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A COLLISION OF PRACTICE AND THE LAW IN U.S. SCHOOLS AND SCHOOL DISTRICTS

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I. INTRODUCTION

Although it is difficult to accurately assess the number of so-called “illegal” immigrants residing in the United States; recent estimates suggest that undocumented children and youth alone total around 1.8 million.² In 1982, the U.S. Supreme Court found in *Plyer vs. Doe* that because the presence of undocumented children in the United States is, in fact, the case – through no fault of their own – these children are entitled to the same free K–12 education that states provide to children who are citizens or legal residents.³ In other words, U.S. public schools may not deny enrollment or treat exceptionally any school-age children on account of their immigration status.⁴ Thus, undocumented students are eligible for free and reduced-price meals, special education services, and participation in school-sponsored events and activities just like their documented peers. Moreover,

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² Jeffrey S. Passel, *Size and Characteristics of the Unauthorized Migrant Population in the U.S.*, PEW RESEARCH HISPANIC TRENDS PROJECT, March 7, 2006, available at <http://www.pewhispanic.org/2006/03/07/size-and-characteristics-of-the-unauthorized-migrant-population-in-the-us/>.

³ Nina Bernstein, *No Visa, No School, Many New York Districts Say*, N.Y. TIMES, July 22, 2010, http://www.nytimes.com/2010/07/23/nyregion/23immig.html?pagewanted=all&_0.

⁴ See, e.g., *Plyer v. Doe*, 457 U.S. 202, 226 (1982) (holding that “in the area of special constitutional sensitivity presented . . . we perceive no rational policy that supports the State in denying these [undocumented] children an elementary education.”); see JOHN WILLSHIRE CARRERA, IMMIGRANT STUDENTS, THEIR LEGAL RIGHT OF ACCESS TO PUBLIC SCHOOLS: A GUIDE FOR ADVOCATES AND EDUCATORS 87 (Rev. ed., 1992); see also Harriett D. Romo, *The newest “outsiders”:* *Educating Mexican migrant and immigrant youth*, in CHILDREN OF LA FRONTERA: BINATIONAL EFFORTS TO SERVE MEXICAN MIGRANT AND IMMIGRANT STUDENTS, 61, 63 (Judith LeBlanc Flores ed., 1996), available at <http://files.eric.ed.gov/fulltext/ED393631.pdf>; see Nina Bernstein, *No Visa, No School, Many New York Districts Say*, THE NEW YORK TIMES (July 22, 2010), available at <http://www.nytimes.com/2010/07/23/nyregion/23immig.html?pagewanted=all&r=0>; *Feds: All kids, legal or not, entitled to school*, USA TODAY (May 6, 2011), available at http://usatoday30.usatoday.com/news/education/2011-05-06-immigration-students-education_n.htm#; see also *Undocumented Students*, NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS (May 6, 2011), http://www.nassp.org/Content.aspx?topic=Undocumented_Students.

federal law does not require school districts or their employees to report undocumented students to immigration authorities.⁵ Indeed, to do so or to disclose any information in a student's education records without consent would constitute a violation of the Family Educational Rights and Privacy Act of 1974.⁶

Under this rubric, too, schools and districts may not require students or parents to disclose or document their immigration status, may not make inquiries of students or their parents that may expose their undocumented status, and may not require Social Security numbers from these students or their parents. Regrettably, some U.S. schools and school districts ignore some or all of these regulations and engage in "creative" attempts to "chill" access to school or to "out" students or their parents regarding their undocumented status. In this paper, I will first discuss the illegal practices that some U.S. schools use to discourage undocumented students from attending; thereafter, I will address some of the consequences that such practices have for students, their families, and society as a whole; finally, I will recommend practices that schools can implement in order to proactively embrace undocumented students and their parents in an educational environment that is friendly and productive for all.

