

BOARD OF FREDERICK COUNTY
COMMISSIONERS,

Appellant

v.

FREDERICK COUNTY BOARD
OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

Opinion No. 09-11

OPINION

INTRODUCTION

The Frederick County Board of Commissioners (County Commissioners) filed a request for declaratory ruling “concerning whether a local school system has the legal authority and ability to collect data that would tend to support whether a student is lawfully present in the United States.” The Frederick County Board of Education filed a Motion to Dismiss or for Summary Decision. The County Commissioners have opposed that Motion. The American Civil Liberties Union, along with several other interested groups, filed a request to submit an Amicus Brief. The County Commissioners have opposed that Motion.

FACTUAL BACKGROUND

In September of 2008, the County Commissioners passed a Resolution to petition this Board for a declaratory ruling “as to whether a local school system may collect data that would tend to support the proposition that a student is lawfully present within the United States.” *See* Resolution #08-31 attached to Request. On October 15, 2008, the County Commissioners filed their Request for Declaratory Ruling with this Board. In the cover letter, the County Commissioners stated that “[s]ome of the County Commissioners have proposed . . . conditioning funding to the local board . . . based on the collection of this information.”

In late November, the local board filed a Motion to Dismiss or for Summary Decision arguing first that this Board has no jurisdiction to hear the case, and that on the merits, the County Commissioner’s plans to condition funding for education on collection of immigration status information was unconstitutional and/or would be preempted by federal immigration law.

In January, the County Commissioners filed an Opposition to the local board’s Motion arguing that the request for declaratory ruling on the collection of information related to immigration status is focused solely on State education law and that this Board should not and could not consider the federal law issues.

Meanwhile, in late December 2008, Delegate Galen Clagett requested advice from Assistant Attorney General, Dan Friedman, Counsel to the General Assembly, about the legality of legislation to require the counting of illegal immigrants in Frederick County Public Schools. Mr. Friedman responded on January 6, 2009. Although Mr. Friedman did not have a specific legislative proposal to review, he provided general advice based on Delegate Clagett's description of the possible legislation. (See, January 6, 2009 Letter of Friedman to Delegate Clagett added to the record here). Mr. Friedman concluded that the legislation as described would be either unconstitutional or preempted by federal law. As to the constitutionality, Mr. Friedman explained:

It is a violation of the Equal Protection clause of the 14th Amendment for a state or local government to deny illegal immigrants a free public education. *Plyer v. Doe*, 457 U.S. 202 (1982). Unless there is a valid public purpose articulated to explain the need to count illegal immigrants, a court is likely to find that the proposed count is intended to intimidate and harass these children, perhaps to the point that they will choose not to attend school. If that is the case, the legislation will be unconstitutional under the 14th Amendment.

Similarly, he concluded that, absent a valid public purpose that would withstand judicial scrutiny, the proposed legislation would also be preempted by federal law.

With that background, we turn to the issue at hand.

STANDARD OF REVIEW

A party may file a petition for declaratory ruling on the "interpretation of public school law or regulation of the State Board that is material to an existing case or controversy." COMAR 13A.01.05.02(D). This case presents a question of law. The State Board shall exercise its independent judgment on the record before it in the explanation of and interpretation of the public school laws. COMAR 13A.01.05.05E.

LEGAL ANALYSIS

There are two issues for review. First, the local board questions whether the State Board has jurisdiction to hear this case at all. Second, if this Board has jurisdiction, the Commissioners ask whether state law prohibits a school system from requesting information to support whether a student is lawfully present within the United States.

Jurisdiction

The local board's argument that this Board has no jurisdiction rests on the premise that there is no "existing case or controversy" between the local board and the County

Commissioners. They state that the Commissioners have not actually directed the local board to collect the information. Of course, a case or controversy is "an absolute prerequisite to the maintenance of declaratory judgment action." *Anne Arundel County v. Ebersberger*, 62 Md. App. 360, 367-68 (1985). Clearly, courts will not decide "rights in anticipation of an event that may never happen but will wait until the event actually takes place, unless special circumstances appear which warrant an immediate decision." *Id.* at 368-71. Special circumstances exist here. When "public agencies are at loggerheads" courts have found that conflict to be a "special circumstance" warranting a declaratory ruling absent a ripe case or controversy. *Id.* at 372; *Liss v. Goodman*, 224 Md. 173, 177-78 (1961).

