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Addressing Misplacement of 9th Grade Students in Bay Area School Math Classes

A report issued by the Lawyers' Committee for Civil Rights
of the San Francisco Bay Area (LCCR)
www.lccr.com

In collaboration with the law firm of
Gibson, Dunn & Crutcher LLP

With support from Silicon Valley Community Foundation

January 2013

ACKNOWLEDGEMENTS

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area would like to thank Silicon Valley Community Foundation for its generous financial support and the vision and encouragement of its staff throughout the development of this report.

In addition, we are greatly indebted to the law firm of Gibson, Dunn & Crutcher LLP and particularly **George H. Brown, Sarah Brown Hadjimarkos, and Ashley Rogers** for their invaluable research and writing assistance. We would also like to thank the **Sequoia Union High School District** and Assistant Superintendent **Morgan Marchbanks** for their leadership on this issue, researcher **Steve Waterman** for his work on the Pathways Study and his guidance throughout the development of this report, and **Manny Barbara**, Vice President, Silicon Valley Education Foundation, for his valuable insights. Finally, this report significantly benefited from the contributions of members of our staff, including Executive Director **Kimberly Thomas Rapp**, Legal Director **Oren Sellstrom** and Thurgood Marshall Fellow **Cecilia Chen**.

Educational opportunity is a critical component of life success for our youth, particularly youth of color. Encouraging successful students to excel at every level should be fundamental to our educational systems. To hold back any student without a legitimate and equitable basis is an infringement with life-altering implications. This work endeavors to bring attention to a problem that can be easily addressed in order to improve the educational, career and life success of all students.

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EXECUTIVE SUMMARY

The classes that a student takes in 9th grade form the foundation of her high school career, the starting line of a path that will either effectively prepare the student for college and all the opportunities college presents—or not. When it comes time to apply for college, students are evaluated on whether they are academically prepared and have challenged themselves, which requires colleges to consider a student's SAT scores, grades, extracurricular activities, and the specific classes a student has taken. Therefore, determining students' 9th grade class schedules is one of the most critical roles a school district assumes. Given the significance of course placement, districts expose themselves to potential legal liability if they misplace students in lower-level classes.

Ninth grade math placement can not only have far-reaching impacts on a student's confidence, general knowledge of mathematical concepts, and high school experience—more importantly, it can impact the college and career options available to that student.

While districts regularly make placement decisions regarding all core subjects (math, English, science, social studies), one area is most significant: math. Most universities (including California State and University of California) require at least three years of math for college eligibility, and they prefer students who have taken high-level math courses such as Calculus or AP Statistics. However, such high-level math courses are generally only available to students who begin high school in Geometry. Ninth grade math placement can therefore not only have far-reaching impacts on a student's confidence, general knowledge of mathematical concepts, and high school experience—more importantly, it can impact the college and life opportunities available to that student.

Failing to take high level math classes in high school can have significant ramifications on the student's future economic and social success. If the student is able to get into college without high level math classes, he or she will be behind other students at college. Moreover, without advanced math classes

in high school, a student is effectively frozen out of the highly compensated, highly sought after fields of science, technology, engineering, and math (“STEM”). Most, if not all, students who choose majors in STEM fields come to college well-versed in high level math and science concepts.

Unfortunately, many 9th graders are being forced off of the college-readiness path on the first day of high school. Data indicate that many 9th graders are being improperly placed in 9th grade Algebra I classes, despite having passed the class in 8th grade and/or having met or exceeded state standards on California Standards Tests (“CSTs”). More alarmingly, data indicate that minority students are being disparately impacted by these improper placements: specifically, a number of San Mateo and Santa Clara County schools and districts are regularly misplacing certain minority 9th graders in low-level math classes.

Purposeful placement decisions that disproportionately impact minority students violate state and federal laws. But those responsible for math placement decisions also face legal liability if the misplacement decisions are the *unintentional* results of applying seemingly objective placement criteria that disproportionately impact minority high school students. Under what is known as the “disparate impact” doctrine, policies and practices that have an unjustified adverse effect on minority students are as illegal as those that are based on invidious intent. Civil rights laws recognize that in many contexts, it is the impact that matters. No matter what the underlying motivation, if minority students are being systematically disadvantaged with no adequate justification, the law provides a remedy.

This report is intended to call attention to the math misplacement issue; to educate districts, community members, and parents about the potential liability associated with such placement decisions; and to encourage districts to take relatively simple steps to remedy the problem of math misplacement. Part I of this report explores the problem of math misplacement in greater detail and reviews the publicly available data regarding 9th graders’ math class placement in school districts in San Mateo and Santa Clara counties. Part II explains the disparate impact doctrine and demonstrates why a district that

engages in math misplacement, even if unintentionally, puts itself at legal risk. Part III explores other possible bases of legal liability. Finally, Part IV presents practical solutions to the problem of math misplacement and provides recommendations for school districts, community advocates, and lawyers to follow to remedy this critical civil rights issue.

MATH MISPLACEMENT AND ITS DISPROPORTIONATE IMPACT ON STUDENTS OF COLOR

Overview of the Problem

A student's 9th grade math placement is a crucial crossroad for future educational success.¹ While its significance is not always recognized, misplacement in a 9th grade math class creates a number of barriers that students must overcome and results in students becoming less competitive for college admission, causing potentially life-long implications. Higher education is a critical factor influencing earning power and other measures of success.²

Competitive universities look for students who have completed challenging, rigorous high school course work.

UCLA looks at the "number and rigor of courses taken and grades earned in those courses." UCLA considers "completion of courses beyond the University's a-g minimums . . . [and] performance in honors, college level, Advanced Placement (AP) . . . courses . . ."

Stanford University's "primary criterion" is "academic excellence" and a high school transcript displaying challenging courses.

Loyola Marymount University uses "a student's academic record [as] the primary factor for consideration" and "look[s] at each candidate's application for indications of academic achievement, preparation, and potential."

Many universities, including the University of California, require a student to complete a minimum of three years of college preparatory mathematics.³ While it is technically acceptable for a college applicant to take Algebra I in 9th grade, the most competitive students begin 9th grade in Geometry and graduate having taken Calculus or another college-level mathematics classes.

In addition to impacting a student's college opportunities, misplacement can have much farther reaching effects. Numerous studies confirm that "better-educated individuals earn higher wages, experience less unemployment, and work in more prestigious occupations than their less-educated counterparts."⁴ And numerous studies show that there is a dearth of minority candidates for careers in STEM fields. According to one report, "[o]nly 6 percent of STEM workers are black despite the fact that blacks make up 11 percent of the overall workforce. Hispanics make up 6 percent of STEM workers and 14 percent of the overall workforce."⁵ Moreover, research shows that "[t]he gap starts early in elementary school, widens in middle school, and continues, through filters and barriers, on a trajectory of low achievement and missed opportunities. By the end of college, the number of Latinos and African Americans who graduate with degrees in science, technology, engineering, and math is a trickle: an estimated 1,688 from the University of California and California State University in 2008."⁶

Numerous studies show that there is a dearth of minority candidates for careers in STEM fields. Research shows that "[t]he gap starts early in elementary school, widens in middle school, and continues, through filters and barriers, on a trajectory of low achievement and missed opportunities. By the end of college, the number of Latinos and African Americans who graduate with degrees in science, technology, engineering, and math is a trickle: an estimated 1,688 from the University of California and California State University in 2008."

