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## Fixing Alabama's Public School Enrollment Requirements in H.B. 56: Eliminating Obstacles to an Education for Unauthorized Immigrant Children

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FIXING ALABAMA'S PUBLIC SCHOOL ENROLLMENT  
REQUIREMENTS IN H.B. 56: ELIMINATING  
OBSTACLES TO AN EDUCATION FOR UNAUTHORIZED  
IMMIGRANT CHILDREN

*Sean Mussey\**

I. INTRODUCTION

In 2011, Alabama enacted a comprehensive immigration law primarily aimed at addressing unauthorized immigration in the state.<sup>1</sup> The Beason-Hammon Alabama Taxpayer Citizen and Protection Act (H.B. 56) impacts many areas of an unauthorized immigrant's life, including law enforcement, transportation, housing, employment, and children's participation in public schools.<sup>2</sup> The legislative findings portion of the law asserted that the state of Alabama encourages illegal immigration by providing public benefits without confirming immigration status.<sup>3</sup> Section 28 of the law mandated that children produce citizenship or immigration documentation so school districts could verify the immigration status of parents and students.<sup>4</sup> This provision of the law forced many families and children, with deep ties to their community, to move or be kept from school out of fear of deportation.<sup>5</sup> This paper shows that the policies in Section 28 are unconstitutional. It also proves that school districts can obtain information from

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<sup>1</sup> Richard Fausset, *Alabama enacts strict anti-illegal-immigration law*, LA TIMES (June 10, 2011), <http://articles.latimes.com/2011/jun/10/nation/la-na-alabama-immigration-20110610>.

<sup>2</sup> *Id.*

<sup>3</sup> ALA. CODE § 31-13-2 (1975).

<sup>4</sup> Kevin R. Johnson, *Immigration and Civil Rights: Is the "New" Birmingham the Same as the "Old" Birmingham?*, 21 WM. & MARY BILL RTS. J. 367, 392 (2012).

<sup>5</sup> *Id.* at 393.

students at the time of enrollment that ensure district resources are used efficiently, while fostering a welcoming school atmosphere.

Section II of this paper outlines the background of H.B. 56 and Section 28 in particular. Section III outlines the purpose of Section 28 and how it affected school enrollment, and details litigation pertaining to the law. Section IV outlines the reasons Section 28 failed and what actions public school districts are allowed to take during the enrollment process. Section V concludes with the idea that school districts cannot take steps to discourage students from enrolling in school, including requesting immigration information. In spite of limits placed on school districts, important information can still be obtained that maintains a welcoming environment for all students and preserves our societal view that education is a crucial component to a flourishing democratic society and a successful life.

## II. BACKGROUND

While H.B. 56 was enacted to address economic concerns in the state of Alabama, it is hard to dismiss the veil of racism that precedes such laws in the Deep South.<sup>6</sup> The rhetoric used along with the passage of the bill contained racial slurs and derogatory comments from legislators, including the use of “Hispanic” and “illegal immigrant” interchangeably.<sup>7</sup> The supporters of H.B. 56 stated that the purpose of the law is to drive unauthorized immigrants from the state, and thus reduce the state’s economic burden.<sup>8</sup> Alabama Attorney General Luther Strange argued no child would be denied an education based on immigration status regardless of familial immigration status.<sup>9</sup>

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<sup>6</sup> Jeremy B. Love, *Alabama Introduces the Immigration Debate to its Classrooms*, 38 HUM. RTS. 7, 8 (2011).

<sup>7</sup> *Id.* (further examples of racism by legislators included Senator Scott Beason using a racial slur while being secretly recorded by the FBI and State Representative Micky Hammon giving numbers of Alabama’s Hispanic population when asked about how many undocumented immigrants were in Alabama).

<sup>8</sup> Campbell Robertson, *Critics See ‘Chilling Effect’ in Alabama Immigration Law*, NY TIMES (Oct. 27, 2011), <http://www.nytimes.com/2011/10/28/us/alabama-immigration-laws-critics-question-target.html?pagewanted=all>.

