

# School Sorting and Disclosure: Disclosure to Families as a School Reform Strategy

## Part II: Policy and Legal Analysis

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### Introduction

This is the second part of our two-part article on school sorting practices and the prospects for improving them through information disclosure. School sorting refers to the decisions to assign students to particular schools, grade levels, courses and teachers.

In Part I, we documented the general paucity of information available to California parents about the sorting practices in public schools at all levels. We argued that there is a potential for achieving important benefits of various kinds if disclosures can be carried out effectively. These benefits may be thought of in terms of more informed sorting decisions, more consent of the governed concerning sorting processes, more take-up of sorting entitlements, and fewer abuses and errors by the public officials and employees involved in operating the sorting process. Because disclosures also may impose substantial costs, the potential cost-bearers have incentives to oppose and avoid them. The latter reduces the probability that specific disclosure proposals will be implemented effectively.

In this article, we utilize the general benefit-cost framework from Part I for two different but related applications. First, we wish to illustrate how one might analyze the likely effectiveness of some specific disclosure requirements relating to teacher assignment in elementary schools. Second, we consider whether or not the due process clause of the fourteenth amendment applies to any portion of the school sorting process we have considered, thereby requiring certain sorts of disclosures.

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Throughout Part II we pay attention to details that were ignored in the more sweeping evaluation of benefits and costs provided in Part I. For example, we distinguish between various kinds of disclosure such as: general information provided to the community versus child-specific information provided to individual parents; allowing access to information versus outreach to ensure parents receive it; disclosing criteria for decisions versus providing justifications of the criteria. We find that when the analysis is centered on these detailed aspects of specific school sorting questions, further insight is gained into the general benefits and costs framework presented in Part I.

The policy analysis is necessarily illustrative rather than definitive because how one values the various benefits and costs is a matter for individual and community judgments, and differing policy conclusions legitimately may be drawn from the same factual circumstances. Furthermore, the same disclosure proposal may be implemented quite differently in different schools and school districts, depending on whether school officials or teachers are supportive or hostile to the proposal. Thus the assumptions about values and receptivity that we use for illustrative purposes can be replaced by the values and receptivity that apply in a particular setting. It is the *framework* for analysis that we believe to be a useful contribution.

We also show that constitutional law issues may have to be resolved at this level of fine detail. For example, compare these two important but quite different questions that we will discuss: (1) do families have a constitutional right to know about who decides which third-grade teacher their child will have and according to what criteria; and (2) do dissatisfied individual families have a constitutional right to a hearing before a neutral party to determine whether the teacher assignment made for their child was the right one? Two very different types of disclosure are at stake, and the constitutional arguments relevant to each are not identical.

We first present the illustrative policy analysis of disclosure requirements applying to teacher assignment in elementary school. Then we turn to the issues of constitutional law. A final section summarizes and concludes our analysis.

## I. The Policy Framework

### A. *Types and Levels of Disclosure for Evaluation*

The first critical thing to keep in mind is that information disclosure is not a yes-no proposition; you don't simply either do it or not. Rather, it is

far more importantly a question of how much, or what, information. Also key is the medium of disclosure (e.g., written or oral), its trigger (e.g., on request or school initiated), whether transmitted before or after decision, to all or selected families, and so on. To begin to account for these varieties, and simplifying somewhat, we identify three general categories or types of disclosure to evaluate in our illustrative analysis.

The first type is the disclosure of general information about the school's decision-making process. Within this category, we distinguish four levels: (a) the criteria used to make the sorting decision, such as sex and ability balance in elementary school classrooms; (b) justification of the criteria, for example, why, say, ability balance is thought desirable; (c) the process of applying the criteria, for example, who does the ability balancing and how; and (d) the decision alternatives that are possible, for example, that there are three second-grade classes to fill.

The second type of disclosure is child-specific information. Here we distinguish two levels: (a) the child's classification by criteria, for example, ability level; and (b) an explanation for that classification say, how ability was determined.

The third type of disclosure concerns information about the characteristics of the possible decision alternatives, such as the backgrounds, experience levels, and talents of the three second grade teachers.

### ***B. Four Key Questions***

Having arrayed these types of disclosure, our next goal is to evaluate each of them in a way that at once takes into consideration the variety of benefits and costs described in Part I. We wish to assess the likelihood that a particular disclosure alternative could be used to achieve net social benefits, that is, benefits greater than costs. We think this is best achieved by considering four key questions:

(1) If this information were available and fully utilized, how important is it to achieving the different types of social benefits discussed in Part I (informed choice, exercise of entitlement, consent of the governed and control of official abuse)? This question helps to estimate the potential benefits of disclosure, and stops short of considering any obstacles to realizing the potential.

(2) How common is the disclosure of this information in the absence of requirements? Little new can be achieved by requiring the disclosure of information, even very important information, that is routinely disclosed anyway. Moreover, it is not enough to observe that information has not been formally provided in the past. Parents already may have obtained the information through informal channels. This question, in conjunction

with the first one, provides an estimate of the potential additional gains from formally requiring disclosure. The subsequent questions consider the magnitude of the obstacles to realizing the potential gains.

(3) How strenuously would school officials support or resist the passage and implementation of the disclosure requirement? This question is intended to serve as a rough indicator and aggregator of the costs that would be experienced by the school system. These costs include dollar costs, professional demoralization costs, and other "costs" such as reduced socio-economic balance in the school population. To the extent that these costs are perceived by school officials to be significant, one would expect them to try to avoid them, first by resisting the initial adoption of the requirement and later, if need be, by implementing the requirement in a manner that is least costly from their viewpoint.<sup>1</sup> The latter is most likely to affect the form of the disclosure communication, but it also could include altering the sorting system itself.

One can imagine disclosure inducing both desirable and undesirable changes in the sorting system. For example, a school that had not previously considered soliciting parent preferences may be encouraged to give this consideration, and may find that it easily can accommodate most preferences without harm to its "balance" goals. But one also can imagine a school finding its valuable exercise of professional discretion in sorting decisions hard to justify, and switching to a less thoughtful but simpler system that is easier to defend.

(4) How likely is it that the information actually disclosed will change the behavior or opinions of the information recipient? For information to have impact, it has to matter. In terms of behavior, it is necessary to link the information to altered conduct of parents, children or school officials. If, for example, an objective were to increase parental involvement in the sorting process, would the information provision truly yield such an increase? Since parents can be thought of as implicitly weighing the benefits and costs to themselves of getting involved in the sorting process, one thing to consider is how the disclosed information would change parental perceptions of these costs and benefits. Similar inquiries can be made about the likely linkage of information to changes in opinion. As we saw in Part I, there are reasons to think that in practice some information simply will not be utilized.

The answers to these four questions can provide considerable insight in-

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1. This assumes that the costs of disclosure would be borne primarily by the local school districts and schools. Of course, it is imaginable that the dollar costs could be paid for by the state and/or that other sweeteners could be thrown in to win over local support for a new program. But then, of course, these costs would have to be borne elsewhere; here, in order to simplify the analysis and because we believe it is more revealing, we will assume the local internalization of costs.

to the prospects of achieving net social benefits through information disclosure. Suppose, for example, that some disclosure contains information characterized as theoretically important to achieving social benefits, generally unavailable at present, likely to lead to desirable changed parental or school behavior with respect to the sorting process, and not too costly to the schools. Clearly, this disclosure is a good candidate for policy adoption.

On the other hand, suppose a proposed disclosure rates very well on the benefits side but would be considered costly by school officials. It is possible that one could conclude that the social benefits outweigh the social costs, but nevertheless school officials might strenuously resist the reform. From this we would conclude that the prospects for easy legislative approval of the reform are slight. Public school officials are much better politically organized than are parents (who are largely unaware of the stakes, and who, even if aware, would receive only small individual benefits in comparison with the high individual costs of political mobilization). However, either a concerted political effort or a legal challenge may be feasible ways to achieve the net benefits. Whether a reform movement could be organized around consumer disclosure in public schooling is hard to say. We will, however, discuss the relationship between information disclosure and the law later in this article. In short, these four questions together allow one to assess both the desirability and political potential of a reform proposal.

## II. Applying the Framework: Teacher Assignment in Elementary Schools

### A. *Potential Benefits From Disclosure*

The first key question calls for a consideration of the potential benefits that could arise from the disclosure of different types (and levels) of information. In this analysis, we find it convenient to start with one benefit type (e.g., informed choice) and then systematically consider how each of the disclosure alternatives might contribute to it. We then repeat the process for the other benefit types. In order to simplify, we treat informed choice and the exercise of entitlements together,<sup>2</sup> then consider the control of official errors or abuse, and finally the consent of the governed.

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2. Recall from Part I that the distinction between these two is not always clear. Increased awareness of rights to participate in the sorting process can lead to more exercises of entitlements, but one can also call this more informed choice. While there are circumstances in which the distinction between private benefits from more informed choice and public benefits from increased exercise is important, it facilitates this particular analysis to treat them together.

*1. Disclosure Alternatives — Informed Choice and Take-Up of Entitlements*

If schools paid no attention to parental input or parental preference, there would be no exercise of entitlement opportunities and no potential contribution of parents to more informed choice. In such a case, information would be of no use for purposes of these benefit types.<sup>3</sup> But our field research suggests that elementary schools often accept and pay attention to parental input relevant to a child's teacher assignment. Would it therefore be a good thing if parents were well informed about their ability to participate in this decision (the exercise point), and if so, what information would best help them participate (the informed choice point)?

To begin an answer to this question, let us distinguish between two possible types of parental input: preferences (the expression of parental desires) and information about the child. It is difficult to make evaluative statements about preference inputs, because the value of them depends heavily on community feelings about their relative importance in the sorting process. Some communities may be strong supporters of family choice, in which case the encouragement of parental expressions of preference would be highly valued (even in this case, families will often want to include the expertise of school officials in the decision process). In other communities, there may be a feeling that these sorting decisions should be based strictly on professional educator judgments, and that parental preferences are inappropriate. We will, for illustrative purposes, assume throughout a community value structure which respects parental preferences subject to the "balance" requirements we found typical in elementary schools (and a school system which is tolerant of, but not enthusiastic about, responding to these preferences).

Looking first at disclosures involving general information, we think there is potential benefit from disclosing the criteria of assignment. In Table 1, we denote this by placing an "X" in the Informed Choice/Exercise of Entitlements (IC/EE) column next to the criteria of assignment row. This information helps parents to know if their preferences matter and if they have specialized knowledge of the child that is relevant to the decision (e.g., my child really looks up to child Z who is a good role model, and it would be desirable for them to be in the same class).

Justification of the criteria and disclosure about the process of applying the criteria are judged not to have significant potential benefits from these

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3. To be sure, publicizing both the absence of a parental role and information about the school's current sorting practices could create a political demand for a change in the sorting process that would include a parental role. We treat this type of effect as increased consent of the governed, although it also could be considered more informed collective choice.

models. Thus in Table 1, no "X" appears in the IC/EE column next to the rows corresponding to these two possible disclosures. A parent's choice of input depends much more on knowing *what* the school is striving for than on knowledge of either *why* it so striving or the mechanics of the decision process used by the school.<sup>4</sup>

Similarly, no "X" appears next to either of the child-specific disclosures. Since elementary school classes (in contrast to junior and senior high) are virtually always intended to be ability-balanced, most children will be assigned at random (or in accordance with parental preference). Even if a few children are classified as, say, "leaders," this provides no reason why they are assigned to a particular class (i.e., "leaders" are evenly distributed across classes).

Knowledge of the alternative assignments available (in general and in detail) is rated to be of significant potential benefit. These disclosures might include the number of classes, what distinguishes them, and information about the teachers leading them. Knowing what the choices are is probably the most important general information relevant to a parent's choice of input. That is, a primary factor motivating a parent to intervene is the sense that there is some preferred alternative.

## 2. *Disclosure Alternatives — Control of Official Error and Abuse*

Although we made no effort to determine the true extent of official error and abuse in the assignment of children to elementary school teachers, it is clear that such error and abuse exists. In considering errors and abuses, we have in mind examples that violate the balance norm like placing a disproportionate number of the troublemakers, slow or bright students in one class, examples like misuse of highly subjective classifications (like leader or troublemaker) as a means for teachers to alter the preliminary proposed assignments in order to avoid or receive particular students, and examples of erroneous classification due to administrative errors like clerical mistyping. To be sure, it may be true that the greatest promise for controlling the error and abuse that does exist lies in internal management strategy and not in external control through policing by clients. Nonetheless, disclosure to parents can trigger increased internal control efforts and some deterrence is plainly imaginable.

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4. One exception to the latter would be for schools which actively seek widespread parental input as part of this process; then informing parents about how and when to do this is of course of increased importance.

For this potential benefit of disclosure, in our judgment the most promising information lies in two realms. First, we would consider general information about the available alternatives and criteria used in assigning teachers and pupils together, and perhaps secondarily, about the process of assignment. This is because once people know the sorting possibilities and criteria, they have a standard from which they can charge that officials have deviated. If nothing else, this might help deter gross or class abuses; and it might inspire greater care in individual cases as well. Revelations about the process can help focus the limelight on the responsible actors and may thereby help to assure that they have behaved properly. This, in turn, can help minimize instances of favoritism or bureaucratic pettiness.

However, in order for there to be direct external control over the accurate assignment of individual children to individual teachers, then disclosure will usually be needed about both (a) what conclusions were reached about the individual child (that is, which criteria were applied to this child) and (b) how those conclusions were reached (that is, an explanation of why the criteria were met). Indeed, the greatest potential for checking error and abuse here would come if in every case an explanation for the individual child's placement were routinely preferred (and could be challenged). Second best, and possibly of nearly the same deterrence potential, would be the stated willingness to supply an explanation on request.

We summarize these judgments in Column 2 of Table 1.

### 3. *Disclosure Alternatives — Consent of the Governed*

In our judgment general information about the criteria governing teacher assignment, justification of those criteria, and the process of applying those criteria are potentially the most important in terms of this type of benefit. They best reveal the aspects of the teacher assignment process that would serve to make families feel that this part of school sorting is fair and sensible; the criteria and process also are the things that people would want to specify changes in if they felt the current practices did not reflect popular will. Also of potential importance for this type of benefit, we think, is the disclosure of general information about assignment alternatives since the number and type of them may be issues of community concern.