II. ILLEGAL PRACTICES

On Friday, May 6, 2011, the U.S. Department of Education sent a letter to school districts around the country reminding them that all students—documented or otherwise—are entitled to a free public education.⁷ The letter was inspired by reports that many schools had been attempting to check the immigration status of students seeking to enroll. Related practices that were reported include requiring students' or parents' Social Security numbers, requests from schools for driver's licenses to identify parents, requests for additional "registration" of immigrant children, "safety notifications" for immigrant parents, and requests that immigrant children attend separate schools.⁸

The Department of Education letter may have put fear into some school

³ *Undocumented Students*, NAT'L ASS'N OF SECONDARY SCHOOL PRINCIPALS (May 6, 2014), available at http://www.nassp.org/Content.aspx?topic=Undocumented_Students.

⁶ See Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g) (1974); see also *Undocumented Students*, NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPLES (May 6, 2011), available at http://www.nassp.org/Content.aspx?topic=Undocumented_Students.

⁷ Miami (AP), *Feds: All kids, legal or not, entitled to school*, USA TODAY (May 6, 2011, 9:15 PM), available at http://usatoday30.usatoday.com/news/education/2011-05-06-immigration-students-education_n.htm.

⁸ *Id.*

and district administrators by reminding them about Plyer v Doe and the Family Educational Rights and Privacy Act. Some of these scofflaws, however, may have been emboldened by bills passed or pending in a number of states that have less positive ramifications for the treatment of undocumented students. In 2010, Arizona passed legislation making it a crime to be undocumented in the state and requiring law enforcement officials to inquire about an individual's immigration status when they suspect that he or she may be undocumented.⁹ Although the law has not yet been fully implemented, officials in school districts with large immigrant populations have raised questions regarding the role of school resource officers, who work in the schools but who operate under the direction of law enforcement agencies. This concern, moreover, may soon be widespread, as similar bills have been introduced in Georgia, Mississippi, Indiana, Florida, Nebraska, Kentucky, Utah, Pennsylvania, Texas, and South Carolina.¹⁰ In addition, legislation under consideration in Texas would require school districts to ask for proof of immigration status and to report the number of undocumented students who attend public schools, measures that are already required of school districts in Alabama and that are being considered by the legislatures in a number of other states.¹¹

Some officials set their own illegal policies without waiting for their states to openly challenge federal authority. In New York State, for example, it has been asserted that at least 20% of school districts require immigration papers,¹² thus effectively barring the enrollment of the undocumented. In Durham County, North Carolina, complaints have been noted against schools that are alleged to have regularly asked to see the passports and visas of students before they were permitted to enroll.¹³ In Hazelton, Pennsylvania, moreover, it has been reported that some school officials were considering requiring no fewer than four pieces of proof of residency from new students.¹⁴

⁹ *Undocumented Students*, NAT'L ASS'N SECONDARY SCH. PRINCIPALS (May 6, 2011), available at http://www.nassp.org/Content.aspx?topic=Undocumented_Students.

¹⁰ *Undocumented Students*, NAT'L ASS'N SECONDARY SCH. PRINCIPALS (May 6, 2011), available at http://www.nassp.org/Content.aspx?topic=Undocumented_Students.

¹¹ *Id.*

¹² Nina Bernstein, *No Visa, No School, Many New York Districts Say*, THE NEW YORK TIMES (July 22, 2010), available at http://www.nytimes.com/2010/07/23/nyregion/23immig.html?pagewanted=all&_r=1&.

¹³ Christine Armario, *Feds: All kids, legal or not, entitled to school*, USA TODAY, May 6, 2011, http://usatoday30.usatoday.com/news/education/2011-05-06-immigration-students-education_n.htm.

¹⁴ *Id.*

III. CONSEQUENCES OF ILLEGAL PRACTICES

Thirty years after the Supreme Court ruling in *Plyer vs. Doe*, one might expect that this nation would have accepted the principle that undocumented children have a right to an education. However, the violations of federal law in this regard that have been recorded in many U.S. states suggest that this is far from the case. What drives this resistance to an established principle? Do those who wish to bar undocumented children from public schools believe that this tactic will put an end to illegal immigration? Or do they think that our society would benefit from forcing undocumented persons to become “invisible” by such means? Such imagined advantages are arguable. What is clear, however, is that barring individuals from public education has a negative impact on students, parents, and society as a whole.