The most common and concerning misplacement problem occurs when a student who has successfully completed Algebra I in middle school is forced to repeat Algebra I in 9th grade.⁷ When this happens, the student is immediately made less competitive for college admission. In these situations, the student would graduate having taken, at most, Algebra I, Geometry, Algebra II/Trigonometry, and Pre-Calculus. The student would not have taken advanced math classes such as AP Calculus or AP Statistics—courses that top-performing, competitive students take before college. To be eligible to take college-level mathematics courses by her senior year, a student placed in Algebra I in 9th grade would need to go to summer school, take two math courses simultaneously, or find another way to "make up" the year lost retaking Algebra. Struggling to

regain lost time can place a tremendous academic burden on students and financial burden on their families.

As explained below, a recent study documented this problem in nine school districts in San Mateo and Santa Clara counties, and available data suggests that the same problem also pervades other school districts in these counties. Specifically, data suggests that although a high number of students successfully complete Algebra I in 8th grade, many are forced to retake Algebra I when they enter high school in 9th grade. Notably, a disproportionate number of those students are students of color.

Data Showing the Prevalence of the Problem in San Mateo and Santa Clara Counties

The Pathways Study

In 2010, a Noyce Foundation report called the “Pathways Study” looked comprehensively at math placement in nine school districts located in San Mateo and Santa Clara counties. Among its various findings, the study concluded that there are no uniform math placement criteria for 9th graders; the criteria vary widely from school district to school district. Most schools rely on a mix of objective data (*e.g.*, CST test scores) and subjective data (*e.g.*, teacher recommendations).

The study went on to document that nearly 65% of students who took Algebra I in 8th grade were forced to repeat Algebra in 9th grade.⁸ Failure to master the subject area was not the reason students were required to repeat the course. To the contrary, of the students who repeated the class, 42% met proficiency standards in 8th grade on the MARS test in Algebra⁹, and more than 60% of the students scored “Proficient” or “Advanced” on the CST in Algebra.¹⁰ Similarly, more than 42% of the students who were forced to repeat Algebra I in 9th grade had received a grade or “B-” or higher in their 8th grade class.¹¹

Of particular concern is the impact that this misplacement had on minority students. Disproportionate

numbers of African American, Latino, and Pacific Islander students were forced to retake Algebra I in 9th grade.

Indeed, the statistics in the tables below suggest a very different experience for Asian (excepting Pacific Islanders) and, to a lesser extent, White students, when compared to that of other students of color. The Asian and White students' placements reflect something closer to the trajectory that one would expect as students move into higher level of math: 52% of Asian students took Algebra I in 8th grade and an almost identical percentage of Asian students (51.7%) were enrolled in Geometry in 9th grade. Similarly, 58.6% of White students were enrolled in Algebra I in 8th grade, and a substantial percentage (32.7%) went on to Geometry the following year.

Comparison of Ethnicity to Eighth Grade Placement in Mathematics Classes¹²

Ethnicity	Eighth Grade Math placement (2006-07 School Year)								Total	
	Math/Pre Alg		Algebra		Hon Algebra		Geometry			
	N	%	N	%	N	%	N	%	N	%
Am Indian	7	53.8%	6	46.2%	0	0%	0	0%	13	0.8%
Asian	60	17.5%	181	52.9%	62	18.1%	39	11.4%	342	20.4%
Filipino	183	56.1%	111	34.0%	32	9.8%	0	0%	326	19.5%
Pac Islander	13	44.8%	15	51.7%	1	3.4%	0	0%	29	1.7%
Latino	122	43.0%	144	50.7%	18	6.3%	0	0%	284	17.0%
African Am	25	43.9%	30	52.6%	2	3.5%	0	0%	57	3.4%
White, non-H	117	18.8%	365	58.6%	130	20.9%	11	1.8%	623	37.2%
Totals	527	31.5%	852	50.9%	245	14.6%	50	3.0%	1674	100.0%

Comparison of Ethnicity to Ninth Grade Placement in Mathematics Classes¹³

Ethnicity	Ninth Grade Math placement (2007-08 School Year)								Total	
	Math/Pre Alg		Algebra		Hon Algebra		Geometry			
	N	%	N	%	N	%	N	%	N	%
Am Indian	1	8.3%	10	83.3%	0	0%	1	8.3%	12	0.8%
Asian	4	1.3%	97	30.8%	51	16.2%	163	51.7%	315	21.0%
Filipino	0	0%	189	70.3%	0	0%	80	29.7%	269	17.9%
Pac Islander	0	0%	20	90.9%	0	0%	2	9.1%	22	1.5%
Latino	5	2.1%	197	81.4%	0	0%	40	16.5%	242	16.1%
African Am	0	0%	37	82.2%	0	0%	8	17.8%	45	3.0%
White, non-H	33	5.5%	358	60.1%	10	1.7%	195	32.7%	596	39.7%
Totals	43	2.9%	908	60.5%	61	4.1%	489	32.6%	1501	100.0%

While these data indicate that even Asian and White students are sometimes held back in Algebra from 8th grade to 9th grade, the data concerning African American, Latino, and Pacific Islander students indicates a much more severe problem. While 52.6% of African American students took Algebra I in 8th grade, only 17.8% of African American students were enrolled in Geometry in 9th grade. Similarly, half of all Latino students took Algebra I in 8th grade, but by 9th grade only 16% were enrolled in Geometry. In other words, only about one-third of students in these groups were promoted to Geometry, a dramatically lower percentage than Asian or White students. Although the Pathways Study drew no definitive conclusions about the cause of these disparities, it noted several other data points indicating that the issue was not one of proficiency.¹⁴

The Pathways Study also found that retaking Algebra does not translate into better outcomes for many students. In the study, half of the students who took Algebra in 8th grade and received a grade of "B-" or better performed the same or worse, receiving lower grades, when they retook Algebra in 9th

grade.¹⁵ Critically, not only are these decisions disproportionately impacting minority students, to the extent the placements are meant to help students better master the subject areas, the placement decisions are failing.

Other Publicly Available Data

The Pathways Study researchers had access to a broad range of student data from participating districts and thus were able to track individual student placement and correlate those placements with objective measures. In addition to the study's findings, publicly available testing and enrollment information from other school districts in San Mateo and Santa Clara counties indicates that the problems documented by the Pathways Study are prevalent in other districts as well.

