

**Testimony of Sheilah D. Vance, Esquire, President and General Counsel,
Institute for Educational Equity and Opportunity,
before the Equity and Excellence Commission, U. S. Department of Education,
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I am pleased to have this opportunity to testify today. My name is Sheilah D. Vance, Esq. I am President and General Counsel of The Institute for Educational Equity & Opportunity, or IFEEO for short. IFEEO (www.ifeeo.org) is a non-profit, 501(c)(3) tax-exempt, organization dedicated to the pursuit of educational equity and opportunity, particularly for disadvantaged United States' public school children through legal means. The IFEEO is especially interested in fair and equitable public school finance laws. IFEEO is the brainchild of Congressman Chaka Fattah, whose long commitment to educational equity is recognized in the creation of this federal Equity and Excellence Commission, and Leslie Thornton, Esquire, former chief of staff at the U. S. Department of Education.

Towards this end, IFEEO has concentrated its efforts towards the creation and implementation of four main projects:

- 1) the study of the history of the education clause in the state constitutions of all fifty states and the early federal role in education;
- 2) creation of the IFEEO Legal Fellowship and Summer Associate Award, where law students and recent law school graduates can work with a public interest educational equity project or attorney of their choice in the areas of educational equity and opportunity.
- 3) implementation of the IFEEO Educational Archives Project, to preserve the rich history of the educational equity movement; and
- 4) grants to plaintiff's counsel in equity cases to hire law students to assist with drafting an article regarding school equity and finance litigation.

In furtherance of our mission to educate the public about issues related to educational equity, IFEEO has published two books.

The first is *Education in the 50 States: A Deskbook of the History of State Constitutions and Laws About Education*.¹ The second book is *A Quality Education for Every Child: Stories from the Lawyers on the Front Lines*.² Both books are significant to the work of the Equity and Excellence Commission, and we will make sure that you all receive a copy.

Both books, taken together, show that the federal government has had a significant role and a purpose in the creation and maintenance of a high quality public education system. However, that role has devolved to the system we have today, where a quality education for every child is too often an accident of birth favoring those who live in high wealth school districts, or dependent on the stamina and financial resources of plaintiff's attorneys who represent children who do not live in those districts.

Let me explain by first discussing our book, *Education in the 50 States*, which was prepared by the brilliant legal and American history scholars at the Public Interest Law Center of Philadelphia, under a grant that we provided.

¹ *Education in the 50 States: A Deskbook of the History of State Constitution and Laws About Education*, by the Institute for Educational Equity and Opportunity, 2008. ISBN 978-0-615-23520-2.

² *A Quality Education for Every Child: Stories from the Lawyers on the Front Lines*, by the Institute for Educational Equity and Opportunity, Edited by David Long, Esq., Molly A. Hunter, Esq., and Sheilah D. Vance, Esq., 2009. ISBN 978-0-615-28729-4.

The book, which is the first of its kind, explores the earliest history of education in each of the 50 states. It demonstrates that the early colonists and those who settled the territories consistently established, as one of their very first acts, schools and the administrations to govern them. They explained their pressing need for education in terms that remained remarkably the same beginning in the 1600s and continuing through the 20th century. The explanation was that a vital democracy requires educated citizens to have the tools necessary to vote, to train the next generation of leaders, and to perform useful work. The histories in the book also show education's powerful role in bringing together people with widely dissimilar cultures to form a national identity and cohesiveness.

Education in the 50 States contains three main sections:

- 1) A 45-page introduction and narrative history of the education clauses in all 50 states, tying together the evolution of education in the states from the Colonial Period through the developing Western territories.
- 2) A 114- page State Educational Histories Summaries section that includes, for each state, a timeline of significant education-related events, a narrative summary of the history of education in the state, and a rich bibliography of books and documents used, including many little known or hard-to-find sources, and
- 3) An Appendix that lists the education clause in each state from first adoption to present language.

These education histories are important for many reasons. One main reason is that state courts around the country have used the early legislative histories to decide whether the constitutions in those states create a right to an education. We all know that the U. S. Supreme Court decided in 1973 in *San Antonio Independent School District v. Rodriguez*, that the U. S. Constitution does not contain a right to an education. However, the Court did not have the evidence before it of the deep and densely woven connections between education and the idea of a “citizen” that was embodied in the U. S. Constitution. Well, they do now, and so do you.

The U.S. Supreme Court was unwilling to conclude that a right to education is “implicit” or “capable of being understood from something else, though unexpressed.”³ However, the tapestry of these histories, when taken together, speaks a powerful, consistent truth: education was not merely important, but an implicit right, derived from the meaning of citizenship. The Constitutional framers did not need to mention education because by the time the Constitution was adopted in 1789, national and state laws, taxing authorities and financing mechanisms were firmly in place and, in some cases, had been for over 100 years.

