No. 11-14535-CC

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Hispanic Interest Coalition of Alabama, *et al*.,
Plaintiffs-Appellants,

v.

Governor Robert Bentley, *et al*.,
Defendants-Appellees

On Appeal from the United States District Court
For the Northern District of Alabama
No. 5:11-cv-02484-SLB

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION, THE ALABAMA EDUCATION ASSOCIATION, AND THE NATIONAL SCHOOL BOARDS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS AND URGING REVERSAL OF THE DISTRICT COURT'S DENIAL OF A PRELIMINARY INJUNCTION

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Counsel for *Amici Curiae* hereby certifies, pursuant to Eleventh Circuit Rule 26.1-1, that the following have an interest in the outcome of this case:

AIDS Action Coalition

Alabama

Alabama Appleseed

Alabama Coalition Against Domestic Violence (ACADV

Alabama Council on Human Relations

Alabama Education Association (AEA)

Alabama Fair Housing Center *et al.*

Alabama New South Coalition

Alabama NOW

Alabama State Conference of the National Association for the Advancement of Colored People (NAACP)

Alianza Latina en contra de la Agresión Sexual (ALAS)

American Friends Service Committee

American Immigration Lawyers Association (AILA)

The Anti-Defamation League

Argentine Republic

Arizona Coalition Against Domestic Violence,

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Asian American Legal Defense and Education Fund

Asian Pacific American Labor Alliance

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Barber, Robert

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Central American Resource Center

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Coalition to Abolish Slavery & Trafficking (CAST)

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Family Values @ Work Consortium

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Jane Doe # 4, Plaintiff/Appellant

Jane Doe # 5, Plaintiff/Appellant

Jane Doe # 6, Plaintiff/Appellant

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Joaquin, Linton

John Doe # 1, Plaintiff/Appellant

John Doe # 2, Plaintiff/Appellant

John Doe # 3, Plaintiff/Appellant

John Doe # 4, Plaintiff/Appellant

John Doe # 5, Plaintiff/Appellant

John Doe # 6, Plaintiff/Appellant

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The National Asian Pacific American Bar Association

National Asian Pacific American Women's Forum

National Association for Chicana and Chicano Studies

National Association of Criminal Defense Lawyers (NACDL)

The National Association of Latino Elected and Appointed Officials

National Association of Social Workers and the Alabama Chapter of NASW

National Coalition Against Domestic Violence

National Council of Jewish Women

National Council of La Raza

The National Dominican American Council

National Education Association (NEA)

National Employment Law Project

The National Fair Housing Alliance

National Guestworker Alliance

The National Immigration Law Project of the National Lawyers Guild

National Latina Institute for Reproductive Health

National Women's Law Center

National Lawyers Guild

National School Boards Association

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Republic of El Salvador

Republic of Guatemala

Republic of Honduras

Republic of Nicaragua

Republic of Paraguay

Republic of Peru

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Shin, Susan L.

Schoen, David I.

Sikh American Legal Defense & Education Fund

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Sinclair, Winfield J.

Smith, Deborah S.

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Society of American Law Teachers

South Alabama Center for Fair Housing

South Asian Americans Leading Together

Southern Christian Leadership Conference

Southern Coalition for Social Justice

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Wisconsin Coalition Against Domestic Violence

Wisconsin Coalition Against Sexual Assault

National Association of Working Women

The counsel for *Amici Curiae* further certifies, pursuant to Federal Rule of Appellate Procedure 26.1, that *Amici Curiae*, NEA, and NSBA have no parent corporation, that the parent corporation of AEA is NEA, that none of the *Amici Curiae* are publicly traded, and that no corporation directly or indirectly holds 10% or more of the ownership interest in any of the *Amici Curiae*.

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STATEMENT OF INTEREST OF AMICI CURIAE AND RULE 29 STATEMENT

The National Education Association (NEA) is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges and universities. As expressed in Resolution B-24, NEA has long supported the right of undocumented students and the children of undocumented immigrants to a free public education: "The National Education Association believes that, regardless of the immigration status of students or their parents, every student has the right to a free public education.... The Association supports access to higher education for undocumented students…. The Association also believes that neither educational systems nor their employees are responsible for the determination and enforcement of legal residency status."

The Alabama Education Association (AEA) is a statewide employee organization with more than 104,000 members employed at all levels of public education. AEA's members range from high school students planning for an education career to retirees, but the vast majority are active classroom teachers and education support professionals. AEA's membership includes educators employed by every one of Alabama's city and county boards of education and two-year community colleges. AEA is

the Alabama affiliate of the NEA, and supports those resolutions adopted by our national organization. In an era of diminishing resources for public education, AEA believes that adding law enforcement duties to educators will take valuable instructional time and resources away from Alabama students. AEA believes that educators' time is best spent educating, not trying to enforce immigration laws.

The National School Boards Association (NSBA) is a federation of state associations of school boards representing the school board members governing approximately 14,000 local school districts serving more than 46.5 million public school students. NSBA believes that 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.

The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no other than amici and their counsel made a monetary contribution to its preparation or submission. *See* Fed.R.App.P 29(c)(5).

INTRODUCTION

This case is about the power of fear. The purpose and effect of HB 56 is to use fear and intimidation to drive undocumented immigrants and their children out of the state of Alabama. The candid legislative findings set forth in Section 2 of HB 56 emphasize that the Act is intended to remedy the "economic hardship" allegedly inflicted on the state by "illegal immigration," including, specifically, to remedy the "adverse[] [e]ffect" on "public education resources" caused by the constitutional mandate that Alabama provide a free public education to undocumented students.