As an initial matter, data shows that many districts in San Mateo and Santa Clara counties have widely differing math placement criteria.¹⁶ Most schools in these counties rely on the same mix of objective and subjective factors found in the Pathways Study: objective data (*e.g.*, CST scores) and subjective data (*e.g.*, teacher recommendations). Below are two examples illustrating the varying criteria applied to Bay Area 9th grade students:

- *District A:* District A applies different placement criteria to 8th graders matriculating from its own middle schools and students entering high school from private schools and other districts. Incoming 9th graders matriculating within the district are placed based on teacher recommendation. Incoming 9th graders matriculating from private schools or other districts are offered a placement test based on their 8th grade classes (*e.g.*, 8th graders enrolled in a pre-Algebra class take an Algebra Readiness test for placement in one of the school's Algebra classes, 8th graders enrolled in Algebra I take a Geometry readiness test, etc.).¹⁷
- *District B:* District B appears to utilize CST scores and class grades for placement decisions; however,

the criteria are not clearly delineated in publicly available materials. According to District B's course catalog, students who score "Far Below Basic" on pre-Algebra CST tests will take "Math Mastery," a non-college preparatory course. Students who (a) have never taken Algebra I and who scored "Below Basic" on the General Math CST and (b) failed Algebra I and scored "Far Below Basic" on the Algebra I CST are placed in "Algebra I Enhanced," which is a two-hour math course that incorporates additional academic supports. Students who have never taken Algebra but scored "Basic" or above on their General Math CST and students who failed Algebra I in 8th grade but scored "Below Basic" on the CST are placed in Algebra I (without support). Students who passed Algebra in 8th grade advance to Geometry.¹⁸

As evidenced from the above descriptions, placement decisions can be difficult to predict, as many districts incorporate objective CST results, subjective class grades, and teacher recommendations to varying degrees. In addition, schools tend to be vague about whether a student's 8th grade CST results (which are not typically available until early August, weeks before the beginning of each school year) are considered.

Turning to the impact of these placement decisions, publicly available data suggests that large racial disparities exist in placement in 9th grade Geometry. For example, in one district analyzed, the vast majority of African American and Latino 9th graders were placed in Algebra I, rather than Geometry. For example, in 2012, 470 9th graders from District A took CSTs.¹⁹ Note that we examine CST numbers because the number of students taking a particular CST indicates how many students are enrolled in that class. Of those 470 students, 16 were enrolled in pre-Algebra math classes (taking the "General Mathematics" CST), 183 students (or 38.9% of the 9th Grade Class) were enrolled in Algebra I (taking the "Algebra I" CST), 233 students (or 49.6% of the 9th grade class) were enrolled in Geometry (taking the "Geometry" CST), 13 students were enrolled in Algebra II, and 6 students were enrolled in Summative Math.²⁰

At first glance, this information is promising—half of the district’s 9th graders were placed in Geometry or above. However, the ethnic breakdown of those enrolled in the class and who took the CST tells a different story. The majority of African American 9th graders (11 of 15, or 73%) were placed in Algebra I,²¹ and the majority of Latino 9th graders (40 of 59, or 68%) were placed in Algebra I.²² In stark contrast, only 22.8% of White 9th graders (114 of 735) were placed in Algebra I, and only **3.8%** of Asian 9th graders (19 of 343) were placed in Algebra I.

While this information is not comprehensive enough to permit the kind of detailed analysis available in the Pathways Study, it provides further indication that the problem of math misplacement is prevalent throughout San Mateo and Santa Clara counties. The numbers indicate that students of color are generally not placed in higher level math classes as frequently as their non-minority counterparts.

LEGAL LIABILITY FOR MATH MISPLACEMENT

School districts’ math placement processes violate federal and state anti-discrimination laws if such processes result in an unjustified adverse impact on students of color. Even if a school district is misplacing students unintentionally, it is the *outcome* of those placement processes that matters. Indeed, disparate impact laws do not require any showing that a school district *intended* for its placement processes to negatively affect minority students. To the contrary, the power of such laws is that they create legal liability based on the *effect* of policies and practices, regardless of their apparent neutrality or the intention behind them. Based on the evidence available, math placement decisions are leaving minority students disproportionately behind in college-level math classes and, ultimately, behind in overall college readiness—and accordingly, is exposing school districts making these decisions to legal liability.

Overview of Disparate Impact Law

“Disparate impact” is a legal term that means that a policy or practice, although facially neutral, disproportionately

and unjustifiably affects members of a protected group, including groups defined by race.²³ In short, under a disparate impact claim, the actual motive behind a policy or practice is irrelevant: the law recognizes disparate impact as a form of discrimination that is just as illegal as intentional discrimination.

To illustrate, in one of the earliest cases to recognize the illegality of disparate impact in the employment context, a power company required applicants for certain high-paying jobs to have a high school diploma, even though this requirement bore no relation to the actual job. The diploma requirement had the effect of excluding more African American than White applicants. Even though no evidence existed that this exclusion was intentional, the United States Supreme Court ruled that the practice was both discriminatory in its effects and unnecessary—and therefore illegal—under federal anti-discrimination laws.²⁴

This same concept—that facially neutral policies and practices that have an unjustified adverse impact on minority groups constitute illegal discrimination—has been applied in numerous contexts, including employment, housing, and, importantly, education.²⁵

The Role of Subjective Decision Making in Disparate Impact Analysis

The Supreme Court has interpreted the reach of disparate impact liability, holding unanimously in an employment discrimination case that disparate impact analysis may also be applied to *subjective* criteria “in appropriate cases.”²⁶ According to the Court, the “premise of the disparate impact approach” is that objective and subjective practices, “adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.”²⁷

As such, courts increasingly rely on a “growing body of social science [that] recognizes the pervasiveness of unconscious racial and ethnic stereotyping and group bias.”²⁸ Even decision-makers who act with the best of intentions may be influenced by subtle biases, and decision-making processes that rely on

subjective criteria are particularly vulnerable to being influenced by such bias.²⁹ In short, a school district's placement decisions based on both objective and subjective criteria can be challenged under a disparate impact theory.

Key Disparate Impact Laws

The disparate impact standard exists under both federal and state law—Title VI of the Civil Rights Act of 1964 (“Title VI”) and California Government Code Section 11135 (“Section 11135”), respectively.

Title VI prohibits discrimination on the basis of race, color, or national origin in federally funded programs³⁰ and permits the revocation of federal funding for failure to comply.³¹ By design, Title VI's reach is extremely broad: it specifically covers not only the particular items funded by federal dollars, but all of the operations of any entity receiving federal assistance.³² As the U.S. Department of Justice recounted, “[i]n calling for its enactment, President John F. Kennedy identified ‘simple justice’ as the justification for Title VI:

Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination. Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation.³³

To that end, Title VI specifically prohibits intentional discrimination³⁴ and authorizes and directs federal agencies to enact “rules, regulations, or orders of general applicability” to achieve the statute's objectives.³⁵ Like nearly all other federal agencies, the United States Department of Education, the federal agency with rulemaking authority with respect to Title VI discrimination in education, interprets Title VI broadly to also prohibit neutral procedures or practices that have a disparate

impact on protected classes; under the Department of Education’s regulations, educational entities may not use “criteria or methods of administration which *have the effect* of subjecting individuals to discrimination because of their race”³⁶

The California legislature has similarly provided broad redress for discrimination in enacting Section 11135 and its implementing regulations.³⁷ This state law analog to Title VI prohibits intentional discrimination by any programs or activities that are “conducted, operated, or administered by the state or by any state agency”³⁸ against a range of protected classes, including race, as well as disparate impact discrimination in state-funded programs and activities.³⁹

Individuals may bring a disparate impact claim directly under Section 11135 and its regulations in court⁴⁰ and may file an administrative complaint with the United States Department of Education’s Office of Civil Rights to bring a disparate impact claim under Title VI’s regulations.⁴¹

Whether the form is an individual action or an action by the Office of Civil Rights, the disparate impact analysis is generally the same.