### 4. *Summary*

Viewing Table 1 as a whole captures at a glance our judgments described above. It reveals that the levels of information about teacher assignment



that are theoretically most promising depend on the type of benefit one focuses upon. It also reveals that the disclosure of certain general information, notably the criteria of assignment and the alternative assignments available is of significant potential benefit from all of the different benefit perspectives.

This completes our illustrative assessment of the disclosures in terms of the first key question about potential benefit. The following sections of the policy analysis question the likelihood that the potentials of the disclosures can be realized.

**Table 1**  
**Potential Benefit From Information About**  
**Teacher Assignment In Elementary Schools**

Disclosure Types and Levels	Significant Potential Benefits (X) by Type		
	IC/EE (1)	CA (2)	CG (3)
<b>1. General Information</b>			
a. Criteria of Assignment	X	X	X
b. Justification of the Criteria			X
c. Process of Applying the Criteria		X	X
d. Alternative Assignments Available	X	X	X
<b>2. Child-Specific Information</b>			
a. Classification by the Criteria		X	
b. Explanation for Classification		X	
<b>3. Information About Attributes of Alternative Assignments</b>			
	X		

(\* IC = Informed Choice, CG = Consent of the Governed, EE = Exercise of Entitlements, CA = Control of Official Abuse)

### ***B. Current Voluntary Disclosure***

In our field research, we attempted to survey the extent to which information about sorting is currently disclosed by California schools. If the categories of the information we have identified as theoretically valuable in the previous section were already widely available to parents, then little will be gained by requiring its disclosure.

We have found, however, that there is virtually no *written* disclosure of information about teacher assignment in elementary schools. That is, neither general information, child-specific information, nor information about alternatives is usually provided to parents in writing. The one small exception to this finding is in the request by some schools that parents indicate a preference for their child's teacher assignment, or for the type of teacher they prefer. Even in these cases, usually no information about either the alternative teachers or about how parental preference fits into the actual sorting process is offered in writing. Those parents who put in requests tend to be those more active in school affairs, and who thereby get to know the teachers to find out about them through informal channels (for example, other parents in the PTA, the parents of an older child in the neighborhood).

The lack of written information is not quite sufficient to conclude that the school simply does not inform the whole parent population about this aspect of the sorting process. After all, there are conferences scheduled between each child's parents and teachers twice a year, and plans and prospects for the following year are often discussed during the spring conference. It was beyond the scope of our field research to document what really is communicated during those conferences. It is quite possible that some information about sorting is disclosed at this time, although teachers are given no formal directives to cover specific items. In any event, it is quite likely that most parents would be offered no information at all about many of the *levels* described earlier; and surely most do not take the time to ask for this information when they are there mainly to get an assessment of how their child performed during the past year.

We tentatively conclude that the type of information embodied in the alternative disclosures we are analyzing is not commonly known to a broad range of parents. Therefore, current practice cannot be said to diminish significantly the theoretical benefit potential of these alternatives. In Table 2 we rate the probability that the information intended for disclosure will be "new" to most parents. Each of the disclosure alternatives is rated "high" except for the available alternatives. The latter is rated "medium" in light of limited school efforts to solicit parental preferences regarding teacher assignment.

**Table 2**  
**Probability That the Information**  
**Intended for Disclosure is "New" to Parents**

Disclosure Options	Probability
1. General Information	
a. Criteria of Assignment	H
b. Justification of the Criteria	H
c. Process of Applying the Criteria	H
d. Alternative Assignments Available	M
2. Child-Specific Information	
a. Classification by the Criteria	H
b. Explanation for Classification	H
3. Information About Attributes of Alternative Assignments	
	H

(H = High, M = Medium, L = Low)

### ***C. The Probable School Response***

In this section we will consider the costs of various kinds imposed by information disclosures on school officials. If disclosure costs of one kind or another lead schools to oppose a disclosure requirement, their resistance can surface in a number of different forms. One form is political resistance to the adoption of the disclosure requirement. Because school employees and school board members are politically well organized, they can almost always prevent a reform lacking active and widespread support of parents.

Even if a disclosure reform is adopted, school employees may resist the implementation of the reform by bureaucratic methods. A school may be required to disclose criteria, for example, but its staff may describe the criteria in such a way that practically any sorting decision it makes can be

said to be consistent with the criteria. Even if the state provides additional funds for the schools to publicize their criteria, school officials not interested in this publicity can find ways to comply at a minimal cost and effectively use the remaining funds for other expenses. Finally, a school may respond by changing the sorting system itself. If the changes are ones responsive to community values, then the disclosure is serving its intended purpose. If, however, the changes accommodate school bureaucratic purposes in opposition to community values, then we consider the school to be resisting acquiescence.

These examples illustrate why low probability of acquiescence is, at a minimum, a severe stumbling block to achieving the potential benefits discussed in the earlier sections. Let us now assess these probabilities for the various levels of disclosure concerning teacher assignments in elementary schools. In general, we think that school leaders would be sympathetic to changes that would increase the consent of the governed, so long as the substantive policies they favor were not threatened. But, we think that most school officials are likely to be far less interested in promoting the control of official abuse or the exercise of the voicing of parental preference.

More specifically, we believe that school officials are likely to be most acquiescent to the disclosure of general information. Our general intuition and the way officials dealt with us suggests that school leaders often view with pride the criteria they use to assign children to classes; many will be happy to inform parents in general terms of them. Hence, we rate the prospects of official acquiescence to calls for this disclosure as "high." School officials also would be likely to acquiesce to some justification of these criteria, especially if they could be made to see how this might improve community confidence in the school. However, school leaders might want enough latitude to offer quite general and, therefore, from their perspective, noncontroversial justifications. This would, of course, tend to make the result less informative to parents. Thus, we rate the probability of acquiescence to the desired information as "medium."

We would expect more school resistance to required disclosure of the process of applying the criteria. While this could increase the consent of the governed, it is likely to be seen from the school's perspective as creating an unnecessary threat to the procedures already in place. For example, too many questions might be raised about why, in some places, the principal makes the assignment decisions when the teachers know the children best. Or, once committed in writing to specific procedures, school officials might fear they would lose the flexibility to deal with situations they perceive as unique. We rate the probability of acquiescence to this disclosure as "low."

In terms of disclosing the alternative assignments available, we would expect mild resistance. Again, there is something to be gained in terms of community support, and we saw that some schools already solicit parental preferences concerning teacher assignment. Yet school officials so far have done little voluntarily to publicize the alternatives, and it is not at all clear that they would wish to complicate their lives by further encouraging parental choice. We rate this alternative as "medium."

We think that school officials are less likely to acquiesce in the routine disclosure of child-specific information to parents about their child's classification, especially if the requirements included an explanation of the classification. Many would argue that the placement of young children requires the exercise of expert judgment which cannot be neatly described. They also would object to the dollar and time costs of such disclosure. And they would argue that in many cases the child and family are better off not knowing why the placement was made for fear that it would adversely affect the child's learning in the future. Finally, like most bureaucrats, they are not likely to want to encourage outside policing. In the absence of considerable external pressure, these alternatives are rated "low." Moreover, disclosure on request only, while somewhat less costly, is also likely to be opposed, absent strong adverse political reaction by those perceiving the school's posture as one of extreme paternalism and resistance to local accountability.

Similarly, schools are not likely to acquiesce readily in the disclosure of useful information about the attributes of alternative assignments. They would argue, for example, that accurate measures of a teacher's effectiveness do not exist, and that existing measures are misleading and inadequate and could be bad for staff morale. Furthermore, they would continue, such disclosure would create the kind of pressure which increases the difficulty of balancing classes. Absent strong pressures, we think again that potential acquiescence in these disclosures is "low."

Table 3 displays these conclusions.

#### ***D. The Probability of Changing the Behavior or Opinions of the Information Recipient***

In order for information to achieve benefits, the disclosure must have or be perceived to have some impact on those who receive it. For example, increased awareness of general information about the teacher assignment process could by itself increase favorable parental opinions about school sorting, and thus result in greater consent of the governed. Of course, some families may respond to such a disclosure with disapproval, leading to some "dissent of the governed." The latter could, in turn, lead to

**Table 3**  
**Probability of School Acquiescence in Requiring  
 Disclosure About Teacher Assignment in Elementary Schools**

Disclosure Options	Probability
<b>1. General Information</b>	
a. Criteria of Assignment	H
b. Justification of the Criteria	M
c. Process of Applying the Criteria	L
d. Alternative Assignments Available	M
<b>2. Child-Specific Information</b>	
a. Classification by the Criteria	L
b. Explanation for Classification	L
<b>3. Information About Attributes of Alternative Assignments</b>	L

(H = High, M = Medium, L = Low)

political conflicts in the community and perhaps cause changes in the sorting process. Yet we would consider either of these consequences (increased community approval before or after change) to represent gains for the democratic process, recognizing, of course, that in terms of school official energy and schoolchild short-term learning, costs can well come with community conflict over some school practices.

One hope under the consent of the governed model is that the ongoing disclosure of information serves to keep officials continually accountable to the local political community so that disclosure itself would not precipitate a surprise uprising of community opposition. (We also note in passing that disclosures that satisfy families that errors and abuse are at a minimum and that informed choices by someone, whether parent or school official, are being made about teacher assignment should both serve in a broad way to increase the consent of the governed.) Additional impact occurs, here plainly behavioral change, if disclosure yields more

active parental interaction with the school regarding the actual assignment of specific children.

Although we have sketched various ways in which impact can occur, will the information disclosure actually have any important impact in any of these ways? How many more (and which) parents will question and press the school to justify their child's teacher assignment and with what impact on controlling errors and abuse? How many more (and which) parents will take the opportunity to participate in the selection process and with what impact on informed choice? How will parental and community opinions about the school be altered and with what impact on consent of the governed?

Making sound predictions is very difficult. Yet certain things can be said. First, although school-initiated disclosure of information to all parents surely has more potential to prompt change than does selective disclosure (it also has the highest cost), it should not be assumed indispensable. In short, one should not minimize the potential of information provided upon request to even a small number of families who ask for it. As we suggested in Part I, in the right circumstances relatively few informed consumers can serve to police the market and thereby improve consumer utility for many others as well. In the same way, an informed few can act in ways that check abuse and errors that would otherwise hurt many others. And finally, the altered opinions of key community leaders about the local school can lead to community-wide impact.

A general counter-perspective is that key market makers and public opinion setters are the ones already most likely to have information and hence least likely to be affected by required disclosure. This is difficult to assess. We think that a number of parents in the schools we visited do have informed opinions of the talents of the teachers. However, we think it much less likely that these parents know much about the other aspects of the teacher assignment process, or that they now function to police the system on behalf of the school's children generally. It is also important to appreciate that to the extent that leaders already know about the teacher assignment process, this should undercut the fear that only elites would benefit from disclosure; indeed, on that analysis, prospects for change, if any, lie in the reactions of nonelites to the disclosure. Our judgment is that some elites and nonelites would know *more* were there disclosures of the type we have discussed. And we think some would act on the new information.

We recognize that one would expect an important impact in terms of behavioral change by parents if the disclosure significantly affected their perceptions of the benefits and costs *to them* of becoming more involved in the sorting process. First, a parent must believe that taking action can

achieve benefits (satisfaction) that would not occur without the action.<sup>5</sup> Quite apart from cost, many parents will not get involved no matter how well informed because they feel this "benefit test" is not passed. From their perspective, they believe that school sorting decisions are too unlikely to improve as a result of their input.

Second, even if parents feel their involvement is likely to pass their own "benefit test," they have to consider their costs of involvement. That is, they must give up valuable leisure time, or expand scarce personal energy, to try and achieve the benefits. And many parents will decide that the possible gain is not worth that effort. Some do not even have the energy to make a judgment.

Plainly, then, many families not involved in the sorting process today will remain uninvolved even after required disclosure. That is, many will continue not to offer a teacher preference, and will continue to accept without question the assignment of their child and the existing assignment criteria and process. The question, therefore, is just how many might become newly involved and how many of those now involved might change (and improve) their involvement. And it is hard to give a confident answer.

The evidence on consumer response from studies of consumer disclosure laws (reviewed in Part I) cannot support great optimism here. While unit pricing is an example of consumer disclosure which does seem to have positive impact, it is clear that teacher assignment is not analogous. Unit pricing, after all, involves providing information about a question that consumers routinely ask themselves when shopping ("Am I better off to buy the larger 'economy' size?") at a point where they must make some decision. To be sure, it is imaginable that the spring teacher conference in elementary school could be transformed into a session in which parents are made to provide input. This might convert their participation into something like the range of conduct that probably occurs in families at a time a child decides which college to attend. But this approach would involve more than mere disclosure; and, it contemplates a substantive posture different from most elementary schools we visited, where, after all, the voicing of parental preference was an optional matter rather than a mandated one.

Similarly, the evidence from the welfare field shows that rather few recipients contest their benefit awards, even though they are formally notified of their right to do so, and even though follow-up studies show that many

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5. The satisfaction to parents may arise from feeling that they have helped to do something for the community; it also may arise from feeling that they have helped to improve their own child's education.



more than those who object were improperly underpaid or denied benefits altogether.

Despite this pessimistic appraisal, we think that information about specific teachers that would give parents reason to choose among them could cause a substantial increase in parental participation in the preference-giving process. Indeed, we are confident that many school officials would fear that if families really knew about the comparative talents of their schools' teachers, large increase in requests for the "good" teachers would make the school worry about how to turn them down. In short, there is a small but nonetheless real possibility that disclosure could put substantial pressure on schools to figure out how to get rid of the teachers they know are not very competent.

Put differently, a school that today can tolerate and satisfy a low level of expressed parental preferences, where many parents don't know what a difference there really is among the teachers, might not long be able to retain its community support if there is a great clamoring to avoid certain duds. Moreover, in such a climate it probably would be very difficult for a school to "solve" the problem by assigning only the children whose parents don't complain to the bad teachers on the theory that they are knowledgeably indifferent; some community leaders are likely to complain that the truth is that those parents still don't know or don't care. Hence, there is reason to hope that disclosure will prevent the "dumping" solution.

