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ABILITY TRACKING: WHAT ROLE FOR THE COURTS?*

by
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School boards and other local-level educational policy makers have, in the past, had considerable discretion in crafting curriculum in response to perceived local needs. Accordingly, schools often have different programs, or "tracks," that are intended to prepare students for, e.g., college or a vocation. But state-level policy makers have begun prescribing detailed standards to be taught by all schools and mastered by all students. And courts have begun interpreting state constitutional adequacy mandates to require that students be provided with an opportunity to learn the state standards. In this note, I present an overview of legal precedent concerning court challenges to ability tracking, a practice often favored by local decision-makers. I then summarize the results of some of my own recent research and discuss some new developments on the legal front, concerning the possible legal requirement that schools provide adequacy at every level within a structure of curriculum differentiation. Finally, I discuss some implications for practitioners.

PAST CHALLENGES

Tracking is very common in the nation's schools but has been long identified as a crucial source of inequality of opportunity.[1] It is the practice of placing students in stratified classes (e.g., remedial English, general English, and college prep English), based on the students' perceived abilities. So-called "racial tracking" is a recognized form of second-generation discrimination, whereby students are resegregated into different tracks, all within otherwise desegregated school sites.[2] Racial tracking has been challenged in isolated instances over the past four decades.

While various state and local legal authorities have the potential to play important roles in tracking litigation, the weight of such litigation has relied on the federal Equal Protection Clause and (to a lesser extent) on Title VI of

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1. *See* Jeannie Oakes, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY (1985).
2. *See* Kenneth J. Meier, et al., RACE, CLASS, AND EDUCATION: THE POLITICS OF SECOND-GENERATION DISCRIMINATION (1989).

the Civil Rights Act of 1964.[3] In the former category, one finds *Hobson v. Hansen*,[4] in which the court's finding of intentional discrimination was grounded in significant part upon the district's use of tracking. Twenty-seven years later, the court in *People Who Care v. Rockford Board of Education School District No. 205*[5] reached a similar conclusion. In both these cases, the court found evidence of intentional discrimination.

In several other cases, challenges to tracking arose in litigation subsequent to the implementation of a desegregation order. For instance, the court in *United States v. Yonkers Board of Education*[6] determined that the district's tracking practices were vestiges of prior discrimination. In such cases, plaintiffs argue that school districts turn to tracking as a means of resegregating students within schools that have been desegregated pursuant to court order. In fact, several courts have noted that the tracking systems in question sprouted up at the time of (and in apparent reaction to) forced integration of schools. (See *Moses v. Washington Parish School Board*;[7] *Simmons on Behalf of Simmons v. Hooks*[8]) Similarly, many of these courts have denounced the use of testing as a basis for grouping or placement in these recently desegregated schools (*Singleton v. Jackson Municipal Separate School District*;[9] *United States v. Board of Education of Lincoln County*;[10] *United States v. Tunica County School Dist.*;[11] see also *Hobson*, in which the court questioned the validity and accuracy of tests used for placement).

When plaintiffs move to modify desegregation orders to respond to resegregation caused by tracking, racially disparate grouping in a previously segregated school system is generally held invalid unless the district can demonstrate that the tracking system (a) was not based on the present results of past segregation (i.e., was not a vestige) or (b) would remedy the present results of past segregation by providing enhanced educational opportunities (*McNeal v. Tate County School District*[12]).

Despite the result in *McNeal* itself (finding the tracking system unconstitutional), several courts have used this test to conclude that, since the *particular* children now being tracked had never attended segregated schools, the earlier discrimination could not be blamed for the present disparate

3. Disparate impact actions filed pursuant the Department of Education's implementing regulations for Title VI of the 1964 Civil Rights Act (42 U.S.C. § 2000d, 1982) existed for 35 years, but were recently eliminated by the U.S. Supreme Court in *Alexander v. Sandoval*, 121 S.Ct. 1511 (2001). Post-*Alexander* disparate impact lawsuits must now be framed under 42 U.S.C. § 1983 (*see Powell v. Ridge*, 189 F.3d 387 (3d Cir.1999)).

