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Will Residency Be Relevant to Public Education in the Twenty-First Century?

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Will Residency Be Relevant to Public Education in the Twenty-First Century?

SARAH L. BROWNING*

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I. INTRODUCTION

Long before the framers of New Hampshire's first constitution admonished legislatures and magistrates to cherish education, the provincial government had already established requirements for providing public education; these requirements were related to the size of a settlement.¹

By 1708, the provincial government in New Hampshire had established the first public school.² Not surprisingly, the school was in Portsmouth, which was, at the time,³ the seat of the provincial government.⁴ On May 2, 1719, the province passed an act that required communities of fifty families to employ a school teacher.⁵ Under the same act, a community that had one hundred families was required to maintain a school.⁶ Thus, the province established the duty to provide access to public education in New Hampshire and mandated that the settlements implement it. Where a child lived was the causal connection in the expansion of public education.

1. See, e.g., Apr. 25, 1721, ch. 3, 1702–1745 N.H. Laws 358. Part II, article 83 of the New Hampshire Constitution is the state's educational article for the encouragement of literature. It was the basis for the state's school funding litigation, commonly known as the *Claremont* decision. See *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1376 (N.H. 1993). This clause was part of the original constitution that was adopted in 1784. N.H. CONST. pt. II, art. 83 annots. While this article has been amended twice—once in 1877 to prohibit tax money for the funding of schools of religious denominations and again in 1903 to permit legislative regulation of monopolies and trusts—the original encouragement of literature clause has remained unchanged for 245 years. *Id.* Provincial requirements for public education were enacted on May 2, 1719. Act of May 2, 1719, ch. 9, 1702–1745 N.H. Laws 336.

2. Act of May 10, 1708, ch. 5, 1702–1745 N.H. Laws 85.

3. *Id.*

4. RICHARD F. UPTON, REVOLUTIONARY NEW HAMPSHIRE 2 (Kennikat Press 1971) (1936).

5. Act of May 2, 1719, 1702–1745 N.H. Laws at 337.

6. *Id.*

The purpose of this work is to ascertain whether, as a matter of public policy, the location in which a student lives should continue to determine which public school that student shall attend. The article will first look at the development in, and some of the early exceptions to, the residency requirement and how they have affected education policy. Next, it will discuss the role that state and federal statutes, court decisions, school funding litigation, technology, and current national projects have in modifying a strict reliance on residency as the primary factor that decides where students have access to public education. Finally, it will analyze whether the reliance on a residency-based public education system continues to be justifiable.

While the focus of this article is on public education in New Hampshire, the article also considers statutes and court decisions from Florida and Colorado, as well as some federal statutes and court decisions, in order to illustrate the general application of this analysis to public education nationwide and to demonstrate that the New Hampshire experience is not necessarily unique. There was no particular rationale for the choice of states other than to offer a limited, but geographically diverse, view as evidence of the parallel between the state experience in New Hampshire and that in other states, and of the experience at the national level.

A. *The New Hampshire Experience*

The demise of the residency requirement at the federal level began in the last quarter of the twentieth century. In 1975, Congress enacted the Education for All Handicapped Children Act of 1975.⁷ This law created the impetus for school districts to place students with a disability in public and private schools and programs outside of their resident school district in order to comply with the law's requirement to provide every student with a disability with a free and appropriate public education in the least restrictive environment.⁸ Although this act applied to a small subset of the public school population, this was the first major departure from the residency-

7. Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1482 (2006)).

8. 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(5).

based education delivery model. This option for a small number of children has fueled the demand for alternatives for all children.⁹

The U.S. Supreme Court followed in 1982 with a decision that permitted children of illegal immigrants to attend public schools.¹⁰ In 1987, Congress enacted a law that permitted homeless children and unaccompanied youth to attend school wherever they were, regardless of residency.¹¹ At the beginning of 2001, No Child Left Behind became law and ushered in sanctions for low-performing schools; sanctions that included parental choice of a public school that was not in need of improvement and additional funding for charter schools.¹² The following year, the U.S. Supreme Court upheld the Ohio voucher program over a challenge based on the Establishment Clause of the U.S. Constitution.¹³

During this same time period, states were enacting laws, in response to parental demands, to provide more public alternatives to all students; unsuccessfully trying to implement voucher programs or defend those already in existence against constitutional challenges; and defending their methods of school funding from constitutional challenges in both federal and state courts.¹⁴

While no single event would have had much effect on the residency-based delivery system, in the aggregate, these events have caused a schism in the current system. The question is: will the recognition of this conflict—between the current legal requirement

9. Parents of children that are not identified with disabilities frequently call the Department of Education looking for the same choices in education for their children that children with disabilities have. In some cases, these parents have attempted to use administrative due process hearings to obtain benefits similar to those available to children identified with disabilities. *E.g.*, *In re Tamworth Sch. Dist.*, Nos. 96-022 & 96-024 (N.H. Bd. of Educ. 1997), <http://www.ed.state.nh.us/education/laws/StateBoardDecisionsChronologically.htm>.

10. *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

11. Stewart B. McKinney Homeless Assistance (McKinney-Vento) Act, Pub. L. No. 100-77, §§ 721–725, 101 Stat. 482, 525–28 (1987) (codified as amended at 42 U.S.C. §§ 11431–11435).

12. No Child Left Behind Act of 2001, Pub. L. No. 107-110, sec. 101, §§1001–1004, 115 Stat. 1425, 1439–44 (2002) (codified at 20 U.S.C. § 6301–6304).

13. *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002).

14. *See, e.g.*, *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982); *Coal. for Adequacy & Fairness in Sch. Funding v. Chiles*, 680 So. 2d 400 (Fla. 1996); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375 (N.H. 1993).

of residency for public school attendance and the commitment to public school improvement by authorizing competitive, alternate programs—provide the momentum for a wider discussion regarding large-scale public school reform?

II. THE HISTORY AND RATIONALE FOR RESIDENCY

The general residency criterion for public school attendance in New Hampshire currently states: “Notwithstanding any other provision of law, no person shall attend school, or send a pupil to the school, in any district of which the pupil is not a legal resident, without the consent of the district or of the school board”¹⁵

This standard evolved from the provincial enactment that required settlements to provide access to education when they attained a particular number of households.¹⁶ The initial importance of “residence” was that it triggered a community’s social responsibility mandated by government. In the beginning, population was the driving force that determined when a community was required to offer the rudiments of a public education: first by employing a teacher when there were fifty households in a settlement, and then by maintaining a school when the number of households reached one hundred.¹⁷

Passed on December 23, 1842, chapter 73 of the New Hampshire Revised Statutes represented the first codification of the residency requirement as determinative of one’s access to public education.¹⁸ Its passage shifted the focus of residency from the trigger-point of a community’s obligation to a criterion for access to the public school system that was provided by every established community.¹⁹ Chapter 73, section 7 stated: “No person shall have a right to send to or receive any benefit from any school in a district in which he is not a resident, without the consent of such district.”²⁰

15. N.H. REV. STAT. ANN. § 193:12(I) (2008 & Supp. 2009).

16. *See* Act of May 2, 1719, ch. 9, 1702–1745 N.H. Laws 336.

17. *Id.*

18. N.H. REV. STAT. ch. 73, § 7 (1842).

19. *See id.*

20. *Id.*

This statutory language memorialized the shift from the point where the number of residents in a community activated a social responsibility to the point where the social responsibility was now limited to the number of residents in a community and others to whom they chose to confer the benefit. This standard has continued, largely unchanged, for over a century.²¹ Thus, residency has become the primary criterion for accessing public education. New Hampshire is not unlike other states in this regard.²²

From provincial times until the commencement of New Hampshire's school financing litigation, the primary source of funding for public education was local property taxes.²³ Once a community was large enough to be required to provide public education, the government during the colonial period required the community to fund it. When state law established residency as a criterion for access to public education, its primacy was no longer related to the size of the community. The concurrent fiscal responsibility of each community to pay for public education, as well as its social obligation to provide that education for its own inhabitants, had been required since 1719.²⁴ Resident-based public education became a limiting factor on the social responsibility, as well as on the fisc of a community, which required that communities educate only those children within their boundaries and allowed those communities to choose whether to offer the benefit to others beyond their boundaries.

In addition to limiting the financial impact a community must bear, residency had an additional value as a planning tool. Community planners were able to collect data on population growth and shifts, birth and death rates, available housing units, and business and economic trends in order to forecast the increase or decline in school populations. In this way, communities were able to

21. Compare N.H. REV. STAT. ANN. § 193:12 (2008 & Supp. 2009) (“[N]o person shall attend a school . . . in any district of which the pupil is not a legal resident . . .”), with N.H. REV. STAT. ch. 73, § 7 (1842) (“No person shall have a right to . . . receive any benefit from any school in a district in which he is not a resident . . .”).

22. See *infra* Parts III–IV.

23. See *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1379–80 (N.H. 1993).

24. See Act of May 2, 1719, ch. 9, 1702–1745 N.H. Laws 336.

plan for: school building projects, which are expensive capital investments and take a significant amount of time to complete; the need for teachers and textbooks; and other elements necessary to the public education delivery system.

With the benefits of the social and fiscal limitations along with the ability to plan for the future, the residency requirement provided an aspect of stability that is an essential virtue of public policy. In a period of time when social mobility was relatively rare, this was a rational public policy. In today's world, where people move frequently and regularly, it is appropriate to evaluate whether this policy is still well suited to our educational goals. While there has not yet been an organized challenge to the continued legitimacy of residency as a primary determinant of access to public education, other developments in public education may be eroding the value of residency as the access point for public education. This erosion is, perhaps, an unintended consequence of such developments, but it should be considered as educators, state and local school boards of education, legislators, and other leaders contemplate the future of public education in a society that is far more mobile than were the societies from the eighteenth century through the middle of the twentieth century. This analysis will look at some of these developments.

III. STATUTES, RULES, AND COURT DECISIONS: THE FACTORS THAT UNDERMINE RESIDENCY

Almost two hundred years after the first school was founded in Portsmouth and New Hampshire had required local government to provide and pay for public education, the state legislature enacted a statute that created a duty on parents requiring that they send their children to school.²⁵ Initially, children between the ages of eight and fourteen residing in a school district were required to attend school unless the local school board excused the attendance due to a physical or mental condition or because the child attended a private school that was approved by the local board.²⁶ Today, the

25. Act of Feb. 17, 1903, ch. 13, 1903 N.H. Laws 13.

26. *Id.*

distinction between the school district's duty to provide public education to its residents and a parent's duty to compel attendance is most evident by the fact that these two duties are set out in two different chapters of Title XV, the education title, of the Revised Statutes Annotated.²⁷

In less than a decade after enacting the compulsory attendance requirement, the New Hampshire legislature carved out the first exception to this requirement.²⁸ In 1911, the legislature permitted a person having custody or control of a child to apply to the state superintendent of public instruction whenever that person believed that attending the district school was against the moral or physical welfare of the child.²⁹ Such an application required the state to notify the local school board of the district where the child resided.³⁰

After the notification, the superintendent was authorized to make such orders as he judged were required by the circumstances, including an order that the child attend school in another district.³¹ If ordered by the superintendent to attend school in another district, the resident district was required by law to pay the child's tuition to the district where the child would now be going to school.³² Today, New Hampshire law recognizes a number of exceptions to the residency requirement, including the need to place a child with a disability not only outside the district, but in a nonpublic school as well.³³ Most of these exceptions still require the resident district to pay the cost of the education.³⁴

This exception, which grants to the state the authority to appropriate revenue from a local district, has its roots in the provincial law that not only mandated that a local community hire a

27. The district's duty to provide education to its resident students is found in section 189:1-a of the New Hampshire Statutes, while the parents' duty to compel their children to attend the school to which they are assigned by the school district is found at section 193:1(I). N.H. REV. STAT. ANN. §§ 189:1-a, 193:1(I) (2008 & Supp. 2009).