Under the Department of Education’s regulations, educational entities may not use “criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race”

Under the disparate impact standard, a complainant would first need to show that the recipient of state or federal funding (*e.g.*, a school district) has a facially neutral practice that causes a disproportionate adverse impact on a protected group, such as students of a particular race.⁴² A complainant must show a causal connection between the practice and the disproportionate adverse impact that goes beyond showing “at the bottom line” that a statistical disparity exists.⁴³ Once such a *prima facie* case is established, a district would have to demonstrate a “substantial legitimate justification” for the challenged practice.⁴⁴ To prove a “substantial legitimate justification,” the district would need to show that the challenged policy was “necessary to meeting a goal that was legitimate, important, and integral to the [recipient’s] institutional mission.”⁴⁵ In the education context, the school district must prove that the practice is “*educationally necessary*,”⁴⁶ a burden

that “involves something beyond mere articulation of a rational basis for the challenged practice.”⁴⁷

If the district makes such a showing, the complainant would still prevail by showing (1) there are “equally effective alternative practices” that would result in less racial disproportionality or (2) the district’s justification proffered is simply a pretext for discrimination.⁴⁸

Disparate Impact Framework Applied to Math Misplacement

As discussed, school districts in Santa Clara and San Mateo counties typically have no objective, formalized procedures for determining how to place students in 9th grade math, with many relying instead on subjective criteria (*e.g.*, teacher recommendations), sometimes in conjunction with objective factors (*e.g.*, CST scores).⁴⁹ Further, as the Pathways Study confirms, such practices almost certainly disparately impact minority students. Any district that maintains such practices is exposed to legal risks.

To illustrate how this disparate impact analysis applies in the math placement context, we consider data from a hypothetical school district (“District”). In the District, all students take Algebra I in 8th grade. The District’s high school math placement policies consider students’ 8th grade math teacher’s recommendation and other subjective criteria. To determine whether the District’s placement policies have a disproportionate adverse impact on African American and Latino students entering 9th grade, the District (or a complainant) must first gather and analyze the following placement data:

	YEAR 1—8th Grade	YEAR 2—9th Grade	
	Algebra I Placement (% of total population)	Algebra I Placement (% of subgroup)	Geometry Placement (% of subgroup)
African American	40 (16%)	36 (90%)	4 (10%)
Latino	30 (12%)	27 (90%)	3 (10%)
Asian	80 (32%)	4 (5%)	76 (95%)
White	100 (40%)	10 (10%)	90 (90%)
Total	250 (100%)	77 (31%)	173 (69%)

In this District, it is clear that the African Americans and Latinos repeat Algebra I at a disproportionate rate in 9th grade: while only 31% of 9th grade students repeat Algebra I overall, 90% of African American and Latino students repeat Algebra I compared with 5% of Asian and 10% of White students. The disparate impact of placement decisions is further supported by analysis of the students' performance on the CST in Algebra in 8th grade (Year 1), included below, which shows that while significant percentages of each group scored "Proficient" or "Advanced" on the CST, only a fraction were promoted to Geometry:

	Advanced	Proficient	Basic	Below Basic	Far Below Basic	Total
African American	8 (20%)	12 (30%)	12 (30%)	4 (10%)	4 (10%)	40
Latino	3 (10%)	6 (20%)	9 (30%)	9 (30%)	3 (10%)	30
Asian	20 (25%)	28 (35%)	16 (20%)	12 (15%)	4 (5%)	80
White	12 (12%)	38 (38%)	30 (30%)	10 (10%)	10 (12%)	100
Total	43	84	67	35	21	250

This hypothetical placement data and objective test data combined illustrate that the District's math placement policy, which relies solely on subjective criteria, has a disproportionate adverse impact on African American and Latino students. For example, although 50% of African American and students who took Algebra I in 8th grade scored "Proficient" or above on the CST in Algebra, only 10% of African American students were promoted to Geometry in 9th grade. The remaining 90% of African American students were re-placed in Algebra I in 9th grade, although a significant number performed just as well on the 8th grade CST in Algebra as did their Asian and White peers who were promoted. Conversely, only 4% of Asian students were forced to retake Algebra I in 9th grade, although only 60% had scored "Proficient" or above on the CST in Algebra; similarly, only 10% of White students were assigned to retake Algebra I, although 50% scored "Proficient" or above. These statistics would likely be sufficient to establish a *prima facie* case of disparate impact.⁵⁰

The District could attempt to rebut this initial showing of disparate impact by articulating an "educational necessity" for its existing math placement processes. To meet the "education necessity" standard, the District would need to offer more than an assertion that the 8th grade math teacher is in the best position to evaluate whether a student has mastered the material and is ready to move on to Geometry based on her familiarity with the student's performance throughout the school year. The District would need to show that their current placement practices are "essential" to the efficacy of the District's operations.⁵¹ Based on the current practices of other school districts, meeting this standard would be difficult, if not impossible, particularly given the dramatic racial disparities and ready alternatives (discussed below).

Moreover, even in the unlikely event the District were successful in making the required showing, the complainant would still prevail if she could show that there are less discriminatory alternatives available.⁵² Demonstrating that less discriminatory alternatives are available would likely not prove difficult for complainants. The District's math placement decisions can instead easily be based on identifiable objective

criteria, such as a student’s performance on the 7th grade CST and the 8th grade Algebra CST, in addition to other objective assessments. Even if the District were to implement an extremely straightforward policy requiring all students who took Algebra I in 8th grade and scored “Basic” or above on the CST to move on to Geometry and those who scored “Below Basic” or below to retake Algebra in 9th grade, math placement decisions would reflect a much more proportionate racial distribution. Using hypothetical data, the results are reflected below:

	YEAR 1—8th Grade	YEAR 2—9th Grade	
	Algebra I Placement (% of population)	Algebra I Placement (% of subgroup)	Geometry Placement (% of sub-group)
African American	40 (16%)	8 (20%)	32 (80%)
Latino	30 (12%)	12 (40%)	18 (60%)
Asian	80 (32%)	16 (20%)	64 (80%)
White	100 (40%)	20 (20%)	80 (80%)
Total	250 (100%)	56 (22%)	194 (78%)

Using purely objective criteria, 22% of students overall would be required to repeat Algebra I, with 20% of African American, Asian, and White students and 40% of Latino students repeating the course. Thus, while not a perfect solution (the Latino subgroup is still disproportionately affected), a CST or assessment-based math placement policy is still a demonstrably *less* discriminatory alternative. As such, the District’s placement policy that considers only subjective criteria would almost certainly be found to discriminate against minority students.

As explained in Section below, a number of districts in San Mateo and Santa Clara counties have, in fact, successfully implemented more sophisticated reforms precisely along these lines. The existence of these ready models for less discriminatory alternatives would further bolster any legal claims against a school district that refused to consider such alternatives.

OTHER BASES FOR LEGAL LIABILITY

While this report focuses primarily on claims under a disparate impact theory, the misplacement of minority students in 9th grade math classes potentially implicates other federal and state laws.

