

**PROTECTING *PLYLER*:
NEW CHALLENGES TO THE RIGHT OF
IMMIGRANT CHILDREN TO ACCESS A PUBLIC
SCHOOL EDUCATION**

*Udi Ofer**

Thirty years ago, the Supreme Court ruled in Plyler v. Doe that undocumented children have the same right to access a public school education as children who are United States citizens or immigrant children lawfully admitted to the United States. Yet today, undocumented children still face numerous obstacles when attempting to access a public school education. Moreover, new questions have arisen about the right of children on nonimmigrant visas to enroll in school. This Article reviews the Plyler decision and subsequent attempts to reverse the ruling. The Article examines the rise of the modern-day movement to restrict immigration and the impact of this movement on the right of immigrant children to access a public school education. The Article considers several examples of school districts preventing immigrant children from enrolling in schools, and argues that children on nonimmigrant B visas should not be denied enrollment. Finally, the Article concludes by recommending numerous steps for the federal government to take to ensure that school districts provide equal access to an education to all immigrant children.

INTRODUCTION	188
I. THE SUPREME COURT’S LANDMARK <i>PLYLER</i> DECISION.....	189
II. SUBSEQUENT EFFORTS TO CHALLENGE <i>PLYLER</i> AND ENSUING POLITICAL TENSION	195
III. LOCAL AND STATE ATTEMPTS TO PREVENT AND DETER IMMIGRANT STUDENT ENROLLMENT	204
A. Schools Mandating or Requesting Proof of Immigration Status During Enrollment.....	204
B. Nonimmigrant Children and School Enrollment	211

* Udi Ofer is the Advocacy Director of the New York Civil Liberties Union (“NYCLU”). He is also an adjunct professor at New York Law School. Udi thanks Donna Lieberman, Adriana Piñón, Shira Roza, Clare Tarpey, Jennifer Carnig, and Michael Tan for their work to protect the civil rights of immigrant New Yorkers, and to ensure that every child in New York State has access to a public school education.

C. Student Tracking Proposals.....	218
IV. CONCLUSION AND RECOMMENDATIONS.....	222

INTRODUCTION

In 1982, the Supreme Court ruled in *Plyler v. Doe* that states must not deny the equal protection of the laws to a subclass of children based solely on their immigration status, and that undocumented children have the same right to a public school education as children who are U.S. citizens or immigrant children lawfully admitted to the United States.¹ Yet thirty years later, undocumented children continue to face obstacles when attempting to access a public school education, and new questions have arisen about the right of children on nonimmigrant visas² to enroll in school.

This Article reviews past and present obstacles to the full implementation of *Plyler v. Doe* and offers recommendations for full and meaningful implementation of *Plyler's* protections. Part I reviews the *Plyler* decision. Part II examines subsequent court challenges and legislative attempts to reverse the ruling, as well as the rise of the modern-day movement to restrict immigration.

Part III provides several examples of school districts implementing policies that have the effect of preventing immigrant children from enrolling in public school. This section reviews the practices of school districts in several states, including New York. Until recently, as many as twenty percent of New York districts mandated or requested that families provide documentation of their child's immigration status during the student enrollment process. Part III also examines the question of whether children on nonimmigrant B visas³ should be denied enrollment in school. This section argues that a child's B visa status should not be considered when determining that child's eligibility to enroll in a particular school district. Part III ends with a review of the current movement

¹ *Plyler v. Doe*, 457 U.S. 202 (1982).

² There are multiple categories of nonimmigrant visas. See 8 U.S.C. § 1101(a)(15) (2006). In general, a "nonimmigrant" is a foreigner who is temporarily in the United States for a specific purpose.

³ B visas are issued for business or pleasure: "an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor....) having residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure." *Id.*

in state legislatures to mandate the tracking of undocumented children in school districts.

Part IV of the Article recognizes the positive steps recently taken by the federal government to protect the right of immigrant children to an education. This section concludes by recommending that the federal government take additional steps to ensure that school districts (1) refrain from denying children on B visas a free public education; (2) create clearer distinctions between information that may be asked of children during enrollment and post-enrollment; (3) create model enrollment forms for school districts to ensure that districts avoid constitutional and statutory violations in their enrollment practices; and (4) aggressively monitor school districts' registration practices and compliance with *Plyler* and anti-discrimination protections.

I. THE SUPREME COURT'S LANDMARK *PLYLER* DECISION

In May 1975, Texas passed a statute that withheld state funds for the education of children living in the United States in violation of federal immigration laws.⁴ The statute authorized local school districts to deny enrollment to undocumented children.⁵

In September 1977, Mexican children living in Texas who could not prove their lawful immigration status brought a class action lawsuit in federal court to enjoin the state from enforcing this law.⁶ The United States District Court for the Eastern District of Texas found that the state's discriminatory statute was not supported by a rational basis and permanently enjoined implementation of the statute.⁷ The court also ruled that federal law preempted the state statute and found the Texas statute to be inconsistent with federal immigration, education and civil rights laws.⁸ The Court of Appeals for the Fifth Circuit upheld the lower court's ruling, agreeing that the statute failed a rational basis test.⁹ However, the Court of Appeals disagreed that federal law pre-

⁴ *Plyler*, 457 U.S. at 205 (citing 1975 Tex. Sess. Law Serv. 896 (codified as TEX. EDUC. CODE ANN. § 21.031(1975))).

⁵ *Id.*

⁶ *Id.* at 206. The children resided in Smith County, TX, and attempted to enroll in the Tyler Independent School District. The District Court certified a class consisting of all undocumented school-aged children of Mexican descent residing in the Tyler school district.

⁷ *Id.* at 207.

⁸ *Id.* at 208 n.5.

⁹ *Id.* at 209.

empted the Texas statute.¹⁰ The state appealed to the Supreme Court.

On June 15, 1982, Justice Brennan, writing for the 5-4 majority of the Court, found that Texas violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution when it denied undocumented children access to the same educational opportunities provided to United States citizens or lawfully admitted immigrants.¹¹ Justice Brennan ruled that undocumented children could invoke the protections of the Equal Protection Clause.¹² The Court recognized that undocumented immigrants are not a suspect class under equal protection analysis,¹³ and that public education is not a fundamental federal constitutional right.¹⁴ However, the Court did not deem the right to an education to be a regular government benefit.¹⁵ Following clear precedent,¹⁶ the Supreme Court distinguished public education from other government benefits,¹⁷ emphasizing the importance of education in maintaining basic democratic institutions and the long-lasting impact that education has on the life of a child.¹⁸ The Court concluded: “It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare and crime.”¹⁹

¹⁰ *Plyler*, 457 U.S. at 209. Therefore, the Supreme Court never reached the question of whether federal law preempted the state statute, and instead based its ruling solely on the Fourteenth Amendment. *Id.* at 208 n.8.

¹¹ *Id.* at 230.

¹² *Id.* at 210.

¹³ *Id.* at 219 n.19, 223.

¹⁴ *Id.* at 221, 223 (“Public education is not a ‘right’ granted to individuals by the Constitution Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population.”) (citing *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28-39 (1973)).

¹⁵ *Plyler*, 457 U.S. at 221.

¹⁶ See *Brown v. Board of Ed.*, 347 U.S. 483 (1954).

¹⁷ *Plyler*, 457 U.S. at 221 (“But neither is [public education] merely some government ‘benefit’ indistinguishable from other forms of social welfare legislation.”).

¹⁸ *Id.* at 221 (“Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction [from some mere government benefit].”).

¹⁹ *Id.* at 230. Chief Justice Burger, in his dissent, seemingly agreed with this sentiment. *Id.* at 243.

The Court then applied heightened scrutiny to the Texas statute. Utilizing a variation of an intermediate scrutiny test, the Court concluded that the discrimination authorized by the statute could not be considered rational unless it furthered some substantial goal of the state.²⁰ The majority found that the Texas statute failed this test.²¹

Much of the Court's opinion focused on whether undocumented children could be considered "persons within the jurisdiction" of the state of Texas.²² The Equal Protection Clause provides that no state shall "deny to any person *within its jurisdiction* the equal protection of the laws."²³ The state of Texas—supported by amicus briefs from the Pacific Legal Foundation and the Texas Association of School Boards—argued that because of their immigration status undocumented children are not "persons within the jurisdiction" of Texas and therefore have no right to the equal protection of the state's laws.²⁴ Raising similar arguments employed today by opponents of "birthright citizenship,"²⁵ Texas argued that undocumented children are not within the jurisdiction of the state

²⁰ *Id.* at 224, 230.

²¹ *Id.* at 230 ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here. Accordingly, the judgment of the Court of Appeals in each of these cases is affirmed.").

²² *Id.* at 210-17.

²³ U.S. CONST. amend. XIV, § 1 (emphasis added).

²⁴ *Plyler*, 457 U.S. at 210.

²⁵ Birthright citizenship confers citizenship to any person born in the United States. See *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (holding that the Fourteenth Amendment provides citizenship by birth to those within the territory of the United States). On January 5, 2011, Representative Steve King (R-IA) introduced H.R. 140 to restrict the right of citizenship to only three categories of children: (1) children of United States citizens; (2) children of permanent residents (green card holders); and (3) children of non-citizens in active-duty in the military. Birthright Citizenship Act of 2011, H.R. 140, 112th Cong. (2011). As of April 23, 2012, the legislation was co-sponsored by eighty-seven lawmakers. Similar proposals have been made to amend the U.S. Constitution to restrict birthright citizenship. The Fourteenth Amendment was adopted after the Civil War to ensure that all persons born on United States soil are treated equally in regard to the right of citizenship, and ensures that minorities in the United States are protected from discrimination. If the proposed constitutional amendment to revoke the Fourteenth Amendment's definition of citizenship were adopted, it would be the first provision of the Constitution ever changed to restrict, rather than expand, civil rights.

because they reside in the state illegally.²⁶

The Supreme Court rejected that argument, stating that undocumented children, regardless of their status under federal immigration laws, are persons in any ordinary sense of the term and thus subject to the jurisdiction of the state.²⁷ First, the Court found that any ordinary reading of the term “person” clearly means that it applies to all people, including undocumented immigrants.²⁸ Second, the Court reviewed the history of the Fourteenth Amendment to find no support for the proposition that undocumented immigrants are not within the jurisdiction of the state.²⁹ Rather, undocumented immigrants, regardless of how they entered the United States or whether they overstayed their visas, clearly live within the geographical boundaries of the state and are subject to its laws.³⁰ The Court found that the term “within its jurisdiction” was meant to ensure that the protections of the Fourteenth Amendment “extended to anyone, citizen or stranger, who *is* subject to the laws of a State, and reaches into every corner of a State’s territory.”³¹ The clause could not be used to limit its protections, as the appellants advocated. Quoting from its earlier decision in *Yick Wo v. Hopkins*,³² the Court stated:

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: “Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” *These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the protection of the laws is a pledge of the protection*

²⁶ *Plyler*, 457 U.S. at 210-11.

