—reduce their aptitude and readiness for more advanced learning. Ibid., pp. 61–63.

[121] Slavin, *Ability Grouping and Student Achievement in Elementary Schools*, pp. 63–64.

[122] Ibid.

[123] Ibid., p. 10; Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 474.

[124] George, "Truth About Tracking," pp. 256, 265, 266.

[125] Slavin, "Achievement Effects of Ability Grouping in Secondary Schools" (citing Braddock, *Tracking Implications*); J.D. Jones, E.L. Erickson, and R. Crowell "Increasing the Gap Between Whites and Blacks: Tracking as a Contribution Source," *Education and Urban Society*, vol. 4 (1972), pp. 339–49; W. Schafer and C. Olexa, *Tracking and Opportunity: The Locking-Out Process and Beyond* (Scranton, PA: Chandler, 1971)). The research conducted by one of the Nation's authorities on student placement practices showed that low track classes contained a relatively higher share of lower socioeconomic groups and racial minority students. *See* Oakes, *Keeping Track*; Oakes, "Keeping Track: Part I"; Oakes, "Keeping Track: Part II." *See also* Rogne, "Reflections on the Research," p. 11.

ticularly adversely affected by disproportionate placement in lower ability tracks.[126] For example, in a study of 14,000 eighth grade public school students, Asian and white students were more likely than their African American, Hispanic, and Native American peers to be concentrated in the middle and higher level groups.[127] One education researcher reported that upper middle class, higher income youth tend to dominate in higher level tracks.[128] This researcher found that students from racial, color, or national origin minority backgrounds, particularly those from low socioeconomic backgrounds, were concentrated throughout lower level ability groups.[129]

With respect to lower level English courses, blacks' participation rate was 2.43 times higher (i.e., 143 percent higher) than that of their white peers.[130] Native and Latino Americans were also more than twice as likely as their white peers to participate in lower level English classes.[131] More than one-third of black and Native American eighth graders were enrolled in low track English, in contrast to 15 percent of white and Asian American students.[132]

A review of education literature reveals an array of authorities documenting the adverse effects of ability grouping practices for African American and other minority students. For example, an authority on ability grouping practices and resulting racial/ethnic enrollment patterns expressed that the disproportionate placement of minority students in lower level groups creates a barrier to their educational achievement.[133] Schools whose student enrollment patterns are dominated by racial/ethnic subgroups tend to focus on remedial courses and vocational tracks—coursework that prepares students for unskilled labor. In some cases, their college preparatory classes are less rigorous. In contrast, schools that serve a predominately middle-class, white population concentrate on providing students advanced academic courses and ability level tracks, and preparing students for employment in business and science-related fields.[134]

School policies can foster racial/ethnic inequalities.[135] Various social scientists claim that enrollment patterns in ability level groups and academic courses can resemble and preserve community or labor market divisions among class, race, and ethnicity.[136] A school district's perpetuation of racial/ethnic disparities in social class structures can be reflected in course scheduling patterns and the curriculum's appeal to interests of minority students.[137] One education researcher reported that school structures can deliberately direct minority students to enroll in particular courses that do not provide them with the necessary skills for postsecondary school or better paid employment. For instance, minority students can be intentionally steered to courses that either relate to their heritage (such as black history), or tracked into classes (such as business/vocational courses, child development, food services) to prepare them for the economy's lower tiered service-sector jobs.[138]

A researcher has found that offering courses, such as black history, as one-time courses at the same time period as more rigorous, college preparatory classes (such as Latin I), which serve as prerequisites to other classes, can affect enrollment patterns.[139] For example, the students who

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[126] Slavin, *Ability Grouping and Student Achievement in Elementary Schools*, p. 10 (citing E. Haller and S. Davis, "Does Socioeconomic Status Bias the Assignment of Elementary School Students to Reading Groups?" *American Educational Research Journal*, vol. 17, pp. 409–18; R. Rist, "Student Social Class and Teacher Expectations: The Self-Fulfilling Prophecy in Ghetto Education," *Harvard Educational Review*, vol. 40, pp. 411–51).

[127] Hereford, "Making Sense of Ability Grouping," p. 51.

[128] George, "Tracking and Ability Grouping in Middle School," pp. 20–21.

[129] Ibid.

[130] Braddock and Dawkins, "Ability Grouping: Evidence from NELS," p. 326.

[131] Ibid., pp. 328–29.

[132] Ibid., p. 327, table 1.

[133] Oakes, "Keeping Track: Part I," p. 17.

[134] Oakes, "Keeping Track: Part II," p. 150.

[135] Raymond Calabrese, "The Discriminatory Impact of Course Scheduling on Minorities," *Journal of Education*, Summer 1989, p. 32.

[136] Slavin, *Ability Grouping and Student Achievement in Elementary Schools*, p. 10 (citing E. Haller and S. Davis, "Does Socioeconomic Status Bias the Assignment of Elementary School Students to Reading Groups?" *American Educational Research Journal*, vol. 17 (1980), pp. 409–18; Rist, "Student Social Class and Teacher Expectations, pp. 411–51).

[137] Calabrese, "The Discriminatory Impact of Course Scheduling on Minorities," pp. 34–35.

[138] Ibid.

[139] Ibid. The issue of "aversionary" scheduling is addressed below.

selected to enroll in the culture-related classes would be "locked out" of the more advanced college preparatory courses (such as Latin II) for which the nonselected courses (e.g., Latin I) were prerequisite—the more demanding subjects that can foster preparation for more advanced economic opportunities.[140] However, students interested in a cultural heritage class were not precluded from enrolling in terminal courses such as child development and human relations, since these courses did not conflict in the examined schools' schedules with courses that provided insight to minority students' heritage.[141]

Overall, a pattern of de facto tracking seemed present in the urban school district. Courses that had only one section were aligned with courses that would attract the same type of student. Consequently, even though a school's enrollment was as high as 2,000 pupils of various racial/ethnic subgroups, many students had the same classmates throughout the day.[142] This empirical evidence supports the claim of some education researchers, who say that although it may be possible for students to be placed in a high ranking group for one subject and a lower ranking group for another, in practice, scheduling conflicts can often only accommodate a grouping plan in which all of a student's core courses are taken within the same ability level track.[143]

In effect, scheduling policies, whether intended or not, can foster a homogeneous, "status-derived system of racial/ethnic segregation," as long as minority students are channeled into lower level courses, which do not encourage the development of rigorous academic skills. Although a school system can encourage students to select their course schedules, advanced college preparatory classes are closed to those who do not have the prerequisites for entrance. However, school districts are thereby absolved from blame because students are encouraged to enroll in courses of their choice.[144] School districts' student course scheduling practices may indirectly encourage minority students to enroll in lower level courses, which are designed to establish control and focus on teacher direction—courses that do not encourage critical, independent thinking or intellectual development.[145]

Overall, inequitable allocations of students to specific academic courses and ability groups based exclusively on their demographic characteristics may potentially deprive some students (particularly members of racial/ethnic minority groups) of opportunities to acquire the knowledge and skills of which they are capable of acquiring; deny them a chance to reach as high a standard as possible; reduce their access to a rigorous curriculum that would prepare them for the instruction in upcoming years of school and future postsecondary endeavors; and ultimately perpetuate the underrepresentation and underparticipation of racial/ethnic minority students in highly rigorous academic courses or educational programs.

Minority Students in Math and Science Programs

Underrepresentation of minority students in mathematics and science courses may indicate a denial of equal access to quality education programs. For example, according to a 1996 report of the National Science Foundation, in 1993 minority students accounted for less than 10 percent of the students enrolled in the majority (61 percent) of the high ability mathematics and science courses in high schools. Minority students were more likely to be found in the low ability classes.[146]

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[140] Ibid. In the examined school district, astute minority students recognized that a "dominating" culture "attempted" to cater to racial/ethnic minority students' (erroneously) perceived needs by offering "patronizing courses" that could lead to immediate but unrewarding occupations in the child care industry, for instance. Ibid., p. 36. Consequently, not all racial/ethnic minority students "fell into the trap" of enrolling in courses that provided no significant preparation for postsecondary endeavors. Ibid., p. 36. By discouraging minority students from achieving academically, a school district's assumptions and expectations of minority students can conflict with their personal goals. Minority students who determine/perceive how their respective school system (intends to) direct them to classes may realize that they may not be encouraged to achieve their educational goals. Ibid., p. 35.

[141] Ibid., pp. 34–35.

[142] Ibid., p. 37.

[143] Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," pp. 471–99.

[144] Calabrese, "The Discriminatory Impact of Course Scheduling on Minorities," pp. 35–37.

[145] Ibid., p. 37.

[146] National Science Foundation, *Women, Science and Engineering*, p. 125, table 2–15. Minorities comprised 40 percent or more of the students in more than two-fifths (42 percent) of the Nation's low ability high school mathematics and science classes. Ibid.

The percentage of schools that place students according to ability for mathematics and science increased for each successive grade between fifth and ninth grades. At the fifth and ninth grade levels, 57 and 94 percent of schools, respectively, had between-class ability grouping for math.[147] For sciences, 4 percent and 38 percent of schools reported that they sorted fifth grade and ninth grade students, respectively, in classes based on academic ability.[148] The percentage of students who experience at least some homogeneous grouping increases across the grades, from about 70 percent of fifth graders to 80 percent of sixth graders to 85 percent of seventh through ninth graders.[149] Conversely, 30 percent of fifth graders, compared with only 15 percent of seventh through ninth grade students were enrolled in mathematics classes that were considered heterogeneous with respect to ability.[150]

Mathematics and English are the most often ability-grouped secondary school student courses.[151] In 1993–94, approximately 86 percent of public high schools used ability grouping for mathematics courses.[152] The most recent data revealed that 42 percent of the Nation's high schools sorted students into various science subjects by their abilities.[153]

According to one research study on mathematics performance in the middle school grades, minority students were more likely than their white peers to be in basic skills courses, while the reverse occurred in courses that required a higher level of thinking.[154] Overall, 8 percent of whites and 23 percent of minority students participated in low ability classes (most often studying general mathematics and topics such as arithmetic); whereas 56 percent of whites and 36 percent of their minority peers enrolled in higher level mathematics courses (which tended to focus on algebra and word problems).[155] The inequitable disparities in exposure to knowledge and skills indicate that the students who have lower level class assignments may be precluded from gaining access to the knowledge that is considered by some educators as a critical prerequisite to pursuing postsecondary endeavors.[156]

Mathematics classes at lower levels focused on basic computational skills and mathematics facts, while students in higher level courses were expected to understand concepts.[157] A 1990 national study, whose findings resembled those of 1970s and 1980s work, revealed that lower track mathematics and science classes tended to be taught by less experienced, reputed, and qualified teachers than those assigned to higher ability groups.[158] In contrast, the more skilled teach-

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147 Braddock, "Tracking the Middle Grades," p. 446. The year 1990 is the most recent for information on ability grouping practices at the middle school level.

148 Ibid.

149 Ibid., p. 447.

150 Ibid. Similarly, in 1988 approximately 14 percent of eighth grade students were enrolled in heterogeneous ability mathematics classes. *See* Dominic J. Brewer, Daniel I. Rees, and Laura M. Argys, "Detracking America's Schools," *Phi Delta Kappan*, November 1995, p. 211. This 14 percent figure was obtained from the authors' examination of the NCES' NELS:88 data set, which are the results from a nationally representative survey of eighth graders. The researchers considered the NELS survey data as providing the best available evidence of tracking practices. *See* ibid.

151 Oakes, "Keeping Track: Part I," p. 15.

152 NCES, *Curricular Differentiation in Public High Schools*, p. 14. Note: 1993–94 is the most recent for data on percentages of the Nation's high schools that practice ability grouping in core academic subjects such as mathematics.

153 Braddock, *Tracking Implications*, p. 15.

154 Ruth B. Ekstrom and Ana Maria Villegas, "Ability Grouping in Middle Grades," *Research in Middle Level Education*, vol. 5, no. 1 (Fall 1991), pp. 10, 17.

155 Ibid., p. 10. Approximately 41 percent of minority students and 36 percent of white students were enrolled in middle level ability groups. Ibid., p. 10.

156 Gamoran, "Alternative Uses of Ability Grouping in Secondary Schools," p. 5.

157 Oakes, "Keeping Track: Part I," p. 15.

158 Gamoran, "Alternative Uses of Ability Grouping in Secondary Schools" (citing Jeannie Oakes, *Multiplying Inequalities: The Effects of Race, Social Class, and Tracking on Opportunities to Learn Mathematics and Science* (Santa Monica, CA: Rand Corp., 1990); James Rosenbaum, *Making Inequality: The Hidden Curricula of High School Tracking* (New York: Wiley, 1976); Merilee Finley, "Teachers and Tracking in a Comprehensive High School," *Sociology of Education*, vol. 57 (1984), pp. 233–43)). A major limitation within lower ability groups is that the teachers for critical core subjects may not be as experienced as their counterparts in higher track classes. *See also* Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 473 (citing Gamoran, "Measuring Curriculum Differentiation"; Persell, *Education and Inequality*; Rosenbaum, "Social Implications of Educational Grouping"). *See also* Oakes, *Keeping Track. See also* George, "Truth About Tracking," p. 264. With respect to middle schools, many principals assign the most successful teachers to instruct the highest achieving pupils, and the least effective, unproven, inexperienced staff to students with the most academic difficulties. *See* George, "Tracking and Ability Grouping in Middle School," p. 22. The

ers were disproportionately assigned to higher level ability courses.[159]

A late 1980s study, jointly conducted by the Educational Testing Service (ETS) and the National Urban League, examined the grouping policies and practices for mathematics instruction of 13 middle schools in six urban districts. Special attention was given to racial/ethnic enrollment patterns. Each of the districts was implementing policies to improve middle school education.[160] In five of the six districts, standardized test scores, grades, and teacher/principal recommendations were used to place students in basic, regular, or accelerated (or similar designations) classes.[161] Across all six school systems, 79 of the 89 mathematics classes (in which 30, 32, and 17 were designated as high, middle, and low ability level respectively) were homogeneously grouped.[162]

The pupil mathematics class assignment policies in these districts, therefore, foster the perpetuation of a "mathematics skill gap" between minority students and white students, because students (more likely from racial and ethnic subgroups) have limited access to the knowledge required for higher levels of learning. The researchers claim that the disproportionate number of minority students in mathematics classes designated as lower ability may imply that some school districts' pupil placement policies can inadvertently foster racial/ethnic segregation.[163]

A 1993 survey by the National Science Foundation examined racial/ethnic enrollment patterns in mathematics and science courses.[164] At the high school level (grades 9–12), for science, in 44 percent of low ability groups, minority students represented less than 10 percent of enrollment. However, in more than 60 percent of high ability groups, minority students were less than 10 percent of enrollment. Approximately 28 percent of low ability groups had at least 40 percent racial/ethnic minority students. In contrast, only 16 percent of high ability science groups had a similar enrollment pattern.[165]

Enrollment patterns in high level mathematics courses were virtually identical to enrollment patterns in high ability English classes, in which more than one-third of whites and Asian Americans participated, and only 10 percent and 15 percent of Native American and black students, respectively, participated.[166] In both high ability mathematics and English, Asian American eighth graders were significantly overrepresented relative to their white peers.[167] Similarly, enrollment patterns in lower level mathematics classes resembled the racial/ethnic patterns for English, in which blacks and Native Americans had participation rates that were more than twice as high as that of their white peers.[168]

In 1988 the National Educational Longitudinal Study examined nationally representative data that showed patterns of ability group placement in English and mathematics classes for white, black, Latino, Asian American, and Native American students.[169] With respect to English classes, 40 percent of Asian Americans and 32 percent of whites were enrolled in high ability groups, in contrast to only 9 percent, 15 percent, and 18 percent of Native Americans, blacks, and Latino Americans, respectively.[170] Three racial/ethnic minority subgroups were significantly underrepresented in high track

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allocation of teachers to various ability groups is addressed above.

[159] Gamoran, "The Variable Effects of High School Tracking," p. 814 (citing Rosenbaum, *Making Inequality*; Stephen J. Ball, *Beachside Comprehensive: A Case-Study of Secondary Schooling* (Cambridge, England: Cambridge University Press, 1918); Finley, "Teachers and Tracking in a Comprehensive High School," pp. 233–43).

[160] Ekstrom and Villegas, "Ability Grouping in Middle Grades," pp. 3–4.

[161] Ibid., pp. 8–9. One of the six districts, Lake City, had heterogeneous groupings for mathematics classes, but allowed up to 5 percent of students to participate in an additional advanced class. Ibid., p. 8. While none of the six districts relied exclusively on aptitude test scores to place students in mathematics classes, the researchers stress that more emphasis was given to this criterion than to measures of achievement (e.g., course grades) and teacher recommendations. Ibid., p. 16.

[162] Ibid., p. 9.

[163] Ekstrom and Villegas, "Ability Grouping in Middle Grades," p. 17.

[164] National Science Foundation, *Women, Science and Engineering*, p. 125, table 2–15.

[165] Ibid.

[166] Braddock and Dawkins, "Ability Grouping: Evidence from NELS," p. 327, table 1.

[167] Ibid., pp. 328–29.

[168] Ibid.

[169] Braddock and Dawkins, "Ability Grouping: Evidence from the NELS," p. 326.

[170] Ibid., p. 327, table 1.

English courses in comparison to their white peers.[171]

Approaches to Eliminating Barriers

Members of the education community, including Federal agencies, are concerned about ability grouping practices, especially those that can foster racial/ethnic segregation, cannot be justified on educational grounds, use subjective criteria, prevent student choice with respect to course selection, and deny parents the opportunity to override a school district's placement decision.[172] Consequently, various programs have been established to foster equitable access to educational opportunities and potentially reduce motivational and achievement disparities among demographic subpopulations.[173]

One ability grouping expert notes that classroom and extracurricular interventions aimed at racial/ethnic minority students, in particular, tend to be based on the view that modified instruction, career information, and contact with role models can counteract underrepresentation in subjects such as mathematics and science, as well as improve academic achievement in these areas.[174] The researcher cautions that there is a lack of evidence on some intervention programs' characteristics (e.g., the ages of students and type of ability grouping on which the approaches have the optimal effect) and outcomes that prevent assurance of their effectiveness for diverse groups of students (e.g., high and lower achieving minority and nonminority students) and recommendation of their widespread implementation.[175]

Early Intervention Programs

In the early 1990s, the Educational Testing Service investigated 163 math, science, and/or computer science early intervention programs[176] that targeted female students (13 percent), minority students (33 percent), and both underrepresented groups (54 percent).[177] Some education researchers claim that essential educational decisions can be made during students' middle school years that directly affect their access to further scholastic opportunities and potentially to postsecondary careers. Therefore, it is critical for educators to address potential enrollment and achievement disparities, particularly in secondary school mathematics and science, and implement intervention strategies between students' fourth and eighth grades. Rather than provide the traditional ability-grouped, sequential mathematics and science courses—a practice that assigns students to classes based exclusively on measures of aptitude and/or prior achievement (e.g., performance/grades in previous course work)—as the exclusive educational opportunities for youngsters in the realm of technical fields, additional programs can be implemented that aim to prepare middle school students to pursue and succeed in advanced coursework and other endeavors in the mathematics and science subject areas.[178]

Various education programs have been developed that attempt to reduce the barriers faced by female students and minority students, who tend to be underrepresented in higher level mathematics and science ability groups and advanced courses. Many such programs, or "intervention" efforts, are designed to foster motivation, participation, and achievement in mathematics and science. In fact, advocates of the intervention programs claim one of the major objectives is to counteract educational inequities that had deprived these subgroups. Therefore, the program developers purport to be sensitive and attentive to equity issues and to cognitive and psychological needs (including self-esteem) of intended program participants. Intervention approaches are, consequently, constructed around these needs.[179]

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[171] Ibid., pp. 326–29.

[172] Ibid.

[173] Campbell, "Math Class," p. 518.

[174] Jeannie Oakes, *Lost Talent: The Underparticipation of Women, Minorities, and Disabled Persons in Science*, R–3774–NSF/RC (Santa Monica, CA: RAND Corporation, February 1990), p. 70.

[175] Ibid., p. 75.

[176] The programs deliberately focus on addressing the participation of female students, minority students, and other underrepresented groups in advanced mathematics and science courses (as opposed to the entire range of an education curricula). *See* Beatriz Chu Clewell, Bernice Taylor Anderson, and Margaret E. Thorpe, "The Prevalence and Nature of Mathematics, Science, and Computer Science Intervention Programs Serving Minority and Female Students in Grades Four Through Eight," *Equity and Excellence*, vol. 25, nos. 2–4 (Winter 1992), p. 209 (hereafter cited as Clewell et al., "The Prevalence and Nature of Mathematics, Science, and Computer Science Intervention Programs").

[177] Ibid.

[178] Ibid.

[179] Ibid.

Programs are distributed in all of the Nation's States—ranging in number from 1 (in States such as Alabama, Arkansas, Delaware) up to 21 (in California). Most States have five or fewer programs. The number of programs throughout the States serve students at each ability grouping level between the fourth and eighth grades; however, there are twice as many programs serving seventh and eighth graders (159) as there are for fourth and fifth graders (73).[180] Sponsors include Federal education agencies (e.g., DOEd, National Science Foundation), State and local school districts, colleges and universities, corporations, and foundations.[181] Most (62 percent) of the programs are in-school, during the school day on school premises.[182] More than one-half of the in-school programs (particularly those that have support from industry and/or higher education institutions) have an after-school, Saturday, or summer enrichment component. Intervention programs that serve students for at least 10 months each year require a substantial commitment and coordination of resources; more than one-fourth follow this service delivery model. Although 41 percent of the programs serve fewer than 100 students at any one time, 28 percent have more than 500 participants.[183]

The programs, which tend to be student rather than teacher centered, aim to use innovative instructional techniques, materials, and curricula. Multiple instructional strategies are used to accomplish objectives. Among specific program activities for minority students, approximately 91 percent offered hands-on experiences; 74 percent, direct instruction; and 56 percent, advising. Less frequently offered activities included field trips (47 percent), contests/science fairs (28 percent), study groups (23 percent), tutoring (22 percent), and test preparation. As evident, activities are not exclusively achievement focused.[184]

Cooperative Learning

An innovative practice that has been shown particularly effective for elementary and middle school students is the use of cooperative learning methods, which enable students to work in small, heterogeneous learning groups.[185] The subgroups within a classroom are carefully selected to represent the range of academic ability in each.[186] Because student achievement is evaluated based on an average of an entire subgroup's academic performance, subgroup members must be accountable to one another in assignments, such as discovering information, mastering curricular content, writing a report, and/or completing learning activities and projects.[187] For instance, students may take a quiz after a period of group study. Each pupil's score could be used for individual grades, but a team member average would be calculated as well.[188] Achievement can also be based on the group's improvement from the previous week's performance, which allows for all students to provide equal contributions to group efforts.[189] Students at all ability levels have achieved in cooperative learning environments because peers motivate one another to learn, which can improve each student's achievement and in turn benefit the entire group's average academic performance.[190]

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[180] Ibid., p. 211. The researchers who examined the programs cite views claiming that intervention efforts, such as career awareness, should begin in early elementary years and become more intense during the middle and high school years. Ibid., p. 212 (citing L. H. Fox, *The Effects of Sex Role Socialization on Mathematics Participation and Achievement*, Contract No. FN17–400–76–0114 (Washington, DC: National Institute of Education)). In contrast, intervention activities to develop self-confidence in mathematics performance, which can foster achievement in this subject area, are considered most beneficial if implemented prior to sixth grade. Ibid., p. 212 (citing J.E. Parsons and D.N. Rubble, "The Development of Achievement-Related Expectations," *Child Development*, vol. 48, pp. 1075–79).

[181] Clewell et al., "The Prevalence and Nature of Mathematics, Science, and Computer Science Intervention Programs," p. 209.

[182] Ibid., p. 211. Although the programs can be offered during school hours, they operate separately from the school system. Ibid., p. 209. The implementation of programs on school premises enables them to be long-term interventions, in contrast to one-time conferences or workshops. Ibid., p. 212.

[183] Ibid., p. 211.

[184] Ibid., pp. 209–12.

[185] Slavin, "Synthesis of Research on Grouping in Elementary and Secondary Schools."

[186] Dawson, "Best Practices," p. 351.

[187] Slavin, "Synthesis of Research on Grouping in Elementary and Secondary Schools"; Slavin, "Ability Grouping in Middle Schools," p. 546; Oakes, *Keeping Track*, p. 210.

[188] Slavin, "Ability Grouping in Middle Schools," p. 546.

[189] Dawson, "Best Practices," p. 351.

[190] Robert E. Slavin, "Are Cooperative Learning and 'Untracking' Harmful to the Gifted?" in Bellanca and Swartz, *The Challenge of Detracking*, p. 191 (citing N. Webb,

As an additional explanation for students' increased academic achievement in cooperative learning settings, some education researchers claim that students learn best when conveying their knowledge to others.[191] A researcher on school grouping practices stresses that students can cultivate an interest and raise their achievement in more informal, less competitive settings.[192]

Cooperative learning differs from peer tutoring, in which higher achievers assist students in lower level groups with material that is familiar to the tutor but new to the recipient of the services. In contrast, in cooperative learning all students, regardless of ability level, are gaining access to new knowledge and skills. Consequently, the practice does not hinder higher achievers from being exposed to the same instructional curriculum (including the quantity of content and depth of subject matter) that they would have experienced in an upper level ability group.[193]

Two particular cooperative learning programs that have been shown effective for at-risk students include:

- *Team-Accelerated Instruction (TAI):* A practice in which teachers provide instruction in mathematical concepts to homogeneous "skill-groups" of students, who in turn work on problem-solving exercises with their heterogeneous cooperative team members.[194]
- *Cooperative Integrated Reading and Composition (CIRC):* An education practice used in upper elementary grades for reading, writing, and language arts curriculum. Teachers can instruct "skill-based" reading groups, for instance; and students in turn work with their respective mixed-ability cooperative teams to complete various activities.[195]

Psychosocial factors, such as more positive attitudes toward instructional activities, improved self-esteem, enhanced intergroup and interpersonal skills, and acceptance of students from diverse racial/ethnic backgrounds and disabilities are intended to be promoted as well.[196] Student diversity is viewed as an asset rather than an obstacle to learning.[197]

School District Grouping Practices

Charlotte-Mecklenburg Schools Program

In 1973 Charlotte-Mecklenburg Schools established a program to provide an enriching curriculum and advanced methods of instruction to students identified as academically gifted. To develop their abilities, academically gifted students may require differentiated educational services.[198] The State of North Carolina identifies students as academically gifted based on an assessment of an intelligence/aptitude test score,[199] a reading and mathematics subtest score,[200] and student classroom performance (demonstrated by grades, skills, or products).[201]

"Student Interaction and Learning in Small Groups: A Research Summary," in Robert E. Slavin, S. Sharah, S. Kagan, R. Hertz-Lazarowitz, C. Webb, and R. Schmuck, eds., *Learning to Cooperate, Cooperating to Learn* (New York: Plenum, 1985), pp. 147–72) (hereafter cited as Slavin, "Cooperative Learning and Untracking").

[191] Slavin, "Cooperative Learning and Untracking," p. 191.

[192] Oakes, *Lost Talent*, p. 70.

[193] Slavin, "Cooperative Learning and Untracking," p. 193.

[194] Center for Research on Elementary and Middle Schools, "Research Identifies Effective Programs for Students At Risk of School Failure," in Bellanca and Swartz, *The Challenge of Detracking*, p. 249.

[195] Ibid.

[196] Slavin, "Synthesis of Research on Grouping in Elementary and Secondary Schools"; Oakes, *Keeping Track*, p. 211.

[197] Braddock, *Tracking Implications*, pp. 143–44.

[198] Anne Udall, coordinating director for curriculum and academically gifted, Charlotte-Mecklenburg Schools, interview in Charlotte, NC, May 8, 1996; CMS Response, book 5, appendix U, Charlotte-Mecklenburg Schools, *Program for the Gifted Handbook*, p. 2 (hereafter cited as CMS, *Gifted Handbook*). The State of North Carolina Department of Public Instruction defines academically gifted students as students "who demonstrate or have the potential to demonstrate outstanding intellectual aptitude and specific academic ability." CMS Response, book 2, appendix L–2, North Carolina Department of Public Instruction, Division of Exceptional Children's Services, *Procedures Governing Programs and Services for Children with Special Needs*, 1993 (hereafter cited as NCDPI, *Special Needs*).

[199] Approved aptitude tests for 1995–96 include: Cognitive Abilities Test, Differential Aptitude Test, Stanford-Binet, Wechsler Scales, and five others. *See* CMS, *Gifted Handbook*, p. 32.

[200] Approved tests include the California Achievement Test, Iowa Test of Basic Skills, and SRA Achievement Series. *See* ibid., p. 32.

[201] Ibid., p. 25. All three components are converted to points. A maximum of 110 points can be earned. Students earning 98 or more points on a combination of the IQ/aptitude test, the reading and mathematics subtest, and scholastic per-

The State of North Carolina requires that children be reevaluated periodically. However, the State permits a reevaluation at any time a student's performance necessitates it or when the program design changes. Furthermore, the State requires an annual review of academically gifted students' performance.

The State of North Carolina requires local school districts to adopt screening procedures that ensure the inclusion of minorities and other students from special populations in programs for the gifted.[202] Since the early 1990s, Charlotte-Mecklenburg Schools has been working toward implementing programs to qualify additional black students for the Academically Gifted Program, through Project START, the Early Literacy Program, and Even Start.[203]

According to the Charlotte-Mecklenburg handbook, the program for the gifted "features fast-paced, indepth studies that enhance thinking and creative problem-solving processes. Curriculum builds on grade-level Charlotte-Mecklenburg Schools performance standards by increasing the depth, complexity, and novelty of classroom studies."[204] Currently, several programs are available to meet the diverse needs of gifted students throughout Charlotte-Mecklenburg Schools. Some of these are held in the regular classroom, and others are pull-out programs available only (or primarily) to students with academically gifted certification.[205] Charlotte-Mecklenburg Schools is moving in the direction of providing academically gifted instruction to all children in a class, rather than pulling students identified as academically gifted out of the regular class for supplemental instruction. This transition is based on the view that all students can benefit from the challenging education that traditionally has been offered only to academically gifted students.[206]

Prince George's County Public Schools

Prince George's County Public Schools has "initiated an emphasis on heterogeneous grouping as part of the school reform movement," and indicated that the initiative has "eliminated the practice of tracking."[207] However, the Maryland school district does use homogeneous grouping for students identified as gifted and talented and other students with special needs. A 1990 bulletin to principals shows the district's intention to move away from ability grouping and tracking practices. The bulletin describes six steps toward secondary school restructuring, one of which is "phasing out traditional leveling practices and replacing these procedures with more heterogeneous grouping alternatives."[208] However, the bulletin cautions, "reducing the number of different ability level groupings is not an end in itself" and "[t]his goal does not imply a total elimination of instructional grouping. Students with special needs must be grouped so they may

formance scores are eligible to be considered by the school-based and administrative placement committees for the Academically Gifted Program. Ibid., p. 26.

[202] NCDPI, *Special Needs*, p. 25.

[203] Charlotte-Mecklenburg Schools Staff, *A Review of the Committee of 25's Report on Student Assignment*, p. 10. The Charlotte-Mecklenburg Schools also has a minority achievement program to improve the academic achievement, cultural and career exposure, and social skills of minority students. The overall aim of the program is to help students make transitions between grade levels in school and stages of life. Howell, Nay, *Program Evaluation of the Minority Achievement Program: Results of a Multi-Year Program Evaluation: 1990–1993*, 1993, p. 1.

[204] CMS, *Gifted Handbook*, p. 4. "Depth" refers to elaborating on details and evidence; finding patterns of recurring events; identifying trends that affect concepts; describing rules, standards, issues and ethics; and applying principles, theories, and generalizations. "Complexity" refers to making connections among academic disciplines and to relating information across time. "Novelty" refers to individual interpretation and investigations.

[205] Ibid.

[206] The issue of ability grouping in North Carolina schools has been examined previously by the U.S. Commission on Civil Rights. In 1991 the North Carolina Advisory Committee to the Commission received complaints from black parents across the State of North Carolina alleging that in-school educational tracks resulted in racial isolation. The parents also alleged that schools made mistaken assessments of black children, with adverse results, particularly for black males. In response to these allegations, the State Advisory Committee held a forum to which it invited six education experts, most of them public school administrators, from across the State of North Carolina. North Carolina Advisory Committee to the U.S. Commission on Civil Rights, *In-School Segregation in North Carolina* (March 1991), p. 1.

[207] Jerome Clark, superintendent of public schools, Prince George's County Public Schools, response to U.S. Commission on Civil Rights information request, Feb. 29, 1996, question 25.

[208] Prince George's County Public Schools, Bulletin S–81–90, "Scheduling Information for the 1990–1992 School Year," Mar. 21, 1990.

receive the curriculum and/or instructional strategies especially designed for them."[209]

One of the major steps that Prince George's County Public Schools has taken to do away with ability grouping and tracking is the elimination of low level general mathematics courses and the establishment of a requirement that all students take algebra I and geometry to graduate from high school. By imposing this requirement, the school district has sent a strong signal to teachers and parents that they need to have high expectations for all students.[210]

Teacher-Designed Programs

Teachers have designed successful programs for teaching students of diverse abilities within a single classroom. For example, a teacher in a California high school opened her advanced placement English class to a broad range of students whose Scholastic Aptitude Test scores ranged from the 700s to the 1,300s.[211] The teacher made several adjustments to her teaching styles in order to teach students of different abilities. For example, she demonstrated the process for completing writing assignments rather than simply providing assignment topics. She also focused more time on classroom discussions in order to create a classroom community that made "all students feel good about themselves as learners and contributors to others' learning."[212] One of the students, Paula, had never before participated in an advanced class and was the only Latina student in the class. She was initially overwhelmed by the verbal skills of some of her classmates and reluctant to remain in the class.[213] However, Paula stayed in the class and went on to college with greater confidence in her abilities.[214] Moreover, the teacher found that students with SAT verbal scores below 500 were able to earn high scores on the Advanced Placement English Exam.[215]

OCR's Enforcement Activities

Title VI Compliance Standards

As discussed above, education research has shown that the classification and separation of students can have an effect on the amount and quality of education students receive. Consequently, some students may have limited access to certain educational experiences, such as participating in challenging courses that foster critical thinking skills. Moreover, inappropriate implementation of ability grouping practices may limit equal educational opportunities by denying some students access to the full range of programs, curriculum, resources, facilities, teachers, and experiences offered by the school. As a result, the implementation of particular ability grouping practices has been challenged in the courts on constitutional and statutory grounds.[216]

Several Federal court cases and DOEd administrative decisions have addressed the validity of grouping practices. At least three Federal courts have held that ability grouping is not on its face unconstitutional even when it results in racial disparity in a school district's classrooms.[217] According to OCR draft guidance on ability grouping, if a facially neutral grouping practice has a racially disproportionate effect, then the school district must provide a substantial educational justification for the practice.[218] For example, grouping may be sufficiently justified if the purpose and result of the practice is to accommodate the specific needs of students

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[209] Ibid., pp. 2–3.

[210] Jerome Clark, superintendent of public schools, and Clark Estep, special assistant to the superintendent, Prince George's County Public Schools, interview in Prince Georges County, MD, April 24, 1996, p. 2.

[211] *See* Joan Kernan Cone, "Untracking Advanced Placement English: Creating Opportunity is Not Enough," *Phi Delta Kappan*, May 1992, pp. 712–17.

[212] Ibid., p. 714.

[213] Ibid., p. 713.

[214] Ibid., p. 717.

[215] Ibid., p. 274.

[216] Jeannie Oakes, *Keeping Track*, pp. 172–73.

[217] *See* Georgia State Conf. of Branches of NAACP v. Georgia, 775 F.2d 1403, 1412–13 (11th Cir. 1985); Castaneda v. Pickard, 648 F.2d 989, 996 (5th Cir. 1981); Hobson v. Hansen, 269 F. Supp. 401, 511–12 (D.D.C. 1967), *aff'd, remanded*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[218] 775 F.2d at 1417. *See also* Richard D. Komer, Deputy Assistant Secretary for Policy, Office for Civil Rights, U.S. Department of Education, memorandum to OCR regional civil rights directors, Draft "Ability Grouping Investigative Procedures Guidance," Mar. 14, 1991, p. 4; attached Draft "Investigative Plan Ability Grouping Compliance Review," (hereafter cited as OCR, Draft "Investigative Plan"). For a more detailed discussion of the standards for proving discrimination, *see* chap. 3.

served in the remedial programs.[219] However, grouping students in a single class for the entire day is not sufficiently justified if its only purpose is to make it easier for parents to work with one teacher.[220]

Although the educational justification of a practice is determined on a case-by-case basis, the Federal courts and OCR have relied on three general conditions, in various forms and combinations, to determine whether an ability grouping practice is educationally justified. First, students should be grouped in specific subjects based on their achievement or ability in those subjects, rather than placed in a single ability group for the entire school day.[221] As the fifth circuit stated, "We agree that, just as job requirements must adequately measure characteristics related to job performance in the employment context, the criteria by which students are assigned to a specific class must adequately measure the student's abilities in that subject."[222] Second, the students should be reevaluated or retested regularly to determine if their initial placement was accurate and if they are progressing in these subjects. Moreover, reevaluation and retesting is important for ensuring that there is an opportunity for movement and advancement among ability groups.[223] Third, the grouping practice itself should be evaluated to determine if it succeeds in meeting the school's stated purpose for using it. This evaluation also should include evidence demonstrating that the quality of education received by students in lower groups is sufficient.[224] An educationally justified ability grouping practice may still violate title VI if there is an "equally effective" alternative educational practice that would result in less underrepresentation of minority students in advanced ability level groups and courses, or less overrepresentation in lower level groups.[225]

Investigative Approach

OCR relies on the general prohibitions contained in title VI and its implementing regulations to conduct its investigations of ability grouping practices.[226] These general prohibitions do not specifically address ability grouping practices, but rather prohibit discriminatory actions that limit an individual's access to or participation in the benefits of a federally assisted program.[227] OCR has not issued any formal policy guidance to ensure that school districts comply with title VI in the development and implementation of ability grouping practices. However, OCR developed a draft policy guidance on investigative procedures for ability grouping practices.

OCR's draft ability grouping guidance includes a draft investigative plan to assist OCR investigators in evaluating a school district's ability grouping practice. To determine if the structure of a school's ability grouping practice complies with title VI, OCR investigates and evaluates how the ability grouping system is supposed to work and how it functions in practice.[228] To understand the theory and application of a school district's ability grouping structure, OCR tries to answer a series of questions based on the title VI compliance standards discussed above. For example:

- Are students ability grouped for particular subjects or are they placed in the same ability groups for the entire day? In which grades and subjects is ability grouping used?
- Does the system afford students the opportunity to move from one ability group to another? Are students periodically reevaluated

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219 OCR, Draft "Ability Grouping Investigative Procedures Guidance," p. 4.

220 OCR, Draft "Investigative Plan," p. 6.

221 *See, e.g.*, Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750, 754 (5th Cir. 1989). OCR, Draft "Investigative Plan," p. 8.

222 775 F.2d at 1419.

223 775 F.2d at 1420 ("The reliability of the local defendants' grouping criteria is also supported by the evidence showing improvement in student scores and mobility between achievement groups"); 868 F.2d at 754–55 ("Further, expert testimony established that Oxford's students are not locked into place, or tracked, in the grouping system. Oxford's achievement grouping plan provides several opportunities for movement among achievement levels during the school year").

224 775 F.2d at 1419 ("The record discloses that such grouping permits more resources to be routed to lower achieving students in the form of lower pupil-teacher ratios and additional instructional materials. There is also evidence that ability grouping results in improved class manageability, student and teacher comfort and student motivation").

225 OCR, Draft "Ability Grouping Investigative Procedures Guidance," pp. 6, 8.

226 Ibid., pp. 1–2.

227 34 C.F.R. § 100.3(b) (1996).

228 *See* OCR, Draft "Investigative Plan," pp. 5–10.

to determine whether their initial placements are still appropriate, and if so, how often?

- What are the goals of the ability grouping system, and how and when were these goals developed?
- If the goal of the grouping practice is to improve the achievement of the students in the lower groups, then is the school providing extra resources for these students? Is the student/teacher ratio different in this group than in others? Do teachers of these groups have any special training or certification?
- Is the grouping practice providing an educational benefit to the students? For example, are students in the lower groups actually showing improvement in achievement?[229]

Moreover, OCR also may assess if other practices in the school limit student access to the educational benefits of the ability grouping practice. For example, if the school groups students in mathematics and science, OCR will determine whether the school schedules classes so that students who were initially in lower groups have an opportunity to take prerequisite courses that will qualify them for participation in advanced mathematics and science courses. Conversely, OCR will determine if the school schedules the prerequisite mathematics or science courses at the same time as other courses that may attract primarily minority students, such as an elective in African American history (sometimes known as aversionary scheduling), with the intent or effect of discouraging or delaying minority students from enrolling in advanced mathematics or science courses.[230]

OCR's Kansas City Enforcement Office has developed an innovative approach, known as Profile, Assessment, and Resolution (PAR) reviews, to ensuring nondiscrimination and equal educational opportunities for minority students in advanced education programs.[231] As of 1998, other OCR enforcement offices do not use PAR reviews.

The PAR review is designed to facilitate a partnership among OCR, local school officials, and the community. The goals of the PAR review are twofold:

> (1) to assist the district in reviewing its advanced educational programs to ensure that placement into these programs is nondiscriminatory on the basis of race, color, and national origin; and
> (2) to assist the district in developing strategies to provide minority students equal access to advanced educational programs and to their prerequisites, so that these students may enjoy equal educational opportunity and meaningful participation in the district's educational programs.[232]

The PAR review includes an overview of the title VI legal standards associated with advanced education programs and suggested strategies for ensuring nondiscrimination and providing equal access to these programs. In addition, the PAR reviews include a "District Self-Assessment Guide" and a "Profile Data Request." The self-assessment guide asks schools to describe their advanced education programs, and is designed primarily to assist schools in complying voluntarily with title VI, but may also be used by OCR in conducting compliance reviews.[233]

The PAR review strategies address improvements in student placement, counseling and guidance services, and program and service comparability among multiple sections of advanced courses within a school or across a school district.[234] However, the PAR review does not provide strategies for structuring ability grouping programs that, for example, group by subjects based on performance in those subjects and

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[229] *See* ibid.

[230] U.S. Department of Education, Office for Civil Rights, Draft "Investigative Manual: Underrepresentation of Females and Minorities in Upper-Level Mathematics and Science in Secondary Schools," prepared by Expert Team on Underrepresentation of Women and Minorities in Mathematics, Science, and Other High Track Courses, August 1994, p. I–4.

[231] U.S. Department of Education, Office for Civil Rights, Region VII, "Profile, Assessment, and Resolution Reviews: Equal Educational Opportunities for Minority Students in Advanced Education Programs" (undated) (hereafter cited as OCR Region VII, "PAR Review for Minority Students in Advanced Education Programs"). The Kansas City office has developed PAR reviews addressing minority students in special education, opportunities for students with limited English proficiency, and racial harassment. For a further discussion of these PAR reviews, *see* U.S. Commission on Civil Rights, *Equal Educational Opportunity Project Series: Volume I* (December 1996), pp. 210–12.

[232] OCR Region VII, "PAR Review for Minority Students in Advanced Education Programs," p. 1.

[233] Ibid., District Assessment Guide, n.1, p. 1.

[234] OCR Region VII, "PAR Review for Minority Students in Advanced Education Programs," pp. 3–4.

that ensure mobility and opportunity for advancement. Moreover, although the PAR review provides strategies for program and service comparability among advanced programs, it does not provide strategies to ensure that programs and services are comparable among all groups so as to avoid, for example, the "dumbing down" of the curriculum in the lower groups.

Complaints, Compliance Reviews, and Agreements

OCR has conducted compliance reviews and complaint investigations to identify racially identifiable classrooms and analyze the structure of ability grouping practices that may create a disproportionate representation of minority students. Although a review of available letters of finding and resolution agreements indicates that there is little consistency among OCR regions in the thoroughness of their investigations, some case letters do demonstrate that OCR investigators have applied title VI compliance standards accurately and follow OCR's draft investigative plan in some cases. For example, in a compliance review in New Bedford, Massachusetts, OCR found that the school district's block grouping practice in the seventh grade violated title VI.[235] After finding a statistically disproportionate number of African American students and Hispanic students in the lower groups, OCR analyzed the structure of the district's grouping practices based on the district's stated justification. The district justified its block grouping practice in the seventh grade as necessary for students' stability and educational needs, and to facilitate the provision of additional services to educationally disadvantaged students.[236]

OCR interviewed teachers and administrators and found that block grouping is neither necessary nor desirable for student stability. For example, one teacher observed that students who have all of their classes together become "too chummy" and thus disruptive. To test the argument that grouping is necessary to meet the educational needs of the students, OCR analyzed district data on placement of students. OCR discovered that some minority students were denied access to the highest mathematics level, despite SAT scores in mathematics comparable to white students in the highest levels. OCR found that the disparity in mathematics placement was based on the fact that the minority students had lower reading and language scores than the white students.[237] Thus, block grouping did not properly reflect the actual ability of students in each subject. OCR also found that the block grouping practice in seventh grade made it less likely for minority students to move into higher level courses later in their academic careers. To evaluate the assertion that block grouping facilitated the provision of additional services, OCR examined class size and found that there was limited evidence to support the district's justification.

