



LEGAL ISSUES FOR SCHOOL DISTRICTS RELATED TO THE EDUCATION OF UNDOCUMENTED CHILDREN



“Public schools should provide equitable access and ensure that all students have the knowledge and skills to succeed as contributing members of a rapidly changing, global society, regardless of factors such as race, gender, sexual orientation, ethnic background, English proficiency, **immigration status**, socioeconomic status, or disability.”

Article IV, Section 1.2
Beliefs & Policies of the National School Boards Association

[The National Education Association] opposes any immigration policy that denies human and/or civil rights or educational opportunities to immigrants and their children regardless of their immigration status.

National Education Association Resolution I-21. Immigration



LEGAL ISSUES FOR SCHOOL DISTRICTS RELATED TO THE EDUCATION OF UNDOCUMENTED CHILDREN

A JOINT PUBLICATION OF

The National School Boards Association (NSBA) and
The National Education Association (NEA)

John W. Borkowski
Partner
Hogan & Hartson, LLC
Author

Lisa E. Soronen
Senior Staff Attorney
National School Boards Association
Editor

This publication does not offer legal advice. When faced with a question regarding the legal rights of undocumented or foreign students in school, school districts should seek the advice of their school attorney.

ISBN 978-088364-311-2

Copyright © 2009 National School Boards Association. All rights reserved.

Participating Organizations

American Association of School Administrators

American Federation of Teachers

Association of Teacher Educators

Council of Chief State School Officers

Council of Great City Schools

Education Law Association

National Assembly on School-Based Health Care

National Association of Elementary School Principals

National Association of School Nurses

National Association of School Psychologists

National Association of Secondary School Principals

National Association of State Boards of Education

National Association of State Directors of Special Education

National Association for Bilingual Education

National Parent Teacher Association

School Social Work Association of America

FOREWORD

The idea to publish a guide on the legal issues surrounding undocumented students in public schools had its genesis with a request for resources from one of the National School Board Association's (NSBA) state school boards associations. The idea gained momentum as school attorneys increasingly began to inquire about the topic, leading the NSBA Council of School Attorneys' Board of Directors to enthusiastically support creating this guide. The project ultimately came to fruition when the National Education Association (NEA) generously agreed to provide funding for every public school district in the country to receive a hard copy of this joint work. We are pleased that a number of national education associations have also signed on to the publication.

Ironically, the lack of statutes, case law, and other legal authority discussing the legal rights of undocumented students in public schools emphasizes the need for writing this publication, and the difficulty in doing so. The 1982 U.S. Supreme Court case *Plyer v. Doe*, which held that undocumented students have a constitutional right to attend public elementary and secondary school for free, is the sole federal case contemplating the rights of undocumented students in school, save a 1995 federal district court case from California, *League of Latin American Citizens v. Wilson*. Likewise, a legal publication on the rights of undocumented students could not be complete without discussing the legal rights of B-2 visa bearers to attend school. The rights of these two groups of students are intertwined, though B-2 visa bearers are actually prohibited from attending school in the United States as a condition of their visas.

The reader may well conclude that this guide favors providing undocumented students an education in a very broad sense despite scant legal precedent. The conclusion would not be unwarranted. However, the perspective of this document is based on careful consideration of the U.S. Supreme Court's sole legal opinion in this area. First, *Plyer* itself, in both reasoning and result, supports the responses to questions posed in this guide, even where *Plyer* does not directly answer the question. Regardless of whether *Plyer* would be decided the same today, it is still good law, and may well be the only relevant precedent a court could apply to decide an unresolved legal issue related to undocumented students. Second, in today's world of blogs, electronic social networking, and Internet media, it is a safe bet that most legal issues regarding undocumented students will be tried in the court of public opinion long before they reach a court of law. An expansive reading of *Plyer* could avoid not only protracted and costly litigation, but also public relations fracas that distract from the educational mission of the school district. Finally, shaping the perspective of this document—beyond the letter and spirit of *Plyer*—is the enduring belief of both NSBA and NEA that all children in the United States should be educated regardless of immigration status.

This publication could not have been possible without the contributions of three key individuals: Council board member John W. Borkowski who did the research and writing for this publication; NSBA Senior Staff Attorney Lisa E. Soronen who marshaled resources (both practical and ethereal) and did expert editing; and NEA Assistant General Counsel Michael Simpson who brought to bear the financial resources of NEA. We owe each a debt of gratitude.

On behalf of NSBA, NEA, and our 16 participating national educational organizations, we hope you will find this guide useful as you navigate the uncharted waters of this timely topic.

Francisco M. Negrón, Jr.,
NSBA General Counsel and Associate Executive Director
August 2009





Legal Issues for School Districts Related to the Education of Undocumented Children

INTRODUCTION

A glance at a few newspaper headlines reveals that the issue of undocumented persons living in the United States is controversial. Schools districts are affected directly by this issue because undocumented children attend public elementary and secondary schools. In fact, the U.S. Supreme Court held in *Plyler v. Doe* that undocumented children have a constitutional right to receive a free public K-12 education.

This booklet discusses 13 legal questions commonly asked by school board members and school administrators related to undocumented students. Unfortunately, few of the questions have definitive answers. *Plyler* directly addressed only the narrow question of whether undocumented children are entitled to receive a free public school education. *Plyler* is the sole U.S. Supreme Court case dealing with the rights of undocumented children in public schools. Moreover, lower court cases and state laws rarely address the questions raised in this booklet.

Due to the limited legal precedent in this area, it is difficult to predict with certainty how courts would decide a case raising any of the questions discussed in this booklet. However, this booklet provides tentative answers that are designed to help school districts minimize their legal risks in light of current law. It assumes that both courts and potential litigants would accept *Plyler* as the principle precedent in this area and would read it to include its logical implication that school districts should not deter undocumented children from exercising their right to a public education. It assumes this for two main reasons: First, the *Plyler* decision itself is broadly protective of the rights of undocumented children to receive a K-12 education. Second, in most instances, making decisions based on an expansive rather than a restrictive interpretation of *Plyler* would less likely result in legal challenges.

Plyler v. Doe is generally the starting place for addressing any legal question that directly or indirectly concerns the rights of undocumented students in public schools. The first question discusses the U.S. Supreme Court's rationale in *Plyler* and suggests an approach that lower courts likely would use to apply *Plyler* to different factual situations involving the rights of undocumented students in public schools. *However, given that little statutory or case law addresses these issues and existing state laws and court cases vary, when dealing with legal questions related to undocumented or foreign students in schools, school districts are well advised to seek legal advice from their school attorney.*

RIGHTS OF UNDOCUMENTED STUDENTS TO RECEIVE AN EDUCATION

I. Are public elementary and secondary schools required to educate undocumented children?



Yes. The U.S. Supreme Court held that undocumented children have a constitutional right to receive a free public K-12 education.

In 1982, the Supreme Court held in *Plyler v. Doe*¹ that Texas violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution by denying undocumented school-age children a free public education. Reasoning that such children are in this country through no fault of their own, the Court concluded that they are entitled to the same K-12 education that the state provides to children who are citizens or legal residents.

The Court in *Plyler* noted that education is a child's only path to becoming a "self-reliant and self-sufficient participant in society." A public school education, the Court reasoned, "inculcat[es] fundamental values necessary to the maintenance of a democratic political system" and "provides the basic tools by which individuals might lead economically productive lives." According to the Court, denying children access to a public school education could doom them to live within "a permanent caste of undocumented resident aliens."

The Court in *Plyler* concluded that for the state to deny undocumented children access to a free public education, the state must demonstrate that doing so serves a "substantial goal." The Court rejected the following goals the state offered: (1) protecting the state from an influx of illegal immigrants; (2) relieving the state of the added, unique costs of educating undocumented children, thus retaining resources for legal resident children; and (3) the claim that undocumented children are "less likely than other children . . . to put their education to productive social or political use within the State."