<sup>9</sup> *Id.*

H.B. 56 went into effect on September 28, 2011.<sup>10</sup> H.B. 56 was determined by some to be the strictest anti-immigration law in the country.<sup>11</sup> Section 28 of the law provided that, at the time of enrollment, every public elementary and secondary school was to determine whether a student enrolling was born outside the United States or was the child of an alien who was not lawfully present in the United States.<sup>12</sup> The law forced school districts to determine immigration status by a birth certificate, a sworn affidavit by the children's parents, or other official documents.<sup>13</sup> The penalty for not producing any of the required documents, or producing forged documents, resulted in a presumption by the State that the child was an illegal immigrant.<sup>14</sup> School districts were required to pass the information along to the State Board of Education, as well as to scholars and researchers to determine the costs for Alabama to educate unauthorized immigrants.<sup>15</sup> Section 28 of the law did not force public schools to immediately forward the information to law enforcement officials;<sup>16</sup> federal law requiring the disclosure of illegal immigrants to the federal government, however, superseded this provision and rendered the protection intended for unauthorized immigrants and their children ineffective.<sup>17</sup>

### III. ANALYSIS

#### A. Purpose of Section 28

While the legislature stated the overarching goal of H.B. 56

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<sup>10</sup> Richard Fausset, *Alabama's immigration law prompts alarm*, LA TIMES (Oct. 8, 2011), <http://articles.latimes.com/2011/oct/08/nation/la-na-alabama-immigration-20111009>.

<sup>11</sup> Robertson, *supra* note 8.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Mark Walsh, *Court Rejects Alabama's School Immigration Checks*, EDUCATION WEEK (Aug. 21, 2012), [http://blogs.edweek.org/edweek/school\\_law/2012/08/court\\_rejects\\_alabamas\\_school\\_.html](http://blogs.edweek.org/edweek/school_law/2012/08/court_rejects_alabamas_school_.html).

<sup>15</sup> Robertson, *supra* note 8.

<sup>16</sup> *Id.*

<sup>17</sup> *Hispanic Interest Coal. of Alabama v. Governor of Alabama*, 691 F.3d 1236, 1247 (11th Cir. 2012); ALA. CODE § 31-13-2 (1975); (Section 2 of H.B. 56 also required all state agencies to "fully cooperate with federal immigration authorities in the enforcement of federal immigration laws.")

was to encourage self-deportation of unauthorized immigrants,<sup>18</sup> many believed the purpose of Section 28's reporting provisions was to collect the data necessary to advance a legitimate challenge to the U.S. Supreme Court's finding in *Plyler v. Doe*.<sup>19</sup> In 1975 the Texas legislature modified its education laws to refuse state funds that would be used for educating children not legally admitted to the United States.<sup>20</sup> The revision to the education law also allowed school districts to deny enrollment of children not legally admitted to the United States to public schools.<sup>21</sup> A class action suit was filed on behalf of children of Mexican descent, who could not establish the lawful admittance into the United States.<sup>22</sup> The children were now residing in Smith County Texas.<sup>23</sup> The class challenged the constitutionality of the provisions.<sup>24</sup> The Court found that the State of Texas failed to provide compelling evidence of economic costs and other costs of undocumented student attendance in public schools to support their measure to refuse to reimburse school districts for the educational expenses of unauthorized immigrant students and require those children pay tuition to attend public schools.<sup>25</sup>

The Court stated that the Fourteenth Amendment, guaranteeing equal protection of the law, applies to "undocumented aliens" as they are people and their immigration status does not nullify their presence within a territorial jurisdiction.<sup>26</sup> Further, there is no language in the Fourteenth Amendment that limits its protection to citizens, so while a person is within a State's territory he is subject to the obligations of the State's civil and criminal regulations, as well as the equal protection of those same laws.<sup>27</sup>

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<sup>18</sup> Joey Kennedy, *This May be the Most Important Week for Immigration Reform*, AL.COM (April, 8, 2013), [http://www.al.com/opinion/index.ssf/2013/04/this\\_may\\_be\\_the\\_most\\_important.html](http://www.al.com/opinion/index.ssf/2013/04/this_may_be_the_most_important.html); *Plyler v. Doe*, 475 U.S. 189 (1979); see also *Id.* at 223.

