

Equally Unprotected: Assessing Whether Evanston Township High School's Former or Future Freshman Honors Curriculum Runs the Risk of Violating Students' Rights

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I. INTRODUCTION

School leaders have the challenging (and sometimes unenviable) task of developing a curriculum that balances the dichotomous goals of every public school program: excellence and equity.¹ A curriculum geared towards excellence will focus on raising standards in order to maximize each student's potential, while an equitable curriculum concentrates on narrowing the achievement gap and making certain that every student is receiving the same adequate education, regardless of differences in ethnicity, ability, or race. Ideally, all school curricula would fully address both; the reality, however, is that even striking a reasonable balance between the two has proven challenging.² With the limitations on resources, teachers, and time, educational leaders soon come to find that the concentration on one goal often comes at the expense of the other.

Evanston Township High School (ETHS) is a prime example of a school struggling to achieve an acceptable equilibrium within its curriculum. For many years, the high school used a system known as "tracking," under which students were assigned to instructional groups based on ability.³ This practice fostered a challenging environment for many students, especially the high-tracked "honors" students. Unfortunately, there was a noticeable racial disparity within the tracks, with the minority (non-white) students being vastly underrepresented in the higher level tracks.⁴

¹ Lisa Robbins, *Equity v. Excellence: Is Education Still a Zero-Sum Game?* PEABODY REFLECTOR (2007), http://peabody.vanderbilt.edu/equity_vs_excellence.xml.

² Frederick Hess & Andrew Rotherham, *Can NCLB Survive the Competitiveness Competition?*, 2 AM. ENTER. INST. FOR PUB. POLICY RESEARCH 2 (2007), <http://www.aei.org/outlook/26339>. Analyzing this dynamic, the researchers noted:

Historically, there always has been an unavoidable tension between efforts to bolster American 'competitiveness' (read as efforts to boost the performance of elite students, especially in science, math, and engineering) and those to promote educational equity. Champions of particular federal initiatives tend to argue that the two notions are complementary, but trends of the last fifty years show that the ascendance of one tends to take attention from the other.

³ RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, 1501 (1st ed. 1983).

⁴ Evanston Township High School, FRESHMAN HUMANITIES FAQ, <http://www.eths.k12.il.us/assets/1/Documents/Humanities%20FAQ%2011%2019%2010.pdf>.

This past academic year, in an effort to address the racial discrepancy, ETHS decided to “de-track.”⁵ Specifically, the school modified its Freshman Humanities tracks (including the elimination of the “honor-only” course) for the upcoming school year, replacing them with two “mixed-level” courses.⁶ The hope is that the integration of abilities will raise the achievement of the lower-tracked students (traditionally made up of minorities), maintain the rigorous curriculum of the higher-track classes, and expose all students to more diverse classroom composition. The community’s reaction to ETHS’s curriculum restructure was mixed. Some expressed concern that the new program would not properly address the needs of the top students; others believed the old program trapped minority students in lower-level courses for the entirety of their education.⁷

While all students are ostensibly affected by such modifications within the curriculum, the most radical changes will likely be felt by the gifted and the minority students. Both groups have special rights outside that of the normal student, but the scope of these rights is a matter of debate.⁸ Even in a narrowly construed context, research suggests these rights appear to be most adequately addressed by two ideologically opposite curricula: gifted students thrive when offered homogeneous honors courses, minorities prosper in mixed-ability courses.⁹

Faced with a curriculum Catch-22, ETHS chose to de-track. It is a move that is becoming more and more prevalent in school districts across the nation, but is it legal? This

⁵ Evanston Township High School, FRESHMAN COMMON CORE STANDARDS RECOMMENDATION, <http://www.eths.k12.il.us/assets/1/Documents/Freshman%20Humanities%20Recommend.pdf>.

⁶ Evanston Township High School, APPENDIX – EARNED HONORS CREDIT MODEL, <http://www.eths.k12.il.us/assets/1/Documents/Appendix-Earned%20Honors%20Credit.pdf>.