In summary, undocumented children's right of access to public education is grounded in *Plyler*. When applying *Plyler* to unanswered questions about the rights of undocumented students in school, lower courts will likely address two factors: (1) how central the activity in question is to the child's education; and (2) whether the state can demonstrate that any substantial goal is

served by denying the child the experience or access. Several organizations also interpret *Plyler* to require that the state's actions do not “chill” or hinder undocumented children's right of access to an education.²

2. Does an undocumented child's right to an education include secondary benefits of public education like participating in extracurricular activities?

Probably. While the Supreme Court in *Plyler* did not discuss whether undocumented children have a right to participate in extracurricular activities, and no reported lower court cases address this issue, courts would likely extend the *Plyler* rule to cover extracurricular activities.

As discussed in the first question, a court faced with this question must determine whether the denial of access to a particular activity: (1) impedes the education of undocumented students; and (2) accomplishes a substantial state goal.

The description of public education discussed in *Plyler* is quite broad, suggesting that most, if not all, extracurricular activities would be covered under *Plyler*. While academic clubs, such as science and math clubs, which clearly deliver educational content, would almost certainly fall under *Plyler*, non-academic clubs likely would be included in *Plyler*, as well. The team building and social skills honed in athletic and social organizations, for example, are exactly the sort of “fundamental values” that *Plyler* identifies as important.

The conclusion that *Plyler* applies to wholly extracurricular experiences, such as a school prom, may be less certain. But even here, *Plyler's* appeal to *Brown v. Board of Education's* requirement that education be “available to all on equal terms,” makes it unlikely that a court would allow a school district to deny undocumented students access to extracurricular activities like prom.

As a result, if extracurricular activities are deemed to be sufficiently educational under *Plyler*, undocumented students could be prohibited from participating in them only if the school district could demonstrate a substantial state interest is served by denying the undocumented students access. It is difficult to imagine what substantial state interest might be served by not allowing undocumented students to participate in math club or even prom.



School districts thus should be wary of denying undocumented children access to any extracurricular school activities. Unless the activity is found not to contribute at all to the educational goals of *Plyler* and denying participation would further a substantial state goal, the extracurricular activity probably would be protected under *Plyler*'s guarantee of access to education.

3. Are undocumented students permitted or required to receive services that other students receive from school districts and other local government agencies?

Probably required. If faced with the question, a court would likely conclude that services like free and reduced meals and educational assistance to manage a learning disability are protected by *Plyler* because they are central to a student's educational experience. Likewise, many of these services are available to undocumented students by statute, regulations, or guidance.

Students may receive a number of secondary services at school such as transportation to and from school, health care treatment from the school nurse or a school-based health center, and free or reduced-cost meals. Likewise, some students receive specialized educational programs to manage learning disabilities, counseling, or other psychological services. As with extracurricular activities, determining whether a school district or other local government agency is required to provide such services to undocumented students requires evaluating how central the services are to the child's educational experience and whether a substantial state interest is served by denying the benefit. It would be difficult for a school district to argue that any of the above services are not central to a student's educational experience.

This application of *Plyler*'s reasoning perhaps is complicated by a federal statute, 8 U.S.C. § 1611(a), which states that an undocumented alien "is not eligible for any Federal public benefit."³ The statute, however, then defines "Federal public benefit" as "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, [or] unemployment benefit."⁴ Although 8 U.S.C. § 1611 has been interpreted in other contexts as completely denying benefits to undocumented immigrants,⁵ it has not yet been applied to public K-12 education, and its explicit reference to "postsecondary education" suggests that it likely would not be. Therefore, even if any of the above supplemental services are federally funded, 8 U.S.C. § 1611 is not likely a bar to undocumented students receiving them.

Furthermore, a number of federally funded services are made available to undocumented students in school by statute, regulations, or guidance. The U.S. Department of Agriculture, for example, has stated that eligible undocumented children have access to free and reduced price meals under the National School Lunch Program and the School Breakfast Program.⁶ Similarly, undocumented children with disabilities have a statutory right to services under the Individuals with Disabilities Education Act⁷ (IDEA) or Section 504 of the Rehabilitation Act of 1973⁸ (Section

504). For a state to be eligible for federal assistance under IDEA Part B, it must provide assurance that “a free appropriate public education is available to all children with disabilities *residing*” in the state.⁹ Likewise, under Section 504 eligibility for students depends on age.¹⁰ Finally, some state boards of education have provided guidance on this matter, establishing explicit policies requiring districts to provide supplemental services to undocumented students.¹¹

In conclusion, undocumented students are likely entitled access to any services central to receiving an education. Further, undocumented students covered by IDEA, Section 504, or similar legislation should receive the benefits guaranteed them under those statutes.

ADMITTING UNDOCUMENTED AND NON-IMMIGRANT STUDENTS TO SCHOOL

4. Can school districts ask questions about immigration status to determine if a student is a resident of the district?

Probably not. Asking students questions about their immigration status when determining residency may discourage undocumented students from enrolling in school, arguably in violation of *Plyler*.

States typically require that to attend a particular public school district tuition-free a student must be a resident of that district. Although the definition of a resident varies among states, in *Martinez v. Bynum*,¹² the U.S. Supreme Court upheld a Texas residency requirement to attend public school. School districts usually require some proof that a student is in fact a resident of the district before enrolling the student. Sometimes school districts have asked questions during the enrollment process that implicate immigration status, such as whether students can provide a social security card or whether students are undocumented.¹³

Plyler itself does not directly address the question of school district inquiries regarding student immigration status. Assuming that *Plyler* does indeed prevent district actions that “chill” or dissuade undocumented students from receiving an education, it seems fairly clear that districts questioning students about immigration status would not be permitted under *Plyler*. After all, such questioning likely would dissuade undocumented children from enrolling in school. To date, no federal court has directly ruled on the issue of whether school districts can ask students about their immigration status.

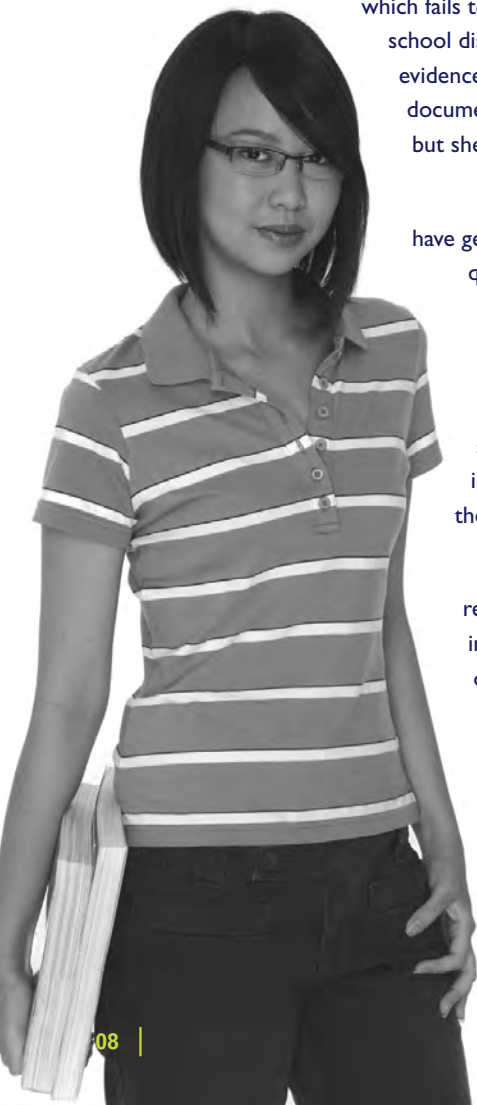


In *League of Latin American Citizens v. Wilson*,¹⁴ a federal district court invalidated section seven of California Proposition 187, which required school districts to, among other things, not admit undocumented students, verify the legal status of all students, and report undocumented students to the Immigration and Naturalization Service, now Immigration and Customs Enforcement. The court invalidated section seven in its entirety, citing *Plyler v. Doe*'s holding that states are prohibited from excluding undocumented children from public schools. Whether this ruling stands for the proposition that a school district could not question its students about their immigration status or whether it only stands for the proposition that questioning followed by denial of access violates *Plyler* is not entirely clear. Thus, although this ruling suggests that merely investigating a student's immigration status could be a violation of *Plyler*, it does not settle the question. What is clear from both *Plyler* and *Wilson*, though, is that any information about a student's undocumented status cannot be used to deny enrollment to that student.