<sup>19</sup> Robertson, *supra* note 8.

<sup>20</sup> *Plyler v. Doe*, 475 U.S. 189, 205 (1979).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 206.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 205.

<sup>25</sup> Johnson, *supra* note 5, at 392.

<sup>26</sup> *Plyler*, 475 U.S. at 210-12.

<sup>27</sup> *Id.* at 211, 215.

In *Plyler*, the Court determined the measures enacted by the legislature to be unconstitutional and found that the State cannot erect such barriers to an education, even of unauthorized immigrants. The court held this because education plays an important role in the advancement of children, the maintenance of the fabric of our society is furthered in the school system, and education sustains our political and cultural heritage as a nation.<sup>28</sup> On a micro level, the deprivation of an education takes an “inestimable toll on the social, economic, intellectual, and psychological wellbeing of the individual, and poses an obstacle to individual achievement.”<sup>29</sup> Section 2 of H.B. 56 explains that immigration status information should be collected because children unlawfully present in the United States adversely affect the availability of educational resources to children who are in the United States lawfully.<sup>30</sup> The Court in *Plyler* noted that the District Court found the exclusion of undocumented immigrants would result in savings on some level, education funding from the state and federal governments was primarily based on enrollment, and thus reducing the overall number of students would reduce overall funding.<sup>31</sup> Section 2 of H.B. 56 further states that the data collected will be used to plan for the impact undocumented children have on public education in Alabama.<sup>32</sup> Scholars in support of the law believed that if the data collected by the provision determine there is no impact from educating unauthorized immigrants on public education or its costs, then Alabama would not attempt to alter what *Plyler* put in place.<sup>33</sup> Experts in the *Plyler* arena further stated that if the statistics gathered by the Alabama Department of Education demonstrated that “education to illegal immigrants severely undermines the quality, and/or drastically increases the cost, of education for those who are lawful residents and citizens, the State will have met an important caveat in the

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<sup>28</sup> *Id.* at 203.

<sup>29</sup> *Id.*

<sup>30</sup> ALA. CODE § 31-13-2 (1975).

<sup>31</sup> *Plyler*, 475 U.S. at 207.

<sup>32</sup> Maria Pabon Lopez, Diomedes J. Tsitouras & Pierce C. Azuma, *The Prospects and Challenges of Educational Reform for Latino Undocumented Children: An Essay Examining Alabama's H.B. 56 and Other State Immigration Measures*, 6 FIU L. REV. 231, 237–238.

<sup>33</sup> *Id.* at 237.

*Plyler* decision itself.”<sup>34</sup>

### B. *Effects*

Just hours after a Federal District Court Judge in Birmingham upheld most of the provisions of H.B. 56, including Section 28, immigrants fled public schools and Alabama en masse.<sup>35</sup> School superintendents responded by claiming that nothing changed for those students who were already enrolled in school.<sup>36</sup> However, the impact of the law on these students was felt immediately and it continued after the 11th U.S. Circuit Court of Appeals froze Section 28’s implementation.<sup>37</sup> The Department of Justice determined that absences for Hispanic students in kindergarten through the 12th grade more than tripled. The absentee rate among Hispanic students remained high after the section on school enrollment was temporarily blocked. The Southern Poverty Law Center requested more detailed information concerning the absences, but the request was denied, prompting the Center to sue the Department of Education for its release.

### C. *Litigation*

The Department of Justice and the Hispanic Interest Coalition of Alabama challenged the law, specifically Section 28, in front of Federal District Court Judge Sharon Lovelace Blackburn.<sup>38</sup> They argued that it was a violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S.

