

**IT IS TIME TO END ABILITY GROUPING AND
“THE SOFT BIGOTRY OF LOW EXPECTATIONS”
IT IMPOSES ON MINORITY STUDENTS**

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Some say it is unfair to hold disadvantaged children to rigorous standards. I say it is discrimination to require anything less—the soft bigotry of low expectations. Some say that schools can't be expected to teach, because there are too many broken families, too many immigrants, too much diversity. I say that pigment and poverty need not determine performance. That myth is disproved by good schools every day. Excuse-making must end before learning can begin.¹

I. INTRODUCTION

Ability grouping is an educational approach where students are grouped based on their perceived academic abilities.² The two main types of ability groups are within-class and between-class groups.³ Between-class grouping, also known as tracking, involves separating students into different classrooms, while within-class grouping involves separating students within the classroom.⁴ Both types of grouping involve placing students based on their perceived academic abilities.⁵ The groups are generally assigned by the classroom teacher and can be heterogeneous or homogenous.⁶

Ability grouping serves as a concrete measuring tool for students to verify their teachers' expectations.⁷ Supporters of ability grouping believe that it accommodates the unique needs of students, and there is research to support some benefits of ability grouping—particularly for students placed in the high-performing groups.⁸ However, there is also substantial evidence showing that ability grouping may result in negative academic, social, and emotional consequences, especially for students placed in the low-level groups.⁹ For example, students placed in high-performing groups consistently show a greater increase in academic achievement as a result of ability

¹ George W. Bush, RENEWING AMERICA'S PURPOSE: POLICY ADDRESSES OF GEORGE W. BUSH JULY 1999 – JULY 2000 17 (2000).

² Kristina N. Bolick & Beth A. Rogowsky, *Ability Grouping Is on The Rise, but Should It Be?*, 5 J. OF EDUC. & HUM. DEV. 40, 41 (2016).

³ *Id.*

⁴ *Id.* at 42.

⁵ *Id.*

⁶ *Id.* A heterogeneous group involves intentionally placing students of varying abilities into one group. *Id.* On the other hand, a homogenous group involves placing all the high-performing students into one group, all the average-performing students into one group, and all the under-performing students into one group. *See id.*

⁷ Yoni Har Carmel & Tammy Harel Ben-Shahar, *Reshaping Ability Grouping Through Big Data*, 20 VAND. J. ENT. & TECH. L. 87, 94–95 (2017).

⁸ *See* Bolick & Rogowsky, *supra* note 2, at 42–43.

⁹ *Id.* at 43.

grouping than students placed in low-performing groups, thus creating unequal educational opportunities and achievement gaps beginning as early as kindergarten.¹⁰ This is because when educators plan instruction for low-performing groups, they are likely to plan lower-level lessons, thus depriving students of adequate rigor necessary for academic growth.¹¹ These differential learning opportunities accumulate over time, reducing students' academic achievements and, ultimately, their life opportunities.¹²

Similarly, depending on their placement, ability grouping can affect students' self-esteem, attitudes toward education, and interpersonal relationships.¹³ For example, students placed in high-performing groups may benefit from their placement, such as enjoying increased self-esteem from being placed in a "superior" group, while students placed in low-performing groups may face the opposite result and suffer a decrease in self-esteem.¹⁴ Thus, although ability grouping does present potential benefits, most of the resulting benefits serve students who are selected to be part of high-performing groups, while most of the negative effects harm those selected to low-performing groups, creating an unequal educational experience early on.¹⁵

Ability grouping is especially harmful to minority students.¹⁶ When ability grouping occurs, minority students are highly overrepresented in low-performing groups.¹⁷ This is particularly serious because schools with high populations of minority students are also more likely to utilize ability grouping as an instructional method, thereby creating a widespread negative effect on minority students' education.¹⁸ The reason minority students are overrepresented in low-performing groups may be attributed, in part, to pre-grouping conditions associated with coming from less advantageous backgrounds.¹⁹ On the other hand, the overrepresentation may be a result of teachers' implicit biases.²⁰

Despite its negative social and academic implications—particularly

¹⁰ *Id.*

¹¹ *Id.*

¹² *See id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Bolick & Rogowsky, *supra* note 2, at 47–48.

¹⁷ *See id.* at 47.

¹⁸ *Id.* at 44.

¹⁹ *See id.*

²⁰ Kane Meissel et al., *Subjectivity of Teacher Judgments: Exploring Student Characteristics That Influence Teacher Judgments of Student Ability*, 65 *TEACHING & TCHR. EDUC.* 48, 49–50 (2017). Teachers' implicit bias does not only show in their perceptions of students academically, but also their perceptions of students' behaviors. *See* Yolanda Young, *Teachers' Implicit Bias Against Black Students Starts in Preschool, Study Finds*, *GUARDIAN*, <https://www.theguardian.com/world/2016/oct/04/black-students-teachers-implicit-racial-bias-preschool-study> (last visited May 4, 2021). For example, "black students are nearly four times as likely to be suspended as white students, and nearly twice as likely to be expelled." *Id.*

for minority students—ability grouping remains a common practice in modern American classrooms.²¹ Therefore, it is time to acknowledge the negative ramifications of ability grouping and replace the educational practice with a less discriminatory alternative that is conducive to the academic and social development of all students.

Accordingly, the remainder of this Comment is broken into three substantive sections. Part II, Background, considers pre-grouping conditions that may influence the overrepresentation of minority students in low-performing ability groups. Part II also considers the effects of educators' implicit biases and expectations on students' academic success and explores the legal issues related to educational equality and, more specifically, ability grouping. Part III, Analysis, begins by predicting the benefits that will result from replacing ability grouping with a less discriminatory instructional method. Part III also discusses strategies to facilitate effective replacement of ability grouping. Additionally, Part III addresses legal arguments that ability grouping is a discriminatory educational practice, particularly in light of less restrictive alternatives. Finally, this Comment closes by offering practical recommendations to help educators smoothly transition from ability grouping to an alternative instructional approach, followed by a brief conclusion.

II. BACKGROUND

A. Pre-Grouping Conditions

To decrease achievement gaps that exist before children enter kindergarten, it is necessary to consider potential pre-grouping reasons for minority overrepresentation in low-performing groups.²² Children's life experiences leading up to kindergarten will impact their school readiness, so the ability gaps observed by teachers may actually be caused by variances in the children's first five years of life.²³ Research shows that African American children from low-income families are disproportionately at risk of being less prepared for school compared to white children.²⁴

One explanation for persistent achievement gaps has been directly

²¹ Bolick & Rogowsky, *supra* note 2, at 44. About 60% of elementary school classrooms utilize ability grouping. *Hot Topic: Does Ability Grouping Help or Hurt*, SCHOLASTIC, <https://www.scholastic.com/teachers/articles/teaching-content/hot-topic-does-ability-grouping-help-or-hurt/> (last visited May 5, 2021).

²² See generally Robin L. Jarrett & Sarai Coba-Rodriguez, "We Gonna Get on the Same Page:" School Readiness from Preschool Teachers, Kindergarten Teachers, and Low-Income, African American Mothers of Preschoolers, 88 J. OF NEGRO EDUC. 17 (2019).

²³ *Id.* at 20. School readiness refers to the skills that a child needs to develop before entering kindergarten. *Id.* at 17.