As a practical matter, it makes little sense to gather information about immigration status which fails to indicate residency in the district. Some states direct school districts to accept in-district utility bills and/or leases as evidence that the student resides in the district, rather than documents like social security cards that indicate immigration status but shed no light on residency.¹⁵

State laws and guidance from state education agencies have generally endorsed the view that schools should not ask questions related to immigration status. For instance, the Iowa Department of Education states, "Schools may not question immigrant students as to their 'legal' status and may not demand their 'documentation.'"¹⁶ Likewise, a 2009 Maryland State Board of Education opinion "prohibits a local school system's record card from including a request for information that would tend to support the proposition that the student is lawfully present within the United States."¹⁷

In states where school districts are permitted or required to ask students for information which may indicate immigration status during the enrollment process or otherwise, school districts should make clear to parents the reason why the district is requesting the information, that the district is not interested in knowing a student's immigration status, and that the district will not discriminate against students in any way based on immigration status.¹⁸



In sum, school districts should avoid asking questions about students' immigration status when enrolling students or in any other circumstances.

5. Does a school district have to educate an undocumented student who is not living with a parent or legal guardian?

Probably. School districts should be cautious about denying enrollment to undocumented children living in the district who are unable to establish that their parents/guardians are residents of the school district if they otherwise meet residency requirements. Denying enrollment may violate *Plyler* and may be prohibited by the McKinney-Vento Act if the undocumented students are homeless.

In some states, students must live with their parents/guardians in order to qualify as residents of the district. One purpose of this requirement is to ensure that students do not move to a particular district solely to obtain an education. However, some undocumented children do not live with their parents and may not be able to establish an alternative legal guardian.

Many states that require students to live with parents/guardians for residency purposes include an alternative for students not living with parents/guardians. For example, in Pennsylvania, when “a resident of any school district keeps in his home a child of school age, not his own, supporting the child gratis as if it were his own, such child shall be entitled to all free school privileges[.]” so long as the child has not moved to the district solely to attend school.¹⁹ Similarly, in New Jersey, a student can live with a non-guardian if his or her guardian files “a sworn statement that he or she is not capable of supporting or providing care for the student due to family or economic hardship and that the student is not residing with the other person solely for the purpose of receiving a free public education.”²⁰

In *Horton v. Marshall Public Schools*,²¹ the Eighth Circuit held that excluding a minor child from school unless the child has a parent or guardian living in the district violates the child's equal protection and due process rights. Relying on *Plyler*, the court concluded the school district offered no substantial goal to justify “singling out” minor children who do not have a parent or guardian living in the district and “totally depriv[ing them] of an education.” State statutes and state and local policies that deny undocumented students access to public education unless they are living with a parent/guardian that do not establish alternatives for establishing residency could, if challenged like the policy in *Horton*, be found unconstitutional. Some courts considering challenges to a living with a parent/guardian residency rule have followed²² *Horton* and others have not.²³



Finally, in certain circumstances, the McKinney-Vento Act, which provides for the education of homeless children, might apply to undocumented children living away from their parents/legal guardians.²⁴ McKinney-Vento requires that school districts allow homeless children to enroll in public schools, even if they are unable to prove residency or guardianship. Homeless children, according to McKinney-Vento, include “children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason.”²⁵ Thus, if students can establish that they are being cared for by a family member or friend—or are living on their own—because their parents are unable to take care of them, they are covered by McKinney-Vento. Such students are assured not only enrollment in the local school district, regardless of their parents/guardians residency or their undocumented status, but also the other protections afforded by the Act.

In conclusion, in the Eighth Circuit, states that do not have a living with a parent/guardian residency rule,²⁶ or states with exceptions to a living with a parent/guardian residency rule applicable to undocumented students, undocumented students who otherwise meet residency requirements should be admitted to school regardless of whether they live with a parent/guardian. In states with a living with a parent/guardian residency rule without exceptions applicable to undocumented students, school districts should be cautious about denying undocumented students enrollment—particularly if the residency rule has not been challenged and upheld by a court—because such a step could violate *Plyler*. Likewise, regardless of state’s living with a parent/guardian residency rule, undocumented children who are not living with parents/guardians may be “homeless” under the McKinney-Vento Act and entitled to enrollment in the district in which they are currently living.

6. Must, may, or should a school district report an undocumented student to Immigration and Customs Enforcement?

No federal law requires school districts to report undocumented students to immigration authorities and arguably school districts are prohibited from reporting them by *Plyler*.

As discussed above in question four, in *League of Latin American Citizens v. Wilson*²⁷ the district court invalidated section seven of California Proposition 187, which required school districts to, among other things, report undocumented students to the Immigration and Naturalization Service (INS), now Immigration and Customs Enforcement (ICE). The court found that because *Plyler* prohibits states from excluding undocumented children from public school, section seven in its entirety conflicted with and was preempted by federal law. Although the court found this “mandatory” reporting requirement conflicted with *Plyler*, it did not discuss the permissibility of voluntary reporting of undocumented students on a case-by-case basis.

However, any voluntary reporting of undocumented students could be considered an affront to *Plyler*’s mandate that undocumented children have access to education. If school authorities

report an undocumented student to ICE and ICE subsequently deports or removes the student from school, the school district's actions could be viewed as having denied that student access to school. In essence, reporting a student to ICE is one of the strongest steps a school district can take toward denying education to a student.

Even if reporting the student does not actually lead to a denial of access to school, reporting undocumented students would undoubtedly have a “chilling” effect on the right to access education. Practically speaking, it may drive parents of undocumented students to pull their children out of school indefinitely.²⁸ While this is a less settled interpretation of *Plyler*, it suggests that school districts should be wary of voluntarily reporting undocumented students to immigration authorities.



As discussed in more detail in question 10, reporting undocumented students to ICE could violate the Family Educational Rights and Privacy Act²⁹ if the district discloses information in the student's “education records” without consent.

In conclusion, school districts are not required to report undocumented students to ICE. Moreover, school districts should not voluntarily report undocumented students to ICE or other immigration authorities because such actions may constitute a denial of access to education under *Plyler*.

7. Can school districts ask to see visa documents if districts do not then deny enrollment to undocumented students?

Even when asking to see visa documents is permissible under state law, school districts should be cautious because doing so could “chill” undocumented student enrollment, arguably in violation of *Plyler*.

Because visa-bearing students are legal visitors to the U.S., *Plyler* does not directly apply to them. Nevertheless, the principles of *Plyler* still impact school district interactions with visa-bearing students because many advocacy groups see requests for visa information as falling under the range of actions that might “chill” undocumented children's access to education under *Plyler*.

Students can study in the U.S. under a number of visa categories including: F-1,³⁰ J-1,³¹ M-1,³² and M-3.³³ B-2 visas, issued to individuals visiting for pleasure,³⁴ do not allow their bearers to enroll in school or a course of study.³⁵ Nevertheless, children with B-2 visas have been known to enroll in school.

Controversies have arisen when school districts have asked to see student visas to identify B-2 visa bearers. In 2006, the Illinois State Board of Education voted to revoke \$3.5 million in state aid to the Elmwood Park school district after the district refused to admit two students with B visas.³⁶ The district ultimately agreed not to ask students about whether they have visas or deny them enrollment based on visa status.³⁷

State law, court cases, and state education agency policies, however, vary widely on whether school districts can ask students to see their visas. Thus, before a school district can determine the most appropriate policy, it should first identify any state laws, regulations, or state education agency policies that are applicable. Four predominant views are set forth by state laws, regulations, and administrative agency policies addressing this issue.