Indeed, it is arguable that today considerable class-related "dumping" occurs, and that in fact the advantages that the educated middle class now have could be eroded in the short-run to the benefit of others through disclosure. This, in turn, could cause pressure to upgrade the general quality of teachers over time, providing benefits to all.

We summarize in Table 4 our judgments of the likelihood that the intended information disclosure would change the behavior or opinions of parents in a positive way (i.e., in a way which works towards achieving one or more of the benefits). In terms of the general information, we rate the criteria of assignment disclosure as "low": Without offering justification of the criteria, it is not likely to alter parental opinions nor elicit much parent inquiry. On the other hand, offering justification of the criteria is rated "medium," in large part because the information itself can favorably affect parent opinions and also because we think it will induce a small number of parents to question the school about the criteria (and thus help ensure the school's thoughtfulness about them).

We rate disclosure about the process of applying the criteria as "low" because while it might strengthen favorable opinions, we think few parents are likely to become engaged in thinking about the details of school ad-

**Table 4**  
**Probability of Beneficial Change**  
**in Parent Behavior or Opinions**

Disclosure Options	Probability
<b>1. General Information</b>	
a. Criteria of Assignment	L
b. Justification of the Criteria	M
c. Process of Applying the Criteria	L
d. Alternative Assignments Available	M
<b>2. Child-Specific Information</b>	
a. Classification by the Criteria	L
b. Explanation for Classification	L
<b>3. Information About Attributes of Alternative Assignments</b>	M

(H = High, M = Medium, L = Low)

ministrative tasks. We rate the disclosure of alternative assignments available as "medium," in recognition that parents' perceptions that teachers (and classmates) matter to their children are strong, and since many schools allow or even encourage parental input, even a little more knowledge about alternatives can induce this.

In terms of child-specific information, we rate as "low" disclosure about both the child's specific classification and an explanation for it. Since most elementary schools have ability-mixed classes, the disclosure of this information is unlikely to cause a parent to desire a change in the child's teacher assignment. If schools offered highly thought out reasons why a child was assigned to one teacher rather than the other, this might serve to increase parents' favorable views of school sorting procedures. But it seems to us that the likelihood of favorably changing the impressions of many parents by this disclosure is slim. On the other hand, we

think more extensive disclosure about the alternative teachers and classes (like the basic disclosure of the alternatives) can induce significantly more parents to express a teacher preference in those schools which allow and wish to encourage this, and we, therefore, rate this as "medium."

### *E. Overall Analysis*

The next task is to combine the results from the previous steps of the analysis. Table 5 displays the summary data. Obviously, our overall assessments depend on the weightings we gave earlier.

We present them not to insist that our weightings are right, but in order to illustrate a method for considering the combined effect of the different factors. Keep in mind that our judgments are based on values and behavioral assumptions that we think are plausible representations of those in the school districts we surveyed. Those in different settings with different ideas about the relative importance of factors and those with different predictions about consequences can think through this analysis using their own weights.

Our judgment is that the required disclosure of general information about school sorting does have the potential to achieve some net social benefits. Requiring disclosure of the school's criteria for assignment is probably the most promising step to take. This is because (a) there is benefit potential in terms of increased consent of the government, better control of official discretion, and greater exercise of choice in a more informed way; (b) schools are likely to acquiesce in the disclosure; and (c) there is virtually no disclosure now. The main uncertainty lies in just how much impact the disclosure will have in terms of changed opinions and behavior of family and schools, but we think the overall potential for achieving net benefits is high.

Probably next most promising is the disclosure of alternative available assignments. This also has benefit potential from all three types, and is more likely to induce a benefit-generating response from parents. However, this is offset by the increased school resistance and the current extent of informal parent knowledge about the alternatives. Thus we rate its overall potential as medium.

The process of applying the criteria serves two of our three purposes of disclosure, rather a little is disclosed about it now, and school official resistance to its disclosure is likely to be only moderate. While we think there is the potential for some new social benefit, just how well the information would actually be used remains uncertain. Thus we rate this disclosure as having low to medium potential for achieving net social benefits.

We can readily imagine how a school could disclose with little difficulty

**Table 5**  
**Overall Assessment: The Potential for Achieving Net Social Benefits**

(H = High, M = Medium, L = Low, N = None)

(\*IC = Informed Consent, CG = Consent of Governed, EE = Exercise of Entitlements, CA = Control of Official Abuse)

Disclosure Options	Significant Potential Benefits (X) by Type*			Probability Discloses Contains "New" Information	Probability of School Acquisition	Probability of Benefit-Generating Change in Opinion or Behavior of Information Recipient	Potential for Achieving Social Benefits
	IC/EE (1)	CA (2)	CG (3)				
<b>General Information</b>							
a. Criteria of Assignment	X	X	X	H	H	L	H
b. Justification of the Criteria			X	H	M	M	L
c. Process of Applying the Criteria		X	X	H	L	L	L-M
d. Alternative Assignments Available	X	X	X	M	M	M	M
<b>Child-Specific Information</b>							
a. Classification by the Criteria		X		H	L	L	L
b. Explanation for Classification		X		H	L	L	L
Attributes of Alternative Assignments	X			H	L	M	L

and modest dollar cost all three of these levels of general information in one well-designed communication. For example, the school could disclose to families of potential third-graders that it has, say, three regular third-grade classes (or, say, two regular and one three-four combination). At the same time it could report that as among the three classes, it strives for sex, race and academic ability balance among students, that it seeks to ensure that each classroom has its fair share of student leaders and behavior problems, and that it will accommodate family preference so long as the school's general commitment to "balance" is not upset.

The supportive school might offer further disclosure. For example, the school might disclose that its teachers generally teach the same grade year after year unless the teacher seeks a change. The school might disclose how and by whom "leaders" and "behavior problems" are identified, how ability balancing is achieved, and how family requests are solicited, received and managed. Hence, if, for example, teachers for each grade level meet and pool personal and test score knowledge of their pupils and thereby make assignments to the next grade, this could be revealed together with a concise explanation of the way they actually apply the less than obvious criteria.

When it comes to disclosing justifications of the criteria, the potential for net social benefit, we think, is reduced. This sort of disclosure is likely to serve only the purpose of increasing the consent of the governed, and it must have a very strong likelihood of success to equal or exceed the benefit potential of the other general information disclosures. But the school resistance combined with the ease of offering an overly general justification implies there is not likely to be highly meaningful disclosure here, and thus we rate its overall potential as low. Were disclosure of justifications required, however, we think a supportive school easily could include in the communication described above an explanation of, say, why it believes in ability mixing rather than ability grouping, why it allows some family choice and so on.<sup>6</sup>

Turning next to the disclosure of child-specific information and information about the attributes of alternative assignments, making a net appraisal is more difficult. The former potentially increases substantially the effective control of official abuse or error, and the latter potentially increases substantially the expression of informed parental preference. Yet

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6. We note that disclosure of various levels of general information about school sorting is broadly analogous to the disclosure now required of governmental agencies engaged in rulemaking pursuant to the Administrative Procedure Act. Hence, it is hardly foreign to governmental bodies. Indeed, the APA also requires the agency to advertise for comments on proposed rules and to publish both criticisms that were not accepted and explanations thereof. We put these elements aside for now.

just how much this information actually will serve these purposes is questionable because of the low potential for use by recipients (notwithstanding the virtual lack of formal disclosure of such information today). Moreover, for both dollar cost and other cost reasons (such as school reputation and teacher morale), school officials are likely to resist most the requirement that they disclose this detailed information. Thus we rate the net benefit potential as low in Table 5.

While the above factors dampen one's enthusiasm for an "outreach" approach to this detailed information, one might still consider whether there is some promise in a publicized "access" approach. As noted earlier, the important deterrence gains with respect to the control of official discretion might be achieved merely by making clear that those parents who ask for explanations about how and why their children were sorted will be given such explanations. Note too that, under the Public Records Acts of many states, much of what information exists in writing about the detailed alternative assignments is currently available to those who ask for it.<sup>7</sup>

An important difference from the Public Records laws, we would think, is that even an "access" approach to detailed information would carry at least this amount of outreach: The school would have to explain (perhaps as part of the general communication described above) that it stands ready to tell parents details about both the decisions made about their child and the available teachers if the parents ask for it. Hence, under this approach a parent would be prompted to find out if his or her child had been identified as one of the "leaders" or "behavior problems," and if so, how this determination was made; so too, on request, the school would explain how the child's sex, race, and ability (and how that was determined) influenced his or her assignment. In short, in terms of child-specific information, were the family to ask it would be provided with information broadly analogous to that which typically is supposed to be given to people when government administrative agencies hold "due process" hearings on individual cases. While this "access" approach is clearly less costly to the schools than the "outreach" approach, we still think schools will perceive the costs as significant and remain unenthusiastic about encouraging potential inquiries.<sup>8</sup>

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7. CAL. GOV'T CODE § 6250-6267 (West 1980).

8. Our illustrative analysis and assessments only apply to teacher assignment in elementary schools, and evaluation of analogous disclosures at higher school levels can be quite different. Consider the child-specific disclosures at the junior high school level. Perhaps the most important potential benefit arises from the risk of error or abuse in placements in those few subjects that are ability-grouped, especially since a decision about math and English tracking in the seventh grade can have a decisive influence on the child's entire secondary education program of study and, in turn, on his or

### ***F. From Policy Analysis to Legal Analysis***

Based on our illustrative analysis, we see some real potential for net social gain from requiring certain disclosures of general information about teacher assignment in elementary schools. We also concluded that there is low potential for achieving net benefits through the disclosure of child-specific information and detailed information about the available alternatives. We must cautiously remind, however, that communities with values different from those we assumed, and with schools more or less supportive than we assumed plausible based on our field experiences, might conclude otherwise.

Moreover, we recognize that many of our judgments are speculative. We appreciate, for example, that if too much information is disclosed, especially in one communication, this could backfire with many parents ignoring the message altogether. We also recognize that schools may change their sorting system in response to disclosure, and not always in a way that is "favorable" according to the assumed community values. For example, school officials fearing an overload from parental requests for particular teachers (in response to a disclosure) may decide to cut out the role of parental requests altogether. Similarly, schools now relying heavily on (generally good) professional judgments which are difficult to defend may, in fear of the response to this disclosure, forgo exercising these professional judgments.

Nevertheless, we believe that our exercise does suggest that certain disclosures may be able to bring about moderate improvements in our public schools, and, therefore, that the idea is worth pursuing. The next step that we would recommend to policy-makers is to experiment. That is, we think that significant experimentation with outreach disclosure of general information about elementary school teacher assignment is a good policy step to take, and some experimentation with access disclosure of detailed sorting decisions is worth while. Such experiments should yield far greater clarification of whether or not the potential gains of school sorting disclosure can be achieved at acceptable costs.

Assuming that some of the disclosure ideas will be thought promising, another significant problem of implementation must be faced. As noted in our analysis, sometimes the apparent potential for social benefits can be difficult to realize because of likely school resistance. One should expect cases where well-organized school officials can deny needed support or,

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her future career. Moreover, even if chance of error or abuse here is small, the potential consequences are probably far more damaging than those ordinarily arising from similar errors or abuses in elementary school. Math and English ability grouping decisions made for seventh graders present perhaps the strongest case for outreach disclosure to all parents.

more actively, block or significantly delay political action on disclosure. Some of these may be appropriate in terms of an overall benefit-cost calculus, but other cases will not be. That is, some disclosure opportunities may offer net benefits if implemented, but will fail politically because the beneficiaries (children and parents) are difficult to organize while the cost-bearers are politically well-organized. It is possible that such change could be ordered and enforced by the courts, and we consider the relevant legal issues in the remainder of this article.

## II. Constitutional Considerations

These days, if someone makes even a plausible case for social reform, a lawyer is likely to step in to argue that the Constitution demands such reform. The potential for change is breathtaking. One persuasive attorney and one daring judge might cut through the political thicket and accomplish in a brief time something that might have taken years to fashion through majoritarian politics.

We have little doubt, therefore, that if a reform movement promoting disclosure of school sorting procedures were launched, a lawsuit eventually would be filed claiming that the federal constitutional guarantee of "due process" requires such disclosure. We put aside here the use of such litigation for tactical political purposes, even though that motivation for "public interest" litigation cannot be dismissed. Rather, we examine the main theoretical avenues such a lawsuit would likely follow and its prospects for success.

### A. *The Objectives of Procedural Due Process*

The fourteenth amendment of the Constitution guarantees individuals due process of law in their encounters with state and local government, and the Supreme Court has interpreted this provision to require various kinds of fair dealings when officials make certain important decisions concerning individuals. The epitome of due process in the Court's view is the set of procedural protections that surround those accused of crime — from limitations on arrest, interrogation, and the obtaining of evidence, to all the elements necessary for a "fair trial." The due process requirement has not been restricted to criminal proceedings, however, and, as a result, in the past two decades many civil and administrative procedures have been altered in response to (or in anticipation of) judicial decrees.

Due process is generally thought to serve two broad purposes. The first is accurate decision-making in individual cases — giving people what they deserve under the law, whether benefits or detriments. In legal theory, both arbitrary results (produced by inadvertence, negligence or whim) and



biased results (brought about through unfair favoritism or discrimination) are best avoided by insisting on features like a neutral decider, who listens to the person involved and gives reasons for his decision. This purpose has been emphasized by the Supreme Court of late.<sup>9</sup>

A second general objective of due process concerns the dignity of those subject to government decisions. The idea is that individuals must be treated with respect by public officials whatever the outcome of the issue to be decided. The exercise of unbridled discretion by those wielding governmental power is inconsistent with the dignity of the citizens; due process, by requiring the communication of reasons for public actions and public participation in official decision-making, permits people to question bureaucratic authority. Although this purpose of due process recently has been down played by the Supreme Court, it has been emphasized by many commentators.<sup>10</sup>

Comparing these purposes with the objectives of school sorting we previously have identified, considerable overlap is at once apparent. Plainly, part of the accuracy-enhancing purpose of due process is to control the abuse of discretion. The informed choice objective is also related to the accuracy-enhancing purpose; this is especially evident in circumstances where school officials ultimately make the choice for the pupil. As for the dignity-enhancing purpose of due process, it is clearly connected to the objective of obtaining the consent of the governed. This does not mean that there is a complete identity between what are said to be the goals of due process and what we have described as the objectives of disclosure. Nor, as we will see, are the traditional mechanisms of due process identical with the sorts of disclosure we have considered. On the other hand, certainly the due process idea and the disclosure strategy share a common core in the form of a commitment to the values of communication and public participation.