28. *See* Act of Apr. 13, 1911, ch. 139, 1911 N.H. Laws 157.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. N.H. REV. STAT. ANN. § 186-C:10 (Supp. 2009).

34. *See, e.g., id.*

teacher and maintain a school but also established a fine on the selectmen in communities that failed to raise the necessary funds to support a teacher or maintain a school when required to do so.³⁵ This authority is the likely link that initially tied together liability for the cost of public education and the residency requirement. It would be nearly a century before that link would be broken by the decision of the U.S. Court of Appeals for the First Circuit in 2002. In *Manchester School District v. Crisman*, the First Circuit's interpretation of the New Hampshire statutes caused a local school district to be liable for the education of a student, not because the student and parents resided in the district, but because it was where they were living when the child was placed in a home for children.³⁶

It appears that the first chink in the armor of residency is linked to the parental duty of compulsory attendance and the exceptions that arose from it. This link may be the key to a fundamental understanding of the sequence of public policy initiatives that occurred during the twentieth century and into the current century concerning parental choice options. Over the last thirty years, New Hampshire has been engaged in these public policy discussions as part of a national dialogue about public education.³⁷ The legislature has enacted various initiatives to provide some measure of parental choice in public education.³⁸ These efforts have been largely unsuccessful for a variety of reasons, including the fact that any cost associated with these initiatives continued to be the responsibility of the resident school district.³⁹ It was not until 2003, when the

35. Act of Apr. 25, 1721, ch. 3, 1702–1745 N.H. Laws 358.

36. 306 F.3d 1, 4–5 (1st Cir. 2002).

37. Beginning in 1975 and continuing through 2007 the indices of the House and Senate Journals for the New Hampshire General Court regularly contain entries for the introduction of bills for charter schools and voucher programs that would permit parents to choose an alternative to public educations. Committee records and research, in addition to the author's personal observation, indicate a number of other states had enacted or were considering similar initiatives within the same time period. *See, e.g.*, Sara Vitaska, *School Choice*, 14 LEGISBRIEF 9 (2006) (providing a selected review of the history of public school choice).

38. *See, e.g.*, N.H. REV. STAT. ANN. §§ 193:3, 194-A (2006).

39. Section 194-B:11(I) of the New Hampshire Statutes requires resident school districts to pay to a charter school not less than 80 percent of that district's average per-pupil cost when a pupil attended a charter school outside the resident district.

legislature authorized a ten-year pilot project that permitted the State Board of Education to directly authorize charter school applications without any approval at the local level, that New Hampshire finally had at least one popular public choice option to compete with the resident district public school.⁴⁰ But the success of this option was due, in large measure, to the fact that the state, and not the resident school district, paid the cost for students that attended these charter schools.⁴¹ The state legislature suspended this program in 2007.⁴² A more detailed discussion of public choice options and their history appears later in this article.⁴³

A. *Extended Learning Opportunities (ELO)*

Although New Hampshire's experience with legislatively-approved options to public education may not be as robust as those in other states, one should not conclude that the state lags behind in preparing for public education that will meet the needs of students in the twenty-first century. In 1919, the legislature created the State Board of Education and invested the board with extraordinary authority that has not been amended in ninety years.⁴⁴ The grant of authority reads, in relevant part: "The state board shall have the same powers of management, supervision, and direction over all public schools in this state as the directors of a business corporation have over its business, except as otherwise limited by law."⁴⁵

N.H. REV. STAT. ANN. § 194-B:11(I). Records at the New Hampshire Department of Education indicate that no district successfully adopted such a provision when it was placed on the school district warrant. See SARAH BROWNING, N.H. DEP'T OF EDUC., CHARTERS GRANTED BY THE STATE BOARD OF EDUCATION PURSUANT TO RSA 194-B:3 1997–2000 (2010) (on file with author) (compiling information from charter school applications that came before the State Board of Education).

40. Act of July 18, 2003, ch.273, 2003 N.H. Laws 522 (codified as amended at N.H. REV. STAT. ANN. § 194-B:3-a).

41. See N.H. REV. STAT. ANN. § 194-B:11(I)(b).

42. Act of June 29, 2007, ch. 263, § 93, 2007 N.H. Laws 301, 331. In 2009, the state legislature renewed the moratorium. Act of June 30, 2009, ch. 144, § 153, 2009 N.H. Laws 146, 184.

43. See *infra* Part III.D.

44. Compare Act of Mar. 28, 1919, ch. 106, § 5, 1919 N.H. Laws 155, 157–58, with N.H. REV. STAT. ANN. § 186:5 (2008).

45. N.H. REV. STAT. ANN. § 186:5.

At the same time, the board was also permitted to set the minimum curriculum and education standards for all grades of the public school.⁴⁶ Today, those standards are one part of the code of administrative rules for education.⁴⁷ By statute, these rules have the force and effect of law.⁴⁸ Since the legislature created the State Board of Education, they have shared, to some degree, the public policy role for public education.⁴⁹ With some exceptions, it seems that the legislature and the state board have each exercised their authority in the public policy realm without great acrimony.⁵⁰ In its most recent adoption of rules for setting the minimum standards for public school approval, the board permitted local school districts to award credit to students for what they defined as ELO.⁵¹ These opportunities are defined as “the primary acquisition of knowledge and skills through instruction or study outside of the traditional classroom methodology” and include such options as independent study, private instruction, performing groups, internships, community service, apprenticeships, and online courses.⁵²

It is accurate to state that ELOs are, at least at the moment, an option in high school and, in some cases, middle school.⁵³ However, gains in the status of ELOs among school districts within the state can be considered another development that reduces the importance

46. Act of Mar. 28, 1919 § 5; *cf.* N.H. REV. STAT. ANN. § 186:8(I).

47. N.H. CODE R. ED. 306 (Weil 2009) (describing minimum standards for public school approval).

48. N.H. REV. STAT. ANN. § 541-A:22(II) (2007).

49. The New Hampshire Constitution, Part II, Article 5 grants full power and authority to the General Court to make laws, while in section 186:5 the general court grants a broad delegation of this duty for public education to the State Board of Education. *Compare* N.H. CONST. pt. II, art. 5, *with* N.H. REV. STAT. ANN. § 186:5.

50. Since section 186:5 has not been amended since it was enacted in 1919, it is reasonable to conclude that the power-sharing arrangement between the legislature and the State Board of Education has been, for the most part, amicable. *See* N.H. REV. STAT. ANN. § 186:5; Act of Mar. 28, 1919 § 5. Were this not the case, the legislature could have amended the statute.

51. N.H. CODE R. ED. 306.04(a)(13) (requiring school districts to adopt and implement a written policy if they choose to offer ELOs).

52. *Id.* at 306.02(c) (providing the definition for ELOs).

53. *Id.* at 306.26(f) (middle school); *id.* at 306.27(b)(4) (high school). However, there are no provisions for ELOs in elementary grades prior to middle school.

of residency. Any of the ELO options can occur in places outside the resident school district, and while a school still remains an anchor for the awarding of credit for ELO activity, there is nothing, beyond the current residency statute, that ties a student to a school in the district where he resides.⁵⁴ It is not unreasonable to hypothesize that a student in the future might be able to seek a school in a community where his internship, community service, or apprenticeship was located and then develop a plan for an independent study coupled with some regular classes at an approved high school or adult high school in that community in order to earn a school year's worth of credit or more. Such options also contemplate the acquisition of knowledge and skills from foreign travel. This again demonstrates the inconsequentiality of a residency requirement in order to access public education.

Currently, every ELO must be approved by the school in which the student resides and be based on a standard adopted by the local school district, if that district chooses to permit students to earn credits using the ELO option.⁵⁵ That is not to say that a local approval process must or will always continue to be the only method for accessing this option. Only a lack of capacity at the state level prevents the legislature and the state board from considering a public policy that would allow a student to apply to the Department of Education for approval of an ELO option. While this is not currently contemplated, the theory is not an unimaginable progression from where we are today.

B. Manchester School District v. Crisman

State law requires the State Board of Education to provide an appeal and issue a decision to any individual that disputes a decision of a local school system or the Department of Education.⁵⁶ Over the years, the board has heard a number of appeals dealing with the residency issue. A change in the law in 2003 shifted these responsibilities to the Commissioner of Education and removed the

54. *See id.* at 306.26(f), 306.27(b)(4).

55. *Id.* at 306.04(a)(13).

56. N.H. REV. STAT. ANN. § 21-N:11(III) (2000).

board from hearing the appeal of that decision.⁵⁷ While the commissioner's decisions are not currently published, the prior state board decisions are available on the department website.⁵⁸ The only current residency case that has found its way into the judicial system is *Manchester School District v. Crisman*.⁵⁹ This case has a procedural history that spans a decade, beginning with an administrative decision in 1992.⁶⁰ The case involved a child who was born in Colorado in September of 1988 and who traveled with her parents to Manchester, New Hampshire in January of 1989.⁶¹ While in Manchester, the child was involved in a serious accident and sustained permanent injuries.⁶² The Division of Children and Youth Services helped the parents place the child in a group home in Pittsfield, New Hampshire.⁶³ The application for placement listed an address in Manchester for the parents.⁶⁴

The decision articulated the basic difference between the residency requirement in section 193:12(I) of the New Hampshire Statutes and a determination of which school district was liable for the cost of a public education, and expressed great concern regarding the wisdom of relying on traditional definitions of residency to determine school district liability, at least for the education of students with disabilities.⁶⁵ Based on the *Crisman* opinion, the district where the student resides may not always be the district liable for the cost of a student's elementary or secondary

57. Act of Aug. 20, 2003, ch. 222, § 2, 2003 N.H. Laws 339, 339–40 (codified as amended at N.H. REV. STAT. ANN. § 193:12(VI) (Supp. 2009)). The Commissioner's decision is appealable to a court of competent jurisdiction. *Id.* The court of competent jurisdiction is the New Hampshire Supreme Court. N.H. REV. STAT. ANN. § 541:6 (2007).