²⁴ Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS (Mar. 1, 1998), <https://www.brookings.edu/articles/unequal-opportunity-race-and-education/>.

attributed to economic inequality and income status.²⁵ There are several reasons why poverty may create a barrier to school readiness, including access to a meaningful preschool education.²⁶ Preschool is not only beneficial for students, but also for parents because it gives them the opportunity to discover what skills their children are expected to have prior to entering kindergarten.²⁷

However, preschool tuition may cost \$4,460 to \$13,158 per year.²⁸ Generally, when parents pay higher tuition, they are really paying more for a high-quality curriculum that will focus on kindergarten readiness.²⁹ Thus, preschool and its direct correlation between quality and affordability contribute to the school-readiness gap.³⁰ The majority of states now provide some form of publicly funded preschool; however, this does not necessarily mean the education that the preschool students are receiving is “high-quality.”³¹ To ensure the benefits of a preschool education, accessibility is only the first step.³² It is also essential that the program is of a high quality, characterized by positive relationships, experiential learning activities, and responsiveness to individual needs and cultural diversity.³³

Another potential explanation for academic disparities correlates with variances in students’ vocabulary exposure.³⁴ Two decades ago, psychologists Betty Hart and Todd Risley discovered the “30 million word gap.”³⁵ The researchers conducted family visits and estimated that children under four years old who were from low-income families heard 30 million fewer words than children of the same age from higher-income families.³⁶

²⁵ See Emma García & Elaine Weiss, *Reducing and Averting Achievement Gaps: Key Findings From the Report ‘Education Inequalities at the School Starting Gate’ and Comprehensive Strategies to Mitigate Early Skills Gaps*, ECON. POL’Y INST. (Sep. 27, 2017), <https://www.epi.org/publication/reducing-and-averting-achievement-gaps/>.

²⁶ Helen F. Ladd, *Presidential Address: Education and Poverty: Confronting the Evidence*, 31 J. OF POL’Y & MGMT. 203, 206 (2012).

²⁷ See Becton Loveless, *Preschool - Everything You Need to Know*, EDUC. CORNER, <https://www.educationcorner.com/preschool.html> (last visited May 5, 2021).

²⁸ See Dana Dubinsky, *Preschool: How Much Does it Cost?*, BABYCENTER, https://www.babycenter.com/family/money/preschool-how-much-does-it-cost_6061 (last visited May 5, 2021).

²⁹ See Beth Meloy, *Research Shows High-Quality Pre-K Can Pay Off, Now Let’s Deliver It*, NAT’L INST. FOR EARLY EDUC. RES. (January 31, 2019), <https://nieer.org/2019/01/31/research-shows-high-quality-pre-k-pays-off-now-lets-deliver-it>.

³⁰ See generally Farah Z. Ahmad & Katie Hamm, *The School-Readiness Gap and Preschool Benefits for Children of Color*, CTR. FOR AM. PROGRESS (Nov. 12, 2013, 8:28 AM), <https://www.americanprogress.org/issues/early-childhood/reports/2013/11/12/79252/the-school-readiness-gap-and-preschool-benefits-for-children-of-color/>.

³¹ See generally Arianna Jain, *Long-Term Effects of Universal Preschool: The Impact of Expanding Access to Preschool on High School Graduation* (Apr. 30, 2018), <https://econjournal.terry.uga.edu/index.php/UGAJUE/article/view/6/14>.

³² *Id.*

³³ *Id.*; see also *Creating a Caring Community of Learners*, NAEYC, <https://www.naeyc.org/our-work/families/what-does-high-quality-program-for-preschool-look-like> (last visited May 28, 2021).

³⁴ See generally Jill Barshay, *Why Talking—and Listening—to Your Child Could be Key to Brain Development*, HECHINGER REP. (Mar. 12, 2018), <https://hechingerreport.org/why-talking-and-listening-to-your-child-could-be-key-to-brain-development/>.

³⁵ *Id.*

³⁶ *Id.*

More recent research suggests similar correlations in vocabulary exposure based on family income but found that the frequency and meaningfulness of conversations are foundational to brain development, as opposed to mere word count.³⁷

B. Teacher Bias

It is also important to consider other potential reasons why minority students are often disproportionately represented in low-performing groups. Teachers who designate ability groups may make selections based on personal biases, which often results in particular groups of students—namely minority students—being wrongfully placed in low-performing groups.³⁸ While ethnicity should never affect judgments about students' achievements, previous research has indicated that it might, indeed, play a role in teachers' judgments.³⁹ For example, one study concluded that teachers' judgments were negatively biased regarding the literacy of their kindergarten students of low socioeconomic status or minority backgrounds.⁴⁰ Another study found that educators underestimated the abilities of students whose native language was a language other than English.

Teacher bias is a serious issue because one teacher's decision, such as a decision to place a child into a low-ability group, can impact a student's life well beyond one school year.⁴¹ This is detrimental for two major reasons. First, mere placement in low-level groups has been shown to impact students negatively as they are inevitably affected by their teachers' low expectations of them.⁴² Second, once students are placed in low-performing groups, they will likely remain on the low-level track—oftentimes throughout their high school careers—resulting in unequal educational opportunities.⁴³

1. Low Expectations

Low academic expectations result in lasting consequences because “if men define situations as real, they are real in their consequences.”⁴⁴ This self-fulfilling prophecy is supported by one of the longest and most insightful longitudinal studies ever conducted on American elementary students.⁴⁵ In 1991, 1,364 new mothers agreed to allow their newborn children to be part of

³⁷ *Id.*

³⁸ Meissel et al., *supra* note 20, at 48–50.

³⁹ *Id.* at 49–50.

⁴⁰ *Id.* at 50; see also Douglas D. Ready & David L. Wright, *Accuracy and Inaccuracy in Teachers' Perceptions of Young Children's Cognitive Abilities: The Role of Child Background and Classroom Context*, 48 AM. EDUC. RSCH. J. 335, 338 (2011).

⁴¹ Meissel et al., *supra* note 20, at 50.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Robert K. Merton, *The Thomas Theorem and the Matthew Effect*, 74 SOC. FORCES 379, 380 (1995).

⁴⁵ See generally Nicole S. Sorhagen, *Early Teacher Expectations Disproportionately Affect Poor Children's High School Performance*, 105 J. OF EDUC. PSYCH. 465 (2013).

a study examining the impacts of under- and over-estimations of a child's abilities.⁴⁶ The study's focus was on teachers' expectations of students' abilities and the long-term effects of such expectations.⁴⁷ At various times throughout the study, the students were tested to determine their math and reading abilities.⁴⁸ Additionally, the students' teachers evaluated them through a questionnaire in which they scored each child on a variety of different academic skills based on the teachers' own perceptions.⁴⁹ The results showed that a teacher's expectations of a student's abilities disproportionately impacted the student's later success.⁵⁰ More specifically:

When teachers underestimated students' abilities in the first grade, the students' [Woodcock-Johnson-Revised ("WJ-R")] scores at age 15 were lower, even after taking into account prior measures of ability, gender, ethnicity, family income, and noncognitive factors known to influence achievement. On the other hand, when a student's academic abilities were overestimated, his or her later performance on the WJ-R was higher⁵¹

These findings are reported in various other studies, supporting the notion that "[s]tudents placed in advanced reading groups tend to perform better on measures of reading achievement regardless of their prior reading abilities, compared to students placed in low-ability groups."⁵² Notably, studies have also shown that teachers' expectations more heavily influenced students from low-income families than students from average-to-wealthy families.⁵³

2. Unequal Educational Opportunities

Teacher bias in student placement is also detrimental because students placed in low-level groups are subjected to unequal educational opportunities and resources.⁵⁴ Ability grouping widens the achievement gap

⁴⁶ *Id.* at 466–67.