California Constitution

The California Supreme Court has held unequivocally that education is a fundamental interest under the California Constitution.⁵³ As a result, the equal protection clause of the California Constitution “precludes the State from maintaining its common school system in a manner that denies the students of one district an education basically equivalent to that provided elsewhere throughout the State.”⁵⁴ A constitutional violation occurs when “the actual quality of the district’s program, viewed as a whole, falls fundamentally below prevailing statewide standards.”⁵⁵

Here, the routine misplacement of 9th graders in Algebra I may violate students’ fundamental right to education. Ninth graders who are misplaced into Algebra I fall behind their peers who are correctly placed in Geometry and are at an academic disadvantage. As school districts across the state recognize the weaknesses of math placement policies based on subjective criteria, many are moving toward math placement policies based on objective criteria. As the use of objective criteria becomes the statewide standard for math placement policies, school districts that persist in basing placement decisions on subjective criteria risk violating students’ constitutional rights.

California Education Code

Similarly, several sections of the California Education Code guard against discrimination based on race in public education, including discriminatory math placement policies. California Education Code section 200 *et seq.* prohibits discrimination in education generally. Specifically, section 220 provides: “No person shall be subjected to discrimination on the basis of . . . race or ethnicity . . . in any program or activity conducted by an educational institution that receives, or benefits

from, state financial assistance or enrolls pupils who receive state student financial aid.” Another section, section 260, makes school boards responsible for preventing discrimination throughout the school district. Specifically, section 260 provides: “The governing board of a school district shall have the primary responsibility for ensuring that school district programs and activities are free from discrimination based [upon enumerated characteristics, including race].”

As discussed above, the high numbers of minority students misplaced in Algebra I in 9th grade raises concerns of racial bias and discrimination in the placement process. The use of subjective data in placement policies, combined with the high number of misplaced minority students, makes racial discrimination in the placement process more plausible.

Equal Protection Clause

Finally, the Equal Protection Clause of the 14th Amendment of the United States Constitution imparts on states and local government entities the “constitutional duty” to eradicate racial discrimination.⁵⁶ In order to establish a claim for an Equal Protection violation, “a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class,”⁵⁷ including race. This can be established by showing either that “the defendants intentionally discriminated or acted with deliberate indifference.”⁵⁸

While this standard is undoubtedly more difficult to meet than the disparate impact standard, the Equal Protection Clause may still be violated if a school knows that minority students are disparately impacted by placement mistakes but does nothing to address the problem. Proving “deliberate indifference” requires showing that the schools “[did] nothing” or “persist[ed] in the same attempts at remediation despite actual knowledge of their ineffectiveness.”⁵⁹ The more that districts are placed on notice of the problem and fail to act, particularly in the face of relatively simple solutions that other districts have adopted, the greater the chance of an Equal Protection violation. Failure to rectify a discriminatory system is itself discrimination.⁶⁰

A Note on Federal Agency Enforcement: The U.S. Department of Education Office for Civil Right (“OCR”) is the agency responsible for enforcing anti-discrimination laws in local educational agencies that receive federal funding. OCR is responsible for enforcing federal laws that prohibit discrimination on the basis of race, color, national origin, sex, disability, and age. Ultimately, OCR has the authority to withdraw federal funding from any educational agency that fails or refuses to comply with federal anti-discrimination laws.

The OCR complaint process is straightforward and easily accessible to the public.⁶¹ Any person, including students, parents, teachers, or community members, can file a complaint about discrimination occurring at a public school. Once a complaint has been filed, OCR will determine if it has jurisdiction to investigate the complaint, and if it so finds, will open an investigation into the allegations raised in the complaint. During the investigation, OCR acts as a neutral fact-finding body and will review documents and interview witnesses and other interested parties. If OCR determines that the school district has violated one or more federal anti-discrimination law, OCR will work with the school district to resolve the problem. As noted above, if the school district refuses to comply with OCR, OCR ultimately has the authority to seek the withholding of federal funds from the school district.

Because OCR can investigate discrimination claims under the disparate impact standard, it is potentially an accessible tool for students, parents, and advocates seeking to address the chronic misplacement of minority students in 9th grade math classes. OCR complaints have led to far-reaching reforms.⁶²

RECOMMENDATIONS

Real-World Solutions to the Problem of Math Misplacement

Fortunately, there are practical solutions to the problem of math misplacement. A number of school districts in San Mateo and Santa Clara counties have already undertaken reforms of their math placement policies—with encouraging results.

The North County Mathematic Consortium

The North County Mathematic Consortium (“Consortium”) was established in December 2010 for the purpose of “increas[ing] the number of students who progress successfully and efficiently through Algebra and [G]eometry.”⁶³ Participating school districts included the Bayshore, Brisbane, Jefferson Elementary, Jefferson High and Pacific Districts, along with the San Mateo County Office of Education.⁶⁴ In each of the school districts, significant numbers of students were being forced to repeat Algebra I in 9th grade.⁶⁵ Superintendents from each school district met regularly to analyze data, strategize and review progress.⁶⁶

One of the strategies implemented was to change the 9th grade math placement process.⁶⁷ Prior to the Consortium, student placement was based primarily on teacher recommendation, student choice, and scores on a math diagnostic test.⁶⁸ The Consortium implemented a new policy that continued to look at the 9th grade math teacher's recommendation, which was then informed and mediated by the student's CST and MARS test scores in 7th and 8th grade.⁶⁹

As a result of the change in placement policy and other efforts by the Consortium members, districts saw a dramatic increase in the number of students being recommended and placed in Geometry in 9th grade.⁷⁰

District	# Taking Algebra in 8th grade			# and (%) Recommended for Algebra in 9th grade				# and (%) Recommended for Geometry in 9th grade			
	2008	2011	2012	2008	2011	2012	Change 08-12	2008	2011	2012	Change 08-12
Bayshore	17	57	38	3 18%	21 37%	9 24%	6 6%	14 82%	36 63%	29 76%	15 -6%
Brisbane	38	65	57	27 71%	30 46%	18 32%	-9 -39%	11 29%	35 54%	39 68%	28 +39%
Jefferson	181	350	462	120 66%	150 43%	80 17%	-40 -49%	61 34%	200 57%	382 83%	321 +49%
Pacifica	164	293	228	122 74%	140 48%	100 44%	-22 -30%	42 26%	153 52%	128 56%	86 +30%
Total	400	765	785	272 68%	341 45%	207 26%	-65 -42%	128 32%	424 55%	578 74%	450 +42%

The Consortium also saw the percentage of students recommended for Geometry increase across every ethnic group. Most notably, Filipino students recommended for Geometry increased from 59% to 87%, and Latino students increase from 47% to 65%.⁷¹ Thus, the Consortium provides an important example of strategies available to school districts throughout the state to address the chronic misplacement of minority students in 9th grade math.

Sequoia Union High School District

In addition to the Consortium, Sequoia Union High School District (“Sequoia”) revised its math placement guidelines to remedy its own discovery of math misplacement issues. After performing an internal analysis of data regarding 9th grade math placements during the 2011-2012 school year, Sequoia administrators realized that a disproportionate percentage of students coming from one feeder elementary school district—a district with a disproportionately high percentage of minority students—had been assigned to 9th grade math classes that were *the same or lower* than the math classes the students took in 8th grade. In fact, while over 20% of 8th grade students from that one elementary school district had been assigned to the same or lower 9th grade math classes, almost no students from other districts had been similarly misplaced.

