

Silent Segregation in Our Nation's Schools

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Ability grouping, often referred to as “tracking,”¹ is an oblique method of school segregation. Found in the vast majority of American public schools,² tracking has been attacked because it increases segregation of students by race, gender, and national origin and is particularly harmful to students placed in the lower tracks.³ The need to end harmful tracking is dire.⁴ Ability grouping early in students' academic careers often has a profound impact on their entire school lives and beyond.⁵ Of gravest concern is that tracking denies equality of opportunity to substantial numbers of minorities throughout our nation's schools.⁶ Often thwarted from participation in programs for the “gifted and talented” and weeded out of high-level courses, minority students are disproportionately placed in low tracks or ability groups, where a watered-down cur-

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¹ “Ability grouping” will be used as a catch-all phrase. This Note uses “tracking” to refer specifically to within-school ability grouping practices, most common in junior and senior high, whereby students take all of their academic courses on a certain level. “Gifted and talented” refers to specialized programs most often found at the elementary and junior high level.

² See PROFESSIONAL STANDARDS & PRACTICE, NATIONAL EDUC. ASS'N, ACADEMIC TRACKING 8 (1990) [hereinafter NEA]; see also Jomills Henry Braddock II, *Tracking the Middle Grades: National Patterns of Grouping for Instruction*, 71 PHI DELTA KAPPAN 445-46 (1990) (discussing a national survey of middle-grade schools that showed that more than two-thirds of the nation's schools serving early adolescents used some between-class ability grouping).

³ Even ability grouping proponents acknowledge the harm to minority and poor students placed in the low track. See, e.g., Tom Loveless, *The Tracking and Ability Grouping Debate* (last modified July 1998) <<http://www.edexcellence.net/library/track.html#anchor993744>>.

⁴ See Debra Viadero, *On the Wrong Track?*, EDUC. WK. ON WEB (Oct. 14, 1998) <<http://www.edweek.org/htbin/fastweb?getdoc+view4+ew1998+1600+2+WAAA+%26%28>>; see also Douglas MacIver & Stephen B. Plank, *Improving Urban Schools: Developing the Talents of Students Placed at Risk*, in WHAT CURRENT RESEARCH SAYS TO THE MIDDLE LEVEL PRACTITIONER 243, 246 (Judith L. Irvin ed., 1997).

⁵ See Kevin G. Welner & Jeannie Oakes, *(Li)Ability Grouping: The New Susceptibility of School Tracking Systems to Legal Challenges*, 66 HARV. EDUC. REV. 451, 459 (1996).

⁶ “[T]he practice of homogeneous ability grouping for all subjects is more often found in schools with sizable (more than 20%) enrollments of African American and Hispanic students.” JOMILLS HENRY BRADDOCK II, CENTER FOR RESEARCH ON EFFECTIVE SCHOOLING FOR DISADVANTAGED STUDENTS, TRACKING: IMPLICATIONS FOR STUDENT RACE-ETHNIC SUBGROUPS 6 (1990).

riculum and lower standards define the educational program.⁷ In *Hobson v. Hansen*,⁸ the district court called for the abolishment of the tracking system in question because it “deprive[d] the poor and a majority of [African American] students . . . of their constitutional right to equal educational opportunities.”⁹

Relatively few school systems that permit racially segregative ability grouping have been challenged since *Hobson*. This Note explores the viability of a variety of legal challenges and the reasons for their paucity¹⁰ and argues that ability grouping practices that have a significant segregative effect may violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.¹¹

Evidence suggests that most educators are unaware that the segregative effects of their school system’s ability grouping practice could render it unlawful.¹² This Note argues that legal challenges to ability tracking may encourage educators to embrace innovative approaches to detacking school systems. This pressure could pave the way for more broad-based school reforms that promise greater integration and higher achievement for all students.¹³ By widely advertising the potential costs of tracking, legal actions would show increasing returns to scale in combating the resegregation of our public schools. Without successful legal action, the silent segregation caused by tracking will continue to subject many minority students in purportedly integrated school systems to a segregated and inferior education.¹⁴

⁷ Researchers have found that with the exception of Asian Americans, minorities, compared with whites, are enrolled in low tracks at a significantly higher rate, and in high tracks at a lower rate. See Jomills Henry Braddock II & Marvin P. Dawkins, *Ability Grouping, Aspirations, and Attainments: Evidence from the National Educational Longitudinal Study of 1988*, 62 *NEGRO EDUC.* 324, 326–29 (1993).

⁸ 269 F. Supp. 401 (D.D.C. 1967), *aff’d sub nom.* *Smuck v. Hansen*, 408 F.2d 175 (D.C. Cir. 1969) (en banc).

⁹ *Hobson*, 269 F. Supp. at 511. On appeal, the Court of Appeals ruled that an ability grouping system per se was not barred from use in the D.C. public schools. See *Smuck*, 408 F.2d at 186.

¹⁰ Nationwide, only 68 complaints about ability grouping and tracking were filed from fiscal years 1993 to 1995. See U.S. COMM’N ON CIVIL RIGHTS, 1 EQUAL EDUCATIONAL OPPORTUNITY PROJECT SERIES 218 (1996) [hereinafter *EEOP*].

¹¹ 42 U.S.C. § 2000(d)(1)–(4) (1994).

¹² See Telephone Interview with Arinita Ballard, Region IV Program Manager, Office for Civil Rights (Oct. 30, 1997); Telephone Interview with Rebecca E. Hoover, National Office, Office for Civil Rights (Nov. 14, 1997); and Telephone Interview with Barbara Shannon, Region IV Director, Office for Civil Rights (Oct. 27, 1997).

¹³ Many schools attempting to detrack face internal resistance from teachers and external resistance from some parents. See, e.g., Viadero, *supra* note 4 (citing a study by Adam Gamoran showing that of 24 schools attempting to make their curricula more equitable, only one—a small high school with small classes—succeeded in detracking in all subjects).

¹⁴ “[W]hen Black students find a greater chance of school desegregation, they are also likely to find a somewhat greater chance of classroom resegregation.” NETWORK OF REGIONAL DESEGREGATION ASSISTANCE CTRS., *RESEGREGATION OF PUBLIC SCHOOLS: THE THIRD GENERATION* 37 (1989).

Part I of this Note examines the research on tracking and similar ability grouping practices, concluding that tracking is especially harmful to minorities because it creates an educational system that is both separate and unequal. Part II looks at reasons for the persistence of tracking. It also argues that the social construction of “intellectual ability” is linked directly to an historical social construction of race rooted in racial superiority. Therefore, the decision to classify students by some measure of “intellectual ability” today, where it has a foreseeable disparate impact, reflects current unconscious societal racism. Part III explores the legal avenues—including Title VI, other federal statutes, and administrative regulations implementing these federal statutes—that exist for challenging ability grouping practices. Part IV discusses how the United States Department of Education’s (“DOEd”) Office for Civil Rights (“OCR”) is currently addressing unlawful ability grouping practices in public schools. In conclusion, this Note suggests that the inexpensive option of filing administrative complaints with OCR may hold the most hope of eradicating segregative tracking on a national scale.

I. Tracking and Its Harmful Effects on Students

Most Americans are familiar with assignment of elementary school students to reading groups, often with inoffensive names designed to obscure ability level, such as the Blue Birds, the Robins, and the Sparrows. Although rigid tracking assignments are more often associated with junior and senior high schools, inflexible between-class ability grouping is a common outgrowth of within-classroom ability grouping and frequently begins at the upper elementary school level.¹⁵

Many schools still track students primarily on the basis of test scores, but generally schools combine standardized tests and grade point averages.¹⁶ Teacher recommendations and parent requests are also factors.¹⁷ Where parents and students are involved in choosing specific leveled courses, often, these choices disappear after a year or two of school because of rigid prerequisites for the more challenging courses, com-

¹⁵ See Robert E. Slavin, *Ability Grouping and Tracking in Elementary Schools: A Best-Evidence Synthesis*, 57 REV. EDUC. RES. 293 (1987); see also POLICY, ENFORCEMENT, & PROGRAM SERV., OFFICE FOR CIVIL RIGHTS, ABILITY GROUPING TECHNICAL ASSISTANCE RESOURCE PACKAGE app. at 1–12 (1992) [hereinafter ABILITY GROUPING PACKAGE].

¹⁶ See COMMITTEE ON APPROPRIATE TEST USE, HIGH STAKES: TESTING FOR TRACKING, PROMOTION AND GRADUATION 93–95 (Jay P. Heubert & Robert M. Hauser eds., 1999) [hereinafter HIGH STAKES].

¹⁷ See *id.*

monly referred to as "gate keeping" courses.¹⁸ Information about these prerequisites is not always presented to students or parents.¹⁹

At the other end of the spectrum, the difference between a special education placement and an assignment to a low track depends a great deal on how specific schools approach the education of low-achieving students. In some cases minority students are assessed as having low ability, primarily on the basis of social behavior, while in others minority students are subjected to dubious psychometrics and assessed as educationally mentally retarded or learning disabled and placed in isolated special education programs.²⁰ Unlike special education students, low-tracked students are *not* entitled to receive support services specifically tailored to their needs or to any extra information about their progress.

A. *The History of Tracking, Ability Grouping, and the Concept of Giftedness*

The merits of programs intended to improve education by grouping students according to "intelligence" or other measures of academic "ability" are suspect because the original push for such programs was heavily rooted in racist conceptions of intelligence and jingoistic public education policy. This history informs the reasoning behind the disparate impact approach found in DOEd regulations.

Ability grouping was originally instituted in our public schools with the goal of limiting participation by certain racial and ethnic groups.²¹ During the period between 1920 and 1950, the concept of "giftedness" in the educational setting was most notably expounded upon by Lewis Terman.²² Terman, who is credited with importing the Stanford-Binet IQ test to America and giving it a "hereditarian" interpretation,²³ traced "the development of high-IQ children from their childhood in the 1920s to mid-

¹⁸ See, e.g., Nicola A. Alexander, *Race, Poverty, and the Student Curriculum, 1975-1995: Implications for Public Policy* (visited Apr. 8, 1999) <<http://nces.ed.gov/pubs97/97535f.html>>.

