



THE COMMONWEALTH EDUCATIONAL POLICY INSTITUTE

CENTER FOR PUBLIC POLICY - L. DOUGLAS WILDER SCHOOL OF GOVERNMENT AND PUBLIC AFFAIRS

CEPI Education Law Newsletter

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DECEMBER 2010: Vol. 9-4

EQUAL EDUCATIONAL OPPORTUNITIES: EMERGING ISSUES**Overview**

The United States Supreme Court made it perfectly clear in Brown v. Board of Education (1954) that education “where the state has undertaken to provide it, is a right which must be made available to all on equal terms.” In the several decades immediately following Brown (1954), the Supreme Court and the courts below it (federal and state) were very busy dismantling the doctrine of “separate but equal.” Coupled with an emerging and escalating children’s rights movement, the post-Brown (1954) decades produced a comprehensive transformation in education law and policy. As Professor Charles Russo so eloquently states, “[b]eginning with school desegregation and culminating in the Civil Rights Movement, *Brown* spawned an era of equal educational opportunities by heightening consciousness for protecting the rights of other disenfranchised groups, most notably women and students with disabilities.” (Russo, 2008)

Post- Brown: The Changing Landscape. Suffice it to say, the 1960’s, 70’s, 80’s, and 90’s, produced an avalanche of court decisions dealing with a variety of education-related issues (e.g., student discipline, ability grouping, school finance, gender equity, special education, standardized testing). These court decisions plus the subsequent passage of statutory law, both federal and state, opened public schoolhouse doors (i.e., created equal access) to all children of school age—no matter what their race, disability, national origin, gender, socio-economic class, homeless condition, or immigration status. It was from this era of rapid social and educational change that the following legal principle emerged, a principle that still forms the very foundation upon which policy making in contemporary public school systems rests: No child of school age shall be arbitrarily, or capriciously, or in any way discriminatorily denied equal access to appropriate and meaningful educational opportunities (academic, extra-curricular, and social). (Vacca and Bosher, 2008)

Emerging Challenges

As public education moved through the 1990’s and into the 2000’s, public education moved through a period of major reform in which local school officials, administrators, and classroom teachers, faced new challenges as community demographics began to rapidly shift and parent and student populations became more diverse. Coupled with a reluctance of many judges to remain actively involved in school desegregation cases

post-Oklahoma City Public Schools v. Dowell (1991), new curricular approaches and teaching methodologies were implemented to: (a) promote diversity in schools, (b) narrow a rapidly growing achievement gap, and (c) reduce a growing student drop-out rate.

To meet emerging challenges, while maintaining “integrated and diverse school environments,” public school systems fashioned creative and more flexible approaches to school system organizational patterns (breaking free of a strict attendance zone model) and, at the same time, increased efforts to establish and expand non-traditional curricular offerings were implemented. In addition to strengthening academic programs and career and technical offerings, school systems across the country established *theme-based secondary schools* (e.g., arts and drama, communications, science and mathematics, leadership, engineering and technology, military); *special purpose academies* (e.g., at risk students); *gender specific schools and programs* (all female or all male); *special education alternative schools and programs* (e.g., students with autism), and *charter schools*. In other parts of the country local public school systems entered into contractual arrangements with private companies—in which the private company provides specialized programs and services within the public school district (e.g., programs and schools for *at risk students*, and programs and schools for students categorized as *chronic disciplinary problems*).

At the same time, a growing number of public school systems (urban, suburban, and rural) experienced an influx of students with limited *English language proficiency*. Where small English as a second language (ESL) classes once existed, whole programs grew to accommodate a rapidly growing population.

Equal Educational Opportunities: Emerging Issues: 2010-2011

Several important lessons were learned during the post-Brown (1954) era one of which is that *equal educational opportunity* is not synonymous with *same educational opportunity*. To put it another way, local school officials, administrators, classroom teachers, and other school system personnel discovered that curricular offerings, programs, and related services must be tailored to meet the diverse and unique needs of students and their parents. To provide every student with “the same” was not the key to establishing access to meaningful educational opportunities. The path was moving public education forward in an individual child (student) oriented direction.