⁷ Diane Rado, *Honors Class Leads to Diversity Debate*, CHI. TRIB., Nov. 23, 2010. The article reported the reaction of those in attendance at the town meeting, noting that “[a]ppause broke out [in support of the proposal] in some, but not all parts of the mostly white audience,” during what was an emotionally charged and race-tinged debate. *Id.*

⁸ See *infra* Part II (discussing the arguable scope and limits of the rights of gifted and minority students).

⁹ See Monica Aguon, *Equal Protection for the Gifted Student in the Public School System*, 13 SCHOLAR 443, 445 (2010); see also Daniel J. Losen, *Silent Segregation In Our Nation’s Schools*, 34 HARV. C. R.-C. L. L. REV. 517, 518 (1999).

Note will argue that, while both curricula may have negative effects on the education of each group, neither plan actually violates the rights of the gifted or minority students. Part II will examine the legally-granted rights of these student groups, and Part III will analyze each ETHS curriculum (former and future) in light of the gifted and minority students' rights.

II. DISCUSSION

Free public education is not a Constitutionally-granted, fundamental right.¹⁰ Instead, the issue is left to the states. However, once a state does offer the opportunity of education, it must operate within the limits of the Fourteenth Amendment's Equal Protection Clause, which allows that "No state shall...deny any person within its jurisdiction the equal protection of the laws."¹¹ In terms of education, this means a state cannot capriciously discriminate against groups that are similarly situated. Interestingly enough, the foundational basis for the extended rights of *both* gifted and minority students is rooted in this protection.

A. Equal Protection for Gifted Students

i. Rationale for Gifted Student Rights

At the most basic level, gifted students require a different type of education if they are to fulfill their learning potential.¹² Much akin to the disabled, the capacities of gifted students dictates that the instruction provided to the general student populous is, if not ineffective, at least dramatically less effective on those considered to be gifted. The federal government acknowledges as much, defining gifted students as "those who give evidence of high

¹⁰ San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 56 (1973) (stating that to classify education as such would result in an "upheaval in public education").

¹¹ U.S. CONST. amend. XIV, §1.

¹² Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. I. REV. 485, 499 (2005) ("[E]quity should mean that every child has an opportunity to maximize his individual education rather than having all students learn the same information.").

achievement capabilit[ies]...and who *need services or activities not ordinarily provided*...in order to fully develop those capabilities.”¹³

When these services are absent, there are some generally-recognized negative effects.¹⁴ The first is that gifted students are not challenged academically, leaving their abilities inadequately developed. Unchallenged gifted students can suffer emotionally, and drop out of high school at a high rate.¹⁵ Issues with self-esteem and self-efficacy also surface.¹⁶ Given that the services which challenge them are “not ordinarily provided,” scholars contend that gifted students need legislative protection to ensure that they receive the progressive education and healthy psychological development afforded to normal and disabled students. Whether this protection is actually provided, however, is a matter of geography and interpretation.¹⁷

ii. Gifted Rights and State Legislation (Geography)

Educational policy is generally a state function, and thus, most regulations concerning gifted student’s rights originate from state statutes. The policies often center on the understanding that gifted students need programs that are not regularly provided and, thus, statutes guaranteeing this educational right are necessary. Some states mandate that every school district provide educational programs and services to all identified gifted children. Other states merely have permissive statutes that authorize the department of education to address these needs, if inclined to do so.¹⁸ Illinois, for example, enacted the Gifted and Talented Children Article to “provide encouragement, assistance, and guidance” to school districts that implement

¹³ Elementary and Secondary Education Act of 1965 §9101(22), 20 USC § 7801(22) (2006) (emphasis added).

¹⁴ U.S. DEPARTMENT OF EDUCATION SECRETARY RICHARD W. RILEY, NATIONAL EXCELLENCE: A CASE FOR DEVELOPING AMERICA’S TALENT (Ross, 1993).

¹⁵ Roseann G. Padula, Note and Comment, *The Plight of Connecticut’s Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1338 (1997) (noting that unchallenged students will experience anger, boredom, frustration, and isolation).