Based on this compliance review, the district agreed to discontinue block grouping. OCR and the district signed a resolution agreement that contained specific requirements for restructuring the district's ability grouping practice. For example, the district agreed to reduce to a maximum of three ability groups in English and mathematics and to a maximum of two ability groups in science and social studies.[238] Moreover, the district agreed to improve its placement process by facilitating parental choice for student placement and developing written criteria for staff placement recommendations.[239]

To address the differences in quality of education among the groups, the district agreed to provide enrichment programs for students to "improve their capacity to learn or perform to their fullest potential."[240] The district also agreed to provide training for teachers on heterogeneous instruction methodology to improve their skills in teaching academic subjects to students at a variety of ability levels.

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[235] Thomas J. Hibino, regional director, Region I, Office for Civil Rights, U.S. Department of Education, letter to Constantine Nanopoulos, superintendent, New Bedford Public Schools, re: No. 01–92–5004, May 1, 1995, p. 1 (hereafter cited as New Bedford letter of finding).

[236] Ibid., p. 4.

[237] Ibid., pp. 4–5.

[238] DOEd's Office of General Counsel has made the following statement to the Commission: "Many educational experts believe that ability grouping is appropriate only in skill acquisition classes, not for subjects such as science and mathematics." *See* Karl Lahring, assistant general counsel, Office of General Counsel, U.S. Department of Education, Note to Frederick D. Isler, assistant staff director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Sept. 9, 1997, p. 5 (hereafter cited as Lahring, Note to Frederick D. Isler).

[239] New Bedford letter of finding, p. 6.

[240] Ibid., Resolution Agreement, p. 1.

More recently, OCR entered into a partnership agreement with the Prince George's County Public Schools in Maryland to address the problem of minority overrepresentation in special education programs. The partnership was established to:

> evaluate these issues within the District's schools and to enhance the opportunities of all students to have access to a high quality curriculum and, to the extent that they need special education services, to receive those services with students who are not disabled to the maximum extent appropriate.[241]

Among the issues addressed in the agreement, the district agreed to review and reevaluate at least annually student records and placement to identify students who may benefit from assignment to mainstream educational settings.[242] This reevaluation is designed to ensure that special education placement does not result in disparate impact for minority students in violation of title VI. Thus, as with ability grouping in academic subjects, OCR is requiring Prince George's County to provide an opportunity for mobility among education programs in compliance with title VI.

Technical Assistance, Outreach, and Education

Promising Practices

OCR has begun to develop compilations of effective model programs in various issue areas to improve equal educational opportunities for all students.[243] OCR has not developed a compilation of model programs or promising practices that specifically address equal educational opportunities for minority students and ability grouping practices. However, one manual does describe some model programs that are designed to increase access for minority students in mathematics, science, and gifted and talented programs.[244]

Since OCR allows school districts broad discretion in devising strategies and educational practices to ensure equal educational opportunity for minority and female students, the programs addressed in the manual are not promoted by OCR as definitive approaches for compliance with civil rights statutes such as title VI. Rather, OCR considers the listed mathematics and science programs to be representative initiatives to address the educational needs of minority students and mechanisms to foster participation in mathematics and science from elementary school on. Programs that are implemented during the initial elementary school years are considered "early interventions" and can be offered to minority students to prevent underrepresentation in school mathematics and science curricula.[245]

The models can serve as practical guides for school districts confronting underrepresentation of students from various racial/ethnic groups and female students, to determine what can be accomplished and the accompanying strategies to reach those goals.[246] Each model includes information on project goals, target groups, program descriptions, evidence of effectiveness, as well as appropriate contact persons.[247] Programs target various groups of at-risk students, including minority students.[248] At present, no par-

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[241] Robert A. Smallwood, director, Region III, Office for Civil Rights, U.S. Department of Education, and Jerome Clark, superintendent, Prince George's County Public Schools, MD, "Partnership Agreement," Sept. 13, 1996, p. 1 (hereafter cited as Prince George's County Partnership Agreement).

[242] Prince George's County Partnership Agreement, p. 3.

[243] Lee Nell, chief regional attorney, Philadelphia Enforcement Office, Office for Civil Rights, U.S. Department of Education, telephone interview, p. 19; Jean Peelen, enforcement director, DC Metro Office, Office for Civil Rights, U.S. Department of Education, interview in Washington, DC, May 28, 1996, pp. 2, 6.

[244] OCR has created promising practice documents relating to equal educational opportunity for students with limited English proficiency, female students and minority students in advanced mathematics/science courses, and students in special education programs. *See, e.g.,* Office for Civil Rights, U.S. Department of Education, *Promising Practices and Programs for Serving National Origin Limited English Proficient Students,* prepared by Lau Team, (March 1996); Office for Civil Rights, U.S. Department of Education, *Promising Practices and Programs To Enhance Access for Women and Minorities to Mathematics and Science Programs and Gifted and Talented Education Programs* (April 1996).

[245] OCR, *Promising Practices and Programs To Enhance Access for Women and Minorities,* pp. 2–3.

[246] Ibid., p. 1.

[247] Ibid., pp. 4–43.

[248] Ibid., pp. 4, 6. "At-risk" students usually refers to students who are identified as at risk for school failure based on a variety of factors, such as low socioeconomic status, low measured ability, learning disabilities, learning problems early in the schooling experience, behavioral problems, poor attendance, and eligibility for remedial services. *See, e.g.,* Robert E. Slavin and Nancy A. Madden, "What Works for Students at Risk: A Research Synthesis," *Educational Lead-*

ticular model addresses educational needs (for placement in mathematics and science courses or ability groups) specifically for minority girls or boys. However, one of the programs, which is used at more than 300 elementary schools, Activity Centered Elementary Science (ACES), is geared to both female students and minority students.[249] Similarly, the Mathematics and Science Education Network, offers female students and minority students (but not minority female students or minority male students in particular), at the secondary school level, the opportunity to receive tutorial assistance as well as explore potential career opportunities in mathematics and science areas.[250] Overall, the compendium suggests a variety of hands-on and instructional programs that can be flexible, inclusive, and applicable to a variety of educational settings. Consequently, programs targeting at-risk students overall can mediate the disadvantages that minority girls may confront.

OCR's promotion of model programs designed to enhance the participation of minority students and female students in various mathematics and science endeavors can serve as part of a response to civil rights concerns under title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972.[251] However, OCR has not identified program models that are tailored specifically to the educational needs of minority female students or minority male students.

Additional Innovative Approaches

In response to educational concerns about black males, various public school districts are developing and/or implementing a variety of programs that exclusively target this subpopulation. Programs can range from a small scale (such as single-sex classes) to a larger scale (such as African American all-male schools or academies).[252]

According to a legal group at Tulane University, all-male schools for black students have "split the civil rights community into deep factions."[253] Supporters of single gender schools for black students defend their legality by claiming that the Constitution "secures equality" rather than integration. Other advocates view African American schools as the exclusive solution to ineffective attempts at school desegregation.[254] "Some theorists claim that the current education system is not addressing the needs of black students because it is Eurocentric," and therefore, the academic curriculum and methods of instruction that are offered to white students would not provide their black peers with an equal educational opportunity.[255]

In contrast, opponents stress that the law prohibits segregated education facilities, such as all-male African American public schools.[256] In fact, various courts since *Brown v. Board of Education*,[257] have ruled that segregated schools should not be established.[258] The "male only" aspect of these education programs can be considered "facially discriminatory," and can foster "constitutional scrutiny."[259]

For example, in *Garrett v. Board of Education*, the Federal district court, in granting a motion for preliminary injunction, enjoined the Detroit Board of Education from further implementing male-only public school academies.[260] The plaintiffs, girls enrolled in Detroit public schools and their parents, argued that the all-male academies violated both the Federal and Michigan Constitutions and statutes. The court stated that the female student plaintiffs would likely prevail on the merits of their claims under both the Michigan Constitution and the equal

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ership, February 1989, p. 4; Robert E. Slavin and Nancy A. Madden, *Effective Classroom Programs for Students at Risk* (Baltimore: Center for Research on Elementary and Middle Schools, 1987), p. 2.

[249] OCR, *Promising Practices and Programs To Enhance Access for Women and Minorities*, pp. 8–9.

[250] Ibid., pp. 20–21.

[251] Ibid., p. 1.

[252] In large urban cities, 40 percent of black males are considered functionally illiterate, and 40 percent do not graduate from high school. *See* Michael John Weber, "Immersed in an Educational Crisis: Alternative Programs for African American Males," *Stanford Law Review*, vol. 45 (1993), p. 1099.

[253] Pamela J. Smith, "All-Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education," *Tulane Law Review*, vol. 66 (1992), p. 2007.

[254] Weber, "Immersed in an Educational Crisis," p. 1117.

[255] Ibid., p. 1103.

[256] Ibid., p. 1101. With respect to educational concerns, critics of single gender schools for black students claim that the lack of interaction of both genders can foster "sexist attitudes among male students." *See* ibid.

[257] 347 U.S. 483, 493 (1954) (*Brown I*).

[258] Weber, "Immersed in an Educational Crisis," p. 1121.

[259] Ibid., p. 1125.

[260] 775 F. Supp. 1004, 1014 (E.D. Mich. 1991).

protection clause of the 14th amendment.[261] Moreover, with respect to a violation of title IX, the court deferred to OCR's judgment that all-male public elementary and secondary school programs violate title IX.[262]

There is no implementing regulation that (a) compels school districts to coordinate their title VI and title IX compliance efforts and provide equitable mathematics and science programs, particularly for girls and boys who are members of racial/ethnic subpopulations, and (b) fosters proportionate representation of female students and male students from each racial/ethnic subpopulation in ability groups, ability level tracks, and courses in a sequential curriculum.[263]

With respect to participation of students in mathematics and science ability groups, if OCR continues to lack any regulatory enforcement mechanism to link gender and racial/ethnic issues, then gender equity concerns can continue to be addressed separately from issues related to racial/ethnic profiles; gender and racial/ethnic issues can continue to eclipse one another; and male-female enrollment disparities in mathematics and science ability groups, course sections, and courses in a sequential curriculum for each distinct racial/ethnic subpopulation may not be accounted for in educational policy.

The lack of coordination between title VI and title IX policy issues enables school districts to treat their title VI and title IX compliance responsibilities as mutually exclusive issues. For instance, as localities monitor their compliance with both title VI and title IX in relation to student mathematics and science course enrollment patterns, OCR is not:

- Enforcing school districts to track data, for instance, on female students' enrollment in upper level mathematics and science courses, relative to their share of the student population, specifically within each racial/ethnic subpopulation. (Yet localities are required by OCR to maintain student population and course enrollment data for female students overall and students from each racial/ethnic group overall.)
- Mandating that local education agencies track data on female students' course enrollment patterns relative to their male peers in each racial/ethnic group. (Yet local school districts are compelled by OCR to examine course enrollment data that compares the representation of males with their female peers overall.)[264]

OCR's lack of official effort to coordinate title IX and title VI responsibilities in the realm of mathematics and science education can perpetuate the lack of a formal mechanism among school districts to collect appropriate data and information (a) for each racial/ethnic subpopulation, to determine, record, or evaluate the current and potential disparities in girls' enrollment in the student population relative to their assignment to and representation in mathematics and science ability groups and program level tracks; (b) for each racial/ethnic subgroup, to address gender equity issues, and compare female students' (relative to their male peers) participation in specific mathematics and science courses and ability groups; and (c) to monitor potential and current systematic discrimination against minority female and minority male students in mathematics and science programs.

OCR's separate enforcement of title VI and title IX enables localities to focus on their compliance responsibilities for gender equity separately from racial/ethnic equity issues. These practices can hinder educators' and policymakers' efforts to focus education policy specifically on male students and female students within each racial/ethnic group.

Reevaluating Changes in Performance Education Policy

Ability grouping and tracking practices provide a means of affording students with similar abilities or capacities to learn with instruction suited for their specific academic needs. Many ability grouping practices do not allow for movement between groups when warranted by

[261] *Id.* at 1006–08.

[262] *Id.* at 1009–10.

[263] "Appropriate" enrollment of a group of females from a specific racial/ethnic subpopulation, in a high level ability group or upper level mathematics or science course, for instance, would resemble that specific demographic subpopulation's share of enrollment in the total student population in a particular school.

[264] OCR, Draft "Investigative Manual: Underrepresentation of Females and Minorities in Mathematics and Science," pp. I–3 and A–1.

academic performance, thus depriving those students of equal educational opportunities.[265]

To ensure that students in ability groups receive equal educational opportunities, school systems must employ methods for periodic reevaluating and regrouping after a student's initial placement in an ability group to account for changes in academic performance and/or misplacement, and to allow for mobility between tracks. A number of factors can influence inappropriate student placements and lack of mobility between ability groups. For instance, in many schools, organizational constraints, such as block scheduling, limit flexibility in student placements and can result in mismatches between students' ability and their assignment to a particular ability-grouped class or track,[266] or the use of inappropriate diagnostic and evaluative instruments can result in students being placed in the wrong ability group or academic track. Reevaluating and regrouping periodically to reflect differential ability in various subjects is fundamental to ensuring that students placed in ability groups and tracks have equal educational opportunities.

Reevaluation refers to the process undertaken by schools to determine whether a student's placement in an ability group or educational track requires revision. Regrouping refers to changes in student placement from one ability group to another. For example, screening and diagnostic procedures may indicate a student's progress in a regular mathematics course warrants placement in an advanced mathematics group, or vice versa. Another example of regrouping is the Joplin Plan, which refers to the regrouping of students for reading across all grade levels. For example, "a reading class at the fifth grade first semester reading level might include high-achieving fourth graders, average achieving fifth graders, and low-achieving sixth graders." This form of regrouping also requires that students be frequently reevaluated to adjust for student progress, or lack thereof.[267]

This educational principle encompasses assessments, evaluation, and criteria for placement, such as diagnostic testing and teacher referrals. Additional information used to reevaluate students can include interpersonal and social function data.[268] One researcher studying student placement procedures for gifted and talented programs noted that "[f]ormative evaluations, in which the teacher and student monitor growth regularly throughout the school year, provides the first indication of the level of success of the academic placement."[269] Such periodic evaluations are of crucial importance for making placement decisions. The student's placement in an advanced academic track or remedial program, or his or her inclusion in the school's regular education program, depends on accurate reevaluation and regrouping practices.

Reevaluation and regrouping practices also allow students to move between groups or academic tracks. Education literature indicates that rigid ability grouping practices may adversely affect some students through isolation.[270] Furthermore, the consensus among educators is that once students are placed in ability groups, the likelihood of being reassigned to a more advanced group is minimal.[271] Education research, in this regard, suggests that since groups are taught as a whole, limiting individualized instruction, it is difficult for any one child to move ahead to a more advanced group.[272]

Mobility between ability groups or tracks will provide the student the greatest access to the

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[265] George, "Tracking and Ability Grouping in the Middle School," p. 18.

[266] Hallinan, "The Organization of Students for Instruction in the Middle School," p. 126. Although it is possible for students to be placed in a high ability group for one subject and a lower group for another, in practice, scheduling conflicts can often only accommodate a grouping plan in which all of a student's core courses are taken within the same ability level track. Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," pp. 471–99.

[267] Slavin, "Ability Grouping and Student Achievement In Elementary Schools," pp. 5–6

[268] Teresa Argo Boatman, Keith G. Davis, and Camila P. Benbow, "Best Parctices in Gifted Education," in Thomas and Grimes, *Best Practices in School Psychology–III*, p. 1092.

[269] Ibid.

[270] Jeffrey M. Schneider, "Tracking: A National Perspective," *Equity and Choice*, Fall 1989, p. 16; Eva Wells Chun, "Sorting Black Students for Success and Failure: The Inequity of Ability Grouping and Tracking," ed., Smith and Chunn, *Black Education: A Quest for Equity and Excellence* (New Brunswick and Oxford: Transaction, 1989).

[271] George, "Tracking and Ability Grouping in the Middle School," p. 18.

[272] Anne Wheelock, *Alternatives to Tracking and Ability Grouping* (Arlington, VA: American Association of School Administrators, 1994), p. 12.

school's educational opportunities. One researcher on the effects of reevaluation and regrouping in ability grouping practices finds that group assignments must be frequently reassessed to enable a student to have the opportunity to transfer into an alternate ability group that would more appropriately match the youngster's ability and/or particular subject level mastery.[273] In developing reevaluation and regrouping procedures, flexibility should be a key consideration, as a student's progress may support reassignment to a more challenging ability group.[274]

Mobility can also occur within ability groups. For instance, schools can integrate different groups of students for different purposes, such as alternating homogeneous and mixed-ability grouping during the school week.[275] In programs such as these, reevaluating and regrouping students would assist schools in making accurate placement decisions. Reevaluation and regrouping practices rely on educational theory that suggests that a student's learning potential is not fixed, and is influenced more by continual academic challenges.[276]

The importance of reevaluating and regrouping periodically to reflect both differential ability in various subjects and changes in achievement, performance, and development is supported in statutory, regulatory, and case law, such as the Bilingual Education Act and section 504. For example, the Bilingual Education Act includes provisions on the evaluation and assessment of student progress within an instructional program for students with limited English proficiency.[277] There are similar requirements for reevaluations in the section 504 regulations. Under the first 504 requirement, a school district must evaluate a student with a disability before "any subsequent significant change" in the initial or existing placement of a student with a disability.[278] Under the second reevaluation requirement, the regulations require that schools must have procedures in place so that students with disabilities are reevaluated periodically.[279] Congress makes clear that reevaluating and regrouping are equally important as the original identification and placement into an ability group, and must be implemented with the same consideration for neutral and nondiscriminatory means.

OCR's Efforts to Ensure Reevaluation

It is apparent that the Office for Civil Rights considers reevaluating and regrouping periodically an important educational practice by embodying such principles in OCR's section 504 regulations. However, the Office for Civil Rights has not specifically addressed the issue of reevaluation and regrouping in ability grouping placement methods in assuring nondiscrimination in its title VI regulations.

Compliance Standards

OCR has issued to its staff draft title VI policy guidance related to reevaluating and regrouping students periodically in ability grouping practices. A 1991 OCR draft memorandum titled "Ability Grouping Investigative Procedures Guidance" discusses the need for reevaluation and regrouping in ability grouping practices. In the draft guidance, OCR indicates that it may find a school's or school system's justification for an ability grouping practice is pretext for discrimination under title VI when the school asserts that "the ability grouping is designed to serve a particular educational goal, such as increasing student achievement, and the school cannot substantiate how well that ability grouping system is achieving that goal (such as evaluating achievement of students in the lower ability groups and determining whether im-

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[273] Slavin, "Ability Grouping and Student Achievement In Elementary Schools."

[274] Hereford, "Making Sense of Ability Grouping," p. 52.

[275] Margaret M. Dawson, Center for Learning and Attention Disorders, "Best Practices in Promoting Alternatives to Ability Grouping," in Thomas and Grimes, *Best Practices in School Psychology–III,* p. 351.

[276] Wheelock, "Alternatives to Tracking and Ability Grouping," p. 10

[277] 20 U.S.C. § 7433(a), (c)(1)–(3) (1994) (emphasis added).

[278] *See* 34 C.F.R. § 104.35(a) (1996). The section 504 regulation does not refer to this requirement as a reevaluation and, in fact, has a separate provision, 34 C.F.R. § 104.35(d), entitled "Reevaluation." Nevertheless, the evaluation required under 34 C.F.R. § 104.35(a) also is a reevaluation in that it occurs subsequent to the evaluation conducted prior to the student's initial placement. The distinction between the two reevaluation requirements is in the required timeframes; one requires a reevaluation before "any subsequent significant change in placement," while the other requires "periodic" reevaluations.

[279] 34 C.F.R. § 104.35(d) (1996).

provement has been made)." Therefore, schools must establish policies and procedures for measuring achievement and a means for determining if the goals of the ability grouping practice are being met. In cases where schools do not have methods or procedures for making these determinations, the school's or school system's ability grouping practice may in fact be a pretext for discrimination.[280]

During an investigation, OCR can require schools to provide a description of their ability grouping program, including any goals or objectives. The draft guidance memorandum also requires OCR staff to request that schools provide a description of the criteria and procedures school personnel use to determine when a student's ability group placement should be changed, and how often a student's ability group placement is reevaluated. OCR also recognizes the importance of determining whether the ability grouping program is beneficial to the students within ability groups. The draft guidance suggests that OCR staff:

> Obtain a written description of the district's or school's method, if any, for assessing the educational benefits derived by students in ability groups. If standardized tests are used to assess educational benefit, obtain copies of the tests, rating scales, and any documents the school has concerning the purpose, validity, and reliability of the test. Obtain the testing schedule for each grade in which ability grouping is used.[281]

During pre-onsite analysis, OCR looks to see if a school system affords students the opportunity to move from one ability group to another. OCR also may review a school's ability grouping program to determine if students are periodically reevaluated to determine the appropriateness of the initial placement. And if so, OCR may seek to determine how often this reevaluation occurs.[282]

Enforcement

A review of OCR case letters reveals that OCR has found violations of title VI based on limited mobility in ability grouping practices. OCR has identified such practices as critical areas that contribute significantly to statistical disparities in ability grouping. For instance, OCR's preliminary review of the St. Martin Parish School Board determined that the school district did not have sufficient policies and procedures to address "methods for measurement of student progress [within ability groups]," and "mobility of students between ability groups."[283] Subsequently, the school district volunteered to establish procedures to guide school officials in assessing student progress within ability groups, and to develop procedures and criteria for determining when a student's ability grouping assignment should be changed.

Monitoring and Technical Assistance

OCR acknowledges the importance of students being able to move between ability groups. During the monitoring stages of an investigation, OCR investigators are directed to determine whether the school's procedures afford an opportunity for intertrack or intergroup transfer and whether students actually move across tracks and groups consistent with the procedures. They also are instructed to ascertain whether students are retested periodically to determine whether they should be moved into different ability groups. OCR also has developed technical assistance documents encouraging schools to reevaluate and regroup students. One such document states that "periodic testing and reevaluation of students in specialized courses of study may be required."[284]

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[280] OCR, Draft "Ability Grouping Investigative Procedures Guidance," p. 6.

[281] OCR, Draft "Investigative Plan," p. 3.

[282] Ibid., p. 4.

[283] Office for Civil Rights, U.S. Department of Education, St. Martin Parish School Board Resolution Agreement, Dec. 3, 1993.

[284] Office for Civil Rights, U.S. Department of Education, brochure, "Student Assignment In Elementary and Secondary Schools & Title VI."

Chapter 5

Using Nondiscriminatory Screening and Diagnostic Procedures When Placing Students in Education Programs

Students vary in their educational needs and abilities.[1] Appropriate placement of students in an education program based on their abilities is one of the first steps in providing equal educational opportunity. Assessment practices should be undertaken with the intention of improving children's development and assisting appropriate persons in making informed decisions about the placement of the children.[2]

Screening and diagnostic procedures are used for identification, evaluation and assessment for placement, and classroom performance evaluations and reevaluations of students. In the context of ability grouping and tracking, screening and diagnostic practices can be used to place students in a mathematics or science magnet school, in advanced, regular, or remedial courses, or in other performance-based courses such as gifted and talented programs.

The use of arbitrary and subjective screening and diagnostic practices[3] to place students in ability groups can be a barrier to equal educational opportunity for those children, particularly those who are placed in lower ability groups.[4] The screening and diagnostic procedures used to make these important assessments must be designed carefully to avoid improper placement. For example, research indicates that students usually remain in the same ability group or track through elementary and secondary education. If a student is misclassified, the inappropriate placement may result in serious educational problems for the student that could affect his or her entire academic career. In addition, if a student is inappropriately placed in a remedial track, it is probable that the student will remain in remedial education programs despite changes in his or her performance due to a lack of mobility between tracks.[5]

The major problem with screening and diagnostic practices is the lack of adequate, uniform guidelines for identification, assessment, and placement of students in ability groups and tracks. The screening procedures used to place students in ability groups and tracks range from no specific eligibility requirements, to specific grade requirements, test scores, or teacher recommendations. Achievement tests are the most common method of evaluation or assessment, although many schools use teacher recommendations, intelligence or IQ tests, and criterion-referenced tests.[6] Research shows that lack of consistent, neutral, and uniform screening and diagnostic procedures can result in inappropriate, and often discriminatory, placement of students in ability groups and tracks.[7] In addition, research shows that misplacement of students because of the use of these practices affects their

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[1] *See* Thomas E. Shea, "An Educational Perspective of the Legality of Intelligence Testing and Ability Grouping," *Journal of Law and Education*, vol. 6 (April 1977), pp. 137, 142.

[2] *See* Thomas Oakland, ed., *Psychological and Educational Assessment of Minority Children* (New York: Brunner/Mazel Publ., 1977), p. iii.

[3] *See* "Teaching Inequality: The Problem of Public School Tracking," *Harvard Law Review*, vol. 102 (1989), pp. 1318, 1331 (hereafter cited as "Teaching Inequality").

[4] *See* "Teaching Inequality," p. 1330.

[5] *See* ibid., p. 1331.

[6] *See* Michael J. Feuer, Kathleen Fulton, and Patricia Morison, "Better Tests and Testing Practices: Options for Policy Makers," March 1993, p. 530 (hereafter cited as Feuer et al., "Better Tests and Testing Practices"). This article was adapted from a study, *Testing in American Schools: Asking the Right Questions* (Office of Technology Assessment, 1992); Jeannie Oakes, "Keeping Track: How Schools Structure Inequality," 1985, as cited in "Teaching Inequality," p. 1318.

[7] *See* "Teaching Inequality," pp. 1318–19; Feuer et al., "Better Tests and Testing Practices," pp. 530–31.

self-esteem, achievement level, and overall perceptions about education.[8]

Barriers to Fair Diagnostic and Screening Procedures

Testing and Ability Grouping

Tests often are used to make educational decisions that can affect the allocation of educational benefits and opportunities.[9] Standardized tests are used to determine whether students graduate, to track students, and to determine whether they can be promoted from one grade to the next.[10] In the public school system, standardized tests are used for prediction, diagnosis, evaluation, and reporting of data, and in tracking or placing students, beginning in elementary schools.[11] Historically, most public school students have been tested, ranked, and segregated into separate ability groups and classes based on standardized test performance.[12] According to two researchers, standardized testing serves two major functions in public education: (a) classifying children and placing them in special programs and (b) acquiring information through assessment for educational planning and evaluating interventions.[13]

Tests and test scores can be viable, measurable tools for screening students. Many districts use intelligence testing to classify students for ability grouping.[14] The proper use of intelligence test scores,[15] in conjunction with other information, can help the teacher identify the particular needs of each student, either within an ability grouping structure or within a classroom.[16] These test scores have proven to be of "critical importance" in counseling by determining the student's abilities in relation to his or her goals.[17] However, research indicates that test scores may not solely reflect meritocratic factors, such as achievement or aptitude, but instead may partly reflect students' characteristics such as race, national origin, or gender. One of the major challenges for educators is to use standardized tests fairly to identify, screen, and place children in groups based on the needs of the students.

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[8] *See* "Teaching Inequality," pp. 1331–32.

[9] *See* U.S. Commission on Civil Rights, *The Validity of Testing in Education and Employment* (May 1993), executive summary, pp. 1, 118 (hereafter cited as USCCR, *The Validity of Testing*); U.S. Department of Education, Office for Civil Rights (OCR), "Testing, Assessment and Admissions, prepared by Expert Team on Testing Assessment and Admissions, part II, "Testing Guidelines," Mar. 2, 1994 (provided to the Commission by U.S. Department of Education, Office for Civil Rights, Region III, in response to request for information letter dated June 6, 1996), p. 1 (hereafter cited as OCR, "Testing, Assessment and Admissions").

[10] A standardized test is a test administered and scored under conditions uniform to all test takers to make test scores comparable and to ensure that test takers have equal chances to demonstrate what they know. *See* USCCR, *The Validity of Testing*, pp. 15, 174; Linda Darling-Hammond, "Performance-Based Assessment and Educational Equity," *Harvard Educational Review*, vol. 64, no. 1 (Spring 1994), pp. 13–14. Standardization of a test is the process of establishing norms of a test by administering it to a large and representative sample. It also involves the establishment of directions, time limits, and the correctness and points awarded for various answers. In standardized testing, all children of a given age group taking the test are supposed to receive the same instructions, take the test under the same conditions, and have their responses recorded the same way. Luis M. Laosa, "Nonbiased Assessment of Children's Abilities: Historical Antecedents and Current Issues," in Oakland, *Psychological and Educational Assessment of Minority Children*, p. 3.

[11] Darling-Hammond, "Performance-Based Assessment and Educational Equity," p. 13; Thomas Oakland and Paula Matuszek, "Using Tests in Nondiscriminatory Assessment," in Oakland, *Psychological and Educational Assessment of Minority Children*, p. 52.

[12] *See* Darling-Hammond, "Performance-Based Assessment and Educational Equity," p. 10; W. Findley and M. Bryan, *The Pros and Cons of Ability Grouping* (1975); National Education Association, *Survey of School Programs and Practices of Public School Students* (1980); J. Coldiron, R. Braddock, and J. McPartland, "A Description of School Structures and Classroom Practices in Elementary, Middle and Secondary Schools," paper presented at the annual meeting of the American Educational Research Association (1987), as cited in "Teaching Inequality," p. 1318.

[13] Oakland and Matuszek, "Using Tests in Nondiscriminatory Assessment," p. 52.

[14] Shea, "An Educational Perspective of the Legality of Intelligence Testing and Ability Grouping," p. 151.

[15] The original purpose of intelligence testing was to assess low achieving children in order to differentiate between those with "normal and subnormal intelligence." *See* Oakland and Matuszek, "Using Tests in Nondiscriminatory Assessment," p. 52.

[16] Shea, "An Educational Perspective of the Legality of Intelligence Testing and Ability Grouping," p. 142.

[17] *See* ibid. For example, if special learning problems are not discovered, the child may feel lost and isolated in the classroom. Such isolation and inability to learn certain subject areas may contribute to feelings of failure. The information from these tests can assist educators in determining the needs and the ability group in which each child is placed.

The use of tests as a means to determine students' educational experiences has substantial potential for unfairness.[18] Critics of tests contend that they fail to measure students' cognitive abilities or support their capacities to perform tasks.[19] Research suggests that the use of tests has had "harmful consequences" for individual students, particularly minority students.[20] Tests have been used against racial and ethnic minorities to place them in certain classes, which reinforces school segregation and different learning opportunities for these children.[21] As one researcher explains:

> The effects of basic skills test misuse have been most unfortunate for the students they were most intended to help. Many studies have found that students placed in the lowest tracks or in remedial programs—disproportionately low-income and minority students—are most apt to experience instruction geared only to multiple-choice tests, working at a low cognitive level on test oriented tasks that are profoundly disconnected from the skills they need to learn. . . . In short they have been denied the opportunity to develop capacities they will need for the future, in large part because commonly used tests are so firmly pointed at educational goals of the past.[22]

Another researcher notes that as a result of testing, disproportionate numbers of poor and minority students (principally black and Hispanic) are placed in low ability or noncollege tracks and are underrepresented in programs for the gifted and talented.[23] Thus, the use of tests has impeded, rather than supported, the goal of educating all students.[24]

Test bias commonly refers to differences in test scores unrelated to the performance the test is intended to measure.[25] Education researchers define test bias as occurring "when two individuals of equal ability but from different groups respond differently to a test item and therefore do not have the same probability of success on the item."[26] Test bias may occur when a pattern of errors in test scores systematically affects some groups but not others,[27] thereby limiting the probability of success for one group.[28] The controversy over bias in testing emanates from concerns over the validity of the scores derived from standardized tests, and the use of those scores to place and admit students into certain programs, including ability groups and tracks.[29] Scores on standardized tests historically have been used to identify students and place them in programs deemed to be educationally appropriate.[30] Test bias occurs when test scores consis-

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[18] Jeannie Oakes, *Keeping Track: How Schools Structure Inequality* (New Haven, CT: Yale University Press, 1985), p. 11 (hereafter cited as Oakes, *Keeping Track*); Jeannie Oakes and Martin Lipton, "Tracking and Ability Grouping: A Structural Barrier to Access and Achievement," in John I. Goodlad and Pamela Keating, eds., *Access to Knowledge: An Agenda for Our Nation's School* (New York: The College Board, 1990), p. 193.

[19] *See* Darling-Hammond, "Performance-Based Assessment and Educational Equity," p. 11.

[20] Ibid., p. 13; *see also* D. Monty Neill, "Standardized Testing: Harmful to Civil Rights," National Center for Fair and Open Testing, as cited in USCCR, *The Validity of Testing*, p. 119.

[21] Darling-Hammond, "Performance-Based Assessment and Educational Equity," p. 10. *See also* U.S. Department of Education, OCR, "Testing, Assessment and Admissions," part II, "Testing Guidelines," p. 1.

[22] Darling-Hammond, "Performance-Based Assessment and Educational Equity," p. 12.

[23] *See* ibid., p. 13. *See also* Oakland, *Psychological and Educational Assessment of Minority Children*, p. iii.

[24] Darling-Hammond, "Performance-Based Assessment and Educational Equity," p. 13.

[25] USCCR, *The Validity of Testing*, p. 15.

[26] Esther E. Diamond and Carol Kehr Tittle, "Sex Equity in Testing," in Susan S. Klein, ed., *Handbook for Achieving Sex Equity Though Education* (Baltimore, MD: The Johns Hopkins University Press, 1985), p. 168. *See also* USCCR, *The Validity of Testing*, pp. 23–24. This report includes a list of a variety of potential sources of bias.

[27] USCCR, *The Validity of Testing*, pp. 15–16.

[28] According to the Commission's report: "Test bias is when test scores consistently over- or underpredict performance for members of some subgroup compared with test-takers in general. . . . Group differences in rates of correct responses on test items among examinees having the same ability is an acceptable definition of bias only when tests have already shown to have no differential prediction." USCCR, *The Validity of Testing*, p. 16.

[29] Validity refers to the degree to which a test measures what it is supposed to measure, that is, inferences from its scores are appropriate or meaningful as supported by evidence. Validation is the evaluation of the appropriateness and meaningfulness of interpretations from scores on a test. *See* ibid., p. 175.

[30] Asa G. Hilliard III, "Misunderstanding and Testing Intelligence," in John I. Goodlad and Pamela Keating, eds., *Access to Knowledge: An Agenda for Our Nation's Schools* (New York: The College Board, 1990), p. 155; Kenneth A. Sirotnik, "Equal Access to Quality in Public Schooling: Issues in the Assessment of Equity and Excellence," in Goodlad and Keating, *Access to Knowledge: An Agenda for Our Nation's Schools*, p. 162.

tently over- or underpredict performance of some subgroup compared with other test takers.[31]

There are various meanings and types of intelligence, and different influences affect how intelligence is measured or evaluated.[32] However, researchers note that no matter which definition of intelligence is used, although such tests are helpful as screening and diagnostic tools, they are not definitive indicators of ability or absolute in their accuracy.[33] However, students may be inappropriately placed in a lower ability group on the basis of one intelligence test score, preventing them from developing skills necessary to move and compete effectively in school.[34] In addition, one of the effects of the use of standardized testing is that minority students are overrepresented in some classes and underrepresented in others.[35]

There also is debate over the validity of standardized tests. Generally, validation is the process of evaluating the degree to which a test measures what it claims to measure, how well it measures it, and what can be inferred from that measurement.[36] A test may be valid for one education program or population of students, but not valid for others.[37] However, a test may be used to measure different education programs and different populations of students, even though the test may be inappropriate.[38] A test has validity if its scores mean what they should mean.[39] External validation establishes the relationship of test scores to other factors or that the test correctly predicts performance. Such studies are useful for finding systematic biases in the test. The appropriateness is measured by the degree of relationship between test scores and performance. Internal validation examines the properties of the test, frequently by examining how different groups perform on test items. The validation of tests can reveal bias.[40] Bias can affect minority children disproportionately.[41] As the 1993 U.S. Commission on Civil Rights report on test validity explains:

> Tests are often thought biased when proportionate numbers of blacks and other minorities are not included in the standardization. The failure to include minorities or other groups when developing a test can certainly give rise to test bias, because comparisons between groups cannot be made to eliminate unfair questions. However, these comparisons are made during validation.[42]

A researcher whose paper is published in the Commission's report discusses the use of standardized tests, validation, and biases found in the questions or language of the tests. He explains:

> Researchers have identified several characteristics of standardized tests which could bias results against minority and low-income students and job applicants. Each reflects a focus on the middle to upper class language, culture, or learning style which typifies these exams. As a result, test scores are as much a measure of race/ethnicity or incomes as they are of achievement, ability, or skill. To communicate their level of

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[31] This definition, referred to as differential prediction, is the only adequate definition of test bias. Group differences in rates of correct responses on test items among examinees having the same ability is a definition of bias when the tests have already been shown to have no differential prediction. USCCR, *The Validity of Testing*, p. 16.

[32] *See* Shea, "An Educational Perspective of the Legality of Intelligence Testing and Ability Grouping," pp. 138–39. Tests are often evaluated as being biased when proportionate numbers of a subpopulation are not included in the standardization or test construction process. This happened with the IQ tests developed in the 1920s. USCCR, *The Validity of Testing*, p. 17; Laosa, "Nonbiased Assessment of Children's Abilities," pp. 6–9.

[33] Ryan, "I.Q.—The Illusion of Objectivity," in K. Richards, D. Spears, and M. Richards, eds., *Race and Intelligence*, vol. 41 (1972), pp. 41–46, as cited in Shea, "An Educational Perspective of the Legality of Intelligence Testing and Ability Grouping," pp. 140–41.

[34] *See* Shea, "An Educational Perspective on the Legality of Intelligence Testing and Ability Grouping," p. 145.

[35] Ibid., p.138.

[36] *See* D. Monty Neill, "Standardized Testing: Harmful to Civil Rights," National Center for Fair and Open Testing, in USCCR, *The Validity of Testing*, p. 122.

[37] *See* OCR, "Testing, Assessment and Admissions," part III, "Investigative Guidance," p. 8.

[38] *See* John R. Hills, "Apathy Concerning Grading and Testing," *Phi Delta Kappan*, March 1991, pp. 540–45; USCCR, *The Validity of Testing*, p. 28.

[39] USCCR, *The Validity of Testing*, p. 3.

[40] Ibid.; Nancy S. Cole, "Judging Test Use for Fairness," Educational Testing Service, in USCCR, *The Validity of Testing*, pp. 92–95. *See also* Oakland and Matuszek, "Using Tests in Nondiscriminatory Assessment," pp. 57–62.

[41] *See* Cole, "Judging Test Use for Fairness," pp. 99–100. *See also* Oakland and Matuszek, "Using Tests in Nondiscriminatory Assessment," pp. 58–59.

[42] USCCR, *The Validity of Testing*, p. 17. For a detailed discussion on validation procedures, including external and internal validation, as well as the types of validity, *see* ibid., pp. 17–19, 21–23.

achievement, ability, or skill, test takers must understand the language of the test. Obviously, tests written in English cannot effectively assess those who primarily speak Spanish or some other language and for whom English is a second, partially learned language. Researchers also have discovered that the use of the elaborated stylized English that is common on standardized exams prevent tests from accurately measuring students who use nonstandard English dialects. These include speakers of Afro-American, Hispanic, Southern, Appalachian . . . dialects.[43]

Court Cases on Testing

Various court cases have been initiated to define, challenge, and clarify the use of tests and other assessment practices.[44] Courts have ruled on the legality of using standardized tests, and many of the suits were brought claiming a denial of equal protection for minority students. In *Diana v. State Board of Education*, a challenge was made against a California school district to its classifying children as mentally retarded on the basis of IQ tests. The plaintiffs claimed bias against Mexican American children based on standardization methods, as well as linguistic and cultural bias in the tests.[45] When the children were tested bilingually, their test scores were higher. The case was resolved when the defendant agreed to change the procedures for classification. In one researcher's analysis, this case is a "clear example" of the misuse of intelligence tests. He notes that the test scores were used without other information in the placement of students, and the test was inappropriate for children who speak a different primary language.[46]

In *Debra P. v. Turlington*, a Federal court reviewed Florida's program to link the award of a high school diploma to successful performance of a minimum competency test.[47] Florida had a high school graduation requirement that students pass a test in applied reading, writing, and mathematics. After massive failures, particularly among the minority students, litigation was filed. The fifth circuit held that a State cannot deprive its students of a high school diploma based on test performance unless it has submitted proof of the validity of the test. The court further determined that if the test covers material not taught to the students, the test violates equal protection and due process. This case and others similar to it triggered proposals to reform the use of testing in the school system.[48]

In another case, the court found the use of intelligence testing procedures to be unconstitutional. *Moses v. Washington Parish School Board* involved a Louisiana school system that had used, before desegregation, verbal and mathematical ability tests to group students.[49] After desegregation, the grouping was based only on verbal tests. The court found that the intelligence testing as used in the schools was a violation of equal protection and ordered the school system to stop segregating students based on the intelligence test scores.[50]

Probably the most famous case that involved the legality of intelligence testing is *Hobson v. Hansen*.[51] Intelligence tests had been exclusively used in the Washington, D.C., school district to assess the intelligence of individual students. The case of *Hobson v. Hansen* addressed the issue of a school district's sole reliance on poten-

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[43] Neill, "Standardized Testing," p. 129.

[44] This report does not attempt to discuss all of the cases involving testing. For a history of major cases relative to the testing of children, *see* Thomas Oakland and Luis M. Laosa, "Professional, Legislative, and Judicial Influences on Psychoeducational Assessment Practices in Schools," in Oakland, *Psychological and Educational Assessment of Minority Children*, pp. 36–48.

[45] Civil No. C–70 RFR (N.D. Cal. Jan. 1970), as cited in Shea, "An Educational Perspective of the Legality of Intelligence Testing and Ability Grouping," p. 149.

[46] Shea, "An Educational Perspective of the Legality of Intelligence Testing and Ability Grouping," p. 149.

[47] Debra P. v Turlington, 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, rev'd in part*, 644 F.2d 397 (5th Cir. 1981), *on remand*, 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (11th Cir. 1984), as cited in Diana C. Pullin, "Learning to Work: The Impact of Curriculum and Assessment Standards on Educational Opportunity," *Harvard Educational Review*, vol. 64, no. 1 (Spring 1994), p. 41.

[48] Diana C. Pullin, "Learning to Work: The Impact of Curriculum and Assessment Standards on Educational Opportunity," *Harvard Educational Review*, vol. 64, no. 1 (Spring 1994), p. 41.

[49] 330 F. Supp. 1340 (E.D. La. 1971) *aff'd* 456 F. 2d 1285 (5th Cir. 1973 (per curiam) *cert. denied*, 409 U.S. 1013 (1972), as cited in Shea, "An Educational Perspective of the Legality of Intelligence Testing and Ability Grouping," pp. 148–49.

[50] *Id.*

[51] 268 F. Supp. 401, 476 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969) as cited in Shea, "An Educational Perspective of the Legality of Intelligence Testing and Ability Grouping," p. 149.

tially biased IQ test scores as a means to determine students' assignment to ability groups (for all academic courses) and program level tracks. In 1967 Julius Hobson filed a school segregation suit against the District of Columbia Board of Education, in which Carl Hansen served as superintendent. The circuit court judge of the district court, J. Skelly Wright, held that the school system deprived blacks and poor public school children of their right to equal educational opportunity relative to their white and more affluent peers.[52]

One of the court's major findings was that the track system used to form ability groups (which ranged from "basic" for slower students to "honors" for gifted students) violated constitutional rights of black and economically deprived boys and girls, because these students were assigned to academically lower tracks based on their scores on intelligence tests, which were standardized exclusively on white, middle-class children.[53] Because the tests were not related to experiences of blacks and economically disadvantaged children, pupil assignments based on scores resulting from these tests placed blacks and economically deprived students in programs with "reduced curricula" and inadequate remedial and compensatory education.[54]

In *Hobson*, Judge Wright determined the tracking system in the D.C. public schools violated the equal protection clause of the 14th amendment, created "suspect" classifications of economically impoverished and minority students, and operated questionable maximum educational opportunities for students of all ability levels.[55] In addition to the use of potentially biased standardized IQ tests to assign students to ability groups and provision of "reduced curricula" and lack of remedial and compensatory educational opportunities offered to students in lower level groups, the *Hobson* case also showed that the relative permanence of purported ability classifications and the inflexible grouping system locked students into their particular ability level tracks, which restricted the mobility of lower grouped students to access the challenging coursework offered in the advanced or honors track.[56] Furthermore, the judge determined the District of Columbia public school system's tracking practices imputed stigmatizing labels on students in the lowest level ability groups.[57]

In *Hobson v. Hansen*, the court considered tracking educationally inappropriate, discriminatory, and illegal when the method of assigning students creates a barrier of limited educational opportunities for certain students on the erroneous assumption that "they are capable of no more."[58] To correct these barriers of placement in remedial ability level tracks, which resulted in a form of racial and economic discrimination, the District of Columbia school system was ordered to abolish the tracking system.[59]

Elimination of Barriers and Alternatives to Testing

Although the courts have found the use of tests in ability grouping and tracking practices

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[52] 269 F. Supp. 401 (1967).

