

AALS Education Law Section 2021 Newsletter

Greetings from Erin Archerd, Education Law Section Chair



**Prof. Erin R.
Archerd**

This last year has left those of us who research in and teach Education Law with many concerns about the well-being of students at both the K-12 and higher ed levels. The COVID-19 pandemic has heightened inequalities, driven students and teachers from the classroom and then back into the classroom with fewer precautions than the previous school year, and fundamentally altered the way in which students are educated in the United States.

As families grappled with rapidly shifting policy changes by schools, many of us have developed a new, and renewed, appreciation of the importance of a strong and stable educational system. We have also seen how a shock to the system can cause a rapid reexamination of best practices, adoption of technology, and innovation within education.

I want you to take a moment to pause and commend yourself, your students, and, if you have kids, your children, for past 18-months you have made it through. You, and they, are doing a great job.

Now, as we emerge into a world of increasing social interaction, we have an opportunity and an obligation to think critically about the choices we make in educating our nation's students. As law professors, we have unique tools to examine the impacts of the pandemic and to advocate for students going forward. I encourage you all to share what you are doing with the AALS Education Law Section by emailing me (archerer@udmercy.edu) and Chair-Elect Natalie Gomez-Velez (gomez-velez@law.cuny.edu) with updates.

In January 2021, we held a fantastic AALS panel looking at the Future of *Plyler v. Doe*. I was, frankly, surprised by the optimism that the panelists had about the continued enforcement of *Plyler*, and I am waiting to see whether states decide to attempt to charge tuition or take other measures to challenge *Plyler* in hopes that the matter may be resolved by SCOTUS' shadow docket, or even by a full decision on the merits. I commend Maryam Ahranjani, the Immediate Past Chair of the AALS Education Law Section, for all of the work she did in putting on our 2021 panel, which you can read more about in this newsletter below.

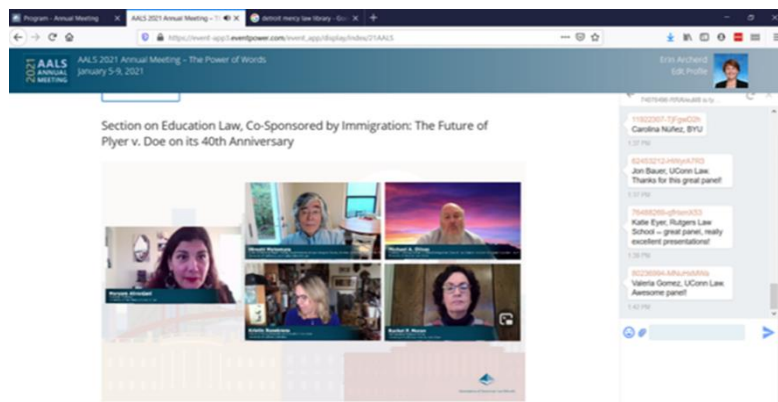
As you begin to make your plans for the coming schoolyear, save the date for **AALS 2022, which will be held virtually** for a second year in a row from January 5 – January 9, 2022. Our Section will be holding its session on *Administrative Law in Higher Education* on Friday, January 7 at 12:35 EST, co-sponsored by the Administrative Law Section. It will be followed immediately by our Education Law Section meeting at 2:00. We will also be co-sponsoring a session with Disability Law on *The Future of Accommodations* on Wednesday, January 5 at 11:00 EST.

You can cap off AALS 2022 with a wonderful AALS Discussion Group Program on Sunday, January 9 at 12:35 p.m. on *Bridges and Barriers to Educational Equity: Should Law Schools Continue to Use Remote Learning Technology and Pedagogy for In-Person Classes?* Section member Erik Girvan has been instrumental in organizing this important discussion.

Finally, in case you missed it, our Education Law Section was spotlighted in the Spring 2021 issue of the AALS Newsletter. [You can read the interview here on the AALS website.](#)

Good luck and good heath to you all as begin another year of teaching and scholarship. Please reach out to me with any ideas for programming, for resources, or thoughts about how the AALS Education Law Section can connect with members.

AALS Education Law Section 2021 Annual Meeting Session (co-sponsored with the Section on Immigration Law): The Future of *Plyler v. Doe* on its 40th Anniversary



Moderator: Maryam Ahranjani
Panelists: Rachel F. Moran (UCI)
Michael Olivas (Houston, ret.),
Hiroshi Motomura (UCLA), and
Kris Rosekrans, Ph.D.