58. N.H. Dep't of Educ., State Board Decision by Subject, <http://www.ed.state.nh.us/education/laws/StateBoardDecisionbySubject.htm> (last visited Feb. 6, 2010).

59. 306 F.3d 1 (1st Cir. 2002).

60. *Id.* at 5. A redacted version of the administrative decision is available at the New Hampshire Department of Education, Office of Legislation and Hearings.

61. *Id.* at 4.

62. *Id.* at 5.

63. *Id.*

64. *Id.*

65. *Cf. Crisman*, 306 F.3d at 11 (“The definition of legal resident contained in section 193:12 does not affect the particular statutory provisions on which [Manchester School District's] liability to [the child] turns.”).

education.⁶⁶ The court in *Crisman* held that the Manchester school district was liable for the educational costs of a student with a disability who had never established residency in Manchester and who, by the time she was old enough to attend school, was living and going to school in another New Hampshire school district.⁶⁷ The court advanced the premise that the residency requirements in the state's statutes simply limit where a child may go to school; they do not address the issue of who is responsible to pay for the student's education.⁶⁸

The First Circuit relied on several sections of section 193:12, the state's residency law, and on the provisions of chapter 186-C, the state's special education law, to affirm the district court's decision. The district court's decision upheld the hearing officer's determination that, despite all of the legal theories advanced by the school district, Manchester was the school district responsible to pay for the education of the child because the child and her parents were living in Manchester at the time that the child was placed in a home for children in Pittsfield.⁶⁹

In its decision, the court stated that section 193:12, the current residency statute, only sets forth where a child *may* go to school, unless the child meets the requirements of one of the exceptions; and section 193:12(V) is an exception that requires the determination of liability to be made in accordance with section 193:29.⁷⁰ The court also reviewed the language of section 193:27, which states, in relevant part that a sending district is "the school district in which the child *most recently resided* other than in a home for children."⁷¹

The court next relied on a recent New Hampshire Supreme Court decision, which held that "most recently resided" meant the place where one lived prior to placement in a home for children, regardless of residency.⁷²

66. *See id.* at 11–13.

67. *Id.*

68. *Id.* at 11.

69. *Id.* at 11–13.

70. *Id.* at 12.

71. *Crisman*, 306 F.3d at 11 (emphasis added) (quoting N.H. REV. STAT. ANN. § 193:27(IV) (1999)).

72. *Id.* at 12 (citing *In re Gary B.*, 466 A.2d 929, 932 (N.H. 1983)).

Without challenging the merits of the decision by either the First Circuit or the New Hampshire Supreme Court, it is still possible to observe that the *Crisman* decision breaks the link between residency and liability. If a liability determination may obligate a school district for the expenses of educating a child that is an inhabitant, but not a resident, of the district, then the premise of residency as a limit on fiscal obligation is severely compromised. Furthermore, with this link between residency and financial liability now broken, this decision arguably strengthens the position of the plaintiffs in the school funding litigation cases. If there is no correlation between where a student lives and which community pays for a student's education, the notion that it is the state's responsibility to provide the access for all its resident students to get a public education becomes more viable. So, even a correct decision concerning liability may have unintended consequences that have the power to undermine the stability of an unrelated and long-standing public policy that set out residency as the principal factor in determining access to public education.

C. Plyler v. Doe

On the national level, the U.S. Supreme Court addressed residency in a decision that held a 1975 Texas law unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment by treating children of illegal immigrants differently than other children within Texas's borders.⁷³

The case of *Plyler v. Doe* reached the Court by way of two cases that challenged the constitutionality of a Texas law involving residency: (1) a class action suit from the Eastern District of Texas; and, (2) a number of challenges in the Southern District of Texas, originating in various parts of the state, that were consolidated below.⁷⁴ On appeal from the decisions of the Fifth Circuit, the U.S. Supreme Court consolidated the two cases.⁷⁵ At issue was a state statute that withheld state funds from school districts for the education of children that were not legally admitted to the country

73. *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

74. *Id.* at 206, 209.

75. *Id.* at 210.

and therefore not residents of Texas.⁷⁶ It also authorized school districts to refuse to enroll these children as students in the public school system.⁷⁷ In the class action, the certified class was a group of undocumented children of elementary or secondary school age.⁷⁸

Texas argued that since they entered Texas illegally, these children were not residents of Texas and were not properly within the jurisdiction of the state; therefore, they were not entitled to access public education and were not entitled to protection under the U.S. Constitution.⁷⁹ Texas also maintained that the statute was a financial measure to prevent a drain on the State's treasury.⁸⁰ The district court held that the state statute was an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment.⁸¹ Both the Fifth Circuit and the Supreme Court upheld the district court's opinion.⁸²

Again, what makes this opinion interesting to the analysis concerning the relevancy of residency is not the holding or the reasoning employed by the various courts to strike down the state statute. What is notable are two of the district court's findings: (1) in the class action case, the court found that the number of illegal immigrants seeking to enroll in public schools in Texas was small and that the increase in enrollment was attributable, for the most part, to children who were legal residents;⁸³ and (2) in the consolidated cases, the court found that the state's concern for fiscal integrity was not a compelling state interest.⁸⁴ It is also interesting to note that part of the Supreme Court's holding extended equal protection to the student class on the theory that minors are not held responsible for the illegal actions of their parents.⁸⁵ The Court reasoned that it would be fundamentally unfair to disable a child by withholding the benefits of public education where the child was

76. *Id.* at 205.

77. *Id.*

78. *Id.* at 206.

79. *Plyler*, 457 U.S. at 210.

80. *Id.* at 227.

81. *Id.* at 208.

82. *Id.* at 208–09, 230.

83. *Id.* at 207.

84. *Id.* at 209.

85. *Plyler*, 457 U.S. at 219–20.

brought to this country by his parents and had no opportunity to cure his disability, because as a minor child he could not control the actions of his adult parents.⁸⁶ Again, without debating the validity of the *Plyler* decision, it is apparent that the value of residency as a limit on financial responsibility and social obligation are further eroded by this decision. If fiscal integrity is not a compelling state interest and students whose parents cannot meet the residency requirements of a state law may still access the public education system, the rhetorical question must be: what is the value of a residency requirement?

D. Options to Resident District Public School Attendance

New Hampshire's experience with school choice options has been limited and not entirely successful from the view of those who support choice. With the enactment of the statute that created compulsory attendance as a parental duty, the initial choice was for the parent to have a child excused from attendance by the local district or appeal to the state for a change in school assignment.⁸⁷

As of this writing, section 193:3 provides two options for a change in school assignment, one based on manifest educational hardship, and the other based on best interests of the child.⁸⁸ It should be noted that neither of these options is clearly defined, and both require approval by the resident school district and the payment of tuition by that district to the district to which the student is re-assigned.⁸⁹ This option is infrequently approved, onerous for parents, and designed to maintain the status quo of the union of residency with liability.⁹⁰ Although this is not necessarily a

86. *Id.*

87. Act of Apr. 13, 1911, ch. 139, 1911 N.H. Laws 157.

88. N.H. REV. STAT. ANN. § 193:3 (Supp. 2009).

89. *Id.* § 193:3(I), (III).

90. A survey of the recent state board administrative hearings indicates that manifest educational hardship is often the basis for appeal of a local school board decision. See N.H. Dep't of Educ., Laws & Hearing / Mediation, <http://www.ed.state.nh.us/education/laws/StateBoardDecisionbySubject.htm> (last visited Apr. 2, 2010) (demonstrating that approximately twenty of the eighty-eight cases contain "manifest educational hardship" or "hardship" in the description of the case). Since "best interest of the child" decisions cannot be appealed to the

satisfactory option for parents, it is still evidence of a public policy that is willing to carve out niches in the residency criterion. In addition to this statutory provision, parents willing to pay tuition to another public school district have successfully enrolled their children in other districts when district policies have permitted accepting tuition students.⁹¹ In addition, there are some collective bargaining agreements with teachers where the employing district permits those employees who live outside the district in which they teach to enroll their children in the employing district, sometimes at a significantly reduced tuition.⁹² Under current law, a child may be excused from attending a public school within the resident school district if the child is attending a charter or nonpublic school or is enrolled in a home education program.⁹³

1. *Vouchers and Section 194-A*

The concept of voucher programs is another attack on the viability of the residency requirement. State legislation permits school districts to issue vouchers for a specified amount to pay for a student's education in a private school, anywhere in the state, that is authorized and willing accept the vouchers.⁹⁴ While the concept undermines local public education, the programs have not had much of an effect because they are generally challenged on constitutional grounds and because the challenges, to date, have been very successful.⁹⁵ The early voucher legislation provided for the state to pay the vouchers directly to the schools.⁹⁶ Since most of the private

state board, pursuant to section 193:3(III)(h), there is no method, short of surveying every school district, to know how often these requests are approved, but it is unlikely that the approvals would be more frequent than those for manifest educational hardship. *See* N.H. REV. STAT. ANN. § 193:3(III)(h).

91. Statistics are available from the New Hampshire Department of Education, Office of Information Services upon request.

92. *See* Judgment of July 20, 2006, No. 06-05-065 (N.H. Dep't of Educ. July 20, 2006), <http://www.ed.state.nh.us/education/laws/0605065.htm>.

93. N.H. REV. STAT. ANN. § 193:1(I) (2006).

94. Act of May 27, 1975, ch. 182, 1975 N.H. Laws 152, *repealed by* Act of May 1, 1986, ch. 41, § 29, 1986 N.H. Laws 53, 65.

95. *See, e.g.,* Owens v. Colo. Cong. of Parents, Teachers & Students, 92 P.3d 933, 944 (Colo. 2004); Bush v. Holmes, 919 So. 2d 392, 412–13 (Fla. 2006).

96. *See Holmes*, 919 So. 2d at 397.

schools that were willing to accept these vouchers were parochial schools operated by the Roman Catholic Church, the early challenges were based on religious clauses in state constitutions or the Establishment Clause of U.S. Constitution.⁹⁷ Supporters of the voucher programs conceived a strategy to get around this impediment by having the school district pay the voucher to the parent of the student. The opponents met this challenge by resorting to various educational clauses in a state's constitution.⁹⁸

New Hampshire was willing to consider providing vouchers even before it statutorily permitted home-schooling and charter schools. The impetus for this legislation was a grant from the federal government to the New Hampshire Department of Education.⁹⁹

The New Hampshire Department of Education received the federal grant in the spring of 1973 to develop a model to test an unrestricted voucher program.¹⁰⁰ The department agreed, on advice of counsel, to eliminate sectarian schools from participation due to recent Supreme Court rulings.¹⁰¹ In December of 1973, the Attorney General's office encouraged the Department to seek legislation to resolve issues that required legislative authority to implement the program.¹⁰²

In the 1975 legislative session, two voucher bills were filed.¹⁰³ The bill requested by the Department was sponsored by a bipartisan group of legislators led by the former chairman of the House Education Committee and, at the time, the House Majority Leader.¹⁰⁴

97. Martin R. West, *School Choice Litigation After Zelman*, in FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 167, 177–78 (Joshua M. Dunn & Martin R. West eds., 2009).