### ***B. The Supreme Court's Two-Step Approach to Procedural Due Process***

In dealing with procedural due process claims, the Supreme Court has adopted a two-step analysis. Before any process is constitutionally due, the claimant's case must pass a threshold test. Only if the threshold is surmounted does the Court turn to the second step to decide what process is due.

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9. See e.g., *Walters v. Nat'l. Assoc. of Radiation Survivors*, 473 U.S. 305 (1985).

10. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2nd ed. 1988) at 666-67, and Mashaw, *Administrative Due Process: The Quest for a Dignity Theory*, 61 B.U.L. REV. 885 (1981).

Step one: Is the claimant, in the words of the fourteenth amendment, being "deprived" of "liberty or property"? Nearly twenty years ago in *Goldberg v. Kelly*,<sup>11</sup> the Court discredited the notion of government benefits as "privileges," where the state was seen as largely free from judicial control, and accepted instead the notion of "entitlement," the holders of which had due process rights against the state. Drawing importantly on Professor Charles Reich's "new property" idea,<sup>12</sup> *Goldberg* held that once you were receiving welfare, the state could not summarily cut off your benefits. Rather, you had a right to a fair hearing meant to determine whether you really were "entitled" to stay on welfare.

For a while it looked as though the courts would identify for themselves which government decisions were important enough to require due process protection. This view is now much eroded. In recent years, the Court has looked primarily to state law to find identifiable property and liberty rights (assuming no substantive constitutional right is at stake.)<sup>13</sup>

*Goldberg*, in short, is now seen to rest primarily on the fact that people meeting certain standards have an underlying statutory right to welfare, and not so much on the Court's judgment that being deprived of welfare threatens to undermine your ability to enjoy a basic material or political existence. In the same vein, *Goss v. Lopez*,<sup>14</sup> decided in the mid-1970s, which dealt with school suspensions, is now seen to rest primarily on the fact that the state had created a statutory right to go to school (and hence could not arbitrarily deny schooling to an individual, even if for only a short time) and not so much on the ground that schooling is critically important for success in America or that schooling is crucially tied to free speech and political action.

Despite the apparent simplicity of this formulation, lower court decisions applying the "liberty or property" test are not easy to reconcile, and the Supreme Court itself remains sharply divided in many cases. In practice, just what amounts to a deprivation of the required property right or liberty interest is often ambiguous. The Supreme Court has talked about "justifiable" expectations on the one hand and those expectancies that are "too ephemeral" on the other, but without making clear where the line is drawn.<sup>15</sup>

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11. 397 U.S. 254 (1970).

12. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

13. See L. TRIBE, *supra* note 10 at 677.

14. 419 U.S. 565 (1975).

15. There has been considerable scholarly criticism of the first step in the court's analysis, some of it suggesting that there really should be no first step. Rather than seeking to tie the due process requirement to some narrowly identified "liberty" or "property" right, Professor Van Alstyne, for example, has argued that, broadly viewed, "liberty" entitles Americans to "freedom from arbitrary ad-

Step two: What process is due? Although due process in regular criminal prosecutions that may lead to a loss of liberty through incarceration requires elaborate procedures, the Court has made clear that where less is at stake, less process is due.

The "what process" decision is currently made by the Court on the basis of cost-benefit analysis. As articulated in *Mathews v. Eldridge*<sup>16</sup> in 1976 and followed since, the task is to balance the burden on government of providing extra process (typically, but not exclusively, its monetary cost) against the extra benefit of such process to claimants. This extra benefit is primarily measured by considering the prospects that additional procedures will increase the accuracy of determinations, weighted by the importance of the potential deprivation. In short, government is supposed to keep on investing in additional procedural protections so long as their marginal cost is outweighed by the marginal benefit achieved.

As with the threshold step, despite the superficial simplicity of the formula, predicting the outcome of Supreme Court and lower court decisions on the second step is difficult. This is because the importance of the wrongful deprivation of the claimant's interests is often a matter of subjective values and not something to be ascertained scientifically and because both costs of additional procedures and the prospects for increased accuracy are typically speculative.<sup>17</sup>

### C. Does School Sorting Implicate a Liberty or Property Interest?

#### 1. Supreme Court Precedent

Since *Goldberg*, the Court has decided three important procedural due process cases in the schooling area. In 1975 in *Goss*, as noted above, the Court held that school suspensions amounted to the deprivation of interests sufficient to pass the threshold test for applying due process

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judicative procedures." See Van Alstyne, *Cracks in "the New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 487. For a more recent and sweeping critique of the Court's way of transferring concepts developed elsewhere to the field of administrative justice, see Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044 (1984).

16. 424 U.S. 319 (1976).

17. For discussion and critique of the *Mathews* test, see L. TRIBE, *supra* note 10 at 674 and 717 and Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976). Although he is critical about the way the Court has applied the *Mathews* test, Professor Kenneth Davis proposes this formulation, which adopts the *Mathews* theory while rejecting the Court's approach to the first step: "When officials impose a grievous loss on any person, due process should require not less than the procedural protection that is justified by cost-benefit analysis." K. DAVIS, *ADMINISTRATIVE LAW* 224 (2nd ed. 1982 Supp.).

analysis. Two years later in *Ingraham v. Wright*<sup>18</sup> the Court held that corporal punishment in public schools also invoked due process guarantees.

In *Board of Curators v. Horowitz*,<sup>19</sup> decided in 1978, where the claimant was academically dismissed from medical school, the Court first suggested that the plaintiff had no evident property right under state law to her place in the medical school. The Court then cast doubt on whether she had a protectable liberty interest at stake, suggesting that the student's claims about the stigma that might attach to her dismissal and thus impair her future opportunities were constitutionally insubstantial, especially when no publicity was given to the reasons for her dismissal. The majority went on to make it clear, however, that it need not actually decide the liberty-property issue in this case, since, whatever the Constitution might require, the plaintiff's medical school already provided sufficient due process via its internal administrative review carried out prior to dismissal.<sup>20</sup>

What do these three cases tell us about whether any process is constitutionally required in connection with the school sorting decisions that have concerned us here? The Court has not adopted a formulation to the effect that where one has a right to be in school, *any* important decision with respect to that education generates a due process entitlement. Nor, on the other hand, has the Court rejected that proposition. Rather, in cases that have come before it, the Court has been able to focus on the specific deprivation at stake and to ask whether *it* is something with respect to which the pupil can claim a property or liberty right. Hence, in *Goss*, since wrongful suspensions clearly deprive pupils (albeit temporarily) of their right to attend school, that would seem to end the need for further analysis. In *Ingraham*, too, the Court was quickly able to focus on one's right to bodily integrity (as protected by state tort and criminal law) as the thing being violated by wrongful corporal punishment. Again, this seemed to end analysis — without the need even to connect this right to an important school deprivation. Since *Horowitz*, like *Goss*, involved a dismissal, it also did not present the Court with the less-than-full exclusionary impact of the sorting decisions that concern us.

If these three cases turn out to mean that due process will apply to the sorting process only if one can point to a firmly anchored statutory, state

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18. 430 U.S. 651 (1977).

19. 435 U.S. 78 (1978).

20. In *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985), the Court adopted the same position it *did* in *Horowitz*. Whether or not due process applied, sufficient process had been supplied. The Court's latest foray into the procedural rights of school children concerned an interpretation of the statutory rights of handicapped pupils. *Honig v. Doe*, 108 S.Ct. 592 (1988).

regulatory or common law right covering the sorting details at stake, then those who would seek to bring school sorting process under constitutional due process rules are likely to be out of luck. Teacher assignment and transfer, school assignment and transfer, course assignment, grade promotion and so on are not likely to be matters about which the state constitution, the state education code or regulations or common law cases have anything very useful to say. Moreover, it will not be easy, as it was in *Ingraham*, to claim that wrongful sorting decisions can give rise to state created tort or other penalties. After all, education malpractice suits have been largely unsuccessful.<sup>21</sup> In addition, it is important to appreciate that *Horowitz* was seen by the Court as involving an academic, as contrasted with a disciplinary dismissal, and that Justice Rehnquist, speaking for the majority, emphasized that due process requirements are more suited to punishment decisions than to academic judgments.

Yet, there is something highly unsettling about an approach that would sharply distinguish for due process purposes between short term suspensions and corporal punishment on the one hand and the sorting decisions that have interested us on the other. Conceding that, in some instances, what starts out as an undeserved short-term suspension can lead to a pupil's failure to graduate from high school and that wrongful corporal punishment can leave the student scarred for life in more ways than one, it seems equally plain to us that, in some cases at least, a very great deal turns on many other erroneous sorting decisions. If, for example, because of discretionary abuse, irrational or uninformed professional decision-making, or systematic bias in school assignment policies, a pupil gets the wrong teacher, winds up in the wrong school or grade level, or in the wrong course of study, the consequences can be very severe indeed.

To be sure, for many pupils such sorting mistakes will turn out to have either trivial or no negative consequences. But the same may be said about the deprivations the Court has considered. For many students, a mistaken, mild spanking by a dean of boys will be quickly forgotten and of little moment; by the same token, five days out of school pursuant to a wrongful suspension may, by itself, cause no important loss in learning, self-esteem, motivation, future opportunities and the like. It is only for some pupils that such errors can have momentous consequences.

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21. See *Donohue v. Copiague Unified Sch. Dist.*, 147 N.Y.2d 440, 391, N.E.2d 1352, 418 N.Y.S.2d 375 (1979) and *Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal. App.3d 814, 131 Cal. Rptr. 854 (1976). See generally, Elson, *A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching*, 73 Nw. U.L. REV. 641 (1978) and Sugarman, *Accountability Through the Courts*, 82 SCH. REV. 233 (1974). For the argument that procedural due process itself potentially requires states to recognize educational malpractice claims, see Note, *Educational Malpractice: Potentialities for Applying Procedural Due Process*, 14 STETSON L. REV. 103 (1984).

Moreover, we think that the academic dismissals, disciplinary suspensions and corporal punishments that have been considered by the Court are most sensibly viewed as part of the board sorting process, especially when one thinks about their counterparts in the lower grades. In elementary schools, as we have seen, there are no academic dismissals. One repeats a grade or a course, does not "graduate" with one's peers, is transferred to a less demanding program or to another school and so on. By the same token, "trouble-makers" in the second grade are not suspended (and probably not paddled); but next year (if they are promoted) they are often divided up in hopes of both constraining the harm they do and helping them to behave better.

Confidently predicting how the Court would decide a claim for due process in the regular sorting process is beyond us. We note, however, that in recent terms the Court, in several non-due process cases, has adopted a posture of great deference to the authority of school officials.<sup>22</sup>

## 2. *Procedural Due Process in the Lower Courts*

An important series of lower courts decisions has concluded that procedural due process applies to the assignment of children to classes for the handicapped. Since some of these cases involved children who had been completely excluded by public school systems, it is easy to see how, following the *Goss* idea (even if decided before *Goss*), a court could decide that these children deserve due process protection.

However, many of these handicapped children cases were not restricted to excluded children. Some also clearly covered the transfer into special education classes of children who were previously in regular classrooms. In short, these cases found due process applicable to sorting within a school. In the leading case of *Mills v. Board of Education of District of Columbia*<sup>23</sup> the court said that "due process of law requires a hearing prior to exclusion, termination or classification into a special program." Unfortunately, neither this precedent, nor similar decisions we will discuss, make explicitly clear just why the assignment of a child to a special education program threatens a protected liberty or property interest under the 14th Amendment.

For example, in *Cuyahoga County Association for Retarded Children & Adults v. Essex*<sup>24</sup> which also held that students must be afforded due pro-

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22. We have in mind *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (concerning in-school searches); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (concerning the regulation of student speech); and *Hazelwood Sch. Dist. v. Kuhlmeier*, 108 S.Ct. 562 (1988) (concerning the censorship of student newspapers).

23. 348 F. Supp. 866, 875 (D.C. 1972).

24. 411 F. Supp. 46 (N.D. Ohio 1976).

cess before being placed in special education classes, the court cited *Goss*, and said that “defendants do not deny that children within a compulsory public school system must be accorded due process in matters materially affecting their education.”<sup>25</sup> In *Hairston v. Drosick*<sup>26</sup> the court, citing no cases, simply asserted that the exclusion of a minimally handicapped child, without prior notice or a hearing, from a regular public school classroom situation violated the procedural due process protections of the fourteenth amendment. And a federal district court in New York held that placement of school children out of the “mainstream” requires procedural due process protection, *Lora v. Board of Education of New York City*.<sup>27</sup> This case involved the assignment to Special Day Schools of children whose severe emotional problems according to school authorities, were seen to cause them to “act out” and display unacceptably aggressive behavior in regular classroom. The court cited *Mills, Hairston*, a Pennsylvania case approving a consent decree<sup>28</sup> and academic literature in support of its due process holding. In short, while the precedent in cases involving “special education” is impressively consistent, its rationale is not self-evident.

By contrast, there is a line of lower federal court decisions involving sports participation that rejects the applicability of due process to internal school decisions. Frequently, the plaintiff had newly transferred to the school where he sought to play sports and was ruled ineligible for one reason or another (e.g., he changed schools but his parents had not moved in to the new school district, or he transferred to or from a boarding school, or he had not lived in the district long enough). It is important to appreciate that the plaintiffs in these cases, challenging rules governing participation in interscholastic athletics, typically had *substantive* rather than procedural objections to the rules; alternatively, plaintiffs objected that the rules unfairly, irrebuttably presumed that they were the sort of athlete (e.g., someone recruited to play on a better team) that the rules overinclusively sought to catch. Either way, school and athletic association decisions made pursuant to such rules have been repeatedly held not subject to due process protection.<sup>29</sup> The reasoning behind these decisions

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25. *Id.* at 57.