<https://www.youtube.com/watch?v=uvZ2uBj8Uhg>

The Education Law Section sponsored a panel marking the 40th anniversary of the Supreme Court's decision in *Plyler v. Doe*. *Plyler* involved a 14th Amendment equal protection challenge to a 1975 Texas statute that permitted withholding state funds from local school districts for educating undocumented children. The Court held, in a

5-4 decision, that the Texas statute violated equal protection. The Court reasoned that, though not citizens of the United States or Texas, undocumented children are “people” “in any ordinary sense of the term” and, therefore, are afforded Fourteenth Amendment protections. Because the Texas law severely disadvantaged the undocumented children by denying them education access, and Texas did not demonstrate that it served a sufficiently significant state interest, the Court struck down the law.

Though a narrow ruling, *Plyler* is notable for acknowledging undocumented children as “persons” entitled to equal protection of law with respect to the important (if not fundamental) right to education access.

The panel explained *Plyler’s* importance in highlighting the dignitary function of education, the humanity of undocumented children and families, and the crucial role public education plays in realizing the U.S. promise of equality and justice. The panel examined key aspects of the case, including its positive and aspirational vision for educational equality and immigrant justice, and how that vision has been limited over time. Panelists placed *Plyler* in context, unpacked the Court’s reasoning and drew parallels with current rationales supporting the Deferred Action for Childhood Arrivals (DACA) program.

Michael Olivas began the discussion, setting forth key facts and circumstances surrounding the case. Olivas noted the Mexican American Legal Defense and Education Fund’s (MALDEF’s) role in the challenge. He explained how the challenged Texas statute operated on the ground, prompting school districts to regulate the number of students “living apart from parents” because the state “didn’t want students and families shopping for school districts, especially along the border.” He noted that the challenge was prompted in part by the fact that school districts were charging \$1000 to enroll undocumented children. The Court held that the undocumented students could establish residency and struck down the Texas statute on equal protection grounds because citizenship is not required to trigger protection for persons residing in the U.S. Olivas noted that *Plyler* has particular resonance today because of the circumstances facing “DACA-mented” students (those enrolled in the federal Deferred Action for Childhood Arrivals program), including access to basic education despite uncertain future citizenship status that creates significant legal and practical restrictions in the United States.

Kristin Rosekrans picked up on a theme in *Plyler* that denying undocumented students access to public education would lead to a life of hardship. Embedded in the *Plyler* majority opinion was the intention that the students could adapt to living within the structures of U.S. institutions by attending school and socializing with peers. She noted that many challenges to such inclusion persist because undocumented students tend to be in the most under-resourced, underserved schools,

concentrated among English learners and taught by inexperienced and often unqualified teachers. Rosenkrans explained that undocumented students often face multiple layers of segregation. They are segregated by schools – with low socioeconomic status and primarily students of color -- and segregated within the schools as English language learners (ELLs). She noted that ELL departments are often stigmatized within schools, offering lower quality education and experiencing high dropout rate. This has implications for DACA eligibility, which requires a high school graduation. Undocumented and DACA-mented students also face a range of challenges outside of school including uncertainty of deportation and family separation, effects of traumatic experiences that led to migration, living with extended family or others, and the need to work. Teachers need to understand context to help undocumented students succeed.

Rachel F. Moran explained *Plyler's* place in education and immigration jurisprudence, describing it as marking a “high water mark of constitutional personhood.” Noting the Court’s references to dignitary harm, innocence, vulnerability, and the stigma of illiteracy with respect to undocumented students, Moran highlighted the Court’s extension of these harms to the broader society and how allowing such harms diminishes the democratic commitment to justice and equality. Moran lamented that the principles articulated in *Plyler* “have taken a beating” most notably the recognition of the innocence of children. She compares *Plyler's* acknowledgement of human dignity and the vulnerability of immigrants and children with the current “treatment of families as ‘gaming the system’ and children viewed not just as pawns but also as co-conspirators.” Moran also discussed the current polemical narrative of about personhood and citizenship, pitting “citizen” versus “person” framed as a zero-sum political game. Moran noted current efforts to foreground the dignity that goes with personhood. Those efforts are rooted in advocacy seeking to establish legal recognition of a right to education, such as the recent *Gary B.* case.