²⁷ *Id.* at 210.

²⁸ *Id.*

²⁹ *Id.* at 214 (“Although the congressional debate concerning §1 of the Fourteenth Amendment was limited, that debate clearly confirms the understanding that the phrase ‘within its jurisdiction’ was intended in a broad sense to offer the guarantee of equal protection to all within a State’s boundaries, and to all upon whom the State would impose the obligations of its laws.”).

³⁰ *Id.*

³¹ *Id.* at 215.

³² *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (finding that the discriminatory application of a San Francisco statute, even against non-citizens, violated the Equal Protection Clause).

of equal laws.³³

The Court found that permitting the State of Texas to use the constitutional phrase “within its jurisdiction” to deny a subclass of people the guarantees of the Equal Protection Clause would directly undermine the very purpose of the clause, since the Fourteenth Amendment was designed to ensure that the laws are applied equally to all persons.³⁴ The Court concluded that undocumented immigrants live within the jurisdiction of the state and are subject to the laws of the state in the same way that undocumented immigrants are subject to the obligations imposed on them by the state’s criminal and civil laws.³⁵

The Court also found troubling the fact that the Texas statute imposed its penalties on the children of undocumented immigrants, rather than on those who willfully acted to break the laws of the United States.³⁶ Any persuasive arguments to support withholding benefits from those who violated federal immigration laws do not apply to children of lawbreakers since they have little control over their circumstances.³⁷ The Court rejected Texas’s attempt to control the conduct of adult lawbreakers by punishing their children,³⁸ and concluded:

[The Texas statute] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In

³³ *Plyler*, 457 U.S. at 211 (quoting *Yick Wo*, 118 U.S. at 369).

³⁴ *Id.* at 213.

³⁵ *Id.* at 215. If the State of Texas believed that undocumented families lived outside of its jurisdiction and its laws, then could an undocumented family break the state’s laws without consequences? Could they, for example, violate the state’s penal law without having to fear arrest? If Texas argues that the jurisdictional requirement of the Equal Protection Clause does not apply to undocumented immigrants, then it must also argue that the state’s other laws do not apply to undocumented immigrants.

³⁶ *Id.* at 219-20.

³⁷ *Id.* at 220. This point, that innocent children should not be punished for the actions of their adult caretakers, is very much relevant today, where children on temporary visas find themselves unable to enroll in school because their parents have decided to violate their immigration status.

³⁸ *Plyler*, 457 U.S. at 220.

determining the rationality of [the Texas statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the Texas statute] can hardly be considered rational unless it furthers some substantial goal of the State.³⁹

The majority determined that Texas failed to show a substantial goal to justify its discrimination.⁴⁰

Chief Justice Warren E. Burger, writing for the minority, criticized the majority for overstepping its judicial functions by assuming a policymaking role.⁴¹ Chief Justice Burger confessed to agreeing with the majority that undocumented immigrants should not be denied a public school education, but he concluded that such determinations should be left to the political branches and not to the judiciary.⁴²

The minority of the Court did agree with the majority that the Equal Protection Clause applies to undocumented immigrants,⁴³ but it disagreed with the test applied by the majority to determine the statute's constitutionality.⁴⁴ Chief Justice Burger applied a traditional rational basis test—whether the legislative action has a rational relationship to a legitimate government purpose—to determine that denying undocumented children a free public school education was a “rational and reasonable means of furthering the State's legitimate fiscal needs.”⁴⁵ While Chief Justice Burger disagreed with Texas's reasoning, stating that he “would agree without hesitation that it is senseless for an enlightened society to

³⁹ *Id.* at 223-24.

⁴⁰ *Id.* at 227-30. The State of Texas made numerous arguments, rejected by the Court as insufficient, to attempt to justify its discriminatory statute: to preserve money that will be used for the education of United States citizens and lawful residents; to protect itself from an influx of undocumented immigrants; to avoid the special burdens imposed on the State to provide an adequate education to undocumented children; and to refrain from spending resources on a population of undocumented children that are less likely to remain in the United States and contribute productively to the State.

⁴¹ *Id.* at 242 (“We trespass on the assigned function of the political branches under our structure of limited and separated powers when we assume a policymaking role as the Court does today.”) (Burger, J., dissenting).

⁴² *Id.* at 252.

⁴³ *Id.* at 243.

⁴⁴ *Id.* at 248.

⁴⁵ *Plyler*, 457 U.S. at 249.

deprive any children—including illegal aliens—of an elementary education,”⁴⁶ he emphasized that it is not up to the court to determine whether a state’s action is a desirable social policy. Chief Justice Burger concluded that the State of Texas had the right to make a policy decision to prohibit undocumented children from receiving a free public school education.⁴⁷

II. SUBSEQUENT EFFORTS TO CHALLENGE PLYLER AND ENSUING POLITICAL TENSION

Since the Supreme Court’s decision in *Plyler*, federal, state, and local policymakers have attempted to overturn the ruling. Each challenge has brought new obstacles to full implementation of the protections afforded to immigrant children by the Court.

Criticisms of the Supreme Court’s decision in *Plyler* began immediately. Hours following the ruling, a young assistant Attorney General by the name of John G. Roberts wrote a memo for the Justice Department criticizing the Department’s failure to file a brief in support of the appellants and of the Texas statute, citing it as a failure to encourage judicial restraint.⁴⁸ The case had first been filed under the Carter administration, and the Justice Department supported the plaintiffs in their challenge to the Texas statute.⁴⁹ By

⁴⁶ *Id.* at 242.

⁴⁷ *Id.* at 252-53 (“Denying a free education to illegal children is not a choice I would make were I a legislator. Apart from compassionate considerations, the long-range costs of excluding any children from the public schools may well outweigh the costs of educating them. But that is not the issue; the fact that there are sound *policy* arguments against the Texas Legislature’s choice does not render the choice an unconstitutional one.”).

⁴⁸ Memorandum from John Roberts & Carolyn Kuhl to the Attorney General, “*Plyler v. Doe*—‘The Texas Illegal Aliens Case’ ” (June 15, 1982), <http://www.archives.gov/news/john-roberts/accession-60-98-0832/036-chron-file-3-1-82-8-31-82/folder036.pdf>. Federal lawmakers raised the contents of Judge Roberts’ memo during his 2005 Senate confirmation hearings to become the Chief Justice of the Supreme Court. United States Senator Richard J. Durbin (D-IL) asked Judge Roberts his views on this issue twenty-three years following the court’s decision. Judge Roberts refused to answer the question directly, instead stating that his memo focused on the lack of consistency in the Attorney General’s litigation strategy at the time. He explained that should he have to consider this case today, it would be entitled to respect under the legal doctrine of *stare decisis*. *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 390-393 (2005).

⁴⁹ Linda Greenhouse, *Justices Rule States Must Pay to Educate Illegal Alien Pupils*, N.Y. TIMES, June 16, 1982, at A1.

the time the case made its way to the Supreme Court, President Reagan had assumed office and the Justice Department abandoned its support for the case. The Department continued to support the Equal Protection Clause's application to undocumented immigrants but took no position on the constitutionality of the Texas statute.⁵⁰

In the 1990s, opposition to the Supreme Court's decision grew intensely.⁵¹ In November 1994, California voters approved, by a vote of 59% to 41%, Proposition 187, which prohibited undocumented immigrants from utilizing the state's social services, including public education.⁵² The proposition mandated that public school personnel, as well as law enforcement, social services, and healthcare personnel (1) verify the immigration status of individuals they come in contact with; (2) report suspected undocumented immigrants to state and federal authorities; and (3) deny such individuals education, healthcare and social services.⁵³

Section 7 of the Proposition, entitled "Exclusion of Illegal Aliens from Public Elementary and Secondary Schools," mandated the classification of immigrant children into eligible and ineligible categories, as well as cooperation between local and federal authorities in identifying and facilitating the deportation of undocumented children.⁵⁴ Sections (a)-(c) mandated verification of children's immigration status and limited eligibility for enrollment in a California public school to a child who is a "citizen of the United States, an alien lawfully admitted as a permanent resident, or a person who is otherwise authorized under federal law to be present in the United States."⁵⁵ (Interestingly, the latter category appears to include nonimmigrant children, such as those on a B visitor's visa.) Section (d) mandated the verification of the lawful immigration status of parents of children enrolled within a school district.⁵⁶

⁵⁰ *Id.*

⁵¹ The Southern Poverty Law Center has described the late 1990s as seeing the greatest explosion of anti-immigrant sentiments and nativism in a century, and it associated the rise of nativism with a backlash to the growth of the Latino population in the United States. Heidi Beirich, *Essay: The Anti-Immigrant Movement*, S. POVERTY LAW CTR., Feb. 19, 2011, <http://www.splcenter.org/get-informed/intelligence-files/ideology/anti-immigrant/the-anti-immigrant-movement>.

⁵² *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 763 (C.D. Cal. 1995) (including a history of the ballot initiative and vote).

⁵³ *Id.* at 787 app. A.

⁵⁴ *Id.* at 789.

⁵⁵ *Id.* at 789 app. A.

⁵⁶ *Id.* at 790 app. A

Section (e) required that schools report the undocumented status of children *and* parents to state and federal agencies.⁵⁷ Finally, section (f) mandated full cooperation in removing the child to attend school in that child's country of origin.⁵⁸

Proposition 187 further escalated the already intense debate surrounding immigrants' rights in the United States and once again brought the issue of providing undocumented children with a free public school education to the forefront of public debate. The referendum took place during a difficult re-election battle for Governor Pete Wilson, who made support for the referendum a primary focus of his ultimately successful re-election campaign.⁵⁹

Numerous civil rights organizations filed a federal challenge to Proposition 187 immediately after it passed, including the American Civil Liberties Union and the Mexican American Legal Defense and Educational Fund.⁶⁰ In December 1994, a federal district court enjoined the implementation of most of Proposition 187.⁶¹ On November 20, 1995, the district court granted in part plaintiffs' motion for summary judgment.⁶² Most significantly for purposes of this Article, the court ruled that federal law preempted the provisions within the Proposition that excluded undocumented immigrants from a public school education.⁶³ The court found that section 7 in its entirety conflicted with federal law, including the *Plyler* decision.⁶⁴ Moreover, it repeated the holding in *Plyler* that such

⁵⁷ *Id.*

⁵⁸ *Wilson*, 908 F. Supp. at 789-90 app. A.