[53] *Id.*

[54] *Id.*

[55] *Id. See also* Oakes, *Keeping Track*, p. 184. One interpretation of the equal protection clause is that any governmental action cannot discriminate against similarly circumstanced individuals unless the differential treatment can demonstrate that a valid government objective is achieved. Ibid., p. 180 (citing T. Shannon, Chief Justice Wright, "The California Supreme Court and School Finance: Has the Fourteenth Done it Again?" *Nolpe School Law Journal*, vol. 3 (1973)).

[56] Oakes, *Keeping Track*, p. 184. For an ability grouping practice to be legally acceptable, a school district must periodically reevaluate students, to determine the educational effectiveness and appropriateness of their particular assignment. Consequently, the placement of a student in a particular ability level track, for instance, early in his or her school years, must be flexible; and a student must be reassigned to alternate level groups or classes, if his or her academic performance warrants doing so, without penalties or extra work. *See* Paul S. George, "Tracking and Ability Grouping in Middle School: Ten Tentative Truths," *Middle School Journal*, March 1993, p. 23.

[57] Oakes, *Keeping Track*, p. 184. As shown above, stigmatizing labels can hinder students' self-perceptions and have other psychological consequences. Ibid., p. 176. The "stigmatization of lower track students can especially hinder those who were misassigned due to a haphazard or inappropriate classification process." Ibid., p. 177. Issues related to the impact of stigma and labeling were examined by the Supreme Court in a precedent-setting case, *Wisconsin v. Constantineau*, in which the Chief Justice ruled that a due process hearing would be required prior to the imputation of a stigmatizing government-affixed label such as "drunkard." Ibid, p. 178. Public labeling and potential stigmatizing of students based on their purported ability is prohibited. *See* George, "Tracking and Ability Grouping in Middle School," p. 23.

[58] Oakes, *Keeping Track*, p. 184 (citing Hobson v. Hansen, 269 F. Supp. 514 (1967)).

[59] 269 F. Supp. 401 (1967).

often results in racial segregation,[60] standardized tests remain a tool for identifying, screening, and placing students in different ability groupings. In addition, in some districts tests remain the primary tool for screening children into different ability groups. The distinctions in students' perceived aptitudes, achievement, and preparation, as revealed by standardized test scores, justify school systems' practice of using ability groupings that enable students with similarities in specific areas to have comparable educational experiences.[61] Thus, scores on standardized tests are used to help support the notion that heterogeneous classroom groupings present too wide a range of variation and diversity and are therefore more difficult to support than homogeneous ones.[62]

Although it is argued students' performance on standardized tests will be improved through eliminating bias in standardized tests, differences in test scores also can result from differences in educational opportunity and resources. Education research on differences in test scores suggests that exposure to different sets of experiences; different attitudes and expectations on the part of parents, teachers, and other school personnel; encouragement to take certain courses and reject others; and career expectations that follow stereotypical lines all affect student performance on standardized tests.[63]

Critics of this educational practice argue that relying solely on standardized test scores may not accurately reflect the abilities of a particular student, or group of students. To be used effectively, intelligence testing must be interpreted in reference to other information about the child. In addition to test scores, other important sources include teacher evaluations, counseling reports, parent conferences, and any other information that contributes to a "total understanding" of the child.[64]

Researchers have identified mechanisms for reducing bias from tests. Many of the procedures to eliminate bias can be applied during the construction of the test. These mechanisms include reviewing test items for insensitivity, developing bias detection techniques, and developing culture-reduced tests.[65]

Researchers and educators also call for replacing standardized tests with new methods for the assessment of students' work and learning abilities, including multicriteria procedures for performance and portfolio assessment.[66] These alternatives to testing are frequently called performance-based assessments because they engage students in "real-world" tasks rather than multiple-choice tests, and evaluate them according to criteria that are important for actual performance.[67] Such assessments include oral presentations, debates, exhibits or projects, and students' written products, as well as teachers' observations and inventories of individual students' work and behavior.[68] The performance competencies are built on the student's basic skills, critical thinking, and personal qualities.[69] One researcher finds that standards for an effec-

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[60] Shea, "An Educational Perspective of the Legality of Intelligence Testing and Ability Grouping," p. 154.

[61] Oakes and Lipton, "Tracking and Ability Grouping," pp. 197–98; George, "What's the Truth About Tracking and Ability Grouping Really?" in James Belanca and Elizabeth Swartz, eds., *The Challenge of Detracking: A Collection* (Palatine, IL: IRI/Skyline Publishing, Inc., 1993), p. 255.

[62] Oakes and Lipton, "Tracking and Ability Grouping," pp. 197–98.

[63] Diamond and Tittle, "Sex Equity in Testing," p. 169.

[64] Shea, "An Educational Perspective of the Legality of Intelligence Testing and Ability Grouping," p. 145.

[65] *See* USCCR, *The Validity of Testing*, pp. 24–27.

[66] One researcher explains a student portfolio as documented accountability of the student's work. In every class, a student prepares a folder that contains class work, journals, and projects. The portfolio becomes the major document for teachers, parents, advisors, and guidance counselors on the students' activities, drawing on all of their work to provide the best and most current evidence of their progress on essential learning tasks. Dennie Palmer Wolf, Paul G. LeMahieu, and JoAnne Eresh, "Good Measure: Assessment as a Tool for Educational Reform," *Educational Leadership*, May 1992, pp. 9–12; *see also* Feuer et al., "Better Tests and Testing Practices," p. 530. This article was adapted from a study, *Testing in American Schools: Asking the Right Questions* (Office of Technology Assessment, 1992); "Symposium: Equity in Educational Assessment," *Harvard Educational Review*, vol. 64, no. 1 (Spring 1994); Pullin, "Learning to Work," pp. 31–54; George F. Madaus, "A Technological and Historical Consideration of Equity Issues Associated with Proposals to Change the Nation's Testing Policy," *Harvard Educational Review*, vol. 64, no. 1 (Spring 1994), p. 76. (Madaus' position is that proposals to replace tests with alternatives to educational assessment are just different technological solutions to an old problem).

[67] Darling-Hammond, "Performance-Based Assessment and Educational Equity," p. 5; Madaus, "A Technological and Historical Consideration of Equity Issues," p. 76.

[68] Darling-Hammond, "Performance-Based Assessment and Educational Equity," pp. 5–6.

[69] Pullin, "Learning to Work," p. 35.

tive performance assessment system could, among other possibilities, clearly define learning outcomes, provide assurance that all students are being taught, protect students from sorting and labeling, and motivate students to succeed.[70] Those who advocate these initiatives believe they can be effective means of facilitating learning in those lower ability groups that emphasize decontexualized and rote-oriented tasks and instruction.[71] However, some researchers warn of complex legal and policy issues affecting performance assessment, particularly for students learning English and minority children who have historically been denied equal educational opportunity because of assessment policies used in the past.[72] Researchers who support the use of performance assessments indicate that such mechanisms should replace standardized tests if they improve and support the growth of students, teachers and schools, and provide educational equity.[73]

Three researchers also propose other recommendations to end barriers caused by discriminatory testing. These include a "testing policy" whereby parents are notified of test requirements and consequences, given information on the types of tests administered and the way test scores are to be used for selection and placement, and allowed to oversee or audit tests that are used.[74] In elementary and secondary school testing, the researchers recommend national standards for testing, which should be designed and developed for each grade level and subject to be tested. Research and development also need to be implemented to evaluate the assessment methods that affect students and teachers. In all of these recommendations, the researchers advocate a prominent Federal role.[75]

Factors Influencing Student Placement

A 1993 survey to a national sample of 912 schools, conducted by the U.S. Department of Education, examined potential influences on schools' policies in placing students in ability-grouped courses. Only 14 percent of the schools indicated that standardized test scores substantially influenced placement procedures.[76] Another 16 percent of schools reported that principals' recommendations significantly influenced student placement.[77] The most prevalent factors reported by schools as having a significant effect on students' placement included prerequisite courses (66 percent), teacher recommendations (57 percent), and students' previous grades (52 percent).[78] In approximately one-third of the surveyed public high schools, students' and parents' requests had a significant influence on placement of students in differentiated courses within a core curriculum.[79] These numbers indicate the extent to which schools use ability grouping practices and the importance of ensuring that these practices do not limit students' access to a quality education.

Since between-class grouping practices, in contrast to within-class ability grouping, involve multiple classes per student, placement decisions cannot be made by one teacher.[80] Frequently, the guidance counselor, a school principal, and at least two teachers are involved.[81] Parents and students tend to participate as well. The implications for gender and racial/ethnic inequities can vary by the characteristics (e.g., consideration of students' prior achievement, teacher recommendations) of the particular pupil assignment method.[82] If assignments are based exclusively on the rank order of students by ability (as measured by standardized test

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[70] *See* ibid., p. 38.

[71] *See* Darling-Hammond, "Performance-Based Assessment and Educational Equity," p. 6.

[72] *See* Pullin, "Learning to Work," p. 31; Darling-Hammond, "Performance-Based Assessment and Educational Equity," pp. 7–9.

[73] "Symposium: Equity in Educational Assessment," p. 31; Darling-Hammond, "Performance-Based Assessment and Educational Equity," p. 5; Madaus, "A Technological and Historical Consideration of Equity Issues," pp. 79–81, 88–90.

[74] *See* Feuer et al., "Better Tests and Testing Practices," p. 532.

[75] *See* ibid., p. 533.

[76] U.S. Department of Education, National Center for Education Statistics, *Curricular Differentiation in Public High Schools*, (Washington, DC: Office of Educational Research and Improvement, 1994), pp. 6, 30, table 13 (hereafter cited as NCES, *Curricular Differentiation in Public High Schools*).

[77] Ibid., pp. 6, 30, table 13.

[78] Ibid.

[79] Ibid., p. 30, table 13.

[80] Maureen T. Hallinan, "The Organization of Students for Instruction in the Middle School," *Sociology of Education*, vol. 65 (April 1992), p. 115.

[81] Ibid.

[82] Ibid., p. 114.

scores), then valid information about students' learning styles, motivation, and course achievement can be overlooked. If characteristics of students, such as previous grades, recommendations of teachers and counselors, and parents' and teachers' preferences are considered, then educators' perceptions, stereotypes, and biases, as well as other characteristics of students unrelated to their learning ability, could affect placement decisions for core courses. An education researcher who has consistently examined data on ability grouping and tracking practices reported that schools tend to vary in the extent to which they employ a particular method to make course placement decisions and determine the structure of within-school grouping practices.[83]

In practice, the assignment of students to ability groups or academic program level tracks is not based exclusively on academic considerations (such as grades, standardized tests, teachers' and counselors' recommendations, prior ability group/track placement, and course prerequisites), which would foster strictly homogeneous clusters of students in courses such as math and science.[84] Rather, nonacademic factors also influence ability level track or course placements. Some nonacademic considerations include course conflicts, cocurricular and extracurricular schedules, work demands, and teacher and curricular resources. Nonacademic factors can increase the heterogeneity of ability groups and can potentially cause overlapping ability distributions in adjacent ability level tracks or courses.[85]

Secondary schools tend to use more systematic criteria in assigning students to upper level ability tracks, and more arbitrary criteria in placing pupils in lower level ability tracks. Some education researchers consider the use of subjective criteria as a more accurate measure of students' potential achievement (in subjects such as math and science, for instance) relative to a sole reliance on more cognitive measures of achievement such as test scores. However, this claim may not be practical if school guidance counselors face time limitations in evaluating each respective student, and potentially make inequitable course or ability level placement decisions.[86]

Overall, some schools may rely more consistently on objective indicators for student course and ability group placement decisions, while others may more frequently use relative measures such as extent of student improvement in a particular course. Therefore, students with similar levels of academic competence can have distinct educational experiences, depending on the school they attend. The more extensive use of placement criteria that are valid measures of students' abilities enhances students' potential for an appropriate course or ability group assignment.[87]

The assignment of students to particular ability groups or academic sequences can be affected by structural constraints.[88] For example, schools differ by organizational structure. Thus, the number of ability groups, the number of available courses, and the variety of courses available within a certain curricular sequence may vary from school to school. As a result, the core course completion opportunities and experiences of students with similar aptitudes, academic performance ability, interests, and other background characteristics can vary if they attend different schools. These within- and between-school disparities in student learning opportunities are major inequities associated with ability grouping and other student course placement policies.[89]

OCR's Enforcement Activities

Title VI Regulations

The Department of Education's regulations implementing title VI prohibit the use of "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race . . . or have the effect of defeating or substantially impairing accomplishment of the objectives of the program. . . ."[90] As such, they prohibit discriminatory use of tests in education. However, they do not contain a nondiscrimination provision that

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[83] Ibid., p. 117.

[84] Maureen T. Hallinan, "Tracking: From Theory to Practice," *Sociology of Education*, vol. 67, no. 2, pp. 79–80 (hereafter cited as Hallinan, "Tracking").

[85] Ibid.

[86] Ibid., p. 83.

[87] Ibid.

[88] Hallinan, "The Organization of Students for Instruction in the Middle School," p. 126.

[89] Ibid.

[90] 34 C.F.R. § 100.3(b)(2) (1987); "Teaching Inequality," p. 1336.

specifically addresses diagnostic and screening procedures in ability grouping and tracking.[91]

Title VI Policy Guidance

OCR has not issued formal policy guidance on screening and diagnostic procedures in ability grouping and tracking. However, a 1995 draft policy memorandum, "Fairness in Testing," produced by OCR provides insight into its policy approach in this area.[92] The draft document contains investigative guidance related to tests used as a basis for "high stakes" educational decisions such as placement of students in ability groups and tracks.[93] It outlines the legal standards OCR investigators should use in investigating allegations of discriminatory test use, providing guidance on two legal approaches for investigating testing cases: disparate impact and differential treatment analyses; as well as on establishing a violation of title VI based upon a recipient's use of a test after a finding that the recipient operated a dual system.[94]

According to the document, to investigate a testing case according to a disparate impact theory, investigators need first to establish a disparate impact, or "a disproportionate denial of an educational benefit or opportunity to members of a particular race, national origin, or gender" using statistical analysis.[95] Then they must examine whether the use of the test is "educationally necessary." The guidance indicates that OCR will find a per se violation of title VI and the use of a test will be deemed not educationally necessary (1) if a test that has a disparate impact is used as "the sole or principal criterion for making educational decisions and it clearly was not designed to be so used" or (2) if a test "is clearly not being used for the purpose(s) for which it was designed."[96] When neither of these per se violations has been found, in determining whether the use of the test is educationally necessary, OCR investigators are to consider "(1) whether the recipient has produced evidence—as determined by experts on test validation—sufficient to show that the test is valid for the purpose for which it has been selected to be used, and (2) whether the test is the least discriminatory alternative for allocating the benefit or opportunity."[97] The guidance provides a detailed discussion of test validity and remedies under disparate impact analysis. Appendices to the document provide investigators detailed guidance on how to determine whether a test has a disparate impact and how to determine whether a test is educationally necessary.[98]

To investigate a testing case according to the differential treatment theory, OCR investigators are to consider the following questions:

- Did a recipient treat someone or some group differently in the administration of a test or the use of test scores for the denial of an educational benefit or opportunity?
- Was the different treatment based on race, national origin, or gender?
- Did the circumstances of the test used provide a legitimate, nondiscriminatory reason for the different treatment?
- Was the reason given by the recipient actually a pretext for discrimination.[99]

Finally, the document cautions that "the use of any educational test may be a violation of Title VI if its use is a vestige of the previously segregated system."[100]

In June 1999, OCR disseminated draft guidelines accompanied by an information pamphlet on "high-stakes" testing.[101] In the information pamphlet, OCR describes high-stakes tests as those "whose results are used to make place-

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[91] 34 C.F.R. §§ 100.1–100.13 (1996).

[92] *See generally* Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, draft memorandum to All OCR Staff, Mar. 14, 1995 (re: Fairness in Testing) (hereafter cited as OCR, "Fairness in Testing").

[93] Ibid., "Overview" section, p. 3.

[94] Ibid., pp. 4–5; "Compendium of Legal and Technical Resources" section.

[95] Ibid., "Investigative Guidance" section, p. 4.

[96] Ibid., p. 5.

[97] Ibid., p. 6.

[98] Ibid., Tab A, "Steps for Establishing Disparate Impact," and Tab B, Draft "Investigative Questions for Evaluating Evidence of Educational Necessity."

[99] Ibid., "Investigative Guidance" section, pp. 12–13.

[100] Ibid., "Investigative Guidance" section, p. 14.

[101] *See* U.S. Department of Education, Office for Civil Rights, Draft "Nondiscrimination in High-Stakes Testing: A Resource Guide," undated (hereafter cited as OCR, Draft Guidelines, "Nondiscrimination in High-Stakes Testing"); U.S. Department of Education, Office for Civil Rights, Draft "Test Use and Civil Rights," undated (hereafter cited as OCR, Draft Information Pamphlet, "Test Use and Civil Rights").

ment, promotion and graduation decisions."[102] The draft guidelines, completed in April 1999, clarify and describe civil rights compliance standards used by OCR and the courts. These standards require that once a race or gender disparity is shown on standardized test scores, a school utilizing these tests as a determinant for admittance, placement, or assessment and other educational decisions, must show that there is an "educational necessity" for the use of the test and that there is no practicable educational alternative that would have a less discriminatory effect.[103]

In the information pamphlet accompanying the guidelines OCR set forth its view on test use and civil rights:

> The issue of nondiscrimination in testing and assessment is properly viewed as consistent with standards-based reforms—the cornerstone of many of the U.S. Department of Education's initiatives. . . . Nondiscrimination in testing and assessment is essential to ensuring that equal opportunities for educational excellence are provided regardless of race, national origin, or sex. . . . It is critical that high standards for academic achievement be coupled with the necessary instruction and support that help students reach those standards—as determined by valid and reliable assessments.[104]

Shortly before the draft guidelines were disseminated for public comment, the *New York Times* reported on them. The *Times'* reporting sought to show the rationale behind OCR's decision to develop and issue the guidelines by quoting sources familiar with these efforts.[105] For example, the newspaper quoted DOEd's Deputy Assistant Secretary for Civil Rights as stating, "[w]e are trying to capture existing, longstanding anti-discrimination principles and to discuss test measurement standards in a way to help educators and policymakers devise and craft appropriate test-use policy."[106] The same article quoted an associate professor of education at Teachers' College and an adjunct professor of law at Columbia Law School as agreeing that "[t]his is a very well established principle in the law and the standards adopted by testing professionals."[107]

The draft guidance, or "resource guide," contains two primary sections. The first is a general overview of the document, including discussions on its scope and foundations. The second section, the "resource guide" itself, contains discussions on basic Federal standards, disparate impact and disparate treatment analysis, equal opportunity for limited-English-proficiency students, an analysis for cases involving a prior dual system, and, finally, applicable remedies.

One of the most important aspects of the document is its discussion of the standards an education agency must meet in order to remain in compliance with Federal civil rights laws enforced by the U.S. Department of Education. In its discussion on applying legal standards to determine whether discrimination is present, OCR provides a detailed, thorough discussion of applicable discrimination analyses, particularly disparate treatment and disparate impact.

The discussion of disparate impact in the guidance is one of the most important sections of the document because it addresses one of the more significant forms of discrimination associated with testing practices. In its disparate impact section, the guidance provides an excellent discussion of the "educational necessity" standard that forms the heart of OCR's analysis on disparate impact discrimination. The guidance explains clearly OCR's use of the "educational necessity" standard as a means of assessing an education agency's defense of its use of standardized tests.

The guidance recites OCR's analysis for applying the "educational necessity" standard. Under this standard, OCR will undertake the following searching analysis to make its assessment as to whether discrimination has resulted from a given testing practice:

- Whether the educational institution's use of an educational test results in a significantly disproportionate denial of an educational benefit or opportunity to members of a particular race, national origin, or sex.

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[102] OCR, Draft Information Pamphlet, "Test Use and Civil Rights," p. 1.

[103] *See* OCR, Draft Guidelines, "Nondiscrimination in High-Stakes Testing," pp. 2–8.

[104] OCR, Draft Information Pamphlet, "Test Use and Civil Rights," p. 1.

[105] *See* Stephen A. Holmes, "Conservatives Say Pamphlet on Testing Goes Too Far," *New York Times*, June 12, 1999, p. A–10.

[106] Ibid.

[107] Ibid.

- If so, whether the test is educationally necessary.
- If so, whether there are practicable alternative forms of assessment that would substantially serve the school's stated purpose and are valid and reliable for the purpose but have a less discriminatory impact on the basis of race, national origin, or sex.

This is a very rigorous standard that requires an education agency to show that the test is valid and reliable for the purpose for which it is being used. The scrutiny OCR will apply in evaluating whether there is validity and reliability is appropriately searching. This standard has strong support in case law involving disparate impact discrimination.

Investigative Manuals and Plans

OCR's draft investigative manual on underrepresentation of females and minorities in mathematics and science directs OCR staff to examine the placement criteria used by the school district, including "the use of testing instruments for guidance or ability grouping."[108] Staff are directed to "determine whether they comprise objective, educationally relevant measures which have been validated for ability grouping or tracking in mathematics and science"[109] and whether the tests "have been validated for the population being tested,"[110] to determine whether the tests exhibit biases, and to ascertain whether the tests are being used consistently and appropriately.[111]

Cases

A review of OCR's letters of finding reveals that OCR enforcement activities such as compliance reviews and complaint investigations, frequently address issues associated with identification and assessment procedures.[112] In general, letters of finding addressing identification and assessment procedures offer clearly written, strong support for the positions OCR takes on compliance. In addition, the letters of finding addressing this issue provide detailed descriptions of the procedures undertaken by the school district. Such descriptive narrative is important because it enables OCR staff to maintain a sound basis for its compliance analysis and to communicate effectively with the school district on compliance-related issues.

During the 1994–95 school year, OCR did a compliance review of the Newport-Mesa Unified School District.[113] One of the agency's concerns was that minorities may not have had an equal opportunity to participate in advanced mathematics and science courses. OCR examined 1991–92 through 1994–95 enrollment data for upper level math and science courses (including advanced placement classes). Enrollment data in noncollege preparatory mathematics and science courses were examined as well. OCR's title VI compliance review revealed Hispanic students (males and females) were overly represented (to a statistically significant extent) in several basic skills classes and underenrolled in various col-

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[108] U.S. Department of Education, Office for Civil Rights, Draft "Investigative Manual: Underrepresentation of Females and Minorities in Upper-Level Mathematics and Science in Secondary Schools," prepared by Expert Team on Underrepresentation of Women and Minorities in Mathematics, Science, and Other High Track Courses, August 1994, p. I–2.

[109] Ibid., p. I–6.

[110] Ibid.

[111] Ibid.

[112] *See generally* Gary D. Jackson, regional director, Region X, Office for Civil Rights, U.S. Department of Education, to Otis Falls, superintendent, North Franklin School District, Connell, WA, re: Case No. 10945010, Mar. 13, 1996; M. Arnold Chavez, regional director, Region VIII, OCR, DOEd, to Steven H. Peterson, superintendent, Washington County School District, St. George, UT, re: Case No. 089445022, Nov. 8, 1995; Gary D. Jackson, regional director, Region X, OCR, DOEd, to Pam Carnahan, superintendent, Sedro Woolley School District, Sedro Woolley, WA, re: Case No. 10935003, Oct. 1, 1993; Charles J. Nowell, regional director, Region VII, OCR, DOEd, to Jim B. Hensley, superintendent, Kansas City Unified School District #500, Kansas City, KS, re: Case No. 07925004, Jul. 29, 1993; Cathy H. Lewis, regional director, Region VIII, OCR, DOEd, to Raul Bejarano, superintendent, Nogales Unified School District #1, Nogales, AZ, re: Case No. 08935002, May 25, 1993; Gary D. Jackson, regional director, Region X, OCR, DOEd, to Leslie Wolfe, superintendent, North Marion School District No. 15, Aurora, OR, re: Case No. 10925002, Sept. 2, 1992; Archie B. Meyer, Sr., regional director, Region IV, OCR, DOEd, to Garry W. Norris, superintendent, Indian River County School District, Vero Beach, FL, re: Case No. 04–92–5002, July 24, 1992; Taylor D. August, regional director, Region VI, OCR, DOEd, to Arthur Steller, superintendent, Oklahoma City Public Schools, Oklahoma City, OK, re: Case No. 06911152, June 25, 1992.

[113] John Palomino, director, Compliance Division, OCR, Region IX, U.S. Department of Education, letter to Mac Bernd, superintendent, Newport-Mesa Unified School District, Newport Beach, CA, re: Docket No. 09–95–5005, Jan. 26, 1996.

lege preparatory subjects. Until the OCR 1994–95 compliance review, Newport-Mesa had not systematically addressed the issue of minority underrepresentation in mathematics and science programs, despite the school district's awareness of the problem. Although some teachers at isolated high schools had made efforts to correct the racial/ethnic math and science course enrollment disparities, districtwide support was not provided.[114]

OCR examined the Newport-Mesa School District's and the schools' criteria and practices that affect student entry into math and science classes—criteria that determine if students are assigned to lower level/remedial courses or college preparatory courses, which can serve as prerequisites for advanced math and science classes. OCR also went on site at three high schools and one intermediate school. OCR staff interviewed school site administrators, counselors, and teachers to determine how math and science courses are sequenced, and to assess how students within each grade enroll in their respective courses. OCR also interviewed groups of students to gain insight into their perceptions about possible discriminatory school practices.

During the site visits, OCR determined that enrollment in math and science courses in the Newport-Mesa School District was based on a combination of factors, such as:

- Eighth grade math teachers' recommendations for the ability level math that is appropriate for a student.
- Counselor's perspectives.
- Student's prior academic "experience" (i.e., meeting course prerequisites).
- Math assessment tests.
- Student choice.[115]

OCR did not find sufficient evidence of intentional pupil discrimination in the math and science course enrollment process. Despite (a) counselors' large caseloads of students (which could hinder possible efforts to thoroughly assess pupil cognitive abilities, strengths, limitations, and needs) and (b) a lack of district guidelines for teachers to foster consistency in student course placement recommendations, Newport-Mesa secondary school faculty and staff, according to OCR, claimed that the student course placement process was reliable. However, with respect to student choice, OCR was concerned that school faculty (e.g, guidance counselors) were not sufficiently encouraging minority students (particularly Hispanics) to enroll in college preparatory courses, and that some racial/ethnic minority students could have been enrolled in courses below their level of ability. OCR determined, during teacher interviews, that some high school students in Newport-Mesa were not confident in their abilities to enroll in more challenging courses.[116]

Some Newport-Mesa high schools' math departments, before OCR's recommendations, initiated measures to correct the underrepresentation of minority students in upper level courses and overrepresentation in lower level classes. For instance, one school (Estancia) developed a required (at the beginning of a school year) mathematics proficiency assessment to ensure appropriate course placement (lower and higher ability level courses within the math sequence). Estancia has also conducted outreach to parents of minority students who successfully completed algebra and geometry, in order to encourage the students' participation in trigonometry. Parental influence in determining math courses in which students enroll resulted in increased minority representation in courses such as trigonometry. Additional individuals in the Newport-Mesa district also favored the use of parental support and interest as a strategy to influence students' enrollment in courses.

OCR stressed in the letter of finding that for Newport-Mesa to comply with title VI, students with limited English proficiency must be placed in math and science courses based on their analytical capabilities, irrespective of their English proficiency. The district agreed to address the underrepresentation of minority students, particularly Hispanics, in advanced math and science courses, and submitted a resolution plan to OCR in September 1995. The letter of finding did not specify the particular strategies that the school district intended to employ in order to foster minority student enrollment in math and science programs.[117]

In assessing ability grouping and tracking practices, OCR reviews the school's placement

[114] Ibid.

[115] Ibid.

[116] Ibid.

[117] Ibid.

criteria. OCR does not encounter many schools that use multiple criteria or strict guidelines for placement decisions. OCR's methodology for addressing this problem has evolved over time. In the past, OCR simply asked schools to address the problem, but more recently, OCR has provided more specificity by outlining multiple criteria requirements with specific guidelines.[118] OCR's position is to require multiple identification and evaluation mechanisms for placement decisions. Although OCR permits schools to use validated IQ tests for their intended purpose, in cases where it finds a violation, OCR requires schools to provide other forms of testing, including portfolio reviews, grade reviews, or teacher recommendations for students who do not test well.[119]

Technical Assistance, Outreach, and Education

Technical assistance materials prepared by OCR provide a variety of useful information to States and local school districts on this important aspect of their education program implementation. Such materials are prepared by both headquarters and regional OCR offices. These materials support OCR efforts in doing compliance reviews and monitoring. In addition, OCR relies on such materials for proactive activities, such as conferences, workshops, and meetings, where identification and assessment procedures often are important topics for discussion. These proactive efforts provide an opportunity for OCR to engage in information sharing on ability grouping and tracking practices with a variety of key individuals, including education experts and representatives from civil rights advocacy and parent groups.[120]

OCR has produced a number of technical assistance documents addressing issues relating to title VI and ability grouping and tracking practices. With respect to diagnostic and screening procedures in this context, OCR has offered guidance to schools through a technical assistance document on title VI and title IX compliance. The title VI technical assistance document states that "schools must ensure that all screening procedures are nondiscriminatory." The document also indicates that under certain circumstances "periodic testing and reevaluation of students in specialized courses may be required."[121]

In an OCR Region VII (Kansas City, MO) document, OCR addresses the use of standardized tests to place students in ability groups and tracks.[122] The document examines certain criteria with respect to the use of standardized tests for placement in ability groups and tracks. The document provides four areas that relate to diagnostic and screening procedures to be examined for compliance in the placement of students in advanced courses. The OCR's Region VII document indicates that the regional office should examine school districts to determine:

> If standardized test instruments are used, they should be validated as appropriate for the purposes for which the district is using them.
>
> The district should provide trained staff to administer, evaluate, and interpret the results of the test instruments used.
>
> If the district uses subjective assessments a part of the process to determine admission to the program, the district should provide clear and specific guidance to this staff on how those assessments are to be made. The district should apply whatever criteria it uses to determine admission to the program consistently among all students.[123]

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[118] Steve Deering, David Rolandelli, and Louise Bonanova, OCR, Region IX, U.S. Department of Education, telephone interview, June 25, 1996.

[119] Sherry Goldbecker, issue coordinator for Minorities and Women in Mathematics and Science, OCR, U.S. Department of Education, interview in Washington, DC, May 30, 1996. DOEd's Office of General Counsel has stated that "IQ scores are primarily relevant as one of many factors with respect to placement in special education or gifted and talented programs, as opposed to ability grouping in the regular education setting." Karl Lahring, assistant general counsel, Office of General Counsel, U.S. Department of Education, Note to Frederick D. Isler, assistant staff director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Sept. 9, 1997, p. 6.

[120] Alice Wender, program manager, DC Enforcement Office, OCR, U.S. Department of Education, telephone interview, July 19, 1996, p. 5.

[121] U.S. Department of Education, OCR, "Student Assignment In Elementary and Secondary Schools and Title VI," technical assistance document.

[122] *See* U.S. Department of Education, OCR, Region VII—Kansas City, Missouri: Profile, Assessment, and Resolution Reviews, A Region VII Pilot Project (no date) and OCR, "Testing, Assessment and Admissions."

[123] U.S. Department of Education, OCR, Region VII—Kansas City, Missouri: Profile, Assessment, and Resolution Reviews, A Region VII Pilot Project, p. 3.

Chapter 6

Facilitating Parental Involvement in Children's Education

Education research supports parental involvement as an important component in any student's education.[1] Children whose families are involved in education programs show improved academic achievement, across grade and socioeconomic levels.[2] During the past two decades, outreach to parents has become more common in elementary and secondary schools.[3] However, for the most part, parental and community involvement in school affairs is still voluntary and not national policy. At a 1994 congressional hearing on parental involvement, for example, Sen. Christopher Dodd said: "Clearly, there is no way we can legislate parental involvement. . . . It is a choice each parent must make. However, I think we can and must work together to be sure that it is a viable choice for all parents, that school doors are opened and perceived as being open to them, and that work environments accommodate the needs of children and that communities support parents in these roles." [4] Parental involvement also is usu-

[1] *See Promising Practices: Parental Involvement in School,* Hearing Before the Subcommittee on Education, Arts and Humanities of the Committee on Labor and Human Resources, U.S. Senate, on To Promote Parental Involvement in their Children's Education (Washington, DC: Oct. 7, 1994) (hereafter cited as Hearing, *Promising Practices: Parental Involvement in School*), Opening Statement of Sen. Christopher J. Dodd, p. 2, appendix and Prepared Statement of Secretary Richard W. Riley, p. 40; Larry E. Decker, Gloria A. Gregg, and Virginia A. Decker, *Getting Parents Involved in Their Children's Education* (American Association of School Administrators, 1994), p. 1 (hereafter cited as Decker et al., *Getting Parents Involved*); Jacquelyne S. Eccles and Rena D. Harold, "Parent-School Involvement During the Early Adolescent Years," *Teachers College Record,* vol. 94, no. 3 (Spring 1993), p. 2; Joan F. Goodman, Virginia Sutton and Ira Harkey, "The Effectiveness of Family Workshops in a Middle School Setting: Respect and Caring Make a Difference, *Phi Delta Kappan,* May 1995, p. 695; Van D. Mueller, "Choice: The Parents' Perspective," *Phi Delta Kappan,* June 1987, p. 761; Timothy Z. Keith, Thomas M. Reimers, Paul G. Fehrmann, et al., "Parental Involvement, Homework, and TV Time: Direct and Indirect Effects on High School Achievement," *Journal of Educational Psychology,* vol. 78, no. 5 (1986), p. 374; Wendy S. Grolnick and Richard M. Ryan, "Parent Styles Associated with Children's Self-Regulation and Competence," *Journal of Educational Psychology,* vol. 81, no. 2 (1989), p. 143; Kathleen V. Hoover-Dempsey and Howard M. Sandler, "Parental Involvement in Children's Education: Why Does It Make a Difference?" *Teachers College Record,* vol. 97, no. 2 (Winter 1995), pp. 310–31.

[2] *See* Eccles and Harold, "Parent-School Involvement During the Early Adolescent Years," p. 2; Goodman, Sutton, and Harkey, "The Effectiveness of Family Workshops in a Middle School Setting," p. 695; Decker et al., *Getting Parents Involved,* pp. 1–3; Mueller, "Choice: The Parents' Perspective," p. 761; Timothy Z. Keith et al., "Parental Involvement, Homework, and TV Time: Direct and Indirect Effects on High School Achievement," *Journal of Educational Psychology,* vol. 78, no. 5 (1986), p. 374; Patrick Welsh, "They've Got What It Takes: My Black Female Honors Students Beat Long Odds to Succeed," *The Washington Post,* Outlook: Commentary and Opinion, Apr. 27, 1997, p. C–2; Susan L. Dauber and Joyce L. Epstein, "Parents' Attitudes and Practices of Involvement in Inner-City Elementary and Middle Schools," in N.F. Chavkin, ed., *Families and Schools in a Pluralistic Society* (Albany, NY: State University of New York Press, 1993), p. 53; Anne T. Henderson, "Parents Are a School's Best Friends," *Phi Delta Kappan,* October 1988, p. 149, cited in *Parent Involvement In The Schools,* Hot Topic Series (Center for Evaluation, Development, Research, Phi Delta Kappa, no date), p. 56 ; The National Education Goals Panel, *The National Education Goals Report, Executive Summary: Improving Education Through Family-School-Community Partnerships* (1995), p. 3.

[3] *See* Leon Lynn, "Building Parent Involvement," A Research Paper (University of Wisconsin-Madison: Wisconsin Center for Education Research, 1994) (ERIC Document ED 366 094), p. 2; Decker et al., *Getting Parents Involved,* pp. V–1; Frank E. Nardine and Robert D. Morris, "Parent Involvement in the States: How Firm is the Commitment?" *Phi Delta Kappan,* January 1991, p. 363.

[4] Opening Statement of Sen. Christopher Dodd, Hearing, *Promising Practices: Parental Involvement in School,* p. 3. *See* Chris Pipho, "Parental Support for Education," *Phi Delta Kappan,* December 1994, p. 270; Nardine and Morris, "Parent Involvement in the States," pp. 364–65; Milbrey Wallin Mclaughlin and Patrick M. Shields, "Involving Low-Income Parents in the Schools: A Role for Policy," *Phi Delta Kappan,* October 1987, pp. 157–58.

ally targeted to certain parents or neighborhoods.[5] For example, a survey in 1992 found that parents of white seniors in high school were more likely than those of African American, Hispanic, or Asian seniors to be asked to volunteer in school. African American parents were more likely than white or Hispanic parents to be contacted by school personnel to inform them about helping their child with school work. Parents with a bachelor's degree or higher or whose child's achievement test scores were in the highest quartile were more likely to be called by school personnel about their child's post-high school plans and to be asked to volunteer at school. Parental involvement is often reactive more than proactive. For instance, minority and disadvantaged children's parents are usually contacted when the child is referred for disciplinary action.[6] More often, too, parental involvement is a Federal initiative,[7] and a component of Federal and State educational programs rather than local school personnel-initiated activities.[8]

Other barriers to parental involvement are the parent's lack of educational experience, a lack of economic resources to participate, a lack of knowledge about the educational system, feelings of inferiority, a lack of understanding about the role that parents can play, and negative experiences and interactions with school personnel.[9] Two researchers discuss the negative experiences of African American parents within the school environment:

> Most black Americans have experienced continuing crisis regarding their children's education ... [from slavery to segregation to desegregation].... In short,... the black community has long had a "crisis of confidence" relative to the benefits of public education for its children. There have been numerous efforts within the community for many years that have attempted to maximize parent involvement and participation in schools. Although the majority of black Americans still favor public education, they express continuing concern about the public schools' influence on their children's learning and development. There is yet another context in which the concept of parent involvement has particular salience for the black community. Many, indeed the majority, of black American families are middle to low-income households, and a disproportionately high number of these households that include children are in poverty.[10]

Given the historical and economic phenomena that have limited the involvement of African American parents in their children's education, the barriers to their inclusion are more critical. Education researchers and policymakers realize the need to keep African American parents, as well as the parents of other disadvantaged children, involved in public education, and to take responsibility for their inclusion to ensure that their children achieve within the public educational system.[11]

The quality of parental and community involvement also varies. Variables such as the kinds of activities, the role of parents and the community, the practices of school personnel, as well as the socioeconomic status and educational

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[5] U.S. Department of Education, National Center for Education Statistics, Indicator of the Month (May 1996). This is followup to a Parent Survey in the National Education Longitudinal Study of 1988. *See also* McLaughlin and Shields, "Involving Low-Income Parents in the Schools," pp. 156–57.

[6] Decker et al., *Getting Parents Involved,* p. 8.

[7] National Goals Panel, *The National Education Goals Report, Executive Summary, Improving Education Through Family School-Community Partnerships* (1995), p. 3. The National Education Goals Panel, which consists of the Nation's Governors, was established in 1990. It recommended eight educational goals. Goal 8 is parental participation: "By the year 2000, every school will promote partnerships that will increase parental involvement and participation in promoting the social, emotional, and academic growth of children."

[8] *See* U.S. General Accounting Office, *Early Childhood Programs: Parent Education and Income Best Predict Participation,* Report to the Chairman, Subcommittee on Children, Family, Drugs and Alcoholism, Committee on Labor and Human Resources, U.S. Senate (December 1994), p. 4; Joyce L. Epstein, "School/Family/Community Partnerships: Caring for the Children," *Phi Delta Kappan,* May 1995, pp. 701–08; Diane D'Angelo and C. Ralph Adler, "Chapter 1: A Catalyst for Improving Parent Involvement," *Phi Delta Kappan,* January 1991, pp. 350–52; Decker et al., *Getting Parents Involved,* pp. 16–17, 26–30; Diana T. Slaughter and Valerie Shahariw Kuehne, "Improving Black Education: Perspectives on Parent Involvement," in Willy DeMarcell Smith and Eva Wells Chunn, eds., *Black Education: A Quest for Equity and Excellence* (New Brunswick, NJ: Transaction Publ., 1988), p. 61; McLaughlin and Shields, "Involving Low-Income Parents in the Schools," p. 158.

[9] Eccles and Harold, "Parent-School Involvement during the Early Adolescent Years," pp. 2–4, 9–10.

[10] Slaughter and Kuehne, "Improving Black Education," p. 60.

[11] *See* Renee Smith-Maddox and Anne Wheelock, "Untracking and Students' Futures: Closing the Gap Between Aspirations and Expectations," *Phi Delta Kappan,* November 1995, p. 226; Dauber and Epstein, "Parents' Attitudes and Practices of Involvement in Inner-City Elementary and Middle Schools," pp. 53–56.

level of the parent, and race and ethnicity of the students, influence the level and quality of parental and community involvement. Within early childhood programs, for example, children of low-income parents who did not finish high school and who live in certain areas are the least likely to participate in preschool.[12] Research indicates that parental and community involvement also is influenced by the child's track or ability grouping. For example, a disproportionate number of minority, at-risk, and disadvantaged children are in the lower ability classes,[13] where parental involvement is minimal. Information is not usually available or required for parents with children in low ability classes; thus, these parents are the least informed about ways to be involved or about other programs.[14] In low ability classes, for example, the only interaction between teachers and parents is usually through scheduled conferences. In addition, there is very little written communication to these parents. For example, a 1985 study in Appalachia (in West Virginia) found that the most prevalent interactions between teachers and parents are by telephone, parent-teacher conferences, and parents signing various kinds of correspondence to be returned to the school. [15]

Many minority and disadvantaged children come from homes where the parents are not aware of or do not insist on their children taking high ability classes. Moreover, many of these parents received minimal education or were in the lower educational tracks themselves.[16] These parents, because they are the least informed and have fewer skills, tend to rely on the schools to make educational decisions for their children.[17] Consequently, minority children may have been disproportionately placed in low ability groups because there was minimal or no parental involvement.[18]

Parents with children in high ability classes tend to be more involved and are more informed about their children's education program than parents with children in low ability classes.[19] In high ability or advanced classes, there appears to be more teacher-parent interaction, information about programs, activities for parents, as well as students progress reports.[20] Since, minority and disadvantaged students are under-

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[12] U.S. General Accounting Office, *Early Childhood Programs,* p. 15. *See also* Nettles, "Community Involvement and Disadvantaged Students: A Review," *Review of Educational Research,* vol. 61, no. 3 (Fall 1991), pp. 379–406 as cited in *Office of Research,* vol. 1, no. 1 (Summer 1993), pp. IV–1–6; Nardine and Morris, "Parent Involvement In the States," p. 366; McLaughlin and Shields, "Involving Low-Income Parents in the Schools," pp. 157–59; Dauber and Epstein, "Parents' Attitudes and Practices of Involvement in Inner-City Elementary and Middle Schools," pp. 60–61, 68; Patricia Edwards, "Strategies and Techniques for Establishing Home-School Partnerships with Minority Parents," in Andres Barona and Eugene E. Garcia, eds., *Children at Risk: Poverty, Minority Status, and Other Issues in Educational Equity* (Washington, DC: National Association of School Psychologists, 1990), pp. 222–23.

[13] *See* Decker et al., *Getting Parents Involved,* p. vii; Edwards, "Strategies and Techniques for Establishing Home-School Partnerships with Minority Parents," pp. 221–22.

[14] *See* Dauber and Epstein, "Parents' Attitudes and Practices of Involvement in Inner-City Elementary and Middle Schools," pp. 61, 69; Edwards, "Strategies and Techniques for Establishing Home-School Partnerships with Minority Students," pp. 220–21; Gloria S. Boutte, "Frustrations of an African-American Parent: A Personal and Professional Account," *Phi Delta Kappan,* June 1992, pp. 786–88.

[15] *See* Don Davies, "Parent Involvement in the Public Schools," *Education and the Urban Schools,* vol. 19, no. 2 (February 1987), p. 158, cited in *Parent Involvement In The Schools,* Hot Topic Issues (Center for Evaluation, Development, Research, Phi Delta Kappa, no date), p. 110.