The body politic insisted upon them because a crucial attribute of a “citizen” was the intellectual skills necessary for meaningful participation in the community's political and economic life. As with other attributes of “citizen,” the framers of the Constitution did not have to expressly articulate every attribute because they were a well-recognized part of the landscape. This is a truth for use by advocates, litigators and policymakers in making real the aspirations of our forefathers. In 1787, Thomas Jefferson wrote to James Madison-“above all things, I hope the education of the common people will be attended to.”⁴

George Washington said, “In a republic, what species of knowledge can be equally important, and what duty more pressingly on its legislature, than to patronize a plan for

³ *Education in the 50 States*, p. 1.

⁴ *Education in the 50 States*, p. 23.

communicating it to those, who are to be the future guardians of the liberties of the country, by educating the nation's youth in the science of government."⁵

Education in the 50 States illustrates that perhaps the greatest demonstration of the early government's role in establishing education as a right of every citizen was its requirement, in two early ordinances, that each state seeking admission to the Union establish public schools.

Specifically, the original states ceded all territories between the Allegheny Mountains and the Mississippi River to the National government. In governing that territory, Congress passed the Land Ordinance of 1785. Congress required that the 16th plot out of the 36 one-mile square plots from every township, be reserved for the maintenance of public schools.

In 1787, the First Congress ratified the Northwest Ordinance, avowing that: "religion, morality, and knowledge...being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."⁶

To carry out this mandate, Congress required every new state created from these territories to commit to creating its own system of public schools. Thus, while the federal government did not itself fund the local school systems, it used the greatest asset at its disposal--its newly acquired territories--to promote a national system of education, by refusing to cede the land without provision for educational funds: "These western lands were regarded as a great resource for revenue; the right of Congress to dispose of them was unclogged by conditions; and yet the Congress of the Confederation determined to recognize, in the earliest legislation for their survey and sale, the paramount interest of public education."⁷

This transfer of land constituted a "solemn bilateral compact between each State and the Federal Government." The United States ceded its land "in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry." Significantly, these parcels did "not pass to the State upon its admission into the Union, but remain(ed)...disposed of by the Government in any manner and for any purpose consistent with applicable federal statutes."⁸

Acceptance by the states constituted "an irrevocable compact, vesting title to the described lands in the state and creating a trust for the use of schools." As a trust, the grant created continuing obligations on the part of the states, as later manifested in the state constitutional provisions. Each of the states that subsequently entered the union accepted these terms.⁹

So, the blossoming federal government firmly established free public education as a right of the citizens.

However, when the U. S. Supreme Court in *San Antonio v. Rodriguez* did not see education as a fundamental right of our nation's citizen's, the legal struggles for educational equity, particularly as they relate to adequate funding of education, were forced to the state level.

This is because education is legally seen as a responsibility of each individual state. Each state constitution has a clause that requires that state to establish and maintain a system of free public education for its citizens. Those state education clauses vary as to their content, especially when it comes to addressing the type of free public education system that must be provided.

⁵Id. at 25.

⁶Id. at 28.

⁷ Id.

⁸ Id.

⁹ Id.

For instance, here in Pennsylvania and New Jersey, the state is required to provide a “thorough and efficient” education. That language is used on other state constitutions as well. Other state constitutions require that their state’s system of free public school meet such standards as “general”, “uniform”, or “suitable”, or “complete” or merely “open”, or as Florida—the granddaddy of them, requires—“uniform, efficient, safe, secure, and high quality.”¹⁰

But what do those words mean as to the type of free public education the states are required to provide? What does “thorough” mean? And “efficient”? And “uniform”? What types of educational programs have to be put in place to satisfy these terms? And how much money has to be put into schools and school districts to meet these requirements?

Plaintiffs’ attorneys representing children seeking their rights to a quality education have to go to state court to have the courts define these terms and make them real for these students. And, attorneys have done this, so far, filing educational equity and school finance lawsuits in 46 states. Plaintiffs have won 27 of these cases, and the defendant state has won in 16 of them. Results have been mixed in two states, and one case is still pending.

That is where IFCEO’s second book, *A Quality Education for Every Child: Stories from the Lawyers on the Front Lines*, comes in.

This book is a unique look at some of the most important school finance and educational equity cases in this country from the viewpoint of the lawyers who litigated the cases with the goal of securing a quality education for every child. Seventeen of the nation’s most outstanding lawyers in the field of school finance and educational equity wrote the articles providing an overview of the cases in which they were involved, where they primarily litigated the meaning and requirements of the state constitution education clauses. Your commission member, Michael Rebell, wrote the book’s introduction and co-authored an outstanding article on the case that he litigated—*Campaign for Fiscal Equity v. State of New York*. Commission member David Sciarra litigated—and keeps litigating—*Abbott v. Burke*, which is also the subject of an article. The articles cover cases in 17 states in all regions of the country and involve school districts from the rural to the urban and everything in between. Each article includes five parts:

- 1) An introductory explanation of the school finance case;
- 2) A discussion of the status of education and education finance in the state before the litigation;
- 3) An explanation and evaluation of the legal strategy followed in the courts, public engagement; communications/media strategies; and compliance proceedings;
- 4) Discussion of the court’s decision, legal remedy and how it is being or has been implemented; state administration and legislative responses, including a discussion of public engagement, and compliance proceedings;
- 5) A “Lessons Learned” conclusion, including how litigators can approach such cases in the future, discussions of missing elements in school finance jurisprudence that impacted litigation, and how the courts can respond.