Two public agencies are at loggerheads here. The County Commissioners have not only announced their intention of passing a resolution to require the school system to collect immigration status information about students, they are considering conditioning funding to the school system based on the information collected. The school system opposes those plans. Before the Commissioners' intentions and considerations go any farther, it is appropriate, we believe, to issue a declaratory ruling to address, as the Commissioners request, the legality of their intentions and plans.

Merits

The County Commissioners look to the Student Records Manual (SRM), promulgated as a regulation at COMAR 13A.08.02.01, as their authority under State law to require the school system to collect information that will support the proposition that the student is lawfully present in the United States. The purpose of the Student Records Manual is to describe a systematic way for schools to collect "information on enrollment, attendance, and promotion of students" COMAR 13A.08.02.01.

For enrollment or attendance purposes, any child who resides in Maryland and who lives in one of its counties may attend public school in that county. Md. Educ. Code Ann. §7-101; COMAR 13A.08.01.01.

The SRM lists various documents, such as deeds, leases, utility bills or, affidavits, that can be used to prove residency. The Student Records Manual contains only one instance of proof of immigration status. (SRM-B-4). It requires F-1 Immigration status to be recorded "for secondary students only." *Id.* F-1 immigration status refers to students who are given permission to enter the United States specifically to study in public elementary and secondary schools. The SRM captures that information because, as a condition of entry, these students must pay tuition to attend the public school. *See* 8 U.S.C. §1184; *see also* attached advice memo February 27, 1997.

The Student Records Manual states that local school systems may collect additional and more detailed information. (SRM at A-1, B-1). The Commissioners assert, therefore, that the SRM provides authority for the data collection they want. In our view, they read that regulation much too broadly. Moreover, they ask that we read that regulation without reference to any federal law that may govern in this area.

Both parties, for different reasons, argue that this Board should not or cannot consider federal law in this case, but the Supremacy Clause of the United States Constitution requires judicial bodies to consider the validity of state laws in light of federal law that touches on the same subject. *See, e.g., Conway v. Social Services Admin.*, 298 Md. 639, 649-50 (1984). When we opine on the meaning of a State regulation, like the Student Records Manual, we must consider the lines drawn by federal law.

We concur with Counsel to the General Assembly and for the reasons cited in his letter of January 6, 2009, that unless the County Commissioners can articulate a valid public purpose for seeking information on the immigration status of a child, they are prohibited by federal law from requesting the school system to collect such information. To that end, we have reviewed the County Commissioners' filing to ascertain their purpose for seeking such information. They state in their Response to the local board's Motion:

The purpose for this Petition is irrelevant to the State Board's ruling. State law does not require any specific purpose. Because the BOE has raised this issue, the County will provide just one example of a legitimate, neutral purpose. (There are more.) The County will provide over \$220 million to the BOE in FY 09. Immigration, and particularly illegal immigration concerns are much in the news. The Maryland Department of Legislative Services, Office of Policy Analysis has issued a 202 page report entitled "International Immigration The Impact on Maryland Communities" (available online at: http://mlis/state.md.us/Other/Fiscal_Briefings_and_Reports/2008_Immigration_Impact.pdf). Estimates for the scope of this concern vary widely. An oft-repeated management adage is that "You can't manage what you can't measure." The County would like some better measurement of the scope of the issues with Frederick County public school students who are not legally in the U.S. If, as some suspect, the number of such students is significant, then the BOCC might plan for and proceed with certain budgetary alternatives. If the number is insignificant, then the BOCC might direct its budgetary resources elsewhere.

Response at 3, FN 1.

The Amici provide additional background and information about the stated purpose of the Commissioners' request to require information on the immigration status of students. As they explain, on April 22, 2008, Frederick County Commissioner, John L. Thompson, introduced a proposal conditioning the county school system's funding for the following year on the school board's count of the number of undocumented students in its schools. *Frederick official wants count of illegal immigrant students*, THE ASSOCIATED PRESS, Apr. 23, 2008. On May 20, Commissioner Thompson reintroduced the proposal at a Joint Meeting of the Frederick Board of

County Commissioners (BOCC) and the Board of Education (BOE). It read: "The BOCC consider conditioning a portion of the BOE's FY 2009 Current Expense Fund (Operating Budget) until the BOE makes a reasonable effort to provide the BOCC with the total number of students in FCPS whose lawful presence in the United States cannot be reasonable proven." *Joint Meeting of the Board of County Commissioners and the Board of Education: Minutes of the Frederick Board of County Commissioners* (May 20, 2008), available at <http://www.co.frederick.md.us/archive.asp?AMID=31&Type=&ADID=> (Last visited Jan. 26, 2009).