⁵⁹ See Cathleen Decker & Daniel M. Weintraub, *Wilson Savors Win, Democrats Assess Damage*, L.A. Times, Nov. 10, 1994, available at http://articles.latimes.com/1994-11-10/news/mn-61016_1_democratic-party; Susan Davis, *Shades of Prop 187? Pete Wilson Cuts Immigration Ad for Whitman*, WALL ST. J., Washington Wire Blog (May 11, 2010, 4:27 PM EST), available at <http://blogs.wsj.com/washwire/2010/05/11/shades-of-prop-187-pete-wilson-cuts-immigration-ad-for-whitman/>.

⁶⁰ *Wilson*, 908 F. Supp. at 763.

⁶¹ *Id.* at 764 (grammatical error in the decision states 1995 rather than 1994). The court enjoined sections 4, 5, 6, 7, and 9 of Proposition 187.

⁶² *Id.* at 755. Even though the court granted and denied in part the motions for summary judgment, the court's decision did not dispose entirely of the case; therefore, it also ruled that the preliminary injunction against implementation of the full statute should remain in effect until further order of the court. *Id.* at 764.

⁶³ *Id.* at 774.

⁶⁴ *Id.* at 774. The court relied on the Supreme Court's decision in *De Canas v. Bica*, 424 U.S. 351 (1976), to determine whether a state statute related to immigration is preempted: (1) whether the state's statute is a regulation of

exclusions of undocumented children violated the Equal Protection Clause of the Fourteenth Amendment.⁶⁵

While legal challenges to the law proceeded, supporters of the Proposition took their cause to the federal level. Republicans had taken control of Congress in 1994 and California Republicans such as Governor Pete Wilson urged congressional Republicans to support Proposition 187's challenge to *Plyler v. Doe* by passing federal legislation that would authorize individual states to deny a public education to undocumented children.⁶⁶ Heeding his call, Representative Elton Gallegly (R-CA), who now chairs the House of Representatives' Subcommittee on Immigration Policy and Enforcement,⁶⁷ introduced an amendment (known as the "Gallegly Amendment") in 1996 to the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA"), which would allow states to deny public education to undocumented immigrants.⁶⁸ His amendment passed the House of Representatives by a vote of 257-163,⁶⁹ but did not pass the Senate and eventually died in committee negotiations.⁷⁰

immigration; (2) if not a regulation of immigration law, whether Congress intended to occupy the field that the statute attempts to regulate; or (3) whether the statute conflicts with federal law, making compliance with both impossible. *Wilson*, 908 F. Supp. at 768.

⁶⁵ *Id.*

⁶⁶ Pete Wilson, *Piety, But No Help, on Illegal Aliens*, N.Y. TIMES, July 11, 1996, at A23.

⁶⁷ See *An Unexpected Choice for a House Post*, N.Y. TIMES, Jan. 8, 2011, at A12.

⁶⁸ H.R. 4134, 104th Cong. (1996).

⁶⁹ Final vote results for Roll Call 433, Vote on passage of H.R. 4134, 254-175-5 (Sept. 25, 1996).

⁷⁰ See Eric Schmitt, *G.O.P. Will Delete Disputed Measure in Immigrant Bill*, N.Y. TIMES, September 24, 1996, at A1. The Gallegly Amendment would have faced an immediate legal challenge should it have passed and most likely would have been struck down by the courts. Opponents of the amendment would have argued that the Supreme Court addressed this issue in *Plyler v. Doe*, which found that the Equal Protection Clause requires that undocumented children be provided with the same opportunities to access a public school education as United States citizens and documented children. Supporters of the amendment would have argued that the *Plyler* decision is no longer binding since Congress has now made it clear that undocumented children are ineligible for a free public school education, and under its plenary powers to regulate immigration, Congress may authorize states to deny a public school education to undocumented children. Despite the strong arguments made by supporters of the amendment, they would not be able to overcome the Supreme Court's reasoning in *Plyler* that the Equal Protection Clause prohibits

Although the amendment did not succeed, it once again brought to the forefront the Supreme Court's 1982 decision and the question of whether the Constitution provides to undocumented children the equal protection of the laws and the right to receive the same access to a public school education as United States citizens and documented children. Republicans attacked Senators from their own party who opposed the amendment, such as Texas Republican senators Phil Gramm and Kay Bailey Hutchison.⁷¹ Writing in a *New York Times* op-ed, Governor Pete Wilson accused them of “sticking taxpayers in California” with an unfunded mandate.⁷² According to Governor Wilson, state governments should not bear the responsibility of paying for the education of undocumented children.⁷³ Instead, a child's birth country or the Federal Government should shoulder the financial burden.⁷⁴

Also in 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”), which, among other things, instituted a comprehensive regime regulating the availability of federal, state, and local public benefits and services to non-citizens.⁷⁵ It created categories of qualified and non-qualified immigrants and made determinations on their eligibility for benefits based on such categorizations.⁷⁶ Congress expressly stated that the

the government from being able to carve out classifications of individuals for the sole purpose of denying them an important government benefit such as a public school education, which the court has determined to be distinguishable from other government benefits.

⁷¹ See, e.g., Wilson, *supra* note 66, at A23.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* Governor Wilson made the case that the public was fed up with unfunded mandates imposed on the states by the federal government. He never fully explained where the mandate came from—whether from the *Plyler* decision or the federal government's failure or inability to deport millions of undocumented immigrants—but regardless, he did not believe that states should have to pay for the education of undocumented children.

⁷⁵ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105. See also 20 U.S.C. § 1070 (2006).

⁷⁶ Congress defined “qualified alien” to mean:

- “(1) an alien who is lawfully admitted for permanent residence under the Immigration and Nationality Act [8 U.S.C.A. § 1101 *et seq.*],
- (2) an alien who is granted asylum under section 208 of such Act,
- (3) a refugee who is admitted to the United States under section 207 of such Act,
- (4) an alien who is paroled into the United States under section

legislation was a “national policy concerning welfare and immigration” and explained that the availability of public benefits should not be constituted as an incentive for individuals to immigrate to the United States. The legislation emphatically stated: “It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.”⁷⁷ However, the law also stated, “Nothing in this chapter may be construed as addressing alien eligibility for a basic public education as determined by the Supreme Court of the United States under *Phyller v. Doe* (457 U.S. 202) (1982).”⁷⁸

In response to passage of PRWORA, defendants in the *League of United Latin American Citizens* case moved for reconsideration of the court’s 1995 decision.⁷⁹ The federal district court responded by holding that the PRWORA preempted portions of Proposition 187 and that section 7 of Proposition 187 was invalid.⁸⁰ The district court held that while PRWORA is a comprehensive law limiting the availability of public benefits to non-citizens, it does not deny the right to a free public school education for immigrants.⁸¹ Instead, the federal law supports the Supreme

212(d) of such Act for a period of at least 1 year,
 (5) an alien whose deportation is being withheld under section
 243(h) of such Act.”

8 U.S.C. § 1641(b) (2006).

⁷⁷ *Id.* § 1601.

⁷⁸ *Id.* § 1643.

⁷⁹ *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1252 (C.D. Cal. 1997).

⁸⁰ *Id.* at 1255-56. The court found that section 7, as well as other sections of Proposition 187, attempted to cover the same benefits covered by PRWORA, and because the federal law is so comprehensive, “the states have no power to legislate in this area.” *Id.* at 1255. The only regulations that California could promulgate in this area were regulations to implement the federal law. *Id.*⁸¹ *Id.* at 1255 (“As stated, the PRA [PRWORA] is a comprehensive statutory scheme regulating alien eligibility for government benefits. It does not deny public elementary and secondary education to aliens . . . although basic public education clearly must be classified as a government benefit, just as health care is, the PRA does not purport to deny it to non-qualified aliens. Proposition 187 cannot do that either under the present state of the law.”).

⁸¹ *Id.* at 1255 (“As stated, the PRA [PRWORA] is a comprehensive statutory scheme regulating alien eligibility for government benefits. It does not deny public elementary and secondary education to aliens . . . although basic public education clearly must be classified as a government benefit, just

Court's decision in *Plyler* and by not denying a public school education to immigrants who it considered unqualified to receive other federal, state, and local benefits.⁸² On March 13, 1998, the federal district court issued a final order declaring section 7 and most of the other sections of Proposition 187 to be unconstitutional and preempted by federal law.⁸³ On July 29, 1999, a court-approved mediated agreement was signed by the state of California.⁸⁴ Newly elected Governor Gray Davis agreed to withdraw the appeal to the Ninth Circuit that had been filed by Governor Wilson.⁸⁵

Despite the defeat of Proposition 187, immigration restrictionists have not abandoned hopes of overturning the decision. They claim that immigration is “overwhelming school systems,”⁸⁶ yet they make few distinctions in attacking undocumented immigrants and U.S. citizen children of immigrants who attend public schools.⁸⁷ They also lambast Justice Brennan and criticize anyone who would apply the Equal Protection Clause to undocumented immigrants,⁸⁸ yet do not mention that even the

as health care is, the PRA does not purport to deny it to non-qualified aliens. Proposition 187 cannot do that either under the present state of the law.”)

⁸² See *Wilson*, 997 F. Supp. at 1255-56.⁸³ *Id.*

⁸³ *Id.*

⁸⁴ Patrick J. McDonnell, *Davis Won't Appeal Prop. 187 Ruling, Ending Court Battles*, L.A. TIMES, July 29, 1999, available at <http://articles.latimes.com/1999/jul/29/news/mn-60700>.

⁸⁵ *Id.*

⁸⁶ FED'N FOR AM. IMMIGRATION REFORM (FAIR), *Immigration and School Overcrowding*, Oct. 2002, http://www.fairus.org/site/PageServer?pageName=iic_immigrationissuecenters51f8.

⁸⁷ *Id.* Anti-immigrant movements historically have been associated with nativist as well as discriminatory sentiments, and the current anti-immigrant movement, with its roots in the mid- to late-1990s, has its eye on Latino immigrants. According to the Southern Poverty Law Center: “Nativist groups contend, with little and no empirical evidence to back them up, that Latin American immigrants contribute disproportionately to a host of societal ills—from poverty and inner city decay to crime, urban sprawl and environmental degradation.” Beirich, *supra* note 51. In a May 2000 rally in Sierra Vista, Arizona, Barbara Coe of the California Coalition for Immigration Reform denounced “alien savages” and encouraged vigilantes to catch individuals trying to cross the southern border because it would mean “one less illegal alien bringing in communicable diseases, one less illegal alien smuggling deadly drugs, [and] one less illegal alien gang member to rob, rape and murder innocent U.S. citizens.” *Id.*

⁸⁸ Howard Sutherland, *Plyler v. Doe: The Solution*, VDARE, Feb. 13, 2003, http://www.vdare.com/sutherland/the_solution.htm. See also Edwin S. Rubenstein, *The Burden of Plyler v. Doe*, THE SOCIAL CONTRACT PRESS, May 1, 2010, available at <http://www.thesocialcontract.com/articles/plyler-v-doe.html>.

minority in the Supreme Court's *Plyler* opinion—including Justice Rehnquist—recognized that the Equal Protection Clause applies to undocumented immigrants.⁸⁹ Lawmakers in Texas continue to introduce legislation that would deny a free public school education to undocumented immigrants⁹⁰ or that would deter their enrollment.⁹¹ During his campaign for governor of Colorado, former congressman and presidential candidate Tom Tancredo promised that he would deny funding for the public school education of undocumented children should he be elected governor, in the hope of triggering a court battle.⁹² Critics of the Supreme Court decision call *Plyler* “truly insane public policy”⁹³ and accuse it of “wreak[ing] havoc on public education.”⁹⁴

Some groups also continue to call on Congress to pass legislation to overturn *Plyler*.⁹⁵ They interpret the *Plyler* decision to have been based largely on a particular set of facts in the 1970s that

⁸⁹ *Plyler v. Doe*, 457 U.S. 202, 243 (1982) (“I have no quarrel with the conclusion that the Equal Protection Clause of the Fourteenth Amendment applies to aliens who, after their illegal entry into this country, are indeed physically ‘within the jurisdiction’ of a state.”) (Burger, C.J., dissenting, joined by White, Rehnquist, and O’Connor, JJ.).

