VOLUNTARY INTER-DISTRICT OPEN ENROLLMENT: LEGAL ISSUES AND EQUITY IMPLICATIONS ~ A PRELIMINARY ASSESSMENT

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Abstract: Explores the operation of one state’s voluntary inter-district enrollment program, its implications for educational equity, and the potential legal issues and challenges that might be raised. Given a state in which 4 out of every 5 districts open themselves to non-resident students under a state voluntary inter-district open enrollment law, what are the legal and educational implications of a discernable pattern of “closed districts” surrounding major urban districts that serve economically disadvantaged and predominately African American student populations and register the lowest district performance indexes in the state?

This presentation then has a threefold purpose:

1) To review the number and distribution of districts participating and those failing to participate in the Open Enrollment Program.

2) To analyze the demographic characteristics of such districts, as well as their ability to promote the academic performance of the students they serve; and

3) To explore potential legal theories and bases for challenging such voluntary open enrollment policies.

Introduction

Since the issuance of the Nation at Risk Report in 1983, states have tried a variety of approaches to spur educational reform and more positive outcomes for the nation’s schools and youth. In doing so they have employed various types of policy instruments including mandates, incentives, capacity building, and systems changing strategies [McDonnell and Elmore, 1987]. Prominent among the systems changing strategies has been the introduction or expansion of school choice, fundamentally altering the relationship between public schools and the families they serve, and presumably, at least theoretically, fueling competition that will drive school improvement [Chubb & Moe, 1990].

A variety of programs affording parents a choice regarding where their children may be educated have been adopted by states across the nation [Wixom, Education Commission of the States, 2013]. These include Open Enrollment, Charter Schools, Home Schooling, Post Secondary Options, and several Scholarship programs providing vouchers to certain students to attend private schools.

Ohio Open Enrollment Policy

Ohio, over the past quarter century, has adopted a full-range of such options. One of the first of these options, adopted as part of an Omnibus Educational Reform Act (S.B. 140) in 1989, was the Open Enrollment Program. That program, as described by the State Department of Education on its website, provides that:

Students can attend school in a district where [their] parents are not residents. Every school district in Ohio decides whether to allow open enrollment. If it is allowed, the district creates a process, such as lottery or first-come, first-served, so that all students who apply have a fair chance for the spaces available in a grade level. Families must contact an open enrollment district for its process and follow it.
The state statute requires that each school district adopt a resolution pursuant to the state open enrollment law [ORC 3313.98(B)(1)]. The policy, however, is a permissive one in that each district is free to decide to permit enrollment or “entirely prohibit the enrollment of students from …other districts, [except for] students for whom tuition is paid” [ORC 3313.98 (B)(1)(a)]. The law requires participating districts to adopt application procedures (B)(2)(a) and admission procedures, including ones that establish capacity limits by building level, school and educational program (B) (2)(b) and that guarantee admission to resident students and a preference to those previously enrolled in the district pursuant to the open enrollment policy. The law, in addition, prohibits the admissions decisions based on: 1) academic ability, or athletic, artistic or other extra-curricular skills (except where admissions were so limited prior to the adoption of the Open Enrollment statute, see, ORC 3313.982); 2) student disability (unless IEP-required services are not available in the district); 3) English language proficiency; or 4) disciplinary history (unless the student has been suspended or expelled for a period of 10 or more days in the current or immediately preceding school year) [ORC 3313.98(C)(1-4)].

The statute interestingly does not set out race as a prohibited basis for making admission decisions, although it of course would be under both state civil rights authority and the equal protection clause and other federal civil rights laws including Title VI of the 1964 Civil Rights Act. Districts, however, are expressly authorized to object to the enrollment of one of their resident students in another district: when necessary to "maintain an appropriate racial balance" (F)(1)(a). The application of this provision to bar several white students from transferring from a substantially minority to a near all-white suburban district, however, has been enjoined in one Ohio case, where the federal district court found the “maintain racial balance” standard not to be sufficiently narrowly tailored to withstand strict scrutiny [Equal Open Enrollment Association for Equal Opportunity v. Akron Board of Education, 1996; for discussion of other cases, see Brown, 2000; and U.S. Department of Education, 2011 (Guidance on Voluntary Use of Race to Achieve Diversity…)].