¹⁶ Mary Lou Herring, Note, *Model Federal Statute for the Education of Talented and Gifted Children*, 67 CHI.-KENT L. REV. 1035, 1035-36 (1991).

¹⁷ See *infra* Part II.A.ii & iii.

¹⁸ See *supra* note 16, at 1035 (detailing various states’ “gifted” provisions).

gifted programs.¹⁹ It does not, however, *require* any action of the school districts within the state. Some states, such as Pennsylvania, are much more aggressive, finding that gifted children are “exceptional children” and need specialized enrichment programs.²⁰ These states mandate every school district to provide these programs.

iii. Gifted Rights and Federal Legislation (Interpretation)

Aside from state statutes that mandate programs, any claim that there is a federally-authorized right for gifted students would be debatable at best. They are recognized under the federal No Child Left Behind Act (NCLB), and states are encouraged to include statistics regarding the development of gifted students when addressing the NCLB provisions.²¹ But, similar to states with permissive statutes, the Act does not mandate that the learning needs of gifted students are addressed. Congress did reauthorize the Jacob K. Javits Gifted and Talented Students Education Act of NCLB of 2001, which supports the development of gifted students by funding targeted research and programs.²² Similarly, though, the Javits Act does not protect the legal rights of gifted students. Instead, it merely provides support, should states wish to take action to implement gifted student provisions.

Some scholars contend that gifted students are (or, at least should be) protected under the federal Individuals with Disabilities Education Act (IDEA).²³ This Act is the most comprehensive federal legislation that protects the rights of students who have disabilities. The logical nexus is that disabled and gifted children are similarly “exceptional” and require

¹⁹ 105 ILCS 5 § 14A-15.

²⁰ See Rachel Piven-Kehrle, Annotation, *Special Education Requirements of Gifted Students*, 115 A.L.R.5th 183 (2004) (discussing various court decisions in regards to gifted education, specifically Pennsylvania in this case, that outlined the boundary for the scope of gifted students’ rights).

²¹ 20 USC § 6301 et. seq. 2002.

²² 20 U.S.C. § 8031-8037 (2006) (amend. 2001).

²³ 20 USC § 1400-1491 (1994).

individualized instruction in order to realize their potential.²⁴ However, the Supreme Court has reviewed IDEA in such cases as *Board of Education v. Rowley*²⁵; there, the Court held that the Act only required schools to implement provisions that would make public education *accessible* to those with disabilities. This narrow interpretation of the Act (and what it can compel) makes it unlikely that the gifted would be protected under its provisions.

B. Equal Protection for Minority Students

i. Rationale for Minority Student Rights

Students who belong to a racial minority are protected due to the status of race as a suspect classification.²⁶ By belonging to one of the identified “discrete and insular minorities,” these students are afforded the right of heightened judicial scrutiny against any governmental action that may discriminate against them (and thereby violate their rights under the Equal Protection Clause).²⁷ This right recognizes that some groups lack (or have lacked) the normal protections of the political process. Any time a race-based classification is used in school-based programs, the court will examine the methodology under strict scrutiny. To meet the burden of a strict scrutiny judicial review, the school district’s action must (1) be justified by a compelling government interest, (2) be narrowly tailored to meet this interest, and (3) be the least restrictive means at achieving this interest.²⁸ With such a substantial burden, many implementations of public school programs that face strict scrutiny are found to be unconstitutional.²⁹

ii. Minority Rights in Race-Based Tracking System

²⁴ Aguon, *supra* note 9, at 466-67 (comparing the gifted and disabled, noting the idea that regular school instruction might be rendered essentially meaningless to both due to mental capacities).

²⁵ 458 US 176 (1982).

²⁶ *See, e.g., Regents of Univ. of Cal. v. Bakke*, 438 US 265 (1978) (explicitly recognizing racial distinctions as suspect).

²⁷ *See United States v. Carolene Products Co.*, 304 US 144, 152 n. 4 (1938).