⁴⁷ *Id.* at 466.

⁴⁸ *Id.*

⁴⁹ *Id.* at 467–68.

⁵⁰ *Id.* at 465, 470.

⁵¹ *Id.* at 470. The WJ-R test is program that tests a wide variety of cognitive skills to determine academic achievement, similar to other IQ tests. See generally *Woodcock Johnson Tests*, TESTING MOM, <https://www.testingmom.com/tests/woodcock-johnson/> (last visited May 12, 2019).

⁵² *Id.* at 466; see also Madeleine Saffigna, et al., *Victorian Early Years Learning and Development Framework*, MELBOURNE GRADUATE SCH. OF EDUC. (2011), <https://www.education.vic.gov.au/Documents/childhood/providers/edcare/highexpect.pdf>.

⁵³ *Id.*; see J. Benjamin Hinnant, et al., *The Longitudinal Relations of Teacher Expectations to Achievement in the Early School Years*, 101 J. OF EDUC. PSYCH. 662, 662–70 (2009). The longitudinal study found that first grade teachers' inaccurate beliefs of students' math abilities while in first grade played a greater influence on low-income students' later math success than on their wealthier peers' later math success. *Id.* at 668.

⁵⁴ See generally Har Carmel & Ben-Shahar, *supra* note 7. This is particularly serious considering once students are placed in a low-level group, it is difficult to "move up" into a higher group, and some students remain on the low-level track even throughout high school. See *id.* at 95.

by presenting lasting problems for minorities, as “[a]bility grouping leads to inequality in educational resources: students on lower tracks . . . tend to receive *fewer* resources than students on the higher tracks, are taught by less experienced teachers, and suffer from negative peer effects.”⁵⁵ Ability grouping affects nearly every aspect of children’s educational experiences, including the resources they receive and the peers with whom they interact.⁵⁶ In their later years, students on the lower tracks are frequently prevented from registering in advanced classes, which inevitably impacts the students’ opportunities beyond high school.⁵⁷

3. Long-Term Consequences

Low expectations, coupled with unequal educational opportunities and resources, result in long-term consequences for minority students.⁵⁸ For example, “before graduating high school . . . [o]nly 57% of Black students have access to the full range of math and science courses necessary for college readiness, compared to 81% of Asian students and 71% of white students.”⁵⁹ Moreover, while only 31% of all ACT test-takers fail to meet all four of the college-readiness benchmarks, this number jumps to 61% for Black test-takers.⁶⁰ Additionally, African American students are more likely to be required to take remedial courses in college, compared to all other student groups.⁶¹ Not surprisingly, these disparities extend beyond education and are present in employment and earnings as well.⁶²

C. Legal Background

1. Is Education a Fundamental Right?

Although the Supreme Court has not yet recognized education as a constitutionally protected fundamental right, the Court has recognized that the

⁵⁵ *Id.* at 97–98 (emphasis in original).

⁵⁶ *Id.* at 89.

⁵⁷ *See id.* at 99–107.

⁵⁸ Brian Bridges, *African Americans and College Education by the Numbers*, UNCF, <https://www.uncf.org/the-latest/african-americans-and-college-education-by-the-numbers> (last visited May 5, 2021).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*; *see also* MEREDITH B.L. ANDERSON, UNCF, A SEAT AT THE TABLE: AFRICAN AMERICAN YOUTH’S PERCEPTIONS OF K-12 EDUCATION 11 (2018), <https://uncf.org/pages/perceptions-a-seat-at-the-table-african-american-youths-perceptions-of-k-12>.

⁶² *See generally* U.S. DEPT. OF EDUC., ADVANCING DIVERSITY AND INCLUSION IN HIGHER EDUCATION (2016), <https://www2.ed.gov/rschstat/research/pubs/advancing-diversity-inclusion.pdf>. In fact, “[B]lack workers remain twice as likely to be unemployed as white workers” Jhacova Williams & Valerie Wilson, *Black Workers Endure Persistent Racial Disparities in Employment Outcomes*, ECON. POL’Y INST. (Aug. 27, 2019), <https://www.epi.org/publication/labor-day-2019-racial-disparities-in-employment/>. Moreover, Black workers are more likely to have a job and income that do not adequately reflect their credentials. *Id.* For example, a Black with a college degree is more likely to work in a field that does not require a college degree than a Caucasian person with a similar degree. *Id.*

right to a desegregated education is a fundamental right.⁶³ Moreover, the Court has recognized that equal access to education is a fundamental right.⁶⁴

In *Brown v. Board of Education* (“*Brown*”), the Supreme Court declared that the right to a desegregated education is a fundamental right, thus making de jure segregation illegal in public schools.⁶⁵ The Court emphasized that segregation, in and of itself, has a detrimental impact on students’ perceptions of their own abilities.⁶⁶ In reaching its decision, the Court acknowledged the great importance that education has on society as a whole, recognizing that education is a prerequisite to performing “basic public responsibilities,” is the “foundation of good citizenship,” and is a “principal instrument” in preparing a child to succeed in a future career and to overcome everyday challenges with resilience.⁶⁷

Despite acknowledging the great importance of education, the Court did not expressly recognize education as a fundamental right, instead only recognizing the narrow right to a desegregated education.⁶⁸ In 2007, the Court reaffirmed its distinction between de jure and de facto segregation, explaining that de jure segregation, which results from intentional governmental discrimination, is unconstitutional, whereas de facto segregation, which results from unintentional actions by government or private entities, is not unconstitutional.⁶⁹ In 2020, the U.S. Court of Appeals for the Sixth Circuit momentarily declared that a “basic minimum education” is a fundamental right.⁷⁰ At this time, however, the Supreme Court has not explicitly recognized education as a fundamental right.

2. Ability Grouping Trends

After *Brown*, ability grouping became a popular practice in public schools, arguably because it was viewed as a tool to continue segregation without being blatantly discriminatory.⁷¹ However, about fifteen years after *Brown*, society began to acknowledge the negative ramifications of ability grouping, and the classroom management technique became widely condemned.⁷² However, in the last couple of decades, ability grouping has

⁶³ See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁶⁴ See generally *Plyler v. Doe*, 457 U.S. 202, 223 (1982).

⁶⁵ 347 U.S. at 495.

⁶⁶ *Id.* at 493–95.

⁶⁷ See *id.* at 493.

⁶⁸ See *id.* at 493–95.

⁶⁹ See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 752–757 (2007).

⁷⁰ *Gary B. v. Whitmer*, 957 F.3d 616, 655 (6th Cir. 2020).

⁷¹ See generally Richard W. Donelan et al., *The Promise of Brown and the Reality of Academic Grouping: The Tracks of my Tears*, 63 J. OF NEGRO EDUC. 376, 381 (1994) (“Yet, even as *Brown* helped remove legally sanctioned barriers to equal educational opportunities and resources, subtler policy used academic tracking and ability grouping to maintain boundaries that still keep African Americans from realizing their full potential in American society.”).