98. *See, e.g., Colo. Cong. of Parents*, 92 P.3d at 935; *Holmes*, 919 So. 2d at 397–98.

99. Act of May 27, 1975, ch. 182, sec.1, § 1, 1975 N.H. Laws 152, 152–53, *repealed by* Act of May 1, 1986, ch. 41, § 29, 1986 N.H. Laws 53, 65; ROBERT L. BRUNELLE, OFFICE OF THE COMM'R, N.H. STATE DEP'T OF EDUC., THE NEW HAMPSHIRE VOUCHER EXPERIMENT 6 (1976).

100. BRUNELLE, *supra* note 99, at 1.

101. *Id.* at 6.

102. *Id.*

103. *See* N.H. JOURNAL OF THE HOUSE 1137 (1975) (listing H.B. 374 and H.B. 867).

104. *Id.* at 428; THE BROWN BOOK OF THE NEW HAMPSHIRE LEGISLATURE 45–46 (1975). Additionally, the author was employed by the Office of the Speaker of the

H.B. 867, an act providing for the test of education voucher programs, became Chapter 182 of the Laws of 1975.¹⁰⁵ The other bill, H.B. 970—an act providing for partial tuition payments for parents of children attending private elementary schools if approved by local referendum—was killed by the House.¹⁰⁶ The House Education Committee report on H.B. 970, which recommended the bill as inexpedient to legislate, offered the following: “There is an on-going test of the voucher plan in New Hampshire. The Education Committee feels that HB 867 should be supported now and that this bill, which would be unconstitutional as written, should not be passed.”¹⁰⁷

Chapter 182 was intended to permit a voucher pilot project when federal money was available.¹⁰⁸ It authorized the Board of Education to operate the program and required voter approval by a local school district meeting in order to participate in the program.¹⁰⁹ It also contained a section that terminated the authority granted to conduct the test as of June 30, 1983.¹¹⁰ It would not take that long for the program to fail. At school district meetings held in March of 1976, there were six school districts that had articles on their warrants to permit them to participate in the voucher program.¹¹¹ Not one of them passed.¹¹² The program ended on May 31, 1976.¹¹³ The statute, section 194-A, was repealed in 1986 as part of a bill to reauthorize and reorganize the Department of Education, under the then-existing sunset provisions of state law.¹¹⁴ The primary

House from 1975–79 and ultimately assigned as research assistant to the House Majority Leader and is familiar with the legislative activities during this time period.

105. N.H. JOURNAL OF THE HOUSE, *supra* note 103, at 1274.

106. *Id.* at 618.

107. *Id.*

108. Act of May 27, 1975, ch. 182, sec. 1, § 1, 1975 N.H. Laws 152, 152–53, *repealed by* Act of May 1, 1986, ch. 41, § 29, 1986 N.H. Laws 53, 65.

109. *Id.* § 2–3.

110. *Id.* § 6.

111. WILLIAM H. MILNE, N.H. DEP’T OF EDUC., FINAL REPORT: NEW HAMPSHIRE EDUCATION VOUCHER PROJECT 15 (1976) (on file with author).

112. *Id.*

113. *Id.* at 18.

114. Act of May 1, 1986, ch. 41, § 29, 1986 N.H. Laws 53, 65.

opponent of the test project was the New Hampshire chapter of the National Education Association (NH-NEA).¹¹⁵

Despite the Department's initial intention to exclude sectarian schools, legislation was designed to be an unrestricted voucher program, and it contained language that stated that the pilot project was not intended to aid any particular school or type of school, but was intended to aid students.¹¹⁶ This appears to be an attempt to satisfy the three-prong *Lemon* test of (1) offering a general welfare benefit to an individual rather than advancing or inhibiting a particular religion; (2) serving a legitimate secular purpose; and (3) having no excessive entanglements between church and state—a test announced by the U.S. Supreme Court four years earlier.¹¹⁷ Since no school district elected to participate in the voucher program, it was never challenged in court as offensive to either the state constitution or the Federal Constitution on any grounds, including violation of the *Lemon* test.

More recent efforts have not been any more successful. In 2004, the legislature considered two bills related to vouchers. H.B. 727 created a committee to study the issue of school choice in New Hampshire.¹¹⁸ The study did not result in any changes in choice options for parents beyond what already existed.¹¹⁹ The House Education Committee referred H.B. 754, which established an educational certificate program to allow parental choice in the selection of schools for children, to interim study where it died at the end of the session.¹²⁰ There were many opponents to vouchers this

115. BRUNELLE, *supra* note 99, at 4.

116. Act of May 27, 1975 sec. 1, § 1.

117. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

118. Act of June 11, 2004, ch. 204, 2004 N.H. Laws 375.

119. Section 5 required: “The committee shall report its findings and any recommendations for proposed legislation to the senate president, the speaker of the house of representatives, the senate clerk, the house clerk, the governor, and the state library on or before November 30, 2004.” *Id.* No additional parental choice options have been enacted since 2004.

120. N.H. General Court Bill Status System, Docket of HB 754, http://www.gencourt.state.nh.us/bill_status/bill_docket.aspx?lsr=218&sy=2004&sortoption=&txbillnumber=HB754 (last visited Feb. 6, 2010) [hereinafter Bill Status].

time, including the State and the Department of Education.¹²¹ One reason for opposition that had not been a factor in 1975 was the *Claremont* school-funding litigation.¹²² With the New Hampshire Supreme Court monitoring the legislative efforts to define and fund an adequate education, this was probably not the ideal time to siphon off limited state resources to fund any private alternative to public education.¹²³

Both Florida and Colorado have had their voucher programs declared unconstitutional by the supreme courts in those states.¹²⁴ This may be the one area where state courts are willing to maintain the status quo and limit the options for residency-based education. Yet this may be due more to the fact that these programs generally provide public money to private schools in addition to, or as an alternative to, public schools, rather than due to an aversion to choice in public education. It is also interesting to note that the voucher statutes in these two states were not struck down based on a state constitutional provision requiring the separation between church and state.¹²⁵ This will become evident in the sections dealing specifically with the Colorado and Florida educational development. However, due to the myriad educational choices already available in both states, the Florida and Colorado state court decisions invalidating voucher programs have not reinforced residency as a

121. As special assistant to the commissioner and an advisor to the State Board of Education, the author has primary responsibility for the legislative agenda of the Department of Education and was an active participant in the legislative process of the 2004 legislative session.

122. See Bill Status, *supra* note 120.

123. The school funding litigation that began as *Claremont School District* and its progeny have kept the New Hampshire Supreme Court involved in the legislature's efforts to define, determine the cost of, fund, and assess the provisions of an adequate education for more than a decade. See, e.g., 635 A.2d 1375 (N.H. 1993).

124. *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933, 944 (Colo. 2004); *Bush v. Holmes*, 919 So. 2d 392, 412–13 (Fla. 2006).

125. See *Colo. Cong. of Parents*, 92 P.3d at 943–44 (finding instead that the statute violated the state's constitutional mandate to empower democratically representative school boards, not parents directly, to control public education); *Holmes*, 919 So. 2d at 412 (finding instead that the statute violated the state's constitutional mandate to provide adequate public education).

principle for accessing public education.¹²⁶ In contrast, the U.S. Supreme Court, within the same time period, upheld a voucher program that had been enacted by the Ohio legislature.¹²⁷ This decision, because of its narrow scope of review, also had no discernable effect on residency-based education.

2. *The Option to Home School*

The next successful choice option enacted in New Hampshire was the statute that permitted parents to withdraw their children from public school for the purpose of educating them at home.¹²⁸ Unlike the change of school assignment option, the home schooling option did not require approval of the local district, although initially a school district could challenge a parent's decision to home school a child.¹²⁹ Home schooling also did not involve an appropriation of any state or local tax money. This legislation was not enacted until 1990. The legislative purpose stated:

The general court recognizes, in the enactment of RSA 193-A as inserted by section 3 of this act, that it is the primary right and obligation of a parent to choose the appropriate educational alternative for a child under his care and supervision, as provided by law. One such alternative allows a parent to elect to educate a child at home as an alternative to attendance at a public or private school, in accordance with RSA 193-A. The general court further recognizes that home education is more individualized than instruction normally provided in the classroom setting.¹³⁰

126. *See infra* Parts IV–V for explicit detail of the choices available to parents that do not choose to enroll their children in the public schools in both Florida and Colorado.

127. *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002).

128. N.H. REV. STAT. ANN. §§ 193-A:1–10 (2008 & Supp. 2009).

129. Act of Apr. 28, 1990, ch. 279, sec. 3, § 7, 1990 N.H. Laws 547, 550 (codified as amended at N.H. REV. STAT. ANN. § 193-A:7 (2008)) (describing the process by which a school district may challenge a parent's decision to home school).

130. *Id.* at sec. 2.

There must be a participating agent responsible for overseeing every home school program.¹³¹ The law permits the resident superintendent, a non-public school principal, or the Commissioner of Education to act as participating agents.¹³² The Department of Education encourages parents to elect the resident superintendent as the participating agent in order to foster communication at the local level. This communication can be important if home-schooled students wish to participate in co-curricular courses or activities at the local elementary or secondary school, which they are permitted to do by law.¹³³ It also makes the transition of returning to public school easier if the parents choose to terminate the home school program or the program is terminated by order of a hearing officer, when the child's annual evaluations for two consecutive years are unsatisfactory.¹³⁴ This policy supports the norm of residency-based education, while the choice itself invalidates the value of the norm.

The ability of a parent to educate a child at home is not only a challenge to the residency requirement, but also an assault against the entire system of universal public education. This is not a criticism of the home-education model. It is simply to state the fundamental difference between teaching a child one-on-one as opposed to in a classroom with twenty or more peers. It is a basic withdrawal from and a repudiation of that state of society created by constitutions for the protection of a form of governance that guarantees the continued existence of a free society.¹³⁵ While the home school population may reduce the financial impact on the system, it is one factor that undermines the ability of a district to plan for its needs. Alone, home education is not a significant factor, but it is part of the story.

131. N.H. REV. STAT. ANN. § 193-A:4(II).

132. *Id.*

133. N.H. REV. STAT. ANN. § 193:1-c.

134. *See id.* § 193-A:6(III) (setting forth a one-year probationary period following the first unsatisfactory annual evaluation and revocation, subject to due procedures, following the second unsatisfactory annual evaluation).

135. *Cf.* N.H. CONST. pt. I, art. 3 (“When men enter into a state of society, they surrender up some of their natural rights to that society, in order to ensure the protection of others . . .”).