⁹⁰ Katherine Leal Unmuth, *25 Years Ago, Tyler Case Opened Schools to Illegal Migrants*, THE DALLAS MORNING NEWS, June 11, 2007, at 1A.

⁹¹ H.B. No. 262, 81st Leg. Sess. (Texas 2009).

⁹² Jessica Yellin, Tancredo: Deny Public School Funding To Children of Illegal Immigrants, CNN, Aug. 10, 2010.

⁹³ Howard Sutherland, *Plyler v. Doe: The Solution*, VDARE, Feb. 13, 2003, http://www.vdare.com/sutherland/the_solution.htm.

⁹⁴ *Id.*

⁹⁵ *See, e.g.*, Sutherland, *supra* note 93 (“The answer to *Plyler* is political. The 14th Amendment itself says ‘The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.’ Contrary to what most people today believe, the Supreme Court is not the sole interpreter of the Constitution. The Congress can and should pass legislation clarifying that the Equal Protection Clause cannot be construed to compel a state to provide discretionary benefits, including public education, to anyone who is not legally admitted into the United States. The legislation should specify that it is not subject to judicial review.”) (quoting Fourteenth Amendment); FAIR, *supra* note 86 (“*Plyler v. Doe* also found that there is no fundamental right to education, that Texas had not proved its argument that admission of illegal alien children to public schools would damage the educational opportunities provided to U.S. citizen children, and that there was no evidence that the U.S. government seriously intended to deport the parents of the illegal alien children. The Court could reverse the ruling if these circumstances were to change or if Congress were to make the exclusion of these students explicit by legislation.”).

are no longer relevant today.⁹⁶ Organizations such as FAIR argue that they could convince the Supreme Court to uphold such restrictions and reverse the *Plyler* decision by proving that denying undocumented immigrants access to a public school education will benefit the educational opportunities provided to U.S. citizens and documented residents.⁹⁷

One person who had vigorously supported denying undocumented children access to a free public school education, however, now believes that he was wrong. Former superintendent Jim Plyler, the appellant in *Plyler v. Doe*, now agrees with the Supreme Court's 1982 decision. According to Mr. Plyler, if he would have won his case, "[i]t would have been one of the worst things to happen in education."⁹⁸

Jim Plyler has not spoken extensively about his change of mind, but his reflection does provide a practical perspective on this controversial issue. While one may disagree with the Supreme Court's ruling that the Constitution protects the right of undocumented children to a free public school education, the policy of providing a public education to undocumented children is a sound and practical one. As Chief Justice Burger recognized in his dissent in *Plyler*, while he did not believe that the Constitution prohibited states from denying a free public school education to undocumented children, he did believe that such restrictions were senseless and counterproductive. The long-term consequences of depriving undocumented children with a public school education greatly outweigh any short-term financial gains. Jim Plyler may not have realized this when he fought to deny undocumented children a public school education. However, after living in Texas for twenty-five years following the *Plyler* ruling and seeing the day-to-day impact of a public school education on the lives of children—including undocumented children—he realized that the Supreme Court was right to prohibit Texas from restricting the right of immigrant children to attend public school.

⁹⁶ FAIR, *supra* note 86. FAIR argues that in the *Plyler* case, Texas did not have the factual evidence to support the contention that undocumented children have a negative impact on the ability of states to provide an adequate public school education to United States citizens and documented children. FAIR also argues that evidence exists today to support such allegations.

⁹⁷ *Id.*

⁹⁸ Unmuth, *supra* note 90, at A1.

III. LOCAL AND STATE ATTEMPTS TO PREVENT AND DETER IMMIGRANT STUDENT ENROLLMENT

The hostility towards the rights of immigrants also has seeped into the schoolhouse gate,⁹⁹ where school districts have established new methods to deny or discourage enrollment by undocumented children, as well as certain categories of documented children. Some school districts now request or even mandate that children provide proof of their green card, Social Security number, or visa information when attempting to register for school. Other school districts are preventing students on nonimmigrant visas from enrolling in school. Moreover, numerous states have legislative proposals before them to mandate that school districts track and report the number of undocumented children in their schools, and one state has already passed such a proposal. Variations of some of these methods were attempted in the 1990s during the first great backlash against *Plyler* but current attempts to deter certain students from enrolling in school reflect new challenges to the equal right of immigrant children to access a public school education.

This section provides examples of the above practices and their impact on the ability of immigrant children to register for school. It argues for an interpretation of *Plyler* that prohibits school districts from asking questions about a child's immigration status during the enrollment process or requiring documents that may reveal a child's status. Moreover, it argues that a child's B visa status should not be considered when determining eligibility for a free public school education.

A. Schools Mandating or Requesting Proof of Immigration Status During Enrollment

Families who enroll their children in public school typically must provide documentation proving their child's age and residency in a particular school district. In most school districts, families may meet these requirements by providing records that do not also reveal their children's immigration status. Yet as explained in this section, school districts throughout the nation have adopted policies or engaged in practices that do require or request documentation of a

⁹⁹ See Michelle Garcia, *School Forms' Immigration-Related Questions Stir Concern*, WASH. POST, Sept. 10, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/09/AR2006090900832.html> (quoting a representative from FAIR who stated that ordinances such as the ones passed by Hazleton, PA that deny housing to undocumented immigrants will eventually extend to education.).

child's, and even parent's, immigration status. The examples provided below from the states of Pennsylvania, New Jersey, and New York do not mean to suggest that this problem is unique to those states. Rather, they reflect states where families and advocates have brought this problem to the public's attention. The practices identified in these states are most likely present in many other parts of the country.¹⁰⁰

In 2008, the Education Law Center studied the registration practices of school districts in Pennsylvania and determined that 162 out of the 501 school districts had enrollment policies and practices that violated federal or state law.¹⁰¹ Fifty-seven of the school districts investigated by the Education Law Center required a Social Security number as a prerequisite to enroll a child in school, with two of the school districts even requiring that the parents of the prospective student possess a Social Security number.¹⁰² Undocumented children are ineligible for Social Security numbers and thus, were unable to register for school in these districts.¹⁰³ Moreover, some school districts required that families provide a passport, visa, or green card to register, or that "alien residents" receive special approval from the school superintendent in order to enroll in school.¹⁰⁴

¹⁰⁰ According to conversations the Author had in the fall and winter of 2010 with civil rights attorneys from various parts of the country, there is growing concern about school districts' practices throughout the nation. For example, in Tennessee, schools have begun to request Social Security numbers from enrolling students, and in Michigan, at least one school district is requiring that all foreign born residents provide green cards to register for classes. Copies of email correspondences that the author had with advocates in several states are on file with the author.

¹⁰¹ Letter from Education Law Ctr. to Dr. Linda Rhen, Pa. Dep't of Educ., Aug. 8, 2008, at 5, <http://www.elc-pa.org/pubs/downloads/english/imp-Request%20for%20Investigation%208-08.pdf> [hereinafter Letter to Dr. Rhen].

¹⁰² *Id.* at 5.

¹⁰³ Mandating that children provide their Social Security number when registering for school also raises concerns under the federal Privacy Act of 1974. Privacy Act of 1974, 5 U.S.C. § 552a (2006). Under section 7 of the note to the Act, state and local government agencies requesting an individual's Social Security number also must disclose: (1) whether disclosure of a Social Security number by the individual is mandatory or voluntary; (2) the authority by which the Social Security number is solicited; and (3) the uses to which such information shall be put.

¹⁰⁴ Letter to Dr. Rhen, *supra* note 101, at 6.

Pennsylvania is one of the few states in the country that has laws in place to provide guidance to school districts on the inquiries that may be made during the enrollment process regarding a child's immigration status. Pennsylvania's Administrative Code prohibits school districts from conditioning a child's eligibility to enroll in a school on that child's immigration status and prohibits schools from inquiring about a child's immigration status as part of the enrollment process.¹⁰⁵ Yet these practices took place despite Pennsylvania's protections.

In September 2008, the ACLU of New Jersey (ACLU-NJ) released a similar study to Pennsylvania's and found that twenty percent of New Jersey's school districts illegally asked for information during the enrollment process that would reveal a child or parent's immigration status.¹⁰⁶ It cited Monmouth County as the worst, with twenty-six school districts in that county alone mandating citizenship or immigration status information as a prerequisite to enroll in school.¹⁰⁷ The ACLU-NJ sent letters to the

¹⁰⁵ 22 PA. CODE § 11.11(d) (2007). The Pennsylvania Code does not recognize that a student on an F-1 visa still has to pay tuition to the school district. *Id.* However, this should not impact the student registration process, since foreign students receive F-1 visas after a school district already has certified that the student meets the visa's requirements, such as the paying of tuition to the school district. *See Student Visas*, U.S. DEP'T OF STATE, http://travel.state.gov/visa/temp/types/types_1268.html (last visited Mar. 30, 2011) (requiring all "prospective nonimmigrant students" to have been accepted for enrollment in a school approved by the Department of Homeland Security and a computer-generated I-20 form submitted by the school).

¹⁰⁶ *1 in 5 NJ Schools Puts Up Barriers for Immigrant Children*, AM. CIVIL LIBERTIES UNION OF N.J., Sept. 2, 2008, <http://www.aclu-nj.org/news/2008/09/02/1-in-5-nj-schools-puts-up-barriers-for-immigrant-children/> [hereinafter AM. CIVIL LIBERTIES UNION OF N.J.]. New Jersey's Administrative Code states that immigration status shall not affect the eligibility of a child to enroll in school. N.J. ADMIN. CODE § 6A:22-3.3(b) (2010). The Administrative Code also prohibits a school district from requiring, or even requesting, as a condition of enrollment in the school, documents or information relating to a child's citizenship or immigration/visa status, including a child's Social Security number. *See id.* § 6A:22-3.4(d). School districts may not even request these documents indirectly as a condition of enrollment. *See id.* § 6A:22-3.4(e). Like Pennsylvania, the New Jersey Code does contain an exception for students who are on an F-1 visa. *See id.* § 6A:22-3.3(b)(1). It is likely not accidental that the states with statutory protections for the enrollment of immigrant children (New Jersey and Pennsylvania) also have seen extensive advocacy by advocates to ensure that school districts meet their statutory and constitutional obligations.