4. *Hobson v. Hansen*, 269 F.Supp. 401 (D.D.C.1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C.Cir.1969).

5. *People Who Care v. Rockford Bd. of Educ. Sch. Dist. No. 205*, 851 F.Supp. 905 (N.D.Ill. 1994).

6. *United States v. Yonkers Bd. of Educ.*, 123 F.Supp.2d 694, 716–718 (S.D.N.Y.2000).

7. *Moses v. Washington Parish School Bd.*, 456 F.2d 1285 (5th Cir.1972).

8. *Simmons on Behalf of Simmons v. Hooks*, 843 F.Supp. 1296 (E.D.Ark.1994).

9. *Singleton v. Jackson Municipal Separate Sch. Dist.*, 419 F.2d 1211 (5th Cir.), *vac'd in part and rev'd in part sub nom. Carter v. West Feliciana Parish Sch. Bd.*, 396 U.S. 290 (1970).

10. *United States v. Board of Educ. of Lincoln County*, 301 F.Supp. 1024 (S.D.Ga.1969).

11. *United States v. Tunica County Sch. Dist.*, 421 F.2d 1236 (5th Cir.1970), *cert. den'd*, 398 U.S. 951 (1970).

12. *McNeal v. Tate County Sch. Dist.*, 508 F.2d 1017 (5th Cir.1975).

impact of tracking. (*Georgia State Conference of Branches of NAACP v. Georgia*;[13] *Montgomery v. Starkville Mun. Separate School Dist.*;[14] *Quarles v. Oxford Mun. Separate School Dist.*[15]) Most recently, however, in *Simmons v. Hooks*, the court applied the *McNeal* test in a much less deferential way, relying on expert testimony in finding that the tracking system would not remedy the results of past discrimination by providing better educational opportunities.

RECENT RESEARCH

I recently studied tracking in four school districts (San Jose, California; Wilmington, Delaware; Woodland Hills, Pennsylvania; and Rockford, Illinois) and found a clear pattern of discrimination.[16] All four districts were racially diverse and were all operating under court-ordered desegregation plans.

In theory, the process of tracking children is supposed to facilitate learning by separating them into groups, so that they are taught alongside peers of similar ability and apart from those with higher or lower abilities. In the four school districts I studied, students with an extraordinarily wide range of ability levels—as measured by standardized tests such as the sixth grade Iowa Test of Basic Skills (ITBS) and California Test of Basic Skills (CTBS)—were placed together in remedial, college preparatory and advanced academic courses.

In all of the districts, early judgments about the students' capacities persisted throughout their school careers, and placements, once made, tended to take on a life of their own. Lower-tracked students were caught in a downward cycle—their education failed to prepare them in terms of knowledge and skills, and their transcripts reflected missing prerequisites for later courses. Labels became fixed, internally for students themselves and externally for teachers, counselors and other students.

Racial sorting through the tracking systems occurred in these districts even among students with comparable achievement. That is, the disproportionate placement of African-American and Latino students in low-track classes, and the corresponding exclusion of these students from high-track classes, went above and beyond any effect attributable to prior measured achievement.

Finally, analyses of data from the four districts demonstrate that just one year of differential track placement has a strong effect. Students placed in low tracks immediately fall behind their high-track counterparts, and the achievement gap remains and even increases over subsequent years. As a policy matter, this negative impact of low-track placement is even more important than the proof of racial discrimination among students of comparable prior achievement. It raises the question of why any student, of

13. *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir.1985).

14. *Montgomery v. Starkville Mun. Separate Sch. Dist.*, 665 F.Supp. 487 (N.D.Miss.1987).

15. *Quarles v. Oxford Mun. Separate Sch. Dist.*, 868 F.2d 750 (5th Cir. 1989).