¹⁹ For example, a parent may not know a sixth grade math placement could effectively forestall enrollment in calculus in high school. See JEANNIE OAKES, *MULTIPLYING INEQUALITIES* 45 (1990).

²⁰ See EEOP, *supra* note 10, at 93-95.

²¹ By the 1920s, ability grouping had gained popularity as a means of coping with the new diversity of students attending school, and as a way to separate those students "destined for college" from those "destined for low-level jobs." Popular scientific theories of intelligence, and particularly Social Darwinism, influenced public schools to develop separate curricula tracks. See STEPHEN J. GOULD, *THE Mismeasure of Man* 368 (1996); JEANNIE OAKES, *KEEPING TRACK* 16-17, 25 (1985).

²² See Harry Passow, *Forward to BEYOND TERMAN* at xiii (Rena F. Subotnik & Karen D. Arnold eds., 1994).

²³ See GOULD, *supra* note 21, at 368.

life and beyond,"²⁴ urging the use of ability grouping to keep certain ethnic groups separated from Anglo-Americans in school.²⁵

After the 1930s, ability grouping practices in schools declined following research that indicated grouping by ability had little or no effect on achievement gains.²⁶ However, gifted programs once again began to proliferate²⁷ along with a resurgence in ability grouping in general²⁸ with the launching of Sputnik in 1957 and the increased technological competitiveness associated with the Cold War. Most notably, following the Supreme Court decision in *Brown v. Board of Education*,²⁹ there was a dramatic increase in the use of ability grouping as a means of circumventing court-ordered desegregation, particularly in the southern states.³⁰ Even as recently as 1994, Terman's bio-deterministic concept of IQ was reintroduced and widely publicized in Richard J. Herrnstein and Charles Murray's book *The Bell Curve*.³¹ The persistence of these popular misconceptions suggests that racist beliefs about intelligence and ability are deeply embedded in our culture.

B. *The Harms of Tracking and Ability Grouping*

Researchers have documented extensively both the long and short-term harms of tracking.³² Heterogeneously grouped students in foreign countries significantly outperform high-tracked American students.³³ While the achievement difference is not due to grouping practices alone, ability grouping, especially before students reach high school, is a significant factor in American students' relatively poor performance in math and science.³⁴ Other research has concluded that there is no clear indication that these practices help students at the highest levels and that

²⁴ See Rena F. Subotnik & Karen D. Arnold, *Longitudinal Study of Giftedness and Talent*, in BEYOND TERMAN, *supra* note 22, at 1.

²⁵ See OAKES, *supra* note 21, at 36 (citing LEWIS TERMAN, *INTELLIGENCE TESTS AND SCHOOL REORGANIZATION* 27-28 (1923)) (noting Terman's determination that 80% of new immigrants were feeble minded).

²⁶ See Note, *Teaching Inequality: The Problem of Public School Tracking*, 102 HARV. L. REV. 1318, 1320 (1989).

²⁷ See OAKES, *supra* note 21, at 24.

²⁸ See ABILITY GROUPING PACKAGE, *supra* note 15, at 3.

²⁹ 347 U.S. 483 (1954).

³⁰ See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 24 (1990).

³¹ RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994).

³² See HIGH STAKES, *supra* note 16, at 103-04, 282.

³³ See Shing-Ying Lee, *Mathematics Learning and Teaching in the School Context: Reflections from Cross-Cultural Comparisons*, in *GLOBAL PROSPECTS FOR EDUCATION, DEVELOPMENT, CULTURE AND SCHOOLING* 46, 74 (Scott G. Paris & Henry M. Wellman eds., 1998).

³⁴ See *id.*

there is thoroughly convincing evidence that they are harmful to students in the lower levels.³⁵

The correlation between labeling low-tracked students as "dumb" and diminishing their self-esteem is well-established.³⁶ Students in low-track classes tend to have lower aspirations and have their plans for the future frustrated more often.³⁷ Further, research indicates that low-tracked students participate less in extracurricular activities at school and have higher dropout rates than higher-tracked students.³⁸

Despite indications that ability grouping is damaging to low-tracked students, there are many ability grouping proponents. Supporters contend that heterogeneous grouping is unfair because high achievers become bored from slowly paced instruction and a lack of challenging assignments, while low achievers cannot get extra help and are given goals they cannot achieve.³⁹ They also claim that ability grouping practices result in more effective use of instructional time when dealing with a diverse group of students.⁴⁰ Additionally, some proponents focus on the "gifted and talented" and claim that students so labeled are entitled to a free appropriate public education⁴¹ equivalent to that which Congress made available for students with disabilities.⁴²

C. Viable Alternatives

Criticism of tracking need not be equated with a belief that differentiation among students should *never* occur. The alternatives to tracking are numerous and viable. They include heterogeneous grouping, whereby the teacher teaches the same content and skills to all students, and grades students on their individual level of achievement; project based instruction, an approach that allows for greater individual work and assessment

³⁵ See, e.g., Robert E. Slavin, *Achievement Effects of Ability Grouping in Secondary Schools: A Best-Evidence Synthesis*, 60 REV. OF EDUC. RES. 471 (1990).

³⁶ See generally OAKES, *supra* note 21.

Clearly [low-tracked] groups are not equally valued in the school . . . individual students in these groups come to be defined by others—both adults and their peers in terms of these group types. A student in a high achieving group is seen as a high achieving person and in the eyes of many, good. And those in the low achieving groups come to be called . . . dummies, sweat hogs or yahoos.

Id. at 3.

³⁷ See *id.* at 9.

³⁸ See *id.*

³⁹ Cf. OAKES, *supra* note 21, at 6 (discussing assumptions underlying ability grouping practices). But see HIGH STAKES, *supra* note 16, at 102 (noting that low-track classes that are effective are usually run by exceptional teachers with small classes and extra resources).

⁴⁰ See NEA, *supra* note 2, at 3.

⁴¹ See 20 U.S.C. § 1400(c) (1994).

⁴² See Peggy S. Bittick, Comment, *Equality and Excellence: Equal Education Opportunity for Gifted and Talented Children*, 36 S. TEX. L. REV. 119 (1995).

and provides extra support for students who need it; and individualized instruction, in which students work at their own pace through leveled curriculum materials.⁴³ Many alternatives to ability grouping exist in which students are tested for achievement level and given temporary, narrowly tailored, and highly individualized instruction in a specific content area, usually on a short-term basis.⁴⁴

Some supporters of tracking justify the harm to low-tracked students by pointing to the benefits to students in the highest tracks, arguing that the cost-benefit tradeoffs justify tracking programs.⁴⁵ However, the research is inconclusive regarding the benefits to high-tracked students and to students admitted to "gifted and talented" programs.⁴⁶ Even if some students at the highest levels do benefit, data show that minorities are disproportionately barred from both the high-track college bound and "gifted and talented" programs.⁴⁷

II. Current Bias in Favor of Assessment and Assignment

There is limited evidence that ability grouping practices have been effective even for students assigned to the highest groups.⁴⁸ Even proponents of gifted education admit that longitudinal studies provide "little empirical evidence that [such] interventions are accomplishing long-term educational goals."⁴⁹ Despite this, many people support tracking based on testing and grading because they believe it makes teaching easier,⁵⁰ pro-

⁴³ See generally ROBERT COOPER, DETRACKING IN A RACIALLY MIXED, URBAN HIGH SCHOOL (Center for Research on the Educ. of Students Placed at Risk Report No. 12, 1997) (discussing alternatives to tracking); ANNE WHEELOCK, CROSSING THE TRACKS (1992) (discussing methods of untracking). But see Dominic J. Brewer et al., *Detracking America's Schools: The Reform Without Cost?*, 77 PHI DELTA KAPPAN 210, 210-15 (1995).

⁴⁴ The difference between truly flexible differentiated instruction within a content area and harmful ability grouping practices is that students in rigid ability groups are easily identifiable as members of a particular group, whereas students in flexible curriculum programs frequently move in and out of content specific ability groups as they achieve requisite academic goals or express the desire to do so. See Robert E. Slavin, *How Title I Can Become the Engine of Reform in America's Schools*, in HARD WORK FOR GOOD SCHOOLS: FACTS NOT FADS IN TITLE I REFORM 86 (Gary Orfield & Elizabeth H. DeBray eds., 1999).

⁴⁵ See, e.g., Loveless, *supra* note 3 (arguing that the total gains or losses from tracking are not known, and that rigid tracking is not a widespread problem). However, the evidence is at best inconclusive. For example, Loveless first states that no reliable national surveys of ability grouping in elementary schools have been conducted, yet boldly concludes in the same paragraph that "[t]racking between classes remains rare at the elementary school level." *Id.*

⁴⁶ See Subotnik & Arnold, *supra* note 24, at 6-8.

⁴⁷ For example, in one 1984 study, black males were shown to be three times more likely than white males to be assigned to classes for the mentally retarded, yet only half as likely to be in gifted and talented programs. See Carnegie Corp. of N.Y., *Renegotiating Society's Contract with the Public Schools*, 29 CARNEGIE Q. 1, 1-4 (1984).

⁴⁸ See, e.g., Brewer et al., *supra* note 43, at 215.

⁴⁹ Subotnick & Arnold, *supra* note 24, at 2.

⁵⁰ See NEA, *supra* note 2, at 3 (citing CARNEGIE FOUND. REPORT, THE CONDITION OF

vides mechanisms for differentiating among students, and improves student achievement.⁵¹ Given the strong bias in favor of testing and grading, some may doubt that the principle of ability grouping can ever be divorced from practice in American schools that has been historically laced with racism.