¹⁰⁷ AM. CIVIL LIBERTIES UNION OF N.J., *supra* note 106.

State Department of Education and the 187 offending school districts asking them to stop their practices.¹⁰⁸ The State Department of Education intervened and mandated that districts end these practices.¹⁰⁹

In New York state the New York Civil Liberties Union (“NYCLU”)—where the author of this Article works—first received a complaint from a family in the summer of 2009 about a local school district asking for proof of their child’s immigration status during the school enrollment process. After receiving the intake, the NYCLU conducted a cursory search of New York school districts’ enrollment practices and found that at least five other school districts had similar practices. The NYCLU contacted those districts to ask that they amend their practices, and on September 8, 2009, the NYCLU also wrote to the New York State Education Department (“SED”) asking it to review the registration practices of the five districts that the NYCLU identified, as well as the requirements of all school districts in the state. The SED refused to contact the offending school districts or to investigate whether other school district may have similar practices.¹¹⁰

On December 14, 2009, the NYCLU wrote to the SED again to request that officials take immediate steps to ensure that school districts do not deprive undocumented children of their right to enroll in school. Once again, the NYCLU did not receive a satisfactory response, and on February 5, 2010, the organization wrote for a third time. The State Education Department responded to the third letter by posting a short notice buried in a much longer SED electronic news bulletin reminding school districts of a past SED Commissioner’s decision on the type of documentation schools may require as proof of a child’s age for admission to school.¹¹¹ The bulletin did not provide any context for this reminder, nor did it include an explanation that schools must not require that families provide proof of their child’s immigration status

¹⁰⁸ *Id.*

¹⁰⁹ In at least one school district, after the local school board explained that it will not deny enrollment to immigrant children despite asking immigration-related questions, there was an increase in the number of South Asian families registering their children for school in that district. Garcia, *supra* note 99.

¹¹⁰ Copies of communications between the New York Civil Liberties Union and the State Education Department are on file with the author.

¹¹¹ See Letter from Donna Lieberman & Udi Ofer to David Steiner, State Educ. Comm’r, July 21, 2010, http://www.nyclu.org/files/releases/NYCLU_Letter_to_SED_07.23.10.pdf.

when attempting to register for school.¹¹² It made no mention of immigrant students or *Plyler v. Doe*. The State Education Department did tell the NYCLU, however, that “no further action” would be taken.¹¹³

Frustrated by SED’s lack of an adequate response, the NYCLU reviewed the school enrollment practices of almost all 695 school districts in New York State. The examination revealed that at least 139 school districts (twenty percent of all school districts) in New York appeared to have in place registration policies that mandated or requested that families provide proof of their child’s lawful immigration status when registering that child for school.¹¹⁴

School districts implemented a variety of practices during their registration processes. Some mandated that non-citizens provide their green card in order to enroll in school. For example, the Spencerport Central School District stated in its student registration checklist of mandatory items that: “If your child is not a U.S. citizen by birth, please bring your child’s I-94 form a [*sic*] Resident Alien card (green card). If the card is expired it will not be accepted.”¹¹⁵ Moreover, inside the registration packet, the school district included an entire section on “immigration status,” with a notice that “immigration papers must be provided.”¹¹⁶ Other school districts, like the Oxford Academy and Central Schools, mandated that children provide their Social Security number when registering.¹¹⁷ Districts such as Sweet Home Central School District

¹¹² *See id.*

¹¹³ Letter from Kate Gaffney, Assistant Counsel, State Educ. Dep’t, to N.Y. Civil Liberties Union, Apr. 20, 2010 (on file with author). In the letter, Gaffney stated that the State Education Department will not take any additional actions to respond to the NYCLU’s concerns. *See also* Nina Bernstein, *No Visa, No School, Many New York Districts Say*, N.Y. TIMES, July 23, 2010, at A16.

¹¹⁴ Press Release, N.Y. Civil Liberties Union, “NYCLU Analysis: 1 in 5 New York State School Districts Puts Up Illegal Barriers for Immigrant Children,” N.Y. Civil Liberties Union, July 23, 2010, <http://www.nyclu.org/news/nyclu-analysis-1-5-new-york-state-school-districts-puts-illegal-barriers-immigrant-children>.

¹¹⁵ Lieberman & Ofer, *supra* note 111. A copy of the old Spencerport Central School District form is on file with the author. Following the NYCLU’s revelations, the district removed these requests and questions from its student enrollment forms.

¹¹⁶ *Id.*

¹¹⁷ *Id.* A copy of the old Oxford Academy and Central Schools form is on file with the author. The district has since removed the requirements

asked about a child's "Visa Expiration Date" and stated that "If not US Citizen, must provide a passport, VISA to verify length of stay."¹¹⁸

On July 21, 2010, the NYCLU wrote to SED officials once again, and sent letters to all 139 offending school districts.¹¹⁹ The NYCLU also provided a copy of the findings to *The New York Times*, which ran a lengthy article describing the practices of some of the 139 school districts, as well as the State Education Department's failures to address them.¹²⁰

Forty days later, and following dozens of news articles across the state chronicling the NYCLU's findings,¹²¹ the State Education Department issued a guidance to all school districts explaining that "school districts may not deny resident students a free public education on the basis of their immigration status."¹²²

from its student enrollment form, although it still lists documentation of a Social Security number as "optional."

¹¹⁸ *Id.* A copy of the Sweet Home Central District registration form is available at <http://district.shs.k12.ny.us/documents/regpacket1112.pdf>.

¹¹⁹ Lieberman & Ofer, *supra* note 111.

¹²⁰ Nina Bernstein, *No Visa, No School, Many New York Districts Say*, N.Y. TIMES, July 23, 2010, at A16. The *Times* article explained SED officials' general lack of interest in responding to this problem and quoted a spokesperson as stating that "[i]t is the responsibility of each school district to ensure that it complies with all laws and decisions regarding student registration Anyone who is aggrieved . . . may appeal to the commissioner." The *Times* story quoted the author's response on behalf of the NYCLU explaining that it is irresponsible for SED officials to wait until school districts deny children their right to enroll in school, and that SED officials must not place the burden on families to challenge school districts' practices.

¹²¹ See, e.g., Kenneth C. Crowe, *Group Cites Local Schools, NY Civil Liberties Union: Questions May Hinder Immigrant Enrollments*, TIMES UNION (July 24, 2010, 1:00 AM EST), <http://www.timesunion.com/local/article/Group-cites-local-schools-589095.php>; Brian Meyer, *School districts' policies target immigrants, Report Cites 13 in Region*, BUFFALO NEWS (July 23, 2010, 7:08 PM EST), <http://www.buffalonews.com/city/article80344.ece>; Jennifer Gustavson, *Rocky Point School District rethinks enrollment policies*, N. SHORE SUN (Aug. 6, 2010, 12:00 AM), <http://northshoresun.timesreview.com/2010/08/683/rocky-point-school-district-rethinks-enrollment-policies/>; Editorial, *Immigration action absurd*, LEADER HERALD, Aug. 5, 2010, <http://www.leaderherald.com/page/content.detail/id/524652.html>; Dan Weissner, Rye, Blind Brook Schools Update 'Unconstitutional' Registration Requirements, RYEPATCH (Sept. 17, 2010), <http://rye.patch.com/articles/rye-blind-brook-schools-update-unconstitutional-registration-requirements>.

¹²² Memorandum from John B. King Jr., Senior Deputy Comm'r for P-12 Educ., to Dist. Superintendents 1 (Aug. 30, 2010), <http://www.p12>.

The guidance explained that while *Plyler* did not expressly address the question of whether a school district may inquire about a child's immigration status during the registration process, "the decision is generally viewed as prohibiting any district actions that might 'chill' or discourage undocumented students from receiving a free public education."¹²³ The guidance concluded: "Accordingly, at the time of registration, schools should avoid asking questions related to immigration status or that may reveal a child's immigration status, such as asking for a Social Security Number."¹²⁴

The practices employed by the school districts above range from those clearly intended to impede the access of undocumented children to a public education—e.g., the Spencerport Central School District policy—to those that effectively impede access but are not as clearly intended to do so. All of the policies and practices, regardless of their intent, raise serious concerns under the Supreme Court's *Plyler* decision. First, many of the above practices make no secret of their requirement that children prove their lawful immigration status to enroll in school. Some do it in a direct manner by requiring green cards from non-citizens, while others may do it more surreptitiously, and even unknowingly, by requiring Social Security numbers for children. Regardless of the mechanisms they use to mandate that children prove their immigration status during the enrollment process, these practices violate the Fourteenth Amendment by denying undocumented children equal access to a free public school education. Non-citizens without a green card or Social Security number would not be able to attend school in these districts.

Second, even those school districts that do not mandate the production of immigration documents to enroll in school, but simply request such documents as part of the enrollment process, violate the Equal Protection Clause by chilling or discouraging families from accessing a public education for their undocumented children. Many parents simply will not register their children for school if they have to admit during the registration process that their child is unlawfully residing in the United States, fearing that such answers could result in arrest and deportation. Moreover, few school districts will ever learn of this fear because parents forego

nysed.gov/sss/pps/residency/studentregistrationguidance082610.pdf. See also Kirk Semple, *New York Asks Schools to Avoid Pupil Immigration Status*, N.Y. TIMES, Aug. 31, 2010, at A21.

¹²³ Memorandum from John B. King, *supra* note 122, at 1.

¹²⁴ *Id.* at 1-2.

even attempting to register their child for school or engaging in a conversation with school administrators about the potential immigration consequences of their answers. Parents will take the registration packet home and never return to the school district.

B. Nonimmigrant Children and School Enrollment

Children living in the United States on temporary visas, such as B visas, which are issued for business or pleasure visits to the United States, face unique obstacles to enrolling in school. When Congress passed the Immigration and Nationality Act of 1952, it precluded B visa holders from enrolling in school.¹²⁵ In addition, more recent regulations state that B visa holders violate the terms of their status by enrolling in school.¹²⁶ Any B visa holder who enrolls in a school without first receiving approval and a change in nonimmigrant status to F¹²⁷ or M¹²⁸ status is disqualified from subsequently applying for a change in nonimmigrant status.¹²⁹ But

¹²⁵ 8 U.S.C. § 1101(a)(15)(B) (2006). Congress defined a B visa holder as “an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor . . .) having residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure.”