[16] Some parent involvement programs focus on home learning activities, such as parents reading with the children, tutoring, and checking homework. This would be difficult for parents with minimal education or language minorities. *See* Oliver C. Moles, "Who Wants Parent Involvement? Interest, Skills, and Opportunities Among Parents and Educators," *Education and Urban Society,* vol. 19, no. 2 (February 1987) cited in *Parent Involvement In The Schools,* Hot Topic Series (Center for Evaluation, Development, Research, Phi Delta Kappa, no date), pp. 139–40; Welsh, "They've Got What It Takes," pp. C–1–2; Decker et al., *Getting Parents Involved,* p. 1.

[17] *See* Welsh, "They've Got What It Takes," p. C–1. One study found parents of children at all levels of school want to be kept informed about their children's instructional programs and progress. The report maintains that if guidance is provided to the parents, they will respond; Decker et al., *Getting Parents Involved,* pp. 3, 5; *see also* McLaughlin and Shields, "Involving Low-Income Parents in the Schools," p. 157; Edwards, "Strategies and Techniques for Establishing Home-School Partnerships with Minority Parents," p. 223; Dauber and Epstein, "Parents' Attitudes and Practices of Involvement in Inner-City Elementary and Middle Schools," p. 61.

[18] *See* Gloria S. Boutte, "Frustrations of an African-American Parent: A Personal and Professional Account," *Phi Delta Kappan,* June 1992, p. 787.

[19] *See* Renee Smith-Maddox and Anne Wheelock, "Untracking and Students' Futures: Closing the Gap Between Aspirations and Expectations," *Phi Delta Kappan,* November 1995, p. 226; Welsh, "They've Got What It Takes," pp. C–1–2; Henderson, "Parents Are a School's Best Friends," p. 57.

[20] *See* Welsh, "They've Got What It Takes," p. C–2.

represented in the high ability, college, and advanced placement curriculum, most of their parents are not involved in these activities.[21]

Some school personnel assume that parents who do not actively demonstrate or participate in their children's education are not interested, and thus, they do not actively seek their involvement.[22] However, one study reports that parents of inner-city school children, for example, want better education programs for their children, information about their child's progress, a better understanding of schoolwork, and more parent support groups.[23] Researchers identify five barriers that could influence the involvement of these parents:[24]

- School practices that do not accommodate the growing diversity of families.
- Time and child care constraints.
- Parents' negative experiences with schooling.
- Lack of support for cultural diversity.
- Lack of basic survival needs (shelter, food, health care).

Other practices that may affect parental involvement include written materials and activities that are not understood by language minority and disadvantaged parents,[25] poor scheduling of events, resources and responsibilities within the school that are not used to encourage parental involvement, and negative attitudes of some teachers and other school personnel toward these parents.[26] Unless these barriers and practices are addressed by school personnel, it is unlikely that involvement of parents of minority and disadvantaged students will improve.[27]

Community organizations have always played important roles in students' educational development. During the past decade youth advocates, education researchers, and policymakers have called for increased community participation in public schools, and especially in the education of disadvantaged children.[28] Researchers define community involvement as actions by parents, businesses, universities, social service agencies, religious organizations, and the media to promote student education and development.[29] Community organizations and agencies can provide resources, serve as mentors, and provide leadership in school initiatives. Community representatives also can serve as language interpreters, tutors, and mentors. And businesses can provide resources, technology, and relevant employment training, awareness, and information for all students.[30] The current re-

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[21] In a high school in Alexandria, VA, 46 percent of the students are black and 28 percent are white. Only 3 African American boys and 18 African American girls are among the 147 students in the advanced placement (AP) English courses; only 3 African American boys and 2 African American girls in AP calculus out of 50; 2 African American boys and 5 African American girls among 54 students in AP biology, and none in AP physics. Welsh, "They've Got What It Takes," p. C–1. Patrick Welsh teaches English at T.C. Williams High School in Alexandria.

[22] *See* Decker et al., *Getting Parents Involved,* p. 8; *see* Moles, "Who Wants Parent Involvement? p. 141.

[23] *See* Richard M. Jaeger and John A. Hattie, "Detracking America's Schools: Should We Really Care?" *Phi Delta Kappan,* November 1995, p. 226; Anne C. Lewis, "Washington Commentary: Changing Views of Parent Involvement," *Phi Delta Kappan,* February 1995, pp. 430–31; Susan Peterson Miller and Pamela Hudson, "Using Structured Parent Groups to Provide Parental Support," *Intervention in School and Clinic,* vol. 29, no. 3 (January 1994), pp. 151–55; Moles, "Who Wants Parent Involvement?" p. 141.

[24] In 1989 the Office of Community Education in the Massachusetts Department of Education identified these barriers. Decker et al., *Getting Parents Involved,* p. 7.

[25] *See* James Claypool, principal, Robert E. Lee High School, Testimony, *Promising Practices: Parental Involvement in School,* Hearing Before the Subcommittee on Education, Arts and Humanities of the Committee on Labor and Human Resources, U.S. Senate, on To Promote Parental Involvement in Their Children's Education (Washington, DC: Oct. 7, 1994), pp. 29–31 (hereafter cited as Claypool Testimony).

[26] *See* Decker et al., *Getting Parents Involved,* p. 9; Edwards, "Strategies and Techniques for Establishing Home-School Partnerships with Minority Parents," pp. 221, 223, 232. Barriers identified by public schools to parental involvement from minority groups include poor literacy skills, language deficits, inability to implement suggestions, and unwillingness to attend meetings. This "attitude" on the part of school personnel would limit the involvement of and outreach to these parents. *See also* Moles, "Who Wants Parent Involvement?" p. 141.

[27] *See* Leon Lynn, "Building Parent Involvement," A Research Paper (University of Wisconsin-Madison: Wisconsin Center for Education Research, 1994) (ERIC Document ED 366 094), p. 2.

[28] Nettles, "Community Involvement and Disadvantaged Students," p. IV–1. The researcher defines "educationally disadvantaged" as students who face multiple impediments to success in school. These students include, for example, poor African American and Hispanic students and others at-risk of having negative educational outcomes.

[29] Nettles, "Community Involvement and Disadvantaged Students," p. IV–2.

[30] *See* Testimony of Richard Riley, Secretary, U.S. Department of Education, and Winton I. Goodrich, executive direc-

search and programs for parental and community involvement support school, home, and community partnerships.[31]

Witnesses at a 1994 hearing on parental involvement also stressed the importance of community participation in the school environment, and held that such organizations are an integral part of the home-school partnership.[32] As one educator explained:

> It is not enough for the school to do these things. The schools must also be ... community active oriented.... We must go into the community and conduct ... outreach programs.... If we do outreach, if we go to the elementary schools, if we go to the churches, if we go to the community organizations, then we can impact [on] our reputation in the community and really impact [on] the attitude of the children and families when they come to school.[33]

However, there are barriers to the inclusion of communities and organizations in public education. The barriers include the underutilization of these entities, a lack of awareness of the community resources that are available, and minimal outreach to communities or organizations by school officials beyond the immediate neighborhood, which may not have businesses or universities.[34]

Initiatives to Encourage Involvement

Researchers report that schools have to move beyond the conventional family and community involvement initiatives to have quality involvement for the parents of children, especially those students in lower ability groups.[35] Conventional parental involvement initiatives include holding meetings or workshops during or after school, disseminating school correspondence, providing instructions on what schools need parents or communities to do, asking parents to volunteer for activities or serve as tutors, and contacting those community establishments where the students live or where the schools are located.[36]

In the 1990s, it is doubtful that these activities are sufficient to enhance or expand parental and community involvement, especially for parents of minority and disadvantaged children in lower ability classes. Nontraditional approaches are needed. For example, instead of just focusing on home learning and school visits, initiatives for parental and community involvement for minority and disadvantaged parents also need to focus on long-term home-school-community interaction and ways to develop or improve knowledge and skills for parents *and* educators.[37]

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tor, Vermont Chamber of Commerce, Business/Education Partnerships, Montpelier, VT, Hearing, *Promising Practices: Parental Involvement in School,* pp. 8, 24–25, 37; Nettles, "Community Involvement and Disadvantaged Students," pp. IV–6; Goodman, Sutton, and Harkey, "The Effectiveness of Family Workshops in a Middle School Setting," p. 696.

[31] Nettles, "Community Involvement and Disadvantaged Students," pp. IV–4; Barry Rutherford and Shelley H. Billig, "Eight Lessons of Parent, Family and Community Involvement in the Middle Grades. Special Section: Studies on Education Reform," *Phi Delta Kappan,* vol. 77, no. 1 (September 1995), p. 64; Epstein, "School/Family/Community Partnerships," pp. 701–11; Calvin R. Stone, "School/Community Collaboration: Comparing Three Initiatives," *Phi Delta Kappan,* June 1995, pp. 794–814; Anne Wheelock, *Crossing the Tracks: How Untracking Can Save America's Schools* (Boston: Massachusetts Advocacy Center, 1992) (ERIC Document ED 353 348), pp. 103–05.

[32] *See* Testimony of Richard W. Riley, Secretary, U.S. Department of Education and Sue Ferguson, chairperson, National Coalition for Parental Involvement in Education, Hearing, *Promising Practices: Parental Involvement in School,* pp. 8, 16; Claypool Testimony, p. 23.

[33] Claypool Testimony, p. 23.

[34] *See* Nettles, "Community Involvement and Disadvantaged Students," pp. IV–4–IV–6.

[35] *See* Decker et al., *Getting Parents Involved,* pp. ix; 9–10, 21–29; McLaughlin and Shields, "Involving Low-Income Parents in the Schools," p. 157.

[36] *See* Rutherford and Billig, "Eight Lessons of Parent, Family, and Community Involvement in the Middle Grades," p. 64; Epstein, "School/Family/Community Partnerships," p. 705; Decker et al., *Getting Parents Involved,* pp. xi, 9–10; Edwards, "Strategies and Techniques for Establishing Home-School Partnerships with Minority Parents," pp. 230–31; Slaughter and Kuehne, "Improving Black Education," p. 62; McLaughlin and Shields, "Involving Low-Income Parents in the Schools," p. 157; Joyce L. Epstein, "What Principals Should Know About Parent Involvement," *Principal,* January 1987, pp. 6–8, cited in *Parent Involvement In The Schools* (Center for Evaluation, Development, Research, Phi Delta Kappa, no date), pp. 87–89.

[37] *See* Eccles and Harold, "Parent-School Involvement during the Early Adolescent Years," pp. 11–17; Moles, "Who Wants Parent Involvement?" pp. 140, 144; Henderson, "Parents Are a School's Best Friends," p. 150; Don Davies, "Parent Involvement in the Public Schools: Opportunities for Administrators," *Education and Urban Society,* vol. 19, no. 2 (February 1987), p. 157; Carol Ascher, "Improving the School-Home Connection for Poor and Minority Urban Students," *The Urban Review,* vol. 20, no. 2 (Summer 1988), p. 117, all cited in *Parent Involvement In The Schools,* Hot Topic Series (Center for Evaluation, Development, Research, Phi Delta Kappa, no date), pp. 22, 26, 57, 109, 247.

Federal Initiatives

At a 1994 congressional hearing on parental and community involvement in the school environment, Secretary Richard W. Riley of the U.S. Department of Education discussed a Federal and private partnership that includes the Department, the National Coalition for Parent Involvement in Education, and other organizations that work together to promote greater family involvement in learning. Called the Partnership for Family Involvement of Learning, it has 76 representatives from various organizations, including parents, school officials, religious and other community-based groups, and businesses. The partnership uses all these resources for educational improvement and community renewal to support and encourage students' efforts in the classroom. The partnership is designed to establish a supportive environment for family involvement. It identifies and publicizes examples of parental involvement nationwide. In addition, it provides useful information to parents, schools, businesses, and community groups on how to be involved. The Secretary said that schools, communities, and businesses can all be a part of a network of support for families and students. Where schools and educators have reached out to families and communities, they have been rewarded with higher test scores, more active parent teachers' associations, volunteers, tutors, mentors, and strong parent-community-school partnerships. He also said that educators can use technology to get parents more involved in the learning process.[38]

At the hearing, the Secretary also spoke of a report the Department released in 1994 that explains that the family is the "building block" for learning. The report shows that all families can make a difference in their children's learning.[39] At the same hearing on parental involvement, two Senators explained that there must be Federal efforts that provide opportunities for parents, teachers, administrators, and policymakers to share ideas for school and student improvement, and that resources be allocated to carry out those efforts.[40] An educator who spoke at the hearing also said that the Federal Government has a "realistic role" as supporter and resource for local programs, as well as the role of observer, analyst, and advisor in implementing educational efforts to build the family involvement initiative.[41]

State and Local Initiatives

Some State and local education agencies sponsor educational initiatives that involve parents and the community and that include innovative strategies. For example, the Vermont Initiative for Mentoring establishes a long-term mentor relationship for every school child in the State who wants or needs one by providing collaboration among educators, businesses, and community members to build a mentor program infrastructure. One goal is to create mentor initiatives in every Vermont school district.[42]

Another project to enhance community involvement uses members from black and white churches, universities, and businesses to serve as mentors for at-risk students in seven Baltimore, Maryland, middle schools. There is a 7-year commitment on the part of the mentors. The objectives are to raise the student's self-esteem and improve school progress. It is a long-term, intensive community-school program.[43]

At a high school in Alexandria, Virginia, the honors classes are open to any student who is willing to try the courses.[44] According to one of the English teachers at the school, the composition of the honors class has only a little to do with ability, and a little more to do with the student's motivation. However, he adds that it has a

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[38] Prepared Statement of Secretary Richard W. Riley, Hearing, *Promising Practices: Parental Involvement in School,* appendix, pp. 39–42.

[39] The report is entitled "Strong Families, Strong Schools," as cited in Hearing, *Promising Practices: Parental Involvement in School,* Prepared Statement of Secretary Riley, appendix, p. 39.

[40] Opening Statement of Sen. Christopher Dodd and Prepared Statement of Sen. James M. Jeffords, Hearing, *Promising Practices: Parental Involvement in School,* pp. 4–5.

[41] Claypool Testimony, appendix, p. 45.

[42] Vermont Initiative for Mentoring, presented at Hearing, *Promising Practices: Parental Involvement in School,* appendix, p. 47.

[43] James M. McPartland and Saundra Murray Nettles, "Using Community Adults as Advocates or Mentors for At-Risk Middle School Students: A Two-Year Evaluation of Project RAISE," *American Journal of Education,* August 1991, reprinted in *Office of Research,* vol. 1, no. 1 (Summer 1993), pp. IV–28, IV–31.

[44] Welsh, "They've Got What It Takes," p. C–1.

lot to do with the parents' interest.[45] Three minority students who succeeded in the honors program attributed their skills and motivation to involvement of their parents or guardians.[46] The students also noted that a school program was crucial in their success. The program, Project Discovery, is sponsored by the city and State for students whose parents have not gone to college and includes visits to college campuses. For the most part, these parents used discipline, the home environment, positive community influences, and their interest in their children's education to support their children in the advanced program.[47]

A New York City network of staff and parent-run schools, serving poor and minority students, emphasizes active learning, interdisciplinary teaching, and individualized teaching that eliminates tracking and other discriminatory practices.[48] In the program, parents have key roles on school governance committees that decide policies in all areas. A university's faculty developed the network, and university representatives continue to work as collaborators with these schools, as well as the public school system.[49]

In the early 1980s, a mathematics program began in Cambridge, Massachusetts, that now makes algebra available to all seventh and eighth grade students, regardless of their prior skill development or academic achievement. The program, which is called the Algebra Project, has a strong parental and community involvement component that helped enable students to participate in algebra coursework. The founder of the project is an African American parent who, as an educator, supplemented the teaching of mathematics in school by teaching the subject to his children at home. The teacher of one of his children invited him to the classroom to work with the eighth graders on algebra, and the project became a part of another program at one of the Cambridge schools. The program focuses on providing algebra to students, the majority of whom are minorities who have been mainstreamed or grouped out of the advanced mathematics curriculum. Using his experiences from the civil rights movement on how to involve and mobilize the community, the parent focused on three major components: involving teachers and administrators in changing the content and methods of teaching mathematics; involving parents in activities that would enable them to better support their children's learning; and reaching out to college graduates, consultants, and representatives of organizations in various communities to serve as tutors.[50]

From its inception, the program's organizers developed a set of policies and practices to encourage parents' active involvement in staff hiring, curriculum, observation and evaluation of teachers, and governance and administration of the school. Parents serve on a committee to consider decisions about studying algebra, are involved in the educational choices for their children at all levels, and participate in outreach activities to other parents. As the project evolved, parental participation increased as parents volunteered in classrooms and participated in workshops on student self-esteem and achievement. The project also offered an algebra course to parents, teaching algebra the same way it was being taught to their children. Parental involvement was the catalyst for inviting all of the program children entering the seventh grade to study algebra, and the involvement "launched a change in school policy and culture."[51]

The project also reaches out to community organizations and university students and graduates for tutors and role models. The program's community organizing approach is nontraditional in the sense that the organizer becomes involved in the total community, learning its strengths, resources, and concerns. In other words, the organizer goes beyond just trying to get financial support from certain establishments in the community. The project participants seek the involvement and views of the community participants, as well as educate other community members who are uninvolved but

[45] Ibid., p. C–1. The author acknowledges that more white parents are aware of the honors program and "insist" on their children's placement in the curriculum.

[46] Ibid., p. C–2.

[47] Ibid.

[48] Decker et al., *Getting Parents Involved,* p. 41.

[49] Ibid., p. 42.

[50] Robert P. Moses, Mieko Kamij, Susan McAllister Swap, and Jefftrey Howard, "The Algebra Project: Organizing in the Spirit of Ella," *Harvard Educational Review,* vol. 59, no. 4 (November 1989), pp. 423–28, 439.

[51] Ibid., pp. 429–30.

may have an interest at stake.[52] For example, as part of the project, the college tutors developed a study hall program in algebra for the students.[53]

Researchers identify some of the barriers and solutions for parental involvement in ability grouping. Some programs address these concerns. However, the next challenge is to implement the programs or initiatives at all levels. Federal, State, private, and local education entities must collaborate on efforts to include and involve all parents and communities as resources throughout the public school system.

OCR's Enforcement Activities

To implement Federal education programs, title VI requires the Department of Education to administer and enforce the statute by issuing rules, regulations, or orders establishing standards for statutory compliance.[54] Title VI implementing regulations establish requirements including specific prohibitions for school districts to achieve compliance under the title VI statute. However, the title VI regulations do not address compliance specifically in the context of requirements for parental notification or the promotion of parental involvement in education programs based on ability grouping and tracking practices.[55] Unlike the section 504 regulations, which specifically require a recipient school district to "[t]ake appropriate steps to notify" persons with disabilities and their parents or guardians as to the school district's responsibilities under the statute,[56] title VI regulations do not require school districts to include or involve parents in their children's education programs based on ability grouping and tracking assignments.

Title VI Compliance Standards

OCR staff involved in title VI compliance activities can consider parent and community involvement in school districts' education programs when conducting compliance and monitoring activities. When appropriate, community organizations are also made aware of resolution agreements, so that they can informally monitor schools.[57] However, OCR does not assess how much parents should be involved as a statement of policy for a school.[58] Although it realizes the importance of parental and community involvement in education, OCR examines and addresses their involvement on a case-by-case basis during the factfinding process. No regulation or policy guidance requires or instructs school districts to include or involve parents or communities systematically or routinely in *all* school activities.

Investigative Process

In compliance reviews, OCR may contact and interview parents and community residents to gather information about the underrepresentation of minorities in school programs. In addition, OCR encourages parental involvement through other means, such as resolution agreements, and consults with parents and students as to the best remedies for a case.[59] Parental involvement can be an element in a resolution agreement, if, for example, OCR learns that parents have not been given information about certain programs, such as gifted and talented programs, which require parental notification, or if OCR finds that certain parents have less access to information about course offerings.

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[52] Ibid., pp. 438–39. Taking an active role in soliciting broad community involvement and not just support, the organizer did not target a particular neighborhood, university, or funding organization, or organizations with similar disciplines. *See also* Claypool Testimony, p. 44.

[53] Moses et al., "The Algebra Project," pp. 436–37.

[54] 42 U.S.C. § 2000d–1 (1994).

[55] 34 C.F.R. §§ 100.1–100.12 (1996). DOEd's Office of General Counsel has noted, however, that "OCR requires school districts to provide parental notifications in a language that the parents can understand." Karl Lahring, assistant general counsel, Office of General Counsel, U.S. Department of Education, Note to Frederick D. Isler, assistant staff director, Civil Rights Evaluation, U.S. Commission on Civil Rights, Sept. 9, 1997, p. 6 (hereafter cited as Lahring, Note to Frederick D. Isler).

[56] 34 C.F.R. § 104.32(b) (1998).

[57] Helen Whitney, regional director, Region II, Office for Civil Rights, U.S. Department of Education, interview, June 21, 1996.

[58] Susan Bowers, senior enforcement director, Office for Civil Rights, U.S. Department of Education, interview, May 28, 1996.

[59] Judy Stover, equal opportunity specialist, and Catherine Edwards, staff attorney, Office for Civil Rights, U.S. Department of Education, telephone interview, June 18, 1996, p. 1 (hereafter cited as Stover and Edwards interview). ("Parental involvement may be direct under the evaluation resolution of that particular school district. Sometimes a school district should involve parents as a source . . . We encourage schools to use parents as a resource. Indirect involvement of the parents through notification is always required").

Cases

In December 1994, the Office for Civil Rights in Region VI conducted a compliance review of the Lawton, Oklahoma, Public Schools' gifted and talented program.[60] The review focused on the underrepresentation of minority students in the school district's program to determine compliance with Title VI and OCR's implementing regulations.[61] OCR conducted an onsite visit, analyzed data, and interviewed school district staff, parents, and community residents to identify policies, practices, and/or procedures that may contribute to the underrepresentation of minority students in the program. Although the investigation did not reveal that any policies were discriminatory or that criteria for nominating, screening, and selecting students were discriminatory, the review did reveal "significant" underrepresentation of minority students in the gifted and talented program.[62]

OCR concluded that there were some other practices that influenced the participation of minority students in the program. Parents are supposed to be involved in the nominating and screening processes. For example, the screening process requires parental notification in that parents submit documents, including consent forms and an application that describes the child's performance and behavior characteristics. In addition, a standardized test score form must be signed by the school principal, parent, school psychologist, the gifted and talented teacher, and the regular teacher. However, during interviews with school officials, parents, and students, OCR learned that information was not "sufficiently disseminated" to parents of minority children. In addition, some minority parents reported that they were not aware that they could nominate their children for the program, and that they did not have "significant knowledge" about the program nor were they being provided information from the school district about the program.[63]

The review also showed that the minority students were not being referred at the same rate as white students to the programs. OCR learned that teachers and parents were not effectively participating in the referral process. The evidence suggested to OCR that this practice contributed to the underrepresentation of minority students in the program. In order to resolve the complaint, the school district is to implement specific actions to address OCR's areas of concern.[64]

Technical Assistance, Outreach, and Education

Though the title VI regulations do not specifically address ability grouping and tracking practices, or parental notification and involvement, OCR recognizes the importance of parental involvement in title VI compliance-related documents. OCR issued a memorandum to OCR regional staff directors in which it provides guidance in determining whether a school's ability grouping practices violate title VI regulations.[65] The memorandum, which includes a model investigative plan for use in ability grouping investigations, identifies parents as an important source of information during onsite activities of an investigation. The model investigative plan calls for OCR staff to "interview parents and students in different ability groups to obtain their perceptions of the ability grouping system and anecdotal evidence of any problems or inconsistent application of the system."[66] Though the memorandum requires that OCR staff interview the parents of students in ability grouping and tracking practices during onsite investigations, OCR does not require that parents be notified by the school district of the use of such practices; nor does the memorandum require that schools notify parents when students are moved between ability groups.[67] The memorandum also does not lend itself to encouraging school districts to ensure appropriate parental involve-

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[60] Office for Civil Rights, Region VI, Letter of Finding to superintendent, Lawton Public Schools, Oklahoma, October 1995, p. 1 (hereafter cited as OCR, Lawton LOF).

[61] *See* 42 U.S.C. § 2000d (1994); 34 C.F.R. Part 100; OCR, Lawton LOF, p. 1.

[62] OCR, Lawton LOF, pp. 1–2.

[63] Ibid., p. 4.

[64] Ibid.

[65] Richard D. Komer, Deputy Assistant Secretary for Policy, Office for Civil Rights, U.S. Department of Education, memorandum to OCR regional civil rights directors, Draft "Ability Grouping Investigative Procedures Guidance," Mar. 14, 1991.

[66] U.S. Department of Education, Office for Civil Rights, Draft "Investigative Plan Ability Grouping Compliance Review," p. 6.

[67] *See generally* OCR, Draft "Ability Grouping Investigative Procedures."

ment in schools that use ability grouping and tracking practices.[68]

However, OCR places emphasis on the importance of parental involvement and notification in ability grouping and tracking programs through a number of proactive activities. OCR regional offices establish contacts with parents and community groups to gather information on and support for voluntary compliance, and offer support and other technical assistance activities. For example, some of the regional offices participate in parent and community group meetings and initiate efforts to open dialogue between the school officials, parents, and the community.

As strategic goals, OCR seeks to involve parents, as well as advocacy groups and education experts, in the proactive targeting of its resources.[69] It also has sought to empower students and their parents to learn to solve their own problems of securing equal access to quality education. To meet this second goal of student-parent empowerment, OCR has focused on outreach and collaboration with parents and their communities.[70] In many instances, OCR has accomplished these aims. For example, according to staff members at the headquarters and regional offices, OCR has sought to involve parents in compliance reviews and at the remedies stages of reviews and investigations. Effective dialogue between parents and OCR staff assists in educating parents on ability grouping and tracking practices. OCR also may contact community organizations to identify sites for proposed compliance reviews, collecting information on possible problem areas within school districts.[71] Before doing a compliance review, OCR contacts parent groups, such as the school's parent-teacher association, local advocacy groups, or church groups, and meets with parents, members of community groups, and school district officials and staff to discuss issues related to the compliance review and to explain what OCR plans to do during the compliance review process.[72] Initiatives such as these can be an effective means of encouraging parental involvement in ability grouping and tracking programs.

At a Civil Rights Summit in 1995, the Assistant Secretary for Civil Rights spoke of OCR's partnership approach in addressing discrimination complaints and compliance reviews:

> We also are using partnerships in carrying out the civil rights laws with regard to discrimination complaints that are filed as well as our program of self-initiated compliance reviews. In both of these investigative activities, we are moving away from the traditional approach where we used to go on-site to collect extensive data and worked almost independently until we arrived at compliance findings, sometimes years later, often in a confrontational posture. Now we are striving for a partnership approach that recognizes that Federal, state and local education agencies, as well as parents and other interested parties share a common goal of providing equal opportunity and access to high quality education. . . .[73]

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[68] *See* ibid.

[69] U.S. Department of Education, Office for Civil Rights, Draft "Strategic Plan," July 22, 1994, pp. 1–2.

[70] Ibid., pp. 5–6.

[71] Helen Whitney, regional director, Region II, Office for Civil Rights, U.S. Department of Education, interview, June 21, 1996.

[72] *See* Jean Peelen, enforcement director, Office for Civil Rights, DC Metro Office, U.S. Department of Education, interview in Washington, DC, May 28, 1996, p. 7 (Ms. Peelen is also the former issue contact person for minorities in special education); Stover and Edwards interview, p. 2 (OCR held a focus group at a school system where it was to do a minorities in special education compliance review. Approximately 50 parents attended this meeting); Linda Colón, team leader, Office for Civil Rights, Region II, U.S. Department of Education, telephone interview, June 26–27, 1996, p. 4.

[73] Remarks by Norma Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, 2nd Annual Civil Rights Summit, Kansas City, MO, Sept. 8, 1995, p. 8.

Chapter 7

Evaluating and Allocating Teachers, Counselors, Facilities, and Other Resources in Education Programs

Educators and policymakers are calling for equity and excellence in the education for all students, regardless of the ability of the student, or whether the student is a high or low achiever.[1] However, within the classroom are conditions that influence how much and how well students learn. Unfortunately, in many instances, the quality of education is influenced by the ability grouping of the student. Teachers and teaching techniques, instructional and curriculum quality, and facilities and resources for low ability classes can become barriers in the education that many children receive.[2] In essence, the quality of these educational components influences the achievement and success of students. However, there appears to be disparity in the quality of education based on ability grouping.

Educational research indicates a pattern of differential treatment across different ability groups.[3] Students in high ability classes or groups get more attention; students in low ability groups get less.[4] Grouping practices regularly exclude many students in low ability classes from high quality teachers and instruction, as well as access to certain facilities and resources.[5] Low ability classes receive the poorest quality of teachers, instruction, facilities, and equipment, as well as inadequate funding and other resources.[6]

The different learning experiences found within ability groups affect the educational achievement of minority and disadvantaged children more because these children are disproportionately placed in low ability or noncollege preparatory classes or groups.[7] They also are more likely to be overrepresented in remedial and special education classrooms, underrepresented in gifted and talented classrooms, and overrepresented in vocational classes that train

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[1] *See* Remarks by Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education, 2nd Annual Summit, Kansas City, MO, Sept. 8, 1995, p. 4 (hereafter cited as Cantú 1995 Remarks).

[2] *See* Richard S. Marsh and Mary Anne Raywid, "How to Make Detracking Work: Educational Reform," *Phi Delta Kappan*, December 1994, pp. 314–15; Michael P. Brady et al., "Teacher Interactions in Mainstream Social Studies and Science Classes," *Exceptional Children*, vol. 58, no. 6 (May 1992), p. 530; Pamela Keating and Jeannie Oakes, *Access to Knowledge: Breaking Down School Barriers to Learning* (New York: The College Board, August 1988), pp. 7–8.

[3] "Teaching Inequality: The Problem of Public School Tracking," *Harvard Law Review*, vol. 102 (1989), p. 1332 (hereafter cited as "Teaching Inequality"); Jeannie Oakes, "Keeping Track: Part I," *Phi Delta Kappan*, September 1986, p. 16.

[4] *See* Aaron M. Pallas, Doris R. Entwisle, Karl L. Alexander, and M. Francis Stluka, "Ability-Group Effects: Instructional, Social, or Institutional?" *Sociology of Education*, vol. 67 (January 1994), p. 28; Oakes, "Keeping Track: Part I," p. 16.

[5] Keating and Oakes, *Access to Knowledge*, p. 8.

[6] *See* Sonia Nieto, *Affirming Diversity: The Sociopolitical Context of Multicultural Education* (Longman Publ., USA, 1996), p. 89; Michael P. Brady, Paul R. Swank, Ronald D. Taylor, and Jerome Freiberg, "Teacher Interactions in Mainstream Social Studies and Science Classes," *Exceptional Children*, vol. 558, no. 6 (May 1992), p. 530; "Teaching Inequality," p. 1332; Oakes, "Keeping Track: Part I," p. 16.

[7] *See* Larry E. Decker, Gloria A. Gregg, and Virginia A. Decker, *Getting Parents Involved in Their Children's Education* (American Association of School Administrators, 1994), p. vii; Ruth B. Ekstrom, "Six Urban School Districts: Their Middle-Grade Grouping Policies and Practices," in *On the Right Track: The Consequences of Mathematics Course Placement, Policies and Practices in the Middle Grades*, Report to the Edna McConnell Foundation (Princeton, NJ: ETS and the National Urban League, 1992) in Nieto, *Affirming Diversity*, p. 88; Patricia Edwards, "Strategies and Techniques for Establishing Home-School Partnerships with Minority Parents," in Andres Barona and Eugene C. Garcia, *Children at Risk: Poverty, Minority Status, and Other Issues in Educational Equity* (Washington, DC: National Association of School Psychologists, 1990), pp. 221–22; Keating and Oakes, *Access to Knowledge*, p. 8; Oakes, "Keeping Track: Part I," p. 14; John I. Goodlad, *A Place Called School* (New York: McGraw-Hill Co., 1984), pp. 152–56.

students for the lowest level occupations.[8] Therefore, barriers to the education of low ability students will affect minorities and the disadvantaged to a greater degree.[9]

Teachers and Ability Grouping

Most public school teachers are hard-working, dedicated, and qualified. However, researchers report that the quality of teachers and teaching can vary by the types of ability grouping and tracking classes.[10] Studies show that many teachers in low ability classes tend to be "overly concerned" with students being punctual, sitting quietly, and following directions.[11] These teachers usually emphasize discipline, class routines, and the acquisition of social skills over classwork.[12] As one professor explains, "In many schools, students who misbehave are placed in low track [classes].... In these settings, ... teachers often resort to classroom activities in which students are kept separate and quiet for purposes of control. These complex dynamics help perpetuate low-level curriculum for low-track students."[13]

In addition, teachers in the low ability classes tend to be less experienced and concerned,[14] and more punitive toward the students than their peers who teach high ability classes.[15] A major concern about students in lower ability groups is that their teachers may be less enthusiastic about instructing them. Many teachers have indicated their strong preference for placement in advanced and high track classes, and object to teaching lower track classes.[16] A survey revealed that 3 percent of teachers were interested in instructing lower ability group classes.[17] In contrast, teachers in high ability classes more often encourage critical thinking and questioning, assign homework and other activities, and use various teaching techniques to enhance learn-

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[8] *See* Todd V. Fletcher and Carlos Cardona-Morales, "Implementing Effective Instructional Interventions for Minority Students," in Barona and Garcia, eds., *Children at Risk,* pp. 152–53; Oakes, "Keeping Track: Part I," p. 14. *See also* Goodlad, *A Place Called School,* pp. 145–46.

[9] One study explains that barriers to the provision of quality education for African American students with disabilities include negative attitudes toward African American students and their families and communities, in general, testing, misclassification and tracking, monocultural textbooks and curriculum, narrow instructional techniques, and different reward systems. *See* Bridgie Alexis Ford, "Multicultural Education Training for Special Educators working with African American Youth: Issues in the Education of African-American Youth in Special Education Settings," *Exceptional Children,* vol. 59, no. 2 (October 1992), p. 107.

[10] *See* Stephen A. Raudenbush, Brian Rowan, and Yuk Fai Cheong, "Contextual Effects on the Self-perceived Efficacy of High School Teachers," *Sociology of Education,* vol. 65 (April 1992), p. 164.

[11] Robert B. Kozma and Robert G. Croninger, "Technology and the Fate of At-Risk Students," *Education and Urban Society,* vol. 24, no. 4 (August 1992), pp. 445–46; Keating and Oakes, *Access to Knowledge,* p. 8; Oakes, "Keeping Track: Part I," p. 16.

[12] *See* Oakes, "Keeping Track: Part I," p. 16.

[13] John O'Neill, "On Tracking and Individual Differences: A Conversation with Jeannie Oakes," *Educational Leadership* (no date), p. 20.

[14] *See* ibid., pp. 19–20; Robert P. Moses, Mieko Kamii, Susan McAllister Swap, and Jeffrey Howard, "The Algebra Project: Organizing in the Spirit of Ella," *Harvard Educational Review,* vol. 59, no. 4 (November 1989), p. 428. One of the teachers assigned to teach mathematics in a low ability classroom was a former music teacher. She had to take classes to attain State certification in mathematics. It is inferred that she taught during her "training." *See also* Oakes, "Keeping Track: Part I," p. 16.

[15] Keating and Oakes, *Access to Knowledge,* p. 8; "Teaching Inequality" pp. 1332–33. *See also* Oakes, "Keeping Track: Part I," p. 16.

[16] Paul S. George, "What's the Truth About Tracking and Ability Grouping Really?" in *The Challenge of Detracking,* ed., James Bellanca and Elizabeth Swartz (Palatine, IL: IRI/Skyline Publishing, Inc., 1993), p. 257 (hereafter cited as George, "Truth About Tracking"). *See also* Robert E. Slavin, "Achievement Effects of Ability Grouping in Secondary Schools: A Best-Evidence Synthesis," *Review of Educational Research,* vol. 60, no. 3 (Summer 1993), p. 473 (citing A. Gamoran, "Measuring Curriculum Differentiation," *American Journal of Education,* vol. 97, pp. 129–43); C. H. Persell, *Education and Inequality: A Theoretical and Empirical Synthesis* (New York: Free Press, 1977); J. E. Rosenbaum, "Social Implications of Educational Grouping," *Review of Research in Education,* vol. 8 (1980), pp. 361–401. *See also* Jeannie Oakes, *Keeping Track: How Schools Structure Inequality* (New Haven, CT: Yale University Press, 1985) (hereafter cited as Oakes, *Keeping Track*). Teachers may also be less organized in lower level ability groups. *See* Paul O. Rogne, "Reflections on the Research," *G.C.T.,* January/February 1993, p. 11. The allocation of teachers to various ability groups is addressed above.

[17] Paul S. George, "Tracking and Ability Grouping in Middle School: Ten Tentative Truths," *Middle School Journal,* March, 1993, p. 22 (citing W. Findley and M. Bryan, "The Pros and Cons of Ability Grouping," *Phi Delta Kappan Fastback,* vol. 66, no. 12 (1975)). The allocation of teachers to various ability groups is addressed above.

ing.[18] Teachers in these classes are more often enthusiastic and organized.[19]

One study found that in a systemwide tracking program in a large urban area, the elementary schools designed a tracking model for grades 1–3. Although the teaching methods did not vary significantly for most courses, the researchers found a difference in instruction for the remedial and regular mathematics and reading classes. The regular classroom teachers used more independent learning activities and more group instruction, were better classroom managers, and made more efficient use of instructional time. The remedial teachers tended to describe their students in negative terms with regard to test taking, self-control, aggression, attention, and absenteeism. The researchers noted that the remedial teachers were less likely to notice improvement in these children. Thus, the negative attitude toward these children suggests that teachers may become a barrier in the education of the students in some of the remedial classes.[20]

Overall, teachers may perpetuate inequities by teaching students placed in lower ability groups "self-fulfilling lessons about their role in society."[21] Negative teacher attitudes can affect students' sense of productivity, performance, and involvement in school. In schools where African American and Hispanic students are the majority and are in the lower ability groups, the teachers' negative attitudes exacerbate these conditions.[22]

If teachers have lower expectations and impose fewer academic demands on students in lower tracks, these attitudes are conveyed to students.[23] In turn, students reduce their personal performance objectives and produce less. They begin to conform to their teachers' lowered expectations.[24] Overall, educators have stated that the higher a teacher's expectations, the greater a student's performance.[25] In contrast, lower expectations may foster poorer academic performance.[26] Education research shows that this self-perpetuating cycle can be difficult to interrupt. The accuracy of teachers' perceptions of students' abilities in this cycle is immaterial. Therefore, the achievement levels of pupils who are assigned erroneously to a lower track group, over time may regress toward the average level of the group. Research shows that the reverse can occur when students participate in higher groups than their academic capabilities may merit.[27]

If students are inclined to perform according to the pace and level of instruction provided to them, then higher teacher expectations may improve achievement levels of "lower ability students" as they acquire the exposure to the same curriculum content and standards of subject mastery, as their "higher ability peers" routinely receive.[28] Teachers who assume that their stu-

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[18] "Teaching Inequality," p. 1332; Oakes, "Keeping Track: Part I," p. 16.

[19] Keating and Oakes, *Access to Knowledge*, p. 8; Oakes, "Keeping Track: Part I," p. 16.

[20] Steven M. Ross et al., "Math and Reading Instruction in Tracked First Grade Classes," *The Elementary School Journal*, vol. 96, no. 2 (November 1994), p. 116.

[21] "Teaching Inequality," p. 1319.

[22] *See* Nieto, *Affirming Diversity*, pp. 97–99; Rebecca S. Payne, "The Relationship Between Teachers' Beliefs and Sense of Efficacy and Their Significance to Urban (Lower Socioeconomic Status) LSES Minority Students," *Journal of Negro Education*, vol. 63, no. 2 (1994), pp. 181–82.

[23] George, "Truth About Tracking," p. 263. As explained above, teachers tend to make fewer academic demands, and reduce their curriculum's pace and level of rigor for students in lower ability groups. *See* ibid., p. 263; Oakes, "Keeping Track: Part I," pp. 15–17; Maureen T. Hallinan, "Ability Grouping and Student Learning," pp. 41–69, in Maureen T. Hallinan, ed., *The Social Organization of Schools: New Conceptualizations of the Learning Process* (New York: Plenum Press, 1987) p. 62 (hereafter cited as Hallinan, "Student Learning"); George, "Tracking and Ability Grouping in Middle School," p. 1; Rogne, "Reflections on the Research," p. 11; Adam Gamoran, Alternative Uses of Ability Grouping in Secondary Schools: Can We Bring High-Quality Instruction to Low-Ability Classes?" *American Journal of Education*, vol. 102 (November 1993), p. 5.

[24] George, "Truth About Tracking," p. 263. Teachers' treatment disparities of students affect their achievement levels. *See* Patricia B. Campbell, "What's a Nice Girl Like You Doing in a Math Class?" *Phi Delta Kappan*, March 1986 (hereafter cited as Campbell, "Math Class") p. 517.

[25] Hallinan, "Student Learning," p. 50; Daniel Gursky, "On the Wrong Track," in Bellanca and Swartz, *The Challenge of Detracking*, p. 182 (hereafter cited as Gursky, "Wrong Track").

[26] Gursky, "Wrong Track," p. 182; Hallinan, "Student Learning," p. 50. Students can perceive when teachers impose fewer academic demands and overall have lower expectations of them. Students, in turn, can produce less and validate and perpetuate teachers' reduced expectations of them—a "self-fulfilling prophecy." *See* George, "Truth About Tracking," p. 263.

[27] Hallinan, "Student Learning," p. 61.

[28] Ibid. Teachers' treatment disparities of students affect their achievement levels. *See* Campbell, "Math Class," p. 517.

dents have high academic capabilities (regardless if an accurate perception) tend to provide a stimulating and challenging curriculum. Evidence shows that students in higher ability groups interact more frequently with teachers during instruction through question-answer sessions and discussions.[29] This practice may promote greater student attention, interest, and effort to learn.[30] These student behaviors, which are in response to high expectations, can raise achievement levels.

School officials' expectations influence students' academic achievements and perceptions of themselves. The lower the expectations, the lower the achievement and perception; the higher the expectations, the higher the achievement and perceptions of the students, regardless of the background or culture of the student.[31] All children can benefit from high expectations and a challenging curriculum, but many are assigned to less demanding education programs because of lower expectations and unawareness of many students' strengths and abilities.[32] The expectations conveyed to students are especially critical for minority and disadvantaged children. According to one study:

> The relationship among students, teachers and communities is also implicitly connected with students' achievements and perceptions of themselves....The essential problem lies not with the academic potential of Black children but with the unproductive institutional arrangements, lowered expectations ... Unproductive institutional arrangements refer to structural factors such as tracking and testing; and...a lack of creativity and critique in instruction....[33]

The researcher found in heterogeneous classes teachers' interactions with students were less controlling and no longer influenced by the race or ethnicity of the students. Other researchers who have studied the relationship between culture and teachers' expectations point out all children can learn if modifications are made in instructional practices reflecting the multiculturalism or diversity of the schools.[34]

Counselors and Ability Grouping

In addition to teachers, counselors have a critical role in the placement decision of students in ability groups.[35] More often than not, the counselor's perceptions or attitudes about a student's ability and potential achievement in academics can determine the student's entire public school career, beginning at the elementary level. Guidance counselors, as well as teachers, can "steer" or encourage students to enroll in particular courses or place them in tracks.[36] Their decisionmaking role may become a barrier to certain students, if the counselor discourages the student from taking certain courses or intentionally steers him or her from advanced courses.[37] In one survey of over 2,000 students in the public school system, two in five students reported that discouragement from guidance counselors and teachers was an important reason why they did not pursue mathematics and science.[38] Researchers indicate that discouragement or encouragement regarding the ability of a student to take courses can be based on the counselor's perceptions about a student's race,

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[29] Hallinan, "Student Learning," p. 51. *See also* Howard D. Hill, *Effective Strategies for Teaching Minority Students* (Bloomington, IN: National Educational Service, 1989), pp. 85–88.

[30] Hallinan, "Student Learning," p. 51. Refer to discussion on the potential educational resource disparities among different level ability groups.

[31] *See* Nieto, *Affirming Diversity*, pp. 33, 53–73; Michael P. Brady, Paul R. Swank, Ronald D. Taylor, and Jerome Freiberg, "Teacher Interactions in Mainstream Social Studies and Science Classes," *Exceptional Children*, vol. 58, no. 6 (May 1992), p. 530.

[32] Nieto, *Affirming Diversity*, p. 93.

[33] Ibid., p. 73.

[34] *See* ibid., pp. 143–47.

[35] *See* W. Smith and E. Chunn, eds., *Black Education: A Quest for Equity and Excellence* (New Brunswick, NJ: Transaction Publ., 1989), p. 101.

[36] *See* Raymond Calabrese, "The Discriminatory Impact of Course Scheduling on Minorities," *Journal of Education*, Summer 1989, pp. 34–35.