A. Testing

Valid tests, when combined with other sources of information may be valuable tools for educators to evaluate educational performance.⁵² But they are often inappropriately regarded as highly accurate and predictive measures of "ability" and play a dominant role in placement decisions.⁵³ If societal and cultural biases are not fully accounted for,⁵⁴ reliance on such tests further closes avenues of access and success for minorities. Furthermore, because measures used to define intelligence ignore vast areas of important cognitive skill and development,⁵⁵ the degree to which students' abilities and intelligence are assessed on the basis of such measures is suspect.

In cases where test scores are relied upon as the sole basis for tracking and other placement determinations, courts have disallowed such reliance. In *Shariff ex rel. Salahuddin v. New York State Education Department*,⁵⁶ tests relied on in awarding scholarships did not correlate with grades or later academic achievement for girls.⁵⁷ Under Title IX of the Education Amendments of 1972,⁵⁸ the *Shariff* court granted an injunction ending the state's reliance on a neutral test that had a disparate impact on girls seeking scholarships to the state colleges of New York.⁵⁹ Nevertheless, recent developments in education reform suggest a growing reliance on testing for student placement and curriculum decisions. Test scores are emerging as the sole basis for grade retention and diploma de-

TEACHING: A STATE BY STATE ANALYSIS 77 (1999) (finding that 63% of all U.S. teachers feel that "tracking students by ability is a useful way for schools to deal with diversity").

⁵¹ See MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 562 (3d ed. 1992).

⁵² Although the reliance on such psychometrics to determine academic ability is highly problematic, achievement and IQ tests have been shown to have some predictive value in terms of academic success, especially for white middle-class male students. See, e.g., ROBERT L. HAYMAN, JR., THE SMART CULTURE 253-306 (1998).

⁵³ See HIGH STAKES, *supra* note 16, at 93-94.

⁵⁴ See ABILITY GROUPING PACKAGE, *supra* note 15, at 11 (describing a 1990 study by the National Center for Fair and Open Testing, concluding that standardized tests are inherently biased against minorities and children from low-income families).

⁵⁵ See generally HOWARD GARDNER, THE UNSCHOOLED MIND (1991) (emphasizing the need for schools to recognize other intellectual capabilities that often go ignored, such as verbal and mathematical intelligence, in their curriculum).

⁵⁶ 709 F. Supp. 345 (S.D.N.Y. 1989).

⁵⁷ See *id.* at 362.

⁵⁸ 20 U.S.C. §§ 1681-1688 (1994).

⁵⁹ See *Shariff*, 709 F. Supp. at 348.

cisions.⁶⁰ These developments along with the rise of high-stakes testing will likely spur on legal challenges because low-tracked minorities will likely be inadequately prepared and educationally disadvantaged.

B. Placements Based on Recommendations and Grades

Teacher recommendations are the second most commonly used criteria, after achievement tests, for determining placements.⁶¹ Just as reliance on testing often has a disparate impact on minorities, research indicates that placements based solely on teacher recommendations or grades tend to result in a greater degree of racially identifiable classes.⁶² While student assignment based on a combination of grades and test scores is widely accepted, the element of bias in each has not necessarily been eradicated by using more than one measure.⁶³

Parental influence is also an important factor in determining placement. Not only are poor minority parents less likely to complain about tracking policies and procedures than white middle-class parents, but white middle-class parents are also more likely to be assertive in gaining access to the upper tracks⁶⁴ and gifted and talented programs than are minority poor parents.⁶⁵ Parental factors may also affect ability grouping policies in less direct ways. Evidence suggests that segregative grouping practices are motivated by system-wide fear of "white flight."⁶⁶ High level courses tend to be offered in integrated schools that have significant numbers of minority students, but not in racially isolated inner city schools.⁶⁷ This accommodation of middle-class white concerns has reinforced inequalities and entrenched segregation within schools.⁶⁸ Even in some magnet schools, which were created to counter segregation by attracting middle-class, predominantly white students to inner city schools, racially identifiable classrooms are commonplace.⁶⁹

⁶⁰ See, e.g., HIGH STAKES, *supra* note 16, at 114–22.

⁶¹ See Telephone Interview with Arinita Ballard, *supra* note 12; see also OAKES, *supra* note 21, at 12.

⁶² See OAKES, *supra* note 21, at 13.

⁶³ See EEOP, *supra* note 10, at 235.

⁶⁴ See Patrick Welsh, *Fast-Track Trap: How "Ability Grouping" Hurts Our Schools, Kids and Families*, WASH. POST, Sept. 16, 1990, at B1.

⁶⁵ See HAYMAN, *supra* note 52, at 296 (citing a recent study showing that "a white student is 3.2 times more likely to be assigned to a gifted class than is a black student").

⁶⁶ See Telephone Interview with Barbara Shannon, *supra* note 12; see also Welsh, *supra* note 64, at B4 (quoting a D.C. school administrator as saying "[s]chools desperately need the middle class"). But see GARY ORFIELD & SUSAN EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996) (making a forceful argument that "white flight" is best characterized as a consistent trend among the white middle class toward suburbanization and not primarily a reaction to desegregation).

⁶⁷ See generally JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1992).

⁶⁸ See Welsh, *supra* note 64, at B1.

⁶⁹ See generally Kimberly C. West, Note, *A Desegregation Tool that Backfired: Magnet*

C. *Why Schools Still Track Students*

The segregative effects of tracking have been challenged as evidence of continued de jure segregation in cases where municipalities have sought to rescind desegregation orders. Outside of this context and the context of special education, however, parents and civil rights advocates, for a variety of reasons, have infrequently challenged the widespread harmful and segregative practice of tracking.⁷⁰

Support of tracking in the face of its disparate impact on racial minorities comports with Professor Charles Lawrence's theory of "unconscious racism." Lawrence argues that to the extent we are influenced by a common historical and cultural heritage in which racism has played a dominant role, we are all racists.⁷¹ Our unconscious racism is manifested in two ways. First, now that our society rejects racism, cognitive dissonance results when traditional practices rooted in racism lead to racial injustice.⁷² To defend our minds against the guilt that would come with conscious acknowledgment, we refuse to recognize this injustice.⁷³ Second, because racism is so deeply ingrained in our culture, racism may not be communicated through explicit lessons.⁷⁴ Instead racism becomes part of the rational ordering of our perceptions of the world.⁷⁵ For example, we do not question a meritocracy that consistently places blacks at the bottom because we regard the ordering as a natural and fair outcome.

Lawrence posits a connection between unconscious racism and the existence of cultural symbols that have racial meaning.⁷⁶ He suggests that governmental acts that convey racially symbolic messages both reinforce and evidence unconscious racism.⁷⁷ Accordingly, a public school's classification of students by "ability," where the segregative effect is foreseen-

Schools and Classroom Segregation, 103 YALE L.J. 2567 (1994) (finding that racially identifiable classrooms caused by ability grouping practices were most common in partial-site magnet schools within schools). *But see* CITIZENS' COMM'N ON CIVIL RIGHTS, DIFFICULT CHOICES: DO MAGNET SCHOOLS SERVE CHILDREN IN NEED? (Corrine M. Yu & William L. Taylor eds., 1997) (finding that minority achievement was generally boosted by the magnet schools studied).

⁷⁰ According to OCR, between 1993 and 1995, 228 complaints were received about gifted and talented placements, almost four times as many as the 64 complaints on ability grouping. The data did not specify how many of these complaints were based on race or ethnicity. *See* EEOP, *supra* note 10, at 245. Euphemistic terms for remedial level classes may further the lack of parental awareness among parents whose children are placed in the lower tracks. *See* Telephone Interview with Barbara Shannon, *supra* note 12.

⁷¹ Lawrence presents this point in arguing that the distinct and mutually exclusive treatment of intent and disparate impact in constitutional law is a false dichotomy. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319-24, 366-67 (1987).

⁷² *See id.* at 322-23.

⁷³ *See id.* at 323.

⁷⁴ *See id.*

⁷⁵ *See id.*

⁷⁶ *See id.* at 324.

⁷⁷ *See id.*

able, conveys the racial message that blacks are less intelligent than and not worthy of the same quality of education as whites. Lawrence imagines a legal construct that would allow courts to use disparate impact as a proxy for intent whenever the governmental action in question coincides with historically held stereotypes against African Americans.⁷⁸ Following this theory, many ability grouping practices should be struck down as unconstitutional. This approach is a far cry from that embraced by the Supreme Court with regard to equal protection arguments. On the other hand, Title VI regulations, which have passed judicial scrutiny, implement Lawrence's theory in so far as they make educational programming with strong racially disparate effects unlawful.⁷⁹

III. Legal Challenges

To segregate public school students by race, color, or ethnicity within a school is unconstitutional under the Equal Protection Clause;⁸⁰ it is also a well-established violation of Title VI of the Civil Rights Act of 1964.⁸¹ The law is less settled on the question of whether ostensibly neutral ability grouping practices that have a disparate impact by race, color or ethnicity, are unconstitutional. Lastly, Title I of the Elementary and Secondary Education Act,⁸² designed to supplement the education of students living in poverty, may also be a heretofore unexplored avenue of relief.

A. Equal Protection Claims

In an equal protection challenge to tracking, a court might apply rational basis or strict scrutiny standards of review. Given that some research supports the proposition that ability grouping achieves an educationally justifiable purpose for students in the highest tracks,⁸³ it is doubtful whether a challenge to the practice could withstand judicial review on a rational basis test. Strict scrutiny is applied where the ability grouping practice can be shown to infringe on a "fundamental interest," or where it is based on a "suspect classification,"⁸⁴ for which the school must show a "compelling state interest."⁸⁵ As this section will illustrate, only if facially neutral ability grouping practices achieved nearly total segregation would they trigger strict scrutiny review under the Constitution.⁸⁶

⁷⁸ See *id.*

⁷⁹ See 34 C.F.R. § 100.3(a), (b)(1)(ii), (b)(1)(iii), (b)(2) (1998).

⁸⁰ See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976).