In this respect, HB 56 is on all fours with Georgia's HB 87, a less harsh anti-immigrant law that was recently struck down. In rejecting the state's proffered justifications for the statute as "gross hypocrisy," District Court Judge Thomas W. Thrash, Jr. found that the "apparent legislative intent is to create such a climate of hostility, fear, mistrust and insecurity that all illegal aliens will leave Georgia." *Georgia Latino Alliance For Human Rights v. Deal*, 2011 WL 2520752, *11 (N.D. Ga. 2011). So too with Alabama's HB 56.

As Alabama House Majority Leader Micky Hammon, chief sponsor of HB 56, explained, the purpose of the Alabama law is precisely the same. "When this bill passes and is signed into law, I think you will see illegals

leaving north Alabama and going elsewhere…. This bill is designed to make these people export themselves."[1] "We really want to prevent illegal immigrants from coming to Alabama and to prevent those who are here from putting down roots," he said.[2] After HB 56 was passed, Hammon boasted that HB 56 will "rid[] this state of illegal immigrants…."[3] He later crowed that the reason the instant lawsuit was filed was that the law was having its intended effect because illegal aliens "are packing up and leaving Alabama…. That was the intent of the bill in the first place…."[4]

Scott Beason, the Act's chief sponsor in the Senate, amplified these sentiments with a chilling analogy. Speaking to the Cullman County

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[1] MJ Ellington, *House OKs Immigration Bill*, The Times Daily, April 6, 2011, *available at* http://www.timesdaily.com/article/20110406/NEWS/110409882?Title=House-OKs-immigration-bill .

[2] R. Cort Kirkwood, *Alabama Gov Signs Immigration Bill; Leftists Outraged*, New American, June 10, 2011, http://www.thenewamerican.com/usnews/immigration/7817-alabama-gov-signs-immigration-bill-leftists-outraged.

[3] Tamika Bickham, *The Alabama Legislature Approves Immigration Bill*, CBS 8 News WAKA Montgomery, June 2, 2011, http://www.waka.com/news/7688-the-alabama-legislature-passes-immigration-bill.html.

[4] Reuters.com, *Groups Seek to Block Tough Alabama Immigration Law*, July 21, 2011, http://www.reuters.com/article/2011/07/21/us-immigration-alabama-idUSTRE76K63C20110721.

Republican Party, Beason explained that the legislature has to "empty the clip, and do what has to be done" to deal with "illegal immigrants."[5]

The resulting Act imposes an array of restrictions on immigrants designed to drive those without proper documentation from the state. Those restrictions include several – sections 8, 11, 13, 15 and 28 of the statute – that will particularly undermine the role public schools play in providing an education and a place of safe harbor to all children, both documented and undocumented. Consistent with their longstanding commitment to public education for all, *amici* NEA, AEA, and NSBA submit this brief to detail the respects in which the provisions of HB 56 related to the public schools are unconstitutional.

SUMMARY OF ARGUMENT

Section 28 of the Act, which requires public schools to "determine" whether students seeking to enroll in Alabama's public schools or their parents are in this country legally, violates the Equal Protection Clause because it effectively denies to undocumented children their right to a public education recognized by *Plyler v. Doe*. Section 13 of the Act, which makes it a crime to "[c]onceal, harbor, or shield" persons known to be

[5] Sam Rolley, *Beason: Dems Don't Want to Solve Illegal Immigration Problem,* The Cullman Times, February 6, 2011, http://www.cullmantimes.com/local/x2072622472/Beason-Dems-don-t-want-to-solve-illegal-immigration-problem.

undocumented, is unconstitutional because it conflicts with the constitutional duty of schools and their employees under *Plyler*. It also conflicts with school employees' legal obligation under state law to supervise and protect the students entrusted to their care. Section 8, which prohibits undocumented immigrants from enrolling or attending any Alabama public postsecondary education institution, is preempted by federal law and violates the Equal Protection Clause.

ARGUMENT

I. SECTION 28 OF THE ACT VIOLATES THE EQUAL PROTECTION CLAUSE UNDER *PLYLER V. DOE*

The cornerstone of HB 56's provisions relating to education is section 28. Section 28(a)(1) provides that school employees "shall determine whether the student enrolling in public school was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States…." Subsection (a)(2) requires parents to provide a valid birth certificate of the child. In the absence of a valid birth certificate showing birth in the U.S., a document establishing citizenship or immigration status, or a sworn declaration from his parent that the child is a "citizen or an alien lawfully present in the United States," the child is deemed to be "an alien unlawfully present in the United States." § 28(a)(5).

Based on these enrollment disclosures, each school district in the state must submit to the State Department of Education an annual report verifying the number of undocumented students enrolled in each school in the district. § 28(a)(5)(b) and (c). The State Department of Education is then required to use this data to prepare an annual report to the state legislature. These enrollment disclosure requirements will result in school employees learning information about the immigration status of students and their families that they are obligated to report under HB 56 or face criminal sanction.[6]

A. The Act's enrollment disclosure requirements and its reporting requirements already have and will continue to deter undocumented

[6] Section 5(f) of HB 56 requires employees of political subdivisions of the state—including public school employees—to report any violations of the "Act." That provision also makes it a state crime (obstructing governmental operations) for such employees to "willfully fail[] to report any violation of this act." Before the court below, the Alabama state defendants argued that this provision of the statute does not mean what it says because the word "Act" will be changed to "section" when the bill is codified. State Defendants' Response to Plaintiffs' Motion for Preliminary Injunction and Memorandum in Support. (Case 5:11-cv-02484-SLB, Doc. 82 at 34). See also Declaration of Alabama Code Commissioner Jerry Bassett (stating that when HB 56 is codified, he intends to change the word "act" used in 5(f) to the word "section") ((Case 5:11-cv-02484-SLB, Doc. 82-2 at 2).