Hiroshi Motomura described *Plyler* as providing a very important lens through which to think about immigrant rights (in education and more). Identifying three basic themes – the meaning of unlawful presence, the role of state and local governments versus the federal government, and the integration of immigrants into U.S. society, Motomura explains how *Plyler* fits a civil rights framework. For example, the *Plyler* Court analyzes unlawful presence as “ambiguous and changeable” which leaves room for more inclusive policy choices. In addition, while acknowledging that States and local governments have interests to be considered, *Plyler* thinks of undocumented immigrants as “future Americans or Americans in waiting” foregrounding federal interests. Motomura discussed *Plyler's* role in framing immigration law in civil rights terms, with the idea of immigrants claiming a rightful place in the U.S. national community in a manner limited to formal legal status. *Plyler's* position that

unlawful presence need not preclude belonging for immigrant children applies a useful approach to challenging racial marginalization, exploitative labor policy, and other forms of immigrant exclusion and subordination. That said, Motomura emphasized that when this framing has been applied in other cases, it often does not win and indeed is in significant jeopardy at this political moment.

Following the panel presentations, **Maryam Ahranjani** moderated a rich roundtable discussion exploring *Plyler* and its meaning today. In response to questions about *Plyler's* implications for today (and the possibility that it might be overturned), the panelists explained that despite its laudable narrative and principles, *Plyler* is a narrow decision of limited application. For example, Rachel Moran characterized *Plyler* as a “jurisprudential anomaly. Its holdings have been very compartmentalized.” She noted that *Plyler* could have been a preemption case; that the Court talks about vulnerability, but never applies heightened scrutiny; and that although it articulates a right to attend schools, it makes no mention of a right to a minimum or equal education.

Panelists noted how *Plyler's* narratives about dignity, innocence, personhood, and the inclusion of undocumented immigrants as members of the U.S. polity parallel arguments supporting DACA. They also highlighted *Plyler's* and DACA's significant limits in addressing myriad problems facing immigrant communities. Several described *Plyler* as fragile. To the extent *Plyler* may be used to advocate for DACA, the DREAM Act, a right to literacy, or other inclusive and equitable immigration and education policies, it risks being further narrowed or overturned by hostile courts in a punishing political climate.

Still, the discussion closed with an emphasis on *Plyler's* important contributions. For example, Rachel Moran emphasized that *Plyler* created a framework where children went to school to feel like they belonged. It gave them the tools to have a civic voice. *Plyler* in this way has inspired a generation to feel “we’re Americans, except on paper.”

Section Members’ Professional Updates – Publications, Presentations, and Other News

Scott Bauries was awarded the Robert M. and Joanne K. Duncan Law Faculty Teaching Award, University of Kentucky J. David Rosenberg College of Law, 2020. Scott Bauries authored the following articles: Special Education’s Lessons for School Funding Litigation, ___ Education Law & Policy Review ___ (forthcoming 2021) (with Spencer Weiler) (peer reviewed); Public Employees Who Testify, 24 Employee Rights & Employment Policy Journal 71 (2020) (peer reviewed); Professor Williams and the Education Debates in State Constitutional Law: A Festschrift for Robert Williams, 72 Rutgers University Law Review

101 (2020); Perversity as Rationality in Teacher Evaluation, 71 *Arkansas Law Review* 325 (2019). Recent Book Chapters include State Constitutional Provisions Prohibiting Financial Aid to Religious Institutions, in *Law, Religion, and Education* (Charles Russo, ed., forthcoming); Liability for Negligence Involving Colleges and Students, in *Contemporary Issues in Higher Education Law* (Susan Bon, David H. K. Nguyen, Jennifer Rippner, & Richard Fossey, eds., 4th ed. 2019). Scott Bauries engaged in the following academic presentations: Recent Developments in School Funding Litigation, Southeastern Association of Law Schools Annual Meeting (held virtually due to COVID-19), 2020; State Constitutional Law Discussion Group, Southeastern Association of Law Schools Annual Meeting (held virtually due to COVID-19), 2020; The Rights of LGBTQ Workers After Bostock, Southeastern Association of Law Schools Annual Meeting (held virtually due to COVID-19), 2020.

Susan De Jarnatt published *Virtual Reality: Cyber Charter Schools and the Need for Reform*, 92 PA. Bar Quarterly 1 (Jan. 2021), and *Taking on the Role of Lawyer: Transactional Skills, Transnational Issues, and Commercial Law*, 44 S. Ill. U. L. J. 225 (2020) (co-authored with Paolo Butturini, Università di Verona).

Jim Dwyer, co-author of *Homeschooling: The History and Philosophy of a Controversial Practice* (Chicago University Press) co-hosted with Elizabeth Bartholet of Harvard Law School an online Summit on Homeschooling, June 9-11. Jim also recently published an article entitled "Deflating Parental Rights" in the peer-reviewed journal *Law and Philosophy*.