[37] *See* Louis Harris and Associates, Inc., *Uniformed Decisions: A Survey of Children and Parents About Math and Science*, conducted for the National Council for Minorities in Engineering, 1995, pp. 10, 259–61 (hereafter cited as Harris, *Uninformed Decisions*). The researchers interviewed approximately 2,500 public school students nationwide, in the 5th to the 11th grades. Approximately 67 percent were white students and 33 percent were minority. Approximately 1,000 telephone interviews were conducted with parents. The purpose of the study was to understand on what basis students decided to choose mathematics and science, while others dropped the subjects. *See also* Robert Leitman, Katherine Binns, and Akhil Unni, "Uniformed Decisions: A Survey of Children and Parents About Math and Science," NACME, *Research Letter*, vol. 5, no. 1 (June 1995), p. 1.

[38] Harris, *Uniformed Decisions*, p. 10.

ethnicity, and gender.[39] For example, counselors who encourage female students to pursue traditionally female careers, regardless of their ability or interest, may contribute to the underrepresentation of girls in mathematics and science courses.[40] Another study reports that while most students surveyed felt that they had been encouraged by the counselors to pursue mathematics and science, the minority students felt that they received encouragement least frequently.[41] In addition, the minority students reported they received "different messages" from the counselors. In particular, one-sixth of the African American and American Indian students, as compared with less than one-tenth of the nonminority students, reported guidance counselors discouraged them from taking advanced mathematics and science classes.[42]

The recommendation of the guidance counselor in the placement of students in certain ability groups or tracks becomes very important, especially when tests and other assessment tools are not used in the assignment process. Counselors in "tracked" schools play the role of "gatekeeper" to information about postsecondary and occupational opportunities. As two authors explained:

> The advice they give students about course placement at specific levels makes concrete their assessment of the students' potential to realize their dreams. Indeed, their advice can foreclose opportunity for many students. In contrast, counselors in untracking schools work not to restrict opportunity, but to teach students and their parents the knowledge and skills necessary.... In schools that are untracking, counselors, like teachers, focus on helping students develop the knowledge to take advantage of future opportunities.[43]

The authors described how counselors play the role of "gatekeeper." According to one counselor, in placing students in different ability groups, there are many "unknowns," unexplored options, and a lack of knowledge. She said parents wanted the best for their children even if they were not recommended for the higher level classes, and students were made to feel inferior if they could not handle the work in the particular ability group.[44] Another counselor spoke of her experiences at a high school where many students were excluded from challenging courses, and where she, rather than the teachers, had to encourage students to achieve and pursue their educational goals.[45]

Researchers also noted many disadvantaged students are not aware the courses they take in high school are critical to the opportunities they will have in the future. They also noted, for example, in response to the underrepresentation of African American and Latino students in high level courses, that one school district offered a comprehensive system of support services to help them succeed in the new educational setting. Some initiatives to improve these students' awareness of these courses and their long-range impact on them include academic support and other services, in addition to the traditional counseling. The researchers explain that counselors and teachers must assume a variety of roles, particularly in "untracking" schools. For example, they must be coaches for students who are entering higher level courses and guide students and parents through an educational structure that may be unfamiliar to them and offer

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[39] One education researcher noted that minority children can be intentionally directed or steered to certain courses, including business/vocational courses and food services, to prepare them for certain lower tiered jobs. Calabrese, "The Discriminatory Impact of Course Scheduling on Minorities," pp. 34–35. *See also* Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," pp. 471–99; Pamela Keating, "Striving for Sex Equity in Schools," in John Goodlad and Pamela Keating, eds., *Access to Knowledge: An Agenda for our Nation's Schools* (New York: The College Board, 1990), p. 97.

[40] *See* U.S. Department of Education, Office for Civil Rights, "What Schools Can Do to Improve Math and Science Achievement By Minority and Female Students," Resource Document (no date); Beatriz Chu Clewell, Bernice Taylor Anderson, and Margaret E. Thorpe, *Breaking the Barriers: Helping Female and Minority Students Succeed in Mathematics and Science* (San Francisco, CA: Josey-Bass Co., 1992).

[41] *See* Leitman, Binns, and Unni, "Uniformed Decisions: A Survey of Children and Parents About Math and Science," p. 3.

[42] Harris, *Uniformed Decisions*, pp. 11, 103. There were also differences in the encouragement/discouragement received from counselors by the age, grade, and race of the students. For example, less than one-half of the younger students (grades 5–8), were encouraged to pursue mathematics and science, and more of the younger students were discouraged by the guidance counselors to pursue mathematics and science courses than students in grades 9–11. Ibid., pp. 112–13.

[43] Renee Smith-Maddox and Anne Wheelock, "Untracking and Students' Futures: Closing the Gap Between Aspirations and Expectations," *Phi Delta Kappan*, November 1995, p. 224.

[44] Ibid.

[45] Ibid.

the necessary support to develop the skills that students need for success in the higher level courses.[46]

Another study examined the role of the counselor. Even when counselors are available, they generally are assigned other responsibilities and cannot focus their attention on assisting students in making academic decisions. In such cases, students make their decisions based on minimal information and what is perceived as relevant by their peers.[47] The study also found many students had no guidance or other services in school, such as assistance in preparing college applications or for college entrance examinations.[48] The lack of counseling also influences the achievement of students. Another study found that students are making academic decisions with little guidance from school personnel.[49] This may explain why some students are not placed in advanced mathematics and science courses.

Curriculum and Instruction

Researchers call for tailoring educational methods to meet all students' individual abilities and needs. In reality, however, there is enrichment for those students who are the "fastest learners," and some "remedial attention" for those who are slower learners.[50] In some cases, the teacher's curriculum and instruction may become barriers in the education of low ability-grouped students. Researchers find that the curriculum and instruction for high ability groups are very different from what is experienced by students in low ability groups.[51] According to two researchers, differences in the curriculum and instruction available to students in different groups and tracks reveal "serious inequities" in education.[52] Lecturing, monitoring, and a variety of instructional modes, such as coaching, tutoring, assignments, problem solving, and role playing, usually dominate classroom teaching. However, students usually assigned to the lower ability tracks are more likely to have lessons emphasizing behavioral or training techniques, lower level skills, memorization, rote learning, fragmented knowledge or instruction, or easily tested facts.[53]

One research study confirmed students had different types of instruction depending on the ability grouping. For example, students in high ability English classes were exposed to topics and skills that met college requirements. They studied classics and learned good narrative writing. They were expected to write essays, do library research, and learn vocabulary to assist them on college entrance examinations. They had opportunities to think critically or solve problems. On the other hand, in the low ability English classes, the instruction was totally different. They were not expected to learn the same skills. They learned through workbooks, read "young adult" fiction, wrote simple paragraphs, and practiced filling out job applications and other kinds of forms. Their learning tasks were restricted to memorization or low level comprehension. The differences in instruction and curriculum followed the same pattern in mathematics. High ability classes focused on mathematical concepts; low ability classes stressed basic computation skills. Yet there was no empirical evidence from the study that the students in the lower ability classes were innately less capable of learning than their peers in the higher ability groups.[54]

If a self-contained, heterogeneous classroom operates a within-class ability grouping system, then teachers must allocate their time to the different subgroups.[55] Students have different learning needs and require varying amounts of instructional time to incorporate the same material. Equal allocation of instructional time across ability groups would not accommodate individual differences in learning rates. Students who may be slower at processing new information can be disadvantaged because they have less instructional time relative to the amount of time they require to learn than do their higher ability peers. In addition, students in low ability groups can be less self-directed and require more teacher input. However, structural or organiza-

[46] Ibid., pp. 224–28.

[47] Nieto, *Affirming Diversity*, p. 88.

[48] Ibid., pp. 337–38.

[49] Leitman, Binns, and Unni, "Uniformed Decisions: A Survey of Children and Parents About Math and Science," p. 2.

[50] Thomas K. Glennan and Arthur Melmed, *Fostering the Use of Educational Technology: Elements of a National Strategy* (RAND, Inc., 1996), p. 5.

[51] Keating and Oakes, *Access to Knowledge*, p. 9.

[52] Ibid.

[53] *See* Nieto, *Affirming Diversity*, p. 89; Keating and Oakes, *Access to Knowledge*, p. 9; "Teaching Inequality," p. 1332.

[54] Oakes, "Keeping Track: Part I," pp. 14–15.

[55] Hallinan, "Student Learning," p. 55.

tional characteristics of any classroom, "including physical space and scheduling considerations, may demand that instructional periods be of identical length for each subgroup."[56]

Fragmented instruction or coursework, rather than integrated learning techniques, may be a "particular burden" for less capable students.[57] Remedial teaching approaches usually cause them to miss essential core curriculum experienced by their peers, and teachers usually seek referrals or specialists to assist them with these children. The students are often "pulled out of class," rather than receiving the classroom help that would support their success in the class environment. These students are usually expected to learn without benefit of the support and instruction associated with teachers and students placed in the central curriculum of the school.[58] This type of passive or restricted instruction may further erode these students' opportunities for a productive, valuable education.[59]

Teachers in lower ability classes tend to use the drill-and-practice type of instruction rather than problem-solving techniques.[60] Even when low ability groups have access to technology, teachers use drill-and-practice software for instructional approaches. These teachers believe that this type of instruction is the most appropriate for these students, regardless of the tools available.[61] However, in an interview with a researcher conducting a study on ability group practices, one professor said:

> The curriculum issue needs to be turned on its head. We need to realize that the kind of drill-and-skill curriculum that we've traditionally offered low-track students probably makes knowledge *less* accessible to them, than would a richer and more demanding curriculum that better approximates real-life problem solving.[62]

A 1991 study provided detailed anecdotal evidence of the negative effects of a lower track learning environment on students. This study of lower track classrooms focused on case studies to answer several basic questions about school culture as it influences lower track classrooms. The researcher limited her study to two schools. She stated that her task in studying the two schools was not to prove the superiority of homogeneous or heterogeneous grouping but rather to "detail how curriculum differentiation works in a small sample of classrooms at two schools and how teachers and students understand its significance."[63]

The researcher observed classroom activity in the "Additional Needs" section, the lower track of a high school with a largely "able, affluent, college-bound" student body. She describes the lower track classrooms as having erratic attendance patterns, frequent behavior problems and classroom interruptions, and a lack of any challenging coursework. In fact, students in these classrooms are not assigned any oral reports, research projects, book reports, or quizzes. She said:

> In teachers' accounts, the educational hierarchy [perpetuated in the tracking system] is nearly permanent: To enter Southmoor as an academically unsuccessful student is not simply to be different from the majority of the students but to be irremediably different, and teachers are not held accountable for students' instruction. Holding such contradictory role expectations, lower-track teachers direct confused and uncertain classroom encounters.[64]

In contrast, the researcher states that teachers in the higher track classrooms at the high school found their professional experience and their perceptions of the students in the higher track classes as highly positive. For example, the researcher writes that teachers typify the students in the higher track classes as coming from "upper-middle-class, professional families" and

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[56] Ibid.

[57] Keating and Oakes, *Access to Knowledge*, p. 9. *See also* Todd V. Fletcher and Carlos Cardona-Morales, "Implementing Effective Instructional Interventions for Minority Students," in Barona and Garcia, *Children at Risk*, p. 155.

[58] *See* Keating and Oakes, *Access to Knowledge*, pp. 9–10.

[59] *See* O'Neill, "On Tracking and Individual Differences: A Conversation with Jeannie Oakes," p. 19.

[60] Dennis Sayers, "Educational Equity Issues in an Information Age," *Teachers College Record*, vol. 96, no. 4 (Summer 1995), p. 768.

[61] *See* Rosemary E. Sutton, "Equity and Computers in the Schools: A Decade of Research," *Review of Educational Research*, vol. 61, no. 4, pp. 482, 494–95; Sayers, "Educational Equity Issues in an Information Age," pp. 768–69.

[62] O'Neill, "On Tracking and Individual Differences: A Conversation with Jeannie Oakes," p. 19.

[63] Reba Neukom Page, *Lower-Track Classrooms: A Curricular and Cultural Perspective* (New York: Teachers College Press, 1991), p. x.

[64] Ibid., pp. 85–88.

that these students make teaching at the high school "heavenly" because these students are "motivated." The researcher includes a quote from a teacher who said, "They are *easy* to teach, *easy* to relate to. You don't have to *work* to relate to them. . . . Usually, I give them an assignment and they take it from there: I do hardly anything and they're off and running."[65]

In a review of this researcher's work, one critic stated:

> If various levels of school context cause chaos, hostility, and inconsequential knowledge to be the reality of lower-track classrooms, what more is there to be said about the process? What has been left out of [this] analysis? Briefly: vision and hope for a more equitable education system. I find it unfortunate that she limits the interpretation of her role as researcher to neutral descriptions and analysis of what is (especially when "what is" is so disturbing). Who is going to represent the best interests of these lower-track students? The teachers? Administrators? The state? Their parents? Social researchers do not all agree on their appropriate role in relation to their subjects, but I must express my dismay at this emphasis on scientific neutrality.[66]

In essence, the teachers' curriculum and teaching methods were influenced by their perceptions and attitudes toward the students in the different tracks.

Facilities and Resources

Disparities

Research also indicates that there is disparity in the types of facilities and resources made available for students by ability grouping.[67] For example, in low ability classes, resources are usually workbooks, kits, and "easy" materials.[68] Students primarily use worksheets or read out of textbooks rather than use materials that enable them to do projects.[69] In high ability classes, in addition to the standard classroom materials, resources are made available for students to perform projects and other assignments. They can participate in activities outside the classroom such as field trips. In addition, they usually have access to laboratories for hands-on experiments, as well as equipment such as microscopes and computers.[70] However, facilities outside the classroom and technological equipment and resources are not usually available for students in the lower ability classes.[71]

Achieving Equity in Educational Technology

Perhaps no component is changing the classroom environment as much as technology. The use of technology by schools through equipment and connections to the World Wide Web has reformed educational learning, and its use is projected to continue as a major educational force in the 21st century. Despite technology's rapid growth and usage, limited access exists. The use of technology and technology-supported instruction, as a daily classroom practice, tends to be limited to small groups of teachers attempting to motivate their students, or introducing new resources such as radio and film as tools in certain classrooms.[72] In essence, there has not been a global understanding of the potential technology has for improving the success and achievement for all students. However, research indicates that the availability of technology and equipment (e.g., personal computers, educational software, CD-ROM, Internet) in the classroom influences and improves students' achievement and success in the school.[73] Two researchers noted the importance of technology for *all* students:

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[65] Ibid., p. 83.

[66] Bram Hamovitch, "Essay Reviews," *Urban Education*, January 1993, p. 479.

[67] *See* Nieto, *Affirming Diversity*, pp. 99–100.

[68] Keating and Oakes, *Access to Knowledge*, p. 8. *See also* Oakes, "Keeping Track: Part I," p. 15.

[69] *See* O' Neill, "On Tracking and Individual Differences: A Conversation with Jeannie Oakes," p. 19; Kozma and Croninger, "Technology and the Fate of At-Risk Students," p. 445.

[70] *See* Sutton, "Equity and Computers in the Schools," p. 478; Sayers, "Educational Equity Issues in an Information Age," p. 768.

[71] *See* Kozma and Croninger, "Technology and the Fate of At-Risk Students," p. 450; Robert Hennelly, "Forget Computers: Kids Without Phones," *The Education Digest*, January 1996, pp. 40–43; Sutton, "Equity and Computers in the Schools," pp. 478–79. These articles focus on the lack of technology in primarily poor and minority schools which would affect the majority of these students regardless of their grouping; Sayers, "Educational Equity Issues in an Information Age," p. 768.

[72] *See* Glennan and Melmed, *Fostering the Use of Educational Technology*, summary, p. 2, introduction, p. 1.

[73] *See* Isabelle Bruder et al., "School Reform: Why You Need Technology to Get There," *Electronic Learning*, May/June 1992, pp. 22–28; Kozma and Croninger, "Technology and the Fate of At-Risk Students," pp. 446–47.

> Technology can clearly assist schools, and the nation generally to more effectively meet many goals . . . the goal that calls for *all* students to possess demonstrated competency in challenging subject matter and be prepared for productive leadership, continued learning, and productive employment. . . . Educational technology can make an important contribution to the ideal of tailoring education methods more closely to individual learner needs and abilities. It can provide additional specialized tutoring to those that need more time to master a subject area, both inside and outside school. It can create learning environments that engage large groups of students, freeing teachers for more intensive work with small groups of students with common interests and needs. It can provide enrichment and extended learning opportunities to students who have mastered the core subject area and are anxious to move on to more challenging material. Technology can and clearly does contribute to . . . life-long learning, the professional development of teachers, and the achievement of high proficiency in science.[74]

Conversely, lack of technological knowledge and resources will hinder the job marketability of those students in lower ability groups or those denied access to such equipment, as society accelerates the demand for at least on-the-job computer literacy.[75] The compelling issue in the use of technology by students who have traditionally been denied even the most basic resources and curriculum is how to move them effectively from worksheets to the computer.[76] To move them into the technology era in education, one researcher thinks that "conventional computer assisted instruction" for certain students will not be effective.[77]

A 1997 report provides information indicating lack of access to education technology for many minority and disadvantaged students.[78] In summary, the research shows that there are major differences among schools in their access to different kinds of education technology. Students from minority groups are less likely to have courses or experience in word processing and computer literacy, as well as less likely to use computers in English courses and to solve problems in mathematics and natural science.[79] Concurring with the research study, the Assistant Secretary for Civil Rights said that students attending poor and high-minority schools have less access to most types of technology than students attending other schools, including access to computers, the Internet, and CD–ROM.[80] This problem is exacerbated by the disparity in computer access in disadvantaged homes and low income communities.[81] For example, one study indicates disadvantaged children have less access to computers at home, which negatively affects their attitudes, confidence, and competence.[82] Another study revealed 43 percent of white Americans have at least one computer in the home, while only 16 percent of black Americans and 15 percent of Hispanic Americans have computers in the home.[83] Of families with income over $75,000, 63 percent have computers in the home, whereas only 27 percent of families with income between $30,000 and $39,999 and 9

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[74] Glennan and Melmed, *Fostering the Use of Educational Technology*, Introduction, p. 5.

[75] It is projected that by the year 2010, 60 percent of the new jobs created will demand computer capabilities. Robert Hennelley, "Forget Computers: Kids Without Phones," *The Education Digest*, January 1996, p. 42. *See also* "The Changing Workplace: Skills for the Future, Where We Stand: May 1996," *The Children's Partnership*, 1996, p. 1.

[76] *See* Stanley Pogrow, "A Socratic Approach to Using Computers with At-Risk Students," *Educational Leadership*, February 1990, p. 61.

[77] Ibid.; Sayers, "Educational Equity Issues in an Information Age," pp. 772–73.

[78] Richard J. Coley, John Cradler, and Penelope K. Engel, *Computers and Classrooms: The Status of Technology in U.S. Schools* (Princeton, NJ: Educational Testing Service, Policy Information Center, 1997), p. 3. *See also* Robert O'Harrow, Jr., "Computer Access Found to Vary Widely in Fairfax (Virginia) Schools," *The Washington Post*, May 18, 1997, pp. B1–2. The article states that schools with aggressive, technology-oriented parent teachers' associations or ties to local businesses have acquired new technology equipment, while poorer communities have lagged behind. At a technology-rich elementary school, students use the equipment almost daily for mathematics, social studies, and other instruction. However, in the elementary schools in other areas, students have to wait longer to use computers, have unsophisticated equipment, and are not connected to telecommunications. One educator in the school district said that "it will be a major challenge to address the equity issue" in technology.

[79] Coley, Cradler, and Engel, *Computers and Classrooms*, pp. 3–4.

[80] *See* Cantú 1995 Remarks, p. 7.

[81] *See* Sutton, "Equity and Computers in the Schools," p. 477; "The Changing Workplace: Skills for the Future," *The Children's Partnership*, 1996, pp. 1–2; Elizabeth Corcoran, "Microsoft's Gates Plans $200 Million Gift to Libraries: Goal Is to Bring Computers to Lower-Income Areas," *The Washington Post*, June 14, 1997, pp. A–1, A–10.

[82] Sutton, "Equity and Computers in the Schools," p. 477.

[83] "Who has Computers?" *Black Issues in Higher Education*, vol. 14, no. 7 (May 29, 1997), p. 21 (citing *Digest of Education Statistics*, 1996).

percent of families with income under $20,000 have computers in the home.[84]

Research also shows many teachers have not had the education or training to use technology effectively in their teaching.[85] One study indicates that only 16 percent of teachers currently use telecommunications for professional development, and that only 15 percent of the teachers reported having at least 9 hours of training in education technology.[86] In a survey, researchers found that although large numbers of teachers nationwide are aware of technology and favor the use of technology in the classroom, only one-third of the teachers reported actually using it. In addition, even fewer reported that they had knowledge of such technology as the Internet.[87]

Although there are some public schools, mainly in the suburbs, with superior technology, most classrooms are disconnected from electronic information.[88] School districts with large minority enrollments are most likely not to have any type of technology. In remarks at a civil rights summit, the Assistant Secretary for Civil Rights said:

> We need technology in every classroom so that every child in school today has an equal chance in the 21st century. We need to visualize the classroom of the future—where, instead of blackboards, there are video screens; where there are computers, instead of textbooks; where a CD–ROM player is on every student's desk.

To make technology available for all public schools, the Assistant Secretary for Civil Rights noted school and community partnerships as a solution. She cited the collaboration between schools and cable companies that provided students with commercial-free education programs, as well as electronic field trips, cable, and satellites. In another partnership, telephone companies are linking schools and homes together so that parents as well as students can use computers.[89]

State, Local, and Federal Initiatives

To eliminate some of the barriers in ability grouping, one researcher explains that initiatives must address certain institutionalized "norms," practices, and perceptions about ability. This would require altering or reconstructing many of the barriers so that all students can have equal educational opportunity.[90] In other words, to eliminate the barriers and practices relative to teachers, curriculum and instruction, and resources, policymakers and educators will have to take into consideration restructuring these school components to address the concerns and needs of those children assigned to the low ability groups. Simply to "beef up" the lower ability classroom with more experienced teachers, more exciting curriculum, and more variety in instruction alone will not eliminate the barriers and biases that these children now experience in their public education.[91] To provide equal educational opportunity for all students regardless of academic placement, some of the approaches to eliminating these barriers may have to redirect or challenge traditional, institutionalized perceptions and attitudes about the ability of students and about coursework. As two researchers explained, "The quality of the curriculum and instruction for the high-ability group and the resources that support advance-track students also work well for lower-ability students."[92] Thus, to alter curriculum and instruction, traditional views concerning ability as well as perceptions of student's ability have to be evaluated. Programs and initiatives that influence educational practices and resources have to take into consideration the needs of all students in order to mainstream them in the public school environment.

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[84] Ibid.

[85] Bob Hoffman, "Managing the Information Revolution: Planning the Integration of School Technology," *Talking Technology Bulletin* (October 1996), pp. 88–96.

[86] Coley, Cradler, and Engel, *Computers and Classrooms*, p. 5.

[87] Belden & Russonello Research and Communications, "Teaching the Information Highway: Opinions of Teachers Toward Internet: An Analysis of Findings from a National Survey," October 1996, p. 1. *See also* Dale S. Niederhauser, "Using Computers in an Information Age Classroom: What Teachers Need To Know," *Talking Technology*, October 1996, pp. 74–75.

[88] Cantú 1995 Remarks, pp. 6–7.

[89] *See* Ibid., p. 7.

[90] *See* Keating and Oakes, *Access to Knowledge*, p. 10; O'Neill, "On Tracking and Individual Differences: A Conversation with Jeannie Oakes," p. 20.

[91] *See* O' Neill, "On Tracking and Individual Differences: A Conversation with Jeannie Oakes," p. 20. *See also* Diana Oxley, "Organizing Schools into Small Units: Alternatives to Homogeneous Grouping," *Phi Delta Kappan*, March 1994, pp. 521–22.

[92] Keating and Oakes, *Access to Knowledge*, p. 9.

In addition, strategies to eliminate the barriers to learning may have to come from outside the school environment. Resources in the community, expanded community involvement, and separate facilities for comprehensive and concentrated learning in advanced coursework may be necessary. For example, in addition to the teacher, students in low ability groups may require the services of tutors and mentors to assist them in the learning process. Many programs aimed at elevating the coursework and educational experiences of these students use university faculty, business representatives, or fraternal organizations as tutors and mentors.[93]

To move all children, including those students in lower ability groups, into the technology era effectively, many teachers will have to master technology, and school systems will have to introduce a new kind of instruction, as well as have adequate support and resources.[94] In essence, there will have to be professional staff development, technical support, and adequate facilities to provide technology for all students.[95] Ensuring access to technology takes time and requires careful State and local planning, as well as Federal coordination and activities in technology-related areas.[96] If addressed effectively, technology can enhance learning for children with special needs, including children with disabilities, limited-English-speaking students, girls having difficulty in advanced mathematics and science, and boys with lower reading and English skills.[97]

State and Local Initiatives

In 1977 the Governor of North Carolina established the North Carolina School of Science and Mathematics (NCSSM), a comprehensive, residential learning facility, to provide educational experiences and prepare 11th and 12th graders statewide for leadership in science and mathematics. The purpose of the school is to offer opportunities and resources to help develop the talents of students to enable them to reach their potential. No student is denied entrance based solely on the score of any achievement or aptitude test. Students are selected based on science and mathematics grades, SAT scores, teacher and guidance counselor assessments, letters of recommendation, and written essays. In the 1980s, of the average number of 200 students enrolled, approximately 37 percent were minority. As a comprehensive school, NCSSM requires English, foreign language, social science, and other core classes, and students must complete at least two mathematics and three science courses before graduation. All students are instructed at an advanced level, and students are not ranked based on their achievement. Support services include tutoring, use of library and other learning facilities, as well as computer laboratories that are accessible on weekends and evenings. Faculty and other professionals from Duke University, the North Carolina Medical Center, and the North Carolina State Chemical Engineering Laboratory serve as consultants and mentors. By the late 1980s, at least 600 students participated in the tuition-free, 5-week science research program. In 1982, 80 percent of the school's graduates pursued postsecondary study or work related to mathematics or science. Using the NCSSM as a model, similar residential schools were established in Illinois and Louisiana.[98]

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[93] *See* Moses et al., "The Algebra Project," pp. 436–37.

[94] The researcher explains that many teachers may not feel comfortable using a computer, or teaching their curriculum with computers. Other teachers who would like to use computers with their students do not have one, or they do not have access to the software or the necessary infrastructure (such as electric outlets or a telephone line) that could serve their students. Hoffman, "Managing the Information Revolution," pp. 90, 92.

[95] Ibid., pp. 92–93, 95. *See also* Niederhauser, "Using Computers in an Information Age Classroom," pp. 74–75.

[96] U.S. Department of Education, *Making It Happen*, Report of the Secretary's Conference on Educational Technology (Washington, DC: Office of Educational Technology, Mar. 7–9, 1995), Issue 1: Access and Equity, p. 2. This is one of the background documents in the U.S. Department of Education's comprehensive report on technology, *Getting America's Students Ready for the 21st Century: Meeting the Technology Literacy Challenge* (1996). *See also* Council of Chief State Officers, "Improving Student Performance through Learning Technologies," (1992), pp. 1–8; Reed Hundt, "Providing Opportunity for All Through the Telecommunications Revolution," *Talking Technology*, October 1996, pp. 4–5.

[97] *See* U.S. Department of Education, *Making It Happen*, Issue: Access and Equity, p. 4; Albert R. Cavalier, Ralph P. Ferretti, and Cynthia M. Okolo, "Technology and Individual Differences," *Journal of Special Education Technology*, vol. XII, no. 3 (Spring 1994), p. 178.

[98] Charles R. Elber, "The North Carolina School of Science and Mathematics," *Phi Delta Kappan*, June 1987, pp. 773–77. The school is located in Durham and was the first publicly supported statewide residential school in the Nation.

A study examined a school-community program implemented in a high school in Philadelphia, Pennsylvania. It focuses on raising the achievement level of ninth graders who failed to be promoted. The program includes initiatives that promote greater teacher knowledge of the students, broad community involvement, and alternative instructional methods to address their needs. To carry out the program, program staff members did not organize students only by ability, replaced a remedial mathematics class with algebra, and assigned 11 teachers to work on teams to teach and assist the same group of students for 2 years. The way that classes are organized, teachers not only instruct fewer students but spend more instructional time with them. Staff members use an individualized approach to instruction that mainstreams these students into regular classes. The students work in groups, at community learning centers, and are exposed to mathematical exercises and games to solve mathematical problems.[99]

Another study evaluated a mathematics project in Massachusetts. The Algebra Project in Cambridge, which began in the 1980s, makes algebra available to all seventh and eighth graders regardless of prior skill development or achievement. The program's philosophy is that all students, given the proper instruction and support, can achieve in mathematics and science. At its inception, it was not projected the program would become a vehicle in the school district for raising questions about ability grouping, changing teaching methods, or expanding the parent and community roles in the educational process.[100]

In order to achieve the project's objective to include all students in the algebra curriculum, ability grouping was replaced with individual and small group instruction.[101] The organizers altered the content of the curriculum, changed and expanded methods of teaching mathematics, and involved parents and the community in the educational process. Teachers and students have pivotal roles in restructuring the curriculum and instruction techniques. In conferences with teachers, students can set their own objectives and are encouraged to develop habits in approaching daily math work. In the program, which targets students mainstreamed out of the advanced algebra curriculum, teachers assume the role of "coach" rather than "lecturer" in their relationship with students. One teacher became a "learner," after acknowledging her inexperience with mathematics content. As a learner, she could develop methods of responding to students, could identify with the problems they were having, and could help them to feel comfortable with asking questions.[102]

Once algebra opened to all seventh and eighth graders, teachers in lower grades realized that they had to prepare their students for the course, regardless of the grouping. After attending a special institute sponsored by the project, teachers from kindergarten to eighth grade implemented new curricula in mathematics, appropriate for the age and grade levels that they teach. As a result of the institute, teachers can modify their classroom technique, and encourage self-reliance in the classroom. The process gives all teachers a sense of empowerment, and provides self-training on how to present the curriculum effectively. In 1986 the project produced its first graduating class. When the students entered high school in the fall, 39 percent of the program's graduates were placed in honors geometry or honors algebra. Not one student ended up in lower level mathematics courses.[103]

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[99] Diane Oxley, "Organizing Schools into Small Units: Alternatives to Homogeneous Grouping," *Phi Delta Kappan*, March 1994, pp. 522–24. The study examined two schools, one German and one American. This report discusses the American school, William Penn High School in Philadelphia. The school has an enrollment of a large majority of African American and disadvantaged children. The program uses small units in the community to provide different curricular themes and provides instruction in core and theme subjects only (such as African American culture). Electives are organized on a schoolwide basis. The teaching staff includes two teams of four teachers, a Chapter 1 reading specialist, a special education instructor, and a coordinator.

[100] Moses et al., "The Algebra Project," pp. 423–39.

[101] Ibid., pp. 423–24, 427, 430. Prior to the Algebra Project, children in the two seventh and eighth grade classrooms were clustered into separate ability groups: above-grade-level tracks primarily composed of middle class white children and below-grade-level tracks composed of a majority of minority children. The system of ability grouping denied algebra to the below-grade-level tracked children.

[102] Ibid., pp. 428–31. One of the teachers in the program originally taught music. She took courses in mathematics including algebra, and eventually achieved State certification in mathematics. In this case, a teacher used her inexperience in a subject as a guide for teaching her students.

[103] Ibid., pp. 431–32.

Many local school districts also are encouraging technology in schools so that every teacher and student has access to such equipment as computers. An example of this initiative is in a high school located in Colorado, which took computers out of locked laboratories and placed them throughout the school for use by every teacher and student. Computers are now seen as a part of the culture of the school.[104]

In another high school in California, technology-based instruction is integrated into all coursework as students take keyboard and basic computer literacy, as well writing labs and CD–ROM, video programs in English, history and social studies instruction.[105] The administrator's objective is to have the students understand early in their high school education about job prospects and building job-relevant skills.[106] To carry out the objective, the school's curriculum is organized around five career tracks. However, the tracks are not targeted at specific ability levels, nor do they consist of a core set of classes. The tracks are designed to allow students to develop technical and applied skills related to broad industry groups.[107]

Federal Initiatives

Through legislation and funding for programs and other activities, the Federal Government addresses ability grouping concerns by providing equipment, teacher and counselor training, technology, and other resources to raise the achievement and success of all students. For example, Congress recognized the importance of the counselor's role in providing equal educational opportunity for all students by authorizing financial assistance for programs that include the development and improvement of guidance and counseling activities. The Women's Educational Equity Act provides funds to train teachers, counselors, administrators and other personnel, especially preschool and elementary personnel, in developing teaching and learning practices.[108]

The Dwight D. Eisenhower Professional Development Federal Activities program provides grants to support research and other activities to facilitate systemic change and offer teachers opportunities to improve their professional skills and expand their intellectual horizons.[109] The program's objective is to fund research and demonstration projects that address strategies to improve the quality of teaching in elementary and secondary mathematics and science programs, increase the equality of access to instruction in these core areas for all students, and identify effective teaching methods and curriculum content conducive to student learning.[110]

Other programs address ability grouping by supporting strategies to provide all students with access to certain curriculum. The Star Schools program provides funds for local, State, and multistate entities to establish demonstration programs to (a) improve instruction for all students in mathematics, science, foreign language, and other subjects such as literacy skills and vocational education and (b) improve access to high quality mathematics and science programs to underserved populations, including the illiterate, limited-English-proficient students, and individuals with disabilities.[111] The Jacob K.

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[104] *See* U.S. Department of Education, *Making It Happen*, Issue 1: Access and Equity, pp. 1–2.

[105] RAND, Inc., Technology Plan, "School-wide Technology Implementations and Their Benefits: The Costs and Effectiveness of Education Technology," November 1995, p. 4. This is a series of papers prepared by RAND, Inc., concerning technology in the school system.

[106] Ibid., p. 3.

[107] For example, one career track focuses on science, technology, engineering, and manufacturing. Another career track focuses on human and government services that are designed to prepare students for careers in teaching, law, and public administration. Hands-on experiments and other on-the-job projects prepare these students for careers in these fields. Ibid., p. 3.

[108] 20 U.S.C. § 7233(2)(A)(ii) (1994).

[109] Pub. L. No. 101–589, 104 Stat. 2881. The program was authorized under the Elementary and Secondary Education Act of 1965, title II, part A, as amended. The forerunner was the Dwight D. Eisenhower Mathematics and Science Education Program established in 1988. It is currently administered by the Office of Reform Assistance and Demonstration, Development and Demonstration Division. Pub. L. No. 89–10, § 20001, as added Pub. L. No. 103–382 § 101, 108 Stat. 3612; Pub. L. 89–10, title II, as added Pub. L. No. 100–297, § 1001, 102 Stat. 219–227, part A, section 2012.

[110] Executive Office of the President, Office of Management and Budget, Update to the 1995 *Catalog of Federal Domestic Assistance*, 1995, p. 891 (hereafter cited as *Catalog of Domestic Assistance*).

[111] Ibid., p. 914. The Star Schools program was authorized under the Elementary and Secondary Education Act of 1965, as amended, and officially authorized in 1988. It was authorized to provide new learning opportunities for students who typically had no access to mathematics, science, or foreign language classes. Pub. L. No. 89–10, § 3201, as added Pub. L. No. 103–382, § 101, 108 Stat. 3654; Pub. L.

Javits Gifted and Talented Grants program provides funds to expand gifted and talent programs to serve all students. Funds are allocated for adapting existing programs and for developing new programs that implement innovative approaches, such as cooperative learning and peer tutoring, found in traditional gifted and talented classes.[112]

One program developed by the Department of Education, the National Diffusion Network, targeted low income students in grades 4–7, to help find more effective ways for them to use computers.[113] The program, formally called HOTS (higher order thinking skills), is intended to acquaint at-risk students with technology through indirect curricular approaches.[114] It emphasized cognitive skills, combines dialogue and drama with technology and learning theory,[115] and uses software differently from traditional computer instruction.[116] Recent reports on the project showed some of the following results: doubled national average gains on reading and mathematics test scores, and increased students' performance on measures of reading comprehension, writing, and performing novel tasks.[117]

At a 1995 conference sponsored by the Department of Education, participants suggested Federal action that could be undertaken by the Department to improve public knowledge and support for technology in schools. Suggestions included media campaigns, dissemination of information to parents, businesses, and community leaders about technology, coordination with other Federal agencies about related technology missions, and continuation of support for State and local technology initiatives.[118]

OCR's Enforcement Activities

Title VI Regulations

DOEd's most specific guidelines for eliminating discrimination, relative to teachers, counselors, curriculum and instruction, facilities and resources, are in appendix B to part 100 in the title VI regulations, which only covers nondiscrimination for these areas within vocational education programs.[119] Appendix B cites specific responsibilities and practices of vocational education programs, criteria for student eligibility and admission, remedies for facility segregation, equal access for students, and the role and responsibilities of counselors in the process. Similar guidelines are needed in the title VI regulations for other types of education programs, such as those that attempt to provide equal resources and equal access to educational opportunities.

Also, there is no implementing regulation that directly compels school districts to address other issues related to potential disparities between lower and higher ability groups, such as inequitable distribution of tangible (e.g., coursework, curriculum, and instruction) and intangible resources (e.g., quality and timeliness of textbooks and other academic materials and experience).[120]

In addition, OCR has not established any regulations that address the validity of educators' claims regarding the educational conditions of lower level groups, courses, and program level tracks, such as the reduced instructional time; lowered expectations of teachers; and limited provision of challenging coursework and curricular content.[121]

No. 98–377, title IX, as added Pub. L. No. 100–297, § 2302, 102 Stat. 320.

[112] *Catalog of Domestic Assistance*, p. 916. The Jacob K. Javits Gifted and Talented Grants Program was authorized under the Elementary and Secondary Schools Act of 1965, title IV, part B, secs. 4101–4108, as amended in the Hawkins-Stafford Elementary and Secondary Amendments of 1988. Pub. L. No. 100297, § 2151, 102 Stat. 130.

[113] The Department of Education no longer funds the National Diffusion Network. *See* Karl Lahring, assistant general counsel, Office of General Counsel, U.S. Department of Education, Note to Frederick D. Isler, assistant staff director, Office of Civil Rights Evaluation, U.S. Commission on Civil Rights, Sept. 9, 1997, p. 6.

[114] Coley, Cradler, and Engel, *Computers and Classrooms*, p. 37; Pogrow, "A Socratic Approach to Using Computers with At-Risk Students," p. 62.

[115] Coley, Cradler, and Engel, *Computers and Classrooms*, p. 37.

[116] Pogrow, "A Socratic Approach to Using Computers with At-Risk Students," p. 62.

[117] Coley, Cradler, and Engel, *Computers and Classrooms*, p. 37.

[118] U.S. Department of Education, *Making It Happen*, Issue 1: Access And Equity, p. 2.

[119] 34 C.F.R. § 100, app. B.

[120] *See* Oakes, *Keeping Track*, pp. 97–99; Oakes, "Keeping Track: Part I," p. 15; Adam Gamoran, "The Variable Effects of High School Tracking," *American Sociological Review*, vol. p. 814 (hereafter cited as Gamoran, "High School Tracking").

[121] *See* ibid. DOEd's Office of General Counsel has informed the Commission that "there is a statutory to ED's involvement with curricular setting, and OCR cannot become involved in dictating teaching methodologies or curriculum content. What we can do is review a school district's ability grouping program as it relates to the district's proffered educational justification." The Commission notes, however,

Title VI Compliance Standards

When determining if a school district has violated title VI, OCR assesses if the locality has provided a justification based on educational necessity for any significant disparities uncovered.[122] For example:

- DOEd's OCR informs school districts that mandatory placement assignments or decisions (by guidance counselors) in courses such as mathematics and science are discriminatory, if they serve to limit equal opportunity of minorities to access programs in these areas that are available to other students.
- OCR policy also stresses that a school district's "permissive assignments" (i.e., student choice) are discriminatory if minorities are steered into nonmath and nonscience courses while their peers are encouraged to pursue math and science program sequences. School districts are directed to discourage student choices that tend to create or perpetuate racially stereotyped program (e.g., math or science) offerings.[123]

Investigative Manual

OCR's draft Investigative Manual on underrepresentation of females and minorities in upper level mathematics and science includes the school district's provision of counseling and guidance services to students at the secondary level. The goal is to provide assistance in evaluating and determining whether such services discriminate against female and minority students by denying them equal access to upper level mathematics and science courses.[124]

The draft states that if the district has counseling and guidance services, OCR may determine whether the services are being provided to all students in a nondiscriminatory manner. OCR may interview counselors, teachers, students, and parents to reach the determination.

Other factors are whether the district has counseling and guidance policies and procedures for students, what grade level counseling services are initiated, and what criteria are used to evaluate the effectiveness of counseling and guidance services. In addition, OCR may seek to determine whether female and minority students and parents are made aware of the availability of upper level mathematics and science courses and counseling opportunities in the same manner as male and nonminority students and their parents. OCR can examine whether the district targets students for enrollment in upper level mathematics and science courses and, if so, the method of tracking used, and determine whether the information and services provided to students and their parents differ according to the race or gender of the students.

In the evaluation, OCR may look at what materials are used by counselors in providing services to students and whether the same materials are used for all students, and if not, require districts to provide "educational justification" for using different materials. Other elements would include whether counselors have appropriate qualifications or certification to provide counseling and whether there is any relationship between qualifications and in-service training of counselors and their assignment to work with female and minority students. In addition, OCR may examine the criteria counselors use in enrolling students in upper level mathematics and science courses, whether counselors discuss op-

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that this report is not suggesting that OCR "dictate" curriculum or teaching methods. Nonetheless, OCR does have a responsibility to ensure that neither curriculum nor teaching methods play a role in creating unlawful discrimination under title VI.

[122] U.S. Department of Education, Office for Civil Rights Evaluation, Draft "Investigative Manual: Underrepresentation of Females and Minorities in Upper-Level Mathematics and Science in Secondary Schools," prepared by Expert Team on Underrepresentation of Women and Minorities in Mathematics, Science, and Other High Track Course, August 1994, p. I–8 (hereafter cited as OCR, Draft "Investigative Manual: Underrepresentation in Math and Science"). "Disparities" in enrollment in upper level math or science courses, prerequisites, tracks, sequences, or ability groups are based on the underrepresentation of a particular group of students, such as minorities. *See* ibid., p. I–1. If minorities are 30 percent of a student population, they are underrepresented in a particular program if their share of enrollment is below 30 percent. The "disparity" is based on the difference between minorities' share of enrollment in the student population relative to their share of enrollment in the particular program. "An ability grouping system violates Title VI if there is an equally effective alternative educational practice that results in less racial disproportionality. . . ." *See* Richard Komer, Deputy Assistant Secretary for Policy, U.S. Department of Education, memorandum to OCR Regional Civil Rights Directors, "Ability Grouping Investigative Procedures Guidance," Mar. 14, 1991, p. 6.

[123] OCR Draft "Investigative Manual: Underrepresentation in Math and Science," p. I–8.

[124] Ibid., chap. II, p. II–1.

portunities for careers in mathematics and science with students, whether parents and students are made aware of research, financial assistance, and other resources in these subject areas, and whether alternative courses are made to assist students currently enrolled in upper level mathematics and science courses.

The Investigative Manual states that to decide whether a violation has occurred, OCR must determine whether the district employs discriminatory practices in counseling and guidance services to students in upper level mathematics and science courses and their prerequisites. A recipient that offers no reason for any significant disparities may be in violation of title IX and title VI. To determine if the recipient has provided a justification based on educational necessity for any significant disparities, the manual presents the following guidelines:

(1) If a recipient offers no reason for the discriminatory practices identified with respect to counseling/guidance programs, services, and benefits, the recipient is violating 34 C.F.R. §§ 100.3 and/or 106.36.
(2) Steering female and minority students as a group away from upper-level mathematics and science courses cannot be legally justified, although the district may be able to explain such a practice with individual students if such action is not discriminatory.
(3) Counseling materials that do not reflect minorities and females are not acceptable when counseling practices are identified as a cause of underrepresentation of females and minorities in upper-level mathematics and science courses. Appropriate counseling materials are generally widely available or can be developed by the district; there is, therefore, generally no legally sufficient reason for their unavailability at a district's schools.[125]

The effectiveness of the guidance and counseling services provision in the manual is unknown, since OCR has no specific policy on investigating underrepresentation of females and minorities in mathematics and science, nor were any such complaints investigated or reviews done before 1994. In addition, the manual focuses on reviewing the underrepresentation of females and minorities in upper level mathematics and science in secondary schools. The influence of guidance counseling on students begins during the elementary school years, and its potential effect on students' assignment and curriculum is not limited to mathematics and science, or advanced courses.[126]

Furthermore, because ability grouping practices have numerous associated barriers in addition to the overrepresentation of minorities in lower level groups, guidelines for compliance reviews within a school could also address, for core academic courses, disparities between lower and higher ability level groups, courses, course sections, and classes with respect to education factors such as: tangible and intangible resources (e.g., quality and timeliness of textbooks and other academic materials; experience, education level, and other background factors of teachers; student access to services such as counseling); coursework (e.g., fill-in-the blank, workbook exercises compared to extensive writing assignments; basic mathematical calculations compared to mastery of theoretical concepts); curriculum (e.g., content substance and quantity; depth and breadth of subject matter); and instruction (e.g., methods used; pace of presenting course material; actual class time used by teacher to instruct students).[127]

Gifted and Talented Investigative Plan

OCR Region VI (Dallas, Texas) has developed a draft Investigative Plan for assessing gifted and talented programs.[128] The draft Investigative Plan provides approaches for compliance reviews and complaint investigations under title VI. It addresses the underrepresentation of minorities in gifted and talented programs. Critical to the plan are issues of counseling and guidance and whether a school district discriminates against students based on their race and national origin by failing to provide these services.