⁷² Sarah D. Sparks, *More Teachers Group Students by Ability*, EDUC. WK. (Mar. 26, 2013), <https://www.edweek.org/ew/articles/2013/03/27/26tracking.h32.html>.

regained popularity.⁷³ For example, in 1998, the percent of fourth-grade students separated into reading-based ability groups was 28% but then jumped to 71% by 2009.⁷⁴

The first case addressing ability grouping was *Hobson v. Hansen*, wherein Washington D.C. parents alleged that the practice violated their children's federally protected rights.⁷⁵ At the school, students took tests and were accordingly assigned to groups which were designed to prepare them for certain types of careers.⁷⁶ The court held that the school's practice deprived minority students of their constitutional right to equal educational opportunities, reasoning that it was essentially impossible for the students placed in the low-level groups to be moved to higher levels.⁷⁷

Testing procedures for designating students' placements into ability groups also became a subject of controversy due to evidence of overrepresentation of minority students in special education tracks.⁷⁸ For example, in *Larry P. v. Riles* ("*Larry P.*") the court held that solely using IQ tests to determine student placement into ability groups was culturally biased.⁷⁹

These cases demonstrate that when legal challenges regarding ability-grouping policies have been brought, the courts have considered the constitutionality of the school's policies on a case-by-case basis, generally relying on equal protection principles.⁸⁰

3. Ability Grouping Litigation

Lawsuits involving ability grouping are generally brought under constitutional claims of equal protection violations or statutory claims of civil rights violations.⁸¹ The Equal Protection Clause of the Fourteenth Amendment requires that when states establish public schools, all children of that state must be granted equal access to education.⁸² Accordingly, if a public school adopts a policy that intentionally discriminates on the basis of race, the

⁷³ TOM LOVELESS, BROOKINGS, HOW WELL ARE AMERICAN STUDENTS LEARNING? 16 (Mar. 18, 2013), <https://www.brookings.edu/research/the-resurgence-of-ability-grouping-and-persistence-of-tracking/>.

⁷⁴ *Id.* at 17.

⁷⁵ *Hobson v. Hansen*, 269 F. Supp. 401, 442 (D.D.C. 1967), *aff'd sub nom* *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) (en banc).

⁷⁶ *Id.* at 407.

⁷⁷ *Id.* at 443.

⁷⁸ *See generally* *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979).

⁷⁹ *See id.* at 988.

⁸⁰ Charles B. Vergon, *Ability Grouping*, EDUC. L., <https://usedulaw.com/145-ability-grouping.html> (last visited May 5, 2021).

⁸¹ *Id.*

⁸² *See generally* *Plyler v. Doe*, 457 U.S. 202 (1982) (finding that states cannot block illegal immigrant children from accessing public education).

policy will only be upheld if it survives strict scrutiny.⁸³ Similarly, if a public school adopts a facially neutral policy and applies it in a discriminatory manner, it will also only be upheld if it survives strict scrutiny.⁸⁴

To survive strict scrutiny, the policy must further a compelling governmental interest and be narrowly tailored to that interest in order for the policy to be upheld as constitutional.⁸⁵ To be narrowly tailored, the policy must use the least restrictive means to achieve its purpose.⁸⁶

Alternatively, one may bring a statutory discrimination claim under Title VI of the Civil Rights Act of 1964 (“Title VI”), which prohibits discrimination on the basis of race, color, or national origin by programs receiving federal funding.⁸⁷ In terms of school districts and ability grouping, this means that “[s]chool districts have a responsibility to ensure that they do not use ability grouping or tracking practices that result in discrimination on the basis of race, color, or national origin.”⁸⁸

The Supreme Court has consistently held that practices with a discriminatory impact on protected groups may violate Title VI, even if the practice is not intentionally discriminatory, so long as there is evidence that the continuance of the practice will result in a disparate impact on minority students.⁸⁹ To make a claim for educational disparate impact, courts have adopted a three-prong test to determine whether a policy violates Title VI.⁹⁰ The court first determines whether the educational policy disproportionately and adversely affects a particular race or nationality.⁹¹ Second, if there is a disproportionate effect, the school is given an opportunity to demonstrate whether there is a substantial, legitimate justification for adopting the policy.⁹² Finally, even if there is a legitimate justification, the policy may still be prohibited if there a less discriminatory alternative that would achieve the same legitimate justification.⁹³

III. ANALYSIS

Considering the overrepresentation of minority students in low-

⁸³ See *Gary B. v. Whitmer*, 957 F.3d 616, 675 (6th Cir. 2020) (Murphy, J., dissenting) (citing *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007)).

⁸⁴ See generally *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); see also *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that a facially neutral statute was unconstitutionally applied to discriminate against Chinese laundry-house owners).

⁸⁵ See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (describing, generally the principle of strict scrutiny).

⁸⁶ See generally *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978).

⁸⁷ 42 U.S.C. §2000d.

⁸⁸ *Student Assignment in Elementary and Secondary Schools & Title VI*, U.S. DEP’T. OF EDUC., OFF. OF CIV. RTS., www2.ed.gov/about/offices/list/ocr/docs/tviassgn.html (last visited May 4, 2021).

⁸⁹ See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001).

⁹⁰ See *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

performing ability groups, the negative effects of being placed in low-performing groups, and the recent developments in American educational laws, the Analysis will thoroughly address the necessary decision to replace ability grouping with a less discriminatory alternative. Next, it will discuss the legal reasons why continuing ability grouping in light of the alternatives is educational discrimination. Finally, it will conclude by giving tips to educators on how to smoothly transition away from ability grouping and towards the implementation of a less discriminatory alternative.

A. Predicted Benefits of Replacing Ability Grouping with a Less Discriminatory Method

1. Independent Academic Exploration

By no longer placing a ceiling on opportunities for children based on real or perceived abilities, students will have opportunities to explore their own limits.⁹⁴ The ability to explore and discover one's own strengths and weaknesses is foundational to developing and applying each student's own particular skill set.⁹⁵ Placing students in low-level groups, particularly based on one or two tests that administered at the outset of the school year, suggests to students that their abilities are fixed, and the notion of being invited into high-performing groups appears inconceivable.⁹⁶ By imposing ceilings based on perceived abilities, students are deprived of the opportunity to independently explore their own capabilities.⁹⁷ Therefore, when students finally have the chance to choose their own paths, they may migrate toward those which they have been repeatedly told they belong, even if the path does not inspire, challenge, or motivate them, because they have not been afforded chances to see what they are truly capable of.⁹⁸ By replacing ability grouping, students will have greater opportunities to discover their own abilities and interests independent of their teacher's opinions.⁹⁹

2. Promote Inclusion

Replacing ability grouping will promote greater inclusion in the classroom.¹⁰⁰ Inclusion is an essential element of an engaging, effective

⁹⁴ See, e.g., Patrick Capriola, *Finding and Understanding Your Academic Strengths and Weaknesses*, STRATEGIES FOR PARENTS, <https://strategiesforparents.com/finding-and-understanding-your-academic-strengths-and-weaknesses/> (last visited May 5, 2021).

⁹⁵ See *id.*

⁹⁶ See Ulrich Boser et al., *The Power of the Pygmalion Effect*, CTR. FOR AM. PROGRESS (Oct. 6, 2014, 11:31 AM), <https://www.americanprogress.org/issues/education-k-12/reports/2014/10/06/96806/the-power-of-the-pygmalion-effect/>.

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ See *id.*; Capriola, *supra* note 94.