First, some states prevent school officials from inquiring about students' visa status entirely.³⁸ In these states, school districts should simply comply with state requirements, as doing so will meet the requirements of state law and is unlikely to run afoul of *Plyler*.

Second, some states prevent school officials from inquiring about students' visa status, but have special requirements for F-I visas. For example, a Pennsylvania statute clearly forbids schools from inquiring about student immigration status but also notes that this "does not relieve a student who has obtained an F-I visa from the student's obligation to pay tuition under Federal law."³⁹ The statute provides no guidance on whether or how a school district ought to attempt to determine if a student is meeting this obligation or not. However, F-I visas are only issued to foreign students whom school districts have certified meet the visa's requirements, including paying the district tuition.⁴⁰ So it seems that a district would not need to see a student's F-I visa to know whether tuition is owed or has been paid.⁴¹

A third set of states have no clear statute, regulations, or policy, in which case school districts should be especially cautious about asking to see visas. Illinois had no clear state requirement on visa inquiries when the Elmwood Park school district asked to see visas and refused enrollment based on visa status, for instance.

Finally, some states allow and even require school districts to question students about visa status. For example, the Iowa Department of Education states, "Non-immigrant students not only may be asked for their visas, but must be asked by school officials for their visas."⁴² However, asking about visa status could be problematic under a broad interpretation of *Plyler*, as any question regarding visa status could arguably dissuade undocumented students from enrolling in school.

School districts can become frustrated when they suspect non-immigrant B-2 visa bearers are attempting to attend school in the U.S. despite the fact that their visas prohibit attendance in public school. It does not appear that any school district has been held liable for failing to

identify a student in violation of his or her visa and admitting the student to school. In contrast, several school districts have been subjected to or threatened with legal action after they sought to identify or act upon the visa status of their students. Further, an argument can be made that visa-related questions could “chill” undocumented student enrollment, making them suspect under *Plyler*. Therefore, even when permitted by state law, school districts should be very cautious about asking to see visa documents.

8. Can school districts refuse to educate a child who volunteers that he or she has a B-2 visa?

Even when denying enrollment to B-2 visa bearers is permissible under state law, school districts should be cautious because doing so could “chill” undocumented student enrollment, arguably in violation of *Plyler*.

Students who actually have B-2 visas are, in principle, non-immigrants. Therefore, *Plyler* is even less applicable in instances in which students volunteer that they have B-2 visas than in instances in which the district is asking students whether they have visas. In other words, an argument can be made that a school district which turned away a student with a B-2 visa—assuming that the student volunteered his or her visa status—did not violate federal law. Nevertheless, an argument also can be made that denying enrollment to students with improper visas will “chill” undocumented students from attempting to enroll. In addition, a B-2 visa-bearing student who has been denied enrollment may claim *Plyler* has been violated because despite the limitations of the visa, he or she intends to stay beyond the length of the visa as undocumented and he or she otherwise meets the district’s residency requirements.

As with making inquiries about visa status, state law, court cases, and state education agency policies vary widely on whether school districts can deny enrollment to B-2 visa-bearing students. Thus, before a school district can determine the most appropriate policy for itself, it should first identify any state laws, regulations, or state agency policies that are applicable. There is little uniformity in how states approach this issue. In general, states deal with the issue of enrolling B-2 visa-bearing students directly, indirectly, or not at all.

The Texas Education Agency requires Texas school districts to enroll B-visa bearing students regardless of the fact that enrolling in school violates the student’s visa.⁴³ A California case, on the other hand, allows school districts to deny admission to B-2 visa bearers.⁴⁴ Guidance from other states like Virginia⁴⁵ and New York⁴⁶ allows B-2 visa bearers to attend school if they are residents of the district. Statutes in states like Pennsylvania do not refer specifically to B-2 visa bearers but require that school districts neither ask about nor deny admission based on immigration status.⁴⁷ Finally, some states, like Illinois before the Elmwood Park incident, have no clear policy on granting or denying enrollment to students who volunteer that they have a B-2 visa.

When required by state law, schools should admit students with B-2 visas who volunteer their visa status, as doing so will comply with state law and likely is compatible with *Plyler*. Even if state law allows or does not prohibit denial of enrollment to B-2 visa bearers, school districts should be cautious about doing so in light of *Plyler* concerns that undocumented students will be discouraged from enrollment or that B visa-bearing students will claim that they intend to overstay their visa and immigrate.

In conclusion, federal law puts the onus on students to comply with the requirements of their visas. School districts seeking to enforce visa rules by denying admission to school may open themselves up to litigation.

9. Must, may, or should a school district report to Immigration and Customs Enforcement a student who attempts to attend school in violation of his or her visa?

School districts are not required to report to ICE B-2 visa bearers who attempt to attend public school. To avoid a “chilling” claim under *Plyler*, school districts should refrain from reporting them.

As discussed in questions seven and eight, in theory *Plyler* does not apply to non-immigrant visa bearers. However, if a school district calls ICE to report a student who tries to attend school in violation of his or her visa, parents of undocumented students may become wary of continuing to send their children to school, thus “chilling” undocumented children’s access to an education.

Applicable state laws, regulations, or state agency policies should be considered before reporting a student who tries to attend school in violation of his or her B-2 visa.

In those states, like Texas,⁴⁸ where B-2 visa bearers are explicitly allowed to attend school, or in states like Pennsylvania,⁴⁹ where admission may not be denied to any child based on immigration status, it is likely a violation of state law to report a B-2 visa bearer for violating his or her visa by attempting to attend school. Reporting such a student would be tantamount to denying the student admission to school.

In states where it is unclear whether B-2 visa bearers must be enrolled, states like New York⁵⁰ where B-2 visa bearers only have to be enrolled if they meet residency requirements, and states like California where B-2 visa bearers may be denied enrollment, due to *Plyler* concerns, school districts are well-advised not to report B-2 visa bearers to ICE, even if districts turn such students away from school.

In conclusion, school districts have no obligation to report violations of B-2 visas to immigration authorities, and in some states school districts are likely prohibited from doing so by state law. Regardless, school districts should be aware that reporting B-2 visa violations may violate *Plyler*.

UNDOCUMENTED STUDENTS AND IMMIGRATION AND CUSTOMS ENFORCEMENT INVESTIGATIONS

10. Does a school district have to provide Immigration and Customs Enforcement information contained in student records about undocumented students?

The Family Educational Rights and Privacy Act (FERPA)⁵¹ generally prohibits school districts from providing third parties such as ICE information about students contained in student records.

More specifically, FERPA prohibits school districts from disclosing personally identifiable information in a student's "education records" to outside agencies without parental consent or a subpoena. A student's "education records" includes "records, files, documents and other materials which ... contain information directly related to a student" and "are maintained by an educational agency or institution."⁵² If a school has recorded and maintained information about a student being undocumented—which is not always the case—this information is part of a student's education records.

FERPA allows for the release of information from a student's record to comply with a court order or subpoena,⁵³ typically with parental notification, but not consent.⁵⁴ However, some subpoenas may prohibit the district from disclosing the existence or contents of the subpoena to parents or students.⁵⁵ To navigate these nuances, some state education agencies explicitly direct school districts to consult with their attorneys to review any subpoenas.⁵⁶

School districts may also disclose "directory" information without consent. Directory information is information "that would not generally be considered harmful or an invasion of privacy," and includes the student's place of birth.⁵⁷ Districts must tell all parents which categories of information the district has designated as directory information and allow them a reasonable amount of time to request that the district not disclose any or all directory information about their child.⁵⁸ School districts may not disclose directory information relating to students who have "opted out" of such disclosure.

