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Doubting Thomasville's Ability-Grouping Program: *Holton v. City of Thomasville School District*

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I. INTRODUCTION

The summer of 2007 was an active season for education cases in the United States federal court system. While the Supreme Court heard several cases related to freedom of speech and school race issues,[1] the United States Court of Appeals for the Eleventh Circuit heard its own case, *Holton v. City of Thomasville School District*,[2] in which the court examined the City of Thomasville School District's ("the School District")

1. The Supreme Court held 5-4 in favor of a public school principal who prevented a student from displaying a banner with the phrase "BONG HiTS 4 JESUS" at a function attended by other students. Morse v. Frederick, 127 S. Ct. 2618, 2622, 2629 (2007). The Court held that public schools do not violate students' First Amendment rights when acting to protect those under their care from speech that can reasonably be regarded as encouraging illegal drug use. *Id.* at 2629. In another 5-4 decision, the Court held that a school district's voluntary racial integration program cannot use racial classification as its sole classification mechanism. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2760 (2007).

2. 490 F.3d 1257 (11th Cir. 2007) (per curiam).

ability-grouping program.[3] The court held that the School District's program was neither intentionally discriminatory nor the result of prior de jure segregation by the district.[4] The Eleventh Circuit's decision extends the line of cases allowing school districts great deference in the implementation and continuation of their academic programs. This includes programs that result in racially imbalanced school populations, so long as the programs are neither the remnants of past de jure segregation nor the result of present intentional discrimination.

II. FACTUAL BACKGROUND

The year 2007 marked the second time in two years that the City of Thomasville School District appeared before the Eleventh Circuit to justify its educational programs amid claims of racial discrimination.[5] The sole remaining issue on appeal in *Holton v. City of Thomasville School District* (*Holton II*)[6] was the legality of the School District's policy of ability grouping.[7] The Eleventh Circuit previously addressed the other aspects of the original order by the United States District Court for the Middle District of Georgia in 2005.[8] A review of the district court's decision, and that of the Eleventh Circuit in *Holton v. City of Thomasville School District* (*Holton I*),[9] provides relevant background for understanding the Eleventh Circuit Court's holding in *Holton II*. A brief introduction to the concept of ability grouping prefaces this discussion.

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3. *Id.* at 1259. Ability grouping is a method used by school systems to place students on different learning tracks based upon the students' perceived ability to learn. In theory, the programs are designed to create a learning environment in which slower students can learn at a slower pace and therefore not become overwhelmed, while students with a greater ability to learn will be challenged so that they do not become bored by a slower pace of learning. Hobson v. Hansen, 269 F. Supp. 401, 443-45 (D.D.C. 1967).

4. *Holton II*, 490 F.3d at 1263.

5. *See* Holton v. City of Thomasville Sch. Dist. (*Holton II*), 490 F.3d 1257 (11th Cir. 2007) (per curiam); Holton v. City of Thomasville Sch. Dist. (*Holton I*), 425 F.3d 1325 (11th Cir. 2005). An initial determination of liability was never made against the City of Thomasville School District; therefore, the School District never operated under judicial oversight concerning its prior de jure segregated system. Thomas County Branch of the NAACP v. City of Thomasville Sch. Dist., 299 F. Supp. 2d 1340, 1342 & n.2 (M.D. Ga. 2004).

6. 490 F.3d 1257 (11th Cir. 2007) (per curiam).

7. *Id.* at 1259.

8. *Holton I*, 425 F.3d at 1328.

9. 425 F.3d 1325 (11th Cir. 2005).

A. *Ability Grouping*

Ability grouping, also known as tracking, is a well-established, albeit controversial mechanism used in school districts throughout the United States.[10] The basis for an ability-grouping system is to classify students within a school based upon a perception of their ability to learn.[11] The concept revolves around the theory that different students learn at different levels. According to this theory, students should be placed on different tracks that allow each student to learn at the appropriate level.[12] Under such a plan, students on either end of the spectrum would benefit by learning at the proper pace.[13] Specifically, the policy underlying tracking is that brighter students need to be intellectually challenged so that they do not become bored and lazy, while underperforming students require a more remedial approach so that they do not struggle through a curriculum they cannot comprehend, potentially resulting in frustration and depression.[14]