Because the Alabama Code Commissioner lacks authority to "alter the sense, meaning, or effect of any Act" (Ala. Code § 29-7-8(a)), this Court should address the statute as it stands now, not as it may be rewritten or amended in the future.

immigrants from enrolling their children–documented or not–in Alabama's public schools. As the record evidence demonstrates, parents will decline to enroll their children due to fear that the enrollment process will result in the child's or the parents' deportation. In his declaration, John Doe #2 states that HB 56 will require him to reveal the undocumented status of himself and his son, and he has great fear that "school officials will call the federal immigration authorities and cause me or my son to be deported." (¶5, Vol. I, R. 37-32). He adds, "that is a risk that I cannot take" (*id*.), and it "would practically force my children out of school." *Id*., ¶6. Jane Doe #5 states flatly, "As a result [of HB 56], I will not be able to enroll my child in school…. I fear HB 56 will seriously hurt my son's future." (¶6, Vol. I, R. 37-29). Jane Doe #2 expresses her fear that HB 56 will result in school officials reporting her to the police and being arrested. (¶9, Vol. I, R. 37-26). Because of that fear, she is considering home schooling her children. *Id*. Jane Doe #3 is afraid that HB 56 "will affect [her] daughter's school attendance." (¶8, Vol. I, R. 37-27). She is afraid to give school officials contact information about her undocumented husband because she fears that they will turn over that information to immigration officials. *Id*.

HB 56 has had precisely the results that its sponsors intended: large numbers of immigrant children have dropped out of school. According to

Reuters, the Alabama Department of Education reported that the day after the district court's September 28 ruling, 2,454 Hispanic students were absent from school, about 7 percent of the 34,657 Hispanic students enrolled statewide.[7]

The drop in enrollment that followed the district court's ruling has been so dire that the U.S. Department of Justice (DoJ) has initiated an investigation of possible violations of Title IV and *Plyler v. Doe* by Alabama's public schools. On November 1, 2011, Assistant Attorney General Thomas E. Perez sent the superintendent of every Alabama school district a letter stating that "the requirements of Alabama's H.B. 56 may chill or discourage student participation in, or lead to the exclusion of school-age children from, public education programs based on their or their parents' race, national origin, or actual or perceived immigration status…."[8] The letter directs each school district to provide DoJ with a monthly update of certain enrollment information. Among other things, the districts must provide a list of all enrolled students identified by race, national origin and English Language Learner (ELL) status, a list of students who have

[7] http://www.reuters.com/article/2011/10/12/usa-immigration-alabama-idUSN1E79916V20111012.

[8] http://blogs.usdoj.gov/blog/archives/1710.

withdrawn or been absent from school identified by race, national origin, and ELL status, and the number of students absent on October 3 and 4, 2011 identified by race and national origin.

B. Section 28's requirements that schools "determine" the immigration status of students or their parents deprive undocumented students or the children of undocumented immigrants of their right to a public education in violation of the Equal Protection Clause.[9] Since 1982, it has been settled law that states may not deny children a public education based on their immigration status. *Plyler v. Doe*, 457 U.S. 202 (1982). At issue in *Plyler* was a Texas statute that withheld state funding for the education of undocumented students and that permitted school districts to deny enrollment to such students. *Id.* at 203. Students who had been excluded from public school as permitted by the statute challenged the law as unconstitutional. The case thus posed the question

> whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens. [*Id.*]

[9] We fully agree with the *HICA* plaintiffs that the appropriate Equal Protection standard for judging § 28's treatment of undocumented students under *Plyler* is "intermediate scrutiny." Opening brief of *HICA* Plaintiffs-Appellees, at 56.

Given the "supreme importance" of public school systems as the "primary vehicle for transmitting 'the values on which our society rests'," and the central role education plays in "preparing individuals to be self-reliant and self-sufficient participants in society," the Court answered this question "No." *Id.* at 222 (citations omitted).

"What we said 28 years ago in *Brown v. Board of Education*, 347 U.S. 483 (1954), still holds true:"

> Today, education is perhaps the most important function of state and local governments…. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. (quoting *Brown*, 347 U.S. at 493).

Given the costs to society and undocumented children of denying them a free public education, the Court held that the statute had no rational basis and therefore violated the Equal Protection Clause. *Id.* at 224. Notably, in reaching that result the Court considered, and rejected, the state's contention that denying undocumented children an education would

somehow save the state money, finding it "difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare and crime." *Id.* at 229-30.

Plyler remains the law of the land to this day and prevents, not just a direct ban on the public school enrollment of undocumented students, but also actions that have the same effect as such a ban. *Plyler* itself held unconstitutional the denial of funding to school districts that choose to admit undocumented students – an action that only indirectly deterred such enrollment.

In line with that result, the consistent guidance of the United States Department of Education ("ED") since *Plyler* has been that school districts "should not take action to discourage the participation of students that could be viewed or would likely result in denying access" to public schools for undocumented students. Declaration of T. Miller (*U.S. v. Alabama*, Case No. 2:11-CV-02756-WMA (N.D. Ala, Northeastern Division 2011)). ED's latest guidance to that effect was issued on May 6, 2011, in the form of a Dear Colleague letter to school superintendents issued jointly with the United States Department of Justice.

In that letter, ED and DoJ expressly condemn as a violation of *Plyler* any actions by school districts that deter undocumented students or their parents from enrolling such students in public school. The letter (appended here as Attachment A),[10] begins:

> Recently, we have become aware of student enrollment practices that may chill or discourage the participation, or lead to the exclusion, of students based on their or their parents' or guardians' actual or perceived citizenship or immigration status. These practices contravene Federal law.

Specifically, "[a]s *Plyler* makes clear, the undocumented or non-citizen status of a student (or his or her parent or guardian) is irrelevant to that student's entitlement to an elementary and secondary public education." For this reason, "districts may not request information with the purpose or result of denying access to public schools on the basis of race, color, or national origin." The letter urges school districts "to review the documents your district requires for school enrollment to ensure that the requested documents do not have a chilling effect on a student's enrollment in school."