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<sup>34</sup> *Id.* Alabama would have to show more than just a large cost associated with educating unauthorized immigrants. To challenge the ruling in *Plyler*, Alabama would need to demonstrate that the costs of denying an education to unauthorized immigrants would need to be higher than future costs of crime, unemployment, welfare, and other contributions to the U.S. economy. *Id.*

<sup>35</sup> Campbell Robertson, *After Ruling, Hispanics Flee an Alabama Town*, NY TIMES (Oct. 3, 2011), <http://www.nytimes.com/2011/10/04/us/after-ruling-hispanics-flee-an-alabama-town.html?pagewanted=all>.

<sup>36</sup> *Id.* (laying out the effects the law would have on already enrolled students on a Spanish language station.)

<sup>37</sup> *Alabama Immigration Law: SPLC Files Lawsuit After Education Department Refuses to Release Public Records on Latino Students*, HUFFINGTON POST (Oct. 11, 2012), [http://www.huffingtonpost.com/2012/10/11/splc-files-lawsuit-after-\\_n\\_1958738.html](http://www.huffingtonpost.com/2012/10/11/splc-files-lawsuit-after-_n_1958738.html).

<sup>38</sup> Campbell Robertson, *Alabama Wins in Ruling on Its Immigration Law*, NEW YORK TIMES (Sept. 28, 2011), <http://www.nytimes.com/2011/09/29/us/alabama-immigration-law-upheld.html>.

Constitution, but Judge Blackburn upheld the section that required elementary and secondary public schools to determine the immigrant status of incoming students.<sup>39</sup> The Hispanic Interest Coalition of Alabama also challenged Section 28 on the belief that it would deter students from enrolling in schools.<sup>40</sup> The District Court judge dismissed this claim from the Coalition on the basis of standing and did not rule on the merits of the argument.<sup>41</sup>

The 11th Circuit Court of Appeals expedited the appeals process for a decision to be reached within two months.<sup>42</sup> The Department of Justice and the Hispanic Interest Coalition of Alabama asked for a stay of certain provisions of the law until the appellate process could conclude.<sup>43</sup> The State of Alabama responded by stating that the bill was necessary to address a problem the federal government would not, and to protect legal citizens' employment from unauthorized immigrants.<sup>44</sup> The Appeals Court rejected the State's argument and agreed to temporarily block certain portions of the bill, including Section 28.<sup>45</sup>

In *Hispanic Interest Coalition of Alabama v. Governor of Alabama*, the United States Court of Appeals for the 11th Circuit found that Section 28 of H.B. 56 significantly interfered with an undocumented immigrant child obtaining an education when analyzed under heightened judicial scrutiny because of the importance of public education to children.<sup>46</sup> The Court concluded that no substantial State interest justified the interference.<sup>47</sup> The court noted that Section 28 targeted

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Campbell Robertson, Part of Alabama Immigration Law Blocked, *NEW YORK TIMES* (Oct. 14, 2011), <http://www.nytimes.com/2011/10/15/us/2-alabama-immigration-law-provisions-are-blocked.html>.

<sup>43</sup> Jaclyn Belczyk, *Federal Appeals Court Blocks Alabama Immigration Law*, *JURIST* (Oct. 14, 2011), <http://jurist.org/paperchase/2011/10/federal-appeals-court-blocks-alabama-immigration-law.php>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* In *U.S. v. Alabama*, the appellate court did not decide on the merits of Section 28 because it determined it violated the Equal Protection Clause in a companion case. *Id.*

<sup>46</sup> *Hispanic Interest Coal. v. Governor of Alabama*, 691 F.3d 1236, 1249 (11th Cir. 2012) (the court was guided by the principles outlined in the Supreme Court case, *Plyler v. Doe*, in determining the level of scrutiny provided to the class).