Finally, the statute provides that: “The State Board of Education shall monitor school districts to ensure compliance with this section and the district’s policies” and is authorized to adopt rules requiring uniform application procedures and record keeping requirements [ORC 3313.98(G)]. Administrative rules adopted by the Ohio Department of Education [OAC 3301-48-02] require that districts establish criteria for prioritizing applications, as well as criteria for establishing capacity limits, and procedures to ensure proper maintenance of racial balance in district schools. While the monitoring process “shall determine that the policies, procedures and guidelines…are implemented as specified in 3313.98”, its principal means of doing so appears to be the requirement that the district “certify…that the district is complying with the requirements in 3313.98” [3301-48-02 (B)(3)(a)] in as much as copies of district policies and procedures shall be provided the Ohio department of education “upon request” [(B)(2) emphasis added]. The language in the state rules further suggests that requests are likely to be made only “as necessary to verify… policies adopted are being adhered to by the district” [(B)(3) (c)].
Policy Implementation and Educational Implications

In the 2013 school year, 80% of the districts in the state elected to accept students from other districts according to Ohio Department of Education data. Districts that so elect may open their schools to students from adjacent districts only or from students anywhere in the state. Statewide 460 or nearly 70% of the slightly more than 600 Ohio districts accepted students from any other district in the state, while 78 districts or 12% opened their doors, but only to students from adjacent districts. In 2013 approximately 70,000 Ohio students participate in the Open Enrollment Program, a number that has double over the last decade [see Figure 1]. Over 90% of these students attend traditional elementary or secondary public schools, with the relatively small remaining portion attending a joint vocational or career technical school operated typically at the county level. Thus it would appear that Ohio families are afforded an opportunity to send their children to schools where their education might be enriched with enhanced opportunities for learning and assurances of an equal educational opportunity.

Figure 1: Trend in Students Participating in Ohio’s Inter-District Open Enrollment Program: 2003-2013

While this might be happening for some Ohio families and their children, it is not universally the case. In fact, students in a number of the state’s largest urban districts, serving substantial concentrations of minority students and those from economically disadvantaged backgrounds, are excluded from open enrollment opportunities within reasonable proximity to their district of residence. (See Figure 2 below). These include, to varying
degrees, students in the public schools of Akron, Cleveland, Columbus, Cincinnati, Dayton, Toledo and Youngstown.

*Figure 2. Open Enrollment Status of Ohio Districts 2010-11*

No metropolitan area in the state better illustrates this than the region in which the Cleveland Municipal School District is located. There are 31 separate school districts in Cuyahoga County, only two of which admit non-resident students pursuant to the state open enrollment policy. Those two districts are ones serving the City of Cleveland proper and East Cleveland, the later of which admits students from adjacent districts only. These two districts are 66% and 99% African American respectively, and both serve student populations over 95% economically disadvantaged according to state data for 2013-2014. This contrasts to the student racial makeup and level of poverty in the “closed districts” in Cuyahoga county where 26% are African American and only 35% suffer from economic disadvantagement, according to Ohio Department of Education data. For further analysis of the characteristics of open and closed districts, participation rates, and educational outcomes in Ohio, see excellent reports sponsored by the Fordham Institute [see, Community Research Partners, 2013 and Carlson and Lavertu, 2017].

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In addition to concentration of racial minorities and economically disadvantaged students in the core school districts, the education programs and services they receive are not producing positive educational outcomes. For instance, the Performance Index, a numerical measure from 0 to 120, is designed to assess the level of attainment for students in a given district. Cleveland’s performance index is 76 as contrasted to an average PI of 99 for the 29 non-participating suburban districts. Districts are also evaluated on the Value Added to a child’s educational progress year over academic year. Again, the lack of value added compared to the average of like students statewide, further suggests these students may not be progressing at an equivalent rate and receiving an equal educational opportunity. At a minimum, the purported objective of the state Open Enrollment Policy – to enhance the access to high quality education by those that are caught in underperforming schools – does not appear to be realized. To the contrary the state policy, by its voluntary nature, arguably has constructed a roadblock to the realization the objectives it purports to promote at least in some major metropolitan areas.