In line with this longstanding guidance from ED, every state department of education that has advised local school districts regarding whether, under *Plyler*, they may inquire into the citizenship status of

[10] The letter is also posted at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201101.pdf.

students seeking to enroll or their parents, has declared that such inquiries are impermissible under *Plyler*. Specifically, state departments of education in Maryland,[11] New York,[12] New Jersey,[13] Iowa,[14] Michigan,[15]

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[11] "We agree … that one effect of collecting information on immigration status would be to make some immigrant parents so fearful that they will not enroll their children in school. If that were to occur, the protections drawn by *Plyler v. Doe* to provide the benefit of education to immigrant children would be nullified." *Board of Frederick County Commissioners v. Frederick County Board of Education*, Maryland State Board of Education Opinion No. 09-11 (Mar. 24, 2009), *http://www.mnsmd.org/files/state-board-opinions/Frederick%20County%2009-11.pdf*.

[12] *Plyler* "prohibit[s] any district actions that might 'chill' or discourage undocumented students from receiving a free public education. Accordingly, at the time of registration, schools should avoid asking questions related to immigration status or that may reveal a child's immigration status…." New York Department of Education, *Student Registration Guidance*, August 30, 2010, http://www.p12.nysed.gov/sss/pps/residency/studentregistrationguidance082610.pdf.

[13] Under *Plyler*, "school districts are prohibited from requiring students to disclose or document their immigration status, making inquiries of students or parents that may expose their undocumented status or engaging in any practices that 'chill' or hinder the right of access to public schools." New Jersey Department of Education, *Enrollment of Immigrant Students and/or Undocumented Students*, http://www.state.nj.us/education/bilingual/data/immenrol.htm.

[14] Pursuant to *Plyler*, "[s]chools may not question immigrant students as to their 'legal' status and may not demand their 'documentation.'" Iowa Department of Education, *Education of Immigrant Children*, *http://www.educateiowa.gov/index.php?option=com_content&view=article&id=1420:plyler-v-doe-case&catid=411:legal-lessons*.

[15] "As a result of the Supreme Court decision, public schools MAY NOT: … Require students or parents to disclose or document their immigration status." Michigan Department of Education, *Foreign Students Enrolled in Public School Districts*, March 17, 2006 (Emphasis in original),

Massachusetts,[16] Washington,[17] Kentucky,[18] Illinois,[19] and Oregon[20] all have issued opinions or guidance advising local school districts that they are

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http://www.michigan.gov/documents/mde/foreign_students_3-06_193217_7.pdf.

[16] Under *Plyler*, "school districts may not request information with the purpose or result of denying access to public schools on the basis of race, color, or national origin …." Massachusetts Department of Education, *Avoiding Discrimination in Enrollment Based on Citizenship or Immigration Status*, Commissioner's Update June 14, 2011, http://www.doe.mass.edu/mailings/2011/cm061411.html.

[17] "As a result of the *Plyler* ruling, public schools may not: … Engage in any practices to 'chill' the right of access to school. Require students or parents to disclose or document their immigration status. Make inquiries of students or parents that may expose their undocumented status. …" Washington Department of Education, *Immigrant Students' Rights to Attend Public Schools*, http://www.k12.wa.us/MigrantBilingual/ImmigrantRights.aspx.

[18] *Plyler* "held it was unconstitutional for a school to deny free public education to students who were not legally residing in the U.S., and schools could not ask any questions during the enrollment process which would have a 'chilling effect' on a student's right to education." Kentucky Department of Education, *Kentucky Department of Education Guidance on Student Identification Requirements for Initial Enrollment*, *available at* www.education.ky.gov (type in keyword Plyler).

[19] "It is important to understand that a school district cannot require you [to] provide information concerning your or your child's immigration status…." Illinois Department of Education, *The Rights of Children to Receive a Free Public Education* (citing *Plyler*), http://www.isbe.net/bilingual/htmls/rightEng.html.

[20] "As a result of *Plyler v. Doe*, school districts must not: … Require students or parents to disclose or document their immigration status. Make inquiries of students or parents that may expose their undocumented status." Oregon Department of Education, *Undocumented Students' Rights to Attend Public Schools*,

prohibited by law from asking students or their parents about their immigration status. Pennsylvania has enacted a state law to the same effect.[21]

Ironically, the Alabama State Department of Education has similarly advised local school districts not to ask about citizenship status when enrolling a child in public school. Its publication, *Equal Education Opportunity and Non-Discrimination Statement*, states, in pertinent part, "the [*Plyler*] court ruled that public schools may not: … [r]equire students or parents to disclose or document their immigration status[, or] [m]ake inquiries of students or parents that may expose their undocumented status."[22]

Not surprisingly, the only other state law that attempted to mandate that local school districts require students and their parents to disclose their citizenship status was struck down. In 1994, the voters of California passed Proposition 187. Among other things, section 7 of Proposition 187 required local school districts to determine whether the parents of children seeking

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http://www.ode.state.or.us/policy/district/schooladmission/undocsturightstoattpubsch092004.pdf.

[21] "A school may not inquire regarding the immigration status of a student as part of the admission process." 22 Pa. Code § 11.11(d) (2011).

[22] Available at http://alex.state.al.us/ell/node/58. As of November 20, 2011, this advisory was still posted on the Department's webpage.

enrollment are "illegal aliens," and, if so, the children were to be denied admission. A federal district court easily determined that the provision was unconstitutional "in its entirety" because it conflicted with the mandates of *Plyler*. *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 774 (C.D. Cal. 1995).