<sup>47</sup> *Id.*



undocumented school children in Alabama and forced them to divulge their unlawful status, which created an unreasonable hurdle to enrollment.<sup>48</sup> The court further noted that H.B. 56 placed unlawful immigrants in a no-win situation: either admit unlawful status, or remain silent and have your unlawful status presumed by the mechanics of the statute.<sup>49</sup>

Part of the State's argument was that Section 28 affected all enrolling students equally because everyone had to provide citizenship or immigration documentation; however, the appellate court disagreed, finding part of the impact of the section occurs when immigration information is passed from the school district to State officials, which only affects undocumented school children.<sup>50</sup> Further, the appellate court found Alabama could not demonstrate how the data could be obtained in a different manner—a procedure that would not create an impediment to enrollment—and the State conceded that the information obtained by Section 28 would not provide precise data about the impact of illegal immigrant school children on public education.<sup>51</sup> The appellate court also noted that once State officials learn of the status of immigrant children, federal law requires Alabama to disclose the information upon request.<sup>52</sup> Thus, with no ability to control the dissemination of immigration status to the federal government, providing this information to school districts could subject the children to deportation or removal proceedings, thereby invalidating the section's privacy provisions.<sup>53</sup> The revelation of illegal status of children can also lead to "criminal prosecution, harassment, and intimidation."<sup>54</sup>

Ultimately the appellate court found that the interest in obtaining this information did not justify "significant interference" with a right guaranteed under *Plyler*, thus Section 28 violated the Equal Protection Clause.<sup>55</sup> The

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<sup>48</sup> *Id.* at 1247.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1246. (finding that while all school children were required to demonstrate birthplace, this requirement is simply the means to acquiring the information of unauthorized immigrants.)

<sup>51</sup> *Id.* at 1248–49.

<sup>52</sup> *Id.* at 1247.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1249; *Plyler v. Doe*, 475 U.S. 189, 203 (1979). The U.S. Supreme Court

appellate court enjoined Section 28 to an injunction that included other portions of H.B. 56, finding that Alabama has no interest in enforcing a law that is unconstitutional.<sup>56</sup> The State of Alabama responded by asking the U.S. Supreme Court to hear their challenges on certain blocked provisions of the law, however the Court rejected the appeal to revive certain portions of the law.<sup>57</sup> The United States Supreme Court declined to hear an appeal on H.B. 56 from the State of Alabama.<sup>58</sup>

#### IV. ARGUMENT

Alabama's school enrollment provision is unconstitutional for the following reasons: First, because it imposes a "significant interference with the children's right to education," and second, because Alabama's justification of compiling data about unauthorized immigration in public schools is not sufficient to satisfy *Plyler's* requirements that, due to the importance of a public education, the state cannot erect barriers to deter the enrollment of students, including unauthorized immigrants.<sup>59</sup> Disclosure of an undocumented child's status is unlawful and leads to an increased likelihood of deportation, criminal prosecution, harassment, and intimidation.<sup>60</sup> The consequences of disclosure deter undocumented children from enrolling and attending school, and are thus unconstitutional under *Plyler*.<sup>61</sup> While school districts are not allowed to collect immigration data from enrolling students, school districts may gather information that ensures the government's educational resources are

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in *Plyler* stated, "In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of barriers presenting unreasonable obstacles to advancement on the basis of individual merit." *Id.*

<sup>56</sup> *Hispanic Interest Coal.*, 691 F.3d at 1249.

<sup>57</sup> *Supreme Court Rejects Alabama Immigration Law Appeal*, HUFFINGTON POST (April 29, 2013), [http://www.huffingtonpost.com/2013/04/29/supreme-court-alabama-immigration\\_n\\_3177757.html](http://www.huffingtonpost.com/2013/04/29/supreme-court-alabama-immigration_n_3177757.html).

<sup>58</sup> Scott Neuman, *Justices Let Stand Block On Alabama's Tough Immigration Law*, NPR.ORG, <http://www.npr.org/blogs/thetwo-way/2013/04/29/179831193/justices-let-stand-block-on-alabamas-tough-immigration-law>.

<sup>59</sup> *See Hispanic Interest Coal.*, 691 F.3d at 1249.