The topic of whether ability grouping is an effective tool to accomplish this goal has been widely debated in the legal and educational communities.[15] Opponents cite a growing achievement gap between those on higher and lower tracks.[16] Indeed, at least one recent study proffered the use of detracking to close these gaps, stating that "[a]chievement follows from opportunities—opportunities that tracking denies."[17] A number of studies have also called attention to the fact that low-income and minority students are disproportionately placed in lower tracks.[18] While a handful of cases have held ability-grouping programs to be unconstitutional, the basis for these decisions has rested largely on

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10. STUART BIEGEL, EDUCATION AND THE LAW 353 (2006) ("In the public schools today, a large percentage of students continue to be separated out from their peers either for programmatic reasons or on the basis of perceived ability.").

11. Hobson v. Hansen, 269 F. Supp. 401, 444 (D.D.C. 1967).

12. *Id.*

13. *Id.* at 444-45.

14. *Id.*

15. *See, e.g.*, KEVIN G. WELNER, LEGAL RIGHTS, LOCAL WRONGS: WHEN COMMUNITY CONTROL COLLIDES WITH EDUCATIONAL EQUALITY (2001); JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY (2d ed. 2005).

16. Carol Corbett Burris & Kevin G. Welner, *Closing the Achievement Gap by Detracking*, PHI DELTA KAPPAN, Apr. 2005, at 594.

17. *Id.* at 598.

18. *See, e.g.*, Note, *Teaching Inequality: The Problem of Public School Tracking*, 102 HARV. L. REV. 1318 (1989).

findings that the school systems' policies were based on underlying intentional discrimination.[19]

B. District Court's Initial Findings

The Thomas County Branch of the National Association for the Advancement of Colored People (the "NAACP") filed suit on behalf of African-American students enrolled at public elementary, middle, and high schools within the City of Thomasville School District. The plaintiffs alleged that the school system failed to uphold its constitutional obligation to dismantle its formerly de jure segregated system and was operating a segregated public school system in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution[20] and Title VI of the Federal Civil Rights Act of 1964.[21] The plaintiffs sought judicial supervision of the School District's desegregation efforts.[22] The district court, however, found that while racial imbalances existed in several areas of the School District, these imbalances were not traceable to the system's prior de jure segregation and were not the result of intentional discrimination on the part of the School District.[23]

The City of Thomasville School District operated a de jure racially segregated school system at the time of the United States Supreme Court's seminal 1954 decision in *Brown v. Board of Education*[24] and continued to operate a racially segregated school system until 1965.[25] The School District then implemented several desegregation plans resulting in more racially balanced schools. The School District's first plan, a freedom-of-choice plan allowing parents to choose the school their children would attend, failed to racially balance the School District. However, the School District's subsequent school assignment plan was successful, reorganizing student attendance zones to create racially balanced schools across the School District. By the late 1970s, though, demographic factors had ushered in the reemergence of several identifiable racially imbalanced schools within the School District, especially at the elementary school level.[26] Following a lengthy

19. *See* McNeal v. Tate County Sch. Dist., 508 F.2d 1017 (5th Cir. 1975); *Hobson*, 269 F. Supp. 401.

20. U.S. CONST. amend. XIV, § 1.

21. 42 U.S.C. §§ 2000d to 2000d-7 (2000); *Thomas County Branch of the NAACP*, 299 F. Supp. 2d at 1342.

22. *Thomas County Branch of the NAACP*, 299 F. Supp. 2d at 1342.

23. *Id.* at 1367.

24. 347 U.S. 483 (1954).

25. *Thomas County Branch of the NAACP*, 299 F. Supp. 2d at 1352.

26. *Id.* at 1352-57.

discussion regarding the racial imbalances among schools within the district and an application of the factors set out in *Green v. County School Board*,[27] the district court found that the School District had carried its burden of proving that the racial imbalances were not traceable to the School District's previous de jure segregated system.[28]

The specific plan at issue in the present case—whether the School District's use of ability grouping was discriminatory—also passed scrutiny at the district court level.[29] The School District had operated some form of an ability-grouping program since the end of its de jure segregation.[30] Under the plan at issue, the students were grouped at several stages during their time in the public school system. First, students in kindergarten and elementary school were grouped based on perceived abilities and actual performance. Second, middle school students were placed into classes based upon a combination of factors that included standardized test scores and teacher recommendations. Third, high school students were given the ability to choose their own classes under the guidance of teachers, counselors, and parents.[31]