**Legal Issues and Potential Challenges**

This set of conditions leads to the following legal issues that will be preliminarily explored here:

1. Could a state legislatively adopted inter-district open enrollment policies, that authorize, but leave it to local boards whether or not to participate, be found to be a violation of the 14th Amendment Equal Protection clause? Might it, or the maintenance of such a policy, represent a violation of Title VI of the 1964 Civil Rights Act, where the voluntary nature of the policy results in students of color being contained in certain districts and denied access to equal educational opportunities available to others? Under what circumstances might a violation of one or both of these legal authorities be proven?

2. Does a local school board’s decision not to participate in a voluntary inter-district open enrollment program, when in close proximity to a district that is racially identifiable by virtue of a predominately African American student population, represent a violation of Equal Protection or of Title VI of the 1964 Civil Rights Act? Under what circumstances might this be successfully argued?

**Challenges to the Policy**

**Equal Protection**

The 14th Amendment Equal Protection clause is of course an often-invoked law to challenge racially discriminatory policies and actions by governmental officials. It provides the familiar admonition that:

> No state... shall deny to any person within its jurisdiction the equal protection of the laws.

The Ohio Open Enrollment Law, however, does not contain a racial classification on its face, and thus is not per se unconstitutional as were state statutes in *Brown v. the Board of Education* that expressly permitted or required students of different races to be educated in separate schools. While intentionality is seldom evident today in the form an explicit racial classification, it does not mean that the actions of public officials are never purposefully invidious. It has long been established that a law can be unconstitutional if there is evidence of discriminatory intent or purpose in its application [*Yick Wo v. Hopkins*, 1886]. The Supreme Court in the mid-
1970s rejected the notion that a law’s disproportionate impact on minority populations was alone adequate to prove discriminatory intent [Washington v Davis, 1976]. In doing so, the Davis Court announced a more rigorous standard, requiring the evaluation of factors, such as: 1) the historical background and specific sequence of events leading to the governmental decision; 2) the contemporaneous statements of decision makers or records of their actions; 3) the procedural regularity or irregularity of the action; 4) the consistency or inconsistency of the action with usually important or controlling substantive considerations; and 5) the racial impact of the decision. In the same opinion, however, the Court observed that a law’s seriously disproportionate impact “may for all practical purposes demonstrate unconstitutionality because the discrimination is very difficult to explain on nonracial grounds” [Davis at 242].

Notwithstanding this elevated standard, federal courts in numerous school desegregation cases after Davis have found ample evidence of the inconsistent application of policies with foreseeable segregatory consequences, or ones otherwise unexplainable on non-racial grounds. Such findings have served to prove intentional segregation in violation of the 14th Amendment, findings that would be ultimately sustained on appeal by the Supreme Court [e.g., Columbus Board of Education v Penick, 1997 and Dayton Board of Education v. Brinkman, 1997].

Whether or not the Ohio General Assembly’s decision to adopt a permissive Open Enrollment Policy, rather than one mandatory on all districts to implement, was a decision motivated in part by considerations of race is a question for which there is no certain legal answer at present. Some defenders of the policy will point to the not uncommon practice of permissible delegations of authority in a variety of state policy spheres including in education. They will also remind us of the deference to be paid to local control of education a la the Supreme Court’s rationale in declining to adopt a metropolitan remedy in Milliken v. Bradley [1974]. And legislators are likely to explain that a variety of differences between and among districts make “opting out” an important feature of a state Open Enrollment Policy. These reasons they will contend represent rational, non-racial bases, for the voluntary nature of the policy they enacted.

The burden will be on those who seek to challenge the policy to make at least a prima facie case that race was a factor in shaping the policy. They might do so by noting the dramatically disproportionate impact of the policy on the opportunity for African American students in racially identifiable and poor performing districts to gain access to, participate in, and enjoy the benefits of the open enrollment program and enhanced educational opportunities. The effect of the policy seems inexplicably at odds with its purported purpose. Furthermore, it could be argued that while it is not uncommon for the legislature to grant districts permission to undertake a new policy or program, it is common for such policies to later be made mandatory once they have proven their worth, which arguably the open enrolment policy has, as the number of participating districts now exceeds 80% and the number of students participating has doubled over the last decade indicating the perceived benefits of the policy among those with an opportunity to participate in and benefit from it.