Releasing information from student records in violation of FERPA can be economically and politically costly. The City of Manassas and Manassas City Public Schools recently settled a lawsuit





for \$775,000, in which it was alleged that a school employee released information from student records without consent about students' parents' employment and homeownership to city officials who were allegedly targeting Hispanic families for housing violations.⁵⁹

School districts can take several measures to prepare for potential requests for information from immigration agents. First, school districts should explicitly define what information is designated as directory information under FERPA. Particularly in states where directory data must be released under state public records laws, school districts should consider excluding place of birth from directory data to avoid having to reveal this information to ICE. Districts should also verify that parents have not opted out of releasing directory information before fulfilling any such requests. In addition, school districts should consider prohibiting employees from including immigration status in students' education records. Finally, if ICE makes a request for data from student records, school districts should insist on a subpoena before releasing any information⁶⁰ and should consult with their school attorney when faced with a subpoena requiring them to produce information in a student's records.

11. Does a school district have to allow Immigration and Customs Enforcement agents to interview students at school?

In some circumstances, a school district may have to allow ICE agents to interview students at school, but ICE's policy is to generally avoid enforcement actions on school grounds.

The Immigration and Naturalization Act (INA) explicitly allows immigration agents to question a person believed to be an alien "about his or her right to remain in the United States."⁶¹ While the INA appears to be enforceable on school grounds, in 1993 the Immigration and Naturalization Service (INS)⁶² stated its policy is "to attempt to avoid apprehension of persons and to tightly control investigative operations on the premises of schools . . ."⁶³ The policy allows only specific INS employees to approve, in writing, operations at schools.⁶⁴

It is very likely that the above policy is the result of *Murillo v. Musegades*,⁶⁵ decided in 1992. In this case Border Patrol agents "repeatedly stopped, questioned, detained, frisked, searched, and arrested without legal cause" El Paso school district students and employees based on their Hispanic appearance. According to the court, "[q]uestioning with reasonable suspicion of alienage is permissible so long as the INS agent does not restrain the individual, and the individual reasonably believes he or she is free to walk away." In this case the court noted the INS agents did not have reasonable suspicion of "either alienage or illegal alienage" to justify stopping or questioning any of the students or employees. The court issued a preliminary injunction preventing INS



from questioning individuals unless INS actually has reasonable suspicion an individual is in the U.S. illegally or is guilty of committing a crime over which INS has jurisdiction.

A 2004 settlement with somewhat similar facts illustrates possible limitations to ICE's authority to interview students on campus. In *Gonzalez ex rel. Doe v. Albuquerque Public Schools*,⁶⁶ two policemen assigned to work at the Albuquerque public schools allegedly stopped and detained two boys on campus.⁶⁷ After one of the boys failed to provide identification, the police called Border Patrol, who then seized one of the boys' brother from class.⁶⁸ Plaintiffs, relying on *Plyler*, claimed that police interrogation of students about their immigration status "interferes with the students' access to education; a student cannot be educated in a local school while he is being questioned or after he has been deported."⁶⁹ The case settled; so, the court never decided whether the questioning in this case violated *Plyler*. Nevertheless, the plaintiffs' argument highlights one way students may be able to use *Plyler* to stop school districts from allowing immigration authority interviews.

Additionally, one aspect of the settlement agreement in *Gonzalez* suggests that school districts may successfully deny immigration officials' request to interview students. Albuquerque's new policy⁷⁰ states that school personnel are to deny any request from immigration officials to enter a school to search for information or seize students. Instead, school administrators and lawyers must determine whether to grant access to immigration officials. It is notable that the *Gonzalez* settlement probably restricts ICE more than the relief in *Murillo* restricted the INS. The new policy that emerged from *Gonzalez* may allow school districts to prevent immigration-related interviews, while *Murillo* merely required that the INS have reasonable suspicion before questioning individuals about their alienage.

School district officials must walk a fine line in balancing the rights of law enforcement officers to carry out their duties with students' rights to have access to an education without substantial interference. When faced with a request by an ICE agent to interview a student, school employees should seek guidance from their superiors in the school district and from the school district's attorney.

When deciding whether to grant ICE access to interview students, school district policies and state law requirements regarding law enforcement interviewing students on campus should be reviewed. Likewise, at minimum, appropriate school district officials should ask to see the ICE agent's credentials, ask the agent why he or she wants to interview a student to make sure that reason is within the scope of ICE's authority, and ask the agent what evidence of reasonable suspicion he or she has to justify the interview. The ICE agent should also be asked to explain why he or she is not following ICE's general policy of not interviewing students in school and whether the interview has been approved in writing by the appropriate person at ICE. If a school district is ultimately unable to stop a lawful investigation, school personnel may remind the student being interviewed that he or she is free to refuse to answer the ICE agent's questions. Finally, the parents of students should also be notified, unless the ICE agent has specifically instructed the district not to do so.

12. What behaviors does Immigration and Customs Enforcement consider “harboring” in relation to school employees assisting undocumented students and parents?

During an ICE enforcement action, school employees should not assist parents in remaining in the U.S. illegally, but may offer care-giving assistance to undocumented students whose parents have been detained by ICE.

Federal law prohibits any person from intentionally concealing, harboring, or shielding an illegal alien from detection, where the alien’s illegal immigration status is known.⁷¹ It is also against federal law to conspire, aid, or abet such acts.⁷² Moreover, it is a crime to harbor an alien who entered the U.S. legally, but whose continued presence in the U.S. is now unlawful.⁷³ “Harboring” includes any conduct tending substantially to facilitate an alien’s remaining in the U.S. illegally.⁷⁴

The statute extends the prohibition against harboring to “any place,” which is intended to be broadly inclusive.⁷⁵ Thus, schools could constitute locations where persons may be found to be harboring illegal aliens. An argument could be made that schools may be technically harboring illegal aliens by taking custody of undocumented children during the school day. However, ICE has never brought an action against a school district for harboring illegal aliens and is unlikely to do so. Instead, simply taking custody of undocumented students and educating them falls within *Plyler*’s constitutional protections.

School employees should be cautious about assisting parents in remaining in the U.S. illegally, particularly during an ICE enforcement action. For example, if a school employee calls parents to warn them about an impending enforcement action at their workplace, such actions likely fall outside of *Plyler*’s protections because they go beyond simply providing an education for all students. Nevertheless, offering to undocumented students whose parents have been detained in an ICE enforcement action care-giving assistance, such as a ride to a relative’s home or place to stay until a parent is able to pick up the child, is not considered harboring.





13. What are a school district's responsibilities to assist students whose parents have been detained during an Immigration and Customs Enforcement action?⁷⁶

To avoid claims of negligent supervision, school districts should take adequate steps to ensure the safety of children whose parents are detained.

Several highly publicized ICE worksite enforcement actions provide lessons for how schools can more effectively care for students whose parents are detained in a raid.⁷⁷ But these incidents fail to clarify the legal responsibilities facing schools when such raids occur.⁷⁸

School districts may be liable for negligent supervision if they do not take adequate steps to ensure the safety of children whose parents are detained.⁷⁹ In New York, for example, courts have noted how the duty of care imposed on a school district generally “ends when it relinquishes custody,” but that duty of care “continues when the student is released into a potentially hazardous situation.”⁸⁰

When a worksite enforcement action occurs, school districts either will be contacted by ICE or will find out about it through other channels. Receiving knowledge of a raid gives a district reason to believe that some of its students' ordinary caregivers may be under detention and unable to take custody of a student.⁸¹ Knowledge that a caregiver is unavailable may create further responsibility for the district to care for students in order to avoid releasing students into a “potentially hazardous situation.”

To appropriately care for students and to prevent claims of negligent supervision, schools should take measures to ensure the safety of every child affected by an ICE enforcement action. In Grand Island, Nebraska, for example, the school district contacted all children whose parents worked at the raid site.⁸² Elementary schools received specific directives to ensure that every student be released only to relatives or a person that the child could identify. Each school principal prepared his or her teachers, social workers, and guidance counselors to work through the night to ensure students' safety. And although they were not needed, certain schools were designated as emergency shelters for children.⁸³

Schools in Chaparral, New Mexico, took creative measures to ensure their students' safety after a workplace raid on the first day of school. Because the school did not yet have emergency contact information, school staff followed buses and watched children disembark to ensure that they were not left alone.⁸⁴

Workplace raids and other ICE enforcement actions do not appear to create any new legal responsibilities for school districts. Instead, school districts likely owe an ordinary duty of care to ensure the safety of their students. However, to avoid negligent supervision claims, districts should try to make sure students have adequate supervision and care before releasing them from school custody. So long as the district takes such steps, the district and its employees should be able to avoid liability even in the event of an unforeseen accident.