<sup>60</sup> *Id.* at 1247.

<sup>61</sup> *Id.*

appropriately directed to those children that live within the school district and ensure that a welcoming school atmosphere is fostered.

The U.S. Department of Justice and U.S. Department of Education disseminated a Fact Sheet entitled *Information on the Rights of All Children to Enroll in School*.<sup>62</sup> The Fact Sheet began by stating that all “children in the United States are entitled to a basic public elementary and secondary education regardless of their race . . . citizenship, immigration status, or the status of their parents/guardians.”<sup>63</sup> School districts that have enrollment processes that deny or discourage children from enrolling in schools because of their immigration status are in violation of federal law.<sup>64</sup>

The Department of Justice and the Department of Education also published a *Dear Colleague Letter* on May 6, 2011, outlining the acceptable actions a school district may make during the enrollment process.<sup>65</sup> The letter first noted that enrollment practices that discourage or chill educational participation based on a student’s or a parent’s actual or perceived immigration status are illegal under federal law.<sup>66</sup> Title IV of the Civil Rights Act of 1964 prohibits school districts from discriminating based on race, color, or national origin.<sup>67</sup> Title IV also prohibits school districts from “unjustifiably utilizing criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, or national origin.”<sup>68</sup> Federal regulations also prevent school districts from taking actions that have the effect of stopping, or that considerably damage, the success of the objectives of a “program for individuals of a particular race,

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<sup>62</sup> U.S. DEPT OF JUSTICE, U.S. DEPT OF EDUC., FACT SHEET: INFORMATION ON THE RIGHTS OF ALL CHILDREN TO ENROLL IN SCHOOL (2011), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201101.pdf> [hereinafter *Fact Sheet*].

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> U.S. DEPT OF JUSTICE, U.S. DEPT OF EDUC., JOINT “DEAR COLLEAGUE” LETTER (May 6, 2011), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201101.pdf> [hereinafter *Dear Colleague*].

<sup>66</sup> *Id.* at 1.

<sup>67</sup> *Id.* at 1; 42 U.S.C. § 2000c-6.

<sup>68</sup> *Dear Colleague*, *supra* note 65, at 1; 28 C.F.R. § 42.104(b)(2).

color, or national origin.”<sup>69</sup> Thus, enrollment procedures, like those in Section 28, must comply with Title IV of the Civil Rights Act of 1964 and avoid taking action that would discourage participation in school enrollment.

The Department of Justice and the Department of Education stated that the citizenship status of a student, their parent, or their legal guardian is not relevant to the student's entitlement to an elementary and secondary public school education.<sup>70</sup> Students cannot be barred from enrolling in public schools on the basis of their immigration or citizenship status.<sup>71</sup> Related, a school district cannot request information from a student, parent, or legal guardian with the purpose or result of denying access to public education on the “basis of race, color, or national origin.”<sup>72</sup>

During the enrollment process public school districts are allowed to require proof of residency within the district.<sup>73</sup> In *Martinez v. Bynum* the U.S. Supreme Court upheld a Texas residency statute that denied tuition-free schooling to children who lived apart from parents or legal guardians for the purpose of attending free public schools.<sup>74</sup> In that case, Plaintiff was a U.S. citizen by birth, and after living with his parents in Mexico decided to move to the U.S. for the purpose of attending free public school.<sup>75</sup> The McAllen Independent School District denied plaintiff's application for admission because he failed the residency requirement.<sup>76</sup> Plaintiff argued the statute was unconstitutional on its face.<sup>77</sup> A bona fide residency requirement is defined as physical presence within an area and the intent to stay.<sup>78</sup> The Court upheld the provision, stating that a bona fide residency requirement that is “appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are

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<sup>69</sup> *Dear Colleague*, *supra* note 65, at 1; 34 C.F.R. § 100.3(b)(2).

<sup>70</sup> *Dear Colleague*, *supra* note 66, at 1.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 2.