Proponents of its voluntary nature, however, will note districts vary in enrollment trends and available school capacity, differences in the cost of educating students and stresses on district resources, discrepancies in the
needs and performance of students across districts, differences in their capacity to effectively serve additional or particular populations of students, and the potential loss of opportunities and recognition for resident students at the expense of those transferring into a district. So there are multiple plausible factors that the legislature might consider in deciding to adopt a voluntary v. mandatory inter-district approach.

But when a policy such as this has such discernable effects in limiting the opportunities of African American students from participating in a program designed to enhance educational opportunities for students otherwise confined to low performing or failing school system, can state policy makers ignore the effects or acquiesce in them without demonstrating a discriminatory intent? The existent policy provides districts with appreciable discretion in shaping the process and admission criteria, as well as limiting the number of students who can be admitted based on school and program capacity. A mandatory inter-district transfer policy would naturally be subject to certain conditions, including reasonable policies and criteria governing admissions, rules concerning the calculation of building and program capacities, reasonable rules concerning participating in extra-curricular activities and eligibilities for certain honors or awards, and a means of financing that is fair and equitable so as not to burden districts that enroll substantial numbers of non-resident districts, or in the short term have grave fiscal implications for districts losing students before adjustments in expenditures could reasonably be made. These factors are already anticipated, for the most part, by the framework put in place by the legislature when originally adopting the voluntary policy. Without exploring the presence or absence of evidence that might comport with the indicia of purposeful or intentional discrimination, as outlined in Washington v. Davis, it is difficult to predict with any certainty whether a constitutional violation based on legislative action and subsequent inaction could be successfully argued. If it could be, then the legislature’s actions and subsequent continuing deliberate inaction has contributed to creating and maintaining school segregation across school districts in counties such as Cuyahoga in northeastern Ohio.

It is important to note in this regard that several appearingly, racially neutral laws, adopted by legislatures in the post-Brown era, have been found to reflect segregatory intent, including several laws with inter-district implications. In 1968 the Delaware legislature passed the Educational Advancement Act, reducing the number of school districts in the state by half, but effectively resegregating schools in northern New Castle County. This resulted from the legislature’s disallowing the 79% black Wilmington schools to consolidate with the 90% white suburban districts without a vote by the residents of the districts. The referenda requirement was suspended for virtually all consolidations under the Educational Advancement Act except for the reorganization involving the predominately minority Wilmington schools. This resulted in a finding of purposeful segregation, providing the basis for ultimately adopting a desegregation plan merging multiple districts [Evans v. Buchanan, 1975].

Another legislative enactment, this in Indiana, was similarly found to reflect purposefulness in maintaining racially separate schools. In 1969, the General Assembly adopted Uni-Gov, form of metropolitan governance by extending the boundaries of the City of Indianapolis to make them coterminous with those of Marion County and thus consolidating public services on a countywide basis. The boundaries of the Indianapolis Public
Schools, however, were not similarly extended, arguably in order to prevent black public school children from being in the same school district as white children. Federal district judge S. Hugh Dillin concluded that the exclusion of schools from the Uni-Gov Act that merged virtually all other public services across Marion County served to confine black students in the IPS school system [*U.S. v. Board of School Commissioners of Indianapolis, 1991*]. An inter-district student assignment plan was ultimately ordered and implemented involving IPS and the 11 other districts in the county.

Thus public officials, legislative bodies included, are precluded from adopting or rejecting measures when race is one of the motivating reason for doing so. The exception being only where race conscious remedies are required to remedy adjudicated unconstitutional segregation or its lingering affects, or where a compelling state justification can be demonstrated and measures are narrowly tailored to accomplish that purpose and for only so long as necessary [*Parents Involved in Community Schools v. Sch. Dist., Seattle, No. 1, 2007*].

Local districts may also be susceptible to equal protection challenger if it can be demonstrated that they voted to opt out of the inter-district enrollment program for racial reasons, such as their proximity to districts with racial or language minority populations. Again, an analysis of multiple factors would be necessary to prove intent to segregate or discriminate on the part of the local district, analogous to that discussed previously with regard to the state, although the pattern may be so consistent as to point to racial explanations.

Even among districts that might open themselves to non-resident students, the policies regarding recruitment and admitting students may reflect segregatory intent, such as failing to publicize open enrollment opportunities in areas and by means likely to reach minority families. Admission policies that provide a preference for children of parents or grandparents who graduated from the district can also contribute to the disproportionate exclusion of students of color and potential discriminatory intent, as may in-person registration procedures that disadvantage populations without transportation or the ability to absent themselves from their jobs during regular work hours to stand in-line to register their children. The inconsistent application of admission procedures or criteria may similarly serve to prove discriminatory intent on the part of a local district.

