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Ability Grouping and Student Assignment: Legal and Policy Issues 2005-2006**Overview**

Every school year the process of placing students in special schools, programs, and activities according to their abilities and/or disabilities is a subject of heated debate. This is especially true now that school systems are required to: (1) measure and monitor student academic performance, (2) disaggregate student test data, and (3) provide extensive remedial programs for underachieving students in response to the mandates of No Child Left Behind, 20 U.S.C. 6301, et seq. (2002). Suffice it to say, there is a major effort both nationally and in the states to ensure that children who for whatever reason have been in the past underserved and/or disadvantaged be provided access to high quality educational opportunities.

While it remains a legal fact that the discretionary authority of local boards of education and school officials to assign students to special programs, classes, and schools remains in tact, the enactment of various civil rights statutes (federal and state) and decisions handed down by courts (federal and state) over the past fifty years have consistently mandated that such assignments and placements shall not in any way be discriminatory. Russo (2004) This is especially true where there exists a resulting effect that demonstrates a disproportionate impact on race, or disability, or gender.

The purpose of this commentary is to focus on the general concept of *ability grouping* and associated legal and policy issues. The commentary will not attempt to examine and discuss specific sub-issue areas such as the impact ability grouping on students with educational disabilities.

Ability Grouping: What Does it Mean?

More than two decades ago, my old friend and legal scholar Joseph Bryson and a colleague devoted an entire book to the subject of *ability grouping*. In their treatise the authors define ability grouping as: "...the practice of prejudging students' ability on some type of intelligence tests and past educational performance, and then assigning two or more students to a particular instructional setting for a sustained period of time." Bryson and Bentley (1980) The authors then define two specific types of ability grouping. First, there is *achievement grouping* which involves grouping students "based on scores students make on achievement tests and on their past performance." Second, *tracking* is the "practice of assigning...students to a specific curriculum such as

general, vocational, business, or college preparatory.... The assignment may be based on intelligence tests, achievement tests, past performance, teacher judgments, or a combination of these.” Bryson and Bently (1980) Of the two types of ability grouping the *tracking* process has been the most litigious.

Ability (Achievement) Grouping 2005-2006: Disaggregated Data and Subgroups

As a general rule, “courts have supported ability grouping in theory unless racial and cultural bias is shown.” Lunenburg and Ornstein (2004) At the same time, past case law and the opinions of legal scholars also have made it clear that student ability grouping criteria and evaluation processes that discriminate against children on socio-economic status must cease.

As mentioned above, there is a current emphasis on grouping students according to academic achievement and ability. Public school systems must identify student populations who need some form of remedial and compensatory help to achieve academically in school. Thus, disaggregation of student standardized test data is crucial in the process.

Disaggregated Data. As one legal resource defines the term, “Disaggregated data is data from schools or school divisions which has been broken down by group so that performance of individual groups can be identified separately from the performance of the entire student population.” Kaminski, *et al.* (2005) Making specific reference to the *Adequate Yearly Progress* (AYP) mandate of No Child Left Behind, the authors make it clear that disaggregated student data are categorized and grouped into the following subgroups: economically disadvantaged, students from major racial and ethnic groups, students with disabilities, and LEP (Limited English Proficient) students. Kaminski, *et al.* (2005)

Integration and Mainstreaming v Resegregation. Today’s emphasis on data-driven management, coupled with the above mentioned requirement that underserved student populations be specifically identified and provided for, places public school officials in an awkward position. This situation is made more complicated by a related movement in which some advocates insist that separate classes, programs, and schools be designed and implemented for specific populations of students. There are those who claim that *bona fide* reasons exist for grouping students according to race (e.g., schools for African-American males), or gender (e.g., single sex classes, programs, and schools for female students), or disability (e.g., schools for students with autism).

Recently, Jack Boger, Director of the University of North Carolina Legal Center for Civil Rights, made the following comments regarding a California controversy in which a local public school system (in a effort to ensure that students not be left in racially isolated schools) used *race* as a factor in approving student transfers from one school to another: “If a willing school board wants to consider race as a factor, shouldn’t it be able to do so, if after all, nobody is denied a fourth grade or a seventh grade education, just denied a certain school?” He then continued, “In a sense, if the school can’t do that, it is denying the choice of all parents who want their children in racially diverse schools.” [NSBA Legal Clips](#) (December 15, 2005)

Will it be that the extensive efforts of the past fifty years to integrate and mainstream all students into a more diverse school environment will be abandoned as public school systems turn down a path toward separating students into distinct groups, where *academic potential*, *performance*, and *achievement* (especially in reading, mathematics, science, social studies, and English) are the principal placement criteria; with socio-economic status, geographic location, and other such factors functioning as collateral criteria?