¹²⁶ 8 C.F.R. § 214.2(b)(7) (2011). In relevant part, this section reads: “An alien who is admitted as, or changes status to, a B–1 or B–2 nonimmigrant on or after April 12, 2002, or who files a request to extend the period of authorized stay in B–1 or B–2 nonimmigrant status on or after such date, violates the conditions of his or her B–1 or B–2 status if the alien enrolls in a course of study. Such an alien who desires to enroll in a course of study must either obtain an F–1 or M–1 nonimmigrant visa from a consular officer abroad and seek readmission to the United States, or apply for and obtain a change of status under section 248 of the Act and 8 CFR part 248. The alien may not enroll in the course of study until the Service has admitted the alien as an F–1 or M–1 nonimmigrant or has approved the alien’s application under part 248 of this chapter and changed the alien’s status to that of an F–1 or M–1 nonimmigrant.”

¹²⁷ 8 C.F.R. § 214.2(f). To study under an F-1 visa, students must demonstrate that they have reimbursed the school district for the cost of providing that education before they can obtain the visa.

¹²⁸ 8 C.F.R. § 214.2(m). M-1 visas are for vocational or other non-academic programs.

¹²⁹ See 8 C.F.R. § 248.1(c)(3). This penalization was promulgated by regulation along with § 214.2(b)(7). 67 Fed. Reg. 18,062, 18,602 to 18,064 (Apr. 12, 2002).

since 1952, holders of a B visa violated the conditions of their visa when they enrolled in school.¹³⁰

The *Plyler* decision made it clear that undocumented children must be provided with the same access to an education as U.S. citizen children and children lawfully admitted to the United States. The Supreme Court ruled that not having lawful immigration status must not be a barrier to enrolling in school. Yet how should school districts treat students who are in the United States lawfully, but are prohibited by the conditions of their visa from enrolling in school? This question is the latest challenge in *Plyler* implementation, as school districts have been denying enrollment to students residing in the United States on temporary B visas or have used B visas as a reason to ask all prospective students for their immigration status.¹³¹

One answer to the above question reads *Plyler* as holding that a child's immigration status must never be a factor when making a decision to enroll a child for a free public school education. Proponents of this view, which includes the Author, would argue that schools should apply the normal school eligibility

¹³⁰ 8 U.S.C. § 1101(a)(15)(B) (2006). Despite this longstanding prohibition, when Texas passed its statute (that was struck down by the Supreme Court in the *Plyler* decision), it created two categories of children to determine school enrollment eligibility: 1) undocumented children and 2) United States citizens and children lawfully admitted to the United States. Children on B visas fall into the latter category and would have been eligible to enroll in school under the old Texas statute. *Plyler v. Doe*, 457 U.S. 202, 205 (1982). The statute denied enrollment to undocumented children only, and made no mention of nonimmigrant children, such as B visa holders. *Id.* Similarly, California's Proposition 187 also permitted all lawfully present children to enroll in school. *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 789-90 (C.D. Cal. 1995). Therefore, when the Supreme Court issued its decision in *Plyler*, it focused its holding on undocumented children and did not directly address the question of nonimmigrant children eligibility, although it did provide guidance in its analysis and reasoning.

¹³¹ See, e.g., Colleen Mastony & Diane Rado, *State Slaps District That Barred Teen*, CHI. TRIB., Feb. 24, 2006, http://articles.chicagotribune.com/2006-02-24/news/0602240141_1_immigration-status-district-s-school-board-members-school-district; Andrew Trotter, *District Will Stop Querying Students on Immigration*, EDUC. WEEK, Mar. 8, 2006, <http://www.edweek.org/ew/articles/2006/03/08/26elmwood.h25.html> (citing state education agency's vote to deny up to \$3.3 million to Elmwood Park School District for refusing to admit a nonimmigrant child). John W. Borkowski, *Legal Issues For School Districts Related to the Education of Undocumented Children*, Nat'l Sch. Bds. Assoc. & Nat'l Educ. Assoc. 3 (2009), <http://www.nea.org/assets/docs/HE/09undocumen tedchildren.pdf>.

test—which is, traditionally, proof of age, and physical presence and intent to reside in the district—when determining a B visa holder’s eligibility to enroll in school. Therefore, if a family can prove that they reside in a particular school district and intend to stay in that particular district for the duration of the semester or longer (by providing copies of their rental agreements, deed, utility bills, etc.), they should be eligible to enroll a child who meets the age requirements. A child’s B visa status is irrelevant to this calculation.

Opponents of this view interpret *Plyler* more narrowly to prohibit the denial of school admission to undocumented children only. Such a view would argue that *Plyler* does not apply to immigrant children who lawfully reside in the United States, including children on B visas. Proponents of this interpretation point to federal prohibitions on B visa holders to enroll in school as placing an obligation on school districts to ensure that children do not violate the terms of their immigration status when attempting to enroll in school. Such school districts insist that they have an affirmative obligation to identify, reject, and even report children on B visas who attempt to enroll in school.¹³²

For example, in 2006, the Elmwood School District in Illinois denied enrollment to at least two students on B visas. In the first case, the school district denied enrollment to a child from Ecuador on a B visa, and the girl eventually left the school district.¹³³ In the second incident, however, a child from the Czech Republic said that she possessed a B visa but refused to show it.¹³⁴ The school district refused to enroll her and the girl sued.¹³⁵ In court, it was revealed that her tourist visa had expired eight years earlier, resulting in her having become undocumented.¹³⁶ Afterwards, the school district enrolled the student.¹³⁷

The Elmwood School District argued that the children with B visas had no right to enroll in school and that the district had the right to ask all applying children about their immigration status, and

¹³² See, e.g., Nina Bernstein, *No Visa, No School, Many New York Districts Say*, N.Y. TIMES, July 23, 2010, at A16; Mastony & Rado, *supra* note 131. The author of this Article has had numerous conversations with school districts and their attorneys claiming an obligation to identify and deny enrollment to such prospective students.

¹³³ Trotter, *supra* note 131.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

even to report to immigration authorities students on B visas who attempted to enroll in school.¹³⁸ The district claimed that *Plyler* did not apply to nonimmigrants and that residing in a school district on a tourist visa indicated an intent not to reside permanently in that district.¹³⁹

The Illinois State Board of Education disagreed with the Elmwood School District and voted to revoke \$3.3 million in state funding to the district.¹⁴⁰ The state Board of Education argued that the protections of *Plyler* did apply and that the school district acted in an illegal manner.¹⁴¹ According to the state Board of Education's general counsel, the school district should not be asking about immigration status because of the chilling effect it might have on undocumented children.¹⁴²

While the Elmwood School District eventually relented and agreed to stop asking children about their immigration status,¹⁴³ this example illustrates the conflict that current federal law imposes on school districts. On the one hand, the Elmwood School District insisted that it was following the law by identifying school applicants living in the United States on B visas and by preventing them from enrolling in school in violation of federal immigration law. On the other hand, by doing so the school district discouraged—perhaps even prevented—undocumented children from enrolling in school by acting as an immigration enforcement agent and by asking all children questions about their immigration status as a condition for their enrollment in school.

The *Plyler* decision did not address directly the question of the eligibility of children on temporary B visas to enroll in school. However, there are at least five compelling reasons why schools must not deny enrollment to B visa holders who violate the conditions of their visa by enrolling in school or use the justification of identifying B visa holders in order to ask all non-citizens, or students, for their immigration status. First, the reasoning of *Plyler* applies to children on B visas. *Plyler* concluded that states violate the Fourteenth Amendment when they carve out classifications of individuals, based on a particular immigration status for the sole purpose of denying them an important government benefit like a

¹³⁸ *Id.*

¹³⁹ Trotter, *supra* note 131.

¹⁴⁰ Mastony & Rado, *supra* note 131.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

public school education, which the Court determined is distinguishable from other government benefits.¹⁴⁴ The Texas statute challenged in *Plyler* attempted to carve out from the protections of the Fourteenth Amendment a separate category of undocumented children.¹⁴⁵ Similarly, school districts may not carve out the category of children on B visas in order to deny them the equal protection of the laws. Second, students on B visas violate federal immigration laws by enrolling in school,¹⁴⁶ yet like the undocumented children in *Plyler*, they do so through no fault of their own. Their parents brought them to the United States on a B visa, and their parents are the ones who then try to enroll them in school. As the Court stated in *Plyler*, undocumented children attempting to access a public school education should not be punished for the mistakes of their parents.¹⁴⁷ Similarly, children on B visas should not be denied the right of equal access to an education based on the wrongdoing of their parents.

Third, school districts cannot deny enrollment to B visa holders without also chilling the ability of all immigrant children, including undocumented children, to enroll in school. In order to enforce a prohibition against B visa holders, school districts have asked all prospective non-citizen students for their immigration status information during the registration process.¹⁴⁸ Such questions deter immigrant families from enrolling for fear of revealing their immigration status and for fear that their information will be shared with federal immigration authorities. Given the current hostile climate towards immigrants in the United States,¹⁴⁹ such fears seem well-founded. Therefore, school districts should not ask immigration status related questions during the student enrollment process.

Fourth, since children on B visas violate the conditions of their visas when they enroll in school, they therefore are in violation of federal immigration laws and fall out of status.¹⁵⁰ Thus, even a narrower reading of *Plyler* would lead one to conclude that children

¹⁴⁴ *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

¹⁴⁵ *Id.* at 205.

¹⁴⁶ See 8 U.S.C. § 1101(a)(15)(B).

¹⁴⁷ *Plyler*, 457 U.S. at 219-20.

¹⁴⁸ See, e.g., Lieberman & Ofer, *supra* note 111 (referencing the policy of the Sweet Home Central District to ask non-citizen children for their visas); Mastony & Rado, *supra* note 131 (reporting on an Illinois school district's policy of checking the visa status of its prospective students).

¹⁴⁹ See Section II *supra*.

¹⁵⁰ See 8 U.S.C. § 1101(a)(15)(B) (2006).

who violate their B visa status should be afforded the protections of *Phyller* and provided access to a public school education.

Finally, it is simply impractical for schools to deny enrollment to B visa holders, and it exposes them to significant financial liability.¹⁵¹ First, a child on a B visa easily can overstay his or her visa, the duration of which may be six months to one year¹⁵² but which is generally issued for six months. A school district is simply postponing the inevitable by making a child have to wait for months without schooling before they enroll. Yet what do school districts receive in return? They receive exposure to financial liability and harm to their reputation, as illustrated in the example from Illinois.

Instead of relying on immigration status information to make determinations regarding residency, school districts should adhere to one residency test for all students, including B visa holders. Children on B visas should have to prove their age, and physical residence in a school district, and intent to reside in that school district. If a child on a B visa intends to stay in a particular school district for only a few weeks, then that child should be denied admission. If the child intends to stay in the school district for the duration of the semester, however, then his or her immigration status is irrelevant to the determination of their eligibility to enroll.