The district court found that "'a disproportionate number of low income children (most of whom happen to be black) are placed in the lower ability groups' and tend to remain in these lower tracks throughout their academic careers."[32] The racial disparity among classes in the Thomasville School District was determined by the district court to be a result of the impoverished conditions the students faced, including the absence of a positive and supportive background that is crucial in preparing students to learn.[33] The district court commented that "'[w]hen the racial makeup of a community correlates directly with poverty and when poverty correlates with perceived academic readiness, as it does in Thomasville, "this ability tracking" inevitably leads to

27. 391 U.S. 430 (1968). In *Green* the United States Supreme Court held that the New Kent County, Virginia school system had not complied with the Court's mandate to desegregate the school system because the school district's freedom-of-choice plan had not accomplished racial integration within the district. *Id.* at 441. The Court provided a list of factors to guide lower courts in determining whether a school district had effectively dismantled its segregated system. *Id.* The factors included student assignment, faculty, staff, transportation, extracurricular activities, and facilities. *Id.*

28. *Thomas County Branch of the NAACP*, 299 F. Supp. 2d at 1367.

29. *Id.* at 1358.

30. *Holton II*, 490 F.3d at 1259.

31. *Id.*

32. *Id.* at 1260 (quoting *Thomas County Branch of the NAACP*, 299 F. Supp. 2d at 1358).

33. *Id.* (citing *Thomas County Branch of the NAACP*, 299 F. Supp. 2d at 1358).

ability groups that are racially imbalanced.'"[34] The district court ruled that "it was not the intention of the [School District's] tracking system to segregate students based upon race" and that the School District did not manipulate the tracking system to track students based upon race.[35] The district court expressed no opinion on whether the disparity in educational opportunity between poor children and wealthier children would create a cause of action.[36] "No matter how tempted the [district c]ourt may be to intervene and attempt to 'fix the system,' a court is ill-equipped for such a task. Moreover, it does not have the authority to act as a super-school board or social scientist . . . ."[37] According to the district court, the court's function is to remedy violations of federal law, and there is no provision mandating that "poor children be guaranteed a high quality education."[38]

C. Holton I

In *Holton I*, the Eleventh Circuit Court of Appeals affirmed each aspect of the district court's order with the exception of the findings of fact and conclusions of law relating to the School District's ability-grouping program.[39] In remanding that aspect of the district court's order, the Eleventh Circuit agreed with the appellants that the district court failed to properly apply the standard established in *McNeal v. Tate County School District*.[40] The *McNeal* standard allows a school district to implement an ability-grouping program, even when there is a segregative effect on the school population, so long as the "assignment method is not based on the present results of past segregation or will remedy such results through better educational opportunities" for those discriminated against.[41]

While ability-grouping programs may create racial imbalances within classrooms, employing these programs is not necessarily per se unconstitutional.[42] Indeed, school systems may implement ability

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34. *Id.* at 1260 n.4 (brackets in original) (quoting *Thomas County Branch of the NAACP*, 299 F. Supp. 2d at 1359).

35. *Thomas County Branch of the NAACP*, 299 F. Supp. 2d at 1359.

36. *Id.* at 1368 n.31.

37. *Id.* at 1368.

38. *Id.*

39. *Holton I*, 425 F.3d at 1328.

40. *Id.* at 1347-48; 508 F.2d 1017 (5th Cir. 1975).

41. *McNeal*, 508 F.2d at 1020. The Eleventh Circuit adopted as precedent the decisions rendered by the former Fifth Circuit prior to October 1, 1981. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (5th Cir. Nov. 1981) (en banc).

42. *Holton I*, 425 F.3d at 1346-47 (quoting Castaneda v. Pickard, 648 F.2d 989, 994 (5th Cir. Unit A June 1981)).

grouping, even if the policy results in some segregation, "so long . . . as such a practice is genuinely motivated by educational concerns and not discriminatory motives."[43] While educators are best suited to resolve the question of whether a policy is more beneficial than detrimental to students, the question of whether the policy is constitutional is one for the courts to decide.[44] The court must determine whether a district's ability-grouping program is based on the present results of past discrimination or whether it will remedy those results.[45] Here, the district court failed to properly conduct this inquiry.[46] "Because '[p]roper resolution of any desegregation case turns on a careful assessment of its facts,'"[47] the Eleventh Circuit ordered the district court to reconsider the School District's ability-grouping program in light of the *McNeal* standard.[48]