ENDNOTES

1 457 U.S. 202 (1982).

2 The Mexican American Legal Defense and Education Fund (MALDEF), among other groups, has concluded that *Plyler* requires that school districts not “engage in any practices that ‘chill’ or hinder the right of access to school. . . .” See Letter from MALDEF to Dr. Sandra Ellis, Superintendent, North Chicago Community Unit Schools (Aug. 9, 2007), available at http://lawprofessors.typepad.com/immigration/files/north_chicago_school_district.pdf. Some state education agencies have also adopted this stance. The New Jersey Department of Education, for example, prohibits its school districts from “engaging in any practices that ‘chill’ or hinder the right of access to public schools.” New Jersey Department of Education, Changes to INS Regulations Create No New Obligations for Schools, http://www.state.nj.us/education/news/2002/1021imm_a.htm (last visited May 13, 2009). Likewise, the Illinois State Board of Education prohibits “any action that might have a ‘chilling’ effect on the right of access to schools” Illinois State Board of Education, Students’ Rights to Equal Education, <http://www.isbe.net/bilingual/htmls/imfaqs.html> (last visited May 13, 2009). Although the word “chill” does not appear in *Plyler*, the Court’s invocation of *Brown v. Board of Education*’s requirement of education “available to all on equal terms,” could be read to imply such a consideration. *Plyler*, 457 U.S. at 223 (citing *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)).

3 8 U.S.C. § 1611(a) (2006).

4 8 U.S.C. § 1611(c)(1)(B) (2006).

5 See, e.g., *Lewis v. Thompson*, 252 F.3d 567 (2d Cir. 2001) (holding that undocumented immigrant mothers could not receive federally-sponsored prenatal care, despite findings that such care would substantially benefit the infants’ health, provide a considerable savings over funding postnatal emergency care, and reduce the infant mortality rate in America’s inner cities).

6 U.S. DEPARTMENT OF AGRICULTURE, ELIGIBILITY MANUAL FOR SCHOOL MEALS 18 (Jan. 2008), available at <http://www.fns.usda.gov/cnd/governance/notices/iegs/EligibilityManual.pdf>.

7 20 U.S.C. § 1400 et seq. (2003).

8 29 U.S.C. § 794 (2008).

9 20 U.S.C. § 1412(a)(1)(A) (emphasis added).

10 34 C.F.R. § 104.3(l)(2).

11 See, e.g., Illinois State Board of Education, Students’ Rights to Equal Education, <http://www.isbe.net/bilingual/htmls/imfaqs.html> (last visited May 13, 2009) (“Schools are required to provide undocumented immigrant students the same benefits and services made available to other students. Therefore, when determining eligibility for free or reduced lunch and/or breakfast programs under the School Lunch Act, do not reject applications which do not have the parent’s Social Security number.”).

12 461 U.S. 321 (1983) (permitting a school district to deny a student tuition-free public school education if the student lives apart from a “parent, guardian, or other person having lawful control of him under an order of a court” and is present in the district “for the primary purpose of attending the public free schools”).

13 See Letter from Education Law Center to Dr. Linda Rhen, Director, Pennsylvania Department of Education (Aug. 8, 2008) (citing questionable enrollment policies in Pennsylvania school districts including requiring students to provide social security numbers).

14 908 F.Supp. 755, 774 (C.D. Cal. 1995).

15 See, e.g., N.J. ADMIN. CODE § 6A:22-3.4(a) (2008); CAL. EDUC. CODE § 48204.6 (2009).

16 See, e.g., Iowa Department of Education, *Education of Immigrant Children*, SCHOOL LEADER UPDATE (June 2008), available at http://www.iowa.gov/educate/index.php?option=com_content&task=view&id=854&Itemid=1496; 22 PA. CODE § 11.11(d) (2009) (“A school may not inquire regarding the immigration status of a student as part of the admission process.”). Similarly, in New Jersey, “school districts are . . . prohibited from requiring students to disclose or document their immigration status, [or] making inquiries of students or parents that may expose their undocumented status” New Jersey Department of Education, *Changes to INS Regulations Create No New Obligations for Schools*, http://www.state.nj.us/education/news/2002/1021imm_a.htm (last visited May 13, 2009).

17 *Board of Frederick County Commissioners v. Frederick County Board of Education*, Maryland State Board of Education Opinion No. 09-11 (Mar. 24, 2009), available at <http://www.mnsm.org/files/state-board-opinions/Frederick%20County%2009-11.pdf>.

18 North Carolina statutes allow principals to ask for a copy of a birth certificate for any child enrolled in school for the first time to make sure the child is old enough to attend kindergarten. N.C. GEN. STAT. § 115C-364(c). Likewise, a Kansas statute requires school boards to require proof of a child’s identity the first time a child is enrolled in school to locate missing and/or abducted children. Identity may be proved by a certified copy of a birth certificate or “any documentary evidence which a school board deems to be satisfactory proof of identity.” KAN. STAT. ANN. § 72-53, 106.

19 24 PA. CONS. STAT. § 13-1302(a) (2008).

20 N.J. ADMIN. CODE § 6A:22-3.2(a)(1)(i) (2008).

21 769 F.2d 1323 (8th Cir. 1985) (invalidating an Arkansas statute that denied enrollment to minor children who did not have a parent or guardian living in the district). The court distinguished *Horton* from *Martinez v. Bynum* because *Martinez* denied access only to students living away from their parents/guardians solely to attend free public school.

22 Federal district courts in Pennsylvania and Texas have allowed admission to students on grounds similar to those cited in *Horton*. See, e.g., *Nancy M. v. Scanlon*, 666 F.Supp. 723 (E.D. Pa. 1987) (striking on equal protection grounds a law allowing school districts to deny special education services to non-resident, dependent children living in foster homes in the district); *Steven M. v. Gilhool*, 700 F.Supp. 261 (E.D. Pa. 1988) (invalidating on equal protections grounds a statute allowing schools to charge tuition to non-resident students who live in children’s homes in the district); *Major v. Nederland Indep. Sch. Dist.*,

72 F.Supp. 994 (E.D.Tex. 1991) (voiding district's policy denying admission to a student who relocated due to family problems despite the district's concerns with illegal immigration and "white flight"); *Byrd v. Livingston Indep. Sch. Dist.*, 674 F.Supp. 225 (E.D.Tex. 1987) (allowing admission of students living with their non-guardian grandparents to school in the district).

23 The Second Circuit did not follow *Horton* and instead upheld a district's refusal to educate a non-resident child living in a group home. See *Catlin v. Sobol*, 93 F.3d 1112 (2d Cir. 1996). A federal district court in Georgia similarly rejected the *Horton* analysis, denying the plaintiff's motion for a preliminary injunction against a school district that would not admit her three nieces who were living with her because she did not have legal custody over them. *Poston v. DeKalb County Sch. Dist.*, No. 100-2358, slip op. (N.D. Ga. 2000). Pre-*Horton*, a North Carolina federal district court upheld a domicile requirement similar to Georgia's in *Poston* reasoning that school districts have legitimate interests in ensuring that students of a district reside with their legal guardians. See *Harris v. Hall*, 572 F.Supp. 1054 (E.D.N.C. 1983).

24 42 U.S.C. § 11434a (2006).

25 42 U.S.C. § 11434a(2)(B)(i) (2006). McKinney-Vento also explicitly notes that a migratory child—"a child who is or whose parent or spouse is, a migratory agricultural worker"—who fits any of the statute's other requirements would be covered. 20 U.S.C. § 6399(2) (2003).

26 *State ex rel. School District v. Thayer*, 41 N.W. 1014 (Wis. 1889) (student sent to live with his grandmother because his asthma was aggravated by the horses kept on his parents' farm was eligible for tuition-free education in his grandmother's school district).