²⁸ *See, e.g., Andarand Constr. v. Pena*, 515 US 200 (1995).

²⁹ *See Losen, supra* note 9, at 527 (discussing how it is rare for a school-implemented practice to meet the requirements to withstand a strict scrutiny judicial review).

The rights of minority students with respect to school curricula (specifically, tracking) are rooted in the landmark decision from *Brown v. Board of Education*.³⁰ By invalidating the doctrine of “separate but equal” education, the Court established the groundwork to challenge programs that labeled, separated, and tracked students within schools. Following *Brown*, many schools (especially in the South) implemented tracking as a way to circumvent desegregation, assigning students based on race.³¹ High tracks became white tracks, while lower tracks were for the minorities. However, the Equal Protection Clause, coupled with the ruling in *Brown*, established that any race-based model was unconstitutional.³²

iii. Minority Rights in Racial Disparate System

Current tracking systems no longer use race, but instead, assign students based on some combination of tests, grades, and teacher recommendations. Yet, inadvertently or not, programs that track still seem to discriminate against minorities. The programs place a disproportionately low number of minorities in the higher tracks, where the curriculum, instruction, and (oftentimes) resources are of a superior quality.³³ Instead, minorities generally fall to the lower tracks, where “watered down curriculum and lower standards” reside.³⁴ Across the nation, schools that do not consciously factor race into their tracking assignments still find that there is an obvious racial disparity within the track levels.

³⁰ 347 US 483 (1954).

³¹ MARTHA MINNOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 24 (1990).

³² See, e.g., *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), cert. denied, 393 US 801 (1968).

³³ Angelia Dickens, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469, 474 (1996) (“[Minorities] are disproportionately placed in remedial and low educational tracks, which brings one to question whether tracking is a pretense for segregation of students by race.”).

³⁴ See Jomills Braddock II & Marvin Dawkins, *Ability Grouping, Aspirations, and Attainments: Evidence from the National Educational Longitudinal Study of 1988*, 62 NEGRO EDUC. 324, 327 (1993).

There is great difficulty, though, in establishing (or claiming a violation of) the rights of minorities when the disparate impact is a result of a facially neutral assignment program.³⁵ As opposed to a blatantly or inferably biased program that affects all minorities, the standard for finding a supposedly-neutral school program unconstitutional is much higher.³⁶ A court may very well recognize: minorities make up a disproportionate percentage of the middle and lower tracks, instruction in the lower track is inferior, upward academic mobility within the tracks is rare and difficult, or the assessments used are inaccurate. Even so, because education is not recognized as a fundamental right, and these tracking programs do not *aim* to discriminate, school districts will only need to pass the rational basis test to defeat any Equal Protection challenge. Forced merely to show that the program is a reasonable means to a legitimate measure, there is enough research supporting the conclusion that ‘ability-grouping is educationally beneficial’ for a school district to withstand such judicial review.³⁷

One area where minorities may have a substantial claim is in the assessments used to place the tracks. There is research to suggest that whites perform better on the standardized tests (including I.Q. tests) used to designate students because the tests themselves are biased.³⁸ Standardized tests, the research proposes, is based on a statistical paradigm that establishes the

³⁵ *Washington v. Davis*, 426 US 229 (1976). The Supreme Court blocked plaintiffs, whose school had a tracking system that created a racial disparity, from claiming a constitutional violation under the Equal Protection Clause. For all cases following *Davis*, the burden was on the plaintiff to prove intentional discrimination if they hoped to avoid rational basis review. *Id.*

³⁶ See Losen, *supra* note 9, at 527 (explaining the judicial scrutiny typically applied to cases of racial disparity as opposed to outright racial discrimination).

³⁷ A standout exception to this is *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), where a District of Columbia school used a rigid system, with students placed in separated curricula. The track assignments were based on standardized tests, and there was no mobility. Given their previous remedial education, the court determined that African-Americans were basically trapped in the lower track. An additional, pertinent point was that the D.C. Superintendent believed that members of different economic classes should be trained for their appropriate occupations in life.