26. 423 F. Supp. 180 (S.D.W. Va. 1976).

27. 456 F. Supp. 1211, 1278 (E.D. N.Y. 1978), *partially vacated on other grounds* 623 F.2d 248 (2nd Cir. 1980).

28. *P.A.R.C. v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972).

29. *See e.g.*, *Walsh v. Louisiana High Sch. Athletic Ass'n*, 616 F.2d 152 (5th Cir. 1980); *Hamilton v. Tennessee Secondary Sch. Athletic Ass'n*, 552 F.2d 681 (6th Cir. 1976); *Albach v. Odle*, 531 F.2d 983 (10th Cir. 1976); *Dellam v. Cumberland Valley Sch. Dist.*, 391 F. Supp. 358 (M.D. Pa. 1975). For pre-*Goss* decisions to the same effect, *see, e.g.*, *Mitchell v. Louisiana High Sch. Athletic Ass'n*, 430 F.2d 1155 (5th Cir. 1970); and *Oklahoma High Sch. Athletic Ass'n v. Bray*, 321 F.2d 269 (10th Cir. 1963).

may be summarized as follows: “[T]he property interest in education created by the state is participation in the entire process. The myriad activities which combine to form that educational process cannot be dissected to create hundreds of separate property rights, each cognizable under the Constitution.”<sup>30</sup> Another court had the same idea in mind when it said that to be deprived of “one stick” in the “bundle” of things that comprise the educational process did not necessarily mean that due process protections were required.<sup>31</sup> For those who think the importance of the deprivation should matter, it is perhaps not surprising that preventing a pupil from playing in school sports activities has been treated differently from placing a child in a full time special education class.

We turn now to a potpourri of lower court decisions relevant to the sorting process. Unfortunately, they are often unrevealing because either (1) plaintiffs really were making substantive claims, (2) the opinion is conclusory, rather than analytical, (3) the court, perhaps too quickly, concedes that due process applies on its way to finding that the procedures provided were adequate, and/or (4) the issue at stake was importantly different from the sorting issues we have addressed.

*Valadez v. Graham*<sup>32</sup> was brought on behalf of migrant worker children who, because of the impact of the harvest schedule on their parents’ work, returned to their home school well into the fall term each year. Although racial claims were made (and rejected), the plaintiffs included a due process count to the effect that the procedures used by the home junior/senior high school to work them into the school program were unfair. To the extent that what plaintiffs really wanted was a special curriculum designed for them, this is a substantive (and not a promising) claim. However, procedural objections were plainly made — to the school’s method of accepting work started in other schools that fall, to its grading practices for those entering late and so on. Thus, the case concerns sorting practices somewhat like those we have considered. The *Valadez* court made no effort to scrutinize the specific deprivations complained of to see whether a protectable property right was at risk. Rather, and in sharp contrast to the athletic rules cases, it decided the “property right” issue on behalf of plaintiffs merely by concluding that these are decisions affecting public education to which plaintiffs have a “legitimate claim of entitlement.”<sup>33</sup> Perhaps too much should not be made of this, however; having found that due process applied, the court went on to hold that the requirements of due process were in fact met, thereby denying relief of plaintiffs.

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30. *Dallam*, 391 F. Supp. at 361.

31. *Colorado Seminary v. N.C.A.A.*, 570 F.2d 320, 321 (10th Cir. 1978).

32. 474 F. Supp. 149 (M.D. Fla. 1979).

33. *Id.* at 157.



In *Grove v. Ohio State University College of Veterinary Medicine*<sup>34</sup> the court concluded that due process applied when an applicant was denied admission to Ohio State's College of Veterinary Medicine because his exclusion denied him a liberty interest (the opportunity to engage in his chosen profession), although not a property right (since it concluded that the applicant had "no objective expectation" that he would be admitted).<sup>35</sup> We find it a little odd that one could be deprived of a constitutionally protected liberty interest in being a veterinarian when one had no reasonable expectation that he could even get into veterinary school. In any event, although the applicant's lawyer found a way to sell the court on the proposition that a college admission decision was subject to due process guarantees, it is important to appreciate that the University won the case because the court went on to hold that the plaintiff was in fact provided with due process in the handling of his application.<sup>36</sup>

In a case with important racial aspects, *Debra P. v. Turlington*<sup>37</sup> plaintiffs challenged a Florida requirement that public school pupils pass a statewide functional literacy test as a condition of receiving a high school diploma. The important point of the case for our purposes here is the court's conclusion that, through the creation of a public school system, mandatory attendance rules and past educational practices, the state had created a due process protectable "expectation" that regular attendance plus the receipt of passing grades would suffice for a diploma. The "property right" did not, therefore, arise so much from a specific statute but rather, mainly, from past community understandings and local rules. Moreover, the dissenters from the denial of the en banc rehearing complained in vain that *Horowitz* taught that *Goss*' property right holding was inapplicable to "academic" matters like this.<sup>38</sup> In its details *Debra P.* is somewhat different from our problem, however, since it is not really about the part of the sorting process we have described. Moreover, the plaintiffs' central objection was to the substantive decision that Florida had made. Still, the court made clear that, as a matter of constitutional law, this important change in the academic treatment of pupils could not be implemented without giving them adequate notice of the new requirement. Since *Debra P.*, several other courts have also found that due process applies to minimum competency testing (sometimes emphasizing the

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34. 424 F. Supp. 377 (S.D. Ohio 1976).

35. *Id.* at 383.

36. The total exclusionary aspect of the case also may distinguish it from the parts of the school sorting process we have considered.

37. 644 F.2d 397 *reh. en banc denied*, 654 F.2d 1079 (5th Cir. 1981) (*per curiam*), *on remand*, 564 F.2d 177 (M.D. Fla. 1983), *aff'd* 730 F.2d 1405 (11th Cir. 1984).

38. 654 F.2d at 1081 and 1088.

students' liberty interests rather than their entitlement to a diploma) and, typically, they too have insisted on adequate notice.<sup>39</sup>

A contrasting approach is reflected in *Bester v. Tuscaloosa City Board of Education*,<sup>40</sup> upholding a school system's decision to retain elementary school pupils at their current grade when they failed to achieve certain reading levels. This policy was enacted in the aftermath of the desegregation of the district's schools; nearly a quarter of black students were held back, whereas less than six percent of white pupils were retained. On the other hand, plaintiffs did not contend that this led to greater segregation. The Court of Appeals distinguished *Debra P.* on the ground that, whereas the students there had an expectation that they would obtain a diploma if they did satisfactory work in their courses, plaintiffs here were arguing that they had an expectation that they would be promoted even if they did unsatisfactory work, just because that had been the past practice. The court then asserted that "[s]tudents have no legitimate expectation that the meaning of 'satisfactory work' done in the classroom will remain constantly fixed at a level that in truth is academically unsatisfactory."<sup>41</sup> This distinction is unpersuasive. Plainly, Florida too had decided that what was once satisfactory — passing high school courses — was no longer so, and that additional achievement, as demonstrated on competency tests, was required. Some might seek to distinguish *Debra P.* on the ground that failing to receive a high school diploma is a far more serious deprivation than failing to be promoted in elementary school, but others would dispute this. Moreover, if legitimate expectations is the key, as *Debra P.* suggested, then clearly the district in *Bester* had previously created the expectation that pupils would progress with their age peers without having to achieve some specific tested reading level.

But a decision that procedural due process applied in *Bester* would not have meant that the claimants had a substantive due process right to block the introduction of competency testing as a criteria of elementary school promotion. After all, *Debra P.* clearly did not decide that Florida was prohibited from adopting competency testing for the award of a high school

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39. See, e.g., *Brookhart v. Illinois State Bd. of Educ.*, 697 F.2d 179 (7th Cir. 1983) and *Board of Educ. v. Ambach*, 107 Misc.2d 830, 436 N.Y.S.2d 564 (Sup. Ct. 1981), modified, 90 A.D.2d 227, 458 N.Y.S.2d 680 (1982) *aff'd* 60 N.Y.2d 758, 457 N.E.2d 775, 469 N.Y.S.2d 664 (1983) *cert. denied*, 465 U.S. 1101 (1984). For a discussion of the graduation testing issue, see Note, *Testing the Tests: The Due Process Implications of Minimum Competency Testing*, 59 N.Y.U.L. Rev. 577 (1984), which, among other things, criticizes the "property" right deprivation approach of *Debra P.*, favoring instead the liberty deprivation analysis that focuses on injury to reputation and employment opportunities; and Logan, *Minimum Competency Testing in Schools: Legislative Action and Judicial Review*, 13 J.L. & Educ. 35 (1984).

40. 722 F.2d 1514 (1984).

41. *Id.* at 1516.

diploma. Rather, certain procedures might be required. First, adequate notice would presumably have been necessary. Interestingly, the *Bester* court addressed this anyway, concluding that, even if there might ideally have been earlier notice of the change, the plaintiffs had not shown that it would have made a difference (i.e., they had not suffered detrimental reliance).<sup>42</sup> Second, objections might have been raised, for example, to the administration, scoring, reliability or content validity of the tests; or the parties might have sought individualized reviews of whether they were entitled to be promoted, at which reviews objections to testing procedures might be made. But the plaintiffs in the case seemed to have made no contentions at all of this sort. Their theory, in short (apart from the claims about notice) was treated by the court as a substantive one.<sup>43</sup>

This explanation of *Bester* helps explain *Zoll v. Anker*<sup>44</sup> where plaintiffs challenged New York City's shortening of its school day by 45 minutes. Again, the basic challenge was to a substantive change. The court considered whether the plaintiffs had been deprived of a property right protectable by due process. It held that they had not, noting that a companion state court case had decided that plaintiffs were not denied anything to which they were entitled under state law. By clear implication, and contrary to *Debra P.*, this case rejects the notion that due process

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42. *Id.*

43. *See, also*, *Sandlin v. Johnson*, 643 F.2d 1027 (4th Cir. 1981) upholding against constitutional attack the decision of a school board to retain 22 second graders who had failed to achieve a certain reading level.

Like *Bester*, the dispute in *Smith v. Dallas County Bd. of Educ.*, 480 F. Supp. 1324 (S.D. Ala. 1979), arose out of the implementation of a school desegregation decree. A number of students were transferred from a traditionally structured elementary school to one that had a non-graded curriculum. The latter school grouped them according to their functional ability as determined primarily by their performance on a standardized test. A number of parents complained about the consequences to their children arising from the transfer and eventually brought suit. Although the case had racial overtones, plaintiffs also raised a due process claim.

Apparently, the parents' main objection was to the transfer itself. But as the transfer was clearly required by the desegregation order, their legal argument focused on the fact that in the nongraded curriculum their children were placed in classes that put them "behind" their previous placements. Although a substantive challenge to the non-graded curriculum itself seemed hopeless, a procedural due process claim was more promising.

Unfortunately, the court's handling of the challenge was not very illuminating. It focused on whether the placement tests used at the school impaired the pupils' general education rights as recognized in *Goss*, and it then declared that they did not. *Id.* at 1328. As the court saw it, the tests helped assure that pupils are placed at the ability level that best enables him to utilize his education right guaranteed by *Goss*. This is unsatisfactory analysis. Where the complaint is that these tests or their administration fail to put pupils at the proper level, the first issue is whether misclassification of this sort denies pupils a due process protected entitlement. If so, the court should go on to decide then whether other procedures are required to minimize the risk of error.

For further discussion of legal constraints on school retention decisions, see Walden and Gamble, *Student Promotion and Retention Policies: Legal Considerations*, 14 J.L. & EDUC. 609 (1985).

44. 414 F. Supp. 1024 (S.D. N.Y. 1976).

rights can arise simply out of the longstanding practice of having a longer day. Of course, once again, to find that there was an entitlement to the longer day for procedural due process purposes would not have meant that this entitlement could not be taken away, although perhaps notice of the proposed change would be required. But the *Zoll* court was steering clear of the whole issue, arguing that to hold that decisions such as whether "to change classroom hours into study halls, or to teach 'new math' rather than 'old math' or to require attendance at an assembly hall . . . deprives students of 'property' interests would vitiate the state's acknowledged 'power to prescribe the school curriculum' . . ." <sup>45</sup> While this seems to mix together substantive and procedural rights analysis, it nevertheless reveals a contrasting attitude to that of the *Debra P.* court. <sup>46</sup>

Similarly, the Fifth Circuit concluded that a high school student, who had been denied entry to courses of her choice, had no property right to enroll in specific classes. In a very short opinion, the court concluded that access to school was one thing but that access to specific items in the curriculum another. Citing *Goss*, the court in *Arundar v. DeKalb County School District* <sup>47</sup> said that the plaintiff made "no allegation of any 'independent sources such as state statutes or other rules' entitling the plaintiff to the particular course of study. . . ." Note, again, that the family had really alleged substantive due process rights, insisting that the sorting process recognize the student's choice; they did not object to the application of the school's existing sorting rules. <sup>48</sup>

In *Everett v. Marcuse*, <sup>49</sup> where the individual application of school rules was at stake, a federal district court held, citing *Goss*, that an involuntary "lateral transfer" for disciplinary reasons from one regular public school to another required due process protection. Rather than finding any independent basis for the right to remain in one's original school, the court emphasized both the magnitude of the deprivation and the disciplinary basis of the transfer, arguing that on these counts the facts of *Goss* were, if anything, less compelling. On the other hand, it suggested (in dictum) that no due process rights would attach to "purely administrative" transfers or school assignments for non-disciplinary reasons, asserting that "there is

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45. *Id.* at 1028.

46. See also *Scott v. Board of Educ. of City of N.Y.*, 420 F. Supp. 876 (1976), in which the court upheld a school closing decision against procedural due process claim where ample notice and opportunity to be heard had been provided. In view of the process that had been given, the court did not have to decide whether any was constitutionally required.

47. 620 F.2d 493 (5th Cir. 1980).

48. See also *Johnpoll v. Elias*, 513 F. Supp. 430 (E.D. N.Y. 1980), where the court rejected a father's effort to find in the constitution his child's right to attend a specific high school.