27 908 F.Supp. 755, 774 (C.D. Cal. 1995).

28 See, e.g., Nicholas Riccardi, *Student's Deportation Roids New Mexico Town*, L.A. TIMES, Feb. 18, 2008 (noting how there was a "sudden drop" in attendance after a school security officer reported an 18 year-old student to immigration authorities in Roswell, New Mexico); Michelle Garcia, *School Forms' Immigration-Related Questions Stir Concern*, WASH. POST, Sept. 10, 2007, at A07 (describing how school registration by South Asian children increased after the school board stated that immigration information would not be used to check students' statuses); Denise Smith Amose, *Immigration Raid a Crisis School Hadn't Planned For*, CINCINNATI ENQUIRER, Sept. 15, 2007 (noting how approximately 20 children were absent the day after a nearby factory raid, although the principal said it was unclear how many absences were due to the raid).

29 20 U.S.C. § 1232g (2003).

30 INA § 101(a)(15)(F)(i) and 8 CFR § 214.2(f). Foreign nationals who enter the U.S. to pursue a complete course of study frequently do so under F-1 visas. If such a student intends to study at a public secondary school, the student must demonstrate that he or she has reimbursed the local school district for the full per capita cost of providing that education before he or she can obtain the visa. See *id.* § 214.2(f)(1)(i)(D).

31 *Id.* § 214.2(j). Foreign nationals, their spouses, and their minor children may enter the U.S. under J-1 visas under an exchange visitor program approved by the Department of State. J-1 visa holders may apply to extend their stay beyond the initial admission period, and the accompanying spouse and children may not be granted extensions of stay for longer than the principal visa holder.

32 *Id.* § 214.2(m). Students may enter the U.S. under an M-1 visa to study in an established vocational or other non-academic program. M-1 students may not enter the U.S. to enroll in language classes.

33 *Id.* § 214.2. Students enrolled in a full course of study in an approved school located within 75 miles of the U.S. border may study under an M-3 visa. Known as “border commuter students,” these individuals must maintain their actual residence in their country of nationality.

34 8 C.F.R. § 214.1(a)(1)(i) (2009).

35 8 C.F.R. § 214.2(b)(7) (2008). (“An alien who is admitted as, or changes status to, a B-1 or B-2 nonimmigrant . . . 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 a change of status.”).

36 Colleen Mastony & Diane Rado, *State Slaps District That Barred Teen: Elmwood Park Schools Risk Millions in Immigration Case*, CHICAGO TRIBUNE, Feb 24, 2006, at 1.

37 Andrew Trotter, *District Will Stop Querying Students on Immigration*, EDUCATION WEEK, Mar. 8, 2006.

38 See, e.g., Letter from Jo Lynn DeMary, Superintendent of Public Instruction, Commonwealth of Virginia, to Division Superintendents (Nov. 2, 2001), available at <http://www.doe.virginia.gov/VDOE/suptsmemos/2001/inf159.html>. (“School divisions are not permitted to inquire into a prospective student’s citizenship or visa status in order to enroll that student in school.”).

39 22 PA. CODE § 11.11(d) (2009). See also N.J. ADMIN. CODE § 6A:22-3.4(d)(2) (2008) (“A district board of education shall not require or request, as a condition of enrollment in school . . . [d]ocumentation or information relating to citizenship or immigration/visa status, except” as set forth in N.J. ADMIN. CODE § 6A:22-3.3(b) which states: “Districts permitting the attendance of F-1 students may adopt policies and procedures requiring advance payment of tuition, or entry into binding agreements for payment of tuition, before the district will provide the requested I-20 form.”).

40 U.S. Department of State, Student Visas, http://travel.state.gov/visa/temp/types/types_1268.html#public (last visited May, 13, 2009) (“Before an F-1 visa for a public school can be issued, the student must show that the public school in the U.S. has been reimbursed for the full, unsubsidized per capita cost of the education as calculated by the school.”).

41 School districts have to keep records containing certain information and documents relating to F-1 and other foreign students as part of the Student and Exchange Visitor Information System (SEVIS). 8 C.F.R. § 214.3(g). However, it does not appear school districts need to see a student’s visa to record any of the required information. Practically speaking, particularly where state law allows it, asking to see an F-1 visa is not likely to create controversy if only such visa bearers are asked to show their visas.

Schools should know ahead of time which students have F-I visas because such visa bearers must be accepted for admission by the school before they can apply for a visa. As the Elmbrook Park incident illustrates, school districts get into trouble when they ask *all* students to show their visas, if they have one, to ferret out B-2 visa bearers.

42 Iowa Department of Education, *Education of Immigrant Children*, SCHOOL LEADER UPDATE (June 2008), available at http://www.iowa.gov/educate/index.php?option=com_content&task=view&id=854&Itemid=1496. Iowa's guidance goes on to say: "This is because schools are required by federal law to charge tuition of those who hold an F-I visa. Schools are also required to fill out an I-20 form before a student with an F-I visa can be enrolled with the school." The Iowa guidance seems concerned about seeing the visas of F-I students only. However, the guidance does not explicitly limit requiring districts to ask to see only F-I visas. As discussed previously, a school district does not need to see an F-I student's visa to know whether tuition is owed or has been paid. The Iowa guidance does not indicate how a school district is supposed to determine whether a child is undocumented versus a non-immigrant visa-bearing student. School districts should know ahead of time which students have F-I visas but will have no way of knowing whether other students are undocumented, bear other visas, or are U.S. citizens.

43 Texas Education Agency, FAQ's Relating To Visa Information (Sept. 6, 2007), <http://ritter.tea.state.tx.us/curriculum/lote/fesfaq.html> (last visited May 13, 2009) ("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.").

44 *Anselmo v. Glendale Unified School District*, 124 Cal.App. 3d 520 (1981) (reasoning that B visas are only available to residents of other countries; therefore, B visa bearers are not residents of the school district).

45 Letter from the Honorable William C. Mims, Member, Senate of Virginia (Apr. 14, 1999), available at <http://www.oag.state.va.us/Opinions/1999opns/apr992.pdf> (citations omitted). ("As with legal or illegal aliens, although visa holders may be required, as others are required, to establish that they are bona fide residents of a jurisdiction before qualifying for free public schooling in that jurisdiction, their visa status does not presumptively exclude them or their children. Thus, so long as a student is 'a bona fide resident ... and if his residence was not contrived for the primary purpose of securing his attendance at [a] political subdivision's public school system, he is entitled to tuition-free education there,' regardless of his citizenship or his B, C, or D visa status."). The letter continues: "Accordingly, it is my opinion that a local school board is not permitted to inquire into a student applicant's citizenship or his B, C, or D visa status, nor may it require documentation to verify such status, for the purpose of ascertaining whether such applicant is a resident of the school district."

46 *Appeal of Raquel Plata*, New York State Education Department Decision of the Commissioner No. 14,555 (Mar. 29, 2001), available at <http://www.counsel.nysed.gov/Decisions/volume40/d14555.htm> ("[A] school district may not impose an irrebuttable presumption that the holder of a nonimmigrant visa cannot be a resident of the school district. Instead, the child's status should be determined in accordance with the traditional two-part test for residency.").

47 22 PA CODE § 11.11(d) (2009) (“A child’s right to be admitted to school may not be conditioned on the child’s immigration status. A school may not inquire regarding the immigration status of a student as part of the admission process.”).

48 Texas Education Agency, FAQ’s Relating To Visa Information (Sept. 6, 2007), <http://ritter.tea.state.tx.us/curriculum/lotefesfaq.html> (last visited May 13, 2009).

49 22 PA CODE § 11.11(d) (2009).

50 *Appeal of Raquel Plata*, New York State Education Department Decision of the Commissioner No. 14,555 (Mar. 29, 2001), available at <http://www.counsel.nysed.gov/Decisions/volume40/d14555.htm>.

51 20 U.S.C. § 1232g (2003).