As a result of the its own analysis, Sequoia administrators determined that, while it had seemingly objective math placement criteria in place, placement decisions were being significantly impacted by subjective considerations outside of its placement matrix (*e.g.*, negative recommendations by 8th grade and summer school teachers and decisions by department chairs and/or guidance counselors within Sequoia’s own district).

Sequoia administrators responded to this problem by revising its 9th grade math placement matrix. Specifically, placement decisions for the 2012–2013 school year were strictly limited to consider the following objective criteria:

- (1) 8th grade math class;
- (2) Mathematical Analysis Readiness Test (“MDTP”) results;
- (3) 7th grade CST results; and
- (4) 8th grade CST results.

Other than these purely objective criteria, the only subjective information considered was teacher input which recommended the *promotion* of a student into a class *higher* than the objective criteria indicated. (Sequoia’s placement guidelines are attached as Appendix A to this Report.)

Implementation of Sequoia's new placement procedure was in effect by the spring of 2012—less than one year after the problem was identified. At the end of the 2011–2012 school year, District administrators took steps to educate school administrators and teachers in both the elementary feeder districts and its own district clearly of the new system and make initial placement decisions based on incoming 9th graders' 7th grade CST results and 8th grade math class placements. Later, in August 2012, when the incoming 9th graders' most recent CST scores were made available, Sequoia gathered 8th grade CST data from elementary school feeder districts and closely compared those test scores with its initial placements, making changes based on the new data as necessary.

According to the Sequoia administrators, the most critical step in implementation was not reestablishing objective placement criteria; it was ensuring that teachers at both the 8th grade and high school level were committed to helping solve placement mistakes. Active buy-in and participation by the faculty was a critical component, and sharing the misplacement data and explaining the critical nature of proper placement to the faculty was essential to the implementation's success.

Sequoia's new placement procedures required additional work in the summer (because of the late arrival of incoming 9th graders' 8th grade CST results), as well as a strong commitment to ensuring that data was quickly analyzed and acted upon at the beginning of the 2012–2013 school year. However, in the end, changes to the placement process were feasible, and Sequoia had impressively successful results. According to Sequoia administrators, taking the simple step of eliminating subjective discretion from placement decisions remedied almost all misplacements. As of September 2012, administrators had identified only 24 students out of 1,547—less than 2%—who were not placed according to the objective placement criteria. Administrators were committed to following up with this small number of students and their parents during the first weeks of school to ensure that their placement was correct, as the students may have been placed in those classes due to parental requests, which can override placement in any course.

Action Steps to Solve the Problem of Math Misplacement

With these success stories in mind, several action steps are available for any party concerned about a particular school district's math placement practices. The key steps for any action plan include gathering available data and analyzing the data that has been assembled. From that starting point, concrete steps toward reform can be taken.

School Districts	
Gather Data	<ul style="list-style-type: none"> • Pick a time frame to study • Gather retrospective data about past course placement • Gather current data about course placement • Gather placement protocols and procedures • Talk with teachers, administrators • Continue to track results over time
Analyze Data	<ul style="list-style-type: none"> • Look at both retrospective and current data for disparities in placement outcomes
Reform	<ul style="list-style-type: none"> • Eliminate subjective measurements • Determine objective measurements • Communicate protocols; get buy-in from constituents • Monitor results and make adjustments as needed

Parents and Community Advocates	
Gather Data	<ul style="list-style-type: none"> • Meet with superintendent, principals, and local officials • Ask for data showing math placement outcomes • Ask for any available written placement protocols and procedures • Talk to other concerned families
Analyze Data	<ul style="list-style-type: none"> • Review data • Look for disparities in placement outcomes
Reform	<ul style="list-style-type: none"> • Ensure your student is placed in an appropriate math class by requesting any change that is necessary • Ask for school officials to change placement criteria to move toward more objective criteria and to track placement outcomes to assess for racial disparities • File a complaint with the United States Department of Education, Office of Civil Rights • Consult a civil rights attorney

Attorneys	
Gather Data	<ul style="list-style-type: none"> • Meet with superintendent, principals, and local officials • Ask for data showing math placement outcomes • Ask for any available written placement protocols and procedures • File records requests under the California Public Records Act (Gov't Code section 6254 <i>et seq.</i>)
Analyze Data	<ul style="list-style-type: none"> • Review data • Look for disparities in placement outcomes
Reform	<ul style="list-style-type: none"> • Send a demand letter to school officials, asking for reforms • File an administrative complaint with the United States Department of Education, Office of Civil Rights • File a lawsuit under Section 11135

ENDNOTES

¹ While this report focuses on 9th grade math placement, other studies have highlighted the importance of math preparation and placement. For example, a study by WestEd found 7th grade math performance to be a “strong predictor” of future high-school math enrollment. Neal Finkelstein, et al., *College Bound in Middle School & High School?: How Math Course Sequences Matter*, WestEd, 11 (2012), available at http://www.cftl.org/documents/2012/CFTL_MathPatterns_Main_Report.pdf.

² A study following a cohort of students from the 1970s to the 1990s found that increased years of education led to increased annual earnings across all demographics groups, with men, African Americans and Hispanics experiencing the largest gains. Mark C. Long, *Changes in the Returns to Education and College Quality*, 29 ECON. EDUC. REV. 338, 246 (2010).

³ See “a-g Guide,” University of California, <http://www.ucop.edu/agguide>. College preparatory classes include Algebra I, Geometry, Algebra II, Trigonometry, Pre-Calculus, and Calculus.

⁴ David Card, *The Causal Effect of Education on Earnings*, HANDBOOK OF LABOR ECONOMICS, Vol.3, 1801, 1802 (1999).

⁵ Brandon Sasso, *Study: More minority college grads would reduce disparities in math, science jobs*, THE HILL, Sept. 12, 2011, <http://thehill.com/blogs/hillicon-valley/technology/180905-study-sending-more-minorities-to-college-would-reduce-disparities-in-math-science-jobs>.

⁶ John Fensterwald, *STEM-ing the minority gap, College pipeline narrows for critical majors*, SILICON VALLEY EDUCATION FOUNDATION (Apr. 3, 2012) (avail. at <http://toped.svefoundation.org/2012/04/03/steming-the-minority-gap/>). See also Allison L. Scott & Alexis Martin, *Dissecting the Data 2012: Examining STEM Opportunities and Outcomes for Underrepresented Students in California*, LEVEL PLAYING FIELD INSTITUTE (Mar. 2012) (avail. at <http://toped.svefoundation.org/wp-content/uploads/2012/04/Achieve-LPFIstudy032812.pdf>).

⁷ In 2010, California adopted (and is now in the process of implementing) the Common Core State Standards (“CCSS”). Adopted by 45 states around the country, the CCSS set forth K-12 curriculum and content standards in math and English. In California, the goal for all 8th grade students is to take Algebra I. However, recognizing that not all 8th grade students have the necessary prerequisite skills for Algebra I, the California Board of Education adopted two sets of standards for 8th grade—Algebra I and 8th Grade Common Core. See http://www.scoe.net/castandards/agenda/2010/math_ccs_recommendations.pdf, at 33.