Eric Girvan co-authored *Associations between Community-level Racial Biases, Office Discipline Referrals, and Out-of-School Suspensions*, __ SCH. PSYCOL. REV. __ (2021); *Effects of an Equity-Focused PBIS Approach to School Improvement on School Climate and Discipline*, __ PREVENTING SCH. FAILURE __ (2021); and published *Towards a Problem-Solving Approach to Addressing Racial Disparities in School Discipline Under Anti-Discrimination Law*, 50 U. MEMPHIS L. REV. 995-1090 (2020) (symposium issue on Closing the Gap: Solutions to Educational Inequality) and *Project BASICS: Behavioral Accountability for a Successful Instructional Climate in Schools* (R305A210071), U.S. Department of Education Institute for Education Sciences (Co-PI with Claudia Vincent, John English, & Heather McClure).

Natalie Gomez-Velez published *Reimagining Public Education Equity after COVID-19: Will Public Voices from New York's Epicenter Be Heard over the Siren Song of Billionaires?* 48 *Fordham Urb. L.J.* 313 (2021) and *Why Matter of De Vera Matters: Universal Pre-K, Quality, Oversight, and the Need to Restore Public Values in New York Statutory Interpretation*, 23 *CUNY L. Rev.* 238 (2020) . She published *Universal Pre-Kindergarten: Supporting High Quality and Broad Access at a Time of Federal Disengagement* and "School Choice" in *The Oxford Handbook of U.S. Education Law* (Kristine Bowman ed., Oxford University Press 2021). She also participated in "Pathways to Equity in Legal Education and the Profession" on April 16, 2021, a program co-sponsored by New York's Franklin H. Williams Judicial Commission, City University of New York School of Law, St. John's University School of Law, Syracuse University College of Law, and University at Buffalo School of Law.

Rachel Moran published the following articles: *The Unbearable Emptiness of Formalism: Autonomy, Equality, and the Right to Discriminate*, University of North Carolina L. Rev. (forthcoming 2021); *Persistent Inequalities, the Pandemic, and the Opportunity to Compete*, 27 Wash. & Lee J. Civ. Rts. & Soc. Just. 589 (2021); *School Finance Reform and Professor Stephen D. Sugarman's Lasting Legacy*, 109 Calif. L.Rev. 355 (2021). Rachel Moran also joined the *Amicus Brief of First Amendment and Education Law Scholars as Amici Curiae Supporting Petitioner in the United States Supreme Court, Mahanoy Area School District v. B.L.* (No. 20-255, filed March 1, 2021). Rachel Moran's recent education law presentations include: *Race and Education Policy, Law Students for Educational Equity*, UC Irvine School of Law, Irvine, CA, September 25, 2020 (panelist); *From Proposition 209 to Proposition 16: Historical, Legal and Activist Perspectives on Affirmative Action*, UC Berkeley School of Law, Berkeley, CA, October 19, 2020 (panelist); *Educational Inequity, Race and the Pandemic*, Washington and Lee Journal of Civil Rights and Social Justice, Washington and Lee School of Law, Lexington, VA, October 29, 2020 (panelist); *Fundamental Question for Our Democracy Regarding a Federal Right to Education*, University of Virginia School of Law, Charlottesville, VA, November 9, 2020 (panelist); *Persistent Inequalities, the Pandemic, and the Opportunity to Compete*, Faculty Scholarship Retreat, Texas A&M University School of Law, Ft. Worth, TX, November 19, 2020 (presenter); *The Impact of Castaneda v. Pickard 40 Years Later—1981-2021*, California Association for Bilingual Education Virtual Joint Delegate Assembly, December 8, 2020 (keynote speaker); *The Future of Plyler v. Doe on Its Fortieth Anniversary*, Education Law Section, AALS Annual Meeting, Washington, D.C., January 8, 2021 (panelist); *The Contemporary Legal Battlefield: Affirmative Action in Higher Education, Equal Protection's Grand Promise: Reconstruction, Plessy to Bakke and Beyond: Is There a Way Forward?*, University of North Carolina School of Law, Chapel Hill, NC, February 19, 2021(panelist); *Justice Through Education: Reclaiming Our Democracy Following January 6th*, Child Advocacy Research and Education, University of Virginia School of Law, Charlottesville, VA, March 2, 2021 (panelist); *Structural Racism in Education, Structural Racism and the Law: Exploring the Laws and Policies Creating and Sustaining Oppressive Systems*, Loyola University College of Law, New Orleans, LA, March 5, 2021 (panelist); *Immigrant Students in the Public Schools, Course on Race, Education, and Opportunity* (Guest Lecturer for taught by Professor Kimberly Robinson), University of Virginia School of Law, Charlottesville, VA, March 18, 2021; *Castaneda v. Pickard: A Retrospective at 40*, CABE 2021 Virtual Annual Conference: Standing Together for Unity, Multiliteracy, and Equity, California Association of Bilingual Educators, Walnut, CA, March 27, 2021 (keynote speaker); *Persistent Inequalities, the Pandemic, and the Opportunity to Compete*, Wednesday Law Forum, BYU School of Law, Provo, UT, March 31, 2021(speaker); *A Celebration in Honor of Professor Stephen Sugarman*, University of California at Berkeley School of Law, Berkeley, CA, April 29, 2021(panelist).

