VIRGINIA COMMONWEALTH UNIVERSITY
VCU L. Douglas Wilder School of Government and Public Affairs

THE COMMONWEALTH EDUCATIONAL POLICY INSTITUTE
AN INSTITUTE IN THE CENTER FOR PUBLIC POLICY

CEPI Education Law Newsletter

Dr. Richard S. Vacca, Editor; Senior Fellow, CEPI

JANUARY 2015: Vol. 13-5

STUDENT ADMISSION & SCHOOL ASSIGNMENT 2014: POLICY IMPLICATIONS

Overview

Suffice it to say, today's public elementary and secondary school enrollments are far different from those in existence in the days of Horace Mann and the early days of his notion of the "common school." Beginning in the late 1850s and moving through the early 1900s, mainly as a result of the immigration of people from Europe, this country's public school enrollments grew and changed in composition. Almost a century later, following the United States Supreme Court's landmark decision in Brown v. Board of Education (1954), public school enrollments once again became more socially and ethnically diverse as the desegregation movement moved forward. In the mid-1970s public school enrollments once again experienced significant change as federal statutory law and court decisions required equal access to a free and appropriate education for all children with educational disabilities. Beginning in the mid-1970s and up to the present, public school enrollments have experienced another period of rapid social change as increasing numbers of families from Asia and Latin America immigrated to the United States and moved into communities across this country.

While over the past several years local school system policies dealing with student eligibility to attend local public schools and the criteria for assignment to individual schools have experienced major reevaluation, what has not changed?

Student Eligibility Requirements and School Assignment Criteria

As the United States Supreme Court opined in Brown v. Board of Education (1954), "Today, education is perhaps the most important function of state and local governments….Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." However, almost two decades later, in San Antonio I.S.D. v. Rodriquez (1973), the Supreme Court narrowed the scope of that right when it added that education "is not among the rights afforded explicit protection under the Federal Constitution. Nor do we find any

basis for saying it is implicitly so protected." The constitutional analysis turned toward the specific language contained in each state's constitution and education code. (Vacca and Bosher, 2012)

Public Education as a Right. While today's public school enrollments (elementary and secondary schools) are more diverse than ever before in race, ethnicity, and nationality, the right to attend a public school is *not absolute*. As a matter of state law, local school boards retain legal authority to decide what children are legally eligible to attend the schools in their school district. As a general rule, and subject to reasonable requirements and regulations such as school age, bona fide residence requirements and valid immunizations, all children have a *conditional right* to attend public schools in the community where they live.

While the constitutional and legal authority to provide a tuition-free, tax-supported public elementary and secondary education for all children of school age vests at the state level, courts have consistently held that within the bounds of state constitutional and statutory law local school boards possess considerable discretion to determine both the admissibility and assignment of students to particular schools within the local school district boundaries. At the same time, however, courts have consistently held that local school board authority also must be exercised in compliance with federal constitutional and statutory law (*e.g*., FERPA, McKinney-Vento Homeless Assistance Act; Rehabilitation Act of 1973, Section 504; Individuals with Disabilities Education Act). (Vacca and Bosher, 2012)

Recent Developments. This past November President Obama announced an executive order establishing a new national policy which may allow approximately five million unauthorized immigrants who have lived in this country for at least five years, and who are parents of U.S. citizens and legal residents, to remain in the country temporarily, without the threat of deportation. While the size of the population of unauthorized adult immigrants in this country differs from state to state the link between children, public schools, and the new policy is clear. Research shows that "about 4.5 million U.S. citizen children have at least one unauthorized immigrant parent." (Compass Point, November 18, 2014, citing PEW Hispanic Center research) As my coauthor and esteemed colleague the late Dr. Bill Bosher succinctly reminded us, "the impact [of the Obama executive order] on K-12 education may be limited since states and local communities have been required to provide K-12 education to all children of proper age regardless of immigrant status." (Compass Point, November 18, 2014) While I concur with my late colleague, there are and continue to be impact areas (*e.g*., larger E.S.L. classes, expanded community and parent outreach programs) in public school districts across the country. To lay a foundation for our joint opinions it is necessary to briefly look back at and review three United States Supreme Court decisions. Portions of the following discussion are taken directly from our text, LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS, Eighth Edition, 2012), Chapter 9.