52 20 U.S.C. § 1232g(a)(4)(A)(i)-(ii) (2003).

53 20 U.S.C. § 1232g(b)(1)(J)(i)-(ii)(2003). Notably, FERPA allows but does not require compliance with a subpoena that requests information from student records. Compliance with subpoenas is required by other laws.

54 20 U.S.C. § 1232g(b)(2)(B)(2003).

55 20 U.S.C. § 1232g(b)(1)(J)(i)-(ii)(2003).

56 See, e.g., Iowa Department of Education, *Education of Immigrant Children*, SCHOOL LEADER UPDATE (June 2008), available at http://www.iowa.gov/educate/index.php?option=com_content&task=view&id=854&Itemid=1496.

57 34 C.F.R. § 99.3 (2008). Notably, FERPA allows but does not require the release of directory information. State public records laws may require the release of information not prohibited from disclosure by FERPA including directory information.

58 20 U.S.C. § 1232g(a)(5)(A)-(B) (2003).

59 Brigid Schulte, *Student Privacy Spotlighted in Va.*, WASHINGTON POST, Sept. 27, 2008, at B01, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/09/26/AR2008092603641.html?sid=ST2008092700733&s_pos.

60 Insisting on a subpoena may not be possible if ICE is requesting directory data and the state’s public records law requires the release of directory data unless parents have opted out. See Iowa Department of Education, *Education of Immigrant Children*, SCHOOL LEADER UPDATE (June 2008), available at http://www.iowa.gov/educate/index.php?option=com_content&task=view&id=854&Itemid=1496.

61 8 U.S.C. § 1357(a)(1) (2005).

62 In all likelihood ICE continues to apply INS's policy to schools. See Mary Ann Zehr, *With Immigrants, Districts Balance Safety, Legalities*, EDUCATION WEEK, Sept. 12, 2007 (quoting the following ICE policy: "Arresting fugitives at schools, hospitals, or places of worship is strongly discouraged, unless the alien poses an immediate threat to national security or the community:").

63 Memorandum from James A. Puleo, Acting Associate Commissioner, on Enforcement Activities at Schools, Places of Worship, or at Funeral or Other Religious Ceremonies, to District Directors and Chief Patrol Agents (May 17, 1993), available at <http://www.globallawcenters.com/pdfs/25357.pdf>.

64 *Id.*

65 *Murillo v. Musegades*, 809 F. Supp. 487 (W.D. Tex. 1992).

66 No. Civ. 05-580JB/WPL, 2006 WL 1305032 (D.N.M. Jan. 17, 2006).

67 Mary Ann Zehr, *With Immigrants, Districts Balance Safety, Legalities*, EDUCATION WEEK, Sept. 12, 2007.

68 See *id.*

69 *Gonzalez ex rel. Doe v. Albuquerque Public Schools*, No. Civ. 05-580JB/WPL, 2006 WL 1305032, at *3 (D.N.M. Jan. 17, 2006).

70 Mary Ann Zehr, *With Immigrants, Districts Balance Safety, Legalities*, EDUCATION WEEK, Sept. 12, 2007.

71 8 U.S.C. § 1324(a)(1)(A)(iii)(2005) (holding any person criminally liable for "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation").

72 8 U.S.C. § 1324(a)(1)(A)(v)(I)-(II) (2005).

73 *U.S. v. One 1984 Chevrolet Trans Star*, 623 F. Supp. 625, 628 (D. Conn. 1985).

74 *U.S. v. Lopez*, 521 F.2d 437, 440-41 (2d Cir. 1975) ("Although our task would have been lightened if Congress had expressly defined the word 'harbor,' we are persuaded by the language and background of the revision of the statute that the term was intended to encompass conduct tending substantially to facilitate an alien's 'remaining in the United States illegally,' provided, of course, the person charged has knowledge of the alien's unlawful status.").

75 *U.S. v. Cantu*, 557 F.2d 1173, 1180 (5th Cir. 1977) (holding that the "in any place" requirement of the statute is meant to be "broadly inclusive").

76 ICE has recently announced it will focus on *employers* rather than *employees* during worksite enforcement actions. However, ICE "will continue to arrest and process for removal any illegal workers who are found in the course of these worksite enforcement actions . . ." Fact Sheet, Immigration & Customs Enforcement, *Worksite Enforcement Overview* (Apr. 30, 2009), available at <http://www.ice.gov/pi/news/factsheets/worksite.htm>.

77 Recent raids include Grand Island, Nebraska, Marshalltown, Iowa, and New Bedford, Massachusetts. The variety of issues that schools might face include the following: (1) who can or will take custody of children; (2) who will supervise children before caregivers can be reached; (3) what procedures should be taken in the event that parents cannot be reached; (4) how can schools lower truancy levels in the wake of a raid; and (5) what should children be told about the raid.

78 For example, in New Bedford, Massachusetts, some children were “stranded at school” after 327 employees were detained at a factory. ICE claimed that those employees that remained in custody were given the option of letting their children stay with a guardian or putting them in state care. Ray Henry, *Children Stranded After Immigration Raid*, WASH. POST, Mar. 7, 2007, available at <http://www.miracoalition.org/press/mira-in-the-news/dozens-of-children-in-state-custody-after-immigration-raid>.

79 See, e.g., *Chavez v. Tolleson Elementary School Dist.*, 595 P.2d 1017, 1020 (Ariz. Ct.App. 1979) (recognizing that a school district and classroom teacher owe a duty of ordinary care toward students during the time a student is under their charge and that duty is breached when conduct creates an unreasonable risk of harm to student); *Ernest v. Red Creek Cent. Sch. Dist.*, 717 N.E.2d 690 (N.Y.App. Div. 1999) (asserting that a school district’s duty of care toward a student continues when the student is released into a potentially hazardous situation); *Herzel ex rel. Joplin v. Palmyra Sch. Dist.*, 733 N.W.2d 578, 584 (Neb. Ct.App. 2007) (noting how Nebraska courts treat actions against school districts for lack of supervision as standard negligence claims); *Rodriguez v. Seattle Sch. Dist. No. 1*, 401 P.2d 326, 327 (Wash. 1966) (finding that school districts can be liable for injuries sustained as a result of negligent supervision or failure to supervise).

80 *Ernest*, 717 N.E.2d at 693.

81 ICE “considers” releasing parents who are sole caretakers of minor children who are detained in worksite enforcement actions. See Department of Homeland Security, *Guidelines for Identifying Humanitarian Concerns Among Administrative Arrestees When Conducting Worksite Enforcement Operations*, available at http://www.nilc.org/immsemplymnt/wkplce_enfrmnt/ice-hum-guidelines.pdf.

82 Miriam Jordan, *At Public Schools, Immigration Raids Require New Drill*, WALL ST. J., June 18, 2007, at 1.

83 *Id.*

84 Denise Smith Amos, *Immigration Raid a Crisis School Hadn’t Planned For*, CINCINNATI ENQUIRER, Sept. 15, 2007.

ACKNOWLEDGEMENTS

Thanks to the following NSBA Council of School Attorney members for contributing to this publication: Cullen Casey, McKenna Coll Osborn, Sarah Daniel, Ashley Frison, Mary Gannon, Jose Gonzales, Dan Harper, Melanie Gurley Keeney, Elizabeth Eynon-Kokrda, Forrest Jack Lance, Amy Levine, Carol Marchant, Anne McCully Murphy, Jack Murphy, Chelsea Olson, Justin Petrarca, Allison Brown Schaffer, Karla Schultz, and Ron Wenkart.

Thanks to the following immigration attorneys for contributing to this publication: Amy Erlbacher-Anderson, Lisa Duran, and Loan Huynh.

Thanks to the following 2008 Hogan & Hartson summer associates for contributing to this publication: Nathaniel Gleicher and Phil Trout.

Thanks to the following NSBA Legal Interns for contributing to this publication: Margaret Ruthenberg-Marshall and Nicole Vitale.





National School Boards Association
www.nsba.org
1680 Duke Street
Alexandria, Virginia 22314