3. *The Charter School Option*

The last New Hampshire alternative came during the 1995 legislative session when the charter school law was enacted.¹³⁶ It was a complicated law that required two votes at the local level and an approval by the State Board of Education in between.¹³⁷ Although the board issued a number of charter certificates, no charter schools have opened under this provision.¹³⁸ It was not until the 2003 legislative session that a pilot program was established that permitted charter groups to bypass the first local vote and go directly to the Board for authorization.¹³⁹ The pilot program also eliminated the greatest obstacle for charter schools, which was the second local vote.¹⁴⁰ It was this vote that required the local districts to appropriate 80 percent of the per-pupil cost to the charter school.¹⁴¹ No district was ever willing to tax itself to support a charter school.¹⁴² The pilot program was able to surmount this obstacle because the state's funding mechanism at the time used a formula that yielded a statewide per-pupil cost for an adequate education.¹⁴³ The legislature simply directed the school districts to pay to the charter schools the per-pupil amount for any student who resided in

136. *See* Act of June 19, 1995, ch. 260, § 6, 1995 N.H. Laws 409, 410–23 (codified as amended at N.H. REV. STAT. ANN. §§ 194-B:1–22 (2008 & Supp. 2009)).

137. *See* N.H. REV. STAT. ANN. §§ 194-B:3(III).

138. Records at the New Hampshire Department of Education indicate that between 1996 and April of 2000, ten communities had adopted the provisions of section 194-B:4. No charter schools have ever opened in any of these school districts. *See* BROWNING, *supra* note 39.

139. *See* Act of July 18, 2003, ch. 273, § 1, 2003 N.H. Laws 522, 522 (codified as amended at N.H. REV. STAT. ANN. § 194-B:3-a).

140. *Id.*

141. *See* N.H. REV. STAT. ANN. § 194-B:11(I).

142. Although the state board approved charters under the local option provided in section 194-B of the New Hampshire Statutes, no charter schools have yet opened under this provision and all currently existing charter schools have opened under the pilot program under section 194-B:3-a and are funded by the state pursuant to section 194-B:11. *See* N.H. REV. STAT. ANN. § 194-B; BROWNING, *supra* note 39.

143. *See* Act of July 18, 2003 § 2 (codified as amended at N.H. REV. STAT. ANN. § 194-B:11(I)).

its district but elected to go to a charter school.¹⁴⁴ Ultimately, the school funding law was amended and the new formula ceased to produce a statewide per-pupil cost; the legislature simply fixed an amount for an individual charter school education and paid a multiple of that amount directly to the charter schools based on their enrollment.¹⁴⁵ Under the pilot program, the state board approved fourteen charter applications, and of those, eleven are currently still in operation.¹⁴⁶

By law, all charter schools in New Hampshire are not only public schools, but are open-enrollment schools.¹⁴⁷ This means that a child from any school district in the state may apply to any charter school in the state, without regard for whether the charter school is located within the resident school district.¹⁴⁸ Neither residency nor identification of a student as a child with a disability may be considered by a charter school when reviewing applications for admission.¹⁴⁹

The latest figures for enrollment in New Hampshire indicate that students enrolled in charter schools and home-schooling programs amount to less than 3% (2.42%) of the total school-age population.¹⁵⁰ The student enrollment for non-public schools during the same time period was at 9 percent, more than three times charter school enrollment.¹⁵¹ While the combined total of charter and home-schooled students is a small percentage of the New Hampshire elementary and secondary population, it is because parents can

144. *Id.*

145. *See* N.H. REV. STAT. ANN. § 194-B:11(I)(b).

146. N.H. Dep't of Educ., Approved Charter Schools in New Hampshire, <http://www.ed.state.nh.us/education/doe/organization/curriculum/SchoolApproval/CharterSchools/ApprovedNHCharterSchools.htm> (last visited Mar. 3, 2010).

147. N.H. REV. STAT. ANN. § 194-B:1(III).

148. *Id.* § 194-B:1(VI).

149. *See id.* §§ 194-B:1(VIII), 8(I).

150. Percentages calculated from the most recent numbers for fall 2008 through 2009 enrollment collected by the New Hampshire Department of Education. *See* N.H. DEP'T OF EDUC., ENROLLMENT BY GRADE 2008–2009, http://www.education.nh.gov/data/documents/fall_enroll08_09.pdf [hereinafter ENROLLMENT BY GRADE]; N.H. DEP'T OF EDUC., ELEMENTARY AND SECONDARY SCHOOL STATISTICS 2008–2009, http://www.education.nh.gov/data/documents/home_school08_09.pdf.

151. *See* ENROLLMENT BY GRADE, *supra* note 150.

unilaterally select either one that the options themselves potentially disrupt the stability that a residency criterion has traditionally provided. Enrolling students in charter schools and home schooling interferes with the planning process and the financial position of the district by affecting the state funds it receives. Private school enrollment only exacerbates this instability.

Even though almost 89 percent of the school-age population continues to attend non-charter public schools, not all are enrolled in their local school.¹⁵² These students, together with students receiving elementary and secondary education from non-public and charter schools, or being home schooled, raise questions concerning the validity of the residency norm. It is understandable, then, why the organizations representing professional educators tend to oppose these choices.¹⁵³ A healthy skepticism is appropriate, but discussions regarding changes in public education too often revolve around concern for the established system, with speculation concerning the consequences of any change and money. While these are laudable and necessary concerns, the primary concern ought to be focused on determining what educational delivery system can best meet the needs of students in the present, so that they may become adults in the future who will be productive members of their communities. The balance is too often tilted toward the status quo.

4. *The Options Landscape Outside New Hampshire*

New Hampshire's experience with educational models that offer choices different from the default requirement of public education in a local school district is not unique. Circumstances within other states may be significantly different and influenced by any number of local issues, but like New Hampshire's experience, many of the options in other states began as part of popular, national movements

152. *See id.*

153. Legislative records over the years indicate that at various times the New Hampshire School Boards Association, the New Hampshire School Superintendents' Association, and NH-NEA have opposed some or all of the legislative initiatives relative to charter schools. *See, e.g., Hearing on H.B. 727 Before the H. & S. Comm. Educ.*, 159th Sess. (N.H. 2004); BRUNELLE, *supra* note 99, at 2.

that sprung up around the country.¹⁵⁴ The establishment of the Secretary of Education as a cabinet-level position in 1979 may have contributed to increased support for, and the momentum gained by, some of these movements.¹⁵⁵

From 1953, when Health, Education, and Welfare became a cabinet post, until 1979, when Education was set out as a separate entity, it is reasonable to conclude that the staff and resources available to education in a shared environment—especially when one considers the magnitude of the issues faced by those in the health and welfare arena—were not as significant, nor as focused, as they have become in the last thirty years. In addition to the focus provided by an executive branch agency with money to fund demonstration projects and best practices, Congress has also turned its attention to the issue of public education. Even the U.S. Supreme Court has had occasion to affect the public education landscape.¹⁵⁶

Another contributing factor may have been the willingness of some courts during the Civil Rights Era of the 1960s and 1970s to

154. See Vitaska, *supra* note 37.

155. See U.S. Dep't of Health & Human Servs., Historical Highlights, <http://www.hhs.gov/about/hhshist.html> (last visited Feb. 7, 2010).

The Cabinet-level Department of Health, Education and Welfare was created under President Eisenhower, officially coming into existence April 11, 1953. In 1979, the Department of Education Organization Act was signed into law, providing for a separate Department of Education. HEW became the Department of Health and Human Services, officially arriving on May 4, 1980.

Id.

156. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (holding that Ohio's voucher program did not violate the Establishment Clause); *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that Equal Protection Clause applies to children of illegal immigrants); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that funding of public education need be only rationally based because wealth is not a suspect class and education is not a fundamental right); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (replacing *Everson's* "competing principles" test with a three-prong test requiring that: (1) the primary effect is to offer a public welfare benefit, (2) the benefit serves a legitimate public purpose, and (3) there is no excessive entanglement between church and state); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (creating two competing principles that: (1) no tax can be levied to support religious activities or institutions; and (2) governments cannot exclude individuals from receiving the benefit of public welfare legislation due to religious preference or lack thereof).

order the busing of public school children to schools outside of their neighborhoods in order to achieve racially balanced schools within a geographical area.¹⁵⁷ While this may have contributed to the higher cause of a more integrated society, it may nevertheless have contributed to the climate that now challenges the primacy of a residency requirement as a criterion for access to a public education. The question is: “Is a resident-based delivery system for public education still justifiable?”

The next sections will look at some of these choices and how they altered the public education in Florida and Colorado, as well as how Congress and the Supreme Court have weighed in at the national level.

IV. FLORIDA

Most people think of Florida as the state where people go to retire and enjoy the benefits of a climate that is warm and temperate all year, but in 2006, Florida’s median age was 39.9.¹⁵⁸ The largest population group, at 43.5%, was the 0–34 age group.¹⁵⁹ With a total population of 18,349,132,¹⁶⁰ the school-age population in 2006 was almost 15% of the total, or 2,662,701.¹⁶¹ Florida has sixty-seven school districts.¹⁶² State law permits successful school districts maximum flexibility to develop alternatives to the delivery of a standard public school education by using atypical delivery models.¹⁶³ The Florida Education Code has one chapter expressly devoted to alternatives to traditional public schools.¹⁶⁴ The state’s public education delivery system is a countywide system, which

157. See, e.g., *Busing in an Angry Glare*, LIFE, Mar. 3, 1972 at 26 (discussing contemporary politics surrounding the busing of public school children in 1972).

158. EDUC. INFO. & ACCOUNTABILITY SERVS., FLA. DEP’T OF EDUC., FLORIDA EDUCATION AND COMMUNITY DATA PROFILES 1 (2009), available at <http://www.fldoe.org/eias/eiaspubs/word/fecdp0708.doc>.

159. *Id.*

160. *Id.* at 6.

161. *Id.* at 3.

162. *Id.* at 5.

163. See FLA. STAT. ANN. § 1000.02(2)(e) (West 2009).

164. *Id.* §§ 1002.01–.79 (West 2009 & Supp. 2010).

maintains and operates public elementary and secondary schools throughout the state.¹⁶⁵ Florida law allows for the consideration of parents' choice when a student is assigned to a school.¹⁶⁶ This "controlled open enrollment," as it is known, theoretically permits a student to attend any public school in the county.¹⁶⁷

In addition, parents may home-school students, choose a private school at their expense, or select from a number of different charter school options.¹⁶⁸ As part of its public education delivery system, the state also offers a school for deaf and blind students,¹⁶⁹ virtual schooling,¹⁷⁰ a pilot program beginning in the 2008–2009 school year that provides high school credit for nationally or state recognized industrial certification programs,¹⁷¹ the New World School of the Arts,¹⁷² and perhaps most controversially, a voucher program, known as the "Opportunity Scholarship Program" (OSP).¹⁷³ Districts may also offer single-gender schools.¹⁷⁴

Among the charter options, districts may offer lab schools¹⁷⁵ and technical career centers.¹⁷⁶ Lab schools are partnerships with public postsecondary schools that allow the lab schools to focus on a fundamental issue or problem identified in the elementary or secondary public education system.¹⁷⁷ While Florida law permits preferences in student selection, it appears that, if feasible, any student in the state may attend a particular lab school.¹⁷⁸

The OSP, enacted in 1999, is grounded in the state's accountability statutes, which assign a letter grade from "A" to "F" to each public school based on the performance of its students in

165. *See id.* § 1001.30.