Most states simply have ignored the uncertainties surrounding B visa holders and *Phyller* implementation and have left school districts on their own to figure out their enrollment practices.¹⁵³ Yet numerous states have decided to follow the same practices as New York, Illinois, New Jersey and Pennsylvania and have made it clear that schools should not inquire about children's immigration status when registering them for school.¹⁵⁴ Moreover,

¹⁵¹ See, e.g., Mastony & Rado, *supra* note 131 ; Trotter, *supra* note 131 .

¹⁵² 8 C.F.R. § 214.2(b)(1) (2011).

¹⁵³ See, e.g., Mary Dempsey & Art Cusano, *Report: Croton-Harmon, Somers Discouraging Immigrant Enrollment*, N. COUNTY NEWS (July 23, 2010) ("Croton-Harmon School Superintendent Dr. Edward R. Fuhrman Jr. also said there had never been any guidance from the state in the past on student applications but was told the state would be setting guidelines in wake of the NYCLU report.") [North County News is no longer operational, as March 2012].

¹⁵⁴ See, e.g., 22 P.A. CODE § 11.11 (2004); N.J. ADMIN. CODE § 6A:22-3.3(b) (2006) (prohibiting a school district from requesting immigration documents or conditioning enrollment on immigration status, with an exception for F-1 visas); Opinion by Virginia Att'y Gen. to State Sen. William

several states have even directly addressed the question of nonimmigrant B visas holders and their eligibility to enroll in school.

The 2010 guidance issued by the New York State Education Department referenced a past decision by the New York State Commissioner of Education, which stated that holding a nonimmigrant visa must not create an irrebuttable presumption that the holder of the visa cannot be a resident of the school district.¹⁵⁵ The guidance concluded that “the child’s status should be determined in accordance with the traditional two-part test for residency.”¹⁵⁶ The traditional test is for a child to prove physical presence within the school district and intent to reside in the district.¹⁵⁷ Both can be proven by children who have nonimmigrant or undocumented status.

In Georgia, the Administrative Code states “LEAs shall accept non-immigrant, foreign students on B-1/B-2 visas and are not responsible for ascertaining whether or not seeking enrollment in school will violate the terms of the visa.”¹⁵⁸ A fact sheet from the Georgia State Education Department informs school districts that they must avoid “[a]sking about immigration status,” and “[q]uestions that might expose the status of parents or students.”¹⁵⁹

In 1999, the Virginia Attorney General issued an opinion addressing similar questions. Virginia State Senator William C. Mims requested the Attorney General’s opinion regarding whether a local school district may inquire into the visa status of a prospective student, and whether children under certain visas, such as B visas, are unable to meet Virginia’s residency requirement for a free public

C. Mims, Apr. 14, 1999, http://www.oag.state.va.us/Opinions%20and%20Legal%20Resources/Opinions/1999opns/index.htm#April_1999 (concluding that “[l]ocal school board is not permitted to inquire into, or require documentation to verify, student applicant’s citizenship or visa status for purpose of ascertaining whether student is bona fide resident qualified to attend free public school in school district”) (last visited Mar. 31, 2011).

¹⁵⁵ Memorandum from John B. King, *supra* note 122, at 1 (citing Appeal of Racquel Plata, 40 Ed. Dept. Rep. 552, Decision No. 14,555 (holding that B visa holders can enroll in school)).

¹⁵⁶ *Id.* at 1.

¹⁵⁷ *Id.*

¹⁵⁸ GA. COMP. R. & REGS. 160-5-1-.28(2)(b) (2012).

¹⁵⁹ Ga. Dep’t of Educ., Fact Sheet: Undocumented Students, <http://public.doe.k12.ga.us/DMGetDocument.aspx/Plyer%20v%20Doe%20Fact%20Sheet.pdf?p=6CC6799F8C1371F64416C5DE5B15E554A467344ACF7436490737A1BF9E13E954&Type=D>.

school education.¹⁶⁰ The Attorney General responded that a “[l]ocal school board is not permitted to inquire into, or require documentation to verify, student applicant’s citizenship or visa status for purpose of ascertaining whether student is bona fide resident qualified to attend free public school in school district.”¹⁶¹ The Attorney General concluded that school districts are prohibited from inquiring about a student’s B or other visa status.¹⁶²

Similarly, the Texas Education Agency, in its “Frequently Asked Questions” section, also has recognized that school districts cannot deny enrollment based on a student’s visa status. The section explains:

19. Can a foreign student attend school in Texas when he enters the country with a tourist visa?

A foreign student cannot attend Texas public schools on a full-time basis with a tourist visa as this would be in violation of his/her visa status. However, the school district cannot deny the student enrollment on the basis of his/her visa status. The student only has to demonstrate eligibility to enroll under a provision of TEC §25.001 [traditional eligibility test].¹⁶³

The previously mentioned laws and guidance from state authorities recognize the inherent conflict in federal law regarding the eligibility of students on temporary status to register for school. Yet these state laws also recognize that *Plyler’s* underlying intent is to protect innocent children from being denied an education, and therefore, a child’s B visa status should not be a factor when deciding that child’s eligibility to enroll in school.

C. Student Tracking Proposals

The latest attempts being pushed forward by state lawmakers looking to restrict immigrant access to a public school education involve requiring that school districts track undocumented children who attend school and report information on undocumented students to state officials, who are then mandated

¹⁶⁰ Opinion by Virginia Attorney General to State Sen. William C. Mims, *supra* note 154.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ TEXAS EDUCATION AGENCY, *Foreign Exchange Students—Frequently Asked Questions Question 19*, <http://www.tea.state.tx.us/index2.aspx?id=5771#19%29> (last visited Jan. 22, 2011).

to determine the fiscal impact of providing an education to undocumented children. While these proposals do not overturn *Plyler* directly, at least some advocates have made it clear that they see these laws as a first step in a larger strategy to overturn the *Plyler* decision, including by building the evidentiary basis to allow for opponents to argue that providing an education to undocumented immigrants has a substantial fiscal impact on school districts.¹⁶⁴

In 2010, lawmakers in the Arizona State Legislature introduced a bill in the House and Senate that would mandate that the state's 1,500 school districts collect and report data on "aliens who cannot prove lawful residence in the United States."¹⁶⁵ The legislation also would require that the Arizona Department of Education report on the costs associated with educating undocumented children, including the number and cost of teachers employed and general operating expenses associated with educating undocumented children.¹⁶⁶

In Maryland, lawmakers also have introduced legislation to mandate that counties count the number of undocumented children in public schools.¹⁶⁷ The legislation would require that public schools count the number of enrolled students who did not present documentation proving their lawful status in the United States.¹⁶⁸ State Senator David R. Brinkley (R-Dist. 4) introduced the bill "to send the federal government a message" that it should pay the cost of educating undocumented children.¹⁶⁹ The Maryland legislation is supported by an organization called Help Save Maryland, which contends that the count is needed because the residents of Maryland are forced to pay for the education of undocumented children.¹⁷⁰

¹⁶⁴ Campbell Robertson, *Critics See 'Chilling Effect' in Alabama Immigration Law*, N.Y. TIMES, Oct. 27, 2011, available at <http://www.nytimes.com/2011/10/28/us/alabama-immigration-laws-critics-question-target.html>.

¹⁶⁵ SB 1097, 49th Leg., 2d. Reg. Sess. (Ariz. 2010).

¹⁶⁶ HB 2382, 49th Leg., 2d. Reg. Sess. (Ariz. 2010).

¹⁶⁷ Sherry Greenfield, *Brinkley Wants Count of Illegal Immigrants in Schools, Bill Would Broaden Legislation That Would Apply Only to Frederick County*, GAZETTE.NET, Jan. 27, 2011, http://www.gazette.net/stories/01242011/frednew162103_32554.php.

¹⁶⁸ *Md. Bill Would Force Undocumented Student Count*, ASSOCIATED PRESS, Jan. 24, 2011.

¹⁶⁹ *Id.*

¹⁷⁰ Sherry Greenfield, *Proposal to Count Illegal Immigrants Criticized, Casa of Maryland, Help Save Maryland Take Opposite Stands on Brinkley's Measure*, FREDERICK GAZETTE, Feb. 3, 2011, http://www.gazette.net/stories/02032011/frednew165951_32541.php.

In 2008, the Frederick County Board of Commissioners in Maryland requested a ruling from the Maryland State Board of Education on “whether a local school system has the legal authority to collect data that would tend to support whether a student is lawfully present in the United States.”¹⁷¹ This occurred at the same time that the Commissioners proposed counting the number of undocumented children in Frederick County’s public schools.¹⁷² The State Attorney General’s office concluded that such an attempt would be unconstitutional absent a valid purpose.¹⁷³ In March 2009, the State Board of Education adopted the same standard and found 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 *Phylar v. Doe*.”¹⁷⁴ The Board of Education ruled that the county must not collect information about a student’s immigration status.¹⁷⁵

In Texas, state lawmakers have introduced similar legislation to require that public schools count all undocumented students that they enroll.¹⁷⁶ The bill does so by requiring that school districts collect information on each student to determine whether they are lawfully present in the United States.¹⁷⁷ According to the primary sponsor of the legislation, State Rep. Debbie Ridder (R-Tomball), the purpose of the bill is to determine how much money Texas spends on educating undocumented children.¹⁷⁸ As one parent noted in response to the Texas legislation, however, “if this bill passes, a lot of parents are going to perceive schools as immigration enforcement agencies.”¹⁷⁹

¹⁷¹ Bd. Frederick Cnty. Comm’rs v. Frederick Cnty. Bd. Educ., before the Md. State Board, Opinion No. 09-11, at 1, Mar. 24, 2009, *available at* <http://www.mnsmd.org/files/state-board-opinions/Frederick%20County%2009-11.pdf>.

¹⁷² *Id.* at 1.

¹⁷³ *Id.* at 6.

¹⁷⁴ *Id.* See also Megan Miller, *Help Stop Underage Drinking State School Board Bars Frederick Illegal Immigration Checks*, S. MD. ONLINE, Mar. 24, 2009, <http://smd.com/news/headlines/2009/9692.shtml>; Sherry Greenfield, *New County Commissioners Will Tackle Immigration Issue*, GAZETTE.NET, Oct. 21, 2010, http://www.gazette.net/stories/10212010/frednew162104_32540.php.

¹⁷⁵ Miller, *supra* note 174.

¹⁷⁶ Ahsika Sanders, *Students Tackle Anti-Immigrant Bills*, THE DAILY TEXAN, Jan. 25, 2011, <http://www.dailytexanonline.com/news/2011/01/25/students-tackle-anti-immigrant-bills> (second of a three-part series).

¹⁷⁷ H.B. 22, 82nd Leg. (Tex. 2011).