¹⁰⁰ See *The Benefits of Inclusion and Diversity in the Classroom*, AM. UNIV. SCH. OF EDUC. (July 24, 2019), <https://soeonline.american.edu/blog/benefits-of-inclusion-and-diversity-in-the-classroom>.

classroom, from preschool all the way through graduate school.¹⁰¹ Specifically, “[i]nclusion is involvement and empowerment, where the inherent worth and dignity of all people are recognized.”¹⁰² An inclusive environment fosters a sense of belonging by valuing the gifts, backgrounds, and beliefs of all members.¹⁰³ Moreover, an inclusive classroom recognizes that students have unique learning styles and valuable perspectives to contribute to the learning experience.¹⁰⁴ By separating students into groups based on perceived abilities, students are deprived of hearing the valuable perspectives of classmates who learn differently or at a different pace than they do, thus creating a classroom culture where students do not feel a sense of unity and belonging.¹⁰⁵ Therefore, by replacing ability grouping with a less discriminatory alternative, classrooms will more effectively foster inclusion.¹⁰⁶

3. Reach Educational Equality

Replacing ability grouping is a necessary step toward achieving educational equality. The continuance of ability grouping, in light of the expansive research indicating its negative effects on racial minorities, denotes a widespread indifference toward the goal of educational equality altogether.¹⁰⁷

To reach educational equality, it is essential to provide students of all backgrounds with the resources and opportunities they need to achieve academic competence.¹⁰⁸ These objectives simply cannot be met if ability grouping continues to be implemented in the modern classroom.¹⁰⁹ Instead, teachers must exhibit high expectations for *all* students if they expect students to work to their full potential.

B. Strategies to Facilitate Replacement of Ability Grouping

In light of the predicted benefits of adopting an alternative approach to differentiated instruction, the following strategies will help to effectively

¹⁰¹ *Id.*

¹⁰² *Diversity and Inclusion Definitions*, FERRIS STATE UNIV., <https://www.ferris.edu/HTMLS/administration/president/DiversityOffice/Definitions.htm> (last visited May 5, 2021).

¹⁰³ *Id.*

¹⁰⁴ *Diversity and Inclusion in the Classroom—Introduction*, UNIV. OF R.I., <https://web.uri.edu/teach/multicultural/> (last visited Feb. 13, 2021).

¹⁰⁵ *See id.*

¹⁰⁶ *Id.*

¹⁰⁷ Shirley Clark, *Why Ability Grouping Doesn't Work*, EDUC. WK. (Feb. 15, 2016), <https://www.edweek.org/education/opinion-why-ability-grouping-doesnt-work/2016/02>. According to findings from the Sutton Trust: “The evidence is robust and has accumulated over at least 30 years of research. . . . If schools adopt mixed ability grouping they are more likely to use inclusive teaching strategies and to promote higher aspirations for their pupils.” STEVE HIGGINS ET AL., SUTTON TR., TOOLKIT OF STRATEGIES TO IMPROVE LEARNING 9 (May 2011), <https://dro.dur.ac.uk/11453/3/11453S.pdf?DDD45+DDD29+DDO128+ded4ss+cqjd36>.

¹⁰⁸ *See* Bolick & Rogowsky, *supra* note 2, at 50.

¹⁰⁹ *Id.* at 51.

facilitate widespread replacement of ability grouping with a less discriminatory alternative.

1. Being Informed

It is critical for people working in education, particularly those holding leadership positions, to educate themselves and others about the benefits and risks of instructional methods before implementing them in the classroom.¹¹⁰ For example, when Dr. Elizabeth Lolli was hired to serve Dayton Public Schools, one of her first objectives was to educate the faculty on the negative impacts of ability grouping, which she had discovered through her own research.¹¹¹ Dr. Lolli recognized that it would not be effective to simply inform the educators of the adverse effects of ability grouping unless she also provided them with reasonable alternative teaching methods to support the unique needs of each student in their classrooms.¹¹²

2. Mitigate Risks of Implicit Bias

Another step to combat in-class segregation is to highlight teachers' implicit biases and mitigate the risk of teacher bias influencing decisions that could result in long-lasting consequences.¹¹³ This is important because "at the end of the day, the question is not whether or not we have bias. The question is how we can address it."¹¹⁴ Therefore, educators and those in educational leadership positions should implement safeguards to protect students from the potential risks of teacher bias.¹¹⁵ Anyone working in education should be aware of what implicit biases are and how their own implicit biases may affect their decision making.¹¹⁶ To better understand implicit bias, schools can take part in implicit bias training.¹¹⁷ Moreover, assessments should frequently measure student progress in a variety of different ways, ensuring that the gathered data is accurate rather than a mere byproduct of a teacher's

¹¹⁰ See Bolick & Rogowsky, *supra* note 2, at 50.

¹¹¹ Telephone Interview with Dr. Elizabeth Lolli, Superintendent, Dayton Public Schools (Feb. 4, 2020) (on file with University of Dayton Law Review). Dr. Lolli was originally hired as Dayton Public Schools' Associate Superintendent of Curriculum and Instruction. *Id.* She is now the Superintendent of Dayton Public Schools. *Id.*

¹¹² *Id.*

¹¹³ See generally Cheryl Staats, Understanding Implicit Bias: What Educators Should Know, AM. EDUCATOR, Winter 2015–2016, at 29.

¹¹⁴ Linda K. Smith & Shantel Meek, *Addressing Implicit Bias in the Early Childhood System*, QRIS NAT'L LEARNING NETWORK, https://qrisnetwork.org/sites/default/files/resources/2017-01-23%2010%3A39/addressing_implicit_bias_in_the_early_childhood_system.pdf (last visited May 5, 2021).

¹¹⁵ Staats, *supra* note 113, at 33.

¹¹⁶ *Id.* at 29–30.

¹¹⁷ *Id.* at 33. There are various programs for implicit bias training; for example, The Kirwan Institute for the Study of Race and Ethnicity has a free module available to the public that is tailored specifically toward K–12 educators. See *Special Announcement: Implicit Bias Training Available*, KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY (Aug. 29, 2018), <https://kirwaninstitute.osu.edu/media-releases/special-announcement-implicit-bias-training-available>.

perceptions.¹¹⁸

3. Closing Achievement Gaps

Another necessary step to combat in-class segregation is to close the achievement gaps that exist among children before they begin their academic careers.¹¹⁹ To deal with the achievement gaps directly attributed to income status, it is important to eliminate societal barriers to activities and programs that support reading, writing, and language skills.¹²⁰

A monumental step would be to make high-quality preschool accessible to all families, regardless of income.¹²¹ Alternatively, preschools that are not considered “high quality” can make improvements to more effectively prepare students for kindergarten. For example, one way to help decrease academic gaps prior to kindergarten is for preschools to conduct home visits.¹²² Although this strategy is fairly simple, its impacts are remarkable.¹²³ Home visits involve preschool teachers visiting their students at home, or in a public place, such as a park.¹²⁴ The home-visit process does not focus on taking notes, filling out paperwork, or lecturing; the primary purpose is to establish rapport with the students and their families in a non-school setting.¹²⁵ Studies have shown that home visits benefit students in terms of higher attendance rates and improved reading scores.¹²⁶ Home visits also help students develop positive attitudes toward school very early on, shaping how they respond to education for years to follow.¹²⁷

Additionally, offering parents educational information to help prepare their child for school, such as effectively communicating the “what, how, and why” of kindergarten readiness: what their child will need to know, how to help their child learn it, and why it is important for the child to be prepared for formal education.¹²⁸ For example, when a family with young children comes in contact with governmental bodies, such as when they apply for governmental assistance or register for a public library card, the family should be given resources outlining ways to help their children on their

¹¹⁸ Staats, *supra* note 113, at 33.