Firstly, schools and school districts are not police or any other form of law enforcement agency, and it makes little sense for them to actively engage in terrorizing individuals who have not in most cases been charged with any crime. Terror, however, is an apt characterization of the effect on students and parents of school policies that seek to identify and/or exclude undocumented families. Students who have managed to enroll before or in spite of such policies live in fear of exposure, and many never enroll at all due to fear of deportation. Cases have been documented in which parents have pulled their children out of school rather than risk disclosing their status and being arrested, and families have been known to flee across state lines when they feel that an inquiry that started at school has put them at risk.¹⁵

Faced with such a climate, present or potential, those who advocate a firm response to illegal immigration should ask themselves: *Do we really want our schools to be sites of terror? Is not such an atmosphere likely to be damaging to all students and to the education process, which most parents and teachers would agree flourishes best when students feel safest?* If anti-immigration activists answered “No” to the former and “Yes” to the latter question, then they need to accept the fact that they must leave their politics at the schoolhouse door!

Yet beyond such immediate concerns for the school environment, barring undocumented immigrants or their children from attending public schools has negative implications for society as a whole. After all, the

¹⁵ Jorge Rivas, *Fear and Learning in Alabama: Undocumented Students Flee*, COLORLINES, Oct. 3, 2011, available at http://colorlines.com/archives/2011/10/fear_and_learning_at_alabamas_foley_elementary_school.html.

universal right to free public education is a fundamental value in America for good reason, and the Supreme Court had the public good in mind when it protected this principle in *Plyer v Doe*. Education creates productive workers and taxpayers who contribute to the general well-being of the nation. Indeed, a serious challenge facing our country today is the threat of moving forward into the twenty-first century with an undereducated work force.¹⁶ In this context, barring undocumented students from attending school could have a disastrous impact on the nation's long-term chances for economic prosperity.

Even in this age of high technology and advanced degrees, a public K-12 education remains the basic ticket to economic and social mobility—the key to the American dream. Opinions differ as to whether this dream is diminished by efforts to share it too broadly, but denying undocumented children an education would isolate them for a lifetime of hardship and create in them a permanent social underclass. Not only does discriminating against any group in this manner run contrary to our laws and values, such an underclass would create a drag on society, with not just a loss of potential tax revenue but an increase in costs for social programs and correctional facilities as well.

It is interesting to note that many of those who are the quickest to blame undocumented immigrants for social and economic ills, are also championing economic policies that are based ostensibly on the principle that “a rising tide lifts all boats.” The ability of undocumented immigrants or their children to rise to the level of normalcy in this great nation threatens no one. Rather, access to public education grants these members of our community the same fighting chance at survival or better that the rest of us enjoy, and their success in seizing this opportunity represents a major contribution to the diversity, vitality, and prosperity of our society as a whole.

IV. CREATING A POSITIVE ENVIRONMENT FOR ALL STUDENTS

Finally, it is crucial for administrators to understand that steps can and should be taken in order for public schools to serve undocumented children effectively, and that these steps contribute to a positive environment for all

¹⁶ YOLANDA K. KODRZYCKI, EDUCATION IN THE 21ST CENTURY: MEETING THE CHALLENGES OF A CHANGING WORLD, (2002); *Reach Higher, America: Overcoming Crisis in the U.S. Workforce*, NATIONAL COMMISSION ON ADULT LITERACY, available at <http://www.nationalcommissiononadulthoodliteracy.org/ReachHigherBUSINESSPullout/ReachHigherMEDIAPullout.pdf>.

students. The first step is to ensure that all school staff members demonstrate a positive attitude toward undocumented students and their parents, just as they should to their documented peers. Whether documented or otherwise, newly arrived and/or non-English-speaking parents are likely to have difficulty understanding the U.S. education system, and therefore they need assistance and encouragement before they can become involved and begin to help their children to succeed. Parental involvement is a valuable resource in all schools.¹⁷ However, immigrant parents are likely to view schooling in ways that are unfamiliar to many U.S. teachers and administrators. Thus, school staff should receive training regarding the cultural and experiential expectations of the populations that they serve.¹⁸