49. 426 F. Supp. 397 (E.D. Pa. 1977).

no inherent right of the pupil to attend the school of his or her choice. . . ."<sup>50</sup>

This latter theme was repeated in *Spencer v. New York City Board of Higher Education*<sup>51</sup> where a pupil was academically dismissed from a specialized New York City high school, Hunter College High School. Although there had been numerous earlier meetings between the school officials and the pupil and her mother, a formal hearing was sought. The court concluded that due process did not apply; since the pupil could still attend her local high school, she had not been deprived of a protectable right to education. This precedent could be a significant hurdle for those who would seek to have due process apply to mainstream school sorting.

In *Price v. Young*<sup>52</sup> a family, whose son was not selected for the National Honor Society, was also unsuccessful in seeking to have due process apply to this decision, the court holding that he had no property interest at stake. Thus, the common method of selecting members through anonymous teacher evaluations was protected from judicial scrutiny. Like *Spencer*, this is another good example of an individualized school decision (albeit not a sorting decision of the type we have considered) that might be arrived at through the influence of bias or arbitrariness. Still, even had due process been held applicable, the existing procedures might well have been approved, given the traditional advantage thought to arise from confidentiality in the recommendation process.

Of course, those lower court cases that have concluded that due process applies to schooling decision may be "wrong" in the sense that the Supreme Court would reverse them if given the opportunity. But if not, what pattern emerges from the cases we have reviewed? Plainly, several of them display considerable reluctance to impose due process requirements on "academic" as opposed to "disciplinary" decisions. We believe that this primarily reflects the fact that, whereas requiring procedural protection to avoid wrongful punishments is a familiar and comfortable path for courts, academic judgments often appear to be foreign territory in which school officials, by virtue of their training and expertise, are seen to deserve more deference. Still, this distinction does not explain a number of cases including the special education line. Moreover, several cases (some admittedly decided before *Horowitz*) are oblivious to the distinction. Although some people might think that "stigma" — attaching both to

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50. *Id.* at 400. See also Buss, *Implications of Gross v. Lopez and Wood v. Strickland for Professional Discretion and Liability*, 4 J.L. & EDUC. 567, 572 (1975), "If the special class assignment is genuinely motivated by educational concern, however, it is arguable that no deprivation occurs because the transferred student's situation has improved rather than worsened."

51. 502 N.Y.S.2d 359 (Sup. Ct. 1986).

52. 580 F. Supp. 1 (E.D. Ark. 1983).

special education and to disciplinary treatment — is the key, note that unfavorable academic decisions can be strongly stigmatizing too.<sup>53</sup>

Although, generally speaking, the courts seem more likely to find that due process applies when the claimant is understandably trying to assure accuracy in individualized school sorting decisions — as in the vet school admissions case, the children of migrant workers, and the special education cases — this is by no means a universal outcome — as illustrated by the National Honor Society exclusion and Hunter College High School dismissal cases.

A different resolution of the cases suggests there is not simply one overarching concept, but rather several theories: First, significant disciplinary treatment is in a class by itself and attracts due process protection.<sup>54</sup> This explains *Goss*, *Ingraham* and the disciplinary school transfer case. Second, in elementary and secondary education one's "entitlement" is only to enter and to remain in the "mainstream" program (unless ousted or excluded pursuant to appropriate due process measures); put differently, children have an "objective expectation" to attend ordinary classes at their local school.<sup>55</sup> This explains the special education cases, the Hunter College High School case, the sports participation cases, the National Honor Society case, the shortened day case, the denial of student access to courses of her choice case, the vet school admissions case (by analogy) and perhaps, the children of migrant workers case. Third, significant changes in well-relied-upon aspects of the school program must be preceded by reasonable notice. This explains the competency testing cases. But not only does this multiple-theory approach make the analysis ragged, the theories themselves may well be soft on closer inspection — e.g., what is "disciplinary" and what is "mainstream"?<sup>56</sup>

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53. On the similarity of the impact on students of "educational" and "punitive" decisions, see Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. PA. L. REV. 705, 784 (1973).

54. Not all disciplinary decisions have been held subject to due process restraints, however. Courts have been especially shy about imposing hearing-type requirements on classroom discipline. See, e.g., *Dickens by Dickens v. Johnson County Bd. of Educ.*, 661 F. Supp. 155 (E.D. Tenn. 1985), where the court held that procedural due process did not apply where a classroom teacher adopted an isolation technique for disruptive students called "time out" which segregates the student behind partitions so that he can hear but not easily see other students or the teacher.

55. For an observation in a similar vein see, Hyatt, *Litigating the Rights of Handicapped Children to an Appropriate Education*, 29 UCLA L. REV. 1, 49 n.230 (1981). "Since there is no question that handicapped children, by virtue of the protective legislation, enjoy a greater measure of parental protection and accountability in their schooling than the non-handicapped, it may only be a matter of time before a non-handicapped child, dissatisfied with poor educational practices in the regular school program, seeks the same measure of due process and accountability. . . ."

56. Writing more broadly about the application of due process to institutional decisions generally (e.g., in prisons, mental hospitals and schools), our colleague Professor Ed Rubin has, in somewhat the same vein, advanced these propositions: "First, institutional administrators must be afforded

Perhaps the racial aspects of many of the decided cases are pivotal, yet unstated, considerations. After all, racial sensitivity about intelligence testing, together with the disproportionate tracking of blacks into classes for the mildly retarded and the greater incidence of blacks failing Florida's high school literacy test, are social facts that could easily make a judge feel that scrupulously fair treatment in assignment to special education or the granting of high school diplomas is critical. So too, the higher incidence of black than white suspensions and expulsions (let alone the racial context of *Goss* itself<sup>57</sup>) and the apparent higher incidence of corporal punishment of blacks than whites is not to be ignored. The migrant children case, where due process was said to be required, also had racial overtones. By contrast, disqualification from interscholastic sports, inability to enroll in certain courses, "purely administrative" transfers from one school to another, honor society membership, shortening the school day and the like are not generally viewed as race-sensitive issues (whatever the actual facts in terms of racial incidence). This "realist" view, while hard to test, should be kept in mind.<sup>58</sup>

### 3. *Application of Precedent Themes*

Because no sharp picture emerges from the cases reviewed,<sup>59</sup> the follow-

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discretion in their day-to-day activities. . . . At the other extreme, granting supervisors absolute discretion would violate most people's notion of fair treatment. . . . Between these outer limits on discretion and constraint, one can discern certain characteristic situations that seem to demand procedural protection. One is the imposition of unusual discipline. . . . Another is the determination of the individual's basic status as a member of the institution." Rubin, *supra* note 15 at 1174-76. Although Rubin plainly has in mind that most routine decisions by classroom teachers fall into the discretion category and that suspension and expulsion fall into the status-affecting category, he does not provide enough additional criteria to help us decide into which category the sorting decisions that concern us should be placed. Certainly most could be termed "status" decisions and are not part of the day-to-day decisions of teachers. But, on the other hand, many of these decisions could be viewed as part of the routine activities of other school officials; of course, that might also be said, in many schools, of the deans of boys and suspensions. Hence, in the end, it is hard to get away from the idea that it comes down to the notion that due process should apply to very important decisions that might profitably be reined in through the imposition of some procedural requirements.

57. For the *Goss* story, see Zimring and Solomon, *Goss v. Lopez; The Principle of the Thing*, in R. Mnookin et al., *In the Interest of Children* 449-508 (1988). See generally, Children's Defense Fund: *Children Out of School in America* (1974), showing that minorities are suspended or expelled disproportionately more often than are nonminorities.

58. On the other hand, recall that its racial features were not enough to generate constitutional protection in the *Buster* cases concerning grade promotion based on reading scores and that no racial aspects seemed present in *Grove*, the veterinary school admissions case where due process was held to apply.

59. Although this is not the place to review generally the Supreme Court's treatment of procedural due process claims outside of the schooling area, we will make brief mention of two decisions. In *Vitek v. Jones*, 445 U.S. 480 (1980), the Court held that due process applied when prison officials proposed to move a convict from a regular prison to a mental hospital. By contrast in *O'Bannon v.*

ing discussion suggests how a court sympathetic to imposing procedural regularity on school sorting might approach, and discriminate among a range of individual due process claims.

So far we have been seeking to draw rather general conclusions from the reported opinions. Now we will be more specific. Consider first the failure to be promoted from one grade to the next in elementary school. Surely a judge might conclude that the core of American public schooling includes age peer grouping and annual progression from one grade to the next. Therefore, notwithstanding *Bester*, the competency testing, grade promotion case, it would not seem odd to us for a court to decide that procedural due process restricts the ways schools can deprive individual pupils of the "right" to remain with their peers and go on with them to the next grade. Note, too, that while the reason for having a child repeat a grade might be academic difficulty, the decision instead may well be based on the child's maturity as reflected in the child's behavior and hence have a disciplinary-like quality. In these respects, the promotion decision seems more like assignments to special education classes than to decisions made in higher education institutions where failing a course normally rest on academic considerations alone. Moreover, because of the intense and personal connection of teacher and student in elementary school, and because the decision of a single classroom teacher can have such a dramatic effect on a pupil, it may be far less appropriate to shield such decisions from due process protection on "academic freedom" grounds than it is to protect the grading judgments of university or even high school teachers.<sup>60</sup> The assignment of students by counselors to "slow" and "fast" math and English courses in junior high school perhaps falls in between.

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Town Court Nursing Center, 447 U.S. 773 (1980), the Court declined to find that elderly residents receiving Medicare and Medicaid had due process rights in connection with a proposed decertification by HEW of the nursing home in which they were living, which decertification would necessarily lead to their transfer to other nursing homes and alleged "transfer trauma." We see an analogy between *Vitek* and *Everett*, the disciplinary school transfer case, on the other hand, and between *O'Bannon* and both *Zoll*, the shortened school day case, and *Scott*, the school closing case, on the other. The point, it seems to us, is that the latter three cases concern a general decision that impacts similarly on a group, whereas the former two cases concern decisions about specific individuals. Indeed, the Court in *O'Bannon* emphasized this very difference. Underlying this difference, it seems to us, is that with the Supreme Court's focus on "accuracy", it is much less clear in the group impact cases how granting the claimants a hearing would promote that goal. In *O'Bannon* the nursing home itself had a right to a hearing — albeit a post-decertification hearing. In *Zoll* and *Scott*, because there appeared not to be any higher law that restricted the school board's decision, just how could the decision be "wrong"?

60. On the importance of involving parents in the decision to retain a child see, e.g., Overman, *Practical Applications of Research: Student Promotion and Retention*, PHI DELTA KAPPAN 609, 612 (April 1986) and Riffel & Switzer, *Student Promotion and Retention: Towards a Model Policy*, EDUC. CANADA, 4, 7 (Fall 1986). Riffel and Switzer note that "a survey of American systems undertaken in 1983 showed that less than one half of the systems surveyed had written policies concerning retention and social protection." *Id.* at 8.



Decisions that bar a child's effort to transfer to another school may at first seem quite different. Although there is a clear deprivation, where does one find a protectable right, especially if, as suggested earlier, the core of American public education includes, if anything, only the "right" to attend one's neighborhood school? Still, while state law is probably silent, there are, typically, local rules that are meant to govern formal transfer requests — especially in the cases of open enrollment schemes or where transfer requests are made to the central administration before the year starts. Notwithstanding *Spencer*, the Hunter College High School dismissal case, we would not be surprised if a court were to conclude that due process applies to help assure that "rights" established by these rules are protected. By contrast, where virtually standardless decisions on mid-year transfer requests are informally made by principals, there is unlikely to be a firm basis for a pupil to claim that he had an objective expectation with respect to this sort of transfer possibility.

Where the child is not assigned to the elementary school teacher to whom the family claims she should have been assigned, the student is still both in the mainstream and in the right grade. Thus, it may seem difficult to see where a "right" to a specific teacher would be grounded, even though the deprivation can readily be described. *Arundar*, concerning a pupil's failure to gain entrance to a desired course, seems to be in this vein. Yet, if individualized judgments are supposed to be made about where to place a child according to the school's established criteria, cannot the right be said to come from the school's own rules? Moreover, to the extent that a school seeks to divide up friends on the alleged ground that they are too much of a "clique" or "too distracting or too distracted" is that not both a discipline-like decision and the deprivation of liberty/association interests that should require due process?

It is important to keep in mind that this analysis does not suggest that it is impermissible to use certain criteria to assign pupils to teachers, but only that in making and justifying such assignments, the procedures employed must comport with due process guarantees. Indeed, most schools may well now provide all that due process would demand — a matter we shortly take up.

It is also important to recall that since the courts have typically seen the procedures guaranteed by due process as individualistic ones, the fair hearing model is not easily applied when the decision is broadly similar in its impact on a group. Remember, for example, *Zoll*, the shortened day case. Nor do courts easily see the relevance of due process protection when no factual issues seem to be at stake, as, for example, in the sports participation cases where it was widely conceded that the complaining athletes failed to satisfy the eligibility requirements. For these reasons it seems less

likely that courts would impose fair hearing procedures on sorting decisions such as randomly assigning pupils to second-grade teachers, shifting a *teacher* from one grade or class to another, or adopting a "scramble" system for assigning high school pupils to their classes. Finally, it is quite unclear how due process requirements, as they have been discussed thus far, would apply to the portions of the sorting process we have examined that explicitly rely upon student or family choice — such as junior high electives or senior high school scheduling. Later we will return to this question from another perspective.<sup>61</sup>

#### *D. Process That Might Be Due*

##### *1. In General*

It is often said that the essence of due process is fairness (a vague idea) and that fairness demands an unbiased decider acting pursuant to a fair procedure (this too is vague).<sup>62</sup> As a practical matter, the application of the *Mathews v. Eldridge* formula means that parties fight over which of a set of familiar due process elements are required.