Judicial Benchmarks

A class action, Lau v. Nichols (1974) was originally brought in federal district court by parents of non-English speaking (Chinese) students in the San Francisco public schools. In their law suit the parents sought relief claiming that school officials were responsible for their children's "unequal

educational opportunities" by failing to provide courses in the English language, which they alleged violated equal protection under the Fourteenth Amendment.
At the time of the lawsuit The California Education Code (which compelled school attendance of children between the ages of six and sixteen years) mandated that "English shall be the basic language of instruction in the schools." School districts were permitted to determine under the circumstances that "instruction may be given bilingually." And, it was the policy of the state to insure "the mastery of English by all pupils in the schools." Moreover, the law specified that no pupil shall receive a diploma of graduation from grade twelve who has not met the standards of proficiency in English.

While the United States Court of Appeals for the Ninth Circuit held that the school officials did not contribute to any advantages or disadvantages experienced by students, the United States Supreme Court disagreed. Title IV of the Civil Rights Act of 1964, said the Court, bars discrimination which has that effect "even though no purposeful design is present." In effect, said Justice Douglas for the Court, the Chinese-speaking minority receive fewer benefits than the English-speaking majority,…"which denies them a meaningful opportunity to participate in the educational program…." "There is no equality merely by providing students with the same facilities, textbooks, teachers and curriculum…. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful."

Almost a decade later in Plyler v. Doe (1982), a Texas case, questions of Fourteenth Amendment equal protection and the treatment of "undocumented (not legally admitted) school-age children" of alien parents came before the Supreme Court. At the heart of this case was a Texas statute that withheld from local school districts state funds for the education of "undocumented alien children." A revision of the same statute authorized the exclusion of such children (*i.e.*, deny enrollment) from an educational opportunity.

While acknowledging that public education "is not a right under the United States Constitution," the Court opined that because undocumented alien children are "persons" under the law they are entitled to *equal protection* under the Fourteenth Amendment. Emphasizing the importance of education and specifically the ability to read and write (literacy), and the potential impact on an individual's social, economic, intellectual, and psychological wellbeing, the Court concluded that the Texas law imposed a lifetime hardship on a class of children not accountable for their disabling condition and as such the statute could not be enforced. As Professor Bosher and I concluded from our analysis of the Court's rationale, why cause school age children to suffer the deprivation of an educational opportunity solely because of their parents' undocumented immigration status?

Martinez v. Bynum (1982), another Texas case, focused the high court's attention on elements of *residence* and *domicile* in determining a child's eligibility to attend a public school. More specifically, the state statute at issue involved a residency requirement governing minors, ages five years to twenty-one years, who wish to attend public free schools in the district where he/she resides, or in which their parent, or guardian, or other person having lawful control of him/her resides, at the time of application for admission to school. While a child is living apart from their parent or other lawful guardian, said the statute, a local board must see proof that receiving a "tuition-free education" was not the *sole reason* for the child living in the school district. The

requirement applied to children moving from one Texas school district to another, children moving into Texas from other states, and to children moving into Texas from other countries.

The young man in this case (Roberto) was born in Texas in 1961. His parents, who were Mexican citizens, moved to Mexico where they lived until1977. That year Roberto moved back to Texas to live with his sister so that he could attend public school there. His sister, who functioned as his legal guardian, did not intend to legally adopt him. Roberto was denied a tuition-free education under the Texas statute's residency requirement. Subsequently, a federal district court ruled that the State of Texas possessed a legitimate interest in providing, protecting, and preserving the quality of its school system for bona fide residents, a decision that was affirmed by the United States Court of Appeals for the Fifth Circuit.