Second, with respect to enrollment, creating a courteous, welcoming environment and having bilingual staff available are steps that can help undocumented immigrants to overcome the anxiety that they are likely to experience when dealing with institutions. Such feelings, however, can affect all students who are transferring into or otherwise starting out at a new school, so it simply makes good sense to provide clear maps of the school, well-marked rooms, color-coding, bilingual signs, and class “buddies” for new students. Moreover, classroom placements for bilingual and immigrant children should be made by staff members who are familiar with the needs of these students and with the programs available to assist them.

Third, school administrators need to lead an ongoing effort to explain to both parents and staff the school procedures that particularly affect immigrant, bilingual, and undocumented children.¹⁹ School rules should be made available in the languages of the parents, and the purposes of applications, forms, and questionnaires should be explained clearly to parents. In addition, special attention should be given to school practices that may penalize students or parents, such as hidden costs or fines, confusing changes in bus schedules or school hours, or unclear visiting

¹⁷ JOYCE L. EPSTEIN, IMPROVING FAMILY AND COMMUNITY INVOLVEMENT IN SECONDARY SCHOOLS, THE EDUCATION DIGEST 9-12, February 2008, available at <http://homeschoolconnect.pbworks.com/f/Improving+Family+and+Community+Involvement.pdf>.

¹⁸ Linda J. Holman, *Working Effectively with Hispanic Immigrant Families*, THE PHI DELTA KAPPAN 78 647-49 April 1997; Kathleen Flynn & Jane Hill, *English Language Learners: A Growing Population*, MID-CONTINENT RESEARCH FOR EDUCATION AND LEARNING, December 2005, available at <http://chansenedconsultantaea11.pbworks.com/w/file/50595003/McRelenglishlanguagelearnerspop.pdf>.

¹⁹ See JOHN WILLSHIRE CARRERA, IMMIGRANT STUDENTS, THEIR LEGAL RIGHT OF ACCESS TO PUBLIC SCHOOLS: A GUIDE FOR ADVOCATES AND EDUCATORS 87 (Rev. ed., 1992).

procedures.

By and large, the characteristics of good schools are also those that enhance the education of undocumented children. In such schools, parents are involved and welcomed, staff members work as a team to promote students' best interests, and the school values students, their families, and their experiences and cultures. Good administrative and pedagogical practices within such schools include effective assessment of language proficiency and other academic needs; appropriate course and class placement, including consultation with parents and teachers; and the provision of instruction that takes account of students' prior knowledge and experiences. In addition, English learners should be included in classes with English-speaking students, but they should also receive instructional support in their first language for cognitively challenging curriculum. Also important are social and academic multicultural programs, drop-out prevention efforts, college and career counseling, and "second-chance" opportunities for education and training.²⁰

V. CONCLUSION

Whatever the basis for or the popularity of movements that would restrict undocumented immigrants from accessing the benefits of society, Congress and the Supreme Court have declared—with good reason—that such efforts have no place in our public schools. Demonizing and terrorizing individual students and their families will not help to make our schools or our nation safer or more wholesome for Americans of any description. Rather, schools benefit from fostering a welcoming, nurturing environment, and society benefits from the education of all its members. Thus, educators and educational policymakers across the country need to join together to uphold the law and to produce schools that maintain a positive environment for all students. Such efforts will ensure that undocumented children have access to the education that is their legal right and that our schools provide them—and their documented peers—with the quality of education that they deserve.

²⁰ Harriett D. Romo, *The Newest "Outsiders": Educating Mexican Migrant and Immigrant Youth*, in *CHILDREN OF LA FRONTERA: BINATIONAL EFFORTS TO SERVE MEXICAN MIGRANT AND IMMIGRANT STUDENTS* 61-91 (Judith LeBlanc et al. eds., 1996).