According to the authority of a well-known treatise on constitutional law in noncriminal matters the full range of due process protections would include these elements: "(1) adequate notice of the charges or basis for government action; (2) a neutral decision-maker; (3) an opportunity to make an oral presentation to the decision-maker; (4) an opportunity to present evidence or witnesses to the decision-maker; (5) a chance to confront and cross-examine witnesses or evidence to be used against the individual; (6) the right to have an attorney present the individual's case to the decision-maker; (7) a decision based on the record with the statement of reasons for the decision."<sup>63</sup>

The tailoring of the scope of required (or sufficient) procedures to individual cases is illustrated by some leading Supreme Court cases already mentioned. For example, when the state proposed to cut off a beneficiary's welfare check, the Court in *Goldberg* held that prior to such a deprivation essentially all of the items from the above list of safeguards

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61. For discussions of the desirability of using the courts to rein in the authority of school officials, see Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1676-77 (1986) and Elson, *Suing to Make Schools Effective, or How to Make a Bad Situation Worse: A Response to Ratner*, 63 TEX. L. REV. 889, 912-14 (1985).

62. For discussion of the importance of a neutral decider, see Redish and Marshall, *Adjudicatory Independence and the Values of Due Process*, 95 YALE L.J. 455 (1986) and L. TRIBE, *supra* note 10 at 744-49.

63. J. NOWACK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 484 (3rd ed. 1986).

had to be offered. By contrast, in *Goss* the Court held that prior to a short term suspension from school, a far more abbreviated form of due process would suffice — essentially that the student had to be told of the charges and, more or less on the spot, be given a chance to tell his side of the story in hopes of convincing the school official that the proposed suspension was uncalled for.<sup>64</sup> In *Horowitz* the Court concluded that even the informal in-person hearing required for short term school suspensions in *Goss* was unnecessary because the medical school in question (1) had given the plaintiff both notice that her poor performance was jeopardizing her academic future and an opportunity to prove herself through special oral and practice exams and (2) had taken the decision to exclude her through a fair internal decision-making process. In more recent cases, the Court has decided that, in a variety of settings, post-deprivation review of the governmental conduct would suffice; this is illustrated by *Ingraham* where the later opportunity to sue in tort for wrongful corporal punishment was held to afford pupils adequate due process.<sup>65</sup>

## 2. *The Cost-Benefit Calculus in Prior School Cases*

Although *Mathews* was yet to be decided, its formula was foreshadowed in *Goss*. Yet, in *Goss* the cost-benefit calculus did not present much of a problem to the majority. On the one hand, it seemed intuitively obvious that a little conversation with a pupil prior to his suspension could lead to a fewer errors; on the other, the Court thought this talk would not be costly either in terms of time or the school's authority relationship to its pupils. Since the *Goss* plaintiffs had not even been offered this minimal opportunity, and because the Court excluded consideration of longer suspensions, it did not face up to situations in which it would have to admit there are serious considerations on both sides of the cost-benefit scale. The dissenting justices, however, did foresee serious costs to the schools even from the informal consultation, in terms of both the burden of the "hearing" itself and the potential for judicial review of school officials' practices.

In neither *Ingraham* nor *Horowitz* did the Court have to say what was minimally required; rather it approved as constitutionally adequate what was voluntarily provided. In doing so, however, it decided that any additional process that plaintiffs demanded was not cost-benefit justified.

In *Horowitz*, the Court tried to make the cost-benefit issue seem easy. It

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64. See generally, Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 8451 (1978).

65. See generally L. TRIBE, *supra* note 10 at 673.

declined to order additional process, claiming that there would be costs in terms of educational relationships (making teachers and students into adversaries), but no gain in terms of accurate decision-making. While these conjectures may be right, the Court is by no means convincing. Whether a personal appearance before the decision-maker would improve accuracy depends on what is the precise standard for dismissal, something about which the Court was notably silent (perhaps because the defendants had no precise standard). And although it is imaginable that there would be harm to the teaching process by having administrators hear out students who are about to be academically dismissed, this is probably belied by experience at schools that grant informal hearings (and more). Anyway, what some consider a loss in changed teacher-student relations, others will consider a gain.

In *Ingraham* Justice Powell, for the majority, again tried to make the cost benefit calculus seem easy, although with even less success. He first tried to minimize the incidence of improper corporal punishment so as to establish that there was little opportunity for increased accuracy through the imposition of additional procedures. One important reason for the low incidence, according to Powell, is the deterrent effect of the child's tort right against teachers and other school officials for unreasonable corporal punishment. While this approach is fair enough as a general matter, the record in this case, as Justice White pointed out in his dissent, suggests that perhaps as many (or more) errors were being made in imposing corporal punishment than *Goss* showed were being made with respect to short term school suspensions.<sup>66</sup> Powell later admitted that paddling procedures like those required in *Goss* "might reduce that risk marginally"<sup>67</sup> but concluded that such gains are far outweighed by their costs.

As to costs, Powell first cited the time and attention of school officials, although the same claim was plainly not convincing in *Goss*. Assuming, as Powell did, that were the *Goss* procedures applied to corporal punishment this would involve a second school employee in the decision, Powell feared that if a teacher's proposed paddling were rejected this would undermine that teacher's ability to control the classroom. He also argued that the creation of a waiting period before corporal punishment is imposed would cause anxiety for those students who are going to be paddled even after the informal hearing. Once again, however, while these same two points can be made about suspensions, they were not persuasive in *Goss*. Moreover, surely we are not very sympathetic about protecting the classroom authority of teachers who, if they had been left to their own devices, would be

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66. 430 U.S. at 693.

67. 430 U.S. at 682.

committing torts against their pupils. Finally, Powell argued that imposing due process procedures in advance of paddling might force the abandonment of corporal punishment and the shift to other disciplinary measures. In one sense this is an argument on the other side; if corporal punishment is of so little value to school officials in terms of educational and disciplinary gains that they are unwilling to suffer the costs of simple prepaddling procedures, then this suggests that there is very little legitimate state interest in maintaining corporal punishment at all. On the other hand, although Powell is not very clear about it, it is relevant that teachers can well react to a requirement of consultation before paddling by shifting to other forms of punishment, including psychological mistreatment of children, that simply can not be policed by the school and might be worse for some children. In short, due process could create fallout that would involve costs for students of an indeterminate and potentially large amount. But, of course, that risk was equally true in *Goss*.

In sum, the Court fails to make a convincing showing why one should not assume, as was done in *Goss*, that a little conversation with the student before paddling will yield error reduction and dignity improvement at the cost of a very modest burden of the school. In the end, it seems to us that what mainly distinguishes the cases is not the analysis in *Ingraham* but the fact that Justice Stewart either changed his mind or somehow saw the cases differently (although he never gave an explanation of why), thereby giving the four *Goss* dissenters the one vote margin needed to carry the day in *Ingraham*. All of this is not to say that Stewart should not have changed sides or that *Ingraham* is necessarily wrong; rather, it shows that making the cost-benefit analysis contemplated by *Mathews* is by no means the easy matter that the majority in these cases suggests it is.

As we see it, in applying the *Mathews* test the justices first try to focus on just what is it that plaintiffs want that the school does not already provide. They then ask themselves whether, in view of what the school does provide, is it reasonable to impose the new requirement. In deciding that question they make an intuitive judgment that incorporates their own values together with what little empirical evidence might be available. Having made up their minds they take an advocacy stand in their opinions that tends to mask the difficulty of sensibly applying the *Mathews* test.

Lower federal court decisions concerning school sorting do not illuminate the application of the *Mathews* test much further. Since the constitutional development of procedural rights of handicapped students has been largely overtaken by specific federal legislation,<sup>68</sup> we will focus our

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68. Education For All Handicapped Children Act 20 U.S.C. § 1401 et seq. (P.L. 94-142). For pre-P.L. 94-142 analysis, see, Kirp, *supra* note 53 at 785-93.

attention elsewhere. In the migrant student case the court discussed how the district tried, on an individualized basis, to award appropriate credit for work done in other schools. Applying *Mathews* it said “[t]he court is at a loss to find any better method for transferring credits and grades. Student input would be of minimal value because students cannot possibly know the material to be taught and the courses offered at Groveland. . . . Moreover, any student dissatisfied with the school’s decision is given the opportunity to speak with the teacher and the guidance office about it. In this informal manner, the possibility of the school denying credit where credit is due, is very unlikely. . . . Indeed, requiring a formalized notice and hearing procedure would be attacking an ant of a problem with a cannon of relief.”<sup>69</sup> The court also made reference to evidence showing that students who did not arrive until well into the fall semester had, in general, been well treated in the past through the school’s effort to integrate them into its program. As in *Goss*, communicating individual decisions with reasons and providing a chance to object were seen as the heart of due process. But we really do not learn what minimal elements will suffice; more importantly, plaintiffs do not appear to have offered particular procedural alternatives for the court seriously to consider.

In the veterinary school admissions case the court held that due process was well satisfied when an impartial admissions committee provided the applicant with explanations as to why his academic performance was unsatisfactory in math and chemistry and granted him three special opportunities to present additional favorable information in support of his application. But the court did not make clear (nor did it have to) just how many of those elements were required by due process; and the plaintiff’s case, in the end, rested more on his claim that he was misled during a personal interview than on an assertion that some critical accuracy-enhancing process was omitted.<sup>70</sup>

As already indicated, the central element of due process that the court focused on in the Florida high school functional illiteracy test case was the giving of notice to students that this exam would become one of the requirements for graduation.<sup>71</sup> Unfortunately, the court is vague about what would be adequate notice, and is not attentive to the competing cost considerations. Perhaps this is because the notice requirement here does

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69. 474 F. Supp at 158.

70. 424 F. Supp. at 383.

71. 644 F.2d at 404. The court also concluded that the test would be unconstitutional if it “covered matters not taught in the schools” *Id.* for a discussion of the notice requirement in general, see L. TRIBE *supra* note 10 at 732-36.

not really go to accurate decision-making; rather it is a matter of fairness in the introduction of a new substantive requirement.<sup>72</sup>

### 3. *On Applying Mathews to School Sorting*

It should be evident that there are considerable pressures on school officials to adopt participatory procedures for students and their families quite apart from what the fourteenth amendment might require. Due process doctrine will only have bite, therefore, when the courts conclude that the school authorities have made an incorrect cost-benefit calculation. That might occur, of course, because of a genuine difference of opinion over where a fair-minded, public-spirited official should come out after balancing costs and benefits. If this were all there were to it, however, the courts would be expected to be especially deferential to administrators who, after all, have specialized expertise. The trouble is, of course, that there is reason to fear that officials might not weigh costs and benefits in a socially desirable way. Most importantly, their own self-interest may lead them to give more weight to a cost or less to a benefit than the informed public would give.

We have shown in our earlier policy analysis how officials, because of burdens they would face (e.g., less power and increased duties), may seek to resist what the public would consider socially desirable disclosure practices. Although this resistance was seen as a strike against the wisdom of political reform, judicial reform through appeals to constitutional norms is another thing. Indeed, the central role for due process doctrine may be seen to be that of imposing communications and public participation obligations on officials in just those circumstances where those officials are probably able to act upon interests that sharply conflict with public interests (provided, of course, that those conflicts can be identified). Structurally, those circumstances are probably more likely where the officials preside over agencies and institutions that tend to deal with more dependent, and politically and economically less powerful people — such as welfare bureaucracies, prison and mental hospital authorities, and probably to a lesser extent, public schools (especially large schools serving children of the poor).

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72. For a discussion of other procedures that might be required to assure fair competency testing, see *Testing the Tests*, *supra* note 39 at 617-25. See also McClung, *Competency Testing Programs: Legal and Educational Issues*, 47 *FORDHAM L. REV.* 651, 703 (1979): "Competency testing programs obviously involve typical or explicit decisions about performance objectives and educational goals, and these in turn have important implications not only for curriculum and instruction but also for other school practices such as grouping and discipline. Given the crucial importance of these decisions, a model program should provide for representative community-based participation in the decision making process."

One important implication of this analysis must be kept in mind, however. Just as officials might seek to block the political adoption of communication and participation requirements or to engage in foot-dragging in the face of attempted administrative reforms along those lines, so too they are apt to take steps to frustrate the implementation of court-ordered due process guarantees. In order to try to avoid this outcome, courts may either have to employ simple and readily identified procedures so that noncompliance is easily determined or else have to engage in continued monitoring until such time as the imposed reforms have become standard operating procedures of the agency in question.

Turning now to the application of these ideas to our problem, we concede at the outset that our earlier policy analysis showed how difficult it is to make a convincing cost-benefit analysis of a proposed disclosure concerning school sorting, and the impossibility of making one that is value neutral. Even if we restrict ourselves to the exercise of discretion in individual cases and then focus on whether disclosure can efficiently improve the accuracy of sorting decisions, the cost-benefit calculus is very difficult. As a result, and consistent with what we have earlier suggested that courts do, we think that a judge asked to apply *Mathews* to school sorting would resort to a combination of intuition and his or her own values in deciding what process is due. One thing this means is that there is an obvious role for effective legal advocacy.

Of course, the judge would be influenced by the Supreme Court's discussions in the three leading procedural due process cases in the schooling area. However, while they provide some general guidelines, the actual cases are not very helpful. The escape hatch of the possibility of a tort suit, which solved the Court's problem of what to do about corporal punishment in *Ingraham*, will not be available for the sorting decisions that have concerned us. *Goss*, too, is importantly different. Clearly, the direct goal of short term suspensions is to get the student immediately out of school for a few days. This importance of speedy action helps explain why a brief informal presuspension hearing makes sense. For the sorting decisions we have considered, however, time is rarely of the same essence. Therefore, the state's interest in having a summary and prompt process is less.

*Horowitz* and some of the lower court cases tell us that when what is at stake is an academic decision on the student's record, judges ordinarily believe that additional student or family input is unlikely to improve the decision. Once a case is so categorized, an in-person hearing (formal or informal) probably will not be required; nor will the decision have to be reviewed by anyone other than the professional assigned by the school to make the decision.

However, many sorting decisions we have considered involve deter-



minations with respect to which students and families clearly can contribute relevant information. This is by definition true for grade promotions if they, in reality, are a decision subject to parental veto. It is also true for school transfer decisions if they are to turn on child care needs, parental work convenience, or even gross clashes between the child and the current school teachers. Even decisions about which math or English classes a seventh grader should enter could benefit from family input; after all, parents might have knowledge about why the child does not do well on certain kinds of tests or that he was ill the day a key test was given, and parents might have special insight into the psychological impact on the child of being placed in one track or another. Even assignment to the next year's elementary school teacher, if based upon a judgment about the child's personality or peers, can plainly benefit from parental input.