The United States Supreme Court granted certiorari where the Court focused and elaborated on the meaning of the term *bona fide residence*. Generally speaking and according to context, said the Court, "residence generally requires both physical presence and an intention to remain." In the Court's view, "at the very least, a school district generally would be justified in requiring school-age children or their parents to satisfy the traditional, basic residence requirement—i.e., to live in the district with a bona fide intention of remaining there—before treating them as residents." The statute in question, "…grants the benefits of residency to all who satisfy the traditional requirements. The statute goes further and extends these benefits to many children even if they (or their families) do not intend to remain in the district indefinitely. As long as the child is not living in the district for the sole purpose of attending school, he satisfies the statutory test…." Thus, the Texas residency requirement satisfies constitutional requirements. The Fifth Circuit was affirmed.

Policy Implications

Suffice it to say, the student population (elementary and secondary) in our nation's local public school systems (rural, suburban, and urban) is now and continues to grow in diversity. In many communities, what was once the majority student population is now the minority population, while in other communities what was once the predominant minority population is being replaced by a new and growing minority. At the same time a corollary phenomenon involves public school student enrollments shrinking in some communities and growing in others—leaving some school buildings empty while others are beyond capacity. Thus, the policy implications involving all aspects of today's local school system maintenance and operation continue to grow in complexity. Over the years following the Supreme Court's decisions in Lau (1974), Plyler (1982), and Martinez (1982), local school boards realized that policies once appropriate and applicable to students, especially (but not limited to) student attendance eligibility and school assignment, had to be reexamined and new policies developed and implemented. What follows are some changes in policy implemented over the past four decades that are still in effect.

In the 2014-2015 school year, local school boards must continue to make it clear that:

- All school age children (as defined in state statutory law), who reside within the boundaries of the school system, are eligible to enroll in and attend a public school located within the boundaries of the school system where they live.

- Parents, guardians, or other persons having control or charge of a school age child shall be responsible for enrolling their child in a public school or another educational setting meeting the requirements specified in state statutory law.
- The Board and its administrative staff, in concert with other appropriate community agencies, shall endeavor to provide community outreach programs in an effort to disseminate information covering such matters as student eligibility criteria, school enrollment and assignment procedures, school building locations, curricular and program options, educational services (e.g., ESL classes), and programs for parents and guardians—especially parents and guardians moving into the community from other countries.
- The Board and its administrative staff, with the assistance and cooperation of appropriate community agencies and local media outlets, shall strive to communicate all information (*e.g.,* student enrollment requirements, curriculum options, student academic expectations and progress) in the native language of parents and guardians.
- Parental involvement in their child's education and progress in school shall be encouraged.
- The school curriculum, including all supplemental services and extra-curricular activities, and student disciplinary policies, shall be the subject of continuous review to keep pace with changes in the community's multicultural demographics.
- The Board will continue to provide professional development programs in multicultural awareness for all administrators, teachers, and other staff.

Resources Cited

Brown v. Board of Education, 347 U.S. 483 (1954)

Compass Point, CEPI (November 18, 2014)

Lau v. Nichols, 414 U.S. 563 (1974)

Martinez v. Bynum, 461 U.S. 321 (1982)

Plyler v. Doe, 457 U.S. 202 (1982)

San Antonio I.S.D. v. Rodriguez, 411 U.S. 1 (1973)

R.S. Vacca and Bosher, William C. Jr., LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS, 8TH Ed. (LexisNexis, 2012)

Richard S. Vacca
Senior Fellow CEPI

Note: The views expressed in this commentary are those of the author. **Special Note:** This commentary is dedicated to the memory of my late friend, colleague, and co-author, Dr. William C. Bosher, Jr. A faith filled family man, curious scholar, born teacher, and effective leader, Bill's many contributions to education in the Commonwealth of Virginia will be experienced by generations to come. We all miss you very much "Dr. B."