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Family Law and Children's Educational Rights: Introduction & Acknowledgements

Lisa Grumet

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Introduction: Family Law and Children's Educational Rights

LISA F. GRUMET*

As the country commemorates the 70th anniversary of the Supreme Court's monumental civil rights decision in *Brown v. Board of Education*, I am thrilled to present this issue on Family Law and Children's Educational Rights. The articles address a range of current legal, policy, and practice issues relating to the overlapping fields of family law, elementary and secondary education law, civil rights law, and children's rights.

The issue begins with an overview of children's educational rights. In *Restating the Law Governing Children's Education*, Professor Emily Buss discusses the education provisions of the new Restatement of the Law, Children and the Law, which is scheduled for approval in May 2024. Professor Buss served as an Associate Reporter for the Restatement project. The Restatement includes provisions concerning the responsibility of the state and the responsibilities of parents to ensure children receive a "sound basic education." The state's obligation has been recognized by state courts interpreting state constitutional provisions; parents' obligations have been recognized through compulsory attendance laws and child neglect laws. Professor Buss explains that "[t]he Restatement clarifies the alignment of the educational duty of parent and state by harmonizing the terminology in the sections addressing both parent's and state's educational duty . . . and requiring both parent and state to provide a 'sound basic education' to children." Her article also provides historical context for the state's role in public education, and surveys federal constitutional protections for children in public schools.

The next two articles discuss how children's educational rights conflict with so-called "parents' rights" initiatives that have targeted efforts to promote racial justice and LGBTQ+ rights and foster inclusivity through school curricula. In *The Ontological Expansiveness of "Parental Rights" Rhetoric in K-12 Public Schools*, Professor Sacha M. Coupet and Kai Scott compare these initiatives to racist resistance to the *Brown* decision.

*Faculty Editor in Chief, *Family Law Quarterly*; Professor of Law and Director, Diane Abbey Law Institute for Children and Families, New York Law School.

They use the lens of “ontological expansiveness”—which they describe as “a theoretical framework developed by philosopher Shannon Sullivan ‘to describe the complex and nuanced relationships that exist among race, Whiteness, and space’”—to analyze these initiatives, and warn that the initiatives undermine *Brown*’s legacy and jeopardize our democracy. They observe that “[p]arental rights, even if understood to protect a parent’s interest in raising *their* children in a manner that aligns with their values, simply do not support denying *other* children’s opportunities to explore, learn, and thrive.” Furthermore: “By purging from the public school any critical examination of race, racism, and racial bias and their role in shaping our history and our national identity, legislators are facilitating a form of racial segregation that shapes what should be a *communal* space into one serving primarily white interests.”

The conflict between children’s educational rights and the parental rights movement is also explored by Professor Samantha C. Pownall through a study of one community’s experience with these issues. In *Centering Students’ Rights in Our Democracy: A Case Study from Maryland’s Eastern Shore*, Professor Pownall discusses how the work of the first Black superintendent of white-majority Queen Anne’s County, Maryland, was challenged by a local “Patriots” group after she spoke out against racism following the murder of George Floyd and supported a student organization called Students Talking About Race. The “Patriots” group secured a majority on the local school board, weakened proposed language of a state-mandated school district equity policy, and voted down inclusion in the curriculum of Jaqueline Woodson’s novel *Harbor Me* because of its portrayal of immigration law issues from the perspective of a child whose father faced deportation. Professor Pownall calls for recognition of a federal right to education, and also for school board reform and support for student advocacy. She concludes with a hopeful note of how school district personnel successfully pushed back against Patriot-supported anti–Critical Race Theory and anti–social justice education measures, and reflection on the “unsung but formidable role educators and young people play in safeguarding our democracy.”