⁸¹ 42 U.S.C. § 2000(d)(1)-(4) (1994). See generally *Welner & Oakes*, *supra* note 5.

⁸² 20 U.S.C. § 6301 (1994).

⁸³ See, e.g., *Loveless*, *supra* note 3.

⁸⁴ See, e.g., *San Antonio v. Rodriguez Indep. Sch. Dist.*, 411 U.S. 1, 16 (1973).

⁸⁵ *Id.*

⁸⁶ If a neutral ability grouping practice has an effect that clearly belies a system of ra-

In practice, ability grouping pushes minorities toward lower and middle tracks,⁸⁷ but rarely achieves 100% within-school segregation. However, given the less segregative alternatives to ability grouping and the educational harm suffered by students placed in the low levels, the practice would rarely meet the requirement of a "compelling state interest" were strict scrutiny triggered.

Public schools witnessed a dramatic increase in the practice of ability grouping in the wake of *Brown v. Board of Education*.⁸⁸ The Supreme Court's holding in *Brown*, invalidating "separate but equal" education,⁸⁹ provides the basis for challenging ability grouping practices that segregate minorities. However, *Brown* did not address facially neutral school practices. Although the *Brown* Court concluded that school segregation denied students their "important" interest in education, the Court did not declare education to be a fundamental right.⁹⁰

Thirteen years after *Brown*, the *Smuck v. Hobson* court held that the disparate impact of ability grouping on minority students violated the Equal Protection Clause.⁹¹ The *Hobson* district court barred the tracking system in question because it relegated poor and minority children to the lowest track and because the students had little or no opportunity to move up once they had been assigned.⁹² Also, the D.C. school superintendent's testimony revealed his belief that members of different economic classes should be trained for their "appropriate" positions in life.⁹³

The Supreme Court's decision in *Washington v. Davis*⁹⁴ blocked disparate impact plaintiffs from claiming a constitutional violation of their rights under the Equal Protection Clause.⁹⁵ After *Davis*, disparate impact

cial classification, it would be subject to an "as applied" challenge. In other contexts where neutral practices have had extremely segregative effects, the Supreme Court has been willing to acknowledge that the practice was a pretext for intentional discrimination. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding unconstitutional a San Francisco city ordinance regulating laundries that disproportionately affected business owners of Chinese descent).

⁸⁷ See Brewer et al., *supra* note 43, at 211.

⁸⁸ 347 U.S. 483 (1954). For evidence of increase in ability grouping, see Welner & Oakes, *supra* note 5, at 452.

⁸⁹ See *Brown*, 347 U.S. at 494.

⁹⁰ *Id.* But see Angela Dickens, Note, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469 (1995-1996) (arguing that *Brown* established a right to education).

⁹¹ See *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) (en banc).

⁹² See *Hobson*, 269 F. Supp. at 511-14. Dr. Hansen, the superintendent of the D.C. schools, had developed a system that ostensibly provided each child with the optimum level of education, enhanced the prospects for remediation and provided students who did not fit precisely into a single track an "individually tailored" education. See *id.* at 442-92.

⁹³ See *id.* at 444-45.

⁹⁴ 426 U.S. 229 (1976).

⁹⁵ See *id.* at 239 (holding that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the government from invidious discrimination).

plaintiffs have the burden of proving intentional discrimination to avoid a mere rational basis review.⁹⁶ The *Davis* Court acknowledged that “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.”⁹⁷ However, exactly when the Court would infer “an invidious discriminatory purpose” in an educational setting was not made clear.⁹⁸

Since *Hobson*, the only successful challenge relying on disparate impact and not on a claim that the practice was a vestige of prior school segregation was in *People Who Care v. Rockford Board of Education*.⁹⁹ There, the district court found that the acts and omissions of the school district in its tracking system not only had a discriminatory effect, but also were strong evidence of discriminatory intent.¹⁰⁰ Based on the conclusions of the expert, the court ordered that “ability grouping and/or tracking will no longer be allowed in the Rockford schools.”¹⁰¹

On appeal, however, the court found that the provisions of the decree generally forbidding grouping of students by ability and establishing racial quotas for the permitted gifted and talented programs were inequitable.¹⁰² The court further stated that “[w]ere abolition of tracking the only means of preventing the school district from manipulating the tracking system to separate the races, it might be a permissible remedy.”¹⁰³ Similar to the conclusion reached in *Smuck v. Hobson*,¹⁰⁴ the *People Who Care* court concluded that the school should be enjoined from “twisting the criteria to achieve greater segregation than objective tracking alone would have done . . . [but] not, on this record, enjoined from tracking.”¹⁰⁵

Therefore, because it is extremely difficult to prove the requisite element of intent, most constitutional challenges are unlikely to succeed unless they rise to the level of disparity the Supreme Court found in *Go-million v. Lightfoot*,¹⁰⁶ or they are brought against a school system that is under a court order to desegregate.

⁹⁶ *See id.*

⁹⁷ *Id.* at 242.

⁹⁸ *Id.*

⁹⁹ 851 F. Supp. 905 (N.D. Ill. 1994), *rev'd*, 111 F.3d 528 (7th Cir. 1997).

¹⁰⁰ *See People Who Care*, 851 F. Supp. at 912–15, 1005; *see also* Welner & Oakes, *supra* note 5, at 463 n.11.

¹⁰¹ *See* Welner & Oakes, *supra* note 5, at 463 (quoting Magistrate’s Comprehensive Remedial Order, January 26, 1996); *see also People Who Care*, 851 F. Supp. at 934.

¹⁰² *See People Who Care*, 111 F.3d at 535–36.

¹⁰³ *Id.* at 536.

¹⁰⁴ 408 F.2d 175 (D.C. Cir. 1969) (en banc), *aff'g* *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967).

¹⁰⁵ *People Who Care*, 111 F.3d at 536; *see also* Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984) (reversing lower court’s finding of equal protection violation for testing schemes for special education placement).

¹⁰⁶ 364 U.S. 339 (1960) (finding that an Alabama law redefining city boundaries was intended to disenfranchise African Americans). *See also, e.g.*, *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977) (holding that circumstan-

B. Ability Grouping Challenges in the Context of Desegregation Orders

Where there is a pre-existing court order calling for remediation of de jure segregation,¹⁰⁷ that court order can act as a proxy for the intent element in a later challenge.¹⁰⁸ In these cases, the burden is switched to the school district to show that subsequent discriminatory impact is not a vestige of that original discrimination.¹⁰⁹ In *McNeal v. Tate County School District*,¹¹⁰ the court held that ability grouping that has a racially disparate impact may be permitted if the school is "unitary" or the tracking can be justified as a remedy for the effects of past segregation.¹¹¹ In such cases, the plaintiff benefits from a presumption of a connection between the earlier-proven discriminatory intent and the later-proven discriminatory impact.¹¹² The viability of constitutional challenges will likely diminish in the future,¹¹³ because many practices that were illegal before instantly become legal when the school system is declared unitary.¹¹⁴

For the purpose of analysis, the cases evolving in districts currently under a desegregation order can be divided into two categories: defendants' motions seeking "unitary status" and motions by plaintiffs seeking modifications of desegregation orders.¹¹⁵ In the first category, the segregative effect of ability grouping practices is used to counter the school's claim that it has met the requirements of the desegregation order.¹¹⁶ A well-supported disparate impact complaint in this context could provide a formidable obstacle for the attainment of unitary status. The Supreme

tial evidence used to support an inference of segregative intent includes the discriminatory impact of acts, omissions, or policies of the defendant; the history of events leading to conduct maintaining or exacerbating racial imbalance in schools; departures from regular procedures and policies used by the decision makers; and evidence concerning the decision making process).

¹⁰⁷ In many northern cities, desegregation orders were based on evidence of segregative intent absent de jure segregation. *See, e.g.,* *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208 (1973).

¹⁰⁸ *See Welner & Oakes, supra* note 5, at 454.

¹⁰⁹ *See* *EEOP, supra* note 10, at 156.

¹¹⁰ 508 F.2d 1017 (5th Cir. 1975).

¹¹¹ *See id.* at 1020.

¹¹² *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 271 n.21 (1977).

¹¹³ "[C]ourts presume any government action creating racially segregated schools to be innocent" absent proof of intent. *ORFIELD & EATON, supra* note 66, at 19.

¹¹⁴ Motions seeking a court determination that a defendant school district has achieved "unitary status" have been "flooding the courts." *See Welner & Oakes, supra* note 5, at 456 (citing *Freeman v. Pitts*, 503 U.S. 467 (1992), as a prime example).

¹¹⁵ *See id.*

¹¹⁶ *See Diaz v. San Jose Unified Sch. Dist.*, 633 F. Supp. 808 (N.D. Cal. 1985); *see also Keyes v. School Dist. No. 1*, 413 U.S. 189, 201 (1973) (holding that absent statutory segregation in a state, a school district violates the Constitution when "school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers and facilities within the school system").

Court's ruling in *Freeman v. Pitts*,¹¹⁷ however, allowed a district to be partially released from a desegregation order despite falling short of satisfying all the requirements.¹¹⁸ The *Freeman* holding suggests that segregative ability grouping practices should be combined with other evidence of continuing racial bias when mounting systemic challenges.

In the second category of cases against districts still under desegregation orders, the tracking system that has a segregative effect can be directly challenged as a vestige of the old segregated system. Following *McNeal*, the Fifth Circuit upheld the prohibition of an ability grouping practice because the district failed to show that its student assignment methods were "not based on the present results of past segregation."¹¹⁹ The district also failed to prove that the grouping system would provide better educational opportunities for students, remedying the prior harm of segregation.¹²⁰ However, school policies that meet their burden and proffer an educational justification that a court finds reasonable have sometimes withstood constitutional challenges. For example, in *NAACP v. Georgia*,¹²¹ the court not only found that the ability grouping practice that tracked students as early as kindergarten was justifiable, it also stated that the practice corrected the effects of past segregation by providing remediation to blacks.¹²²

Since the education reform movement of the 1990s, it is less likely that a case like *NAACP*, in which the court trumpeted the benefits of "dumbing down" the curriculum for remedial students,¹²³ would be decided the same way, given that today the view that all students benefit from high expectations is, in large measure, a shared conclusion among researchers and politicians alike.¹²⁴ The more recent holding in *Simmons v. Hooks*,¹²⁵ which required the school to alter its tracking system, at least to the extent that the ability grouping practices were vestiges of previous intentionally discriminatory practices, may be the better benchmark.¹²⁶

¹¹⁷ 503 U.S. 467 (1992).