IFCEO’s further mission with this book was to document the history of the public school finance litigation movement. We also wanted to show, as I stated in my introduction, and as any reader of these articles can see, that a quality education for every child is too often dependent on the stamina and financial resources of the plaintiffs’ attorneys.

¹⁰ *Beyond Segregation: The Continuing Struggle for Educational Equity 50 Years After Brown v. Board of Education*, by Sheilah D. Vance, Esq., p. 468; *The SAGE Handbook of African American Education* (2009).

Michael Rebell's excellent Introduction highlights some of the key themes the reader can draw from these articles. Let me add my own, and you will see how easy it is to shortchange children when educational equity issues are battled out on case-by-case and state-by-state basis.

I have distilled nine key lessons learned from these plaintiffs' attorneys' stories. These lessons constitute the pieces and practices of successful litigation. If these nine lessons learned are not learned well, a plaintiff's educational equity case can fall, and children will suffer.

- 1) Public engagement is key. A school finance case is an interplay between law and politics. The general public and the media must be engaged. Grassroots public relations is helpful. Simultaneous lobbying of the legislature to change the funding formula is also effective, as are the costing out studies mentioned below.
- 2) The standards movement has had a tremendous impact on school finance litigation and must be taken into consideration. When educational adequacy is defined in terms of inputs, like pencils, books, and teachers, it is easier to determine the cost of those things. When educational adequacy is defined in terms of outputs, i.e., the opportunity to achieve certain outcomes, the costs are often more difficult to prove. A key issue for attorneys is how to distinguish for the court between guaranteeing equal results and guaranteeing equal opportunity to obtain equal results.
- 3) Counsel and the parties must be flexible as to the legal claims that are made and the courts in which they are made. In federal courts, attorneys can make arguments of equal protection and due process. In state courts, attorneys can make arguments related to the state constitution education clauses, state equal protection clauses, and state due process procedures.
- 4) Litigation involving coalitions of school districts and different types of school districts can be more effective than litigation involving a single school district. For example, the successful litigation in North Carolina described in the book involved both urban and rural schools¹¹. One of the unsuccessful Pennsylvania cases discussed in the book involved only the School District of Philadelphia.¹²
- 5) Commitment and focus is absolutely necessary. These cases take years and are very costly. There can be great political fallout for the parties involved, especially when talk of increased spending is involved. The litigators, school officials, boards of education and plaintiff groups must be and stay committed.
- 6) Litigation is not an end in itself, but is only a part of a larger war for public opinion. As one litigator wrote, "A strong public relations strategy is necessary to accompany any litigation where the real goal of the litigation is a change in public policy."
- 7) Good facts and great need are not sufficient to drive courts to decide for clients when resolution involves wide issues of power or where there are ramifications for the courts because of the need for continuing supervision of the remedy. Many courts determine that these school finances issues cannot be decided by the courts because they are non-justiciable and violate the separation of powers doctrines.
- 8) Attorneys must be prepared for continuous, comprehensive study of how education practices interact with student achievement. Attorneys need collaboration with education experts. Attorneys need to spend time building relationships with key school officials.

¹¹ *A Quality Education for Every Child*, Robert Spearman, Esq., p. 157.

¹² *A Quality Education for Every Child*, Michael Churchill, Esq., p. 309.

- 9) Costing out studies are very helpful. In these studies, the legislature, the court or another organization orders a study of the amount of money needed to provide all students with a meaningful educational opportunity.

Again, if these lessons are not well learned, a plaintiff's educational equity case can fall, and children will suffer.

Why should this state of affairs be where we find ourselves in 2011? Why shouldn't the federal government have a larger role in education? Today, the United States of America is not a collection of isolated states early in development, just coming together to form a union, whose people, because of lack of transportation and communication, are confined to their own borders. We are a united nation, with common goals and understandings, brought on by increased travel and instantaneous communication across state lines.

One of those common goals--even if expressed very differently by political parties and ideologies--is the continuation of the United States of America as a democratic republic with educated citizens who can ensure the country's survival. That was a goal during colonial times, too. Many political and intellectual leaders at the time believed that a republic, while the greatest form of government, could only survive if it had a virtuous citizen to protect it from internal decay. Education was considered a fundamental requirement to be a political citizen, a role essential to the survival of the community. Thankfully, our nation's early policy-makers expanded their views of who was a citizen and required education of additional groups of people, such as women and African Americans, as their citizenship rights expanded.

Today, we must still consider a quality education as a fundamental requirement to be a political citizen of the United States of America, a role essential to the survival of our common community.

The Institute for Educational Equity and Opportunity hopes that the Equity and Excellence Commission will help ensure that, especially as a function and responsibility of the federal government, every child receives a quality education.

Thank you.