16. Kevin G. Welner, LEGAL RIGHTS, LOCAL WRONGS: WHEN COMMUNITY CONTROL COLLIDES WITH EDUCATIONAL EQUITY (2001). SUNY Press.

whatever race or background, is placed in a class generating lesser achievement.

In sum, African–American and Latino students are disproportionately placed in low-track classes that, while they purport to be homogeneous, encompass a wide range of measured abilities. Once placed in low tracks, these students must overcome great odds to move up within the tracked structure. Year after year, they fall further and further behind their high-tracked counterparts. Taken as a whole, these analyses highlight two harmful elements of tracking. First, African–American and Latino students are disproportionately taking these low-track courses, even after controlling for prior achievement. Second, the low-track classes have a detrimental impact on students' later academic performance–regardless of race.

NEW DEVELOPMENTS

The gravamen of the above analyses lies in one key contention: *the quality of educational opportunities offered in low-track classes is substantially inferior to that offered in high-track classes.* The level, and even the existence, of that inferiority varies from school to school (and from class to class), but these variations tend to disappear when one moves to a macro-scale of, for instance, the overall impact of a district's tracking practices. Inferiority is also, however, a social construct: it is contextualized within community values concerning the purpose of schooling. An obvious example of this contextualization would be the value placed on a non-academic vocational education in a blue-collar versus a white-collar community. White-collar students and parents are more likely to view the vocational education as inferior.

In the past, this difference of opinion concerning the value of different types of education added a layer of difficulty for courts considering challenges to tracking systems. However, any such dispute has now been resolved by an avalanche of legislation collectively known as the standards movement.[17] These federal and state statutes provide a framework for a national push for standards and high-stakes accountability. That is, states' accountability systems are often tied to important items such as grade promotion and graduation; this gives the tests "high-stakes" for the impacted students. This standards legislation should resolve the issue of whether schools are required

17. It is also known as the standards-based accountability movement, and it grew out of the systemic reform movement. These reforms are grounded in the idea of alignment between curriculum standards, performance standards, assessment, teacher preparation, staff development, and other forms of capacity-building, incentives, and mandates. As generally practiced, the state adopts a set of standards along with a statewide test and a system of rewards and punishments directed at students, teachers, schools, and/or school districts and all dependant upon students' test scores. See, e.g., Cal. Educ. Code § 60602(a)(2) (West 2001), which mandates the adoption of "a set of statewide academically rigorous content standards and performance standards in all major subject areas," and § 60605, which sets forth the requirement, as part of the Standardized Testing and Reporting (STAR) Program, that students be tested in basic skills in reading, spelling, written expression, mathematics, history-social science, and science). Also see Tex. Educ. Code § 39.025 (Vernon 1996), which requires students to perform satisfactorily on the secondary exit-level TAAS exam before being eligible to receive a high school diploma, and Tex. Educ. Code § 39.131, which describes accreditation sanctions and interventions for school districts and campuses not meeting the accreditation criteria, including that of the secondary exit-level TAAS.

to generally offer an academic education. Moreover, the legislation effectively provides courts with guidelines concerning the actual level of academic preparation that elected representatives have determined to be necessary.

Even the standards themselves–that is, setting aside the high-stakes tests tied to those standards–supply a solid basis upon which courts can ground decisions challenging the adequacy of students' educational opportunities. At least two state supreme courts have expressly turned to their state standards to give meaning to a constitutional adequacy clause.[18] Thus, courts have already begun interpreting adequacy mandates to require that students be provided with an opportunity to learn the state standards. A logical extension of these cases is to demand similar adequacy at every level within a structure of curriculum differentiation. Individual policy decisions that create stratification within a larger (presumably adequate) system can produce inequalities evaluated pursuant to the same guidelines of educational adequacy.