D. District Court on Remand

On remand, the district court conceded that it had failed to properly and completely apply the *McNeal* standard.[49] The court made additional findings of fact and reapplied the *McNeal* standard as directed by the Eleventh Circuit.[50] The district court determined that (1) the racial imbalances in the school system were the result of the School District's ability-grouping program; (2) the children were placed in academic tracks based upon their perceived ability; and (3) this perceived ability was based upon the students' "impoverished circumstances more than anything else and was certainly not traceable to the *de jure* segregated school system."[51] Also, the district court found that no child attending a school in the City of Thomasville School District at the time of the trial had ever been enrolled in the School District's previous de jure segregated system. Furthermore, the court found that the achievement level of the black students in the certified class who were placed in lower ability groups was not the result of the School District's prior de jure segregation.[52]

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43. *Castaneda*, 648 F.2d at 996.
44. *Holton I*, 425 F.3d at 1347.
45. *Id.*
46. *Id.* at 1347-48.
47. *Id.* at 1348 (brackets in original) (quoting Freeman v. Pitts, 503 U.S. 467, 474 (1992)).
48. *Id.* at 1328.
49. *Holton II*, 490 F.3d at 1260.
50. *Id.* at 1260-61.
51. *Id.* at 1260.
52. *Id.* at 1261.

E. *Holton II*

The Eleventh Circuit affirmed the decision of the district court following remand of the case, holding that the School District's ability-grouping program did not intentionally discriminate against African-American students and that a student's "lesser-perceived ability" was not the result of racial discrimination by the School District, but rather resulted from that student's poverty.[53] Accordingly, the conditions which led to the racial imbalance in the School District were not the present results of past de jure segregation.[54] The court held that the School District's use of an ability-grouping plan was not, therefore, a violation of the students' constitutional rights.[55]

III. LEGAL BACKGROUND

A. *Historically Significant Case Law*

The *Holton* cases have their roots in a long line of caselaw beginning with the United States Supreme Court's decision in *Brown v. Board of Education* (*Brown I*).[56] In *Brown I*, the Court overruled *Plessy v. Ferguson*,[57] holding the "separate but equal" doctrine to be irreconcilable with the Fourteenth Amendment.[58] The Court in *Brown I* declared that "in the field of public education the doctrine of 'separate but equal' has no place."[59] The Court held that the "segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive[s] the children of the minority group of equal educational opportunities," and is therefore in violation of the Fourteenth Amendment's guarantee of equal protection.[60]

After having identified the constitutional violation at issue, one year later in *Brown v. Board of Education* (*Brown II*),[61] the Court undertook the more challenging task of providing guidance to local school districts

53. *Id.* at 1263. The court does not define the term "poverty" in its opinion.
54. *Id.*
55. *Id.*
56. 347 U.S. 483 (1954).
57. 163 U.S. 537 (1896).
58. *Brown I*, 347 U.S. at 495.
59. *Id.*
60. *Id.* at 493.
61. 349 U.S. 294 (1955).

about how to implement the ruling from *Brown I*.[62] Impatient with the lack of action taken in the year after *Brown I* and less concerned with the importance of local control of public schools than with desegregation of these schools, the Court placed greater authority in the hands of the lower courts to fashion remedies that would desegregate the schools.[63] The Court, however, provided only minimal guidance to the lower courts on how the mandate from *Brown I* should be accomplished.[64] The Court stated, "In fashioning and effectuating the decrees [of *Brown I*], the courts will be guided by equitable principles," and the courts should issue such orders and decrees that are "necessary and proper to admit [students] to public schools on a racially nondiscriminatory basis."[65] The only time constraint placed on local school officials was the instruction that they were to desegregate their school systems "*with all deliberate speed.*"[66] Many school officials and politicians used this vague guidance to delay the implementation of the widely unpopular desegregation policies.[67]