¹¹⁸ See *Green v. County Sch. Bd.*, 391 U.S. 430 (1968) (delimiting "root and branch" desegregation requirements).

¹¹⁹ *United States v. Gadsden County Sch. Dist.*, 572 F.2d 1049, 1050 (5th Cir. 1978) (emphasis added).

¹²⁰ See *id.*

¹²¹ 775 F.2d 1403 (11th Cir. 1985).

¹²² See *id.*; see also *Price v. Austin Indep. Sch. Dist.*, 945 F.2d 1307 (5th Cir. 1991) (ruling that once the school system had been held "unitary," the burden shifts to the plaintiff to show that a newly adopted student assignment plan with a disparate impact on minorities is intentionally discriminatory).

¹²³ See *NAACP*, 775 F.2d at 1414 (upholding lower court's determination that "lower achieving students [were] being successfully remediated").

¹²⁴ See *Improving America's Schools Act of 1994*, 20 U.S.C. § 8903 (1994) (calling for high expectations for all students); *HIGH STAKES*, *supra* note 16, at 105 (referring to congressional findings).

¹²⁵ 843 F. Supp. 1296 (E.D. Ark. 1994).

¹²⁶ See *id.* at 1304 (holding that the district's old policy of ability grouping and its continued practice of ability grouping in kindergarten through third grade violated the

The *Simmons* court found that ability grouping is most often detrimental to students placed in the low groups.¹²⁷

In conclusion, school systems that have been ordered to desegregate in the past are considerably more vulnerable to equal protection arguments than those that have always been regarded as unitary. When schools are not under a court order, however, the judiciary has been reluctant to exercise power over local decision-makers.¹²⁸

C. Title VI Challenges in the Courts

This Note separates challenges based on equal protection, due process, and Title VI, but it is important to note that these claims overlap. Furthermore, the most effective approach may be to combine the challenges previously treated as isolated.¹²⁹

In *California Board of Regents v. Bakke*,¹³⁰ five Justices of the Supreme Court agreed that Title VI prohibits only those racial classifications that would violate the Equal Protection Clause if employed by the state or its agents.¹³¹ Therefore, the reach of Title VI in *Bakke* was specifically limited to acts of intentional discrimination.¹³²

In a school system that at one time had de jure segregation and has not yet been declared unitary, a party challenging ability grouping under the Equal Protection Clause, Title VI, or both, need not show that the school system *currently* intends to discriminate.¹³³ Still, in districts without past de jure segregation, the intent requirement has made claims challenging ability grouping directly under Title VI generally unsuccessful.¹³⁴

Fourteenth Amendment rights of African American children, but allowed newly introduced tracking practices at the upper levels).

¹²⁷ See *id.* at 1302-03 (noting that even the defendant's expert could not present a credible educational justification for ability grouping).

¹²⁸ See, e.g., *People Who Care v. Rockford*, 111 F.3d 528, 536 (7th Cir. 1997) (noting that deference to local control severely diminishes the chance that equal protection or substantive due process challenges that primarily rely on the effects of ability grouping would survive judicial review without a strong link to intent).

¹²⁹ See *Welner & Oakes*, *supra* note 5, at 455.

¹³⁰ 438 U.S. 265 (1978).

¹³¹ See *id.* at 287 (Powell, J., plurality opinion).

¹³² See *YUDOF ET AL.*, *supra* note 51, at 553.

¹³³ See, e.g., *Simmons v. Hooks*, 843 F. Supp. 1296, 1302 (E.D. Ark. 1994). *But cf.* *Debra P. v. Turlington*, 730 F.2d 1405, 1416-17 (11th Cir. 1984) (affirming the lower court's holding that vestiges of intentional segregation did not cause a test's disproportionate impact on blacks, and that the use of the test as a diploma sanction would help remedy vestiges of past segregation).

¹³⁴ See *NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985) (holding that even if school system is not unitary, achievement grouping may be permitted if it will remedy past discrimination and/or achieve better educational results); see also *Quarles v. Oxford Mun. Special Sch. Dist.*, 868 F.2d 750, 755 (5th Cir. 1989) (holding tracking system educationally justified because of substantial upward mobility afforded to students in low tracks).

The administrative agencies' interpretations of Title VI closely resemble those of Title VII of the Civil Rights Act of 1964,¹³⁵ where claims of illegal discrimination under disparate impact theory have been explored more extensively by the Supreme Court.¹³⁶ Without requiring direct proof of intent, the Supreme Court has upheld disparate impact claims alleged under Title VII, most notably in *Griggs v. Duke Power Co.*,¹³⁷ and more recently in *Wards Cove Packing Co. v. Atonio*.¹³⁸

In *Guardians Ass'n v. Civil Service Commission*,¹³⁹ the Court examined the difference between its own interpretation of Title VI and administrative interpretations of Title VI.¹⁴⁰ The Court held that even if Title VI itself does not proscribe unintentional discrimination, its implementing regulations do.¹⁴¹ Accordingly, the Court upheld the district court's finding that black and Hispanic police officers could make out a claim under Title VI by proving that the police department's "last-hired, first-fired" policy had a disparate impact upon them.¹⁴² Similarly, plaintiffs could challenge tracking programs that have a disparate impact upon minority students. Yet, as in *Guardians*, courts will not grant plaintiffs charging disparate impact compensatory relief absent proof of discriminatory intent.¹⁴³

Many courts have deferred to agency interpretations such as DOE's interpretation and regulations pursuant to Title VI.¹⁴⁴ In *Young v. Montgomery County Board of Education*,¹⁴⁵ the court examined a challenge by black high school students to a policy requiring all student athletes who transfer to schools under a majority-to-minority transfer program to sit out a year of interscholastic athletics.¹⁴⁶ The suit was brought under the Fourteenth Amendment, "Title VI, and regulations thereunder."¹⁴⁷ Although the court ruled against the disparate impact claim on each basis, it distinguished the claim under Title VI from the claim under the DOE regulations pursuant to Title VI and stated, "[e]ven though Title VI itself

¹³⁵ 42 U.S.C. § 2000(e)(1)-(17) (1994).

¹³⁶ See, e.g., *Young v. Montgomery County Bd. of Educ.*, 922 F. Supp. 544, 549 (D. Ala. 1996) ("The elements of a Title VI disparate impact claim under 34 C.F.R. § 100.3(b)(2) derive from cases decided under Title VII.")

¹³⁷ 401 U.S. 424, 432 (1971).

¹³⁸ 490 U.S. 642, 658-60 (1989).

¹³⁹ 463 U.S. 582 (1983).

¹⁴⁰ See *id.* at 592; see also *id.* at 621 (Marshall, J., concurring) (concluding that "reasonable administrative interpretation" that does not contradict statute should not be overridden).

¹⁴¹ See *id.* at 591-93.

¹⁴² See *id.*

¹⁴³ See *id.* at 602-03; see also YUDOF ET AL., *supra* note 51, at 553.

¹⁴⁴ See, e.g., *Larry P. v. Riles*, 793 F.2d 969, 982-83 (9th Cir. 1984) (upholding lower court finding of Title VI violation in which the appellees had relied on the regulations and the Department of Health, Education, and Welfare's interpretative guidelines).

¹⁴⁵ 922 F. Supp. 544 (D. Ala. 1996).

¹⁴⁶ See *id.* at 545.

¹⁴⁷ *Id.* (emphasis added).

bars only intentional discrimination, the regulations promulgated pursuant to Title VI proscribe some actions that merely have a disparate impact on groups protected by the statute."¹⁴⁸ In both *Young* and *Groves v. Alabama State Board of Education*,¹⁴⁹ the court cited regulations and referred to case law that cited agency interpretation for support.¹⁵⁰ It seems fair to conclude that one could successfully challenge ability grouping practices directly in court based on regulations pursuant to Title VI.

The Supreme Court has not heard an ability grouping case involving OCR's interpretation of Title VI, but in *Board of Education v. Harris*,¹⁵¹ the Court, in dicta, indicated that its interpretation of Department of Health, Education, and Welfare regulations would not approve of applying disparate impact theory to "bona fide ability grouping."¹⁵² However, OCR has enforced Title VI with regard to the disparate impact of ability grouping practices without an intent requirement since sometime before 1984 when its interpretation of Title VI was first upheld by an administrative law judge in *Dillon County School District No. 1*.¹⁵³

Given the sharp split in the Court's decision in *Guardians*, it is quite plausible that the current Court might not support OCR's interpretation of Title VI. However, in *Guardians*, Justice White emphasized the Court's deference to the reasonable interpretation of the agency, stating, "even if Title VI [does] not proscribe unintentional racial discrimination, it nevertheless [permits] federal agencies to promulgate valid regulations with such an effect The Title . . . has been consistently administered in this manner for almost two decades without interference by Congress."¹⁵⁴ The lack of Congressional and judicial interference with OCR's interpretation in the fifteen years after *Guardians* is also likely to weigh heavily in favor of upholding the agency's interpretation under Title VI, should it ever come before the Court. On the other hand, Justices

¹⁴⁸ *Id.* at 549.

¹⁴⁹ 776 F. Supp. 1518 (D. Ala. 1991) (holding use of minimum ACT test score as admission requirement for teacher education programs violated Title VI because the tests were not educationally justified).

¹⁵⁰ See *Young*, 922 F. Supp. at 549; *Groves*, 776 F. Supp. at 1523; see also *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 584 n.2 (1983); *NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985).