If minority students are taught disproportionately in classes that present inferior opportunities, and if schools create and maintain an educational structure that facilitates this disproportionality, then, under the Department of Education's implementing regulations for Title VI, schools would have the burden of proving the educational necessity for practices that produce this disparate racial impact.[19] Further, even if low-track classes do not disproportionately house minority students, they raise important issues under state constitutional education clauses[20] as well as due process claims tied to high-stakes testing.[21] That is, courts may now consider the impact of high-stakes testing.

Past challenges to such testing have usually sought the remedy of a diploma being awarded.[22] Plaintiffs in these cases challenged the fairness of

18. *Idaho Sch. for Equal Opportunity v. Evans*, 976 P.2d 913 (Idaho 1998); *Idaho Sch. for Equal Opportunity v. Evans*, 850 P.2d 635 (Idaho 1993); *United Sch. Dist. v. State*, 885 P.2d 1170 (Kan.1994); *See also Opinion of the Justices*, 624 So.2d 107 (Ala.1993) (incorporating the trial court opinion using the state standards to explain the adequacy clause); *Leandro v. State*, 488 S.E.2d 249 (N.C.1997) ("[e]ducational goals and standards adopted by the legislature are factors which may be considered on remand to the trial court for its determination as to whether any of the state's children are being denied their right to a sound basic education.... Another factor which may properly be considered in this determination is the level of performance of the children of the state and its various districts on standard achievement tests." [citation omitted]). The court also noted that neither of these factors should be determinative. *Id.* at 355. On remand, Wake County Judge Howard E. Manning Jr., in the re-named case of *Hoke County v. N.C. State Board of Education*, issued an opinion holding that the North Carolina constitution requires the state to make sure that every student has the opportunity to meet grade-level standards for academic achievement as measured by the state standards and assessments. 2000 WL 1639686 (N.C. Super. October 12, 2000).

19. 34 C.F.R. § 100.3(b)(2) (2000); 42 U.S.C. § 1983. *See Powell v. Ridge*, 189 F.3d at 400–403; *South Camden Citizens in Action v. New Jersey Dept. of Env. Prot.*, 145 F.Supp.2d 505 (D.N.J.2001).

20. *See, e.g., McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex.1989); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky.1989).

21. *Brookhart v. Illinois*, 697 F.2d 179 (7th Cir.1983); *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir.1981); Paul Weckstein, *School Reform and Enforceable Rights to Quality Education, in* LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 306–389 (1999).

22. *Brookhart, supra* n.21; *Debra P., supra* n.21; *Crump v. Gilmer Indep. Sch. Dist.*, 797 F.Supp. 552 (E.D.Tex.1992); *Williams v.*

exit exams (generally framed as a violation of substantive due process) when their underlying schooling provided insufficient preparation for the assessment. In contrast, future challenges might embrace the standards movement and contend that the plaintiffs' schooling itself is unfair. Such claims would build on states' own adopted standards, arguing to the court that schools now have a clear obligation to give every eligible student an opportunity to learn the curriculum designated and assessed by the state.

An action based on high-stakes accountability would presume that each state has a right to adopt learning standards and to make diplomas and promotion contingent upon certain learning as demonstrated by a given assessment. But the state and its subordinate bodies (school districts and schools) must also implement this policy decision in a fair and equitable manner.

Imagine a legal action in a state with a difficult high-stakes test. Minority students still could not successfully challenge the practice of teaching to the test, so long as their instruction includes full preparation for that test. But instead of focusing on the "punishment" (the retention or diploma denial), students' legal attacks might challenge the state's failure to fulfill its voluntarily assumed affirmative duty to provide each student with a fair opportunity to learn the material covered by the exam. This shift in focus accomplishes at least three goals: it puts the court in the position of enforcing, rather than overturning, state policy; it suggests the remedy of increased educational resources and higher expectations for students; and it allows for claims grounded either in racial discrimination or independent of the students' race.