³⁸ See Dickens, *supra* note 33, at 499-500

Anglo-American culture as the point of reference for what “normal” consists of.³⁹ If this is the case, the classifications would be based on race, and the educational institution would be required to show that the classification system is narrowly tailored to serve a compelling state interest in the least restrictive way, a decidedly higher standard.

III. ANALYSIS

In light of these rights, there are certainly some measures and restrictions that those implementing a school curriculum must be mindful of. Given the Evanston community’s mixed reaction (of both staunch support and decisive disapproval) to eliminating the old tracking curriculum for the new mixed-ability grouping, it is pertinent to examine whether either program violates the rights of those students most affected.

A. Former Program & Minority Students

Under ETHS’s former placement practice, students were enrolled in one of four sections of Humanities: enriched, mixed-level regular, mixed-level honors, and honors-only.⁴⁰ Each student’s placement was based on either the Explore or MAP test, administered before entering the ninth grade.⁴¹ Students who scored at or above the 95th percentile were entered into the “honors-only” section, with the remaining students separated into the three lower tracks accordingly.⁴²

The demographics from the 2010-2011 school-year revealed a clear racial disparity within the Humanities sections. 82% of all white students were in one of the two top Humanities sections (mixed-level honors: 34%, honors-only: 48%).⁴³ On the other hand, only 34% of

³⁹ KENNETH J. MEIER ET AL., RACE, CLASS, AND EDUCATION, THE POLITICS OF SECOND-GENERATION DISCRIMINATION 26 (1989) (arguing that standardized tests are “based on a statistical model that institutionalizes the culture of the Anglo-American as the single monocultural frame of reference for ‘normal’”).

⁴⁰ See APPENDIX, *supra* note 6, at 1.

⁴¹ *Id.*

⁴² *Id.*

⁴³ See FAQ, *supra* note 4, at 5.

minority students were in the top two sections (mixed level honors: 24%, honors-only 10%). Similarly, the lowest track contained 10% of the total minority population, while only 2% of the white student body was placed there. This disparity occurred even though the student populations are similarly sized: 298 whites, 340 minorities.⁴⁴

However, as was highlighted in Part II.B.iii, a racial disparity alone is not enough to establish that a program violates the rights of a minority student. The determinative element in assessing whether there is an Equal Protection violation is the criterion used to assign the students to the various tracks. This identifies how the disparity was created, and any motivations or intentions behind it. Here, ETHS uses a simple, transparent formula: students all take the same national test and, based on their score, are assigned accordingly to one of the four tracks. This is a facially neutral assessment tool and, in the absence of any sign of intentional discrimination, the standard of review is merely the rational basis test.⁴⁵ It is reasonable to assume that ETHS would be able to elucidate how tracking is rationally related to the legitimate public interest of providing the best possible education to its children, given the numerous studies that support this proposition.⁴⁶ And, in the unlikely case ETHS could not, the court could still hypothesize this legitimate interest on its own accord.

While ETHS's former Freshman Humanities Course had a glaring racial disparity, it did not have any legal violations of its minority students' rights.

B. Future Program & Gifted Students

⁴⁴ A complete breakdown of the percentages is as follows: Freshman Humanities Enrichment (5 whites, 2% of all white students in freshman class; 45 non-whites, 10% of all non-white students in freshman class), Freshman Humanities mixed-level regular (26, 8%; 140, 31%), Freshman Humanities mixed-level honors (111, 34%; 110, 24%), Freshman Humanities honors-only (156, 48%; 45, 10%). *Id.*

⁴⁵ Davis, 426 US at 229 (establishing that the plaintiff has the burden of proving intentional discrimination in the case of tracking systems that create incidental racial disparity).

⁴⁶ See, e.g., Maureen T. Hallihan, *Tracking: From Theory to Practice*, 67 SOCIOLOGY OF EDUC. 2 (1994); James E. Rosenbaum, *If Tracking Is Bad, Is Detracking Better?*, AM. EDUCATOR (Winter 1999).