As my colleague Professor Boshier and I have concluded, based on our research, today’s goal is for states and their local school districts to provide an *appropriate educational opportunity* for all children of school age (based on a unique needs model)—an opportunity that “ensures basic, minimal quality education for each child.” (Vacca and Boshier, 2008) At the same time, however, we are beginning to see new legal and policy issues replace old ones as evidenced by a growing demand for special purpose (alternative) schools and curricular programs—schools and programs that place some children of school age outside the mainstream of the school system’s general student population.

Related Case Law

Recently, I came across an interesting court decision from the United States Court of Appeals for the Eighth Circuit. Decided on August 25, 2010, Mumid v. Abraham Lincoln High School (8th Cir. 2010) involved a federal district court action brought by thirteen former students at an alternative high school (Abraham Lincoln High School) for immigrant students.

Facts. Abraham Lincoln High School (ALHS) served students age 14 years-old and older who recently arrived in the United States. Approximately two-thirds of the student body had reached the age of 18. Almost all of the students at ALHS were refugees and a majority of the students received services as English Language Learners (ELL). In 2004-2005 the entire student body received ELL services.

All thirteen plaintiffs in the Mumid case were from either Somalia or Ethiopia; all had lived in Kenyan refugee camps before coming to the United States; all were between the ages of 14 to 20 years-old when they arrived in the United States; and all had little to no formal education and had limited facility with English. All plaintiffs attended ALHS between 1999 and 2006; five of them graduated from ALHS after fulfilling, or being excused from, State graduation requirements; and, eight never graduated because they were not able to pass the required statewide examinations (Minnesota Basic Skills Tests [MBST]). ALHS permitted several of the plaintiffs to remain enrolled beyond the age of 21, even though the State discontinued public funding for students who reached that age.

In early 2005, a group of ALHS students (including some of the thirteen plaintiffs) filed a complaint with the Minnesota Department of Education (MDOE) in which they alleged that ALHS was not adequately meeting their educational needs. MDOE investigated and found that the school was failing to provide adequate educational services in several ways. In their findings MDOE said that: (1) it was highly probable that that ALHS missed the identification of numerous special education students, (2) ALHS students who took the MBST had a 17% passage rate, compared to a statewide passage rate of approximately 40% of all ELL students, and (3) ALHS had an unusually high number of students “age out,” *i.e.*, reach age 21 without graduating from high school. MDOE also stated that the school district misunderstood the law regarding special education testing (*e.g.*, the identification of students with learning disabilities and students with limited English proficiency should not be excluded from testing and services for students with special education needs). The School District did not evaluate ELL students until they had been in the school system for three years. MDOE also faulted the District and ALHS for violating Minnesota law by failing to develop remediation plans for students who had not yet passed one or more MBST’s at least two years before their anticipated graduation.

MDOE prescribed a series of corrective plans. On April 4, 2007, MDOE declared that the District had completed the “required course of corrective action.”

Federal District Court Decision. In 2005, a complaint was filed based in part on the MDOE report and findings. Later amended in 2006, Ibrahim Mumid and twelve of his former schoolmates filed suit against the Institute for New Americans (which operated Abraham Lincoln High School under a contract with the Minneapolis Public Schools) and Special School District No. 1 of the Minneapolis Public Schools. In their complaint the students alleged violations of the Equal Educational Opportunities Act (EEOA), 20 U.S.C. 1701-1758; Title VI, CRA of 1964, 42 U.S.C.2000d; and the Minnesota Human Rights Act (MHRA), 363A.13. In 2008, the federal district court granted summary judgment to defendants on all counts. Mumid v. Abraham Lincoln High School, (D.Minn. 2008) Plaintiffs appealed to the Eighth Circuit.

Eighth Circuit Opinion and Decision. The appellate court first looked at Title VI where plaintiffs alleged that ALHS and the District discriminated against them based on their national origin. Here plaintiffs claimed that defendants (1) provided them with a substandard curriculum and program, and (2) failed to offer timely special education testing and services. To support claim number (1) they argued that ALHS provided fewer educational and extra-curricular opportunities for them as compared to those available to students in other area high schools. Here plaintiffs pointed to statements made in an INA self assessment such as “the need to offer arts and sports as well as more specialized services” is also important to help recent immigrants better integrate into American

society. Plaintiffs also emphasized that ALHS did not offer programs for gifted students or vocational education. Regarding claim (2) they argued that school system policy of not testing ELL students for learning disabilities or other special education needs until they had been in the system for three years constituted unlawful discrimination.