The same conclusion follows here. As we have shown, the purpose and effect of the education provisions of HB 56 is to frighten undocumented immigrants from enrolling their children in Alabama's public schools. In line with *Plyler*'s mandates, and the consistent interpretation of those mandates by the federal Department of Education, state education agencies throughout the country, and the sole other federal court to have ruled on the issue, this Court should not permit the state to implement this unconstitutional and unconscionable scheme.

C. What we have said thus far disposes entirely of any contention that § 28 may be defended as a matter of law. But we would be remiss if we did not add that *Plyler*'s policy underpinnings remain as sound today as they were in 1982.

Education remains "pivotal to 'sustaining our political and cultural heritage," *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003), and is now, more than ever, central to an individual's wellbeing. "[I]t is doubtful that

any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Association for Disabled Americans v. Florida International University*, 405 F.3d 954, 957-78 (11th Cir. 2005) (quoting *Brown*, 347 U.S. at 493).

Illiteracy is expensive. Certainly, as a factual matter, education remains a key factor in determining an individual's economic wellbeing. According to the U.S. Census Bureau, over a 40 year full-time work life, individuals with a bachelor's degree earn on average a cumulative total of $2.1 million, more than double what a high school dropout earns. U.S. Census Bureau, *The Big Payoff: Educational Attainment and Synthetic Estimates of Work-Life Earnings* (2002). And on a yearly income basis, the disparities are equally stark. *See* NCES Report, *The Condition of Education* (2009) (reporting that median earnings for people between age 25 and 34 were $45,000 for those with a bachelor's degree, $35,000 with an associate's degree, $29,000 with a high school diploma or equivalent and $23,000 for those who did not complete high school).

Moreover, these earnings–or lack thereof–translate into very real societal benefits and costs. In a study titled *The Costs and Benefits of an*

Excellent Education for All of America's Children,[23] well-respected economist Henry Levin examined the cost to government of high school dropouts. Not surprisingly, he concludes that high school graduates provide higher tax revenues as well as lower government spending on health care and crime. Specifically, when compared to high school dropouts, each new high school graduate yields a public benefit of $209,000 in higher government revenues and lower government spending. Levin further concludes that, if the number of high school dropouts were cut in half, the government would reap $45 billion in extra tax revenues and reduced costs. He writes, "If there is any bias to our calculations, it has been to keep estimates of the benefits conservative. Sensitivity tests indicate that our main conclusions are robust: the costs to the nation of failing to ensure high school graduation for all America's children are substantial." *Supra*, n.23 at 1.

These numbers prove the error in HB 56's legislative findings, which emphasize that the Act is intended to remedy the "economic hardship" allegedly inflicted on the state by "illegal immigration," including

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23 http://www.cbcse.org/media/download_gallery/Leeds_Report_Final_Jan2007.pdf.

specifically the "adverse[] [e]ffect" on "public education resources" caused by *Plyler*'s mandate that Alabama educate undocumented students. Once the true costs to society are calculated, it is clear that Alabama's ill-conceived and misguided effort to push undocumented students out of its schools will actually wind up costing the State millions of dollars.

II. SECTION 13 CONFLICTS WITH BOTH *PLYLER* AND WITH THE LEGAL DUTY OF SCHOOL EMPLOYEES TO SUPERVISE STUDENTS ENTRUSTED TO THEIR CARE

The Act imposes criminal liability on school employees for complying with their legal duty to supervise and protect the students entrusted to their care. Section 13(1) makes it a crime to

> [c]onceal, harbor, or shield … an alien from detection in any place in this state, including any building or any means of transportation, if the person knows or recklessly disregards the fact that the alien has come to, has entered, or remains in the United States in violation of federal law.

The statute does not define the terms "conceal," " harbor," or "shield." Section 13(2) makes it a crime to "[e]ncourage" someone known to be an undocumented alien to "reside in this state." Section 13(3) makes it a crime knowingly to "[t]ransport" an undocumented alien "in furtherance of the unlawful presence of the alien in the United States." The statute leaves the operative scope of these provisions hazy, but by their terms they place school employees in criminal jeopardy for

transporting undocumented students to, or from, school; shielding such students in school by not reporting them; and encouraging such students to continue their studies.

These three provisions are unconstitutional because they directly conflict with the constitutional obligation schools and their employees have under *Plyler* to provide an education to undocumented children and the children of undocumented immigrants. Most teachers enter the profession because they love children. Their roles involve so much more than teaching. They act as confidant and counselor; they soothe hurt knees and hurt feelings; they act as the child's mom or dad while in school. There often develops a strong bond of trust that is so important in engaging the student in active learning. Inevitably, many teachers will learn which of their pupils are undocumented or the children of undocumented parents. This will occur either because the student confides in the teacher or simply because, in small schools, people will talk.

That being so, there are any number of circumstances in which school employees will commit acts that are unlawful under section 13. Since the statute does not define these key terms, we turn to the ordinary dictionary definition. *Webster's* defines "harbor" as "to give shelter or refuge to"[24] and

[24] *Webster's Ninth New Collegiate Dictionary* (9th ed. 1988).

defines "shield" as "to protect."[25] Thus, by allowing an undocumented student to remain present in the classroom, an act required by *Plyler*, a teacher could be said to "harbor" or "shield" the student. Moreover, if there is a school emergency, such as a tornado, and school employees take action to protect students, then they have committed the crime of "protecting" or "shielding" undocumented students.[26]

Highly publicized Immigration and Customs Enforcement (ICE) raids on workplaces in Grand Island, Nebraska, and Postville, Iowa further illustrate the untenable dilemma faced by teachers and other school employees. In the course of those raids, many undocumented parents of school children were taken into custody, leaving their children with literally no place to go. In the Grand Island ICE raid, for example, 25 children had both parents detained. The school superintendent "worked with school staff members to make sure that every child had a safe place to go."[27] At 8 p.m.,

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[25] *Id*.