166. *See id.* § 1002.31.

167. *Id.*

168. *See id.* § 1002.20(6).

169. FLA. STAT. ANN. § 1002.36.

170. *Id.* § 1002.37.

171. *Id.* § 1002.375.

172. *Id.* § 1002.35.

173. *Id.* § 1002.38, *invalidated by* Bush v. Holmes, 919 So. 2d 392 (Fla. 2006).

174. *Id.* § 1002.311.

175. *See* FLA. STAT. ANN. § 1002.32.

176. *See id.* § 1002.34.

177. *Id.* § 1002.32(2)–(3).

178. *See id.* § 1002.32(4).

meeting the proficiency standards set by the state.¹⁷⁹ This initiative “provides that a student who attends or is assigned to attend a failing public school may attend a higher performing public school or use a scholarship provided by the state to attend a participating private school.”¹⁸⁰ The Florida Supreme Court ultimately found this provision unconstitutional.¹⁸¹ The real distinction of this program may be that it served as a model for sanctions set out in No Child Left Behind for schools that were identified as schools in need of improvement and requiring school choice.¹⁸²

A. *Bush v. Holmes*

In *Bush v. Holmes*, parents and organizations challenged the constitutionality of the OSP under state school provisions¹⁸³ and the religious freedom provision¹⁸⁴ of the Florida Constitution, as well as the Establishment Clause of the U.S. Constitution.¹⁸⁵ The case had a long procedural history, from the trial court in Leon County and the Florida First District Appellate Court, before it finally got to the Florida Supreme Court.¹⁸⁶ Under the Florida Constitution, when an appellate court declares a state statute unconstitutional, the state supreme court is required to review the decision.¹⁸⁷

While this case was on remand in the trial court, the U.S. Supreme Court announced that an Ohio voucher program similar to the OSP was not unconstitutional.¹⁸⁸ The plaintiffs in *Holmes* then dropped their Federal Establishment Clause claim.¹⁸⁹

In a 5-2 decision, the Florida Supreme Court, relying on article IX, section 1(a), found that the OSP statute was unconstitutional.¹⁹⁰

179. *See id.* §§ 1002.38, 1008.34.

180. *Bush v. Holmes*, 919 So. 2d 392, 400 (Fla. 2006).

181. *Id.* at 412.

182. *See West, supra* note 97, at 176.

183. FLA. CONST. art. IX, §§ 1, 6.

184. *Id.* art. I, § 3.

185. *Holmes*, 919 So. 2d at 398–99.

186. *Id.* at 399.

187. *Id.* at 397 (citing FLA. CONST. art. V, § 3(b)(1)).

188. *Id.* at 399; *see Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

189. *Holmes*, 919 So. 2d at 399.

190. *See id.* at 413.

Using the state constitution's education clause, the court found that the program undermined the constitutional requirement for the provision of a uniform and efficient system of public schools.¹⁹¹ The majority reasoned that the OSP provided some students an alternative to the public education delivery system which circumvented the uniformity provisions of article IX, section 1 of the Florida Constitution, while diverting state funds for public education to a non-public alternative.¹⁹²

This decision to some degree limited the choices available to students in Florida and maintained the status quo as far as voucher programs were concerned, but its effect on strengthening or supporting the residency requirement was negligible. With a countywide system of sixty-seven school districts guided by a controlled open enrollment provision, and with city and town residency non-essential to student placement, all of the other school-choice options, even without a voucher program, drastically diminish the effect of residency in determining school assignment.

V. COLORADO

Colorado, which gained statehood on August 1, 1876, is divided into sixty-four counties, and in 2005 had an estimated population of 4,665,177.¹⁹³ Its public education laws bear a general similarity to those in other states.¹⁹⁴ In 1887, thirteen years after Colorado became the thirty-eighth state in the Union, a residency requirement for public education was enacted.¹⁹⁵ Although this law remains on the books, more recent legislative enactments have emasculated the general provisions of section 22-1-102 of the Colorado Revised Statutes. The state's delivery system appears to have been at one

191. *See id.* at 412.

192. *See id.*

193. Infoplease.com, Colorado: History, Geography, Population, and State Facts, <http://www.infoplease.com/ipa/A0108189.html> (last visited Mar. 4, 2010).

194. *Compare* COLO. REV. STAT. ANN. § 22-30.5-504 (West 2005), *with* FLA. STAT. ANN. § 1002.33 (West 2009 & Supp. 2010).

195. 1887 Colo. Sess. Laws 301 (codified as amended at COLO. REV. STAT. ANN. § 22-1-102).

time organized and maintained at the county level.¹⁹⁶ Legislation enacted in 2008 reorganized the educational delivery system into twelve regional service areas in order to coordinate the services of 178 school districts, fifty-seven administrative units, and twenty-one cooperative service boards.¹⁹⁷ In considering this reorganization, it is clear that legislators were mindful of the state's constitutional requirement to provide a "thorough and uniform system of free public schools."¹⁹⁸

The Colorado Department of Education describes the state as an "educational choice state."¹⁹⁹ On its website, the department lists charter schools, home schooling, private school, and "other" as options.²⁰⁰ Charter schools in Colorado, as in other states, are considered public schools.²⁰¹ Yet, it is in the "other" category that one finds a significant number of public options.

The first is an open enrollment provision that began in 1990, like Florida's, as a controlled open enrollment to provide choice within the district.²⁰² By the 1994–1995 school year, Colorado law required statewide open enrollment.²⁰³ The provision even permitted a school district to deny a request from a resident student to attend a particular school within the district for a variety of reasons.²⁰⁴ Despite the fact that Colorado's residency law is still valid, this provision is arguably the most significant state attack on the relevancy of a local residence requirement. It appears to signal a possible shift from the traditional local focus for providing public education to a more statewide focus.

Colorado's history suggests the state has always been the dominant force in public education. Since its adoption in 1876, article IX, section 2 of the state's constitution has required the

196. *See id.* §§ 22-4-101 to 105 (repealed 1984).

197. *Id.* § 22-5.5-102(2)–(3).

198. *See* COLO. CONST. art. IX, § 2.

199. Colo. Dep't of Educ., Schools of Choice, <http://www.cde.state.co.us/choice/index.htm> (last visited Mar. 4, 2010).

200. *Id.*

201. COLO. REV. STAT. ANN. § 22-30.5-103(2).

202. *Id.* § 22-36-101(1)(a).

203. *Id.* § 22-36-101(1)(b).

204. *Id.* § 22-36-101(3).

general assembly of the state to provide a public school system.²⁰⁵ The state's supreme court reinforced the state's authority in 1952 when it held that school districts were a subdivision of the state, and the general assembly could abolish them at will.²⁰⁶

The other public options include on-line learning, magnet schools, school programs, and schools-within-a-school.²⁰⁷ The last three are alternatives developed and offered by school districts.²⁰⁸ The magnet schools focus on a particular content area, such as law-themed education.²⁰⁹ School programs focus on special issues and may be located somewhere other than on a school campus, such as an educational program for students with recurring disciplinary issues.²¹⁰ Finally, schools-within-a-school are available on a school campus, such as the International Baccalaureate program.²¹¹ The state also provides a school for the deaf and blind.²¹²

A. *Owens v. Colorado Congress of Parents*

Once again, the Colorado legislature enacted a voucher program that permitted parents to choose non-public schools while using public funds.²¹³ The money was provided to the parents of children who qualified based on the requirements of the program, known as the Colorado Opportunity Contract Pilot Program (COCPP program).²¹⁴ The statute was aimed at students in the highest poverty schools, whose performance ratings were either low or unsatisfactory.²¹⁵

205. *See* COLO. CONST. art. IX, § 2.

206. *See* *Hazlet v. Gaunt*, 250 P.2d 188, 194 (Colo. 1952).

207. Colo. Dep't of Educ., Schools of Choice, Other School Options in Colorado, <http://www.cde.state.co.us/choice/otherschoolorptions.htm> (last visited Apr. 4, 2010).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *See* COLO. REV. STAT. ANN. § 22-80-102 (West 2005 & Supp. 2009).

213. *See* *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933, 936 (Colo. 2004) (discussing the creation of the Colorado Opportunity Contract Pilot Program).

214. *See id.*

215. *See id.*

In *Owens v. Colorado Congress of Parents, Teachers, and Students*, the plaintiffs cited eight claims of unconstitutionality, three of which involved arguments concerning separation of church and state, using public funds for sectarian purposes, and the free exercise of religion.²¹⁶ The trial court found that the law violated article IX, section 15 of the Colorado Constitution, which states:

The general assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the district. Said directors shall have control of instruction in the public schools of their respective districts.²¹⁷

Colorado has a statute that permits the state supreme court to review a trial court decision whenever a trial court declares a state statute unconstitutional.²¹⁸ Article IX, section 15 was in the original constitution and has been the basis of the court's analysis numerous times.²¹⁹ Here, the court upheld the trial court decision, finding that control over instruction was meaningless without control over funding.²²⁰

Once again, the court maintained the status quo without relying on constitutionally prohibited entanglements between the state and sectarian elementary and secondary schools. Yet again, the decision was not pertinent to the effect on the residency requirement because of the broad application of choice options within the state.

216. *See id.* at 936 & n.3 (listing plaintiffs claims at length).

217. *Id.* at 937 (quoting COLO. CONST. art. IX, § 15).

218. *See* COLO. REV. STAT. ANN. § 13-4-102(1)(b) (West 2005).

219. *See, e.g.,* Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); Hazlet v. Gaunt, 250 P.2d 188 (Colo. 1952); Bagby v. Sch. Dist. No. 1, 528 P.2d 1299 (Colo. 1974); Sch. Dist. No. 16 v. Union High Sch. No. 1, 152 P. 1149 (Colo. 1915).

220. *See Colo. Cong. of Parents*, 92 P.3d at 943.

VI. THE FEDERAL ROLE

A. *McKinney-Vento Act*

Earlier it was suggested that the creation of the U.S. Department of Education has led to more activity in the area of public education by federal actors. The McKinney-Vento Act is one piece of evidence to support this claim.²²¹ It was enacted in 1987 for the laudable purpose of permitting homeless children and unaccompanied youth to access public education, despite the fact that they or their parents might not be able to establish residency anywhere.²²² The law further requires that states that have barriers to homeless children and unaccompanied youth enrolling in a public school must work to remove those barriers.²²³ It is difficult to imagine a more compelling federal directive diminishing the role of a residency requirement that would be consistent with the states' rights protection provided by the U.S. Constitution.²²⁴

B. *No Child Left Behind*

Another example of federal activity is the 2002 Congressional enactment known as No Child Left Behind.²²⁵ This legislation was initiated due to a growing concern that our nation's students could not compete in a global society and as a way to require more accountability from the public education system to address this concern.²²⁶ The law did all that and more. It was an overhaul of the Elementary and Secondary Education Act that was enacted in

221. 42 U.S.C. §§ 11431–11435 (2006).