Concerned with the lack of progress by school systems across the country, Congress in 1964 passed the Civil Rights Act.[68] Title VI of the Civil Rights Act specifically addresses racial discrimination in federally assisted school systems.[69] The Supreme Court also criticized the lack of progress by local school districts by stating in the same year that "'the time for mere "deliberate speed" has run out.'"[70] The Court restated this conclusion four years later in *Green v. County School Board*[71] and held that delays in dismantling segregated systems were no longer tolerable because the principles established in *Brown I* and *II* were no longer new and novel.[72] School boards were given the burden to "come forward with a plan [to desegregate their school systems] that promises realistically to work, and promises realistically to work now."[73] In *Green* the Court provided a list of factors to guide lower courts in

62. Thomas County Branch of the NAACP v. City of Thomasville Sch. Dist., 299 F. Supp. 2d 1340, 1345 (M.D. Ga. 2004).
63. *Id.*
64. *Id.*
65. *Brown II*, 349 U.S. at 300-01.
66. *Id.* at 301 (emphasis added).
67. *Thomas County Branch of the NAACP*, 299 F. Supp. 2d at 1345.
68. 42 U.S.C. §§ 2000d to 2000d-7 (2000).
69. *Id.* § 2000d; *Thomas County Branch of the NAACP*, 299 F. Supp. 2d at 1347.
70. *Thomas County Branch of the NAACP*, 299 F. Supp. 2d at 1347 (quoting Griffin v. County Sch. Bd., 377 U.S. 218, 234 (1964)).
71. 391 U.S. 430 (1968).
72. *See id.* at 438.
73. *Id.* at 439.

determining whether a school district had effectively dismantled its formerly segregated system.[74] These factors included student assignment, faculty, staff, transportation, extracurricular activities, and facilities.[75]

In *Swann v. Charlotte-Mecklenburg Board of Education*,[76] the Court provided more specific guidance to lower courts and local school boards, setting forth specific criteria designed to build upon the factors established in *Green*.[77] In *Swann* the Court stated that the key objective was to "eliminate from the public schools all vestiges of state-imposed segregation."[78] If school officials failed to take affirmative steps to eliminate segregation "'root and branch,'" judicial intervention would be appropriate.[79] The Court also clarified that its mandate to desegregate schools does not require that every school in every community reflect the racial composition of the school system as a whole or that school systems have a duty to remedy racial prejudice unrelated to the prior acts of the de jure segregated school system itself.[80]

Two additional cases from the United States Supreme Court, *Keyes v. School District No. 1*[81] and *Freeman v. Pitts*,[82] further addressed current racial imbalances in school systems. The first case established what is known as the *Keyes* presumption: if a school board has intentionally engaged in segregation in the past, any present segregation within the system is presumed to be a result of that intentional segregation—a presumption that the local school board bears the burden of overcoming.[83] The Court in *Keyes* also acknowledged the challenge of deciding whether present racial imbalances were traceable to a district's prior intentional segregation or whether the imbalances were the result of factors outside the control of the district.[84] While the Court rejected the notion that "remoteness in time has any relevance to the issue of intent," it did recognize that "at some point in time the relationship between past segregative acts and present segregation may become so

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74. *Id.* at 435; *see supra* text accompanying note 27.

75. *Thomas County Branch of the NAACP*, 299 F. Supp. 2d at 1347 n.10 (citing *Green*, 391 U.S. at 435). "These factors have become commonly known as the '*Green* factors.'" *Id.*

76. 402 U.S. 1 (1971).

77. *Thomas County Branch of the NAACP*, 299 F. Supp. 2d at 1348.

78. *Swann*, 402 U.S. at 15.

79. *Id.* (quoting *Green*, 391 U.S. at 438).

80. *Id.* at 23-24.

81. 413 U.S. 189 (1973).

82. 503 U.S. 467 (1992).

83. *Thomas County Branch of the NAACP*, 299 F. Supp. 2d at 1350-51 (citing *Keyes*, 413 U.S. at 208, 211).