[26] Tornados are a real threat to students in Alabama. In April 2011, tornados heavily damaged 18 schools across Alabama, and a 2007 tornado killed eight students in Enterprise, Alabama. http://www.mb.com.ph/node/316673/tornadoe. Eric W. Robelen, *Deadly Tornado Spurs Calls for Emergency Planning*, Education Week, March 14, 2007, http://www.edweek.org/ew/articles/2007/03/14/27tornado.h26.html?qs=safe+haven+2007.

[27] Mary Ann Zehr, *With Immigrants, Districts Balance Safety, Legalities*, Education Week, September 10, 2007,

a number of students remained at the school, so school officials loaded them into their own cars and drove them to the homes of relatives.[28] Some schools were designated as "shelters" for the displaced children.[29] Later, school officials were dispatched to the homes of the undocumented students, delivering brown bags filled with beans, rice and other staples. Included in each bag was a note advising parents about a hotline to call if they needed help after the raid.[30] In the aftermath of the Postville ICE raid, school officials worked until midnight to ensure that affected students "had someone to care for them."[31] When 150 Latino students failed to show up for school the next day, the superintendent sent faculty and staff to their homes to tell parents that it was safe to send their children to school.[32] A 2010 Urban Institute study of the aftermath of six ICE raids found that

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http://www.edweek.org/ew/articles/2007/09/12/03safehaven.h27.html?qs=zehr.

[28] *Id*.

[29] Miriam Jordan, *At Public Schools, Immigration Raids Require New Drill*, Wall Street Journal, June 18, 2007, http://online.wsj.com/article/SB118213234807638691.html.

[30] *Id*.

[31] Mary Ann Zehr, *Iowa School District Left Coping With Immigration Raid's Impact*, Education Week, May 21, 2008, http://www.edweek.org/ew/articles/2008/05/21/38immig.h27.html?qs=ice+raids.

[32] *Id*.

schools often provide assistance to families of undocumented workers affected by the raids.[33]

If these ICE raids had occurred in Alabama, and if school employees had responded to the emergencies in the same manner as school employees in Postville, Iowa and Grand Island, Nebraska, they would be guilty of a crime under § 13. Since transporting any person suspected of, or known to be, undocumented is unlawful, driving the children of undocumented workers to a relative's home following a tornado is illegal under Alabama law. Likewise, visiting the homes of persons detained for being undocumented for the purpose of urging their children to return to school would violate the provision of the law criminalizing the act of "[e]ncourag[ing]" someone known to be an undocumented alien to "reside in this state." Providing undocumented families with food and information about resources to help them is both sheltering and encouraging undocumented families to continue to reside in the state. And if school employees allowed undocumented students to stay in their homes or allowed them to visit for a short while, they would potentially be guilty of harboring under state law.

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[33] Urban Institute, *Facing Our Future: Children in the Aftermath of Immigration Enforcement*, February 2, 2010, http://www.urban.org/url.cfm?ID=412020&renderforprint=1.

What makes § 13 even more indefensible is that it conflicts with the legal responsibility of school employees and school districts not to leave students in their care unsupervised. If they violate that duty, *e.g.*, by leaving the children of ICE arrestees stranded at school or failing to shelter students after a tornado, both individuals and school districts can be sued for damages.[34] In *Patton v. Black*, for example, the Alabama Supreme Court

[34] *See, e.g., Personal liability of public school teacher in negligence action for personal injury or death of student*, 34 A.L.R.4th 228; *Hanson v. Reedley Joint Union High Sch. Dist.*, 43 Cal. App. 2d 643, 650 (1941) (school district liable for a teacher's instruction that students obtain transportation home from another student and were injured); *District of Columbia v. Royal*, 465 A.2d 367, 370 (D.C. 1983) (school district negligently failed to supervise a six-year-old student who was injured while waiting to be picked up after school); *Broward County School Bd. v. Ruiz*, 493 So. 2d 474, 479 (Fla. Dist. Ct. App. 1986) (school liable to a student who was attacked and beaten by three other students while waiting in the cafeteria for a ride home); *Gary ex rel. Gary v. Meche*, 626 So. 2d 901, 905 (La. Ct. App. 1993) (school board liable for the injury of a six-year-old student who ran across the street and hit a truck); *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 197 (2000) (teacher and school district were negligent where a student's shirt caught on fire during a welding class); *Ernest v. Red Creek Cent. Sch. Dist.*, 717 N.E.2d 690, 693 (N.Y.App. Div. 1999) (plaintiff made out a prima facie case of negligence against the school district in releasing walking students before the departure of school buses because a "school district's duty of care requires continued exercise of control and supervision in the event that release of the student poses a foreseeable risk of harm"); *Barth v. Central School Dist.*, 278 A.D. 585 (N.Y. App. Div. 1951) (school district liable for the death of a student who was hit by a school bus because the school failed to provide adequate supervision); *Moore by & Through Knight v. Wood County Bd. of Educ.*, 200 W. Va. 247 (1997) (finding there was a genuine issue of material fact regarding the negligent absence of supervision where a child was injured

held that a physical education teacher could be held liable, in part, for leaving his class unsupervised, which resulted in the injury to a student. [35]

In light of this Catch-22, it is fair to ask: what should school employees do when confronted with an emergency at school caused by a natural disaster or an ICE raid? If they protect or shelter students they know to be undocumented or give them a ride home, they arguably are guilty of a crime. If they fail to act and to provide proper supervision, they and their school districts can be held liable for damages. And if they try to remove known undocumented students from their classrooms and deprive them of an education, they have violated the constitution under *Plyler*. No school employee should ever be compelled to make such an impossible choice.