A legal challenge to tracking along these lines invites a reconsideration of the inequitable structures allowing for stratification of educational opportunities. That is, these actions would not question the legal right or individual propriety of parental decisions to seek out the best opportunities for their children. But they do cast doubt on the legality of schooling structures that effectively ration high expectations and quality opportunities to learn, thereby enabling these parental decisions. The call for American students to meet world-class standards in the Goals 2000 and state standards/accountability legislation is explicitly inclusive: all students must be held to these high standards. Likewise, the new "No Child Left Behind" Act (the 2001 ESEA reauthorization) gives such rhetoric sharp new teeth.

Like civil rights legislation of the 1960s, recent standards legislation is intended to hold local school officials (among others) accountable for ensuring that all children receive an adequate education. It is true that the new approach is distinctly different, focusing on outcomes rather than inputs. However, courts may again step into the fray to demand that inputs–the opportunities actually provided to children–meet minimally acceptable levels as framed by the legislated outcome standards. This points to a new vulnerability for practices such as tracking, which may lower inputs below acceptable levels.

Austin Indep. Sch. Dist., 796 F.Supp. 251 (W.D.Tex.1992); *Anderson v. Banks*, 520 F.Supp. 472 (S.D.Ga.1981).

IMPLICATIONS FOR PRACTITIONERS

Tracking is an educational policy issue that only becomes a legal issue under certain circumstances. For instance, school districts serving racially diverse populations have long been subject to OCR investigations when their tracking systems have shown segregative effects.[23] The new standards and accountability legislation, however, has now expanded potential liability to all school districts.

The above-described impact litigation may be targeted at state-level defendants since, depending on the jurisdiction, they maintain ultimate responsibility for providing educational opportunities.[24] Alternatively, or in addition, the actions may target individual school districts, alleging that local policy decisions regarding tracking are responsible for the denial of protected educational opportunities.

Attorneys representing school districts should assess this risk. In most jurisdictions, the present risk (at the time of this writing) is low. Accountability laws are just coming into effect and the only relevant litigation making use of them is targeted at state level actors (as part of larger adequacy claims). Moreover, even if the exposure risk rises as a result, for instance, of a tangible threat of litigation, a decision to reform tracking policies will likely be difficult for school district leadership.[25] At the same time, many districts house educators and leaders who are anxious to reform the practice. School district attorneys should take care not to become partisans in this highly charged political issue. Instead, in playing out the appropriate role of analyzing and informing, attorneys may recommend that their clients conduct their own internal evaluations of practices and possibilities. Any such evaluation would ultimately be considered, along with the attorney's legal analysis, by the district's democratically responsible policy makers.[26]

Finally, I should note that the above discussion of the potential legal impact of standards and accountability legislation could be extended beyond tracking, to other practices that have been demonstrated to limit educational opportunities. For instance, one could envision a plaintiff who is a student in an overcrowded, unheated classroom taught by an inexperienced teacher who is teaching outside of her subject area. Unlike an action grounded in tracking, however, such a case would surely raise serious issues implicating state funding mechanisms, since these input deficiencies would generally be driven by a tight district budget.

23. *See generally* U.S. Commission on Civil Rights. EQUAL EDUCATIONAL OPPORTUNITY AND NONDISCRIMINATION FOR MINORITY STUDENTS: FEDERAL ENFORCEMENT OF TITLE VI IN ABILITY GROUPING PRACTICES (1999).

24. *See e.g., Butt v. State of California*, 4 Cal.4th 668 (1992).

25. Tracking has long been recognized as a poor pedagogical practice, yet it remains very common throughout the nation. In large part, this resilience is attributable to political obstacles to reform. *See* Kevin G. Welner & Jeannie Oakes. NAVIGATING THE POLITICS OF DETRACKING (Skylight Publications 2000).

26. I have not included a discussion of implications for practitioners who might represent plaintiffs in such matters. Suffice it to say that this sort of impact litigation is difficult and costly but holds the potential to create meaningful opportunities for many children.