⁸ Pathways Study, 6. The Study singled out this progression of students who took Algebra I in 8th grade as the most problematic. Other enrollment progressions produced more predictable results. *Id.* at App. 4. (“Nearly all of the students who took Geometry in eighth grade were placed in Algebra II as ninth graders. Likewise, more than 80% of the students who were enrolled in Honors Algebra in eighth grade moved to either Geometry or Honors Geometry.”)

⁹ Pathways Study, App. 6, Table 3a (MARS is a test developed by the Mathematics Assessment Resource Service). As the Study further points out, “historically, nearly all of the students who scored either ‘Met Standards’ or ‘Above Standards’ on the MARS Algebra tests also scored at ‘Proficient’ or ‘Advanced’ on the CST.” *Id.* at 6..

¹⁰ *Id.* at App., p. 12.

¹¹ *Id.* at 6 & App., p. 10, Table 10.

¹² *Id.* at App., Table 7.

¹³ This table reflects a corrected title but includes the same data as the table in the Pathways Study. *Id.* at App., Table 8.

¹⁴ *See, e.g., id.* at App., p. 14 (noting that correlations between objective and subjective factors and ultimate placement were similar for White students, but that for Filipino students, African American students and Hispanic students, objective measures, such as test scores, were better correlates with 9th grade placement than teacher-given grades).

¹⁵ *Id.* at App., p. 11. The WestEd study, *see supra* note 1 at 19–20, following at a statewide cohort of 24,000 students, similarly found that only a small percentage of students who repeated Algebra I attained proficiency on the Algebra CST after taking Algebra I a second time.

¹⁶ Information on school districts’ math placement criteria is easily accessible, as districts maintain course catalogs online.

¹⁷ Criteria included in District A’s online course catalog.

¹⁸ Criteria included in District B’s online course catalog.

¹⁹ Information obtained from the California Department of Education’s online California Standards Test results database (*avail. generally at* <http://star.cde.ca.gov/>).

²⁰ Information obtained from the California Department of Education’s online California Standards Test results database (*avail. generally at* <http://star.cde.ca.gov/>).

²¹ Information obtained from the California Department of Education’s online California Standards Test results database (*avail. generally at* <http://star.cde.ca.gov/>).

²² Information obtained from the California Department of Education’s online California Standards Test results database (*avail. generally at* <http://star.cde.ca.gov/>).

²³ 42 U.S.C. § 2000e. Under federal law and the Constitution, the term “protected group” includes groups defined by race, color, religion, national origin (all under the Civil Rights Act of 1964), sex (the Civil Rights Act of 1964 and the Equal Pay Act of 1962), age (40 and over, the Age Discrimination in Employment Act of 1967), disability (the Americans with Disabilities Act of 1990 and the Vocational Rehabilitation and Other Rehabilitation Services of 1972), veteran status (the Vietnam Era Veterans Readjustment Assistance Act of 1974), and genetic information (the Genetic Information Nondiscrimination Act).

²⁴ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

²⁵ See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (in employment context, state census figures of educational attainment by race demonstrated that an employer's high school diploma requirement adversely affected African Americans under disparate impact standard); *2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673, 679 (D.C. Cir. 2006) (noting that "everyone of the eleven circuits to have considered the issue has held that the [Fair Housing Act] . . . prohibits not only intentional housing discrimination, but also housing actions having a disparate impact" and "assum[ing] without deciding that [plaintiffs] may bring a disparate impact claim under the [Fair Housing Act]"); *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984) (affirming a Title VI disparate impact judgment in favor of a class of African American school children who were disproportionately placed in special classes for the "educable mentally retarded" on the basis of non-validated IQ tests); *Groves v. Alabama*, 776 F. Supp. 1518 (M.D. Ala. 1991) (holding that the state's reliance on a minimum cutoff score on the ACT to determine a student's eligibility to enter an undergraduate teacher training program had an unlawful disparate impact on African American students in violation of Title VI).

²⁶ *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988).

²⁷ *Id.* at 987.

²⁸ *Chin v. Runnels*, 343 F. Supp. 2d 891, 906 (N.D. Cal. 2004).

²⁹ Research has shown that "overt expressions of prejudice have declined significantly over the past 35 years." John F. Dovidio & Samuel L. Gaertner *et al.*, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL SCI. 315 (2000). Nevertheless, despite this decrease in explicit expressions of bias, individuals may still harbor deep-seated biases based on race and gender. See generally Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meaning and Use*, 54 ANN. REV. OF PSYCHOL. 297 (2003).

³⁰ 42 U.S.C. § 2000d ("no person in the United States shall, on the ground of race . . . be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.").

³¹ 42 U.S.C. §§ 2000d-1 ("Compliance with any requirement adopted pursuant to this section may be effected . . . by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement.").

³² When the United States Supreme Court construed Title VI's coverage in a limited way in *Grove City College v. Bell*, 465 U.S. 555 (1984), Congress quickly stepped in to reaffirm Title VI's institution-wide coverage in the Civil Rights Restoration Act of 1987 ("CRRRA"). As explained in the Department of Justice Title VI Manual, "the CRRRA was passed to restore broad interpretations, consistent with original congressional intent, and to reverse the Supreme Court's narrow ruling in *Grove City* . . ." Civil Rights Div., U.S. Dep't of Justice, TITLE VI LEGAL MANUAL, CH. VII, §§ B, C (2001), <http://www.justice.gov/crt/about/cor/coord/vimannual.php>.

³³ Civil Rights Div., U.S. Dept. of Justice, TITLE VI LEGAL MANUAL, Ch. II (2001) (citing H.R. Misc. Doc. NO. 124, 88th CONG., 1ST SESS. 3, 12 (1963)).

³⁴ See *Alexander v. Choate*, 469 U.S. 287, 294 (1985).

³⁵ 42 U.S.C. § 2000d-1; *see also Alexander*, 469 U.S. 287 at 289, 292-94 (explaining *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983)).

³⁶ 34 C.F.R. § 100.3(b)(2) (emphasis added).

³⁷ Cal. Gov't Code § 11135 (West 2012). California Government Code section 11135 states: "(a) No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state. Notwithstanding Section 11000, this section applies to the California State University." Section 11135's regulations not only prohibit intentional discrimination but also prohibit practices that "utilize criteria or methods of administration that . . . have the purpose or effect of subjecting a person to discrimination. . . ." 22 C.C.R. § 98101(i)(1) (2011).

³⁸ *Id.*; *see also* Assemb. B. 677, § 1, 2001 Leg., Reg. Sess., 2001 Cal. Stat. ch. 708.

³⁹ *Id.*

⁴⁰ Cal. Gov't Code § 11139 (West 2012). California Government Code section 11139 was amended in 1999 to read: "This article and regulations adopted pursuant to this article may be enforced by a civil action for equitable relief." Importantly, at least two federal courts have recently recognized Section 11135's private right of action in disparate impact claims. *See Darenburg v. Metro. Transp. Comm'n*, 611 F. Supp. 2d 994 (N.D. Cal. 2009); *Comm. Concerning Cmty. Improvement v. City of Modesto*, No. CV-F-04-6121 LJO DLB, 2007 WL 2408495 at *8 (E.D. Cal. Aug. 21, 2007) *vacated in part on other grounds*, 583 F.3d 690 (9th Cir. 2009) (in declining to grant supplemental jurisdiction over a state section 11135 claim, the court acknowledged that "intentional discrimination is not required for proof of a section 11135 claim, which may be proved by disparate impact.").