The draft Investigative Plan states OCR will interview students to determine whether counselors are steering students toward or away from the gifted and talented programs. In addition,

[125] Ibid., p. II–9.

[126] Ibid., Introduction, p. 2, pp. II–1 to II–9.

[127] *See* Oakes, *Keeping Track*, p. 97–99; Oakes, "Keeping Track: Part I," p. 15; Gamoran, "High School Tracking," p. 814.

[128] U.S. Department of Education, Office for Civil Rights, Region VI, Draft "Gifted and Talented Investigative Plan," (no date), received from OCR Region VII in response to U.S. Commission on Civil Rights Request for Information Letter dated June 26, 1996 (hereafter cited as OCR, Region VI, Draft "Investigative Plan").

OCR will determine whether counselors inform students and parents about the availability of counseling and guidance services. OCR will determine what types of encouragement are used by counselors and their effect on enrollment in the program. OCR will carry out the following tasks in determining whether the counseling and guidance services are discriminatory:

- OCR will examine whether students and parents are made aware of the availability of the gifted and talented programs, whether parents are included when counseling and guidance services are provided to students, whether students are required to use counseling and guidance services before enrolling in the program, and whether parents are included in the enrollment process. OCR will look at whether the district provides counseling and guidance services to students experiencing difficulty in the programs.
- OCR will determine what materials are used to provide counseling and guidance services to students and whether the services are the same for all students. OCR will also determine if the materials used are free from racial and ethnic stereotypes or other discriminatory elements.
- OCR will look at whether counselors have appropriate qualifications or certification. OCR will also obtain detailed information about training opportunities provided to counselors by the district.
- OCR will determine whether counselors maintain, review, and analyze course enrollment data to identify disproportionate enrollment figures regarding minority enrollment.[129]

The draft Investigative Plan includes questions that OCR can ask students about counseling and guidance services and 13 data requests, including a description or narrative summary of how parents are made aware of the availability of gifted and talented programs.[130]

OCR Region VII Pilot Project

OCR Region VII (Kansas City, Missouri) has prepared a document that is a guide to facilitate a partnership approach to civil rights compliance among Region VII, local school officials, and interested local communities. The purpose of the document is to assist officials and community groups who wish to do self-assessments to ensure that students are not rated differently in assignment to advanced classes and in provision of counseling and guidance services and other program services and facilities.[131] OCR Region VII plans to use the document as well as a "Self-Assessment Guide" in doing Profile, Assessment, and Resolution (PAR) reviews to assist school systems in complying with title VI.[132] The goal of the PAR review process is to reduce the burden of title VI compliance reviews by encouraging State and local self-assessment. However, school districts are not required to use the document.

The PAR includes counseling and guidance services that may be provided to students seeking advanced placement. It states that if such services are provided, they should not direct or urge any student to enroll in a particular career or program, or measure or predict a student's prospects for success based on race, color, or national origin. In evaluating the underrepresentation of minorities in guidance and counseling in the advanced classes program, the district should:

- Evaluate its counseling and guidance materials to ensure that they are free from racial stereotypes and other biases, or from discriminatory counseling or appraisal methods.
- Inform all students and parents about the availability of counseling and guidance services on prerequisites for advanced classes.
- Assign counselors to students without regard to the race, color, or national origin of the students or counselors.

[129] Ibid., p. 17.

[130] *See* ibid., pp. 16–19.

[131] U.S. Department of Education, Office for Civil Rights, Region VII, "Profile, Assessment, and Resolution Reviews: Equal Educational Opportunities for Minority Students in Advanced Education Programs" (undated), received from OCR Region VII in response to U.S. Commission on Civil Rights Request for Information Letter dated June 26, 1996, p. 1 (hereafter cited as OCR Region VII, "PAR Review for Minority Students in Advanced Education Programs").

[132] OCR Region VII, "PAR Review for Minority Students in Advanced Education Programs," p. 1. For a further discussion on PAR reviews, *see* U.S. Commission on Civil Rights, *Equal Educational Opportunity Project Series: Volume I* (December 1996), pp. 210–12.

If a district offers advanced classes at more than one school, the services offered and the facilities should be comparable for all students. The district should provide comparable academic materials, facilities, teachers with comparable background and training, comparable counseling services and curriculum, and comparable access to resources, such as laboratory facilities.

The PAR also offers guidance as to the legal standards that should be applied in implementing title VI. For counseling and guidance services, the issue is whether a district discriminates against minority students by failing to provide them with services equal to those for nonminority students. Disparate impact surfaces if the district's policies, procedures, and practices regarding counseling and guidance services appear to be neutral, but have the effect of excluding minority students from advanced classes. In addition, different treatment becomes an issue if the district provides counseling and guidance services to minority students in a different manner than to nonminority students.[133]

Cases

The investigative approach outlined above for reviewing participation of female and minority students in upper level mathematics and science courses, and in gifted and talented programs starts by determining if are significantly underrepresented in these courses. If female and minority students are enrolled in proportion to their numbers in the school population, OCR ends the inquiry. If statistically significant disparities are found, OCR then examines district and school policies and practices that affect student entry into these courses to determine whether they discriminate against the underrepresented group. It is the school district's responsibility to provide valid, nondiscriminatory reasons for the disparities.[134] The cases following illustrate the process.

Newport Mesa, California, School District

In January 1996, the Office for Civil Rights San Francisco Regional Office conducted a compliance review in the Newport-Mesa Unified School District in California. OCR reviewed whether female and minority students, including limited-English-proficiency (LEP) students, had equal opportunity to participate in the school district's upper level mathematics and science courses. OCR analyzed enrollment data provided by the school district and found that Hispanic and LEP students were overrepresented in most basic or noncollege preparatory mathematics and science courses, and underrepresented in many college preparatory and upper level mathematics and science courses. OCR found varying degrees of participation at different schools; however, on a districtwide basis, the disproportions were statistically significant for a number of subjects.

To carry out the review, OCR went on-site and interviewed administrators, counselors, mathematics and science teachers, and students. In essence, OCR inquired about how students come to be enrolled in a course, and whether administrators and teachers were aware of the low enrollment of females and minorities, and if so had taken steps to address it. OCR learned that enrollment in mathematics or science was a combination of teacher recommendations, student choice, counseling, and completion of course prerequisites. OCR did not find evidence of intentional discrimination in the placement process.

However, OCR identified other factors that influenced the underenrollment of Hispanic students in college preparatory, advanced mathematics, and science courses. OCR found that the counselors had extremely large caseloads, making it difficult to provide individualized counseling and planning for students. In addition, while there was heavy reliance on teacher recommendations for student placement, the district had not established guidance or criteria for making recommendations. Furthermore, OCR found that the attitudes of some counselors and teachers toward the students may influence enrollment as they showed lower expectations that Hispanic and LEP students could excel in such

[133] OCR Region VII, "PAR Review for Minority Students in Advanced Education Programs," pp. 1–6.

[134] *See* Office for Civil Rights, San Francisco Regional Office, Region IX, Letter of Finding to Mac Bernd, superintendent, Newport-Mesa Unified School District, CA, January 1996, p. 1; OCR, San Francisco Regional Office, Region IX, Letter of Finding to Michael Caston, superintendent, Santa Barbara High School District, CA, July 28, 1995, pp. 1–2; OCR, San Francisco Regional Office, Region IX, Letter of Finding to Sharon C. Tucker, superintendent, Visalia Unified School District, CA, Dec. 22, 1994, p. 1. For further discussion of OCR's title VI analysis, *see* chap. 3.

courses. In interviews, OCR learned that student choice in the selection of these courses could be a barrier. Since it has been uncommon for Hispanic female students to enroll in advanced mathematics and science in the past, it would be unusual for them to choose to take such courses because they may feel they do not belong in such classes.

Staff in one of the high schools had initiated steps to address the underrepresentation of minorities in mathematics. The school compiled a list of tutors, including bilingual ones and reached out to other school clubs for support. One teacher in the mathematics department personally reached out to the parents of the students who planned to enroll in advanced mathematics. Her efforts increased the enrollment of minority students in the class. However, in general, the district and all school sites had not addressed the issue of underrepresentation in a "systematic manner." Efforts to do outreach and provide information to parents about mathematics and science courses, and college requirements varied from school to school. And while many of the teachers agreed that special approaches may be needed to include LEP students in these courses, such as language assistance, they thought there were too few appropriately trained staff to meet many of these students' special needs. To resolve the complaint, the district agreed to adopt and implement a comprehensive plan to identify and eliminate barriers, and expand opportunities for minority and LEP students in mathematics and science courses. Some of these initiatives included training for counselors and teachers and improving parent outreach and information dissemination.[135]

Santa Barbara, California, School District

In July 1995, the San Francisco Regional Office for Civil Rights reviewed minority and female access to upper level mathematics and science in the Santa Barbara High School District. OCR did not find that female students were underrepresented. However, OCR found that Latino students, who were approximately 40 percent of the student body, were significantly underrepresented in a number of upper level mathematics and science courses, while white students were overrepresented in many of these same courses. A prima facie case of discrimination was established.

Based on data and interviews with administrators, teachers, counselors, and students, OCR identified possible factors or barriers contributing to the disparate enrollment. They included:

- A lack of staff development and training in working with and teaching Latino students.
- Insufficient training and numbers of counselors.
- Low expectations by staff of Latino student performance.
- Prerequisites for advanced placement and gifted and talented education courses that may preclude Latino students from enrolling in these areas.
- Insufficient primary language support in upper level mathematics and science courses to address the needs of limited-English-proficient Latino students.
- Insufficient efforts to encourage Latino parent involvement.
- Permissive class assignments (student choice as a form of tracking Latino students into lower level classes).
- Unequal distribution of staff resources such that lower level classes, where Latino students were overrepresented, were taught by less experienced staff, while upper level classes had overrepresentation of white students and were taught by more experienced teachers.

To address these concerns, OCR contacted one of its educational regional laboratories to provide assistance to the school district. The school district and the laboratory will work together to create a comprehensive plan to ensure equal access to upper level mathematics and science courses for underrepresented minorities. In July 1995, the school district submitted a voluntary resolution agreement and planned to submit a draft comprehensive plan in December 1995. OCR planned to monitor implementation of the

[135] Office for Civil Rights, San Francisco Regional Office, Region IX, Letter of Finding to Mac Bernd, superintendent, Newport-Mesa Unified School District, CA, Jan. 26, 1996, pp. 1–6.

plan and the progress made by the school district through July 1998.[136]

Fredericksburg, Virginia, School District

In January 1995, the Office for Civil Rights conducted a compliance review of the Fredericksburg City School Division in Fredericksburg, Virginia. A complainant alleged that the school district discriminated by implementing policies and practices at one of the high schools that had the effect of limiting the opportunities of African American students and students with learning disabilities. OCR reviewed the procedures, student records, and other documents, and interviewed the complainant, counselors, and administrators. The review did not find evidence to support a violation of title VI, title IX, or section 504. However, OCR highlighted some of the high school's practices with respect to some of the factors discussed in the chapter. It was these practices that may have led to OCR's determination of no violation. In the review, OCR found:

- Seventh grade students at the middle schools and their parents are provided with information about the requirement for the four diploma programs through printed materials, an orientation day, an evening program, and a session with a guidance counselor. Guidance counselors make the recommendations to the programs, but, with the parent's permission, a student may select any diploma program.
- Each subsequent year, the student meets with the guidance counselor, and a program of courses is recommended based on such factors as the student's progress in previous coursework and interest. Students may, with parental permission, select courses that are recommended, as long as any prerequisites have been met.
- According to the guidance counselors, when a student expresses the desire to take a course other than the recommendation, the counselor initiates parent contact to secure a written confirmation. Students acknowledged that their decisions, together with their parent's approval, override recommendations made by the staff.

OCR also reviewed the parental override requests for the 1994–95 school year and found that all the requests were granted, regardless of race.[137]

Lawton, Oklahoma, School District

In December 1994, the Office for Civil Rights in Region VI, initiated a compliance review of the Lawton, Oklahoma, Public Schools' gifted and talented program. The review focused on the underrepresentation of minority students. To carry out the review, OCR conducted an onsite visit, obtained and analyzed data, and interviewed district staff, parents, and community residents to identify policies, practices and/or procedures that might be contributing to the underrepresentation of minority students in the program. The investigations revealed that the policies and procedures were nondiscriminatory on the basis of race or ethnicity. However, the statistical information indicated an underrepresentation of minority students in some of the district's gifted and talented programs.

The identification process for each area of giftedness consists of screening, nominating students for possible placement, and placing students with special needs in appropriate curriculum. Although the screening and identification process requires parental notification and teacher participation, OCR learned that the principal or a designee was responsible for overseeing the screening process. In addition, a standardized test score form must be signed by the principal, parent, school psychologist, the gifted and talented teacher, and the regular teacher. OCR's review of the criteria for nominating, screening, and selecting students did not find that the criteria, on the surface, were discriminatory. However, the analysis did reveal significant underrepresentation of minority students in the program. For example, interviews with school officials, parents, and students indicated that information about the program was not "sufficiently disseminated" to parents of minority children. The evidence gathered indicates that minority students were not being referred at the same rate as white students. School officials stated that teachers and parents were not effectively participating in the referral process.

[136] Office for Civil Rights, San Francisco Regional Office, Letter of Finding to Michael Caston, superintendent, Santa Barbara High School District, CA, July 28, 1995, pp. 1–3.

[137] Office for Civil Rights, Letter of Finding to Dr. J. Garnett, superintendent, Fredericksburg City School Division, Fredericksburg, VA, Jan. 13, 1997, pp. 1–4.

OCR suggested that their minimal participation could be a reason for the underrepresentation of minority students in the program. In resolving the complaint, the school district agreed to perform specific actions that would address OCR's areas of concern raised in the compliance review.[138]

Visalia, California, School District

In December 1994, the Office for Civil Rights San Francisco Regional Office reviewed the Visalia Unified School District in California, with regard to underrepresentation of female and minority students in mathematics and science programs. After analysis of enrollment data, OCR found that the district had not violated title IX and dropped that portion of the case.

OCR found that Hispanic students were significantly underrepresented in a number of upper level mathematics and science courses, and sought to determine the reasons for the disparity. OCR interviewed administrators, counselors, mathematics and science teachers, parents, and students. OCR also reviewed the district's placement criteria, which included teacher recommendations, counseling and guidance services, and testing. It could not find any policy or practice discriminatory on the surface.

OCR identified a number of "speculative reasons" for the disparity, including a lack of sufficient funds to provide special tutoring programs that were once available for minority students and the counselors' heavy caseloads, which affected the monitoring of and support for students. To resolve the complaint, OCR and the school district reached agreement on a voluntary resolution plan that requires the district to develop and implement a comprehensive plan to ensure equal educational access to upper level mathematics and science courses and their prerequisites for underrepresented minority students.[139]

In resolving these cases, OCR went beyond its standard analysis of enrollment data. It identified barriers to the inclusion of minorities in advanced mathematics and science, and gifted and talented programs, and included the elimination of these barriers or factors as part of the resolution. Thus, although these barriers are not covered as criteria under the title VI regulations, OCR acknowledges their effect on equal educational opportunity for these students and includes them in their compliance reviews, at least in these subject areas.

Putnam County, Georgia, School District

In a letter of finding to the Putnam County School District in Eatonton, Georgia, OCR did not find a civil rights violation in a district's placement of African American teachers in low, middle and high level classes. However, in its investigation, OCR found that there are no written or unwritten policies for assigning teachers to low, middle, and high level classes, and that there are no qualifications or requirements for teaching each level.[140]

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[138] Office for Civil Rights, Region VI, Letter of Finding to superintendent, Lawton Public Schools, OK, October 1995, pp. 1–4.

[139] Office for Civil Rights, San Francisco Regional Office, Letter of Finding to Sharon C. Tucker, superintendent, Visalia Unified School District, CA, Dec. 22, 1994, pp. 1–2.

[140] The complainant alleged that the school district discriminated against black teachers, on the basis of race, by denying them an opportunity to teach the middle and high ability groups at an elementary school. The investigation showed that in the school district, African American teachers are being assigned to classes in a manner proportionate to the representation of African American teachers in each grade. U.S. Department of Education, Office for Civil Rights, Region IV, Atlanta, GA, Letter of Finding to William R. Dabbs, Superintendent, Putnam County School District, Eatonton, GA, Feb. 10, 1992, pp. 1–5.

Chapter 8

Findings and Recommendations

Conclusion

The U.S. Department of Education's (DOEd) Office for Civil Rights (OCR) enforces title VI of the Civil Rights Act of 1964 to ensure nondiscrimination and eliminate barriers based on race, color, or national origin in all federally assisted programs funded by DOEd. Title VI and its implementing regulations and policies are invaluable tools for improving equal access to quality education programs. However, the promotion of equal access to a quality education cannot be achieved through civil rights laws alone. The application of education research, theories, and innovative practices also are essential for creating a quality education system accessible to all students.

OCR has recognized the importance of ensuring nondiscrimination in ability grouping and tracking by adopting the issue as one of the priority issues in its Strategic Plan. However, OCR's title VI implementation, compliance, and enforcement program, while generally well-developed and sound, has significant gaps, particularly relating to within-school grouping practices. OCR has not issued formal or final policy guidance on title VI enforcement of this issue, thereby failing to clarify for schools, parents, and students, as well as for its investigators, the standards for ensuring compliance with title VI.

The draft investigative guidance OCR has issued to its investigators is outdated and incomplete. The draft guidance is not sufficiently detailed to provide comprehensive guidance on conducting thorough ability grouping and tracking investigations. Although the draft guidance lists the types of data OCR investigators should collect from school districts, it fails to provide practical instructions for analyzing this information. Moreover, the draft guidance provides only a few examples of the types of ability grouping practices that OCR investigators may encounter.

OCR has conducted a number of ability grouping and tracking investigations, but its letters of finding and resolution agreements do not provide a detailed record of the process and analysis used to reach its decisions. Furthermore, it is not clear that OCR devotes sufficient resources to monitoring school districts after they have been issued a letter of finding to ensure that the provisions are implemented.

Educators and researchers continue to study and debate the effectiveness of ability grouping practices. Placing all students in the same type of classroom and exposing them to similar instructional material may not equalize their educational opportunities or foster educational excellence. Whole-class instruction, in which all classmates encounter the identical lecture, with its specific curricular content and quantity, depth and breadth of subject matter, and pace, may be ineffective for students at either end of the academic learning and achievement spectrum. Rather, to serve students appropriately, the education system must recognize that students differ in their curricular content needs and the instructional methods most conducive to their learning. Thus, to ensure all students have an equal opportunity to receive an education that prepares them for participation in society, a balance must be struck between accommodating the diverse needs of students while providing essential knowledge, skills, and experiences.

This report has described several strategies and programs that address and affect school policy, classroom organization, educational curriculum (i.e., content, substance, and depth of subject matter), methods of instruction, parental participation, division of resources, and responsibilities of school personnel. These education practices and innovative approaches can be developed and implemented to: (a) reduce the potential barriers associated with ability grouping practices, (b) assign students appropriately to classes, and (c) maximize educational equity and

student learning. In addition, various innovative practices specifically aim to address the disparities among students with respect to their participation and achievement in advanced academic courses and ability groups.

OCR must work with schools and parents to ensure ability grouping practices comply with title VI nondiscrimination standards and provide minority students equal access to and meaningful participation in education programs. To accomplish this task, it is important for OCR to develop thorough, formal, and consistent guidelines for ability grouping practices. Nondiscriminatory ability grouping practices place students in specific subjects based on their performance in those subjects, provide frequent opportunities to move among ability groups, and maintain education programs of comparable quality among all grouping levels. It is OCR's responsibility to enforce title VI by evaluating ability grouping practices, particularly practices that result in different treatment or disproportionate representation of minority students, to ensure that (1) the practices are supported by substantial educational justifications, (2) the practices used are the least likely to cause a disproportionate representation of minority students, and (3) the practices achieve their intended goals.

The use of arbitrary and subjective screening and diagnostic practices to place students in ability groups can be a barrier to equal educational opportunity for children, particularly those who are placed in lower ability groups. The screening and diagnostic procedures used to make these important assessments must be designed carefully to avoid improper placement. Research shows that a lack of consistent, neutral, and uniform screening and diagnostic procedures can result in inappropriate, and often, discriminatory placement of minority students in ability groups. In addition, research shows the inappropriate placement of students based on the misapplication of these practices affects their self-esteem, achievement levels, and overall perceptions about education.

Standardized testing is one of the key screening and diagnostic practices used in placing students in ability groups. Historically, tests have been used discriminatorily against racial and ethnic minorities to place them in lower level classes and to reinforce a segregated school environment. Many studies have found that, because of standardized tests, low income and minority students are placed disproportionately in the lowest groups or in remedial programs. Moreover, these students often are underrepresented in advanced curriculum and gifted and talented programs.

One of the major challenges for educators is to use standardized tests to identify, screen, and place children nondiscriminatorily in groups based on the needs of students. However, research suggests the reliance on tests has had harmful consequences for individual students, particularly minority students. Standardized tests are problematic because of their increased potential for racial and ethnic bias and the validity of the scores derived from them.

OCR has taken some steps to ensure its title VI compliance and enforcement activities address the issue of neutral and nondiscriminatory screening and diagnostic procedures. In particular, OCR has developed draft investigative guidance for its staff on fairness in testing to assist them in investigations involving the use of tests in placement decisions. However, OCR has not formalized this investigative guidance. Furthermore, although DOEd's title VI regulations clearly prohibit the discriminatory use of tests in placement decisions, OCR has not produced policy guidance to provide specific compliance standards in this area, nor has it produced detailed technical assistance documents on diagnostic and screening procedures to assist schools in understanding their obligations under title VI.

Education researchers, the Federal Government, and State and local school officials view parental and community involvement as important components in the public school education for all students. For the most part, parental involvement programs are voluntary rather than required as a matter of national policy for all students. When parental involvement programs are established, they usually are targeted to specific groups of parents and neighborhoods, and are more reactive than proactive.

The amount of parental and community involvement is influenced also by the ability grouping of the students. Parents of children in higher ability or advanced courses tend to be more informed and involved in their children's education. Parents of children in lower ability classrooms tend to be less informed and involved in their children's education. Their minimal amount of involvement is not because of a lack of interest in their children's education, but rather

is due to other barriers, including minimal outreach by schools, their lack of knowledge and understanding of school programs and policies because of the minimal outreach, and their lack of resources to become actively involved in programs and activities. These parents leave their children's education primarily to school officials.

The minimal involvement of parents and the community in the education of students in lower ability groups adversely affects minority and disadvantaged students, since they are disproportionately placed in the lower level groups. Although parental and community involvement can improve the academic achievement of students, minority children are often limited in their access to equal educational opportunities in part because there is no uniform policy for ensuring school districts establish parent and community involvement programs.

Low parental and community involvement for lower ability students may influence the fact these students usually are given poorer quality teaching and guidance, curriculum and instruction, and resources for their education. These students often are assigned to teachers and counselors with preconceived notions about their abilities as students, who use unsophisticated and outdated instructional procedures and practices, and who do not provide adequate and current resources for their education. As a result, these children are expected to do more with less.

To achieve equal educational opportunity throughout public education, equity and excellence in teaching, curriculum, instruction, facilities, and resources must be provided for all students, regardless of their ability grouping. For example, a teacher should exemplify the same qualities, including teaching experience and requirements, regardless of the classroom assignment. In addition, the level of instruction should meet the needs and abilities of each student. Educational experiences and resources that can enhance children's knowledge, skills, and achievement should be made available for all students, whether they are in high level or low level ability groups.

In addition, equal educational opportunity in public education requires that all levels of government play the roles of facilitator, analyst, resource provider, and advisor in school matters. Barriers such as inadequate teaching and counseling services for some students, and minimal or outdated resources should be addressed in every school program, and not just in certain educational activities. School, home, and community partnerships need to be mandated and not just encouraged or promoted. Children in low ability groups, a disproportionate number of whom have received less in education historically, will remain behind in academic achievement and success if all components, including Federal, State, and local education officials, parents, and communities are not involved in the public school system.

The disparity in the educational experiences of higher and lower level students has triggered a push for reform in the way the students in lower tracks are educated. Many school reformers are calling for a restructuring of the entire public education system to a new system that assesses and places students according to their interest and motivation, rather than on preconceived attitudes about their abilities or other unfair screening mechanisms.

OCR has compliance documents with specific requirements that guide staff in determining discrimination against minorities in certain programs. However, the focus of title VI enforcement is on the underrepresentation of minorities who enroll in upper level, advanced education, or gifted and talented programs. The kinds of services, materials, faculty, facilities and resources these students receive are reviewed by OCR for title VI compliance. However, education research finds poorer quality services, instruction, facilities, and resources are found in lower ability (or below-average or regular) classrooms.

It is commendable that OCR reviews districts' activities and practices in the upper level and advanced mathematics and science courses, and gifted and talented programs. Numerous letters of finding show that OCR is addressing many of these barriers in these courses. However, title VI, OCR's implementing regulations, and OCR compliance documents should address the same elements, such as counseling and guidance services, parental involvement, faculty, resources, and facilities, for all levels of coursework, throughout the school system.

General Findings and Recommendations

Finding: Historically, many school officials used ability grouping practices to separate students based on racial rather than academic considerations. This was particularly true in the period after the U.S. Supreme Court issued its

landmark *Brown* decisions prohibiting racial segregation in education and obligating the Federal Government to take affirmative steps to eradicate it. For years, many local education officials simultaneously complied with the judicial mandate to allow students of different races to attend the same schools while they relied on ability grouping and tracking to achieve de facto segregation within these schools. Officials typically assigned white students to higher ability groups, giving these students instruction to encourage critical thinking, providing them with sophisticated learning equipment, and preparing them for college and professional careers. Minority students, in contrast, were assigned mostly to lower ability groups where teachers taught by rote, instructional materials were scarce and simple, and preparation for higher education or professional employment did not occur.

Today, most schools in the United States still use ability grouping to organize students. Proponents describe it as an educationally justified practice to enhance the learning experience of students of differing ability levels. However, debate continues on the legitimacy and efficacy of the practice, especially since recent data indicate racial minority students remain overrepresented in lower level ability groups and underrepresented in higher ability groups.

Recommendation: In its 1994 Strategic Plan, OCR listed the overrepresentation of minorities in lower track courses as one of its priority issues. OCR also indicated this issue remained a priority in its fiscal year 1996 budget request to Congress. In light of the historical and possible continued misuse of this widely employed educational practice, OCR should investigate and monitor vigorously the manner in which schools implement ability grouping to ensure compliance with civil rights laws. OCR should establish a goal to eliminate pretextual ability grouping, which perpetuates segregation, and thus ensure schools assign students based on academic qualifications and interests.

OCR also should strengthen and improve its technical assistance, outreach, and education programs to provide clear and detailed guidance to State and local education agencies, school administrators, district title VI compliance officers, teachers, counselors, professional support staff, and parents on the appropriate ways to implement at all stages of education planning the five key principles identified by the Commission. These principles are: (1) providing parental notification and encouraging parental participation; (2) using neutral and nondiscriminatory screening and diagnostic procedures; (3) structuring education programs to serve a diverse student population by grouping students to reflect differential ability in various subjects and reevaluating and reassigning students periodically to reflect changes in ability; (4) evaluating and allocating teachers, facilities, and other resources among education programs; and (5) taking steps to eliminate all institutional barriers, promoting equal access to all subjects and activities, and counseling each student to maximize his or her potential opportunities. By focusing on outreach, education, and technical assistance, OCR may maximize its resources by preventing discrimination and ultimately reducing the number of complaints filed against school districts.

However, guidance alone will not ensure equal access to educational opportunities or compliance with title VI. OCR should require State and local education agencies and school districts to establish accountability systems to monitor and ensure all school personnel understand and apply the key principles. For example, school districts may require all school personnel to attend annual seminars and courses on civil rights implementation and compliance as well as practical workshops on applying the key principles to the day-to-day classroom experience.

Finding: Throughout the United States, many students in lower ability groups or low achieving schools are isolated and afforded unequal educational opportunity. They are taught with a watered-down curriculum and held to lower standards than their peers in higher ability groups and schools. The devastating message these students receive is that they are not expected to attain high levels of academic achievement, and the result is students believing they are "dumb." Confronted with systemic indifference, students stop trying. Furthermore, even those who maintain a positive attitude and try are denied the opportunity to succeed academically, because they are not offered the same quality of education offered their peers in higher ability groups and higher achieving schools. This has serious implications for the equal educational opportunity of minority students in particular, since in many schools ability grouping

and tracking practices historically were used to segregate minority students into lower ability level courses or tracks, based not on their academic abilities or interests but rather on their race.

Across the country, it has been found that the best way to reverse the debilitating effects connected with ability grouping and tracking is to provide all students with demanding curricula, hold all students to high academic standards, and hold school administrators, principals, teachers, and other school personnel accountable for the achievement of the students they teach.[1] However, citing the double bind of scarce resources and ever increasing student diversity, many schools have not remedied the disparate educational quality of programs among student groups or tracks.

Recommendation: DOEd, as the Nation's highest office for educational issues, should use its considerable authority to spur schools' efforts to equalize the educational opportunity of students in schools where ability grouping is practiced. OCR could assist schools in these efforts by funding promising initiatives and disseminating information about innovative practices. In addition, DOEd and OCR should work with school administrators and universities receiving public funds to create partnerships between schools and universities in their communities to support efforts to provide equal educational opportunity to all students. Universities could augment teaching in low achieving, often predominantly minority schools and ability groups by providing university students to mentor elementary and secondary school students isolated in these schools and ability groups. Universities also could offer seminars and courses, perhaps at a discounted cost, to local school teachers to provide them with training, curricula, and other tools specifically designed to meet the educational needs of students in lower ability groups.

It is imperative that schools take steps to ensure that ability grouping and tracking do not result in unequal educational opportunity for students placed in lower ability groups and students in low achieving schools. In particular, schools should ensure that, if they group students according to their ability, they nevertheless provide students in lower ability groups with challenging curricula and hold them to the same high standards as other students. To do this, school districts must implement mechanisms to hold school administrators, teachers, and other personnel accountable for the achievement of students in low ability groups and low achieving schools. School personnel cannot enjoy perpetual job security when evidence shows they are failing to educate students in their schools. Furthermore, school districts must take innovative steps to ensure these students are afforded the extra help they need to meet high academic standards.

Finding: In general, the Department of Education's enforcement of title VI in ability grouping practices reflects a commitment to the promotion of equal educational opportunity through civil rights, compliance, and enforcement. OCR has taken a number of innovative steps to enhance its enforcement of title VI in ability grouping practices. However, OCR has not adequately focused its implementation, compliance, and enforcement efforts on the five critical principles identified by the Commission as essential for ensuring equal educational opportunities for minority students.

The Commission found many of these principles frequently are addressed individually by OCR in its title VI civil rights implementation, compliance, and enforcement activities. However, OCR has not developed a comprehensive enforcement program that recognizes all these principles must be incorporated into education programs to ensure equal access, equity, equal educational opportunities, and most important, nondiscrimination for minority students in ability grouping practices.[2]

Recommendation: OCR should update and formalize its title VI policies and procedures. Specifically, OCR should incorporate the five key principles identified by the Commission and listed above. OCR should develop policy guidance to show how the five key principles can foster effective participation and meaningful access for all students. OCR should develop and disseminate technical assistance documents using these five principles as a comprehensive framework for promoting equal educational opportunity. These policy guidance and technical assistance documents will provide working definitions for the legal requirements and provide

[1] *See* chap. 4, pp. 53–61 and chap. 7, pp. 95–102.

[2] *See* chap. 4, pp. 61–70.

school districts with practical guidance on complying with title VI in ability grouping practices.

Chapter 3: Office for Civil Rights Compliance and Enforcement Efforts

Finding: Since 1990, OCR has placed a high priority on issues related to ability grouping practices. However, as of 1998, OCR had not issued a single, coherent, and cohesive policy guidance document or investigative manual to assist legal and investigative staff working on title VI ability grouping compliance reviews and complaint investigations or schools seeking to ensure their ability grouping practices comply with title VI. In 1991 OCR wrote draft investigative guidance for ability grouping investigations titled "Ability Grouping Investigative Procedures Guidance," and released a draft plan for an ability grouping compliance review, "Investigative Plan Ability Grouping Compliance Review." However, neither of these two documents has been finalized or issued formally. Although the documents remain in draft form, OCR regional staff use the investigative guidance, at least, in conducting investigations.[3]

Recommendation: OCR should update and finalize and issue formally the draft documents on ability grouping practices and develop an investigative manual similar to the draft manual "Underrepresentation of Females and Minorities in Upper-Level Mathematics and Science in Secondary Schools." The finalized documents should specifically incorporate the five principles as essential in ensuring equal educational opportunities for all students, and, therefore, crucial in effective title VI implementation, compliance, and enforcement efforts in ability grouping practices.

Finding: Neither the title VI regulations nor any OCR policy or technical assistance document provides a definition for the term "ability grouping practice." With definitions for this term, OCR can offer clearer guidance to school districts in identifying programs based on ability grouping practices that are racially discriminatory.[4]

Recommendation: OCR should provide in a title VI ability grouping policy or technical assistance document a definition of the term "ability grouping practice."

Finding: OCR's 1991 draft investigative guidance provides a legal analysis of title VI as it relates to ability grouping practices. However, the draft guidance fails to provide thorough examples of the application of this analysis or to describe the outcomes of more recent case law. The draft guidance also fails to analyze the most common ability grouping practices employed by school districts.

The draft guidance refers to the use of "more complex statistical techniques to show that the racially identifiable classes were unlikely to have occurred by chance." However, these techniques are not explained clearly in the draft guidance. The discussion assumes too much technical statistical knowledge on the part of those intended to benefit from it, primarily legal and investigative staff. This weakens the draft guidance as a means of assisting investigative staff in compliance reviews and complaint investigations. The discussion would be far stronger as guidance if it stated explicitly what statistical analyses staff should apply when developing a disparate impact case.[5]

Recommendation: OCR should include in its finalized ability grouping investigative guidance a discussion on the means through which OCR determines disparate impact in ability grouping cases. This discussion should provide a clear, detailed statement on the theoretical underpinnings and the practical application of this issue. OCR should clarify the standard for determining statistical significance. This can probably be accomplished best by providing an updated investigative guidance and investigative plan with a thorough, more detailed discussion of case law that distinguishes among different fact patterns and holdings relating to the standards for statistical significance. Through such a discussion OCR can guide its investigative staff more effectively by providing a uniform, precise method for making the crucial determination of statistical significance in disparities across racial lines. Moreover, if different circumstances or practices require alternate analyses, then OCR should explicitly state this and provide a detailed discussion with examples of specific fact patterns to illustrate. Along these lines, the guidance should state explicitly if there is no one best standard

[3] *See* chap. 3, p. 32 and chap. 7, pp. 108–12.

[4] *See* chap. 3, pp. 21–25.

[5] *See* chap. 3, pp. 21–24, 26–27.

and, if this is the case, OCR also should state explicitly that the standard must be determined on a case-by-case basis using the appropriate standard for the appropriate set of facts.

Finding: OCR stated in its 1991 draft guidance that "an ability grouping system violates title VI if there is an equally effective alternative educational practice which results in less racial disproportionality, or if the justification proffered is shown to be a pretext for discrimination." This standard has strong support in case law and seems wholly appropriate as a basis for a title VI compliance standard. The draft guidance notes further "an alternative practice frequently suggested" is placing students in ability groups by subject, rather than placing each student in a single ability group each day.

Ability grouping by individual subject is a practice whose efficacy in ensuring against civil rights violations may be demonstrated with the example of magnet schools. One of the principle problems with magnet schools, particularly partial site schools, has been that because they are based on "across-the-board" ability grouping, they have led to segregation. One obvious means of addressing civil rights violations in this context is to use the less discriminatory means of determining students' abilities in individual subjects and assigning them accordingly. Ability grouping to reflect differential abilities across various subjects is an important principle consistent with legal theory and practice relating to title VI compliance in ability grouping practices.[6]

Recommendation: OCR should emphasize the usefulness of this principle in other OCR documents, including its policy guidance, resource guidance, and technical assistance documents. Also, OCR should consider issuing a policy guidance or technical assistance document on the title VI compliance issues relating to the policy debate over partial magnet schools and full magnet schools.

Finding: OCR's letters of finding are the most important written contact between OCR and school districts, and the analyses of compliance standards enunciated therein ought to be thorough and clear. However, a review of OCR letters of finding reveals those in ability grouping related cases generally do not provide a thorough explication or analysis of OCR policy on important compliance issues affecting the school district. OCR's letters of finding rely heavily on the use of certain key legal and statistical terms of art, such as "racially identifiable" and "educationally justified," that reflect the analytical underpinnings on which OCR's title VI ability grouping policy is based. However, the letters of finding generally do not explain sufficiently in practical terms—through examples, specific criteria, or further explication or elaboration—the meaning or, more importantly, the application of these legal and statistical terms.[7]

Recommendation: OCR's letters of finding should provide the clearest, most precise, most readily accessible language in explaining the civil rights laws, regulations, and policies on which OCR bases its compliance and enforcement activities. At a minimum, OCR should ensure letters of finding and other written contacts with school districts provide the districts with the most complete and thorough analysis of OCR policy possible, so school districts will know the applicable policy and standards. OCR should explain in practical terms the meaning of the legal terminology it uses. OCR can enhance the overall effectiveness of its written communications with school districts by providing further elaboration on the meanings of and connections between certain key terms. The term "educationally justified," for example, should be explained with hypothetical examples that provide specific contexts for how OCR applies this concept. The use of examples, together with more specificity, will be useful to school districts in meeting OCR's requirements.

In addition, OCR, in collaboration with other key DOEd elements, such as the Office of Elementary and Secondary Education and the Office of Educational Research and Improvement, should prepare a comprehensive questionnaire for dissemination to State and local education agencies, particularly those that have been the subject of compliance reviews or complaint investigations and received letters of finding and other official documentation from OCR. These questionnaires should contain information explaining title VI implementation, compliance, and enforcement, including specific issues such as legal standards for disparate impact. The questionnaires should request school officials and administrators to identify any aspect of the compliance and enforcement process for which

[6] *See* chap. 3, pp. 33–35.

[7] *See* chap. 3, pp. 35–37.

they feel more clarity or explanation would be useful to them in understanding the substance and process of OCR's civil rights enforcement efforts. OCR should then use the responses to these questionnaires to do outreach, education, and training for school district officials and to provide guidance to OCR legal and investigative staff on preparing letters of finding and other official documentation. In addition, the questionnaires could be useful in developing informational and technical assistance materials for dissemination to State and local education agencies.

Chapter 4: Structuring Education to Serve a Diverse Student Population

Finding: Education research shows that to the extent schools use ability grouping and tracking practices, they should group students based on their abilities in specific subjects and not place them in the same ability group for all subjects.[8]

Recommendation: During ability grouping investigations, OCR should determine the particular standardized tests, course prerequisites, and grades earned that are used to assign students to classes that are ability grouped. OCR should determine whether these criteria are tailored specifically for each academic subject or if they relate to general student abilities. OCR should examine a random sample of course enrollment data by race and sex that represents each level of math, science, English, and social studies classes. OCR should examine data on the ability level and achievement/performance level (grades in prerequisite courses) of students enrolled in those specific classes. OCR also should identify the nonacademic factors that can result in students being locked into the same ability group for all subjects, regardless of their subject-specific abilities, including school enrollment patterns, teacher shortages and work schedules, policies governing class sizes, and level of instructional resources. OCR should assist schools in isolating the particular factors that could potentially affect grouping practices in often unpredictable ways. If many students are placed in the same ability levels for most subjects, OCR should determine if this is because: (a) of administrative convenience for a school or (b) course enrollments are an actual reflection of students' achievement abilities. Conversely, within each school practicing subject-specific ability grouping, particularly at the senior high level, OCR should determine the percentages of students assigned to high ability groups for some core courses and lower ability level groups for other classes.

Finding: If students are sorted deliberately into classes at the same level for most of the day (i.e., virtually all of their core courses) based on some measure of overall achievement, it is possible they may be placed in a too high or too low ability level class for some subjects, given students' different levels of performance for different subjects. Thus, this type of grouping may limit students' access to equal educational opportunities.

Education research shows it is essential for educators to recognize disparities in students' learning levels, aptitudes, and performance for diverse academic subjects, to match educational opportunities to student strengths and needs effectively. Policies placing a student in a particular course by his or her specific academic performance level related to the specific class are more likely than whole-class/full-scale ability level tracking practices to provide students with appropriate educational opportunities in each specific academic subject.[9]

Recommendation: During ability grouping compliance reviews and complaint investigations, OCR should examine course enrollment data and achievement/ability data to determine areas in which students' academic strengths and needs do not match their ability levels in courses to which they are assigned. OCR should assist schools in addressing these disparities and encourage them to: (a) refrain from assigning students to a particular track based on their assessed general abilities and overall academic achievement and instead (b) use subject-specific ability grouping practices, and enroll students in each individual course based on their academic performance in a particular subject area or their development of a specific skill.

Finding: To prevent a student from receiving instruction from a class that is above or below his or her respective level of ability, subject mastery/competency, and maturity, school officials must assess students frequently and carefully and adjust track assignments to allow for devel-

[8] *See* chap. 4, pp. 43–50.

[9] *See* chap. 4, pp. 44–46.

opment in psychological and cognitive attributes that affect learning.[10]

Recommendation: OCR, when conducting compliance reviews, should assess if schools reevaluate students at least every year to determine their ability level groups or tracks. OCR should examine the reevaluation frequency and assessment procedures used by schools and school districts, and verify if they relate to the specific academic subjects for which they are used.

Similarly, OCR should examine, as a routine procedure, elementary and secondary schools' policies enabling students to transfer among ability level courses or tracks. If achievement assessments indicate students' academic strengths and needs would be better matched in an alternate placement, OCR should determine both the criteria and frequency with which students are assigned to a different level class or ability track, if academic performance warrants doing so. OCR should ensure pupil placement policies are sufficiently flexible to enable educators to adjust for inappropriate track assignments and changes in students' academic achievement or performance on standardized tests since the previous ability level track placement.

Periodic reevaluation and employment of transfer policies would (a) acknowledge some students mature and learn at different rates, and are better served if they are reassigned to different classes, such as a higher section ability group of a particular core course; (b) prevent students' from being "locked in" an inappropriate educational opportunity; and (c) reduce the potential for inequitable learning opportunities and racial/ethnic disparities, especially for students who are initially misassigned to courses.

Finding: At the elementary school level, changes in ability level subgroups are the most readily adjustable, to reflect a change in student's competency in the particular subject being taught. At the secondary school level it is more difficult to change between-class ability groups and tracks because multiple staff would be affected. Between-class grouping practices involve multiple classes per student, and placement cannot be made by one teacher. Frequently, the guidance counselor, a school principal, at least two teachers, as well as parents and students, are involved. Especially where students are placed "across the board," or "locked in" to a lower ability group in every subject, it often becomes hard for them to move into higher ability level subjects. Changing a student's homogeneous class can be difficult, even for a student who may have been misassigned or whose evident changes in academic performance merits doing so.[11]

Recommendation: When conducting compliance reviews of school districts employing subject-specific and full-scale ability grouping practices, DOEd should analyze the percentages of students in given years who transferred from a lower to higher ability group for each core subject, as well as vice versa. The frequency and direction (i.e., from higher to lower levels and vice versa) of ability level track mobility should be assessed as well.

DOEd should inform school districts with restrictive transfer policies and other indicators students rarely have opportunities to transfer to higher or lower ability level courses that it is possible students whose performance levels do not match the ability level of their course or track placements may be denied equal opportunities to access the knowledge and skills they are capable of learning. Similarly, DOEd also should inform these schools that hindering students from achieving their potential can—in the long-run—reduce their aptitude and readiness for more advanced learning. DOEd should assist secondary schools operating ability grouping policies so they are able to accommodate course transfers for students who demonstrate improvements in academic performance.