III. SECTION 8 VIOLATES THE EQUAL PROTECTION CLAUSE

Section 8 of HB 56 bans admission to Alabama's public postsecondary institutions for aliens who are not lawfully present in the United States *and* for lawfully present aliens who do not have lawful permanent resident status or a nonimmigrant visa. The District Court struck down § 8 on the ground that its "[c]lassification of aliens for purposes of

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when another student slammed him to the ground while both were waiting for the bus after school).

[35] 646 So. 2d 8 (Ala. 1994).

determining who is eligible to attend Alabama's public postsecondary institutions is preempted [by federal law] as only Congress may classify aliens." (*HICA* Opinion at 43-44, Vol. IV, R. 137). We concur in this reasoning and urge the court to affirm this holding. We also offer two alternative bases for striking down § 8.

1. As demonstrated by the violent rhetoric surrounding the enactment of HB 56 (*supra*, pp. 3-5), the Act was motivated by virulent, anti-immigrant sentiment. As in other states, conservative politicians have used the issue of illegal immigration to fire up and appease their political base. It is comparable, in a constitutional sense, to the venomous debate involving the rights of gay and lesbian persons. In *Romer v. Evans*,[36] the Supreme Court confronted Colorado Amendment 2, adopted by the electorate, that amended the state constitution to prohibit state and local governments from enacting laws and policies that banned discrimination against gay and lesbian persons. Applying a rational basis test, the Court ruled that the amendment violated Equal Protection.

The Court first observed that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. '[I]f the constitutional conception of

[36] 517 U.S. 620 (1996).

"equal protection of the laws" means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" 517 U.S. at 634-35 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (emphasis in original)). The Court concluded:

> We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit. "[C]lass legislation ... [is] obnoxious to the prohibitions of the Fourteenth Amendment...." *Civil Rights Cases*, 109 U.S. [3,] 24 [(1883)].
>
> We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do.

517 U.S. at 635. As the Court observed in *Plyler*, "[s]ome classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law." *Plyler*, 457 U.S. at 218.

As we have shown, HB 56 is based on a "bare desire to harm a politically unpopular group" and "reflect[s] deep-seated prejudice." It is "obnoxious" "class legislation" and a "status-based enactment" "born of

animosity toward the class" of undocumented immigrants. It is intended to make them "unequal to everyone else." As such, it violates the Equal Protection Clause.

2. Section 8 fails to pass constitutional muster even under a less stringent rational basis test. The stated purpose of HB 56, including § 8, is to remedy the "economic hardship" allegedly inflicted on the state by "illegal immigration." But as the *Plyler* Court emphasized, "[t]here is no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc." *Plyler*, 457 U.S. at 228. The Court's observation in this regard is also true today.

A ground-breaking study by the College Board documents the great benefits, both to individuals and to society at large, that accompany earning a college degree. Entitled *Education Pays: The Benefits of Higher Education for Individuals and Society*,[37] the study reaches several important conclusions:

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37 http://www.collegeboard.com/prod_downloads/press/cost04/EducationPays2004.pdf.

- Workers with a college degree earn much more and were much less likely to be unemployed than those with only a high school diploma;
- The annual median income of college-educated workers is $21,900 more than those with a high school diploma;
- College degree holders contribute more to tax revenues and are less likely to depend on social safety-net programs, generating decreased demand on public budgets;
- College graduates have lower smoking rates and lower incarceration rates that non-graduates;
- Higher levels of education are correlated with higher levels of civic participation, including volunteer work;
- The children of college graduates display higher levels of school readiness than children of non-graduates and are more likely to attend college themselves;
- Statistically, Hispanics are underrepresented in the ranks of college attendees.

The benefits of a college degree identified by the College Board study mirror the disadvantages imposed by denying students a K-12 education highlighted by the *Plyler* Court. These include: impairing the student's "ability to live within the structure of our civic institutions" and to "contribute … to the progress of our Nation," and taking a toll on the "social, economic, intellectual, and psychological well-being of the individual." Education at all levels helps preserve "a democratic system of government." As the College Board study found, earning a college degree enhances government revenues and decreases the burden on government by decreasing unemployment, incarceration, and the utilization of needs-based government services.

Thus, the state's ban on a public higher education for a whole class of aliens "is not a rational response to legitimate state concerns" (*Plyler*, 457 U.S. at 225, n. 21) and has not been shown to "further[] some substantial state interest. *Id*. at 230. Its purpose and effect is to deny undocumented immigrants access to public postsecondary education and thus to create a permanent underclass of persons lacking the skills to compete in an advanced economy. As such, § 8 violates the Equal Protection Clause.

CONCLUSION

Fear is a powerful tool. History teaches that unscrupulous governments through the ages have used fear to intimidate and manipulate their peoples. So it is with HB 56. As we have shown, the purpose and effect of section 28 is to frighten undocumented immigrants so that they don't enroll their children in Alabama's public schools. Section 13 threatens school employees with jail for keeping the children of undocumented immigrants out of harm's way. The denial of the opportunity for a college degree set forth in Section 8 is nothing more than a "status-based enactment" based on a "bare desire to harm a politically unpopular group" that will deprive undocumented immigrants and the government of valuable benefits.

For all of these reasons, *amici* respectfully urge the Court to reverse the district court's refusal to enjoin this woefully misguided and deeply offensive legislation.

Respectfully submitted this 21st day of November, 2011.

/s_____

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 28.1(e)(2)(A)

I hereby certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 28.1(e)(2)(A). This brief contains 6,966 words.

s/_____
Michael D. Simpson

CERTIFICATE OF SERVICE

I, Michael D. Simpson, hereby certify that on this 21st day of November, 2011, I caused an original and six copies of the foregoing brief to be sent via Federal Express, overnight delivery, to

John Ley, Clerk
United States Court of Appeals for the Eleventh Circuit
56 Forsyth St., NW
Atlanta, GA 30303-6147

An electronic copy of this brief was also uploaded to the Court website using the EDF Electronic Brief Uploading system. I further certify that on this 21st day of November, 2011, I served the foregoing brief by electronic mail on the following counsel, who have consented in writing to service by electronic means. *See* Fed. R. App. P. 25(c)(1)(D).