Under ETHS's future placement practice, students will be enrolled in either 1 Humanities or 1 Humanities with Support.⁴⁷ Both classes are considered mixed-level classes. Each student's placement is similarly based on either the Explore or MAP test, administered before entering the ninth grade. Those students who score at or above the 40th percentile are assigned to 1 Humanities; any student scoring below this mark is placed in 1 Humanities with Support.⁴⁸ All 1 Humanities classes are purportedly taught at the honors level, and honors credit can be earned with sufficient grades.⁴⁹ There is no "honors-only" course available to specifically address the learning needs of gifted students.

However, the lack of an "honors-only" course is not determinative, as ETHS is both under no legal obligation and (arguably) still respecting its gifted students' rights. First, ETHS has no obligation to provide specific gifted programs, because there is not Illinois statute that dictates such.⁵⁰ As noted in Part II.A.ii., Illinois has a permissive statute that authorizes and encourages, but does not *require*, a school district to offer and provide a gifted program. Schools are merely given the authority and flexibility to develop gifted programs if it wishes to meet the community's needs, and thereby qualify for state funding of such programs. ETHS is not mandated to identify its gifted students, much less offer a special gifted course (such as "honors-only"). Furthermore, at the federal level, neither NCLB, Javits Act, nor IDEA necessitates the offering of programs for gifted students. When it comes to providing programs geared at

⁴⁷ See RECOMMENDATION, *supra* note 5, at 1.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 105 ILCS 5 § 14A-15. In full, provides:

the purpose of this Article is to provide encouragement, assistance, and guidance to school districts in the development and improvement of educational programs for gifted and talented children as defined in Section 14A-20 of this Code. School districts shall continue to have authority and flexibility to design education programs for gifted and talented children in response to community needs, but these programs must comply with the requirements established in Section 14A-30 of this Code by no later than September 1 in order to merit approval by the State Board of Education in order to qualify for State funding for the education of gifted and talented children, should such funding become available.

educating gifted students, state and federal law are filled with carrots (additional funding), but no sticks (statutes that could result in violations and sanctions for lack of programs).

Second, even if Illinois were to implement a provision that required a program that addressed gifted children, it is quite possible that ETHS's 1 Humanities would qualify because it is taught at a so-called "honors level."⁵¹ In other states where gifted programs are mandated, courts have given sufficient leeway to schools in determining how best to provide the appropriate instruction. Even Pennsylvania, widely considered the most progressive state with regard to the rights of the gifted, does not require any "individual tutors or...individual programs" outside what the school offers.⁵² As long as the program offered by the school board is appropriate to the child's needs, it does not have to offer instruction which would "maximize" the student's ability to benefit from an individualized education program."⁵³ While it is not likely, an argument could very well be made that a court would find ETHS's "honors level" freshman course to be on par with what is mandated.

While ETHS's future Freshman Humanities Course has a noticeable absence of gifted-only programming, it does not have any legal violations of its gifted students' rights.

IV. CONCLUSION

When it comes to choosing between excellence and equity, the lawmakers are clearly leaving the options and decisions in the hands of the educational leaders. An examination of the statutes related to students' rights reveals a great amount of flexibility for a school to accomplish what it feels is best for the entire student body. Perhaps it is inevitable that some negative consequences will befall a small group of students in any class. If this is indeed the case, then

⁵¹ See RECOMMENDATION, *supra* note 5, at 1 ("[A]ll incoming freshman who are proficient in reading will take the same course using our *straight-honors curriculum* to provide our highly rigorous classes to freshman students." (emphasis added)).

⁵² Centennial Sch. Dist. v. Commonwealth, 539 A.2d 785, 791 (Pa. 1988), *aff'd* 503 A.2d 1090 (Pa. Commw. Ct. 1986).

⁵³ *Id.*

the narrow rights of students is an unfortunate necessity that at least allows schools to operate without continual fear of prosecution. However, even if an ideal balance between excellence and equity can never be achieved, it should continually be sought after. While it may never be perfect, it can always be perfected.