222. Stewart B. McKinney Homeless Assistance (McKinney-Vento) Act, Pub. L. No. 100-77, § 721, 101 Stat. 482, 525 (1987) (codified as amended at 42 U.S.C. § 11431).

223. *See* 42 U.S.C. § 11432(d)(2).

224. *See* U.S. CONST. amend. X.

225. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended at 20 U.S.C. §§ 6301–7941).

226. *See id.* (listing the full title as: “An Act to close the achievement gap with accountability, flexibility, and choice, so that no child is left behind”).

1965.²²⁷ Since 1979, Congress has tinkered with the provisions of that act on an almost annual basis. Several reauthorizations were significant, but this reauthorization was profound.²²⁸ It continued the framework for grading school districts based on how their students performed on a statewide annual assessment, but now required states to disaggregate student results based on race, English proficiency, student poverty, and disability.²²⁹ No longer would the high-performing students be able to carry those students that were not proficient in meeting the grade-level expectations of the curriculum. This disaggregation of test scores identified, for the first time, the traditionally low-performing students that public education systems were “leaving behind,” and imposed progressive sanctions over time if schools and districts did not improve all student performance, as measured by the annual assessment.²³⁰

The new law required states to impose a variety of sanctions on those schools and districts designated as “in need of improvement,” including the obligation to offer students the choice of another public school that is not in need of improvement.²³¹ It also favored the development of charter schools.²³² While these measures are designed to improve public education for all students, they do so without regard to residency requirements. The option of choice for a student in a school in need of improvement is, in essence, a voucher, albeit limited to another public school that is not in need of improvement. It seeks to move whole school populations out of their neighborhood schools, thus affecting the balance in building capacity and transportation schedules, and increasing budgets due to the districts’ need to transport children out of their neighborhood schools. In general, charter schools are open enrollment schools, so their influence on residency can potentially be experienced statewide. Additionally, every dollar invested by the federal government on charter schools is a dollar that is not spent to improve

227. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27.

228. *See* 20 U.S.C. § 6301 note (containing a number of amendments).

229. *See id.* § 6311.

230. *See id.* § 6316; 34 C.F.R. § 200.35–.53 (2009).

231. 20 U.S.C. § 6316(b)(1)(E).

232. *See id.* § 7221.

schools that have already been classified as “needing improvement.” The point is that the public policy enacted at the federal level, designed to improve public education, is undercutting the resident-based delivery system that state laws mandate. This contradiction has caused more conflict among public school advocates rather than promoting a thoughtful discussion of reform.²³³

C. *Zelman v. Simmons-Harris*

In 2002, the U.S. Supreme Court held that the Ohio voucher program did not violate the Establishment Clause of the U.S. Constitution when it provided vouchers to parents of students in a failing school district, even when those vouchers could be used at private, sectarian schools.²³⁴ This is one court case that did not find a voucher program unconstitutional. A court decision upholding a voucher program that permits students to use public money to go to private school, especially a private sectarian school, would strike at the heart of a residency requirement. However, *Zelman*'s effect on eroding the residency requirement was not nearly as significant as it would have been if its holding were given a broader scope. The holding preserved the public policy adopted by the Ohio legislature, but only as it pertained to the Establishment Clause.²³⁵ This left the states in the position to have their voucher programs challenged on a variety of state constitutional grounds. Additionally, the voucher program itself is limited only to Cleveland because it is the only school district in Ohio that meets all of the requirements of the statute.²³⁶

233. In 2002, when No Child Left Behind went into effect, associations of education professionals, as well as some state governors, legislators, and departments of education openly rebelled. There were threats that states would refuse federal money. In New Hampshire, there were several legislative initiatives that attempted to remove the state from the federal entanglement or at least limit the affect of the new federal law. One example of a successful initiative is section 193-H:5 of the New Hampshire Statutes. N.H. REV. STAT. ANN. § 193-H:5 (2008).

234. *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002).

235. *See id.* at 662–63.

236. *Id.* at 644–45.

Those challenging school voucher programs to private schools continue to be successful by raising other state constitutional claims. Both *Holmes* and *Colorado Congress of Parents* were litigated after *Zelman*, but the voucher programs were struck down as violations of the education clauses rather than the religion clauses of those states' constitutions.²³⁷ Martin West states that vouchers, along with tax credits and charter schools, "threaten the district-based system of education provision that has long been dominant in the United States."²³⁸ This system maintains its existence primarily by its reliance on state residency statutes.

VII. THE EFFECT OF SCHOOL FINANCE LITIGATION

The national phenomenon known as "school finance litigation" is the linchpin of the seemingly unrelated statutory enactments and judicial decisions that have diminished the importance of the residency requirement as the entry point in public education, and the rapid technological advances in the last generation that will continue to challenge the legitimacy of the residency requirement. On one side of the school-funding challenges is the natural progression of public education, established through public-policy decisions adopted by state and federal legislative enactments, with refinements by judicial decisions. On the other side is society's entry into a world where communication is immediate and intelligent machines replace people in the workforce. Therefore, it is important to understand the impact of this phenomenon on the residency requirement.

Forty-six American states have been a party in school finance litigation.²³⁹ The four states that have not been a part of this public education experience are Hawaii, Mississippi, Nevada, and Utah.²⁴⁰

237. *Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933 (Colo. 2004); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

238. West, *supra* note 97, at 168.

239. John Dinan, *School Finance Litigation: The Third Wave Recedes*, in FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION, *supra* note 97, at 96, 96.

240. *Id.* at 112 n.1.

The litigation can be categorized into three phases.²⁴¹ In the first phase, the plaintiffs' cases were rooted in the Federal Equal Protection Clause and advanced the theory that equal protection meant equal funding.²⁴² These cases were not successful.²⁴³ Federal courts were not anxious to enter a realm where local control and states' rights were the dominant response.²⁴⁴ The second phase moved to state courts and states' equal protection clauses.²⁴⁵ These cases were somewhat more successful.²⁴⁶ State courts were not always as concerned about the realm of local control.²⁴⁷ After all, school districts are political subdivisions of the state, and as such have only such power and authority as is granted by the state.²⁴⁸

It was not until the third phase that school-funding litigation finally was more successful and had a greater influence on state funding decisions concerning public education.²⁴⁹ In this phase, plaintiffs relied on state constitutional education clauses to support the theory that state-financing systems did not deliver an adequate education for each child in the public education system.²⁵⁰ The most notable, albeit relatively modest, effect of all the phases of school funding litigation is that it has centralized the funding of public education at the state level.²⁵¹ The consequence of this shift, whether intended or unintended, is to further and irreparably diminish the importance of residency in a local school district in order to access public education.

Some anticipate that the next phase of litigation will be a return to the federal courts with claims based on the Citizenship and

241. *Id.* at 96.

242. *Id.* at 96–97.

243. *See id.* at 97.

244. *See id.*

245. Dinan, *supra* note 239, at 97.

246. *See id.* at 97–98.

247. *See id.*

248. School districts, like cities, towns, and other political subdivisions, are creatures of the state. They only have the enumerated powers granted to them by the state constitution or through legislative enactments. U.S. CONST. amend. X.

249. *See* Dinan, *supra* note 239, at 98.

250. *Id.*

251. *See id.* at 101–02, 105.

Enforcement Clauses of the U.S. Constitution.²⁵² The theory of this challenge is that the Equal Protection Clause requires that all children in the country have access to an adequate education and the Enforcement Clause grants Congress the authority to enforce that access.²⁵³ The obstacle to success may be the fact that education is not yet considered to be a fundamental right guaranteed by the U.S. Constitution.²⁵⁴ Therefore, a state only needs to show a rational basis for its financing system.²⁵⁵ If a new round of cases based on this premise can clear this hurdle, one might anticipate a result similar to the state adequacy cases, where the most notable result may be a shift in funding public education to the federal government. Such a shift would effectively remove local control, along with its residency requirement, from any significant role in public education.

Unlike Colorado and Florida, New Hampshire is one of the states where plaintiffs' successful efforts have caused several changes in the state's funding model and caused at least one state supreme court justice to suspect that the state was not adequately funding public education.²⁵⁶ In 1978, Colorado plaintiffs sued in state court claiming the state's financing plan was unconstitutional because it violated the equal protection clause of both the Colorado and U.S. Constitutions.²⁵⁷ The court held that neither constitution established education as a fundamental right and the legislature was not required to establish a central public school financing system that restricted each school district to equal expenditures per student.²⁵⁸ The Florida adequacy case came towards the end of phase three, when courts

252. *See id.* at 109.

253. *See id.* at 109–110.

254. *See, e.g.,* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).

255. *See id.* at 40.

256. *See* Londonderry Sch. Dist. SAU # 12 v. State, 907 A.2d 988, 998 (N.H. 2006) (Duggan, J., concurring specially in part and dissenting in part). In the concurrence and dissent, Justice Duggan suggested that what the legislature appropriated for the cost of an adequate education was not based on the actual cost, but a pre-determined number. *Id.* at 996. That implies that the distribution formula was backed into based on the numbers and how much to send to each of the school districts. *See id.*

257. *See* Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1010 n.1, 1014 (Colo. 1982).

258. *See id.* at 1016, 1018, 1025.

were not so anxious to get involved in the school funding cases due to the protracted nature of the cases and the prospect of being asked to make public policy decisions that were best left to the realm of the legislative branch.²⁵⁹ The court held that the plaintiffs had not articulated “an appropriate standard for determining ‘adequacy’ that would not present a substantial risk of judicial intrusion into the powers and responsibilities assigned to the legislature.”²⁶⁰

VIII. THE EFFECT OF TECHNOLOGY AND OTHER INITIATIVES

On the other side of school finance litigation is the world of the Information Age. Once again, our society is experiencing a fundamental shift in our economy that suggests the need for substantial changes in the methods for participating in this new age. The current difficulties due to economic changes are not unlike difficulties faced by past societies, such as the move from an agrarian economy into the age of the Industrial Revolution. As we attempt to understand how we will function in this new economy, and as we deal with a growth in technology that is perhaps greater than any other generation has known, it should be apparent that such changes will require new knowledge and skills. This requirement is likely to alter both the content and the delivery system of public education in our nation. Even now, technology is providing new methods for providing education in our current system.²⁶¹ New initiatives and partnerships will likely also contribute to the discussions concerning public policy changes in public education.

A. *Virtual Learning*

Virtual learning is a delivery system in which student learning takes place at a computer. These programs are structured, provide rigorous academic content, involve certified teachers, and may be

259. *See* Coal. for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So. 2d 400, 408 (Fla. 1996).