¹⁵¹ 444 U.S. 130 (1979).

¹⁵² *Id.* at 142 (holding a prima facie disparate impact case pursuant to the Emergency School Aid Act regarding teacher assignments, based on evidence flowing from a compliance investigation under Title VI, could be established solely on the basis of statistical evidence).

¹⁵³ 53 Educ. L. Rep. (West Publ'g Co.) 1433 (Apr. 17, 1986); see also ABILITY GROUPING PACKAGE, *supra* note 15, at 29-31; EEO, *supra* note 10, at 158 (stating that "OCR's civil rights enforcement activities have rested on an effects theory since the time of the May 1970 memorandum that reflected OCR's first administrative interpretation of Title VI").

¹⁵⁴ See *Guardians*, 463 U.S. at 592, 593-94 (plurality opinion). Cf. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (holding that an agency regulation based upon permissible construction of a statutory term was enforceable).

O'Connor, Rehnquist, Scalia, and Thomas have consistently called for discriminatory intent when interpreting other statutes.¹⁵⁵ However, after Congress significantly modified the Court's *Wards Cove*¹⁵⁶ holding through the 1991 Civil Rights Act,¹⁵⁷ the Justices may be more likely to defer to the agency.¹⁵⁸ In other contexts, private plaintiffs have filed suits claiming a disparate impact violation of Title VI pursuant to an administrative agency's regulations or interpretation. The circuit courts have been virtually unanimous in agreeing that private actions can be brought incorporating the agency's disparate impact standards.¹⁵⁹

D. Untried Challenges to Tracking

1. The General Theory under Title I

There are other possible challenges that have not yet been tested. Two involve Title I of the Elementary and Secondary Education Act of 1965, which addresses the special needs of educationally disadvantaged children.¹⁶⁰ Over time, Title I has developed strict requirements for schools receiving funding to guarantee the money was being spent as designated by law.¹⁶¹ In 1994, Title I was changed dramatically; new requirements were added to address the detrimental effect of low expectations.¹⁶² Since 1995, Title I has required that all students be provided with

¹⁵⁵ Professor William Eskridge has stated that "the current Court accepts the general idea of deference to agency interpretations of statutes but in practice is not as deferential as the Burger or Warren Courts, particularly in cases where the current Court believes the statute's plain meaning is contrary to the agency interpretation." Letter from William Eskridge to Daniel Losen (Apr. 13, 1999) (on file with author).

¹⁵⁶ See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (holding that statistical evidence was insufficient to establish a prima facie case for violation of Title VII).

¹⁵⁷ See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994); see also *Atonio v. Wards Cove Packing Co.*, 10 F.3d at 1485, 1491 (1993). Congress specifically addressed *Wards Cove* in the statement of findings in the 1991 Amendments, narrowing the Court's holding. See 42 U.S.C. § 1981 note (1994) (Congressional Findings).

¹⁵⁸ There may be "no discernable difference to the standard used in *Atonio* and the 'substantial educational justification' requirement derived from ability grouping case law." Office of Civil Rights, Ability Grouping Investigative Procedures Guidance 6 (Oct. 1994) (draft memorandum, on file with the *Harvard Civil Rights-Civil Liberties Law Review*).

¹⁵⁹ See, e.g., *Buchanan v. City of Bolivar*, 99 F.3d 1352, 1356 n.5 (6th Cir. 1996); *City of Chicago v. Lindley*, 66 F.3d 819, 828-29 (7th Cir. 1995); *New York Urban League, Inc. v. New York*, 71 F.3d 1031 (2d Cir. 1995).

¹⁶⁰ See 20 U.S.C. § 6301(b) (1994). These special needs are based on educational deficits resulting from poverty and language barriers, and are not the same as those addressed under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1491 (1994 & Supp. III 1997), and other provisions for students with disabilities.

¹⁶¹ Investigations by advocacy groups revealed hundreds of schools spending the money inappropriately. See, e.g., *EEOP, supra* note 10, at 16 (citing U.S. COMM'N ON CIVIL RIGHTS, *RACIAL ISOLATION IN THE PUBLIC SCHOOLS* (1967)).

¹⁶² See 20 U.S.C. § 6311(b) (1994).

instruction and curriculum that will enable them to reach high academic standards.¹⁶³

Under Title I, a school's ability grouping practices could be challenged by any student without reference to race or gender. Schools receiving Title I funds, yet maintaining lower expectations for students placed in the lowest track, could be charged with violating Title I on its face. A school might claim that all students are expected to attain a level of proficiency commensurate with state standards. However, such a defense would be rebuttable where the low track students are not taught the same curriculum, or where the curriculum is not at a pace that would provide adequate preparation for state assessments.

OCR does not have jurisdiction for Title I enforcement.¹⁶⁴ Logic suggests, however, that a complaint pursuant to Title I could be filed against the school, the school district/local educational agency ("LEA") or the state educational agency ("SEA"). A facial, or "as applied," challenge against an individual school would be possible because Title I requires schools to share responsibility for holding all students to high standards.¹⁶⁵ The LEA can be sued because LEAs are required to monitor schools within their district for adequate improvement, and should provide support and take corrective measures when schools do not show adequate progress.¹⁶⁶ States can be held liable because Title I requires that each state have a plan for implementing rigorous academic standards for all children.¹⁶⁷

2. Challenges at the School Level

A school's decision to use ability grouping may occur at either the school or the district level. The law requires the state to monitor the LEAs and to support academic improvement when particular schools or entire districts are struggling.¹⁶⁸ The state may also take corrective measures, including withholding funds from LEAs.¹⁶⁹ The LEAs have similar powers and responsibilities and in many cases are the most logical targets for a legal challenge. However, given the growing level of local autonomy over instructional practice, many schools may control their own decisions regarding ability grouping,¹⁷⁰ and so may also be the focus of litigation pursuant to Title I.

¹⁶³ See *id.* at §§ 6301-6338 (1994 & Supp. III 1997).

¹⁶⁴ See EEOP, *supra* note 10, at 149.

¹⁶⁵ See, e.g., 20 U.S.C. § 6312 (f) (1994) (referring to "the shared responsibility of schools, teachers, and the local educational agency" in deciding how to use Title I funds).

¹⁶⁶ See 20 U.S.C. § 6317(a), (c) (1994 & Supp. III 1997).

¹⁶⁷ See 20 U.S.C. § 6311(b)(1)(E)(8)(A) (1994).

¹⁶⁸ See 20 U.S.C. § 6318d (1994).

¹⁶⁹ See 20 U.S.C. § 6317(d)(6)(B)(i)(I) (1994).

¹⁷⁰ Experienced teachers suggest that elementary schools frequently decide these matters. A wide variation in pedagogical practice, therefore, will be found in a given district.

Title I also imposes specific duties on participatory schools that they may violate by employing ability grouping practices. Individual schools using Title I funds are required to develop, together with parents, a school compact outlining how the community will share responsibility for improving student achievement and the means by which the school and parents will together help children achieve the state's high standards.¹⁷¹ A school's ability grouping practices could be challenged to the extent that they fall short of achieving state standards. Advocates might, therefore, challenge schools on the grounds that their compacts do not meet this standard. The school's responsibility to provide additional assistance to children having difficulty meeting standards provides another potential basis for a challenge. Finally, schools could be challenged for violating the SEA's implementing regulations pursuant to Title I.

In numerous ways Title I places responsibility for effective education of students on LEAs and individual schools. For example, one provision may be read as encouraging individual Title I schools to adopt comprehensive "schoolwide" reforms.¹⁷² Although the more autonomous schoolwide programs may be more successful, many schoolwide reform efforts are schoolwide in name only.¹⁷³ In any case, all schoolwide programs are required to provide opportunities for all children to meet the state's proficient and advanced levels of student performance¹⁷⁴ through "effective means of improving the achievement of children" and the use of "effective instructional strategies."¹⁷⁵ Additionally, schools that have not implemented any real changes since 1994 and, in particular, that do not have a school compact should be liable for non-compliance with the law.

Additionally, the Act describes requirements that may support an ability grouping challenge on a procedural basis.¹⁷⁶ For example, "timely information about programs" and "a description and explanation of the curriculum in use at the school, the forms of assessment used to measure student progress, and the proficiency levels students are expected to meet" must be provided to parents of participating students.¹⁷⁷ Accordingly, where schools place Title I children in low tracks without any notice, there may be an actionable violation of statutory procedural due process.

At the junior and senior high levels, tracking is usually a LEA decision, but this is not necessarily always true for districts with more than one school, or experimenting with schools within schools. See *HIGH STAKES*, *supra* note 16, at 15.

¹⁷¹ See 20 U.S.C. § 6319(d) (1994).

¹⁷² See 20 U.S.C. § 6314 (1994).

¹⁷³ See David J. Hoff, *Focus of Title I Shifting From Pullout Efforts*, 17 *EDUC. WK.*, Mar. 11, 1998, at 1 (quoting educational consultant Phyllis P. McClure).

¹⁷⁴ See 20 U.S.C. § 6314(b)(1)(B)(i) (1994).

¹⁷⁵ *Id.*

¹⁷⁶ See 20 U.S.C. § 6319(c)(4) (1994).

¹⁷⁷ *Id.* § 6319(c)(4)(C).

3. Title VI Disparate Impact Challenges to Title I Implementation

In many Title I programs students are pulled out of their regular classrooms to receive remedial instruction in reading and math.¹⁷⁸ These “pull out” programs are widely regarded as detrimental to students for a variety of reasons, including stigmatization and disruption of the students’ regular classroom participation.¹⁷⁹ Where the “pull out” program has segregative effects, it may violate Title VI. In most cases, Title I programs are designed to supplement the existing educational program and not to separate the needier students from other students for extended periods.¹⁸⁰ Generally, a Title VI challenge to a Title I program must be supported by specific evidence. However, if participation in a Title I program means automatic placement in a low track, or if a school develops a separate track specifically for Title I students, a *prima facie* violation of both Title VI and Title I could be found.