84. *Id.* at 1351.

attenuated as to be incapable of supporting a finding of de jure segregation warranting judicial intervention."[85]

The second case, *Freeman*, stands for the proposition that a school district need not satisfy all of the *Green* factors before it will be released from judicial supervision under each of the factors.[86] The Court held that the end goal of judicial supervision is to return the school district to local control when the district has shown a good faith effort in remedying its past de jure segregation and where any remaining racial imbalances are not the result of district policies.[87] When appropriate, partial relinquishment of control by the court can accomplish this goal by removing supervision over areas in which the district has complied, freeing up resources to focus on remedying the other areas still in question.[88] At the time of the decision in *Freeman*, the DeKalb County School System had become more racially imbalanced than when judicial supervision was ordered in 1969.[89] However, the district was ultimately freed from judicial control because the Court held that the school district's racial imbalances were the result of demographic factors, not vestiges of the formerly segregated system, and that the school system had acted in good faith to remedy the effects of its past de jure segregation.[90]

B. The Legal Framework Applicable to Holton II

A school district's obligation is to eliminate the vestiges of its prior discrimination to the extent possible.[91] Once a plaintiff shows "that current racial imbalances exist within a school system, '[t]he burden then shifts to the school district to demonstrate that the racial imbalances are not the result of its present or past discriminatory action.'"[92] The school district must show that any current racial imbalance is not the result of the prior de jure segregated system.[93] If the school district can demonstrate that the racial imbalances within the system are "'substantially caused'" by demographic or other external factors outside

85. *Keyes*, 413 U.S. at 210-11.
86. *Freeman*, 503 U.S. at 490-91.
87. *Id.* at 491-92.
88. *Id.* at 493.
89. *Id.* at 475-77.
90. Mills v. Freeman, 942 F. Supp. 1449, 1456-64 (N.D. Ga. 1996).
91. Holton v. City of Thomasville Sch. Dist. (*Holton II*), 490 F.3d 1257, 1261 (11th Cir. 2007) (per curiam) (citing Holton v. City of Thomasville Sch. Dist. (*Holton I*), 425 F.3d 1325, 1337 (11th Cir. 2005)).
92. *Id.* (brackets in original) (internal quotation marks omitted) (quoting *Holton I*, 425 F.3d at 1338).
93. *Id.* (quoting *Freeman*, 503 U.S. at 494).

the school system's control, the district will overcome the presumption that segregative intent, past or present, is the cause.[94] There will therefore be no constitutional violation.[95] The school district is only required to prove that the demographic factors are a substantial cause for the racial imbalances in the district, rather than the sole cause.[96] The plaintiff, on the other hand, must show that the demographic shifts are in some way connected to the district's prior de jure segregation or to other discriminatory conduct by the district to maintain the presumption that the district's policies are the cause of the current racial imbalances.[97]

While ability-grouping programs may have the effect of creating racial imbalances within a school district, these programs are not per se unconstitutional.[98] Ability-grouping programs will be permissible so long as they satisfy the *McNeal* standard.[99] The segregative effect of the assignment method must not be based on present results of past segregation, or the program must remedy the effects of past discrimination through better educational opportunities for the adversely affected students.[100]

IV. COURT'S RATIONALE

The Eleventh Circuit affirmed the district court's decision, holding there was no reversible error.[101] The court issued a per curiam opinion, with Chief Judge Edmondson and Circuit Judge Tjoflat joined by Circuit Judge John R. Gibson of the Eighth Circuit sitting by designation.[102]

In addressing whether the School District's ability-grouping plan was lawful, the court held that the district court did not clearly err in finding that the racial imbalances that existed in the School Districts's ability-grouping program were the result of demographic factors (such as poverty) and not the present effects of prior de jure segregation or any

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94. *Id.* at 1261-62 (quoting *Holton I*, 425 F.3d at 1339).

95. *Id.* at 1261.

96. *Id.* at 1262 n.7 (citing *Holton I*, 425 F.3d at 1339).

97. *Id.* (citing *Holton I*, 425 F.3d at 1339).

98. *Id.* at 1262 (citing *Holton I*, 425 F.3d at 1346).

99. *Id.* (citing *Holton I*, 425 F.3d at 1347).

100. *Id.* (citing *Holton I*, 425 F.3d at 1347). The district court did not address, nor did the parties argue, whether the ability-grouping program in the City of Thomasville School District intended to remedy the effects of past segregation by providing better educational opportunities for African-American students within the district. *Id.* at 1262 n.8.