Michael A. Olivas published *Perchance to DREAM: A Legal and Political History of the DREAM Act and DACA* (NY: NYU Press, 2020)

Aaron Saiger published *Education in Virtual Environments*, in *The Oxford Handbook of U.S. Education Law* (Kristine Bowman ed., Oxford University Press 2021); *State Regulation of Curriculum in Private Religious Schools: A Constitutional Analysis*, in *Yeshivas versus the State of New York: A Case Study in Religious Liberty in Education* (Jay Greene & Jason Bedrick eds., Rowman & Littlefield 2020); and *School Funding under the Neutrality Principle: Notes on a Post-Espinoza Future*, 88 *Fordham Law Review Online* 213 (2020).

Ben Trachtenberg became Associate Dean for Academic Affairs at the University of Missouri School of Law in January 2021. In April, Ben was a panelist at a PEN America event titled “Free Expression Statements and Policies: Why and How,” which covered campus speech, diversity and inclusion efforts, and shared governance. This spring Ben published “Hiring and Training Competent Title IX Hearing Officers,” 86 *Mo. L. Rev.* (2021). In December 2020 Ben was elected to the American Law Institute.

2021- 2022 Education Law Section Board Officers:

Chair: Erin Archerd (Detroit-Mercy)

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Secretary: Miranda Johnson (Loyola-Chicago)

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Aaron Tang, University of California, Davis, School of Law

Announcements

Education Law-Related Events – 2020-2021



Para Todos Los Ninos – Mendez v. Westminster

The Latino Judges Association presented this film viewing and discussion on Wed, April 14, 2021, now available on YouTube

Publication Opportunities

INAUGURAL WILLIAM C. HUBBARD LAW AND EDUCATION CONFERENCE

CALL FOR PAPERS

The American Bar Foundation and the University of South Carolina Law School are pleased to announce a call for papers for the Inaugural William C. Hubbard Law and Education Law Conference. We plan to host the conference in person at the Law School in Columbia, South Carolina on February 24-25, 2022.

The theme for this inaugural conference is the role of law and education in a well-functioning democracy. We welcome proposals from legal scholars, social scientists, and practicing lawyers who are interested in developing, promoting, and interpreting education laws and policies that promote and sustain a democratic society.

Possible topics include, but are not limited to:

- (1) contests over educational content (e.g., critical race theory, curriculum, patriotic education, pedagogy, and religion);
- (2) diversity, equity, and inclusion (including anti-discriminations and segregations within and among schools, districts, and networks);
- (3) privatization and stability of public-school education (including charter schools, public-school funding, school choice, and vouchers); and
- (4) the rule of law and civics in the public education context.

We are also pleased to announce that the *Journal of Law and Education* and the *South Carolina Law Review* will each publish an issue with papers from the Conference. Paper submission will proceed in two stages:

- First, to apply, please email hubbard@abfn.org with: (1) a 250 to 500-word abstract in an Adobe Acrobat PDF or Microsoft Word document; and (2) contact information for all

of the manuscript's authors. The subject line should read "Hubbard Conference Article Submission"

- Authors may disclose academic affiliation, rank, or demographic membership at their own discretion.
- **Initial abstract submissions are due by 8:00pm ET/7:00pm CT/5:00pm PT on September 24, 2021.**
- We commit to reviewing all abstracts and notifying authors by October 15, 2021.
- **Second, accepted manuscripts are due by January 9, 2022** to enable discussants the opportunity to read and offer helpful comments by the Conference date.

We invite scholars of all rank and institutional affiliations to submit papers. We especially encourage emerging scholars and scholars who are minoritized within the Academy to submit papers.