IV. Complaints Filed with OCR

A. The Advantages of OCR

Filing a Title VI complaint with OCR has significant advantages over filing a private lawsuit.¹⁸¹ Because disparate impact complaints typically require gathering extensive information, the plaintiff would benefit from OCR’s investigative resources. Furthermore, court filers are likely to encounter greater obstacles in accessing school records than the federal government.

OCR has an affirmative duty to ensure that recipients of federal financial assistance do not discriminate against American students or other individuals on the basis of race, color, national origin, sex, disability, or age.¹⁸² OCR fulfills this duty by acting upon individual complaints or its own suspicions, investigating and adjudicating where appropriate.¹⁸³ The emphasis is on helping the parties involved reach settlement rather than issuing a violation.¹⁸⁴ Under Title VI there is no administrative ex-

¹⁷⁸ See *id.* § 6318.

¹⁷⁹ See Thomas W. Payzant & Jessica Levin, *Improving America’s Schools for Children in Greatest Need*, in NATIONAL ISSUES IN EDUCATION: ELEMENTARY AND SECONDARY EDUCATION ACT 61 (John F. Jennings ed., 1995).

¹⁸⁰ See *id.*

¹⁸¹ OCR has jurisdiction to enforce a number of federal civil rights statutes where a school or other educational entity receives federal funds. See *EEOP*, *supra* note 10, at 3.

¹⁸² See *EEOP*, *supra* note 10, at 150 (citing OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., FY 1994 ANNUAL REPORT TO CONGRESS app. A (1994)).

¹⁸³ See *id.* at 206.

¹⁸⁴ See *id.*

haustion requirement, so a plaintiff may drop an administrative proceeding and pursue a private right of action in federal court.¹⁸⁵

As the recent detracking of the New Bedford, Massachusetts, school system shows, OCR has been effective in eradicating harmful tracking where the agency has collaborated with schools and local community organizations.¹⁸⁶ Following a finding that the junior high schools were in violation of Title VI,¹⁸⁷ the agency helped cure the violation by developing a strong working relationship with the assistant superintendent, Michael Longo. Under Longo's leadership, the school system enlisted a local task force comprised of administrators, teachers, parents, and concerned community organizations to develop specific solutions.¹⁸⁸ New Bedford's junior high schools have moved from a four-track to a two-track system, and the school administrators intend to completely detrack by 1999.¹⁸⁹ The success of the task force in New Bedford has led OCR to recommend the New Bedford model in their efforts to assist other violating schools to achieve compliance with Title VI.¹⁹⁰

Ability grouping challenges are investigated with an eye to disparate treatment and disparate impact. The issue of disparate treatment is implicated when a school's decisions about students' placement is affected by the students' membership in a suspect class.¹⁹¹ Disparate impact arguments instead presume that, absent an adequate educational justification, a negative impact on members of a protected group creates an inference of discrimination.¹⁹² When disparate impact has been established, it is unnecessary to demonstrate that different criteria were used to place minority versus white students.

For disparate impact cases, an OCR investigation analyzes classroom and education program data to detect statistical evidence of a segregative effect.¹⁹³ If a segregative effect is suggested, OCR requires the school to

¹⁸⁵ See *supra* text accompanying note 159.

¹⁸⁶ See Telephone Interview with Michael Longo, Assistant Superintendent, Secondary Education, New Bedford Public Schools (Mar. 26, 1999).

¹⁸⁷ See Memorandum from Thomas J. Hibino, Regional Director, Office for Civil Rights, Region I, to Constantine Nanopoulos, Superintendent, New Bedford Public Schools (May 1, 1995) (on file with author) (regarding Compliance Review No. 01-92-5004).

¹⁸⁸ See Telephone Interview with Thomas Mela, Senior Attorney, Office for Civil Rights (Mar. 26, 1999).

¹⁸⁹ See Telephone Interview with Michael Longo, *supra* note 186.

¹⁹⁰ See Telephone Interview with Thomas Mela, *supra* note 188.

¹⁹¹ Under disparate treatment analysis, there must be proof of intentional discrimination. See *EEOP*, *supra* note 10, at 155; see also 34 C.F.R. § 100.3(a) (1998).

¹⁹² See *EEOP*, *supra* note 10, at 156. OCR has taken the position that ability grouping practices that create racially identifiable classrooms are a pretext for discrimination and a Title VI violation. See Memorandum from Michael Williams, Assistant Secretary for Civil Rights and Director, Office of Civil Rights, to the Office of Civil Rights Senior Staff (Oct. 1994) (on file with author) (citing Dillon County Sch. Dist. No. 1, 53 Educ. L. Rep. (West Publ'g Co.) 1433 (Apr. 17, 1986)) [hereinafter Williams Memorandum].

¹⁹³ The first step in an OCR review of an ability grouping practice is to establish a *prima facie* case that the practice has a disparate impact on the group in question. Racially

provide an educational justification.¹⁹⁴ Under the regulations, the burden is on the school both to justify its practice and demonstrate that less segregative alternatives would not be as successful.¹⁹⁵ If the school cannot meet this burden, yet still refuses to comply with the law, OCR is authorized to withdraw all the school's federal funding.¹⁹⁶ Typically, the agency seeks out school officials to implement a voluntary plan that will eradicate the disparate effect of the ability grouping practice.¹⁹⁷

Most schools, when confronted with the disparate impact of their system, offer no rationale.¹⁹⁸ It is very rare that some sort of settlement is not reached.¹⁹⁹ Settlement is favored by OCR for a number of reasons. First, OCR is required to seek voluntary compliance before issuing a violation finding.²⁰⁰ This partnership approach is more effective for bringing about long-term change than a hands-off investigation.²⁰¹ Schools that are ordered by a court to change their practices may be more likely to revert to their old ways once their system is no longer being carefully watched; in contrast, schools that embrace the goals of de-tracking are more likely to be motivated to follow through.²⁰²

The second reason for OCR's preference for settlements is that many of the same children who are hurt by the ability grouping practice would be harmed by withdrawal of federal funds.²⁰³ In some circumstances, a less-than-ideal settlement may help the students more than a protracted legal battle with the agency or in court.

Ability grouping complaints filed with OCR have almost all been resolved through settlement.²⁰⁴ OCR can encourage settlement by using its

identifiable classrooms and/or tracks are those classrooms that have approximately 20% variance from the school population by race, gender, or other categories. Schools that are overwhelmingly minority or majority do not fall under the auspices of the OCR for ability grouping investigations. The approximate figure of 20%, however, is not an absolute figure, but is followed by a more technical statistical analysis that enables the investigator to rule out chance and other complicating factors. See generally Office for Civil Rights, U.S. Dept. of Educ., Statistical Appendix for Ability Grouping Investigative Plan: FY 1991 Compliance Review (1991) (draft manuscript, on file with author).

¹⁹⁴ See EEOP, *supra* note 10, at 156.

¹⁹⁵ In evaluating a proffered justification, OCR looks at the following: (1) Is there any attempt to use, consistently and systematically, objective criteria? (2) Are students cross-tracked by individual subject matter? (3) Does the lower track have as its purpose remediation, and, if so, is remediation achieved? (4) Do students stay in their assigned ability groups for more than the academic subjects? See Williams Memorandum, *supra* note 192, at 8.

¹⁹⁶ See EEOP, *supra* note 10, at 164.

¹⁹⁷ See *id.* at 209-10.

¹⁹⁸ See Interview with Arinita Ballard, *supra* note 12; Interview with Rebecca Hoover, *supra* note 12; Interview with Barbara Shannon, *supra* note 12.

¹⁹⁹ See EEOP, *supra* note 10, at 209.

²⁰⁰ See 42 U.S.C. § 2000d-1 (1994).

²⁰¹ See EEOP, *supra* note 10, at 209-12.

²⁰² See Telephone Interview with Arinita Ballard, *supra* note 12.

²⁰³ For example, removing funding for literacy programs for "at risk" impoverished children places those children more "at risk."

²⁰⁴ See Interview with Arinita Ballard, *supra* note 12; Interview with Barbara Shannon,

leverage to withdraw funding or by exercising its affirmative duty to monitor compliance.²⁰⁵ Also, interested third parties who would be denied standing in court can file claims against schools with OCR,²⁰⁶ which may be especially significant for civil rights advocates.

B. Criticisms of OCR²⁰⁷

Problems with OCR's enforcement may be partly to blame for discouraging plaintiffs from filing OCR complaints. OCR has received a good deal of criticism for failing adequately to collect information on schools' ability grouping practices. Most notably, OCR has not issued clear guidelines explaining how to comply with Title VI.²⁰⁸ Without clear rules to follow, it is difficult for advocates to know what constitutes compliance.²⁰⁹ There are other criticisms: first, compensation may not be as easily available for an individual plaintiff under the regulations;²¹⁰ second, the threat of withdrawing federal funds is not necessarily as effective a tool in changing school practices as is the threat of compensatory damages, and political realities will likely make OCR reluctant to seek monetary damages where no intentional discrimination is found; and third, the settlements achieved through OCR are often ineffective remedies.²¹¹

To remedy these shortcomings, OCR should better inform schools of their Title VI obligations with regard to ability grouping and tracking.²¹² OCR listed segregative ability grouping and the overrepresentation of minorities in low-tracked courses as a priority issue in 1991, 1994, and 1996.²¹³ However, in the 1998 enforcement docket for OCR's Eastern Region, gifted and talented programs, not low-tracking, appear to be the target of the majority of the planned investigations.²¹⁴ Also, when schools

supra note 12.

²⁰⁵ See 42 U.S.C. § 2000d-1 (1994).

²⁰⁶ See EEOP, *supra* note 10, at 151.

²⁰⁷ The following criticisms were based on interviews with Dennis Parker and staff members at the United States Commission on Civil Rights but are not official representations of the viewpoint of any agency or institution. See Interview with Dennis Parker, Attorney with NAACP Legal Defense Fund (Nov. 25, 1997) (speaking only for himself); see also EEOP, *supra* note 10, at 202, 212.