Finding: Congress has adopted language in the section 504 regulations addressing the education of students with disabilities, requiring periodic reevaluation and regrouping subsequent to any significant placement changes. Similar language is also in the Bilingual Education Act addressing the education of students who are limited English proficient, to assess student progress within an instructional program. However, there are no such requirements in the title VI regulations guiding schools in making placement decisions in ability grouping practices.[12]

OCR's technical assistance document titled "Student Assignment in Elementary and Secondary Schools and Title VI," states "periodic test-

[10] *See* chap. 4, p. 52.

[11] *See* chap. 4, p. 52.

[12] *See* chap. 4, p. 69.

ing and reevaluation of students in specialized courses of study may be required." However, further review of OCR technical assistance documents related to title VI compliance suggests OCR has placed little emphasis on periodic reevaluation and regrouping in the context of ability grouping practices.[13]

Recommendation: OCR should develop technical assistance materials citing to sources for the propositions they advance in resource guidance materials. With respect to reevaluation and regrouping, this document should provide substantial citations from the work of education researchers to support this principle. Moreover, OCR should develop technical assistance documents specifically on the importance of reevaluation and regrouping in ability grouping practices. The document should encourage schools to adopt policies and procedures for measuring progress within ability groups. The importance of having mobility between ability groups also should be emphasized.

Finding: OCR's 1991 draft investigative guidance provides a brief explanation of the title VI compliance standards that have evolved through Federal and administrative case law, including the criteria used to evaluate a school district's educational justification for its ability grouping practices. Although the educational justification of a practice is determined on a case-by-case basis, the Federal courts and OCR have relied on three general conditions, in various forms and combinations, to determine whether an ability grouping practice is educationally justified. However, OCR has not issued any formal policy guidance providing clear and detailed examples of the types of grouping practices likely to satisfy these conditions in practice.[14]

Recommendation: OCR's finalized investigative guidance should provide practical guidelines and a checklist. OCR's policy also should expand on the examples provided in the draft (e.g., block scheduling justification is not appropriate). In addition, the policy guidance document should assist schools with title VI compliance by providing citations to research supporting OCR's view and describing effective forms of grouping. OCR should provide a practical guideline or checklist for school districts to ensure all elements of the title VI compliance standards are satisfied. The technical assistance guidance should include examples of legally acceptable and unacceptable ability grouping practices.

Finding: OCR's Kansas City Enforcement Office's Profile, Assessment, and Resolution (PAR) reviews exemplify an innovative approach to ensuring nondiscrimination and equal educational opportunities for minority students in advanced education programs. The PAR reviews are designed to foster a partnership with school districts, rather than an adversarial relationship. Despite the success of the PAR reviews, to date no other OCR enforcement office uses PAR reviews.

The PAR review strategies address improvements in student placement, counseling and guidance services, and program and service comparability among multiple sections of advanced courses within a school or across a school district. However, the PAR review does not provide strategies for structuring ability grouping programs. Moreover, although the PAR review provides strategies for program and service comparability among advanced programs, it does not provide strategies to ensure that programs and services are comparable among all ability groups.[15]

Recommendation: OCR should provide specific examples of practices that are educationally justified, such as practices that group by subjects based on student performance in those subjects and that ensure mobility and opportunity for advancement, so as to avoid the "dumbing down" of the curriculum in the lower groups.

Finding: Letters of finding do not demonstrate that OCR consistently asks the questions outlined in the draft investigative plan about ability grouping structures.[16]

Recommendation: OCR should provide formal training for investigators on how to apply the principles outlined in the formal policy guidance. Emphasis should be placed on ability grouping structures.

Finding: Teachers' judgments are a primary criterion within the combination of factors typically used to assign students to courses.[17]

Recommendation: During its compliance reviews OCR should interview teachers to deter-

[13] *See* chap. 4, p. 70.

[14] *See* chap. 4, pp. 69–70.

[15] *See* chap. 7, pp. 111–12.

[16] *See* chap. 4, pp. 62–64.

[17] *See* chap. 7, pp. 95–98.

mine if their perceptions, possible stereotypes, and biases about students unrelated to their learning ability could affect placement decisions for core courses. Teachers should be encouraged to have their recommendations or other subjective assessments of students based on systematic measures of students' ability to perform in specific core courses such as grades earned in prerequisite courses and scores on unbiased subject-level standardized tests.

Chapter 5: Using Nondiscriminatory Diagnostic and Screening Procedures When Placing Students in Education Programs

The Use of Testing in Ability Grouping

Finding: School officials rely to varying degrees on diagnostic testing to evaluate student ability and determine academic placement. Research indicates evaluation instruments such as standardized and intelligence tests often are racially, culturally, and gender biased. In addition, such tests often are not administered according to the test designer's instructions or uniformly among school districts, schools, and even within individual schools. Resulting test scores may not reflect accurately individual student ability relative to other students and hence may contribute to an overrepresentation of minority students in low ability groups.[18]

Recommendation: During compliance reviews of school districts, OCR should examine data from a sample of students within each school to determine if the district is using testing appropriately. For example, OCR should verify students with similar academic capabilities based on factors that are objective and independent of testing, such as performance in prerequisite courses, who attend different schools are assigned to similar ability level groups. OCR also should determine if procedures to administer, score, and interpret standardized tests are consistent among schools and in accordance with test publishers' instructions. In addition, OCR should assess the extent to which school officials rely on test scores relative to other evaluative criteria.

OCR should do outreach, education, and technical assistance to federally funded State and local education agencies to assist them in developing uniform and neutral diagnostic tests. The outreach, education, and technical assistance should address mechanisms for reducing bias from tests during test construction, such as reviewing test items for insensitivity, developing bias detection techniques, and developing culture-reduced tests.

Overrepresentation of Minority Students in Lower Ability Groups

Finding: Many studies identify a variety of issues associated with underidentification of minority students for higher ability groups and overrepresentation in lower ability groups. The misidentification of minority students often results in tracking in lower ability groups that holds little opportunity for these students to move into higher ability groups and fails to distinguish among their differing abilities across various subjects. Overrepresentation in lower ability groups continues in public schools in part because of problems with screening and diagnostic procedures.[19]

Recommendation: Because of the civil rights implications of the misidentification and misplacement of minority students, OCR should collaborate with the Office of Elementary and Secondary Education, educators, administrators, psychologists, clinicians, social workers, and other experts to examine the problem. This collaboration may include holding conferences, consultations, clinical studies, and/or program evaluations designed to develop clear criteria for appropriately classifying minority students within particular ability groups. For example, in identifying students for placement in ability groups, school districts should apply clear criteria for measuring subjective factors, such as teacher and other staff recommendations.

Ensuring Test Validity and Equity

Finding: Student placement decisions are affected by nonacademic factors, such as course schedule conflicts, extracurricular activities, and teacher resources. In addition, school officials sometimes employ arbitrary or subjective measures of student ability. Since standardized test scores may not reflect accurately the abilities of a particular student, researchers advocate using multicriteria procedures to assess students' ability.

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[18] *See* chap. 5, pp. 71–78.

[19] *See* chap. 5, pp. 72–74.

OCR has taken a number of steps to ensure that its title VI compliance and enforcement activities address the issue of neutral and nondiscriminatory screening and diagnostic procedures. In particular, OCR has developed draft investigative guidance for its staff on fairness in testing to assist them in investigations involving the use of tests in placement decisions. However, OCR has not formalized this investigative guidance. Furthermore, although DOEd's title VI regulations clearly prohibit the discriminatory use of tests in placement decisions, OCR has not produced policy guidance to provide specific compliance standards in this area, nor has it produced detailed technical assistance documents on diagnostic and screening procedures to assist schools in understanding their obligations under title VI.[20]

Recommendation: OCR should formalize its investigative guidance on fairness in testing. Furthermore, OCR should produce policy guidance to provide specific compliance standards in this area. In addition, OCR should produce detailed technical assistance documents on diagnostic and screening procedures to assist schools in understanding their obligations under title VI. OCR should continue efforts to ensure through policy or investigative guidance, increased technical assistance, and outreach and education activities that school officials should rely on several criteria (e.g., teacher and counselor recommendations, students' grades in prerequisite courses) in considering the appropriate ability group assignment for a particular child. For example, performance-based assessments, in which students are evaluated based on their oral presentations, exhibits or projects, allow educators to observe students' basic skills, critical thinking, and personal qualities. School districts should investigate performance-based assessments and implement them in place of standardized testing if they support the growth of students and provide educational equity.

OCR's Letters of Finding

Finding: A review of OCR's letters of finding shows OCR enforcement activities, such as compliance reviews and complaint investigations, frequently address issues associated with ability assessment procedures. In general, letters of finding addressing identification and assessment procedures offer clearly written, strong support for the positions OCR takes on compliance. In addition, the letters of finding addressing this issue provide detailed descriptions of the procedures undertaken by the school district. Such descriptive narrative is important because it enables OCR staff to establish a sound basis for its compliance analysis and to communicate effectively with the school district on compliance-related issues.[21]

Recommendation: OCR should continue its efforts to provide as much clarity and specificity as possible to schools in explaining title VI compliance determinations in letters of finding. OCR should ensure the quality of its letters of finding through appropriate staff training specifically targeted to drafting the letters.

OCR's Technical Assistance, Outreach, and Education Activities

Finding: Technical assistance materials prepared by OCR provide useful information to State and local school districts on screening and diagnostic procedures. However, the complex issues relating to appropriate screening and diagnostic procedures have not been resolved in the education community.[22]

Recommendation: OCR should continue and expand efforts to create technical assistance materials, including suggestions for ways to compensate misplaced students for lost educational opportunities and prevent further problems with misidentification. Such information will assist OCR staff, students, their parents or guardians, and school districts in devising practical resolutions and remedies. Congress and DOEd should support these initiatives by providing OCR with appropriate funding for these and other outreach, education, and technical assistance activities.

In addition, OCR should take a leadership role, in partnership with other Department of Education entities, including the Office of Elementary and Secondary Education and the Office of Research and Improvement to: (1) develop a national consensus on issues such as test bias and validity and the appropriate, neutral and nondiscriminatory use of tests and other screening and diagnostic procedures and (2) en-

[20] *See* chap. 5, pp. 79–82.

[21] *See* chap. 5, pp. 82–84.

[22] *See* chap. 5, p. 84.

sure the use of screening and diagnostic procedures in placement decisions does not operate to discriminate against students based on their race, color, or national origin, but instead to enhance educational opportunity for all students.

Chapter 6: Facilitating Parental Involvement in Children's Education

Finding: Education researchers, advocacy groups, and policymakers support parental and community involvement as important components in the education of all students. Children whose families are involved in education programs and activities show improved academic achievement across grade and socioeconomic levels. Community organizations play an important role in students' education. Community organizations and agencies, including businesses, religious organizations, and universities, can provide resources, serve as mentors and tutors, and provide leadership in school initiatives and activities. However, parental and community involvement in public schools is still voluntary and not national policy, targeted to certain parents or neighborhoods, more reactive than proactive, and usually a component or initiative of Federal and State education programs rather than local school personnel-initiated activities. For example, many school districts only contact community organizations in the schools' or students' immediate neighborhood, and only when there is need for monetary resources.

In addition, the quality and extent of parental and community involvement varies. Attitudes and practices of some school personnel, ability grouping, race and language of students, and educational and socioeconomic status of students and parents influence parental and community involvement. For parents of minority and disadvantaged children, barriers to inclusion in the education of their children are more critical and profound. Many of these parents lack the resources to participate, have had prior negative experiences with public school personnel, and lack understanding about the role parents can and should play in the education of their children.[23]

Recommendation: Education policymakers and school officials should encourage parental involvement and participation of all parents in the education of their children by including parents in school policies, activities, and programs. Outreach to parents of minority and disadvantaged children should be intensified so they can understand the importance of their participation in the public school system to enhance their children's educational experience.

State and local officials should initiate collaboration between local school districts, parents, businesses, universities, and religious and other community organizations to build long-term mentoring and tutoring programs for children in lower ability groups. Officials should provide local school districts with lists of organizations in the community at large and the resources these organizations offer, especially to children in lower ability academic groups and other disadvantaged children.

Finding: Research indicates the level of parental and community involvement varies in relation to students' ability groups. Parents with children in high ability classes tend to be more involved and more informed about their children's education program than parents with children in low ability classes. In high ability classes, there is more parent-teacher interaction, activities for parents, and more frequent student progress reports. Parents with children in low ability courses tend not to be involved and tend to accept the schools' decisions about their children's education. They also tend to have less knowledge or understanding of different educational programs and activities and the effect of such programs on their children after graduation.

Since a disproportionate number of minority children are assigned to lower ability classes, many of the parents *not* involved in public schools are minority parents.[24] This lower level of involvement means many minority and disadvantaged parents are not aware their children may be eligible to take more challenging classes, and as a result their children are more likely to remain in lower level classes. Finally, less involvement in school activities by parents of children in lower ability classes may correlate with the fact these students are usually allocated less experienced teachers and fewer resources.

Recommendation: School officials should uniformly provide information about programs and activities to all students and parents, regardless of the ability level to which students

[23] *See* chap. 6, pp. 85–89.

[24] *See* chap. 6, pp. 89–92.

have been assigned. All parents should receive information about school activities and be encouraged to attend those activities. Schools should inform parents of children placed in low ability groups of all available mentoring and tutoring programs, and other school and community initiatives designed to address their children's specific needs.

Finding: Conventional initiatives to promote parental and community involvement include disseminating general school correspondence to parents, holding meetings or workshops, and instructing parents and communities on children's educational needs. Conventional initiatives may not be sufficient to enhance parental and community involvement, especially for parents of minority and disadvantaged children in lower ability classes. These parents tend to have limited contact with or understanding of their children's schools.[25]

Recommendation: To ensure quality school interaction with parents of children in low ability groups, schools must move beyond conventional family and community involvement initiatives. Nontraditional approaches must be developed and implemented to address complex contemporary issues, including conditions in larger society affecting students in schools. Sample nontraditional approaches include sending school correspondence to parents in languages other than English, intensifying and lengthening mentoring and tutoring programs, extending community outreach beyond the school or students' neighborhoods, and reassessing and strengthening the roles of parents and the larger community.

Schools should invite parents to participate on school governing boards or committees that decide school policies in all areas. They should be involved in creating school policies and activities routinely, not merely at critical times. Parents should be used as resources, especially in assisting students being mainstreamed from lower ability to average or higher ability academic coursework. School officials should develop policies and practices that encourage parents' active involvement in staff hiring, curriculum, observation and evaluation of teachers, and the administration of programs and activities. Local school officials should involve parents in the educational decisions of their children, actively recruit parents as volunteers, develop teacher-parent workshops, and offer coursework to parents interested in learning subjects such as mathematics and science.

Local school officials should become active participants in the community at large to learn the community's strengths, resources and concerns. School officials should solicit the views of the community members and educate those who may not be involved in the school but who have an interest at stake in the public school education of different students. Community organizations should be brought in as consultants to assist school officials in the implementation of programs for students, not merely contacted for monetary resources. Community organizations should be allowed to develop workshops and seminars to educate all students and parents about such issues as job market requirements and specific educational training required for successful futures after graduation.

Federal Initiatives

Finding: Although the Federal position is that parental involvement cannot be legislated or enforced, congressional and other Federal officials support the premise that school doors must be opened for all parents, and that the Government must support home, school, and community partnerships, and encourage parental involvement. For example, Congress has sponsored several hearings and reports on the importance of parental involvement, as well as Federal, State and local strategies that have worked to eliminate some of the barriers to parental participation in public school education.[26]

Recommendation: Congress should continue holding hearings on the importance of parental and community involvement in the public school education of all children until such involvement becomes accepted practice nationwide. Education researchers and policymakers should be invited to provide information regarding how to reach and include all parents in the process and how to find and use community resources. Sharing this information should provide guidance to State and local school officials on ways to involve all parents in their schools.

Finding: DOEd recognizes the importance of Federal participation in the home, school, and community partnerships. In one program, repre-

[25] *See* chap. 6, p. 89.

[26] *See* chap. 6, p. 90.

sentatives from various communities and organizations, including parents, school officials, religious groups, and businesses form a coalition and aim for educational improvement and community support to encourage students' efforts in the classroom. This partnership is designed to establish a supportive school environment for family involvement. It identifies and publicizes examples of parental involvement nationwide, and provides useful information to parents, schools, businesses, and community groups on how to become involved.[27]

Recommendation: DOEd should continue initiatives that bring together many representatives of the school and community, and encourage the development of such partnerships nationwide on a regular, continuous basis. DOEd should facilitate the organization of such partnerships, serve as a technical advisor for those school districts and educational planners who want to develop such partnerships, and work toward making such partnerships an integral and required part of the Federal educational programs administered for all students.

OCR's Enforcement Activities

Finding: Title VI regulations do not address compliance specifically in the context of requirements for parental notification or involvement in education programs based on ability grouping and tracking practices. In its compliance and monitoring activities, OCR can consider parental and community involvement in a school district's programs on a case-by-case basis. Parental involvement can be an element in a resolution agreement, for example, if OCR learns parents have not been given information about certain programs, such as gifted and talented programs, which requires parental notification. However, there is no regulation or policy guidance requiring or instructing school districts to include parents or communities routinely in *all* school activities.

Some OCR regional offices establish contacts with parents and participate in community group meetings, creating a dialogue between school officials, parents, and the community.[28] However, this usually occurs after a complaint is filed. In its compliance reviews, OCR may include parents and affected members of the community in trying to resolve complaints, if OCR finds such inclusion is appropriate or something in the complaint may warrant the inclusion or interview of a parent.[29]

Recommendation: OCR should continue including parental and community involvement in the complaint process, but should not limit its involvement with parents and community to the complaint process. During outreach, education, and technical assistance, OCR should bring schools, parents, and the community together and be the primary facilitator of collaboration efforts. As facilitator of parental and community involvement, OCR should contact school officials, parents, and community representatives prior to a complaint of alleged discrimination. These initiatives should be continuous and part of OCR's routine responsibilities. OCR should offer technical assistance to school districts with diverse student populations about including parents and community officials in school policies and programs. In conjunction with other DOEd offices, OCR also should foster educational partnerships by sponsoring and participating in workshops for school officials, parents, and community organizations.

Chapter 7: Evaluating and Allocating Teachers, Facilities, and Other Resources in Educational Programs

Teachers, Counselors, and Ability Grouping

Finding: Education research indicates a pattern of differential treatment across ability groups. One example of this differential treatment, according to some researchers, is the lack of access to effective teachers and counselors that children placed in low ability groups experience relative to children in high ability groups.

Research shows some teachers in low ability classes tend to be less experienced and more punitive toward students than their colleagues who teach high ability classes. Researchers find teachers of average and high ability grouped children tend to use more innovative learning activities, are better classroom managers, and use instructional time more efficiently. Some teachers of remedial classes tend not to notice improvement in their students, while teachers of high ability grouped children tend to interact more with their students and encourage critical thinking to develop skills. Many researchers conclude this differential treatment can per-

[27] *See* chap. 6, p. 90.

[28] *See* chap. 6, pp. 93–94.

[29] *See* chap. 6, p. 94.

petuate inequities in educational opportunity for students through teachers' negative attitudes and minimal performance. This would seem especially true since teacher inexperience and negative attitudes indicating a lack of concern can affect students' productivity, sense of self-worth, academic performance, and involvement at school.

The educational experiences of children also may be affected greatly by how they are perceived and treated by school counselors. In particular, counselors usually play a major role in the placement of students in ability groups, so a counselor's perceptions or attitudes about a student's ability and academic potential can largely influence the student's public school education and experiences. In some instances, students may make academic decisions they do not comprehend fully because counselors have not provided sufficient, or any, guidance services. Research shows many students, particularly minority and female students, are steered away from certain courses by counselors. Researchers and education policymakers have identified this practice as a contributing factor to the underrepresentation of minorities and females in advanced mathematics and science courses.[30]

Recommendation: School administrators must staff their schools with a sufficient number of counselors to provide adequate guidance to students on academic choices. Administrators must also assume responsibility for hiring trained counselors with specific expertise or training counselors and teachers in curriculum development and instructional methodology to meet the needs and concerns of all students and their parents. Although most public school teachers and counselors are highly qualified and experienced, to promote equal educational opportunity school districts must implement professional development programs for all teachers and counselors. Students in all ability level groups deserve to be served by effective professionals who will provide them equal opportunities for growth and development in a challenging academic setting.

Curriculum, Instruction, and Ability Grouping

Finding: Researchers find the curriculum and instruction for high ability groups is very different from that offered to students in low ability groups. Lecturing, monitoring, tutoring, problem-solving, and projects to develop skills are more common in higher ability groups. Students in lower ability groups are more likely to have lessons that emphasize behavior or training techniques that focus on lower level skills, rote learning, and easily tested facts. High ability classes focus on developing concepts, while low ability classes focus on basic memorization. Even in low ability group classes that have access to technology, teachers tend to use drill-and-practice instruction and present fragmented coursework. Students in low ability groups are seldom assigned reports, projects, or other activities to develop critical thinking skills. Research shows the type of curriculum and instruction presented is influenced greatly by the perceptions and attitudes of teachers toward students in different tracks.[31]

Recommendation: School administrators should provide teachers with training on expanding learning opportunities for all students. Schools with special programs and activities for students should ensure all students who are interested can participate. Teachers should prepare all students for such programs by developing their skills with challenging curriculum and instruction in the classroom. DOEd outreach and education activities for teachers should provide opportunities for professional development to inform teachers about innovative and effective instructional techniques.

Facilities, Resources, and Ability Grouping

Finding: Research indicates there is disparity in the quality of facilities and resources made available to students in different ability groups. Students in lower ability groups tend to receive fewer instructional materials than their peers in high ability groups. Although schools have incorporated technological advances as educational resources, student access to these resources varies tremendously among schools and ability groups. Students in low ability groups tend to receive less sophisticated materials, like simple worksheets, while their peers in high ability groups tend to have access to equipment such as microscopes and computers.

Students who do not receive an opportunity to develop technological experience in school often are unable to gain such experience else-

[30] *See* chap. 7, pp. 96–98.

[31] *See* chap. 7, pp. 100–02.

where. These students will be at a great disadvantage, particularly when they leave school and attempt to enter the work force. It is essential students receive appropriate instruction on available technology; yet research shows only 16 percent of teachers use telecommunications for professional development, and only 15 percent of teachers have had at least 9 hours of training in educational technology.[32] All students, especially those in low ability groups and others who have had little or no access to schools' technological resources, should have access to these resources. Students who historically have been limited by instruction with only the most basic resources must be educated with fewer worksheets and more computers.

Recommendation: To address inequities found in quality of facilities and access to resources, all levels of government should participate as facilitators, analysts, and advisors in school matters. Educators should examine proposals to restructure school programs to meet the needs of students, especially those assigned to low ability groups. Federal officials should provide outreach, education, technical assistance, and support services to school districts to ensure effective restructuring of schools' resources. Parents should play an integral role in the planning and implementation of these initiatives. They should be involved in all phases of restructuring their children's education, including serving on policy boards, contributing to project development, and attending classroom activities and school conferences. The community at large should be included in designing strategies to improve school facilities and eliminate barriers to access to educational resources. Community members can contribute in a variety of ways, such as donating equipment, visiting schools to provide instruction regarding technology or inviting teachers and students to off-campus sites for hands-on experiments and other types of innovative education.

School systems may need to allocate resources toward bringing students in low ability groups into the technology mainstream. However limited resources may be, schools should provide students equal access to resources as part of the schoolwide educational framework so all students can develop and achieve their potential.

OCR's Enforcement Activities

Finding: DOEd's most specific guidelines for eliminating discrimination, relative to teachers, counselors, curriculum and instruction, and facilities and resources are found in appendix B to part 100 in the title VI regulations. These guidelines are limited in scope to address discrimination within vocational education programs. OCR also focuses on the underrepresentation of minorities in upper level, advanced education, or gifted and talented programs. Currently, however, there is no implementing regulation to address discrimination in elementary and secondary schools based on disparities among ability groups, such as the inequitable distribution of resources, the divergent quality of academic materials, or the professional development of teachers and counselors.[33]

Recommendation: OCR should develop comparable guidelines to cover these same issues and barriers as they relate to the education of all students through the public school system, regardless of the ability grouping or track. The underrepresentation of minorities in some programs has been addressed. OCR should now focus on the overrepresentation of students in other programs and coursework.

Finding: DOEd is authorized to provide any school board, State, municipality, school district or other governmental unit responsible for operating a public school, with technical assistance in the preparation, adoption, and implementation of plans for desegregation. OCR proactively provides technical assistance in the form of training to its recipients on numerous issues, including ability grouping or tracking.[34]

Recommendation: OCR should continue its technical assistance, outreach, and education activities regarding equal educational opportunity and nondiscrimination principles being integrated in educational development, implementation, evaluation, and research, especially in the area of ability grouping and tracking. OCR should focus the above technical assistance, outreach, and education activities on assisting schools in providing training to school board, State, municipality, school district, or other governmental officials responsible for managing and making decisions at State and local education agencies, school districts, or individual schools.

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[32] *See* chap. 7, pp. 102–04.

[33] *See* chap. 7, pp. 108–11.

[34] *See* chap. 7, pp. 112–15.

Appendix

National Statistical Trends in Ability Grouping Practices

Background

This appendix presents data on the racial/ethnic enrollment patterns of students participating in high and low ability level groups, courses, course sections or classes, and tracks (ranging from remedial to advanced); courses within a sequence (e.g., algebra I through calculus); as well as special programs (e.g., gifted and talented, remedial).

Ability Grouping in Elementary School

At the elementary school level, a research study done in the mid-1980s revealed that approximately 80 percent of teachers grouped children by ability in the classroom.[1] Within-class ability groups tend to be the most prevalent method of assigning students.[2] These groups are primarily implemented for reading and mathematics.[3] Within-class ability groups can be formed in direct response to the ability distribution of a student population.[4] Teachers (who tend to be the sole decision makers for a single elementary school class' ability groups[5]) can rely on the distributional properties of a class, as well as class size and average student aptitude (on standardized tests), to determine the number and size of, and distinctions among ability groups. Therefore, in any given class, a low ability group can be smaller or larger than any of the other groups.[6] In contrast, education researchers who have examined the determinants and consequences of organizing students by their purported aptitude for a specific core subject reported that the establishment, number, stability, and size of ability groups can be an organizational decision that is independent of the ability distribution of a class of students. Pupil assignment to the within-class ability groups can be related, instead, to structural and organizational characteristics of the school and classroom; and the availability of teachers and the number and diversity of curricular resources can determine the number and size of ability groups.[7] A study done in the mid-1980s found that 25 percent of teachers had sufficiently flexible pupil assignments in which at least 20 percent or more of students could change ability groups within a school year.[8]

Ability Grouping in Middle School

The assignment of students to courses, such as math, science, and English, that are grouped by ability is a practice with important conse-

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[1] W. Smith and E. Chunn, eds., *Black Education: A Quest for Equity and Excellence* (New Brunswick: Transaction Publishers, 1989), p. 100 (citing J. Epstein, "After the Bus Arrives: Resegregation in Desegregated Schools," in *Journal of Social Issues*, vol. 4, no. 3 (1985), pp. 23–43). Note: 1985 is the most recent year for information on the prevalence of elementary schools' within-class ability grouping practices.

[2] Robert E. Slavin, "Achievement Effects of Ability Grouping in Secondary Schools: A Best-Evidence Synthesis," *Review of Educational Research*, vol. 60, no. 3 (Summer 1993), pp. 471–99 (citing J.M. McPartland, J.R. Coldiron, and J.H. Braddock, *School Structures and Classroom Practices in Elementary, Middle, and Secondary Schools* (Baltimore: Johns Hopkins University Press, 1987)); Maureen Hallinan, "The Organization of Students for Instruction in the Middle School," *Sociology of Education*, vol. 65 (April 1992), p. 114. Despite the title of the article, ability grouping issues with respect to elementary school students are addressed.

[3] Hallinan, "The Organization of Students for Instruction in the Middle School," p. 114.

[4] Ibid., p. 116 (citing R. Barr and R. Dreeben, *How Schools Work* (Chicago: University of Chicago Press, 1983)).

[5] Hallinan, "The Organization of Students for Instruction in the Middle School," p. 115.

[6] Ibid., p. 116 (citing R. Barr and R. Dreeben, *How Schools Work* (Chicago: University of Chicago Press, 1983)).

[7] Hallinan, "The Organization of Students for Instruction in the Middle School," pp. 114, 116 (citing M. Hallinan and A. Sorensen, "The Formation and Stability of Instructional Groups," *American Sociological Review*, vol. 48 (1983), pp. 838–51).

[8] Smith and Chunn, eds., *Black Education*, p. 100 (citing J. Epstein, "After the Bus Arrives," pp. 23–43).

quences and implications for gender and racial/ethnic equity, especially since this method of assigning students to classes is used extensively in secondary schools.[9] Classes in math and English tend to be divided into ability groups at the secondary school level.[10] Ability grouping of math, science, or English courses in the Nation's high schools could be a vestige of the ability grouping in core subjects that occurs in middle schools.

In 1990 more than two-thirds of the Nation's schools serving early adolescents reported using at least some between-class ability grouping.[11] Approximately 20 percent of public middle schools have ability grouping for *each* core subject.[12] Specifically, approximately 23 percent of schools practiced ability grouping for each core course of fifth through eighth graders; and 11 percent of schools had full-scale ability grouping for ninth graders.[13]

For subject-specific ability grouping, the percentage of schools that place students according to ability for core courses such as mathematics, science, social science, and English, increased for each successive grade between fifth and ninth grades. With respect to mathematics, at the fifth and ninth grade levels, 57 and 94 percent of schools, respectively, had between-class ability grouping. For sciences, 4 percent and 38 percent of schools reported that they sorted fifth grade and ninth grade students, respectively, in classes based on academic ability. Only 4 percent of schools used ability grouping for fifth graders' social science classes, whereas 19 percent of schools did so for ninth graders. More significantly, for English, 24 percent and 62 percent of schools ability grouped fifth and ninth graders, respectively.[14]

The percentage of students who experience at least some homogeneous grouping also increases across the grades, from about 70 percent of fifth graders to 80 percent of sixth graders, to 85 percent of seventh through ninth graders. The proportion of students who experience ability grouping for each core course also increases as they progress through school; and 12 percent of fifth graders, compared with 25 percent of sixth through ninth graders, are in homogeneous groups for a full day.[15]

Ability Grouping in High School

In a 1993 survey done by the U.S. Department of Education, a national sample of 912 schools responded to a series of interrogatories about approaches to curriculum differentiation, course offerings, student assignment procedures, and teachers' assignments to courses.[16] Approximately 86 percent of public secondary schools in

[9] Sophia Catsambis, "The Path to Math: Gender and Racial-Ethnic Differences in Mathematics Participation from Middle School to High School," *Sociology of Education,* vol. 67 (July 1994), p. 20 (hereafter cited as Catsambis, "Path to Math").

[10] Jeannie Oakes, "Keeping Track: Part I," *Phi Delta Kappan,* September 1986, p. 15.

[11] Jomills Henry Braddock II, "Tracking the Middle Grades: National Patterns of Grouping For Instruction," *Phi Delta Kappan,* vol. 71, no. 6 (February 1990), p. 446. Note: 1990 is the most recent year for information on ability grouping practices at the middle school level. Information presented by Braddock was obtained from the Johns Hopkins University Center for Research on Elementary and Middle Schools' most recent (at the time of this study) national survey to school principals. Ibid., p. 445.

[12] Jomills Henry Braddock II, *Tracking: Implications for Student Race-Ethnic Subgroups:* Report No. 1 (Baltimore, MD: Johns Hopkins University Center for Effective Schooling for Disadvantaged Students, 1990), p. 6 (hereafter cited as Braddock, *Tracking Implications*); Braddock, "Tracking the Middle Grades," p. 446. In grades seventh through eighth, for instance, between 9 and 17 percent of middle or intermediate schools had no classes that were grouped homogeneously; between 57 and 64 percent had some classes grouped by student ability; and between 24 and 27 percent had all classes grouped in this manner. Ibid., p. 447.

[13] Braddock, "Tracking the Middle Grades," p. 446.

[14] Ibid.

[15] Ibid., p. 447. The author did not state if students who experience a full day of ability-grouped courses were in classes that were (a) ability grouped on an individual basis (i.e., subject-specific ability grouping, in which students can be in lower and higher ability groups for their core courses, based on their performance/competency for each subject area) or (b) part of an ability-level track (i.e., full-scale ability grouping, in which each class is the same ability level). In contrast, in 1988, approximately 14 percent of eighth grade students were enrolled in heterogeneous ability math classes. *See* Dominic J. Brewer, Daniel I. Rees, and Laura M. Argys, "Detracking America's Schools," *Phi Delta Kappa,* November 1995, p. 211. This 14 percent figure was obtained from the authors' examination of the NCES' NELS:88 data set, which are the results from a nationally representative survey of eighth graders. *See* ibid., p. 211. The researchers considered the NELS survey data as providing the best available evidence of tracking practices. *See* ibid., p. 211.

[16] U.S. Department of Education, National Center for Education Statistics, *Curricular Differentiation in Public High Schools,* by Nancy Carey et al. (Washington, DC: Office of Educational Research and Improvement, 1994) (hereafter cited as NCES, *Curricular Differentiation*).

the 1993–94[17] school year were comprehensive (as opposed to specialized), and they reported that they offer courses in their core curriculum that are differentiated in terms of content, quantity or intensity of work, or expectations regarding independent work.[18] Almost 60 percent of these schools claimed that State or local education agencies influenced their approaches to providing instruction to students with different abilities.[19] Principals were reported as the next most common influential source in determining schools' instructional approaches, and almost 50 percent of public secondary schools claimed that these school officials influenced instructional approaches to a "great extent."[20] In addition, organizational and structural factors, such as the schools' resources, policies governing the size of classes and teachers' workload, and teachers' and students' activity schedules, can affect the number of program tracks established, ability groups formed, and courses within a sequence offered.[21]

The survey showed that in 15 percent of the Nation's high schools, traditional tracking policies were implemented, with students grouped for a full day in the entire core curriculum.[22] These public secondary schools claimed that they differentiated students into various groupings, based on their diverse overall academic abilities[23] in the core curriculum.[24] The practice of full-scale homogeneous ability grouping[25] is found more often in schools with sizable (more than 20 percent) minority (e.g., black and Hispanic) student enrollment.[26]

Of the remaining 85 percent of public secondary schools that *do not* practice overall full-scale homogeneous groupings of students based on their ability level, 71 percent practice ability grouping *within specific core subject areas* such as mathematics and English, whereby students are sorted based on the schools' measures of student ability.[27] Math and English courses are frequently divided into ability level classes in secondary schools.[28] In 1993–94, approximately 86 percent of public high schools employed ability grouping for mathematics or English courses.[29] The most recent data revealed that 42 percent of the Nation's high schools sorted students into various science subjects by their abilities. With respect to social studies, 39 percent of the Nation's public comprehensive schools practice ability grouping.[30]

The remaining 14 percent of public secondary schools (i.e., those that do not implement full-scale or within-subject ability grouping) reported that they offer a variety of classes that are open or accessible to all students (regardless of a

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[17] Note: 1993–94 is the most recent year for information on school policies and practices used to structure curricula and assign pupils with diverse needs, abilities, and learning rates to courses and program tracks. The data were obtained by DOEd from a nationally representative sample of more than 900 public secondary schools. *See* ibid., p. 5.

[18] Ibid.

[19] Ibid., p. 10, table 3.

[20] Ibid. In over 40 percent of surveyed high schools, both college entrance requirements and school boards influenced schools' instructional approach to a significant extent. Ibid., p. 10, table 3.

[21] Hallinan, "The Organization of Students for Instruction in the Middle School," p. 115.

[22] NCES, *Curricular Differentiation*, p. 5. Note: 1993–94 is the most recent year for data on percentages of the Nation's high schools that practice full-day tracking of students across an entire curriculum of core courses such as math, science, and English.

[23] Measures of ability can be based on a combination of a composite achievement measure, IQ scores, and/or teacher judgment. *See* Braddock, *Tracking Implications*, p. 5.

[24] NCES, *Curricular Differentiation*, p. 5. Note: In NCES' *Curricular Differentiation* report, secondary schools are defined as public schools providing instruction in grades 10 through 12. Ibid., p. 3.

[25] More specifically, with full-scale ability grouping, students are divided based on their ability level, and each group is instructed separately for the full day rather than a single subject only. *See* James A. Kulik, "An Analysis of the Research on Ability Grouping: Historical and Contemporary Perspectives," *Ability Grouping Research-Based Decision Making Series*, No. 9204 (February 1992), p. 2.

[26] Braddock, *Tracking Implications*, p. 6. With respect to public schools serving seventh graders, survey data from 1990 revealed that approximately 20 percent of schools with minority concentrations below 20 percent, and 27 percent of similar schools with minority concentrations above 20 percent practiced ability grouping for each core subject (e.g., English, math, science, social studies, and reading). Ibid., p. 6 and table 2.

[27] NCES, *Curricular Differentiation*, p. 6.

[28] Oakes, "Keeping Track: Part I," p. 15.

[29] NCES, *Curricular Differentiation*, p. 6. Note: 23 percent of secondary schools that offer differentiated courses (by ability level) for mathematics do not practice ability grouping for English classes. *See* ibid., pp. 6, 28.

[30] Braddock, *Tracking Implications*, p. 15. Note: 1990 is the most recent year for information on ability grouping practices at the high school level for social studies.

measured "ability" level) as long as they have taken the prerequisite subjects.[31]

Enrollment Patterns

From elementary to high schools, low socioeconomic status students and non-Asian minority students are disproportionately enrolled in low ability academic classes and tracks, while economically advantaged students and white students are enrolled more often in high ability groups.[32] The U.S. Department of Education's 18th annual report to Congress, as well as the 1992 OCR survey, indicated that black males were disproportionately placed in special education programs (or low ability groups) compared with students of any other racial, ethnic, or gender group.[33] In addition, reports from both the Carnegie Corporation and the College Board indicate that black males were three times more likely than white males to be in classes for the mentally retarded, yet only one-half as likely to be in gifted programs.[34] At the elementary school level, overall, low socioeconomic status students, blacks, and Hispanics can be disproportionately placed in lower ability tracks.[35]

In analyzing data from the National Educational Longitudinal Study of 1988 (NELS: 88), researchers studied the distribution of students by race and national origin in various ability groups.[36] In the eighth grade, the study found that, with the exception of Asian Americans, minority students were enrolled at a higher rate in low ability courses relative to their white peers. Conversely, the study revealed lower minority enrollments in high ability courses.[37] Similarly, in a 1990s study of 14,000 eighth grade public school students, Asian Americans and whites were more likely than their black, Hispanic, and Native American peers to be concentrated in the middle and higher level groups.[38] Another education researcher reported that the upper middle class, higher income youth tend to dominate and be overrepresented in higher level tracks in the Nation's middle schools. The remaining students are concentrated throughout middle level ability groups.[39]

These middle school course placements also may influence the students' future high school course plans with respect to enrollment in curricular tracks, ability level courses and tracks, and overall selection of college preparatory versus nonacademic courses. Data collected on these students at the 10th grade level showed that the non-Asian minority students are overrepresented in vocational education programs and underrepresented in academic courses.[40] With respect to ability level groups at the high school level, disproportionately high percentages of Latino and black students are assigned to low

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[31] NCES, *Curricular Differentiation*, p. 5.

[32] Jeffrey M. Schneider, "Tracking: A National Perspective," *Equity and Choice*, Fall 1989, p. 12; Robert E. Slavin, *Ability Grouping and Student Achievement in Elementary Schools: A Best-Evidence Synthesis*, (Baltimore: Johns Hopkins University, June 1996), no.1, p. 10 (citing E. Haller and S. Davis, "Does Socioeconomic Status Bias the Assignment of Elementary School Students to Reading Groups?" *American Educational Research Journal*, vol. 17 (1980), pp. 409–18; R. Rist, "Student Social Class and Teacher Expectations: The Self-Fulfilling Prophecy in Ghetto Education," *Harvard Educational Review*, vol. 40 (1970), pp. 411–51).

[33] U.S. Department of Education, *To Assure the Free Appropriate Public Education of All Children with Disabilities*, (18th Annual Report to Congress on the Implementation of the Education of the Handicapped Act) (Washington, DC: U.S. Department of Education, 1996). For instance, one study showed that black students were 16 percent of all students in the Nation's schools, but accounted for 35 percent of students with educable mental retardation, 27 percent of students with trainable mental retardation, and 27 percent of those with serious emotional disturbance. Ibid., pp. 85–87.

[34] Carnegie Corporation of New York, "Renegotiating Society's Contract with the Public Schools," *Carnegie Quarterly*, vol. 29 (1984), pp. 1–4; The College Board, *Equality and Excellence: The Educational Status of Black Americans* (New York: The College Board, 1985).

[35] Slavin, *Ability Grouping and Student Achievement in Elementary Schools*, p. 10 (citing Haller and Davis, "Does Socioeconomic Status Bias the Assignment of Elementary School Students to Reading Groups?" pp. 409–18); Rist, "Student Social Class and Teacher Expectations," pp. 411–51.

[36] Jomills Henry Braddock II and Marvin P. Dawkins, "Ability Grouping, Aspirations, and Attainments: Evidence from the National Educational Longitudinal Study of 1988," *Journal of Negro Education*, vol. 62, no. 3 (1993), pp. 324–36.

[37] Ibid.

[38] Nancy Jo Hereford, "Making Sense of Ability Grouping," *Instructor*, May/June 1993, p. 51. Note: The author did not mention specific courses with respect to ability groups.

[39] Paul S. George, "Tracking and Ability Grouping in Middle School: Ten Tentative Truths," *Middle School Journal*, March 1993, pp. 20–21.

[40] Braddock and Dawkins, "Ability Grouping, Aspirations, and Attainments," pp. 324–36.

ability or noncollege-bound classes.[41] Conversely, non-Asian minorities continue to be (as they are in middle school) underrepresented in high ability level groups.[42]

Concerns about the equity of ability grouping can be as compelling as concerns about the practice's effects on student achievement.[43] Racial/ethnic disparities in core courses and ability level groups/classes are considered to have important educational implications because they indicate that some students may have greater access to opportunities to learn a more rigorous and challenging curriculum.[44] Various education researchers have evidence that ability grouping practices may perpetuate persistent racial/ethnic inequities due to minority students' disproportionate representation in lower tiered tracks.[45] Racial/ethnic disparities (between whites and blacks, and whites and Hispanics), with respect to mathematics skill development, for instance, can exceed those between boys and girls.[46]

[41] Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 472; Braddock and Dawkins, "Ability Grouping, Aspirations, and Attainments: Evidence from the National Educational Longitudinal Study of 1988," pp. 324–36.

[42] Braddock and Dawkins, "Ability Grouping, Aspirations, and Attainments," pp. 324–36; Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 472.

[43] Slavin, *Ability Grouping and Student Achievement in Elementary Schools*, p. 10; Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," p. 474.

[44] Catsambis, "The Path to Math," p. 203.

[45] Slavin, "Achievement Effects of Ability Grouping in Secondary Schools," pp. 471–73 (citing Braddock, *Tracking Implications*); J.D. Jones, E.L. Erickson, and R. Crowell, "Increasing the Gap Between Whites and Blacks: Tracking as a Contribution Source," *Education and Urban Society*, vol. 4 (1972), pp. 339–49; W. Schafer and C. Olexa, *Tracking and Opportunity: The Locking-Out Process and Beyond* (Scranton, PA: Chandler, 1971).

The research conducted by one of the Nation's authorities on student placement practices showed that low track classes contained a relatively higher share of lower socioeconomic groups and racial minority students. *See* Jeannie Oakes, *Keeping Track: How Schools Structure Inequality* (New Haven, CT: Yale University Press, 1985); Oakes, "Keeping Track: Part I"; Jeannie Oakes, "Keeping Track: Part II," *Phi Delta Kappan*, October 1986. *See also* Paul O. Rogne, "Reflections on the Research," *G.C.T.*, January/February 1993, p. 11.

[46] Patricia B. Campbell, "What's a Nice Girl Like You Doing in a Math Class?" *Phi Delta Kappan*, March 1986, p. 516 (hereafter cited as Campbell, "Math Class").

Elementary School Level

Racial/Ethnic Disparities in Ability Groups

A 1993 survey by the National Science Foundation examined racial/ethnic enrollment patterns in math and science courses.[47] For grades one through four, in science classes, minorities represented less than 10 percent of enrollment in 43 percent of high ability groups. However, approximately 58 percent of low ability groups had at least 40 percent of students from racial/ethnic minority groups. In contrast, only 9 percent of high ability science classes had high minority enrollment patterns.