¹⁷⁸ Sanders, *supra* note 176.

¹⁷⁹ *Id.*

At the time of the writing of this Article, the most aggressive tracking proposal to become law comes from the State of Alabama. On June 2, 2011, the Alabama State Legislature approved “The Beason-Hammon Alabama Taxpayer and Citizen Protection Act,” commonly known as “H.B. 56.”¹⁸⁰ The law contains provisions similar to those passed by Arizona,¹⁸¹ including those requiring that police officers make a reasonable attempt to determine the immigration status of a person stopped, detained, or arrested if there is reasonable suspicion that the person is in violation of federal immigration law;¹⁸² imposing state criminal penalties for non-citizens who fail to carry their immigration documents;¹⁸³ and banning undocumented immigrants from applying for, soliciting, or performing work.¹⁸⁴

Section 28 of the Alabama law includes an aggressive tracking proposal that mandates that every public elementary and secondary school in the state determine if a child seeking to enroll in school was born outside of the United States or is the child of an undocumented parent.¹⁸⁵ Children who cannot produce a birth certificate proving that they were born in the United States, or who are children of undocumented parents, have to notify the school, either through official documentation or attestation by the parent, of their immigration status.¹⁸⁶ If the parent does not provide such documentation or declaration within 30 days of enrollment then the school must presume that the child is undocumented.¹⁸⁷ The law also mandates that the Alabama State Board of Education compile data on the number of children who do not prove their immigration status and “analyze and identify the effects upon the standard or quality of education provided to students who are citizens” as a consequence of enrolling undocumented children.¹⁸⁸ Both the federal government and several private parties have challenged the Alabama law, and a federal district court granted a preliminary

¹⁸⁰ Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Acts. 535 [hereinafter H.B. 56].

¹⁸¹ Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 ARIZ. LEGIS. SERV. 369 (West) (2010). As of the writing of this Article, the United States Supreme Court was scheduled to rule on the constitutionality of several of the bill’s provisions.

¹⁸² H.B. 56 § 12.

¹⁸³ *Id.* § 10.

¹⁸⁴ *Id.* § 11.

¹⁸⁵ *Id.* § 28.

¹⁸⁶ *Id.* § 28(a)(3)-(a)(4).

¹⁸⁷ *Id.* § 28(a)(3), (a)(5).

¹⁸⁸ H.B. 56 § 28(b)-(d).

injunction on some of the provisions contained in H.B. 56, but not section 28.¹⁸⁹ The federal government and the private parties then moved to enjoin pending appeal the sections not enjoined by the district court,¹⁹⁰ and the United States Court of Appeals for the Eleventh Circuit granted in part the motions, including the motion to enjoin Section 28 based on preemption grounds.¹⁹¹ As of the publication of this Article, the fate of the law remained unclear.

Even though the aforementioned proposals and laws would not overturn *Plyler* directly, they would deter families from enrolling their children in school for fear that their immigration information would be shared with federal authorities. Undocumented parents or children will avoid registering for public school for fear of arrest and deportation. Even U.S. citizen children will be deterred from enrolling in school based on fear that their parents will face deportation. Indeed, the collection of data about the immigration status of parents reveals the true intent behind this law—it is not necessarily to assess the impact of educating undocumented children, but to prevent mix-status families from enrolling their children in public schools.

The *Plyler* decision prohibits actions by school districts that would chill or discourage families from registering their undocumented children for school. School policies or practices that have the effect of preventing undocumented children from having equal access to an education violate the Fourteenth Amendment.

IV. CONCLUSION AND RECOMMENDATIONS

School districts continue to be confused about their obligations under *Plyler v. Doe*. On the one hand, they are not immune to the national discourse regarding the nation's broken immigration system and thus face tremendous pressures to crack down on individuals who break federal immigration laws. On the other hand, the Supreme Court has ruled that states must not deny the equal protection of the laws to a subclass of children based

¹⁸⁹ United States v. Alabama, 443 F. App'x 411, 414 (11th Cir. 2011). The federal government argued that the challenged provisions in the Alabama law were preempted under the Supremacy Clause, while the private parties added Fourth Amendment and Fourteenth Amendment Equal Protection Clause arguments to their challenge to several of the provisions. *Id.* at 414 n5.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 420. The court did not rule on the equal protection challenge by the private parties on mootness grounds.

solely on their immigration status, and that undocumented children have the right of equal access to a public school education.

On May 6, 2011, the United States Department of Justice (“DOJ”) and Department of Education (“DOE”) issued a guidance to all school districts to clarify their obligations under *Plyler* and federal anti-discrimination laws.¹⁹² The guidance came in response to concerns raised by civil liberties and civil rights advocates in New York and other states about school districts adopting enrollment practices that chill or discourage immigrant children from registering for school.¹⁹³

The guidance reminded school districts of their obligations to “provide all children with equal access to public education at the elementary and secondary level.”¹⁹⁴ The letter warned against “student enrollment practices that may chill or discourage” immigrant student registration, and reminded school districts that “the undocumented or non-citizen status of a student (or his or her parent or guardian) is irrelevant to that student’s entitlement to an elementary and secondary public education.”¹⁹⁵ The guidance included a prohibition on school districts from “inquir[ing] into the immigration or citizenship status of a student or parent as a means of establishing the student’s residency in the district.”¹⁹⁶

The DOJ and DOE’s letter to school districts represented the first time in thirty years that the federal government has provided guidance to school districts about their obligations under *Plyler* to provide immigrant children with equal access to an education.¹⁹⁷ The Justice and Education Departments must be commended for issuing this guidance.

¹⁹² Russlyn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t Educ., Charles P. Rose, General Counsel, U.S. Dep’t Educ., and Thomas E. Perez, Assistant Attorney General, Civil Rights Div., U.S. Dep’t Justice, *Dear Colleague Letter on the Rights of All Children to Enroll in Public Schools*, May 6, 2011, <http://www.justice.gov/crt/about/edu/documents/plyler.php>.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ U.S. Dep’t Justice and U.S. Dep’t Educ., *Questions and Answers for School Districts and Parents*, May 6, 2011, available at <http://www.justice.gov/crt/about/edu/documents/plyler.php>

¹⁹⁷ Kirk Semple, *U.S. Warns Schools Against Checking Immigration Status*, N.Y. TIMES, May 7, 2011, at A14 (“Xochitl Hinojosa, a Justice Department spokeswoman, said it was the first time her agency had issued guidance to school districts on the 1982 [*Plyler*] decision.”).

However, while it is too early to fully understand the impact of this action, the federal government's guidance did miss an opportunity to address more directly some additional obstacles that immigrant children face when attempting to enroll in school. Moreover, the guidance will only be as effective as the monitoring of school district policies and practices. Therefore, the federal government should take the following additional steps.

First, the DOJ and DOE must instruct school districts to refrain from denying prospective students a free public school education because of a child's B visa status. While the guidance does take a broad reading of school districts' obligations under federal law and states that a child's immigration status is irrelevant to establishing residency in a particular school district—and therefore a child's B visa status is also irrelevant—it fails to explicitly bar school districts from refusing enrollment of students on B visas.

The DOJ and DOE should have included such an explicit prohibition for the following reasons: (a) the reasoning behind *Plyler* applies to children on B visas. *Plyler* concluded that states must not deny the equal protection of the laws to a subclass of children based solely on their immigration status.¹⁹⁸ The Court rejected Texas's attempt to carve out the category of undocumented children from the protections of the Fourteenth Amendment.¹⁹⁹ Similarly, school districts must not deny the category of B visa holders the equal protections of the laws; (b) the Court reasoned that children should not be punished for the mistakes of their parents.²⁰⁰ Like the undocumented children in *Plyler*, children on B visas violate the terms of their status through no fault of their own. Therefore, children on B visas should not be denied the right to equal access to an education based on the wrongdoing of their parents; (c) school districts cannot deny enrollment to B visa holders without also chilling the ability of all immigrant children, including undocumented children, to enroll in school; and (d) school districts are under no obligation to enforce federal immigration laws, including prohibitions on B visa holders to enroll in school. On the contrary, doing so is not only discriminatory, but impractical and expensive. Instead of relying on immigration status information to make determinations regarding residency, school districts should adhere to one residency test for all students, including B visa holders.

¹⁹⁸ *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

¹⁹⁹ *Id.* at 205.

²⁰⁰ *Id.* at 219-20.

Second, the DOJ and DOE must create brighter lines between what information may be asked prior to enrollment and what information may be asked post-enrollment. For example, the guidance states that schools may request a prospective student's Social Security number at enrollment.²⁰¹ Since undocumented children are ineligible for a Social Security number, the guidance also states, rightfully so, that school districts must not deny enrollment to students who do not provide a Social Security number.²⁰² Yet the mere act of requesting a Social Security number during the enrollment process creates a chilling effect on the right of immigrant children to enroll in school. This effect could have been avoided easily. The federal guidance should have stated that school districts that wish to request a child's Social Security number should do so after enrollment.²⁰³ The same holds true for school districts that are under obligation to report personal data, including about immigrant students, that includes sensitive information about students' demographic information and language abilities.²⁰⁴ While the reporting of such data is important, the information collected for reporting purposes should be done after the student is already enrolled in school in order to avoid any inadvertent chilling effect.²⁰⁵

Third, the DOJ and DOE should issue model enrollment forms for schools to adapt to their own needs. Such forms should not be made mandatory on school districts, but should be provided as guidance on how to ensure that schools receive the information they need to determine eligibility to enroll in school, while avoiding constitutional and statutory violations. Schools then could adapt such model forms to local and state uses easily.

²⁰¹ Ali, Rose, & Perez, *supra* note 192.

²⁰² *Id.*

²⁰³ Availability of a Social Security number should serve no purpose for determining eligibility for enrollment, and is likely asked for in order to create an identification number for a student.

²⁰⁴ For example, in order to receive funding for language instruction for limited English proficient and immigrant students under Title III of the Elementary and Secondary Education Act, as amended by the No Child Left Behind Act, states and school districts must collect and report on immigrant children served. *See* 20 U.S.C. § 6961 *et seq.*; *see also* No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425.

²⁰⁵ The questions and answers document that accompanied the dear colleague letter recognized that asking for certain types of information prior to enrollment may have a chilling effect, but it stopped short of recommending that districts wait until after enrollment to ask for such information. *Supra* note 196.

Finally, for the guidance to be effective, the DOJ and DOE must aggressively monitor school districts' enrollment policies and practices and hold accountable those districts that erect barriers for immigrant students attempting to enroll in school. In addition, the federal government should conduct a nationwide study of local registration practices to ensure compliance with *Plyler* and other civil rights and civil liberties protections. Regular audits of school districts must also be performed to determine compliance with federal law. The burden should not be on immigrant families and advocates to monitor school districts' compliance with constitutional and statutory protections.