²⁰⁸ See EEOP, *supra* note 10, at 171.

²⁰⁹ According to Dennis Parker and staff at the United States Commission on Civil Rights, the fact that OCR has not issued formal or final policy guidance on this issue is a major problem. Not only is this frustrating to lawyers, but schools could benefit from greater clarity. See Interview with Dennis Parker, *supra* note 207.

²¹⁰ Absent intentional discrimination, compensatory relief is not available under Title VI. See *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 602-03 (1983).

²¹¹ See, e.g., EEOP, *supra* note 10, at 168-75; Interview with Dennis Parker, *supra* note 207.

²¹² See Interview with Dennis Parker, *supra* note 207.

²¹³ See EEOP, *supra* note 10, at 176, 178.

²¹⁴ See Eastern Division, Office for Civil Rights, FY 1998 Enforcement Docket (May 22, 1997) (on file with author).

are resistant to settlement, it appears that OCR's enforcement mechanism is not terribly efficient in forcing change, and so activists are uncertain of the effectiveness of seeking an OCR remedy.²¹⁵ Perhaps these schools are motivated to change more out of fear of liability than from a desire to fulfill their educational mission.

Without public pressure, however, it is hard to imagine that OCR, an agency with limited funds, would change its practices and fully explore the segregative effects of tracking in schools throughout America. Internally, criticism has been squelched by the United States Commission on Civil Rights. The Commission funded an extensive report for Congress on OCR's investigations of ability grouping practices, but the report was never released due to a split among Commission members.²¹⁶ Because the agency has a legal obligation to investigate all legitimate complaints, perhaps the most effective way for civil rights activists and concerned parents to force OCR to take more action is to file more complaints. Moreover, an increase in the number of complaints filed might influence the awareness of minority parents to the disadvantages of tracking. OCR could include notice requirements as part of settlements with school systems believed to have violated Title VI. With growing parental awareness, a greater demand for adequate information on educational programs and activities might follow.

C. OCR Enforcement Holds Great Potential

One strategy available to civil rights advocates to combat a tracking practice would be to use OCR as a starting point. If the administrative action became bogged down or DOEd seemed to be pushing a weak settlement, advocates could seek to enjoin the practice pursuant to the department's administrative regulations and interpretation of Title VI. However, even in the short term, the investigative work of OCR can have ripple effects, whereby neighboring school systems voluntarily change their practices when they hear of an on-going investigation.²¹⁷ While not all settlements yield significant changes, given the costs of litigation, the tough requirement of proving discriminatory intent in equal protection claims (and in Title VI claims not pursuant to regulations), and the mixed success in challenging ability grouping practices in the courts, OCR appears to be a more productive mechanism for these challenges.

Filing campaigns by advocates have been effective in changing educational practices pursuant to other statutes. By filing large numbers of

²¹⁵ Internal evaluations of overall efficiency turn on the number of cases resolved, and this pressure to resolve cases logically creates an impetus to settle.

²¹⁶ See Minutes of the Meeting of the United States Commission on Civil Rights (Aug. 15, 1997) (on file with author) (recording that the commissioners deadlocked 4-4 on the history chapter linking ability grouping practices to racism).

²¹⁷ See Telephone Interview with Barbara Shannon, *supra* note 12.

complaints on the same issue in a short time span, advocates have successfully triggered national attention to areas of the law many schools were neglecting. In 1997, the National Women's Law Center filed twenty-five complaints of violations of Title IX of the Education Amendments of 1972²¹⁸ with OCR against colleges and universities on the same day.²¹⁹ This strategy was "highly effective" in part because it drew national attention to Title IX's requirements regarding scholarships for female athletes.²²⁰ Gregory Solas, a disabilities advocate, traveled from state to state filing multiple complaints against federally funded schools for violating the Rehabilitation Act of 1973.²²¹ His administrative complaints and the subsequent settlements seem to have had ripple effects, leading to significantly improved school compliance on a national scale.²²²

Such an approach might work in the tracking context as well. Because OCR must legally investigate all complaints,²²³ it would likely commit more resources to combating the negative effects of tracking if the number of complaints increased significantly. Moreover, political pressure may encourage OCR to promulgate clearer guidelines, collect more comprehensive data on ability grouping practices in our nation's schools, and develop tougher rules to enforce. Perhaps rules similar to the parent consent and notice provisions of IDEA²²⁴ could be developed so that no school could place a student in a program with lower expectations without the informed consent of her parents.

However, advocates must proceed with caution. One potential problem with filing increasing numbers of suits with DOE is that a weak settlement with OCR may later be used to bolster a claim that a particular ability grouping practice is educationally justifiable in a subsequent court challenge. For example, in *Montgomery v. Starkville Municipal Separate School District*,²²⁵ intervenors in a school desegregation suit sought injunctive relief to prevent a declaration of unitary status. They pointed to the segregative effects of the school system's tracking and gifted and talented programs as evidence that the school system was continuing to maintain a dual education system.²²⁶ Since the school had eliminated some grouping criteria at the insistence of OCR, the court ruled that "the

²¹⁸ 20 U.S.C. §§ 1681–1688 (1994).

²¹⁹ See Telephone Interview with Neena Chaudhry, Staff Counsel, National Woman's Law Center (Apr. 14, 1999).

²²⁰ See *id.*

²²¹ 29 U.S.C. § 794 (1994).

²²² See William Celis III, *Wheelchair Warrior Lays Siege to Schools*, N.Y. TIMES, July 28, 1993, at A15.

²²³ See EEOP, *supra* note 10, at 149.

²²⁴ See, e.g., 20 U.S.C. § 1414(a)(1)(C) (Supp. III 1997).

²²⁵ 854 F.2d 127 (5th Cir. 1988).

²²⁶ See *id.* at 130.

existing testing system as thus limited by OCR passed muster."²²⁷ Therefore, where a school is under a desegregation order, an Equal Protection Clause claim would be more appropriate than an OCR complaint.

An orchestrated administrative challenge campaign aimed at forcing DOE to beef up its monitoring and enforcement of Title VI could present a number of practical problems. For example, OCR might have to divert funds from more pressing enforcement needs or dilute its monitoring and enforcement in other regards.²²⁸ These arguments, though not without merit, naively assume that the current enforcement priorities have not been influenced by strategic lawyers, but are the genuine outcome of unbiased non-political bureaucrats. Second, these arguments ignore the reality that complaints about tracking are grossly underrepresented given the existing state of affairs in our nation's schools.²²⁹ Third, the agency has an affirmative duty to enforce the law. Advocates should not have to compensate for an underfunded enforcement body every time they want to stop unlawful practices. An increased demand for enforcement by the public through an administrative challenge campaign could persuade Congress to increase funding.

The courtroom will always play an important role in gaining and protecting civil rights, but more enforcement must be demanded from OCR, an agency dedicated to fulfilling this function. Parents must be made aware of the need to exercise their rights in combating this pervasive second tier segregation. Lawsuits can use evidence of segregative tracking to prevent local governments from escaping their responsibility to maintain desegregated schools. But lawsuits are only one tool, and not always the most effective. The government enforcement mechanisms must be utilized to attack segregative ability grouping practices on a much broader scale.

V. Conclusion

This Note has questioned the theoretical basis for ability grouping and called for strong advocacy to challenge segregative ability grouping practices. The Note has also demonstrated that one can oppose ability grouping as practiced in American schools, yet maintain a belief that the practice is sound in the abstract.²³⁰ Regardless of whether ability group-

²²⁷ *Id.*

²²⁸ Alternatively, the strategy could backfire, giving rise to a negative attitude among investigators toward ability grouping cases or swamping the agency. Under either scenario, many cases would be closed or settled without technical assistance being offered and with diminished monitoring in the future. But this is an unrealistic outcome if one assumes that the complaints that are brought are well-founded.

²²⁹ For example, no complaints to OCR from 1993 through 1995 raised an issue relating to underrepresentation of minorities in math or science; these issues accounted for 27 of the 2,259 issues raised in OCR's compliance reviews. See EEOP, *supra* note 10, at 218.

²³⁰ See HIGH STAKES, *supra* note 16, at 102.

ing benefits some students under some circumstances, for most tracked minority students segregation and lowered expectations appears to be the rule not the exception.²³¹ In light of viable alternatives, this separate and unequal education for minorities is hard to defend.

Brown marked the beginning of the end of de jure apartheid in America, but the evidence suggests that apartheid in education was modified, not ended. After all, attending the same school is hardly a remedy for school segregation if blacks and whites are separated once they enter the schoolhouse door. Regardless of the alleged neutrality of the policy, where the assignment of students creates separate and racially identifiable classrooms, disproportionately low-tracked minorities are likely to receive fewer educational benefits than if they were not tracked at all. As one OCR investigator in Texas suggests, if regulations were made more specific, the public would better understand Title VI, and OCR would receive more complaints.²³² In the past three years, OCR found a prima facie violation in approximately ninety disparate impact cases nationwide.²³³ More than two-thirds of these investigations were compliance reviews, and less than one-third were pursuant to complaints.²³⁴ In the words of one OCR staff member, “[w]e find a prima facie case almost everywhere we look.”²³⁵

²³¹ *See id.*

²³² *See* EEOP, *supra* note 10, at 196 (“[P]eople don’t understand that they are being cheated out of a right, because they don’t know they have that right.”) (quoting Telephone Interview with George Cole, Special Project Team, Dallas Enforcement Office, Office for Civil Rights, (June 26, 1996)).

²³³ *See* Telephone Interview with Rebecca Hoover, *supra* note 12. OCR’s case tracking system is not available to the public. *See* EEOP, *supra* note 10, at 215.

²³⁴ *See* Telephone Interview with Rebecca Hoover, *supra* note 12.

²³⁵ Telephone Interview with Arinita Ballard, *supra* note 12.