**Title VI Challenges**

But even if it is difficult to successfully challenge Ohio’s Voluntary Open Enrollment Policy using the 14th Amendment Equal Protection clause, might it still be vulnerable to a challenge mounted using Title VI of the 1964 Civil Rights Act? Title VI provides:

*No person in the United States shall, on the basis of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance*  [42 U.S.C. § 2000d (1964)].

[Note: The U.S. Department of Education (2009) issued a dear colleague letter confirming the applicability of Title VI to school choice per Title I of No Child Left Behind, but indicating in a footnote the broader application of the principles to other school choice programs. The guidance, however, does not expressly address the effects of voluntary inter-district choice policies with segregatory consequences].
Two theories tend to characterize approaches to demonstrate a violation of Title VI. These are differential treatment and disparate impact. Differential treatment challenges are substantially the same as those brought under equal protection in that governmental action of an intentionally discriminatory or purposeful segregatory nature must be demonstrated. Disparate Impact challenges, on the other hand, employ an alternative theory or test to prove a Title VI violation. Impact theory does not focus on intent or even whether a policy is administered consistently, but rather examines whether a policy or method of administration has a disparate adverse impact on a particular racial population. Under this theory, the Office for Civil Rights or the Department of Justice in initiating an investigation, and ultimately an administrative law judge or federal court in adjudicating a matter, typically engage in a three-part inquiry, They examine the evidence with respect to the following questions:

1. Does the policy or method of administration result in an adverse impact on students of a particular race?
2. Is the policy or method of administration necessary to achieve an important educational goal or governmental end?
3. Is there a reasonably available alternative policy that can achieve comparable results with a less adverse impact on the population of students affected? OR Is the government’s justification a pretext for discrimination?

Clearly the permissive open enrollment policy as now ensconced in state law has an adverse impact on students of color, effectively containing them in urban core districts such as Cleveland and excluding them at a far higher rate than their white counterparts statewide from participating in inter-district enrollment programs proximate to their residence which grant them access to higher performing districts and the educational benefits that state law recognizes such district’s provide. Quite arguably, the permissive nature of the policy is not necessary to achieve an important educational goals or governmental end. The policy itself was to promote access to greater educational opportunity, a goal that the voluntariness of the policy actually appears to frustrate. Furthermore, there is no evidence to suggest that the policy’s affect of maintaining students of color in urban core districts is an educationally justifiable one, such as providing the students with specialized services with a demonstrated ability to reduce the achievement gap more rapidly than in districts to which they might transfer. And finally, a mandatory inter-district open enrollment policy is a reasonably available alternative for achieving the state’s goal with a less adverse impact on the population of students of color. The fact that 4 out of every 5 districts statewide are participating in the inter-district open enrollment program provides evidence that

The state is expressly obligated under its own law, as well as impliedly under Title VI, to monitor the operation of the Inter-district Open Enrollment Policy. Its own reports and the map it has produced graphically illustrates the operation of the state law to maintain concentrations of students of color in a limited number of districts in major urban areas across the state and preventing resident students from enjoying the benefits of equal educational opportunities that might be realized through inter-district open enrollment opportunities. To persist in this policy, once its effects are known, arguably provides evidence of the denial of equal educational
opportunity in violation of Title VI.

Conclusion

Little legal attention has been paid to voluntary or permissive inter-district open enrollment programs adopted by states. The extent to which they maintain if not create segregation across metropolitan areas appears to be substantial in Ohio. Legal challenges to such state policies face a number of hurdles, but there are theories that can be applied, and with the development of necessary proofs, violations of Equal Protection and Title VI could be demonstrated, and effective remedies forged.

Questions or Suggestions regarding this paper may be directed to the author at cbvergon@ysu.edu

References

Articles & Reports


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Statutes

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Ohio Inter-district Open Enrollment Regulations, Ohio Administrative Code 3301-48-02 (Effective dates 7/1/90, modified 8/3/98 and 2/22/08).

Cases


Yick Wo v. Hopkins, 118 U.S. 356, 1886