¹¹⁹ See generally Jarrett & Coba-Rodriguez, *supra* note 22.

¹²⁰ See Ladd, *supra* note 26, at 18.

¹²¹ Jain, *supra* note 31, at 3.

¹²² *Home Visits: What Are They and Why Do We Do Them?*, SPRINGS, <https://www.springsmontessori.com/home-visits-what-are-they-and-why-do-we-do-them/> (last visited May 5, 2021); see also Christina Caron & Katherine Zoepf, *Pre-K Teachers are Making House Calls. It's Helping Kids Succeed.*, N.Y. TIMES (Aug. 22, 2019), <https://parenting.nytimes.com/preschooler/preschool-home-visit>.

¹²³ Caron & Zoepf, *supra* note 122.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*; *Home Visits: What Are They and Why Do We Do Them?*, *supra* note 122 (“Teachers who offer home visits consistently report that those children who have a home visit prior to the start of school begin the school year with less separation anxiety and more confidence.”).

¹²⁸ See generally Garcia & Weiss, *supra* note 25.

academic journey to school readiness.¹²⁹

Another way to decrease the achievement gap is to promote vocabulary exposure.¹³⁰ Engaging in conversations between parent and child may help decrease the achievement gap by increasing vocabulary exposure.¹³¹ Encouraging parents to engage in conversations with their children will help foster their brain and language development, preparing them for the demands of formal education.¹³² Finally, families should be encouraged to seek out resources to help foster their child's language development, such as taking advantage of the educational programs that public libraries have to offer or enrolling in free book programs like Dolly Parton's Imagination Library.¹³³

C. *Less Discriminatory Alternatives to Ability Grouping*

While promoting awareness about the negative impacts of ability grouping, addressing implicit biases, and working to close pre-kindergarten achievement gaps will help lead the way to ending ability grouping, an additional and critical component is that educators have access to alternative teaching methods that can be utilized to meet the varying learning needs and styles of their students.¹³⁴ There are plenty of feasible and less discriminatory alternatives that educators can use while retaining the benefits of differentiated instruction.¹³⁵ A few of these alternatives will be discussed below.

1. Peer Tutoring

One alternative to ability grouping is peer tutoring.¹³⁶ Peer tutoring allows students who understand a topic to explain it to other students who are still working toward mastery.¹³⁷ Peer tutoring is beneficial to both parties because it challenges students who understand the topic to explain it aloud while benefiting children who have not yet mastered the topic to hear it

¹²⁹ See Grace Chen, *Parental Involvement is Key to Student Success*, PUB. SCH. REV. (Oct. 10, 2020), <https://www.publicschoolreview.com/blog/parental-involvement-is-key-to-student-success>.

¹³⁰ Barshay, *supra* note 34.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Dolly Parton's Imagination Library*, DOLLY PARTON'S IMAGINATION LIBR., <https://imaginationlibrary.com/> (last visited May 5, 2021).

¹³⁴ See generally John McCarthy, *3 Ways to Plan for Diverse Learners: What Teachers Do*, EDUTOPIA (Aug 28, 2015), <https://www.edutopia.org/blog/differentiated-instruction-ways-to-plan-john-mccarthy>.

¹³⁵ See *id.* It is important to keep in mind that various classroom teaching methods can be effective, and the examples present are not exhaustive. An effective learning environment fosters the following: (1) learner-centered, (2) well-designed, (3) personalized, (4) inclusive, and (5) social. See generally Ace Parsi & Rebecca Wolfe, *Student-Centered Learning and Inclusion: Getting the Details Right*, EDUC. WK. (Mar. 29, 2018), <https://www.edweek.org/technology/opinion-student-centered-learning-and-inclusion-getting-the-details-right/2018/03>. Keeping these five principles in mind, an educator can design a classroom teaching style that best suits their learners' needs.

¹³⁶ See generally Michelle Nguyen, *Peer Tutoring as a Strategy to Promote Academic Success* (Jan. 7, 2013) (Research Brief, Duke University), https://childandfamilypolicy.duke.edu/pdfs/schoolresearch/2012_PolicyBriefs/Nguyen_Policy_Brief.pdf.

¹³⁷ *Id.*

explained by a fellow student.¹³⁸ Oftentimes, when a child does not understand a topic after it is explained by an adult, hearing an explanation from a peer may be more effective.¹³⁹

2. Adaptive Software Programs

Another less discriminatory alternative a teacher could implement in an elementary classroom is to set aside time for differentiated instruction that is primarily technology-based.¹⁴⁰ Adaptive software programs may serve as a less discriminatory way to meet the unique needs of all students by mitigating risks of teacher bias and decreasing the psychological and social risks associated with being placed in a low-performing group.¹⁴¹ Adaptive software programs are designed to meet the unique needs of the user.¹⁴² Depending on the questions that the student answers correctly or incorrectly, the software generates a lesson specifically tailored to the student's learning needs.¹⁴³

Adaptive software programs are proven to enhance achievement for various levels of students.¹⁴⁴ For example, independent research conducted by New York University ("NYU") found that users of adaptive software programs scored higher on average on standardized tests.¹⁴⁵ The NYU study also showed that the programs positively impacted student achievement regardless of prior skill levels or demographics, helped educators identify and support their students' individual needs, and helped identify potential systemic issues and predict future performance.¹⁴⁶

There are several adaptive software programs advocated for by educational professionals. For example, Dr. Lolli encourages teachers to use adaptive software programs, including Mindplay, ALEKS, and Redbird.¹⁴⁷ First, Mindplay is an Orton-Gillingham-based reading program.¹⁴⁸ Mindplay

¹³⁸ *Id.*

¹³⁹ *See id.*

¹⁴⁰ Santosh Bhaskar K, *Tips for Individualized Instruction With the Help of Technology*, EDTECHREVIEW (Sept. 13, 2013), <https://edtechreview.in/trends-insights/insights/574-tips-for-individualized-instruction-with-help-of-technology>.

¹⁴¹ *Id.*; *see also supra* Part III.A.

¹⁴² Bhaskar K, *supra* note 144.

¹⁴³ *MindPlay Universal Screener™ Uses Adaptive Technology to Assess Students' Reading Skills and Prescribes Interventions*, MINDPLAY (July 1, 2015), <https://mindplay.com/mindplay-universal-screener-uses-adaptive-technology-to-assess-students-reading-skills-and-prescribes-interventions/>.

¹⁴⁴ *See generally* Haya Shamir et al., *Bridging the Achievement Gap for Low-Performing Students Using Computer-Adaptive Instruction*, 9 INT'L J. OF INFO. AND EDUC. TECH. 196 (2019).

¹⁴⁵ *Stanford's Online K-12 Learning Program Accelerates Achievement for Students of All Levels*, NYU Study Finds, NYU (Mar. 19, 2014), https://www.nyu.edu/about/news-publications/news/2014/march/stanford_s-online-k-12-learning-program-accelerates-achievement-.html.