⁴¹ In *Alexander v. Sandoval*, 532 U.S. 275, 288-89 (2001), the U.S. Supreme Court held that private individuals may not bring suit under the Title VI's disparate impact regulations. However, federal agencies may still enforce the regulations. *See* 34 C.F.R. § 100.7(b) (2012).

⁴² *See, e.g., Darenburg v. Metro. Transp. Comm'n*, 611 F. Supp. 2d 994 (N.D. Cal. 2009).

⁴³ *See Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 656-57 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074-75, *as recognized in Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003).

⁴⁴ *Georgia State Conference*, 775 F.2d at 1417.

⁴⁵ *Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1278 (M.D. Ala. 1998), *aff'd*, 197 F.3d 484 (11th Cir. 1999), *rev'd on other grounds, Alexander v. Sandoval*, 532 U.S. 275 (2000), (quoting *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F. 2d 1394, 1413 (11th Cir. 1993)).

⁴⁶ *See, e.g., Elston*, 997 F. 2d at 1413.

⁴⁷ *Cureton v. NCAA*, 37 F. Supp. 2d 687, 697 (E.D. Pa. 1999), *rev'd on other grounds*, 198 F.3d 107 (3d Cir.1999) (stating that the defendant must show that the "practice causing the disproportionate effect is nonetheless justified by an 'educational necessity,' which is analogous to the 'business necessity' justification applied under Title VI").

⁴⁸ *Georgia State Conference*, 775 F.2d. at 1418.

⁴⁹ Depending on how they are derived, student grades could be considered either subjective or objective criteria. To the extent grades are based solely on tests or exams, they would likely be considered to be objective. However, in most cases, student grades will also include subjective teacher assessments.

⁵⁰ To make a disparate impact claim, statistical analysis may be necessary. *Cf. Bouman v. Block*, 940 F.2d 1211, 1233 (9th Cir. 1991) (plaintiff "offered statistically significant proof of discrimination," which "meets federal standards for establishing a *prima facie* case of discrimination").

⁵¹ *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁵² A complainant could also succeed by establishing that the District's justification is a pretext for discrimination. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁵³ *Serrano v. Priest*, 18 Cal. 3d 728 (Cal. 1976), *cert. denied*, *Clowes v. Serrano*, 432 U.S. 907 (1977); *see* Cal. Const., Art. IX, § 5.

⁵⁴ *Butt v. State of California*, 4 Cal. 4th 668, 685 (Cal. 1992).

⁵⁵ *Id.* at 686–87 (emphasis added).

⁵⁶ *Associated Gen. Contractors v. City & Cnty. of San Francisco*, 813 F.2d 922, 929 (9th Cir. 1987) (emphasis in original).

⁵⁷ *Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998), *cert. denied*, 525 U.S. 1154 (1999).

⁵⁸ *Doe v. Gladstone Sch. Dist.*, No. 3:10-cv-01172-JE, 2012 U.S. Dist. LEXIS 78591, at *26–27 (D. Or. June 6, 2012) (quotations and citation omitted); *see also Flores v. Morgan Hill Unif. Sch. Dist.*, 324 F.3d 1130, 1135 (9th Cir. 2003).

⁵⁹ *See Gladstone Sch. Dist.*, 2012 U.S. Dist. LEXIS 7859, at *23; *Montiero v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1999) (finding deliberate indifference where "nothing" was done in response to complaints of harassment); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000) (analyzing whether school was "deliberately indifferent" when it continued with same methods after actual knowledge that remediation was ineffective, affirming judgment); *Flores*, 324 F.3d at 1335–36 (9th Cir. 2003) (finding deliberate indifference for failure to take any further steps once remedial measures were known to be inadequate).

⁶⁰ *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465 (1979); *EEOC v. Inland Marine Indus.*, 729 F.2d 1229, 1235 (9th Cir. 1984) (ratification of discriminatory policies constitutes intentional discrimination, "'subtle,' but intentional nonetheless") (citation omitted).

⁶¹ *See* <http://www2.ed.gov/about/offices/list/ocr/docs/howto.html?src=rt> for guidance on how to file a complaint with OCR.

⁶² See, e.g., OCR Case No. 09125001 (Agreement to Resolve) (comprehensive settlement reached between OCR and Oakland Unified School District regarding more frequent and harsher discipline of African American students), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/09125001-b.pdf>. Cf. Daniel J. Losen, *Silent Segregation in Our Nation's Schools*, 34 HARV. C.R.-C.L. L. REV. 517, 539–40 (1999) (noting that the Office of Civil Rights has taken the position that ability grouping practices that create racially identifiable classrooms are a pretext for discrimination and a Title VI violation and that it is very rare that some sort of settlement between the agency and school officials to implement a plan to eradicate the disparate effect of ability grouping practices isn't reached).

⁶³ North County Mathematics Consortium, INTERIM REPORT, 1 (Mar. 31, 2012).

⁶⁴ *Id.* at 2.

⁶⁵ *Id.*

⁶⁶ *Id.* at 6.

⁶⁷ *Id.* at 3.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 2, 9–15.

⁷¹ *Id.* at 13.

APPENDIX A

**SEQUOIA UNION HIGH SCHOOL DISTRICT
9TH GRADE MATH PLACEMENT GUIDELINES 2012**

8 th Grade Math Placement	MDTP Results	7 th Grade CST Results	Initial 9 th Grade Math Placement [Spring]	Support Class Needed?	8 th Grade CST (Test) Results	Final 9 th Grade Math Placement [August]	Support Class Needed?
General Math	26 and Above	Advanced Proficient	Algebra I	No	(GM) Adv., Prof.	Algebra I	No
			Algebra I	Yes	(GM) Basic	Algebra I	Yes
General Math	25 and below	Below Basic Far Below Basic	Algebra Readiness 1 st Semester	Block of 2 periods	(GM) Below Basic Far Below Basic	Algebra Readiness 1 st Semester	Block of 2 periods
			Algebra I 2 nd Semester	Yes		Algebra I 2 nd Semester	Yes
Algebra I	26 and Above	Advanced Proficient	Geometry	No	(Alg I) Adv., Prof.	Geometry	No
			Algebra I	No	(Alg I) Basic	Algebra I	No
Algebra I	25 and Below	Below Basic	Algebra I	Yes	(Alg I) BB	Algebra I	Yes
			Algebra Readiness 1 st Semester	Block of 2 periods	(Alg I) FBB	Algebra Readiness 1 st Semester	Block of 2 periods
		Far Below Basic	Algebra I 2 nd Semester	Yes		Algebra I 2 nd Semester	Yes
Geometry	N/A	Algebra I CST Advanced Proficient	Algebra II	No	(Geometry) Adv., Prof	Algebra II	No
			Algebra II	No	(Geometry) B, BB, FBB	Geometry or Algebra I	No

Note: Teacher recommendation is used only to move a student to a higher course than scores indicate.

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