260. *Id.*

261. *See generally* LUCINDA GRAY ET AL., U.S. DEP’T OF EDUC., EDUCATIONAL TECHNOLOGY IN PUBLIC SCHOOL DISTRICTS: FALL 2008 (2009), available at <http://nces.ed.gov/pubs2010/2010003.pdf>.

synchronous, asynchronous, or both. The thought of an elementary or secondary school student receiving an education by sitting at a computer could not have been imagined by today's "Baby Boomers" or their parents, yet there are a number of states where the public education delivery system includes this option.²⁶² Both Colorado and Florida have statutes that add virtual learning to their mix of public school choice.²⁶³ In New Hampshire, there is a charter school that offers only virtual learning to its students.²⁶⁴

B. *Competition in a Global Economy*

The advances in technology have affected more than public education. Our world has shrunk to the point where an event anywhere in the world can be communicated almost instantly to all parts of the planet. Employees may be permitted to work at home because of the advances in communication and supporting technology. It is possible to provide video and audio connections so that people in multiple locations, anywhere in the world, can meet and work on a business issue from their own office, rather than each of them commuting to a single destination. In order for present-day students to compete in this rapidly growing technological environment, our public education system may require a reconfiguration of both the curriculum and the delivery system to prepare our students for a promising future in the Information Age. This will require new thinking about the entire public policy dimension of public education at the national and state levels.

C. *Common Core Standards*

In June of 2009, forty-nine states and territories agreed to participate in an initiative co-sponsored by the National Governors Association (NGA) and the Council of Chief State School Officers

262. *See, e.g., id.* at tbls.6, 7, & B-2.

263. COLO. REV. STAT. ANN. § 22-30.7-101 (West Supp. 2009); FLA. STAT. ANN. § 1002.415 (West 2009).

264. Virtual Learning Academy, Charter School, <http://www.vlacs.org/> (last visited Apr. 4, 2010).

(CCSSO).²⁶⁵ The purpose of this initiative is to develop common core standards in English-language arts and mathematics for all public schools.²⁶⁶ It is important to note that participation in this project does not obligate any state to adopt the standards that are developed by the project.²⁶⁷ There is some indication that the current Federal Department of Education may use these standards as one benchmark for evaluating state applications for at least some federal program funding.²⁶⁸ Projects such as this one support a possible shift toward the centralization of responsibility for public education away from the local level and toward the state level. Ultimately, such initiatives may cause a further shift away from the states and toward the centralization of public education at the federal level. Either shift diminishes the justification for a resident-based public education delivery system.

IX. CONCLUSION

The effects of statutory changes, school funding litigation, and technology and current initiatives appear to converge in a paradigm shift away from the traditional local control and resident-based delivery of public education, and toward a more centralized system at either the state or national level. The first victim of this shift is the traditional requirement that children attend the public schools in the district where they reside.

As the economic foundation of a society shifts, public education must also evolve. Those living in an agrarian economy did not require much education because they relied on all able-bodied persons to engage in farm work as the basis for economic support. At that time, school schedules were designed to be compatible with the times in a day and the seasons of the year when children could attend school without neglecting their obligations to the farm and

265. Press Release, Nat'l Governors Ass'n, Forty-Nine States and Territories Join Common Core Standards Initiative (June 1, 2009), *available at* <http://www.corestandards.org> (click "More news releases" on left; click link to June 1, 2009 news release).

266. *See id.*

267. *See id.*

268. *See* Race to the Top Fund, 74 Fed. Reg. 37,803, 37,806 (July 29, 2009).

family. The shifts to an industrial economy and then to a service economy have both required society to significantly alter the curriculum and delivery of public education. As we now contemplate yet another shift into a global and technological economy, it is time to reconsider our current curriculum and delivery models in public education. One of the first criteria we should be ready to discard is the tenacious reliance on local residency in order to gain access to the public education system.

The residency requirement is not the most significant substantive element of reform in public education, but it is arguably the most important procedural element. It is the first and most difficult barrier to critical thinking regarding the status quo. It may also be the one that is the most problematic, at least initially, to overcome.

In his article on state school finance litigation, John Dinan concludes that traditional reliance on local governance and funding of public education is unlikely to be displaced or significantly altered by school-finance litigation.²⁶⁹ That conclusion may be accurate from a limited focus on school financing litigation, itself.²⁷⁰ However, when school finance litigation is viewed along with state and federal court decisions, statutes in areas of public education (such as public choice, vouchers, and other alternatives), and rapidly expanding technology that creates a significantly different global economy, the reliance on local governance and a residence-based delivery system is certainly debatable. Today, it may be more apparent that a paradigm shift is in the making. At the moment, it appears that such a shift favors increased responsibility for governance and, therefore, funding of public education at the state level, or perhaps even the federal level.

Ultimately, the shift may be toward the federal government. If a new round of school finance litigation that relies on challenges at the federal court level based on the Citizenship and Enforcement Clauses of the U.S. Constitution are successful, there may be less discrepancy in funding across the states. New partnerships like the current NGA and CCSSO initiative to develop common core standards in public education aim to level the disparity among states

269. Dinan, *supra* note 239, at 112.

270. *See id.*

concerning what students learn in order to provide an education that prepares all students for postsecondary education or work.²⁷¹ A recent article by Russ Whitehurst, Senior Fellow at the Brown Center, indicates that it is curriculum that is of primary importance in education and assessment.²⁷² Does all of this suggest that a national curriculum is necessary for a twenty-first century education? Do these factors support a public education system that is not driven by student residence?

A holistic analysis and discussion regarding significant changes in our traditional public education system will be emotionally charged, and until now it has been largely avoided in this country. The question is, can we continue this avoidance in the wake of a potential paradigm shift? Common wisdom suggests that the forthcoming reauthorization of NCLB is likely to continue and perhaps strengthen the provisions that support public choice and charter schools. While all of these endeavors may be part of a new public education system, they are inconsistent with local autonomy and create a situation where the criterion of local residency is increasingly less relevant.

This analysis takes no position on whether such a paradigm shift, whether at the state or federal level, is desirable. Its purpose is to simply raise awareness to the existence of such a shift, so that public policy makers at all levels may consider the intended and potentially unintended consequences of the seemingly unrelated changes that are occurring in public education at both the state and national level. This heightened state of awareness will permit state and federal legislators and state boards of education to weigh the options in an integrated, global context, rather than as isolated and individual elements of a system. In this manner, public-policy makers will be able to move toward a goal that will provide every child with access to a twenty-first century education, no matter where in America that child lives. Better partnerships among the local, state, and federal actors and stakeholders are needed to support a model that first values student learning and then considers cost as one of the first

271. See Press Release, *supra* note 265.

272. See GROVER J. WHITEHURST, DON'T FORGET THE CURRICULUM (2009), available at http://www.brookings.edu/papers/2009/1014_curriculum_whitehurst.aspx.

elements of this new conversation. In such a model, the first question may be: “Does where a student lives determine what public education that student may access?” That answer should be: “No.”

While residency may continue to be cited as an important factor for planning, if the costs shift from local districts to a state or the federal government, the reduced fiscal obligations of a local district make residency within a particular school district less important. The residency argument may also be less important with the growth in virtual learning, charter schools, and other publicly financed, alternative-education programs that are available to students. If where a student lives is no longer relevant to the education a student may access, how will we as a society make the transition from a standard that we have relied on for more than three centuries? This should be the next public policy discussion in public education around the country.

Looking at Florida, Colorado, and New Hampshire provides evidence that a delivery model for public education is currently less driven by residency and more focused on innovation and change. The final question is: Will the residency requirement in public education be repealed as part of a thoughtful, orderly transition, or will it simply become so irrelevant as to be ignored? The latter will be the case if we continue the current scheme of “tinkering” with the public education system. To simply react to emerging issues with amendments to the existing structure avoids the more difficult process of large-scale reform. Yet, paradigm shifts frequently require such reform.

For New Hampshire, and states similarly situated, a tradition of strict adherence to the doctrine of local control will impede the process of a thoughtful, orderly reform of the public education system. While there is nothing inherently detrimental in the notion of local control, it does not guarantee either the most efficient use of resources or the best results. In the case of public education, local control is not historically justifiable. Initially, it was the provincial government, the forerunner of the state, that mandated the creation of a public education system and fined selectmen that neglected the mandate.²⁷³ When preparing to enter statehood, it was the framers of

273. See Act of Apr. 25, 1721, ch. 3, 1702–1745 N.H. Laws 358.

the New Hampshire Constitution that, out of their support for state encouragement of education and state funding for schools, drafted a specific article that obligated the state to implement their concept.²⁷⁴ The article was ratified by the voters of the period.²⁷⁵ This article and the history surrounding its adoption were the basis for the state supreme court to find that the provision of an adequate education was a state responsibility.²⁷⁶ The ability of the state to delegate some of its duties to its political subdivisions never relieves the state of its primary obligation. Additionally, there is another provision in the New Hampshire Constitution that shares the same history without amendment as part II, article 83, and that is part I, article 3, which states in relevant part: “When men enter into a state of society, they surrender up some of their natural rights to that society”²⁷⁷ This is not a history that supports the notion of local control. Instead of continuing the power struggle between the state and local school districts, perhaps a better partnership between the two would create the climate in which the conversations concerning large-scale reform could begin.

It appears that the doctrine of local control is not a major impediment to such discussions in states like Florida and Colorado. This may be because neither state emerged directly out of the American colonial experience, or because these states invested county governance with more power and authority than states like New Hampshire did, or it may be due to some other reason altogether. Whatever the reason, it appears that these states find it easier to embrace change and offer more alternatives in public education. While this does not exempt these states from the reform conversations, it is likely that these conversations will occur sooner and produce noticeable results earlier.

None of this is to suggest that reform in any state will be easy or happen quickly. In fact, a thoughtful, orderly transition argues against wholesale, rapid reform. The point is: it is time for meaningful dialogue to begin. Remaining firmly entrenched in the past and wrapped in the cloak of our sacred traditions is not in the

274. N.H. CONST. pt. II, art. 83.

275. *Id.* pt. II, art. 83, annots.

276. *See* Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1376 (N.H. 1993).

277. N.H. CONST. pt. I, art. 3.

best interest of our children. While systemic reform does not require that we abandon all elements of our current system, it does require that we enter into conversations without a preconceived adherence to any particular element, and with a willingness to analyze existing elements, along with new elements, and choose those, whether old or new, that will provide the best public education system we can offer to *all* children. We cannot afford to do less.

During the last century, public education evolved slowly, with changes caused by federal and state legislative enactments and judicial decisions. This process was appropriate for an era when all change, even economic and social change, was incremental. That era has ended. We now find ourselves in an era where change is constant and immediate, and our society is more global than local. This era will create new opportunities that will require knowledge and skills that are unlike those of the past in *some* respects. Success will be achieved by those, whether at the local, state, or national level, that meet the challenge of this new era by providing the educational system that produces men and women who are prepared for the opportunities in a global community.