With respect to mathematics classes, minorities accounted for less than 10 percent of student enrollment in only a small number of low ability groups (13 percent) in grades one through four. Yet, in more than 50 percent of accelerated math groups, minority enrollment was under 10 percent. In contrast, in 75 percent of low ability groups, minorities were more than 40 percent of student enrollment. However, minority concentration reached this level in only 22 percent of accelerated math classes.[48] Similar grouping patterns were found in grades 5 through 12.[49]

Middle School Level

Students in Ability-Grouped Courses

An examination of ability grouping patterns in the Nation's middle schools shows that they are similar to those in high schools. According to a 1990 study by the Johns Hopkins University's Center for Research on Effective Schooling for Disadvantaged Students, approximately 67 percent of middle schools use at least some form of between-class ability grouping, especially for English and mathematics.[50] Twenty percent of middle schools reported that they grouped classes by ability for each core subject.[51]

Most middle school students are enrolled in mathematics and science courses, as well as other core subjects such as English and social

[47] National Science Foundation, *Women, Minorities, and Persons with Disabilities in Science and Engineering: 1996* (Arlington, VA: 1996, NSF 96–311), p. 125, table 2–15 (hereafter cited as National Science Foundation, *Women, Science, and Engineering*).

[48] Ibid.

[49] Ibid.

[50] Braddock, *Tracking Implications*, p. 6.

[51] Ibid.; Braddock, "Tracking the Middle Grades," p. 446.

studies/history.[52] For example, in 1988,[53] 96 percent of eighth graders were enrolled in English, 97 percent in mathematics, and 96 percent in science (74 percent in nonlaboratory science and 22 percent in laboratory science) classes.[54] With respect to mathematics, while almost 60 percent of students were enrolled in regular mathematics, almost one-third were enrolled in more academically demanding courses (e.g., prealgebra, algebra, advanced or honors classes); and 5 percent participated in remedial math.[55] Approximately 84 and 12 percent of eighth graders were enrolled in regular and remedial English, respectively.[56]

Racial/Ethnic Disparities in Groupings

Grouping practices at the middle school level can result in overrepresentation of minority students in lower level subgroups and classes, as well as core courses within a sequence, and underparticipation of these students in courses and ability groups at more advanced levels.[57] In 1988 there were some significant differences in eighth-grade course taking by racial/ethnic groups.[58] Although there were virtually no differences among the representation of blacks, whites, Hispanics, and Native Americans in regular mathematics (Hispanics, 62 percent; blacks, 60 percent; whites, 59 percent; and Native Americans, 57 percent), there were some noticeable disparities in remedial and advanced mathematics enrollment patterns. Approximately 34 percent of whites participated in advanced classes, yet only 26 percent of blacks and Native Americans and 24 percent of Hispanics did so. More than 46 percent of Asian American eighth graders were enrolled in advanced math courses. In addition, only 4 percent of whites were enrolled in remedial mathematics, compared with more than 7 percent of blacks, Hispanics, and Native Americans.[59]

For English, more than 80 percent of the Nation's white (86 percent), Asian American (81 percent), and black (81 percent) eighth graders participated in regular classes. In addition, approximately three-fourths of Hispanics and Native Americans were enrolled in these classes. Approximately 11 percent of blacks and whites were enrolled in a remedial class, compared with 17 percent of Hispanics and 15 percent of Asian Americans and Native Americans.[60]

Gender Disparities in Math Ability Groups

A survey administered to middle school teachers in 1988[61] asked them to best describe the achievement level of eighth graders in their mathematics classes.[62] This question was asked in order to determine the supposed or theoretical ability group level (e.g., high, average, low[63]) of each particular class of students. At this stage of schooling, disparities in mathematics achievement occur mostly among racial and ethnic groups, rather than between the boys and girls.[64]

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[52] U.S. Department of Education, National Center for Education Statistics, *Profile of the American Eighth Grader*, by Anne Hafner et al. (Washington, DC: Government Printing Office, June 1990), p. 35 (hereafter cited as NCES, *Eighth Graders*).

[53] The most recent year of ability grouping data on middle school students is the eighth grade class of 1988.

[54] NCES, *Eighth Graders*, pp. 34–39.

[55] Ibid., p. 36.

[56] Ibid., p. 37. Note: The authors did not report about eighth graders' participation in honors/advanced English.

[57] Paul S. George, "What's the Truth About Tracking and Ability Grouping Really?" in J. Bellanca and E. Swartz, eds., *The Challenge of Detracking* (Palatine, IL: IRI/Skyline Publishing, Inc., 1993), pp. 256, 265, 266.

[58] Ibid., p. 35.

[59] NCES, *Eighth Graders*, p. 36.

[60] Ibid., p. 39.

[61] Mathematics teachers (who instructed the NELS:88 eighth grade students) received a survey that probed their perceptions of the 24,500 sampled students' classroom performance and ability levels. *See* Catsambis, "The Path to Math," p. 202.

[62] Ibid. Student achievement in math was defined by scores on standardized tests (developed by Educational Testing Service) in the eighth grade, and mathematics course grades from sixth grade through eighth grade. Ibid. The specific NELS survey question asked to math teachers was "Which of the following best describes the achievement level of the eighth graders in this class, in comparison with the average eighth-grade student in this school?—higher achievement levels, average, lower, or widely differing achievement levels." Ibid.

[63] Ibid., p. 204.

[64] Ibid., p. 203. Evidence of similar ability levels among (23,700) male and female NELS:88 participants within each respective ethnic group is based on their scores from a battery of four cognitive tests that were developed by Educational Testing Service. *See* ibid., p. 202; U.S. Department of Education, National Center for Education Statistics, *National Education Longitudinal Study of 1988: A Profile of the American Eighth Grader*, by Anne Hafner, et al. (Washington, DC: Government Printing Office, 1990), p. B–4. (hereafter cited as DOEd, *Longitudinal Study of 1988*). These tests were developed to measure and compare males'

Within three respective ethnic groups (whites, blacks, and Hispanics), similar percentages of boys and girls were likely to be enrolled in average ability mathematics classes.[65] For instance, approximately 40 percent of white boys and girls, and Hispanic boys and girls, were enrolled in average ability groups.[66] Approximately one-third of black boys and girls were in average ability level eighth grade math courses.[67]

However, despite similar math achievement levels (as measured by scores on mathematics cognitive tests and previous math course grades[68]) between the two genders, a larger proportion of girls were enrolled in high ability classes and a higher proportion of boys were enrolled in low ability classes.[69] The gender disparities were relatively consistent across the three racial and ethnic groups examined, despite blacks' and Hispanics' overrepresentation and underrepresentation in lower and higher ability level math courses, respectively.[70]

The disparities of eighth grade boys' and girls' placements in math ability groups were significant for whites and blacks. Approximately 40 percent of white girls and boys were in average ability math groups; 30 percent and 27 percent of white girls and boys, respectively, were assigned to above average math groups; 17 percent and 19 percent of white girls and boys, respectively, were placed in low ability groups; and approximately 14 percent of both genders were in heterogeneous math groups. Approximately 33 percent of black girls and boys were in average ability math groups; 18 percent and 14 percent of black girls and boys, respectively, were assigned to above average math groups; and 30 percent and 36 percent of black girls and boys, respectively, were placed in low ability groups.[71]

Racial/Ethnic Disparities in a Math Sequence

At the middle school level, in 1992 racial/ethnic disparities were evident among various mathematics course options.[72] The sequence of math courses available to most eighth graders ranges from eighth grade mathematics, prealgebra, to algebra, as well as "other math."[73] Overall, substantially larger proportions of white eighth graders and Asian Americans participated in algebra (22 percent and 42 percent, respectively), than did their black (13 percent) and Hispanic (12 percent) peers. Similar percentages (approximately one-fifth of students) of blacks, Hispanics, and Asian Americans were enrolled

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and females' aptitudes in core subjects such as mathematics. *See* DOEd, *Education Longitudinal Study of 1988*, p. B–4. *See also* US Department of Education, *Digest of Education Statistics 1996*; Catsambis, "The Path to Math," p. 202. Student achievement is based on scores of these cognitive tests and grades earned in mathematics classes from grades sixth through eighth. *See* Catsambis, "The Path to Math," p. 202.

[65] Catsambis, "The Path to Math," p. 203.

[66] Ibid., p. 204.

[67] Ibid.

[68] Ibid., p. 202.

[69] Ibid., p. 203. Mathematics teachers' responses to a question on the topics they covered in their classes yielded information on learning opportunities of students in different ability classes. Major instructional topics in high ability classes are algebra (90 percent) and problem solving. Average ability classes tend to cover ratios, percentages, integers, and problem solving. Only 57 percent cover algebra. Low ability classes focus on fractions, percentages, and ratios. Less than 40 percent cover algebra as a minor topic; and 24 percent do not expose students to algebra. Ibid., pp. 202–03.

Also note that in contrast to the middle schools' gender disparity (with respect to ability group assignment) in favor of girls, at the elementary school level, boys were more likely than their similarly competent female peers to be assigned to high ability math groups. *See* M.T. Hallinan and A.B. Sorensen, "Ability Grouping and Sex Differences in Mathematics Achievement," *Sociology and Education*, vol. 60, no. 2 (1987), pp. 63–73.

Evidence of similar ability levels among (23,700) male and female NELS:88 participants within each respective ethnic group is based on their scores from a battery of four cognitive tests that were developed by Educational Testing Service. *See* ibid., p. 202; DOEd, *Longitudinal Study of 1988*, p. B–4. These tests were developed to measure and compare boys' and girls' aptitudes in core subjects such as mathematics. *See* DOEd, *Longitudinal Study of 1988*, p. B–4. *See also* DOEd, *Digest of Education Statistics 1996*, p. 472; Catsambis, "The Path to Math," p. 202. Student achievement is based on scores of these cognitive tests and grades earned in mathematics classes from grades sixth through eighth. *See* Catsambis, "The Path to Math," p. 202.

[70] Catsambis, "The Path to Math," p. 203. Girls were more likely to enroll in high ability math classes than their male peers, even when educational, socioeconomic, and psychological factors were controlled. *See* ibid., p. 204.

[71] Ibid., p. 204.

[72] DOEd, NCES, "NAEP Facts: Eighth Grade Algebra Course-Taking and Mathematics Proficiency," February 1996, pp. 1–2. Note: 1992 is the most recent year for middle school students math course completion data. The 1992 NAEP Mathematics Assessment included a background questionnaire that relied on student-reported data. *See* ibid., p. 1.

[73] Ibid., pp. 1–2. Note: The authors did not define the possible courses in "other" math (e.g., remedial, computer math).

in prealgebra as eighth graders in 1988. Almost twice as many blacks and Hispanics (more than 60 percent from each group) as Asian Americans (32 percent) were enrolled in general eighth grade mathematics, and 45 percent of their white peers participated in this regular math course.[74]

High School Level

Students in Specific Courses

In the fall 1993–94 school year, as a result of more than 70 percent of secondary schools allocating students to classes based on some measure of academic ability, the majority of public school secondary students, with sophomores used as an example, (86 percent in mathematics and 72 percent in English) were enrolled in core courses designed for discrete levels of ability.[75] For mathematics, 27 percent of students were in high ability groups, 41 percent in average groups, and 16 percent of students were in low ability level classes.[76] The remaining 14 percent of high school sophomores participated in heterogeneous ability mathematics classes.[77]

For English, 23 percent, 39 percent, and 9 percent of sophomores attending public schools were in high, average, and low ability level classes, respectively.[78] The remaining 28 percent of students were in English courses with a heterogeneous ability group of students.[79] Previously, in 1990, approximately 12 percent of 10th graders were enrolled in heterogeneous ability science classes; 15 percent in heterogeneous English classes; and 18 percent were enrolled in mixed-ability social studies classes.[80]

Enrollment Patterns in Curricular Tracks

The proportion of students in the academic/college preparatory, general, and vocational programs varies over time.[81] In the 1970s, enrollment in the academic curriculum declined (for both genders and all racial/ethnic groups), while enrollment in the general program and (especially for males) vocational program tracks increased.[82] The school reform effort of the 1980s placed renewed emphasis on the academic curriculum, as general and vocational tracks were criticized increasingly for their lack of rigor in imparting the most "socially-valued form of knowledge." Since 1980, program enrollment patterns across various tracks have changed to reflect a "back to basics" movement.[83] Based on data collected in two national longitudinal studies of high school students,[84] of the 24 course

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[74] Ibid., p. 2.

[75] NCES, *Curricular Differentiation*, pp. 14, 16. Some members of the education community report that across all types of schools, mathematics and English are the subjects most often grouped by ability. *See* Braddock, *Tracking Implications*, p. 6; Oakes, "Keeping Track: Part I," p. 15. Note: The school year 1993–94 is the most recent for data on percentages of the Nation's high schools that practice ability grouping in core academic subjects such as mathematics and English. Also note that data were provided only at the high school sophomore level and did not address ability grouping with respect to science or core courses.

[76] NCES, *Curricular Differentiation*, p. 14. Note: The concept of "high," "middle," and "low" ability for any subject area (e.g., mathematics, English) was not explained by the author.

[77] Ibid., p. 5. Note: The percentages may not sum to 100 because of rounding. Note: The school year 1993–94 is the most recent for data on percentages of the Nation's schools that practice ability grouping in core academic subjects such as math. Also note that data were provided only at the high school sophomore level.

[78] Ibid., p. 16.

[79] Ibid., pp. 5, 16. Note: The percentages may not sum to 100 because of rounding.

[80] Brewer et al. "Detracking America's Schools," p. 211. This figure was obtained from the authors' examination of the NCES' NELS:88 data set, which are the results from a nationally representative longitudinal survey of students who were 8th graders in 1987–88 and 10th graders in 1989–90. *See* ibid. The researchers considered the NELS survey data as providing the best available evidence of tracking practices. *See* ibid., p. 211. Ability grouping practices in core courses experienced by high school students in 9th, 11th, and 12th grades were not examined.

[81] U.S. Department of Education, National Center for Education Statistics, *America's High School Sophomores: A Ten Year Comparison*, by Kenneth Rasinski et al. (Washington, DC: Government Printing Office, June 1993), p. 13 (hereafter cited as DOEd, *Ten Years*).

[82] Ibid.

[83] Ibid.

[84] Two longitudinal studies, *High School and Beyond* (*HS&B*) and the *National Educational Longitudinal Study of 1988* (NELS:88) provide information on students' transcripts 10 years apart. The first, *High School and Beyond*, is a national, multipurpose longitudinal survey of 1980 high school sophomores and seniors. It was the first NCES longitudinal study to have a sophomore cohort (rather than focus exclusively on high school seniors, which was the case with the *National Longitudinal Study of the High School Class of 1972*). The purpose of collecting data in HS&B on both sophomores and seniors was to permit a fuller understanding of secondary school experiences and the impact on students, as well as to provide a basis to compare school dropouts with students who remain in school.

units earned by high school graduates in 1992 (up from 21 in 1982), 17 were in academic subjects[85] (up from 14 in 1982), 4 in vocational subjects (down from 5 in 1982) and 3 in personal use.[86] With respect to academic subjects, all three ethnic groups for which data were reported (whites, blacks, and Hispanics) earned more units than their counterparts in 1982.[87]

In contrast, the number of vocational units earned by all three racial/ethnic subgroups (and both genders) decreased, with the largest decline occurring among the Hispanic population (from 5.3 to 3.8 units).[88] In 1992 female graduates earned one-half fewer units in vocational subjects than their male peers;[89] however, males and females showed similar changes from 1982 in their vocational course taking.[90]

The data presented below for high school sophomores and seniors allow two aspects of tracking to be examined: the (1) recent status of tracking (1990 for high school sophomores and 1992 for seniors) and the dissimilar distribution among the various racial/ethnic and gender subgroups; and (2) trends in curriculum program tracking during a 10-year period (from 1980 to 1990) for high school sophomores and a 20-year period (from 1972 to 1992) for high school seniors.

The HS&B sample was a two-stage stratified cluster sample. DOEd, *Ten Years*, app. C, p. 2. The base year survey first selected (with equal probability) 1,015 high schools (the clusters, which were divided into public and private strata), and targeted 36 seniors and sophomores in each. Approximately 58,270 students participated (30,000 of whom were sophomores) in the survey. A sufficient number of minorities were surveyed to enable essential policy analyses. To accomplish this goal, certain types of schools were oversampled, such as those with high percentages of Hispanic students and alternative schools. Ibid., app. c, p. 1.

The instrument collected data on demographic characteristics (e.g., race/ethnicity, socioeconomic status, and parental educational attainment), family characteristics (e.g., size, composition, religious background), characteristics of schools attended (e.g., public, private, nonsecular), extracurricular and employment experiences, self-perception and life values (e.g., marriage, money, work success), attitudes toward learning, afterschool activities (e.g., hours of television watched and homework done per week), specific course selection (e.g., remedial, regular, or honors mathematics), participation in program tracks (e.g., general, vocational, and academic/college preparatory), and plans for the future. Ibid.

The first followup to HS&B collected transcript information for 1982 from a probability subsample of 18,152 students from the original sophomore cohort, and overall 12,116 records were reviewed. Ibid., app. B, p. 11.

The second study is the *1992 Transcript Study*, part of the second (1992) followup to the NELS:88. NELS:88 is considered the most comprehensive longitudinal study done to date by the National Center for Education Statistics. *See* DOEd *Longitudinal Study of 1988*, p. B–4. The purpose of the study was to provide trend data about critical transitions experienced by young people as they develop, attend school, and begin their careers. The resulting information is used to supplement data on the effects of school policies, teacher practices, and family involvement on student outcomes (i.e., academic achievement, persistence in school, and participation in postsecondary education). U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1996*, NCES 96–304 (June 1996), p. 343. The base year study included a student questionnaire, four cognitive tests, a parent survey, a teacher survey, and school administrator survey.

The 1992 NELS:88 survey revisited the same sample of students initially surveyed in 1988. U.S. Department of Education, *Digest of Education Statistics 1995*, p. 483. In addition, the sample was "freshened" with 1992 seniors who were not high school sophomores in the 1989–90 school year in the United States. These students are included so that the 1992 NELS:88 would be representative of the Nation's high school senior class. U.S. Department of Education, National Center for Education Statistics, *A Profile of the American High School Senior in 1992*, by Patricia Green et al. (Washington, DC: Government Printing Office, June 1995), p. 34.

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[85] Academic courses include mathematics (e.g., basic, prealgebra, advanced calculus); science (e.g., general biology, physics); English (e.g., literature, composition, speech); social studies (e.g., American government, European history); fine arts; and foreign languages. Vocational courses include consumer and homemaking education; general labor market preparation (e.g., typewriting, career exploration); and specific labor market preparation (e.g., classes in business and health occupations). Personal use classes focus on areas such as health care, religion, and military science. *See* U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1994*, NCES 94–149 (August 1994), p. 239.

[86] Ibid., p. 72.

[87] Ibid.

[88] Ibid.

[89] Ibid.

[90] Ibid., p. 238.

High School Sophomores [91]

When compared with their 1980 counterparts, fewer 1990 high school sophomores reported that they were in vocational programs (8 percent compared with 21 percent).[92] Consistent drops in vocational program enrollment were reported by sophomores of both genders.[93] Accompanying the decline in vocational program enrollment was increased participation in college preparatory/academic program tracks. Between 1980 and 1990, the enrollment rate in these tracks grew from 33 to 41 percent of students,[94] while selection of the general curriculum increased slightly (from 46 to 51 percent of all students).[95] The proportion of white sophomores in the academic track increased from 35 to 42 percent,[96] while the participation of black sophomores increased from 26 percent in 1980 to 41 percent in 1990. As a result, the disparity in participation in college preparatory programs between whites and blacks was virtually eliminated by 1990.[97] Participation in the academic track by Hispanic students increased from 25 percent in 1980 to 35 percent in 1990.[98] In both 1980 and 1990, a higher percentage of Asian Americans than of whites participated in a college preparatory program.[99] In addition, the participation of Native Americans in the academic track increased from 20 percent in 1980 to 23 percent in 1990. Native Americans' participation increased in the general program as well, from 52 percent in 1980 to 59 percent in 1990.[100]

[91] The 1980 data on high school sophomores comes from the first wave of *High School and Beyond* (*see* discussion of this data set above). The 1990 data on high school sophomores comes from the first (1990) followup of the *National Education Longitudinal Survey of 1988* (*see* discussion of this data set above). The first followup focused on the transition of students into high school.

[92] DOEd, *Ten Years*, p. 16. *See* table A.1. The data on percentages of sophomores in each high school program were obtained from a representative sample of 10th graders. Because the data are student-reported, they may be influenced by students' aspirations and expectations.

[93] *See* table A.1.

[94] DOEd, *Ten Years*, pp. 14–15.

[95] Ibid., p. 16.

[96] *See* table A.1.

[97] DOEd, *Ten Years*, p. 17.

[98] Ibid.

[99] *See* table A.1.

[100] *See* ibid.

High School Seniors [101]

During the two decades from 1972 to 1992, several discernible shifts occurred in enrollment patterns in high school programs.[102] First, participation in academic programs declined between 1972 and 1980, falling from 46 to 39 percent. However, by 1992, enrollment returned to roughly its 1972 level, as 48 percent of high school seniors were enrolled in academic programs.[103] The percentage of seniors participating in vocational programs declined from 22 percent in 1972 (and 24 percent in 1980) to 12 percent in 1992.[104] The rebound in the academic enrollment program by high school seniors is fueled primarily by the higher enrollment rates of females and minorities.[105]

For seniors, the disparities between the participation rates in academic programs of whites and minorities were smaller in 1992 than in 1972. The percentage of whites enrolled in aca-

[101] The 1972 data on high school seniors comes from the *National Longitudinal Study of the High School Class of 1972*. The *National Longitudinal Study of the High School Class of 1972* (NLS–72) began in the spring 1972, with a survey of a national probability sample of 19,001 high school seniors attending 1,061 public and private (secular and church-affiliated) schools. U.S. Department of Education, National Center for Education Statistics, *Trends Among High School Seniors, 1972–1992*, by Patricia Green et al. (Washington, DC: Government Printing Office, June 1995), p. 122 (hereafter cited as DOEd, *Trends 1972–1992*). The sample was designed to be representative of the approximately 3,000,000 high school seniors enrolled in more than 17,000 schools in spring 1972. The 69-minute student questionnaire covered items such as demographic characteristics (e.g., race/ethnicity, family socioeconomic status), types of schools attended, courses and program tracks selected, grades received in specific courses, and satisfaction with one's current education institution. In addition, high school seniors were questioned about work experiences, values and political views, and plans for future (e.g., intended location and type of college, academic major, and occupation/profession). School administrators supplied data on each student, and schools' programs, resources, and grading systems. Ibid., p. 112. The five completed followups (1973, 1974, 1976, 1979, and 1986) were designed to obtain information on the transitions of young adults from high school through postsecondary education and the workplace. DOEd, *Digest of Education Statistics 1995*, p. 465.

The 1992 data on high school seniors comes from the second (1992) followup to the *National Education Longitudinal Survey of 1988* (*see* discussion of this data set above).

[102] DOEd, *Trends 1972–1992*, p. iii.

[103] *See* table A.2.

[104] *See* ibid.

[105] DOEd, *Trends 1972–1992*, p. iii.

demic programs in 1992 was similar to the 1972 level; however, the enrollment rates of their Hispanic and black peers in academic programs increased, from 33 to 43 percent for blacks, and from 27 to 35 percent for Hispanics.[106]

The decline in the proportion of high school seniors enrolled in vocational programs occurred among each demographic subgroup of students. Although there was a statistically significant gender gap in vocational education program enrollment among high school seniors in 1972, by 1992 the disparity was eliminated. Boys and girls no longer participate at distinguishably different rates in this curricular track. Between 1972 and 1992, the percentage of males enrolled in vocational education programs declined from 19 to 12 percent, while the change for their female counterparts was even larger. The percentage of female high school seniors enrolled in vocational education programs declined from 26 percent in 1972 to 12 percent in 1992.[107]

The participation rate in vocational education decreased for both whites (from 21 to 11 percent) and blacks (from 33 to 17 percent). Similarly, the participation rate among Hispanics in vocational education decreased from 30 to 14 percent. Asian Americans continue to have the smallest representation in vocational programs, and their participation rate in 1992 was less than 10 percent.[108]

Trends in Racial/Ethnic Distribution of Students

Some members of the education community have been concerned that the division or sorting of secondary school students among academic and general programs (throughout the 20th century) has reinforced the racial/ethnic and socioeconomic stratification of American society.[109] The 10-year analysis of high school sophomores and the 20-year analysis of seniors presented above show that some disparities between whites and members of ethnic minorities continue. For instance, in contrast to white seniors, Hispanics are more likely to be in a general education program (51 percent compared with 39 percent).[110] And black seniors are more likely than white seniors to be enrolled in vocational education (17 percent compared with 11 percent).[111]

However, some disparities in participation in various programs by whites and ethnic minorities seem to be decreasing. The narrowing of the white-ethnic minority disparity in the participation rate in academic programs reflects a decline in the extent to which ethnic minorities are underrepresented in this curricular track. In contrast, the reduction of the ethnic minority-white high school senior difference in the enrollment rate in vocational education reflects a decline in blacks' and Hispanics' overrepresentation in this program track.

Trends in Course Completion

In the 1990s, males and females have generally been exposed to the same learning opportunities in their course enrollments.[112] Various organizations, such as the Council of Chief State School Officers (CCSSO), have examined NCES' *1982 and 1992 Transcript Studies* and determined that gender disparities in higher level math and science course enrollments (in favor of males) have declined and in some cases have reversed during the 10-year period.[113] In fact, the CCSSO reported, with respect to mathematics courses, by 1992 more females (58 percent) completed algebra II by high school graduation than their male peers (54 percent).[114] DOEd reported that by 1994 the gender disparity in favor of females widened, as 55 and 62 percent of male and female high school graduates, respectively, had algebra II credit.[115] DOEd further reported that enrollment in remedial courses declined between 1982 (33 percent) and 1992 (17 per-

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[106] Ibid., p. 19; *see* table A.2.

[107] DOEd, *Trends 1972–1992*, p. 19; *see* table A.2.

[108] *See* table A.2.

[109] DOEd, *Ten Years*, p. 13.

[110] *See* table A.2.

[111] *See* ibid.

[112] Catsambis, "The Path to Math," p. 208.

[113] Council of Chief State School Officers, *State Indicators of Science and Mathematics Education: 1995*, by R. Blank and D. Gruebel (Washington, DC: CCSSO, 1995), p. 37 (citing U.S. Department of Education, National Center for Education Statistics, *The 1990 High School Transcript Study Tabulations: Comparative Data on Credits Earned and Demographics for 1990, 1987, and 1982 High School Graduates*, by S. Legum et al., NCES 93–423).

[114] Ibid. Similarly, in 1987, 49 percent of female high school graduates compared with 47 percent of their male peers completed algebra II; and in 1990, 53 percent of females and 50 percent of males completed this subject. *See* DOEd, *Condition of Education 1996*, p. 100.

[115] DOEd, *Condition of Education 1996*, p. 100.

cent).[116] In both of these years, females were less likely than males to have participated in remedial mathematics while in high school. Of the 1982 high school graduates, 30 and 36 percent of females and males, respectively, completed at least one remedial mathematics course.[117] Of the class of 1992,[118] 15 and 20 percent of females and males, respectively, participated in at least one remedial mathematics course before high school graduation.[119] Also in 1992, similar percentages of male and female students (based on the National Science Foundation's review of DOEd's *High School Transcript Studies*) completed trigonometry (21 percent of both genders[120]), calculus (10 percent of both genders), and advanced placement calculus (6 percent of males and 5 percent of females).[121]

With respect to science courses, by the 1990s, according to DOEd, females were more likely to earn credits in chemistry.[122] In contrast, in 1994 male students continued to have significantly higher completion rates of at least 1 year of physics (27 percent) than their female counterparts (22 percent).[123] This gender disparity was similar to that of 1982 when approximately 19 percent of male high school graduates and 10 percent of their female peers completed physics.[124] A study undertaken by the American Institute of Physics indicated that female students were increasing their representation among students enrolled in physics. Females constituted 43 percent of high school physics enrollment in 1993, up from 39 percent in 1987. However, females were a smaller fraction of physics students in more advanced classes.[125] Females were only 27 percent of the calculus-based advanced placement physics course enrollment, compared with 46 percent of the enrollment in physics classes for nonscience students.[126]

Similar percentages of male and female high school graduates earned at least one biology credit in 1982 (74 and 78 percent, respectively) and 1994 (92 and 95 percent, respectively).[127] In 1992 males and females had similar completion

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[116] DOEd, *Trends 1972–1992*, p. 60.

[117] Ibid.

[118] The year 1992 is the most recent for data on high school graduates' completion of remedial coursework.

[119] DOEd, *Trends 1972–1992*, p. 60. Similarly, in 1987, 27 percent of males and 23 percent of their female peers participated in remedial mathematics, which declined slightly to 26 and 22 percent of males and females, respectively, in 1990. *See* DOEd, *The 1990 High School Transcript Study Tabulations*, table 36.

[120] Similarly, in 1990, 18 percent of both males and female high school graduates completed trigonometry. *See* DOEd, *Condition of Education 1996*, p. 100; DOEd, NCES, *The 1990 High School Transcript Study Tabulations*, table 36.

[121] National Science Foundation, *Women, Science and Engineering*, pp. 9, 111 (citing DOEd, NCES, *High School Transcript Studies, 1982 and 1992* (cited on DOEd, *Condition of Education 1994*, p. 242)). *See also* U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1995*, NCES–95–273, p. 265. In earlier years, 1984 for instance, boys and girls differed in electives they chose. Boys were still more likely than girls to enroll in higher level mathematics and sciences courses. *See* DOEd, National Center for Education Statistics, "Science and Mathematics Education in American High Schools: Results from the High School and Beyond Study," *Bulletin of the US Department of Education*, (Washington, DC: Government Printing Office, 1984), as cited in R. Mickleson, "Why Does Jane Read and Write so Well? The Anomaly of Women's Achievement," *Education and Gender Equality*, Julia Wrigley, ed. (Bristol, PA: Falmer Press, 1992), p. 152. The year 1992 is the most recent for data on high school graduates' completion of advanced placement coursework.

[122] DOEd, *Condition of Education 1996*, p. 100; Chief State School Officers, *State Indicators of Science and Mathematics Education: 1995*, by R. Blank and D. Gruebel (Washington, DC: CCSSO, 1995), p. 37. In 1990, 50 percent of female high school graduates compared with 48 percent of their male peers completed at least one course in chemistry. *See* DOEd, *Condition of Education 1996*, p. 100. Also in 1994, 59 percent and 53 percent of female and male high school graduates, respectively, had at least 1 year of credit in this subject. *See* DOEd, *Condition of Education 1996*, p. 100.

[123] DOEd, *Condition of Education 1996*, p. 100.

[124] Ibid.; National Science Foundation, Division of Research, Evaluation, and Communication; Directorate for Education and Human Resources, *Indicators of Science and Mathematics Education 1995*, ed. L. Suter (Arlington, VA: National Science Foundation, 1996), NSF 96–52, p. 39; L. Suter, ed., Division of Research, Evaluation and Communication, Directorate for Education and Human Resources, National Science Foundation. *The Learning Curve: What We Are Discovering about US Science and Mathematics Education* (Washington, DC: NSF, 1996), pp. 15–16; National Science Foundation, *Women, Science and Engineering*, p. 9; Council of Chief State School Officers, *State Indicators of Science and Mathematics Education*, p. 37.

[125] National Science Foundation, *Women, Science and Engineering*, pp. 9, 10; AAUW, *How Schools Shortchange Girls: The AAUW Report* (New York: Marlowe and Co., 1992), p. 44.

[126] National Science Foundation, *Women, Science and Engineering: 1996*, pp. 9, 10 (citing M. Neuchatz and L. Alpert. *Overcoming Inertia: High School Physics in the 1990s: Findings From the 1993 Nationwide Survey of High School Physics Teachers* (College Park, MD: American Institute of Physics, 1995)).

[127] DOEd, *Condition of Education 1996*, p. 100.

rates of advanced placement biology (5.8 and 5.7 percent, respectively) and advanced placement chemistry (4.3 and 3.7 percent, respectively).[128]

Racial/Ethnic Disparities in Core Subjects

Evidence From Various Sources of National Survey Data. The Center for Research on Effective Schooling for Disadvantaged Students examined representative samples of longitudinal studies on the status of ability grouping practices to determine the effects on various racial/ethnic groups.[129] Enrollment patterns of various racial/ethnic student subgroups revealed that blacks, Hispanics, and Native Americans are maldistributed across various ability level groups in core courses.[130] For instance, blacks, Hispanics, and Native Americans, at the high school senior level, were significantly overrepresented in remedial English and math relative to their white peers. Asian Americans were not significantly overenrolled in remedial level English, in comparison to whites at the high school senior level.[131]

In contrast, both blacks and Hispanics were significantly underrepresented in honors English and mathematics classes; however, Native Americans were enrolled in both of these courses in proportion to their share of total high school senior enrollment. Asian American high school seniors were significantly overenrolled in honors mathematics and participated in honors English in proportion to their share of student enrollment.[132]

Evidence from a 1992 Survey. The National Educational Longitudinal Study (NELS:88) 1992 followup survey obtained information on high school seniors' course completions (within their respective schools' curricula) through student surveys and high school transcripts.[133] Among students who participated in math and science as high school seniors, the demographic composition varied based on the specific achievement level (i.e., low, average, above average) of the particular class. Racial and ethnic disparities were more evident than gender differences. For mathematics, 9 percent of Hispanics, compared with 3 percent of whites, were enrolled in remedial courses. Almost one-half of blacks were in average groups, compared with only one-fourth of Asian Americans. In advanced placement math classes, Asian Americans were significantly overrepresented (20 percent), in contrast to blacks and Hispanics, who were underrepresented. Only 3 percent and 5 percent of blacks and Hispanics, respectively, received credit for advanced placement mathematics.

For science, with respect to whites, blacks, and Hispanics in particular, enrollment disparities were less pronounced than they were in mathematics. Asian Americans, however, were overrepresented in advanced placement courses, as one-fourth of high school seniors from this group earned credit in this area during high school. In contrast, 6 percent and 8 percent of blacks and Hispanics, respectively, participated in advanced placement science courses as high school seniors.[134]

1993 National Science Foundation Survey. A 1993 survey by the National Science Foundation examined racial/ethnic enrollment patterns in math and science courses.[135] In high school science classes, minorities accounted for 28 percent or more of the students in almost one-third of all low ability groups. However, in the majority of high ability groups, minorities were less than 10 percent of enrollment. The pattern is similar for mathematics classes.[136]

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[128] DOEd, *Condition of Education 1995*, p. 265. *See also* US Department of Education, National Center for Education Statisitics, *Condition of Education 1994*, p. 242.

[129] Braddock, *Tracking Implications*, abstract. Some of the studies examined included NCES' *High School and Beyond*, *National Assessment of Educational Progress 1986 Young Adult Survey*, *National Longitudinal Study of High School Class of 1972*; Johns Hopkins University 1988 National Survey of Middle Grades Principals.

[130] Braddock, *Tracking Implications*, abstract.

[131] Ibid., p. 7. Note: The author did not report the extent of the overrepresentation, other than state that it was "statistically significant."

[132] Ibid.

[133] U.S. Department of Education, National Center for Education Statistics, *High School Seniors' Instructional Experiences in Science and Mathematics*, by Thomas Hoffer et al. (Washington, DC: Government Printing Office, February 1996) (hereafter cited as DOEd, *Experiences in Science and Mathematics*).

[134] Ibid., pp. 58–61.

[135] National Science Foundation, *Women, Science and Engineering*, p. 125, table 2–15.

[136] Ibid.

High Schools with a Large Minority Student Body

The disproportionate placement of minority students in lower level groups creates a barrier to their educational achievement.[137] Schools whose student enrollment patterns are dominated by racial/ethnic subgroups tend to focus on remedial courses and vocational tracks—coursework that prepares students for unskilled labor.[138] In some cases, their college preparatory classes are less rigorous. In contrast, schools that serve a predominately middle-class, white population concentrate on providing students advanced academic courses and ability level tracks, and preparing students for employment in business and science-related fields.[139]

The Harvard Project on Racial Desegregation revealed that high poverty/high minority (particularly blacks and Latinos) schools tend to devote more time and resources to family and health crises, security, children from limited-English-proficient backgrounds, students with disabilities, children from homes void of educational materials, and children lacking sufficient academic preparation for school.[140] These schools tend to invest more resources in remedial education classes and have less emphasis on advanced level courses, programs for the gifted, and educationally rigorous (rather than basic, basal texts) materials.[141]

In a 1980s study of 20,000 high school students (of whom approximately 20 percent were members of racial/ethnic subgroups) in a Midwest school district with 12 public high schools, minorities were primarily and disproportionately tracked in "terminal" vocational (e.g., typing, keyboard) courses that tend to steer participants into low wage occupations, rather than prepare students for advanced learning.[142] Business-related classes had minority enrollments up to 47 percent, while courses geared to immediately prepare students for the fast food industry had minority enrollments as high as 100 percent.[143] In contrast, although minority students participated in entry-level college preparatory classes, their enrollment tended to dwindle as courses became more advanced. White students tended to dominate courses and programs that led to preparation for postsecondary education or highly skilled vocational roles.[144]

These course enrollment patterns resulted from the school district's offering courses such as black history as one-time courses at the same time as more rigorous college preparatory classes (such as Latin I), which could serve as prerequisites to a sequence/hierarchy of other courses. The students who selected to enroll in the culture-related classes would be "locked out" of the more advanced college preparatory courses (such as Latin II) for which the nonselected courses (e.g., Latin I) were prerequisites—the more demanding subjects that can foster preparation for more advanced economic opportunities.[145]

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[137] Oakes, "Keeping Track: Part I," p. 17.

[138] Oakes, "Keeping Track: Part II," p. 150.

[139] Ibid.

[140] Gary Orfield, Mark D. Bachmeier, David R. James, and Tamela Eitle, "Deepening Segregation in American Public Schools," Harvard Project on School Desegregation, April 5, 1997, p. 17. The relationship between segregation by race (measured by percentage of black/Latino students) and by poverty (percentage of students receiving free lunch used as proxy) in the Nation's public schools is higher than 0.7. Ibid., p. 16. The researchers of the Harvard Project claim that references to economically segregated schools are also in reference to schools segregated by race/ethnicity. Ibid., p. 16. NCES data from the 1994–95 school year revealed that of schools that are 10–20 percent black/Latino, 21 percent of these schools have fewer than 10 percent of their respective students eligible for free lunch. Ibid., p. 19. In contrast, 88 percent of schools that are 90–100 percent minority enrollment have between 50 and 100 percent of their students as eligible to receive a free lunch. Ibid.

[141] Ibid., p. 17.

[142] Raymond Calabrese, "The Discriminatory Impact of Course Scheduling on Minorities," *Journal of Education,* Summer 1989, p. 32. Note that the authors did not reveal the specific location of "the large urban Midwestern school district."

[143] Ibid., p. 34. Overall, according to an education researcher, minority students are more likely to be assigned to nonacademic courses because they do not fit the stereotyped middle-class image that the educational system continues to value and preserve. *See* Daniel Gursky, "On the Wrong Track," in Bellanca and Swartz, *The Challenge of Detracking,* p. 177.

[144] Calabrese, "The Discriminatory Impact of Course Scheduling on Minorities," p. 34.

[145] Ibid., pp. 34–35. The authors acknowledge that in the examined school district, astute minority students recognized that a "dominating" culture "attempted" to cater to racial/ethnic minority students' (erroneously) perceived needs by offering "patronizing courses" that could lead to immediate but unrewarding occupations in the child care industry, for instance. Ibid., p. 36. Consequently, not all racial/ethnic minority students "fell into the trap" of enrolling in courses that provided no significant preparation for postsecondary endeavors. Ibid., p. 36.

Similar to middle schools, grouping practices at the high school level can also result in overrepresentation of minority students in lower level classes and subgroups.[146] In the early 1990s, the National Educational Longitudinal (followup) Study (NELS:88) examined nationally representative data that showed patterns of ability group placement in English and mathematics classes for white, black, Latino, Asian American, and Native American students.[147] With respect to English classes, 40 percent of Asian Americans and 32 percent of whites were enrolled in high ability groups, in contrast to only 9, 15, and 18 percent of Native Americans, blacks, and Latino Americans, respectively.[148] As evident, three racial/ethnic minority subgroups were significantly underrepresented in high track English courses in comparison to their white peers.[149]

With respect to lower level English courses, blacks' participation rate was 2.43 times higher (i.e., 143 percent higher) than that of their white peers. Native and Latino Americans were also more than twice as likely as their white peers to participate in lower level English classes. More than one-third of black and Native American eighth graders enrolled in low track English, in contrast to 15 percent of white and Asian American students.[150]

Enrollment patterns in high level math courses were virtually identical to enrollment patterns in high ability English classes, in which more than one-third of whites and Asian Americans participated and only 10 percent and 15 percent of Native American and black students, respectively, participated. In both high ability math and English, Asian American eighth graders were significantly overrepresented relative to their white peers. Similarly, enrollment patterns in lower level math classes resembled the racial/ethnic patterns for English, in which blacks and Native Americans had participation rates that were more than twice as high as that of their white peers.[151]

By discouraging minority students from achieving academically, a school district's assumptions and expectations of minority students can conflict with their personal goals. Ibid., p. 35. Minority students who determine/perceive how their respective school system intends to direct them to classes may realize that they may not be encouraged to achieve their educational goals. Ibid., p. 35.

[146] George, "What's the Truth About Tracking and Ability Grouping Really?" pp. 256, 265, 266.

[147] Braddock and Dawkins, "Ability Grouping, Aspirations, and Attainments," p. 326.

[148] Ibid., p. 327, table 1.

[149] Ibid., pp. 326–29.

[150] Ibid., p. 327, table 1.

[151] Ibid., pp. 326–29.

Table A.1
Percentages of 1980 and 1990 High School Sophomores in General, College Preparatory, and Vocational High School Programs, by Gender and Race/Ethnicity

Student characteristics	General		College preparatory/ academic		Vocational	
	1980	1990	1980	1990	1980	1990
All sophomores	46.0	50.8	33.1	41.3	21.0	7.9
Whites	47.4	51.7	35.0	42.0	17.6	6.3
Blacks	39.0	42.9	26.9	40.9	34.1	6.2
Asian Americans	37.1	42.3	48.8	49.2	14.1	8.5
Native Americans	51.6	58.5	19.8	22.9	28.7	8.6
Hispanics	46.1	55.0	24.6	35.1	29.2	9.9
Males	46.4	50.9	32.5	40.6	21.1	8.4
Females	45.2	50.7	35.8	42.0	19.0	7.4

SOURCE: U.S. Department of Education, National Center for Education Statistics, *America's High School Sophomores: A Ten Year Comparison*, by Kenneth Rasinski et al. (Washington, DC: Government Printing Office, June 1993), pp. 16–17.

Table A.2
Percentage of Seniors Enrolled in General, Academic, and Vocational High School Programs, by Gender and Race/Ethnicity

Student characteristics	General		College preparatory/ academic		Vocational	
	1972	1992	1972	1992	1972	1992
All seniors	31.8	40.0	45.7	47.7	22.4	12.3
Whites	30.6	38.7	48.6	49.9	20.8	11.4
Blacks	34.2	40.2	32.7	42.8	33.1	17.0
Asian Americans	33.7	34.6	53.5	56.2	12.8	9.2
Hispanics	42.4	50.6	27.4	35.4	30.1	14.1
Males	33.1	40.9	48.3	46.6	18.6	12.5
Females	30.6	39.1	43.2	48.8	26.2	12.1

NOTE: Data on Native American students were not available.
SOURCE: U.S. Department of Education, National Center for Education Statistics, *Trends Among High School Seniors, 1972–1992*, by Patricia Green et al. (Washington, DC: Government Printing Office, June 1995), p. 19.

Table A.3
Racial Composition of Public Elementary and Secondary Schools by Region

Race, by region	1968	1980	1988
Midwest			
Black	10.6%	12.5%	11.4%
Hispanic	1.2	2.2	2.8
White	87.9	83.8	83.6
Asian	0.3	1.5	2.2
Northeast			
Black	11.5	13.6	12.4
Hispanic	3.7	6.6	8.8
White	84.4	78.3	75.8
Asian	0.4	1.5	3.0
South			
Black	25.3	25.4	25.3
Hispanic	4.1	7.3	9.1
White	70.2	65.9	63.7
Asian	0.4	1.4	1.9
West			
Black	6.3	6.7	5.7
Hispanic	12.6	18.4	21.4
White	78.2	67.1	62.6
Asian	2.9	7.8	10.3
United States			
Black	14.8	16.1	15.2
Hispanic	4.5	8.0	10.1
White	79.9	73.2	70.7
Asian	0.8	2.6	4.0

SOURCE: Steven G. Rivkin, "Residential Segregation and School Integration," *Sociology of Education*, vol. 67 (October 1994), p. 281.

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