In December, Commissioner Thompson explained that he wanted the school system to use the information collected to determine the number of undocumented students in the county so local officials could lobby the federal government for additional funding. See Margarita Reycheva, *State School Board Asked to Disregard Request on Illegal Immigrants*, FREDERICK GAZETTE, Dec. 4, 2008 ("The Board of Education is siding with those who are in the country illegally,' [Thompson] said. 'Im not saying don't educate them, I'm just saying count them.'"); *News: Frederick County Wants Head Count of Illegal Immigrant Students in School*, (WTOP Channel 8 Television Broadcast, Oct. 6, 2008), at <http://www.news8.net/news/stories/1008/559260.html> (last visited Oct. 6, 2006) ("That number alone, what do you do with it? The only thing you can do with it is go argue with your federal officials[.] [W]e don't know who those children are [?] [H]ow would anyone even know they woulda been counted[?]' Thompson said.")

It is our view that the impact of illegal immigrant students on the school system's budget (whether large or small) is not a valid public purpose under the ruling and reasoning of *Plyer v. Doe*, 457 U.S. 202 (1982), which held that the United States Constitution prohibits the State or local government from denying immigrant children the benefit of a public education. In *Plyer v. Doe*, the State of Texas explained that one reason for excluding undocumented immigrant children from its public schools was "the preservation of the state's limited resources for the education of its lawful citizens." In response to that reasoning, the Supreme Court said that "concern for preservation of resources standing alone" could not justify excluding those children from the Texas schools. *Id.* at 227.

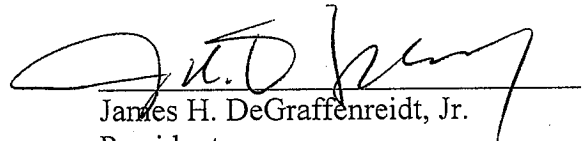
Likewise, it is our view that the County Commissioners' budget and management rationale cannot justify collection of immigration status information. We agree with the local board, Counsel to the General Assembly, and the Amici that one effect of collecting information on immigration status would be to make some immigrant parents so fearful that they will not enroll their children in school. If that were to occur, the protections drawn by *Plyer v. Doe* to provide the benefit of education to immigrant children would be nullified. As the head of the public education system in Maryland, we cannot risk nor abide such a result.

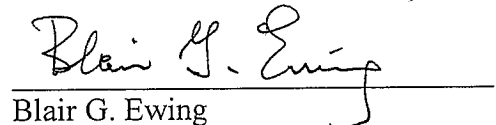
CONCLUSION

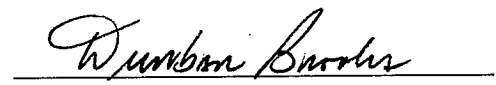
Thus, as to the three questions posed by the County Commissioners, we declare that, unless a substantial, valid governmental interest were shown, the Student Records Manual or any other State education regulation when read in the context of applicable federal law would:

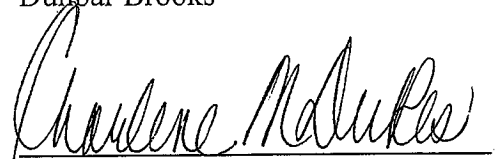
- (1) prohibit a local school system's student record card from including a request for information that would tend to support the proposition that the student is lawfully present within the United States;
- (2) prohibit a local school system's student record card from including a request for documents that would tend to support the proposition that the student is lawfully present within the United States; and
- (3) prohibit a local school system's request that a student (or the student's parent or guardian) provide information or documents that would tend to support the proposition that the student is lawfully present within the United States.

We also grant the Amici's request to submit an Amicus Brief.



James H. DeGraffenreidt, Jr.
President



Blair G. Ewing
Vice President


Dunbar Brooks

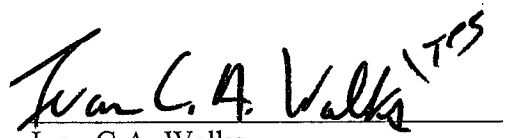

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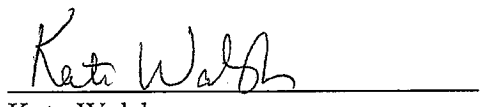

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March 24, 2009