¹⁴⁶ *See id.*

¹⁴⁷ Telephone Interview with Dr. Elizabeth Lolli, *supra* note 111; *see also Spring Break Begins*, DAYTON PUB. SCHS. (Mar. 29, 2020), <https://www.dps.k12.oh.us/news/spring-break-begins/>.

¹⁴⁸ *Award-Winning MindPlay Technology is Supported by Research*, MINDPLAY, <https://mindplay.com/research/> (last visited May 5, 2021). Orton-Gillingham is an approach to reading, writing, and spelling instruction for students that these skills do not come easily. *What is the Orton-*

conducts a computerized assessment that tests the reading skills, including the strengths and weaknesses, of a single student or the entire class.¹⁴⁹ This method provides educators with an easy-to-use testing platform that identifies each student's specific reading abilities while also providing a stress-free environment for students.¹⁵⁰ The program measures students' current strengths and weaknesses in word meaning and recognition, phonics decoding and encoding, and eye-tracking, among other skills.¹⁵¹ After assessing the students, Mindplay formulates lessons specifically designed for each student's educational needs.¹⁵²

Second, ALEKS utilizes an open-response questioning system to discover what a child truly knows or does not know.¹⁵³ Through the individualized assessment, ALEKS then creates a learning path for the student based on concepts they are most ready to begin learning.¹⁵⁴ Finally, Redbird is an adaptive software math program that focuses on games, STEM-based projects, and immediate feedback.¹⁵⁵ The Redbird program uses an "adaptive motion engine" that guides students based on their own understanding of concepts, automatically providing more or less instruction based on student performance.¹⁵⁶ When extra instruction is necessary, it is presented in new ways to help students understand the material.¹⁵⁷ Implementing any of these adaptive programs would be beneficial to students.

3. Challenge Assignments

Another alternative to ability grouping is to assign "challenge assignments" of varying levels of difficulty for any student who wishes to participate.¹⁵⁸ The assignments should be entirely risk free, without any potential to lose or gain points for performance and without strict deadlines for completion.¹⁵⁹ This risk-free approach will help foster children's innate

Gillingham Approach?, ACAD. OF ORTON-GILLINGHAM PRACS. & EDUCATORS, <https://www.ortonacademy.org/resources/what-is-the-orton-gillingham-approach/> (last visited May 5, 2021). For example, the approach is often used with students who have dyslexia. *Id.* The approach focuses on explicit language instruction, especially focusing on those elements of language that are learned naturally by other learners. *Id.* The approach can be used for one-on-one, small groups, or in a classroom setting, but its focus is always on the needs of the individual. *Id.*

¹⁴⁹ *MindPlay Universal Screener™ Uses Adaptive Technology to Assess Students' Reading Skills and Prescribes Interventions*, *supra* note 143.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *What Makes ALEKS Unique?*, MCGRAW-HILL, https://www.aleks.com/about_aleks/tour_ai_intro (last visited May 5, 2021).

¹⁵⁴ *Id.*

¹⁵⁵ *Redbird Mathematics: Products Guide*, REDBIRD, https://s3.amazonaws.com/redbird-pd/RedbirdMathematics_ProductGuide.pdf (last visited May 5, 2021).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Whitney P. Gordon, *Low-Stakes Writing: Promoting Risk-Taking and Critical Thinking*, TEACHHUB (Jan. 3, 2020), <https://www.teachhub.com/teaching-strategies/2020/01/low-stakes-writing-promoting-risk-taking-and-critical-thinking/>.

¹⁵⁹ *Id.*

curiosity for knowledge while allowing them to explore their own abilities, skills, and areas of improvement.¹⁶⁰

Depending on the age-level and dynamic of the school setting, challenge assignments could be completed at school or at home. The challenge assignments could be beneficial not only to students but also to teachers and parents. The assignments may be an opportunity for parents to get involved in their child's education without feeling like they are overstepping by assisting their child with traditional homework. Moreover, challenge assignments may help the teacher gain a closer connection to his or her students and become more familiar with the students' strengths and interests. The teacher could, in turn, use this knowledge to tailor lessons accordingly rather than utilizing a generic curriculum plan.

4. Flexible Grouping

Dr. Lolli also suggested an additional alternative to ability grouping: flexible grouping.¹⁶¹ While ability grouping is long-term and is focused on an entire subject, flexible grouping is temporary and is focused on an isolated concept.¹⁶² After a lesson, educators will assess students to determine what they have learned; then, the students may be placed in smaller groups so that the children who have already mastered the concept can be challenged with more rigor, while the children who have not yet achieved mastery can have more time to grapple with the material.¹⁶³ According to Dr. Lolli, these groupings need to be both temporary, should last no more than two weeks, and be flexible, meaning once a student shows mastery, he or she should be relocated accordingly.¹⁶⁴ However, the inherent risk with flexible grouping is that if educators fail to make the grouping temporary and flexible, the adverse effects of ability grouping may result.¹⁶⁵ Thus, it is critical that the groups be both flexible and temporary.¹⁶⁶

D. Ability Grouping is a Racially Discriminatory Practice

Although the Supreme Court has not yet recognized the right to an education as a constitutionally protected fundamental right, the Court has recognized that equal access to education is a fundamental right.¹⁶⁷ Moreover, the Court made clear in *Brown* that separate is inherently unequal.¹⁶⁸

¹⁶⁰ *See id.*

¹⁶¹ Telephone Interview with Dr. Elizabeth Lolli, *supra* note 111.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *BRIA 7 4 c Education and the 14th Amendment*, CONST. RTS. FOUND., <https://www.crf-usa.org/bill-of-rights-in-action/bria-7-4-c-education-and-the-14th-amendment> (last visited May 5, 2021).

¹⁶⁸ *See Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

1. Equal Protection Clause

The Fourteenth Amendment requires that when a state establishes public schools, all children of that state must be granted equal access to education.¹⁶⁹ Therefore, when a public school adopts a policy that intentionally discriminates on the basis of race or applies a facially neutral policy in a racially discriminatory manner, the policy will be prohibited as unconstitutional unless it survives strict scrutiny.¹⁷⁰ To survive strict scrutiny, the ability-grouping policy would need to further a compelling educational interest and be narrowly tailored to that interest. Although meeting a student's individual needs is likely to be considered a compelling interest, a court may determine that ability grouping is not narrowly tailored as there are less discriminatory alternatives to meet the unique learning needs of students. Moreover, segregation resulting from such a policy is *de jure* segregation which the Court has made clear is prohibited by the Constitution.¹⁷¹

There are two potential Equal Protection arguments regarding ability-grouping policies. First, the complainant could argue that the public school, by using ability grouping as an educational method despite evidence of the substantial risks of racial disparities, engaged in intentional discrimination. However, a court may not accept this argument unless there is evidence that the policymakers, prior to grouping students by abilities, were aware of the racially disproportionate risks involved, which would generally be difficult in the absence of an admission of guilt because people are experts at concealing their own motives.¹⁷² Alternatively, the complainant could attempt to argue that the wealth of data showing the practice's discriminatory effects circumstantially prove that the school had knowledge of the discriminatory risks associated with ability grouping and that the school's subsequent disregard of the risks were evidence of discriminatory intent. The complainant could further try to prove evidence of a school's discriminatory intent by showing that the school was aware of, and yet declined to use, less discriminatory alternatives, and thus the school intentionally discriminated on the basis of race.