101. Holton v. City of Thomasville Sch. Dist. (*Holton II*), 490 F.3d 1257, 1259 (11th Cir. 2007) (per curiam).

102. *Id.*

current intentional discrimination by the School District.[103] The Eleventh Circuit concluded that the district court (1) correctly applied the *McNeal* standard and (2) complied with the court's order to make additional findings in light of this standard.[104]

The court of appeals further held that on remand, the district court correctly and fully applied the *McNeal* standard by asking whether the School District's method of assignment through its ability-grouping program was based upon the present results of past de jure segregation.[105] The district court found that the Thomasville School District based its ability grouping on the perceived abilities of the students, and the lesser-perceived ability of black students in the School District was based more upon impoverished conditions than anything.[106] Furthermore, as applied to the students in the certified class who were placed in lower achievement groups, the placement of these students was not a result of prior de jure segregation by the School District.[107] Because the district court correctly applied the *McNeal* standard, the Eleventh Circuit granted substantial deference to the district court's findings under the clear-error standard.[108]

While Thomasville's ability-grouping program has the effect of creating racial imbalances in the School District by placing lower-income black students in lower tracks, the court held that this in itself does not create a constitutional violation.[109] According to the court, the plaintiffs failed to preserve the presumption that these effects were the result of prior de jure segregation on the part of the School District because they did not show "that either these students' lesser-perceived abilities or their impoverished circumstances are 'the result of the prior *de jure* segregation or some other discriminatory conduct [on the part of the School District].'"[110]

The plaintiffs' main argument was that the School District's ability-grouping program intentionally discriminated against black students and that racial disparities within the program itself, as well as demographic factors, caused the racial imbalance within the School District's

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103. *Id.* at 1262.
104. *Id.* at 1261.
105. *Id.* at 1262.
106. *Id.*
107. *Id.*
108. *Id.* (citing NAACP, Jacksonville Branch v. Duval County Sch., 273 F.3d 960, 965 (11th Cir. 2001)).
109. *Id.*
110. *Id.* at 1263 (quoting Holton v. City of Thomasville Sch. Dist. (*Holton I*), 425 F.3d 1325, 1339 (11th Cir. 2005)).

classrooms.[111] The Eleventh Circuit was not persuaded by the evidence offered by the plaintiffs on this point. Rather, the court held the evidence in the record supported the district court's findings that (1) the School District's ability-grouping program did not intentionally discriminate against black students and (2) a student's lesser-perceived ability was not the result of racial discrimination but instead resulted from that student's poverty.[112] As such, the conditions which led to the racial imbalance in the School District "were not the present results of past *de jure* segregation."[113]

The School District offered persuasive evidence to support the conclusion that "the placement of students [in the School District] correlates to their perceived abilities and that socio-economic status is a strong determinant of a student's academic ability."[114] The School District also presented compelling evidence that the program's assignment method was based upon the student's perceived abilities as well as teachers' perceptions of the student's past and present classroom performance.[115] This methodology lessens the chance for intentionally discriminatory placement by allowing students several avenues to advance to a higher group. The School District also presented expert testimony which suggested a high correlation between poverty and academic ability.[116] This evidence further supported the School District's position that the racial imbalances caused by the program were not intentional. The Eleventh Circuit concluded that the district court's findings on remand were not clearly erroneous and therefore affirmed the district court's judgment in favor of the City of Thomasville School District.[117]

V. IMPLICATIONS

The decision in this case is familiar territory for the State of Georgia. The 1992 decision in favor of the DeKalb County School System in *Freeman v. Pitts*[118] was a landmark decision that cleared the way for school districts across the state and the nation to free themselves from federally-mandated desegregation orders even where racial imbalances remained within the school district.

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111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 1263 n.13.
116. *Id.*
117. *Id.* at 1263.
118. 503 U.S. 467 (1992).

More recently, in 2007 the Bibb County School District emerged from its long-standing court-supervised desegregation order—more than fifty years after *Brown I* was decided.[119] Bibb County, like Thomasville, continues to face racial imbalances within its school district due to demographic factors outside the control of the school board. As these cases demonstrate, school systems will be allowed to operate districts that contain what can amount to racially segregated schools and classrooms so long as the racial imbalances are not the present result of a district's past de jure segregation or renewed intentional discrimination on the part of the current system.