Moreover, as we have seen, improving accuracy is not only a matter of having pupils and their parents contribute new knowledge. In addition, careless, invidious or arbitrary decision-making can be checked, and accuracy thereby increased, by disclosure to parents that simply makes the decider appreciate that he is in the limelight. In short, an official who has to go on the line with an explanation for his conduct may be more careful. This important point seems largely overlooked in the court decisions we have reviewed in the schooling area. Indeed, better individual decision-making may well occur even if there are no official channels available to the parents or students to challenge the explanation provided.

Recognizing the somewhat speculative nature of the predictions to be made, as well as the value laden nature of the costs and benefits involved, and assuming in each instance that the threshold due process test is surmounted, we anticipate that advocates of disclosure would be able, under the *Mathews v. Eldridge* formula, to make the following reasonably strong arguments for individualized communication and participation:

- (1) Anytime a child is placed in a course or classroom on the basis of ability, the school should be required to notify in writing the family of that placement and to give an explanation for it. (It would be more difficult to show that an official forum should also be provided in which parents can at least advance their objection to, if not formally contest, such decision.)
- (2) Before a school proposes to have a child repeat a grade, the family should be notified of this prospect in writing and given an opportunity to provide input; if a retention is actually proposed, the family should be provided in writing with an explanation for the proposal and a statement, assuming this is the school policy, to the effect that the ultimate decision to repeat or not is up to the parents.

- (3) Parents of children who are continuing on to the next grade in an elementary school should be told to which teacher the child was assigned, and, along with that, be provided written information about the alternatives available, the criteria employed, and the process used in making the assignment of their child to the next year's teacher. If family preference is one of the criteria, that should be invited in writing in advance. (It would be more difficult to show that an individual explanation for their child's assignment should be offered, and that an official forum for receiving objections to the assignment should be provided. That amount of individualization plainly raises the spectre of greatly increased costs to the school quite apart from dollar costs. However, those costs could be judged quite differently depending on how one felt about things such as whether it is good to keep secret those judgments made about children which, if released, might negatively affect both their own aspirations and the perceptions of their new teachers.)
- (4) A family seeking to have its child's teacher or school changed during the year should be provided with a written explanation of the criteria and process that is used for making and deciding upon such requests, afforded an opportunity to present its case, not necessarily in person, and, if its request is denied, provided with a written explanation.
- (5) Finally, schools should provide in writing to families a copy of the class schedules that are finally arranged for and by their children, together with (as appropriate) the rules of the high school arena scheduling system (including whether teachers can refuse individual access to their class other than by officially announced prerequisites) and in junior high, the rules governing the selection of electives.

It is important to emphasize that the participation and communication procedures just described, even though individualized, typically are not in the "fair hearing" mode that is typical of traditional due process. Greater informality is envisioned, less emphasis is given to a one-time resolution of an issue through a self-contained decisional event, and, in general, the adversarial aspects of due process are downplayed. But, of course, as we have seen in *Goss* itself, the courts are receptive to innovative due process requirements in the school setting that emphasize consultation. Moreover, consistent with the flexibility permitted by *Goss*, the procedures just suggested seem to us to be responsive to the long-term teachings of Professor

Joel Handler, who has studied procedural reform in a wide variety of social service organizations, including schools.<sup>73</sup>

Will arguments for these sorts of compelled disclosure be convincing? That will depend we think, in part, on how effective the lawyers are, and, in part, on the circumstances of any case that is actually litigated. People are not likely to go to court over these matters unless they are angry with the school or district about something. If the dispute comes about because of an incident in which an error (or abuse) was probably made (as in *Goss*), the psychology of the case will be with plaintiffs far more than if the authorities seem to have acted quite properly on the merits (as in *Horowitz*). This reality of the legal rule for all turning on the idiosyncrasy of which case happens along may be disquieting to policy analysts, but it is what case-by-case judicial decision-making has always been about. Besides, although cases of first impression can cast long shadows, if the first case is an eccentricity, the courts have shown themselves able to avoid or even overrule precedent countless times in the past.

In any event, the prime advocacy job will be to demonstrate in the detail why specific new procedures/information should improve decision-making and that the burden on the school should be viewed as small. What this means, of course, is that just as the courts try to make the cost-benefit calculus seem easy in their opinions, the challenge to the advocates

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73. See, e.g., J. HANDLER, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY* (1986), J. HANDLER, *PROTECTING THE SOCIAL SERVICE CLIENT: LEGAL AND STRUCTURAL CONTROLS ON OFFICIAL DISCRETION* (1979), and Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479 (1966).

We recognize that Professor Jerry Mashaw has expressed serious reservations about whether the sorts of individualized communication we propose will improve official decision-making. That is, he has doubts whether such rights (formal or informal) will actually be used effectively to police the system. Instead, he sees more promise to lie with internal bureaucratic measures (quality control programs, audits, staff training, etc.). See Mashaw, *The Management Side of Due Process*, 59 CORNELL L. REV. 772 (1974). We have earlier conceded that disclosure is but one way, and perhaps not the most effective way, to control official discretion. It is being offered, however, in the absence of evidence that school systems do much with management techniques of the sort Mashaw suggests.

Mashaw has written thoughtfully about alternative models of administrative justice that he terms bureaucratic rationality, professional treatment, and moral judgment. Mashaw, *Conflict and Cooperation Among Models of Administrative Justice*, 1981 DUKE L. J. 181. He shows how these models, as applied, for example, to Social Security disability decisions would imply quite different procedures, and that the differing images of each model can be found in various due process decisions, thus leading both to ambiguity and perhaps unwise judicially created requirements. What is quite unclear, however, is which model appropriately applies to school sorting decisions, or indeed whether but a single model applies to all of them.

For some empirical evidence and a discussion about the inconsistency of school sorting decisions and the arbitrary nature of those decisions, see Potter, Ysseldyke, Regan and Algozzine, *Eligibility and Classification Decisions in Educational Settings: Issuing "Passports" in a State in Confusion*, 8 CONTEMP. EDUC. PSYCHOLOGY 146 (1983).

is to try to show them how to see the case in a light that makes it look reasonably easy.

*E. An Alternative Approach to Due Process: Requiring the Announcement of Rules with Ascertainable Standards*

As we have said a number of times already, the Supreme Court's procedural due process jurisprudence is concerned primarily with individual decisions. This ties together due process doctrine and disclosure of individualized information.

But suppose all that the claimant seeks, or all that policy analysis justifies, is the disclosure of general information to parents and students at large. We believe that there is another, if undeveloped, branch of procedural due process that is applicable to this objective. This approach argues that the due process clause of the fourteenth amendment requires state and local agencies, in appropriate circumstances, to adopt and announce rules containing ascertainable standards.

In a nutshell the argument is that when government has not specified the criteria that will govern its decisions and the procedures by which those decisions are made, it is acting, or is so likely to act, in an arbitrary way as to violate the fundamental notions of fairness implied by due process.

Although this theory is not especially well developed in either judicial opinions or the legal literature, there is strong support for it in the writings of Professor Kenneth Davis and in a few cases, particularly *Holmes v. New York City Housing Authority*.<sup>74</sup> In *Holmes* the plaintiffs complained that the Housing Authority accepted applications, that each year some of those applicants were given public housing and others were not, and that no one understood why. The Second Circuit, in effect, concluded that the Housing Authority was acting lawlessly and in violation of due process by not having adopted and announced regular application procedures and criteria for deciding who gets into public housing. In short, the opinion asserted that the agency was required to promulgate and follow rules that govern its actions.<sup>75</sup>

Notice that *Holmes'* theory does not impose procedures on administrative bodies when adopting rules. For example, under the Administrative Procedure Act federal agencies announce that they are going to engage in rule-making; they announce proposed rules; they receive

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74. 398 F.2d 262 (2d Cir. 1968).

75. As Davis sees it, the goal of due process in these circumstances is not to eliminate all discretion, for that would be undesirable and probably impossible. Rather the objective is "(a) to eliminate unnecessary discretion, (b) to preserve necessary discretion and (c) to provide appropriate control of the exercise of discretion." K. DAVIS, *ADMINISTRATIVE LAW* Vol. 2 187 (2nd ed. 1979).

public comments on the proposals; they consider those comments; and then they adopt final rules, at the same time explaining what the public comments were and to what extent they were accepted or rejected and why. There are arguments for the idea that rule-making procedures like this are constitutionally required by due process. This would mean, among other things, that an agency would have to provide justifications for its substantive decision-making criteria and associated procedures. Be that as it may, that is not what *Holmes* demands, and we put the issue aside here. Instead, we will concentrate on the call for the adoption and disclosure of the rules themselves.

Applied, for example, to the assignment of pupils to teachers in elementary schools, due process would thus force schools or school districts to announce generally what the assignment criteria are and what procedures are used in implementing those criteria.

There is not a great deal more to be said here about this theory. As Davis concedes, the contours of the doctrines are undeveloped and its precise source is murky. Apart from Davis' interesting discussion,<sup>76</sup> we have found little else that has been written on the theory.

Given the limited experience with the *Holmes* doctrine, it is difficult to predict just how well it might be received when attempted in the school sorting area. For one thing, it is not clear what, if any, arguments might successfully be put forward by agencies seeking to have it declared inapplicable to them. Professor Davis is a believer in the inevitable necessity of the exercise of official discretion, and he appreciates the need for informal decision making. Nonetheless, he also sees great promise in the expansion of the *Holmes* doctrine and its application to all sorts of informal administrative processes. If he is right, then surely school sorting is a promising candidate.

One final point must be appreciated, however. To the extent that *Holmes* leads to the disclosure of rules with ascertainable standards, it contains the seeds for the dramatic expansion of claims for individual due process rights — because upon the *Holmes*-prompted disclosures, legitimate individual expectations will, inevitably be built.<sup>77</sup>

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76. *Id.* at 128-140.

77. A yet additional approach to due process that might be raised with respect to certain school sorting rules is that they impermissibly, irrebuttably presume something about a student that the student or his family should be entitled to demonstrate is false. This approach seeks to force individualized determinations where the schools are attempting to rely upon rules of thumb. Although this sort of attack on governmental practices has had occasional part success, for example, in *Jiminez v. Weinberger*, 417 U.S. 628 (1974), the so-called "irrebuttable presumption" doctrine is now plainly in disfavor with the Supreme Court, as made clear in *Weinberger v. Salfi*, 422 U.S. 749 (1975). This disfavor seems to explain best most of the sports participation cases discussed earlier. There, the real

## Conclusion

Our empirical research has demonstrated that school officials provide little formal disclosure about school sorting practices to the families of students. We have, however, identified several social benefits that such disclosure might achieve, and we have developed a framework for analyzing whether those benefits are likely to exceed their costs.

Recognizing that costs and benefits may vary both from community to community and from one specific kind of disclosure to another, we have illustrated how our framework might be applied — specifically to the matter of allocating children among elementary school teachers at the same grade level. By identifying numerous distinct disclosure alternatives (such as general or child specific, and various levels or depths of possible disclosures within each) and by paying attention to likely behavioral responses to the disclosure by both parents and school officials, we showed how to identify the most promising disclosure options.

We also explored the likelihood that judges might order school sorting disclosure pursuant to the commands of the due process clause of the fourteenth amendment. We conclude that, although there are some legal obstacles in the way of those who would urge the increased involvement of the judiciary in school sorting practices, the doctrinal seeds have already been sown for an expanded judicial role (beyond, for example, disciplinary decisions and decisions concerning the education of the handicapped). Prospects are greatest where the sorting decisions in question are readily subject to discretionary abuse or neglect and where the consequences of the wrong decision are potentially severe. Prospects also seem fairly strong for requiring authorities to announce school sorting rules with reasonably ascertainable standards.

Were the judiciary to become more actively involved in school sorting,

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nub of the complaint seems to have been that the firm rule that a student, say, had to attend a school for a year before playing interscholastic athletics unfairly excluded the plaintiff when his reason for changing schools was not the one the rule was based upon (e.g., to prevent competitive recruiting). Recognizing, however, that rules by their nature are often over inclusive, courts have been very reluctant to go down a doctrinal path that would generally block the use of rules of thumb and the many advantages they bring. In the sports participation situation, for example, an individualized approach might be not only costly and frequently inaccurate, but it would invite controversy over individual cases that could be very harmful to interscholastic athletics generally. Thus, it seems to us that something very special about the group bearing the burden of the over-inclusivity, together with the clear feasibility of employing individualized determinations instead, are required before the courts will seriously entertain deciding that due process requires such determinations. Hence, that *Jiminez* involved illegitimate children and would only require Social Security administrators to make dependency decisions of the sort they routinely make, helps to explain the application of the doctrine there but not in *Salfi*, where the children who would have benefited were not illegitimate and the Social Security administrators would have had to make determinations about the motives underlying their mothers' recent marriage to their newly deceased step-fathers.

its function would be to press for socially desirable procedural safeguards — in the form of public communication and participation — that school officials have been unwilling to undertake voluntarily. Of course, determining whether certain procedures are socially desirable requires the courts to have some confidence that they can engage in sensible cost-benefit analysis. Our framework, therefore, ought to be illuminating to the judiciary as well.

Our preferred approach, however, is that the judges, at least for the time being, stay out of this matter and that, instead, local schools and school districts (perhaps pushed or enticed by the state or federal government funding) engage in serious and substantial experiments with school sorting disclosure. Through such experiments we could learn far more about whether or not the net social benefits we predicted in our illustrative analysis for various kinds of disclosure can actually be realized.

To be sure, if school officials resist experimentation, or, even more importantly, if experiments show good results but the successful practices are not widely adopted, then courts may well be necessary to break the logjam. If so, courts should pay special attention to the net balance of benefits and costs that is likely to be achieved in the communities that would be affected by their rulings. In a way, this is naturally achieved by having local trial judges (often federal district court judges) apply the *Mathews v. Eldridge* cost-benefit formula with the advantage of their on-the-ground insights into the circumstances and values of the communities over which their authority extends. Although the result could be expected to be (beyond certain minimums) differing procedural requirements in different places, this sort of federalism and flexibility is consistent with not only the Supreme Court's approach in *Goss* but also our policy analysis.