<sup>73</sup> *Id.*

<sup>74</sup> *Martinez v. Bynum*, 461 U.S. 321, 333 (1983). The residency provision at issue in *Martinez* was contained in the same statute at issue in *Plyler*. *Id.*

<sup>75</sup> *Id.* at 322–23.

<sup>76</sup> *Id.* at 323–24.

<sup>77</sup> *Id.* at 324.

<sup>78</sup> *Id.* at 330.

enjoyed only by residents.”<sup>79</sup>

The Equal Protection Clause of the Fourteenth Amendment and the constitutional right to interstate travel are not violated by a permissible residency requirement.<sup>80</sup> The Texas statute only mandated a person establish residency before demanding services that are restricted to residents.<sup>81</sup> The Court also found that due to the heavily local nature of public education, bona fide residency requirements are justified.<sup>82</sup> Residency requirements also allow school districts to plan and operate the schools more effectively.<sup>83</sup> The Court held the State does have a substantial interest in mandating bona fide residency requirements to maintain the quality of public schools within local districts.<sup>84</sup>

The immigration status of an enrolling student is not relevant to establishing residency in a school district.<sup>85</sup> To combat fears that a child’s information will be used in deportation proceedings, an undocumented child may establish residency with a telephone or utility bill, mortgage document, or lease.<sup>86</sup> While school districts may require residency information at the time of enrollment, this requirement must be applied equally to all enrolling children.<sup>87</sup>

School districts are also allowed to require a birth certificate from enrolling students to determine whether the student meets age requirements,<sup>88</sup> however a student may not be barred from enrolling based on presenting a foreign birth certificate.<sup>89</sup> In order to negate concerns about providing a foreign birth certificate, school districts should take proactive steps to inform and educate parents the information will only

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<sup>79</sup> *Id.* at 328.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 329.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 329–30.

<sup>85</sup> U.S. DEP’T OF JUSTICE, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS FOR SCHOOL DISTRICTS AND PARENTS, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201101.pdf> [hereinafter *Questions and Answers*].

<sup>86</sup> *Id.* at 1.

<sup>87</sup> *Id.*

<sup>88</sup> *Fact Sheet*, *supra* note 62, at 2.

<sup>89</sup> *Id.*

be used to determine age requirements.<sup>90</sup>

A child's social security number may be requested at the time of enrollment for use as a student identification number,<sup>91</sup> but refusing to provide a social security number cannot result in the refusal to enroll a child at a public elementary or secondary school.<sup>92</sup> If a social security number is requested by the school district, the district must tell the individual that offering the information to the district is voluntary, what the basis for collection is, and what the information will be used for.<sup>93</sup> Requests for social security numbers must be made to all enrolling students and not a specific group or groups.<sup>94</sup> The Department of Justice and the Department of Education stated that giving students randomly selected numbers can be an alternative to requiring social security information.<sup>95</sup> The Department of Justice and the Department of Education reason that by assigning randomly selected numbers, a school district can avoid the discouragement to enrollment that requesting social security numbers can cause.<sup>96</sup>

In some situations, school districts are federally mandated to collect racial and ethnic data, however, that information cannot be used to discriminate against school children.<sup>97</sup> A student whose parent or guardian declines a request for racial or ethnic data cannot be denied enrollment by the school district.<sup>98</sup> The Department of Justice and the Department of Education cautioned school districts to assess compliance of enrollment procedures with relevant law and also to analyze patterns in enrollment data to determine whether there are barriers to enrollment for a specific group of students.<sup>99</sup> The Department of Justice also recommended that school districts acquire non-essential information after the student has

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<sup>90</sup> *Questions and Answers*, supra note 85, at 3-4.

<sup>91</sup> *Id.*, at 2, 3-4. Immunization history may also be requested at the time of enrollment. *Id.*

<sup>92</sup> *Id.*, at 2; 5 U.S.C. § 522a(note).

<sup>93</sup> *Questions and Answers*, supra note 85, at 2; 5 U.S.C. § 522a(note).