Second, the complainant could argue that the public school's ability-grouping policy, though facially neutral, was applied in a racially discriminatory manner. This could be directly evidenced by disproportionate numbers of minority students in low-level groups and further supported with

¹⁶⁹ See generally *id.*; *Equal Protection of the Laws*, CORNELL L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/equal-protection-of-the-laws#fn1473> (last visited May 5, 2021).

¹⁷⁰ *Equal Protection of the Laws*, CORNELL L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/equal-protection-of-the-laws#fn1473> (last visited May 5, 2021).

¹⁷¹ See *Parents Involved in Com. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 752–757 (2007); see also *Gary B. v. Whitmer*, 957 F. 3d 615, 621 (6th Cir. 2020).

¹⁷² See *Har Carmel & Harel Ben-Shahar*, *supra* note 7 at 119–20.

circumstantial evidence of discriminatory application, such as evidence of racially discriminatory conversations or actions by policymakers or utilizing only one type of assessment that is geared toward non-minority success, like the IQ test in *Larry P.*¹⁷³

2. Title VI of the Civil Rights Act of 1964

A school's ability-grouping policy may also be prohibited if it violates Title VI.¹⁷⁴ Looking at the three-prong test for disparate impact in education, as laid out in *Elston v. Talladega*, a court would determine whether a school's ability-grouping policy violated students' civil rights.¹⁷⁵ The first prong—that the educational policy disproportionately and adversely affects a particular race or nationality—could be shown if a school's data indicates that minority students are overrepresented in low-performing groups.¹⁷⁶ The school would then argue that, pursuant to prong two, the continuance of the practice is justified by the need to meet the academic needs of all students of varying abilities in any given classroom.¹⁷⁷ Given that a school's priority is to meet the academic needs of their students, this argument is likely to satisfy prong two. Despite this, the policy may not survive prong three if a complainant can show that there are less discriminatory alternatives available to the school that could achieve the goal of meeting the needs of all students without engaging in the discriminatory policy.¹⁷⁸ If a complainant makes this showing, the U.S. Department of Education's Office for Civil Rights would be authorized to investigate the practice, and if it found that the school's practice was discriminatory, it could require the school to discontinue the practice or lose funding.¹⁷⁹

E. Practical Recommendations to Educators

In light of the foregoing information on the detrimental impacts of ability grouping and the reasonable alternatives, the decision to discontinue ability grouping in American classrooms is not only necessary but also feasible. This Part offers three recommendations to help educators make the transition more smoothly: (1) practice effective communication with parents; (2) encourage parental involvement; and (3) provide opportunities for students to actively participate in the transition process.

While educators should always practice consistent communication with their students' parents, teacher-parent communication is particularly

¹⁷³ *Larry P. v. Riles*, 495 F.Supp. 926, 954–55 (N.D. Cal. 1979).

¹⁷⁴ See 42 U.S.C. 2000d; *Title VI of the Civil Rights Act of 1964*, DEPT. OF JUST. (June 26, 2020) <https://www.justice.gov/crt/fcs/TitleVI-Overview>.

¹⁷⁵ *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Title VI*, JUSTIA, <https://www.justia.com/education/title-vi/> (last visited May 5, 2021).

important during a change in classroom methodology.¹⁸⁰ Educators should involve parents in the decision making process as appropriate.¹⁸¹ For instance, educators should send out an explanation to parents outlining why they are abandoning their current system of ability grouping, explaining the wealth of evidence that the practice leads to disparate impacts, and explaining why it is important to develop a new plan. Educators should be receptive to ideas, considerations, and feedback from parents.¹⁸² Then, the teacher should keep parents informed, providing frequent updates on how the method is going throughout the entire process.¹⁸³

Because increased communication should ideally lead to additional parental involvement, school boards should also find ways to incorporate parent participation in the classroom. For example, educators should send home regular reports explaining what the students have been learning in class thus providing ways for parents to promote student learning at home or in the classroom.¹⁸⁴

Finally, educators should involve students in decisions that affect their learning experiences. The level and method of student-involvement will depend on the grade-level of the students. John Dewey, a 20th Century educational philosopher, founded the notion that students should be meaningfully involved in the classroom.¹⁸⁵ When students are invested in what they are learning, rather than merely operating as passive members in the learning process, they learn and retain knowledge much more effectively.¹⁸⁶

IV. CONCLUSION

Separate remains inherently unequal.¹⁸⁷ Yet, American educational systems subject many children to inequality every day they enter the classroom. In 1954, the *Brown* Court declared that even when schools appear to be equal in terms of resources, separate is inherently unequal.¹⁸⁸ Today, although students are not forced to attend entirely different schools like in the pre-*Brown* era, the negative impacts of separation remain, including

¹⁸⁰ See Derrick Meador, *Tips for Cultivating Highly Successful Parent Teacher Communication Individualized Instruction With the Help of Technology*, THOUGHT CO. (Jan. 29, 2019), <https://www.thoughtco.com/tips-for-highly-successful-parent-teacher-communication-3194676>.

¹⁸¹ *See id.*

¹⁸² *See id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ John Dewey, PBS, <https://www.pbs.org/onlyateacher/john.html> (last visited May 5, 2021).

¹⁸⁶ Jess Gifkins, *What is 'Active Learning' and Why is it so Important?*, E-INT'L. REL. (Oct. 8, 2015), <https://www.e-ir.info/2015/10/08/what-is-active-learning-and-why-is-it-important/> (“Active learning promotes recall and deeper understanding of material, as students are engaging with the content rather than simply listening to it. . . . [Active learning] helps to maintain student concentration and deepens learning towards the higher-level skills like critical thinking.”).

¹⁸⁷ *See generally* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁸⁸ *Id.* at 495.

academic, social, and emotional impacts.¹⁸⁹ By separating students by perceived abilities, students are subjected to unequal educational opportunities, the impacts of which may last well beyond one school year.¹⁹⁰ Moreover, low-level placements may subject students to negative social and emotional impacts, such as decreased self-esteem, ill attitudes toward education, and less meaningful interpersonal relationships.¹⁹¹

Because studies show that teachers' expectations directly affect students' success, and the correlation between expectations and success is even higher among low-income students, it is critical for teachers to demonstrate high expectations for all students, regardless of race, family income, or their own biased perceptions of students' academic abilities.¹⁹² It is unrealistic to trust that children will believe their teacher has high expectations of their success when labeled, either implicitly or explicitly, as "low ability."¹⁹³

Due to the unequal and negative impacts associated with ability grouping, particularly for minority students, ability grouping is an inherently discriminatory teaching method. Though there are some potential benefits of ability grouping, the benefits are much greater for students placed in high-performing groups, and the negative consequences are much higher for students placed in low-performing groups, thus operating as an unequal educational method.¹⁹⁴ Moreover, the purpose of ability grouping—to differentiate instruction in order to meet the unique learning needs of all students—can be fulfilled through less discriminatory instructional methods, such as peer tutoring, adaptive software programs, and flexible groupings.¹⁹⁵ In light of the disproportionately harmful effects of ability grouping, particularly on low-income, minority students, it is time for schools to abolish the practice and choose educational equality for all children.

¹⁸⁹ *Id.*

¹⁹⁰ *See generally id.*

¹⁹¹ *See generally* Sorhagen, *supra* note 45.

¹⁹² *See generally id.*

¹⁹³ *See generally id.*

¹⁹⁴ *See generally* Bolick & Rogowsky, *supra* note 2.

¹⁹⁵ *See, e.g.,* Nguyen *supra* note 136.