Children’s educational rights issues also may arise in the context of child custody proceedings. In *The Intersection of Special Education and Family Law: Thoughts for Family Law Attorneys in Divorce and Custody Cases*, Professor Richard D. Marsico provides a detailed overview of the Individuals with Disabilities Education Act (IDEA) and other disability rights laws, with a particular focus on the rights of parents to participate in the process of ensuring school districts provide their children with a “free appropriate public education.” A “parent” under the IDEA has the

right to obtain information, participate in meetings with school personnel, advocate for and make certain decisions concerning special education services for their children, and initiate proceedings to challenge school district determinations. Professor Marsico notes that in the context of child custody proceedings, the question of whether a parent can exercise these rights under the IDEA may depend on the language of the custody agreement or order. He provides examples of “cautionary tales” where litigation arose because the child custody orders did not clearly address the parents’ IDEA rights. As a practice aid, he provides lists of issues and questions for attorneys representing parents of children with disabilities to review with their clients to ensure that their clients’ interests are clearly protected in any custody agreements.

Children’s educational rights may also be impacted in custody disputes when parents have different perspectives on religion. In New York City, city and state officials recently determined that multiple yeshivas led by the Hasidic community failed to meet state educational standards. These findings were made in response to complaints by former students and parents, and followed a series by the *New York Times* documenting the lack of secular instruction at some schools and students’ poor performance on state English Language Arts and math tests. In *Prioritizing Children’s Educational Interests When One Parent Leaves an Ultra-Orthodox Community*, Julie F. Kay discusses her work with the organization Footsteps, which has provided resources and support for more than 2,300 individuals who have left ultra-Orthodox (or Haredi) communities. The author, who has assisted with more than 40 Footsteps cases involving child custody disputes, discusses the challenges her clients have faced when their children attend a school that does not provide secular instruction and that is not supportive of their decision to leave the community or, for LGBTQ+ parents, their sexual orientation. She proposes that courts give more weight to the importance of receiving an adequate secular education when assessing the best interests of the child, and “award educational decision-making to the parent who is best able to ensure that the child attends a school that provides a basic secular education that meets state education standards and that fosters friendly relationships with both parents.” She also provides guidance for practitioners representing parents in these cases.

Another aspect of children’s educational rights is gender equity. In *Period Rhetoric and Partisan Politics*, Professors Emily Gold Waldman and Bridget J. Crawford write about the “menstrual equity” movement, including initiatives to make free menstrual products available in schools. While the menstrual equity movement has garnered bipartisan

support, including the enactment of state legislation ending sales taxes on menstrual products, in some contexts it has become politicized—particularly in relation to schools. The article discusses how proposed Idaho legislation to make menstrual products free in schools was defeated in part because of “parental rights” arguments made by legislators who argued that the legislation put schools between children and parents, with one legislator asking, “Why are our schools obsessed with the private parts of our children?” The authors express concern about politicization of the movement, including some rhetoric used by supporters of menstrual equity, noting that “[l]egislation making menstrual products available in schools had been successful because of the shared recognition of those products as basic necessities.”

The last article in this issue addresses the educational rights of children in foster care. *Improving the Educational Outcomes of Students in Foster Care: Recommendations Based on an Analysis of Data from New York City* presents a detailed analysis of educational disparities for children in foster care as well as recommendations for reform. Authors Sarah Part and Erika Palmer work with the nonprofit organization Advocates for Children of New York, and their article is adapted from a report previously published by the organization. Children in foster care have faced the trauma of being abused or neglected by their parents and the trauma of being separated from their families, and in some cases change schools multiple times. The data analyzed by the authors showed that children in foster care were significantly less likely to achieve academic proficiency than other children, and were more likely to be absent, to be suspended from school, and to drop out. The data also documented significant racial and socioeconomic disparities for children in the foster care system, as well as a disproportionate number of students with disabilities. The authors present proposals for reform, including training school personnel, enhancing communication with child welfare agencies and with parents and foster parents, making transportation arrangements to minimize the need for children to transfer schools, working with child welfare agencies to promote school attendance, and providing appropriate behavioral and mental health supports. They end with a call for action and optimism about the possibilities for change: “By adopting the above recommendations and focusing support specifically on students in foster care, as we have begun to do in New York City, municipalities across the nation can begin to turn the tide and transform schools into a source of support for students in foster care. Youth in foster care deserve nothing less.”

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Finally, thank you to our readers. We hope you enjoy this issue and welcome your feedback. Best wishes to you and your families.