Issues and Related Case Law

In the late 1960's ability grouping became a subject for judicial intervention. The first case of consequence involved the Washington, D.C. school system. In Hobson v Hansen (1967), federal judge J. Skelley Wright held that the tests, methods, and procedures relied on to place students in ability groups (Honors, General, and Special tracks) were discriminatory and therefore violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Judge Wright was convinced that a student's chance of being enrolled in a particular ability group was directly related to his/her socio-economic background.

Three years later, a federal district court in California had before it a grouping plan used in the Pasadena public schools. In this case the court was convinced that the degree of racial segregation found in the school system was a direct result of student ability grouping. At the time elementary school students were grouped as either gifted or below average. Secondary students were grouped as fast, regular, or slow. In ruling against the school system the court focused on the following facts: student placement decisions were primarily based on (1) standardized achievement and intelligence testing results, (2) teacher and administrator recommendations, and (3) parental requests. Spangler v Board of Education (1970)

In subsequent cases, the courts consistently have ruled that ability grouping plans that result in a segregation of specific types of students in low ability groups, where the present segregation can be directly traced to a past pattern and practice of illegal segregation, or to current socio-economic condition, or to educational disability are highly "suspect" under an Equal Protection analysis. Parents in Action on Special Education v Hanlon (1980), and Billings v Madison Metropolitan School District (7th Cir. 2001)

At the same time, however, simply because a student ability grouping process does impact on a particular class of students does not doom it to failure when taken into court. Two factors are of critical importance. First, the court will probe the *intent* of separating students into groups. Where the intent is to identify students who need help and remediation so that they can achieve and succeed academically, and ultimately graduate from high school, the grouping system likely will pass muster. Second, if the court determines that the grouping criteria relied on are *neutral* and the process followed is *fair* the system likely will succeed. San Francisco NAACP v San Francisco U.S.D. (9th Cir. 2002) A good example of a related case in which the court upheld a public school system's student assignment plan because "racial classification" was not the primary criterion, see Anderson v City of Boston (1st Cir. 2004)

This past year the United States Court of Appeals for the Ninth Circuit upheld a local public school system's student assignment plan where race was a factor. In Parents Involved in Community Schools v Seattle School District No.1 (9th Cir. 2005), the court held that the plan did not violate the Equal Protection Clause of the Fourteenth Amendment. The evidence demonstrated that the school system's process did not create racial quotas, and that the assignment plan was narrowly tailored to achieve racial balance in the schools. More specifically, the court was convinced that the school system's intent was to help students gain access to the educational and social benefits of diverse schools.

Policy Implications

Over the past five years (mainly in response to new federal and state legal mandates), public school officials have been busy working to *early identify* students who are: (1) educationally underserved, (2) in need of specialized help, and (3) at risk of failure (academically and socially). In doing so, local school officials have moved to place students in distinct groups and/or categories, so that specialized remedial and compensatory help can be effectively designed and implemented. Thus, local school systems have had to turn away from integration/mainstreaming models relied on for the past fifty-years, and create new student assignment and

placement models that *separate* students into *ability* (or *disability*) *groups*. To put it another way, if students need remedial and/or compensatory help with mathematics, or reading, or science, or English, then they must be early identified, placed in specialized settings, and not left to flounder, underachieve, and ultimately fail.

In effect this new “ability (achievement) grouping era” in public education is forcing school officials to revisit and revise existing policies and procedures and, where necessary, to create new ones more conducive to the task at hand. However, the pitfalls and mistakes of past ability grouping efforts must be avoided. To assist in this task the following suggestions for policy are offered for consideration. Local school officials must make it clear that:

- The intent of the school board is to provide all students (especially those who have been in the past underserved and/or disadvantaged) with equal access to appropriate and meaningful educational opportunities.
- The school board, administrators, classroom teachers, and staff shall work to early identify and assist students who need specialized help to achieve and succeed in school, both academically and socially.
- Parents will be informed and involved in the identification, assignment, and placement processes
- No student will be assigned or placed in any school, program, or class solely based upon race, or ethnicity, or gender, or disability, or socio-economic status.
- Students who need specialized services and settings will be assigned and placed in schools, programs, and schools based upon research-tested criteria.
- Specialized assignments and placements of students will be implemented solely for the purpose of providing the help and assistance necessary to: (1) meet the particular needs of students, and (2) nurture academic achievement and social progress in students.
- Student progress will be continuously monitored and evaluated.
- The intent of the school board is to transition students who need specialized assistance and services, in specialized settings, back into the mainstream of the student population.

I have little doubt that a new era of ability (achievement) grouping students is upon us and new legal and policy issues will spring to life. However, if it is made clear at the outset that local school systems are implementing such processes not solely to comply with federal and state statutory mandates, but rather to help all students (especially those who heretofore have been underserved and/or disadvantaged) achieve and succeed in school (both academically and socially), past history will be overcome. It is important to remember that in order to make a Fourteenth Amendment Equal Protection case, the complaining party has the burden to show that public school officials possessed an unlawful discriminatory intent. Helping all students achieve and succeed academically in school certainly does not fit that description.

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Note: The views expressed in this commentary are those of the author.