The *Holton* decisions reaffirm that even at the individual school level, there can be racial imbalances within the classroom that do not trigger judicial intervention.[120] As *Holton II* clarified, demographic factors such as socioeconomic patterns may cause racial imbalances within school districts.[121] In fact, situations of this nature occur with frequency across the country as socioeconomic conditions significantly affect a student's preparedness to learn and thus guide school district decisions on the best academic program for that student. Consequently, racially imbalanced classrooms are created and perpetuated. As the Eleventh Circuit has repeatedly held, these districts are not acting unconstitutionally.[122] So long as the socioeconomic differences exist and track along racial lines, school systems that exhibit racial imbalances will continue to experience racial divides in the classroom. These racial and economic disparities will trap many students in schools where their academic needs are not met, and will ultimately result in these students never realizing their full potential.[123] Nor will these students realize the immeasurable benefits to be gained from learning in an integrated, multicultural classroom setting.

Furthermore, the ability-grouping programs may aggravate the racial imbalances by widening the student achievement gap along economic and, therefore, racial lines. Students placed in higher ability groups are likely to enjoy superior resources including better faculty and greater community and parent involvement than those students placed in the lower tracks. This problem is further exacerbated if children are not

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119. Adams v. Bd. of Pub. Educ., No. 5:63-CV-1926 (WDO), 2007 WL 841945 (M.D. Ga. Mar. 20, 2007) (slip copy).

120. *See* Holton v. City of Thomasville Sch. Dist. (*Holton II*), 490 F.3d 1257 (11th Cir. 2007) (per curiam); Holton v. City of Thomasville Sch. Dist. (*Holton I*), 425 F.3d 1325 (11th Cir. 2005).

121. 490 F.3d at 1261-62.

122. *Holton II*, 490 F.3d 1257; *Holton I*, 425 F.3d 1325.

123. Thomas County Branch of the NAACP v. City of Thomasville Sch. Dist., 299 F. Supp. 2d 1340, 1368 (M.D. Ga. 2004).

reevaluated or otherwise allowed to easily move to a higher track. When this does not occur, the "die is cast" as early as kindergarten, and the children will remain on the lower track throughout their academic careers, absent parental involvement to induce change.[124]

In its opinion in *Holton II*, the Eleventh Circuit relied on *Freeman* for the notion that "'[a]s the *de jure* violation becomes more remote in time and demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system.'"[125] This quote encapsulates the notion that the further in time our nation is removed from the era of de jure segregation, the less likely it is that courts will find school districts to have committed a constitutional violation based on present effects of prior discrimination. It is therefore likely that for a court to strike down a school district's ability-grouping plan, the court will have to find intentional discrimination by the district or elements of the plan that restrict the movement of students between tracks. Thus, it becomes critical that children are allowed to move to higher tracks. Otherwise it will be difficult to provide equal educational opportunities for all children and to break the cycle of impoverished economic conditions leading to lower academic ability. Furthermore, school districts must ensure that the students in lower ability groups receive the same quality and quantity of resources as those in higher groups to help these students learn beyond their perceived ability and the constraints of their impoverished conditions. Educators must strive to prevent students from becoming mired in lower tracks by constantly seeking to push the children toward higher academic achievement.

The recent line of cases beginning with *Keyes* and *Freeman* and continuing through *Holton II*, combined with measures such as the No Child Left Behind Act,[126] signal a shift from a judicial remedy to a legislative remedy. Under this framework, the solutions for a high quality education for all students will not likely be the result of a judge or of a court, but rather the solutions will result from the focus and work of legislatures, local school boards, superintendents, and communities. Advocates for children who are placed on lower tracks, regardless of racial or socioeconomic background, should therefore focus their efforts on working within the school system and not outside of it.

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124. *Id.* at 1358.

125. *Holton II*, 490 F.3d at 1263 n.14 (brackets in original) (quoting *Freeman*, 503 U.S. at 496).

126. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in scattered sections of 20 U.S.C.).

As Chief Justice Earl Warren famously stated more than fifty years ago, "education is perhaps the most important function of state and local governments."[127] Without question, this remains true today. Moreover, our nation's school districts should "strive to teach that our strength comes from people of different races, creeds, and cultures" as our nation fulfills its moral and ethical obligation of "creating an integrated society that ensures equal opportunity for all its children."[128] So long as a child's socioeconomic condition is a prominent factor in determining the child's potential ability to learn—whether an accurate indicator or not—conditions outside the control of the school district will continue to create racial imbalances within schools. And to the extent that lower-income and minority students are placed and remain within lower tracks, it is unlikely that the cycle will be broken, absent concerted efforts on the part of the school district, teachers, parents, and the community to help lesser-performing students move up the academic ladder.

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127. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

128. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2788, 2797 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

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