<sup>94</sup> *Dear Colleague*, supra note 65, at 2.

<sup>95</sup> *Questions and Answers*, supra note 85, at 2.

<sup>96</sup> *Id.*

<sup>97</sup> *Fact Sheet*, supra note 62, at 2.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 2-3.

enrolled, in order to create a more open environment.<sup>100</sup>

In *Brown v. Board of Education of Topeka*, the U.S. Supreme Court stated that obtaining an education has supreme importance in our society.<sup>101</sup> Obligatory attendance laws and the great sums of money the government spends on education demonstrate the value education has in our society.<sup>102</sup> Education is crucial to meaningful participation in our democratic society and without it a child cannot be expected to succeed in life.<sup>103</sup> Further, in *Plyler*, the Court stated education plays crucial role in maintaining the very fabric of our society and nurturing our political and cultural heritage. For the individual, a lack of education poses an obstacle to achievement economically, intellectually, socially, and psychologically and offers immeasurable deleterious effects on his wellbeing. Thus, where a state provides free public education, it “is a right which must be made available to all on equal terms,”<sup>104</sup> and as such cannot be denied due to actions of the state limiting participation through enrollment procedures. The school enrollment procedures contained in Section 28 of H.B. 56 targeted unauthorized immigrant children, which suppressed the attendance of a certain class of students due to their fear of deportation for attending school. The barriers to enrollment erected in Section 28 were contrary to the principles outlined in *Brown*, and as such could not stand.

## V. CONCLUSION

A public school district’s enrollment policies which have the effect of frustrating the attempt of undocumented children to attend public schools is unconstitutional and contrary to our nation’s view on the importance of education and the advancement of the individual.<sup>105</sup> Further, the Department of Justice and the Department of Education affirm that school districts that have enrollment processes that deny or discourage children from enrolling in public schools because of

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<sup>100</sup> *Questions and Answers*, *supra* note 85, at 4.

<sup>101</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Dear Colleague*, *supra* note 65, at 1.

their immigration status, or have this purpose, are in violation of federal law.<sup>106</sup> Section 28 of H.B. 56 violated federal law as the requirements erected an impermissible barrier to education for unauthorized immigrant students.<sup>107</sup>

A school district may require students to meet certain residency requirements before enrolling in school;<sup>108</sup> immigration status, however, is not relevant to establishing residency.<sup>109</sup> Utility bills or mortgage documents are sufficient to establish residency within a school district,<sup>110</sup> but the condition must be applied to all students equally.<sup>111</sup> A school may also require students to produce birth certificates upon enrollment, but must accept foreign birth certificates.<sup>112</sup> The production of a foreign birth certificate cannot be a basis for denying enrollment.<sup>113</sup> Social security numbers may be collected during enrollment for the purpose of issuing student identification numbers, but the district must explain to the individual that divulging the information is voluntary, what the basis for collection is, and what the information will be used for.<sup>114</sup> Social security number requests at the time of enrollment must be made to all students and not a specific group or groups.<sup>115</sup>

The measures encouraged by the Department of Justice and the Department of Education for school districts are legal and constitutional. The enrollment procedures recommended maintain a welcoming school atmosphere and preserve our longstanding view as a society that education is a key component to a thriving democratic society and a successful life as outlined in *Plyler* and *Brown*,<sup>116</sup> which should not be denied to any child, regardless of immigration status.

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<sup>106</sup> *Fact Sheet*, *supra* note 62, at 1.

<sup>107</sup> *Hispanic Interest Coal. v. Governor of Alabama*, 691 F.3d 1236, 1249 (11th Cir. 2012).

<sup>108</sup> *Id.*

<sup>109</sup> *Questions and Answers*, *supra* note 85, at 1.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Fact Sheet*, *supra* note 62, at 2.

<sup>113</sup> *Id.*

<sup>114</sup> *Questions and Answers*, *supra* note 85 at 3–4.

<sup>115</sup> *Id.*

<sup>116</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).