Regarding Title IV the Eighth Circuit held that plaintiffs failed to show the existence of any pretext for discrimination. Title IV, said The Court, prohibits only “intentional discrimination,” and no evidence of that exists in this case. While the delayed testing might show a *prima facie* case of discrimination, (1) eleven of the thirteen students failed to present evidence that they suffered any injury from the policy, and (2) regarding the other two students the school system offered a legitimate reason for the testing policy—namely, that “it did not believe that it could reliably assess whether a student needed special education services until the student had been in this country long enough to learn English.

In its rationale the Court made a distinction between the terms national “origin” and “language.” Thus, because Title IV prohibits discrimination on the basis on “national origin” the Court opined that a school board policy that treats students of limited English proficiency different from other students in the school district does not facially discriminate based on national origin. Plaintiffs’ contentions that: (1) providing them with different programming was evidence of discrimination, and (2) comparable students at other high schools were more favorably treated failed to pass judicial muster. The Court also focused on the fact that because ALHS now operated as an independent charter school (Lincoln International High School [LIHS]), and has no contractual relationship with the Minneapolis Schools, the school system has no authority over LIHS.

Following a comprehensive discussion including quoting directly from the Equal Educational Opportunities Act (1974) and specifically citing Brown V. Board of Education (1954), the Eighth Circuit affirmed the district court holding that “neither injunctive relief nor monetary damages are available to these plaintiffs.” In the Court’s view plaintiffs lacked standing to seek injunctive relief. Regarding monetary damages the appellate court opined that such relief is not available unless Congress has expressly indicated it. The law does not specifically mention monetary damages. Under EEOA (1974) because the very purpose of that statute is “to specify *appropriate remedies* for the orderly removal of the vestiges of the dual school system...,” one must first look at “equitable remedies” to correct a denial of educational opportunities..

The judgment of the district court was affirmed.

Policy Implications

As public education moves through the 2010-2011 school year three things are very clear. First, the population of students in classrooms across this nation is more racially, ethnically, and culturally diverse than ever predicted. Second, there is a growing academic achievement gap between and among students from differing racial, ethnic, and cultural environments. Third, the number of students with special needs (especially students with limited English proficiency), many of whom are at risk of failure and dropping out of school, is rapidly expanding beyond the boundaries of traditionally accepted categories and labels.

What public school officials, administrators and teachers have come to realize and experience first hand, is a stark realization that educational reform must take a different path. Old issues are either disappearing or morphing into new forms; and, what confounds the situation is that new issues are springing to life on a daily basis. Old remedies (e.g., busing, merging school buildings, relying on percentages to mix student populations)

will no longer suffice and often work at cross purposes with what needs to be done for a growing number of kids with special and unique needs.

As local school systems work to redesign existing academic and extra-curricular offerings and, at the same time, establish, implement, and support alternative schools and programs to meet student needs, legal challenges are inevitable—especially challenges where allegations of resegregation are put forth. Thus, it is critical that local school boards (with input from principals, staff, parents, and community leaders) work closely with legal counsel to reexamine existing school system policies and formulate new policies designed to widen access to appropriate and meaningful educational opportunities for all children. While Mumid v. Abraham Lincoln High School (8th Cir. 2010) is but one case in one jurisdiction it is nonetheless instructive. What follow are some implications for policy gleaned from that decision. Local school system policies must make it clear that:

- All students have equal access to appropriate, adequate, and meaningful educational opportunities.
- All curricular offerings and non-curricular offerings (social, cultural, athletic) are established, designed, implemented, and maintained with the specific purpose of creating an educational environment in every school conducive to effective teaching and learning.
- School administrators, classroom teachers, and other staff members work to identify, accommodate, and provide for the individual needs and learning styles of each student.
- While a principal goal of the school system is to keep each student on pace and together with his/her age-appropriate peers in the mainstream of the school environment, special and alternative schools, program settings, and services are established, designed, implemented, and maintained for the specific purpose of providing for the unique interests and needs of individual students—especially those students who are at risk of failure and dropping out of school, and/or students who need intensive remediation and special help.
- Sustained efforts are made to keep parents and guardians fully informed of their child’s progress in school, and parents and guardians are actively involved in all major decisions involving their child’s education.

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Note: The views expressed in this commentary are those of the author.