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ATTACHMENT "A"

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights
Office of the General Counsel

May 6, 2011

Dear Colleague:

Under Federal law, State and local educational agencies (hereinafter "districts") are required to provide all children with equal access to public education at the elementary and secondary level. Recently, we have become aware of student enrollment practices that may chill or discourage the participation, or lead to the exclusion, of students based on their or their parents' or guardians' actual or perceived citizenship or immigration status. These practices contravene Federal law. Both the United States Department of Justice and the United States Department of Education (Departments) write to remind you of the Federal obligation to provide equal educational opportunities to all children residing within your district and to offer our assistance in ensuring that you comply with the law.

The Departments enforce numerous statutes that prohibit discrimination, including Titles IV and VI of the Civil Rights Act of 1964. Title IV prohibits discrimination on the basis of race, color, or national origin, among other factors, by public elementary and secondary schools. 42 U.S.C. § 2000c-6. Title VI prohibits discrimination by recipients of Federal financial assistance on the basis of race, color, or national origin. 42 U.S.C. § 2000d. Title VI regulations, moreover, prohibit 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, or have the effect of defeating or substantially impairing accomplishment of the objectives of a program for individuals of a particular race, color, or national origin. *See* 28 C.F.R. § 42.104(b)(2) and 34 C.F.R. § 100.3(b)(2).

Additionally, the United States Supreme Court held in the case of *Plyler v. Doe*, 457 U.S. 202 (1982), that a State may not deny access to a basic public education to any child residing in the State, whether present in the United States legally or otherwise. Denying "innocent children" access to a public education, the Court explained, "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. . . . By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation." *Plyler*, 457 U.S. at 223. As *Plyler* makes clear, the undocumented or non-citizen status of a student (or his or her parent or guardian) is irrelevant to that student's entitlement to an elementary and secondary public education.

To comply with these Federal civil rights laws, as well as the mandates of the Supreme Court, you must ensure that you do not discriminate on the basis of race, color, or national origin, and that students are not barred from enrolling in public schools at the elementary and secondary level on the basis of their own citizenship or immigration status or that of their parents

or guardians. Moreover, districts may not request information with the purpose or result of denying access to public schools on the basis of race, color, or national origin. To assist you in meeting these obligations, we provide below some examples of permissible enrollment practices, as well as examples of the types of information that may not be used as a basis for denying a student entrance to school.

In order to ensure that its educational services are enjoyed only by residents of the district, a district may require students or their parents to provide proof of residency within the district. *See, e.g., Martinez v. Bynum*, 461 U.S. 321, 328 (1983).[1] For example, a district may require copies of phone and water bills or lease agreements to establish residency. While a district may restrict attendance to district residents, inquiring into students' citizenship or immigration status, or that of their parents or guardians would not be relevant to establishing residency within the district.

A school district may require a birth certificate to ensure that a student falls within district-mandated minimum and maximum age requirements; however, a district may not bar a student from enrolling in its schools based on a foreign birth certificate. Moreover, we recognize that districts have Federal obligations, and in some instances State obligations, to report certain data such as the race and ethnicity of their student population. While the Department of Education requires districts to collect and report such information, districts cannot use the acquired data to discriminate against students; nor should a parent's or guardian's refusal to respond to a request for this data lead to a denial of his or her child's enrollment.

Similarly, we are aware that many districts request a student's social security number at enrollment for use as a student identification number. A district may not deny enrollment to a student if he or she (or his or her parent or guardian) chooses not to provide a social security number. *See* 5 U.S.C. §552a (note).[2] If a district chooses to request a social security number, it shall inform the individual that the disclosure is voluntary, provide the statutory or other basis upon which it is seeking the number, and explain what uses will be made of it. *Id.* In all instances of information collection and review, it is essential that any request be uniformly applied to all students and not applied in a selective manner to specific groups of students.

As the Supreme Court noted in the landmark case of *Brown v. Board of Education*, 347 U.S. 483 (1954), "it is doubtful that any child may reasonably be expected to succeed in life if he [or she] is denied the opportunity of an education." *Id.* at 493. Both Departments are committed to vigorously enforcing the Federal civil rights laws outlined above and to providing any technical assistance that may be helpful to you so that all students are afforded equal educational opportunities. As immediate steps, you first may wish to review the documents your district requires for school enrollment to ensure that the requested documents do not have a chilling effect on a student's enrollment in school. Second, in the process of assessing your compliance with the law, you might review State and district level enrollment data. Precipitous drops in the

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[1] Homeless children and youth often do not have the documents ordinarily required for school enrollment such as proof of residency or birth certificates. A school selected for a homeless child must immediately enroll the homeless child, even if the child or the child's parent or guardian is unable to produce the records normally required for enrollment. *See* 42 U.S.C. § 11432(g)(3)(C)(i).

[2] Federal law provides for certain limited exceptions to this requirement. *See* Pub. L. 93-579 § 7(a)(2)(B).

enrollment of any group of students in a district or school may signal that there are barriers to their attendance that you should further investigate.

Please contact us if you have any questions or if we can provide you with assistance in ensuring that your programs comply with Federal law. You may contact the Department of Justice, Civil Rights Division, Educational Opportunities Section, at (877) 292-3804 or education@usdoj.gov, or the Department of Education Office for Civil Rights (OCR) at (800) 421-3481 or ocr@ed.gov. You may also visit http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm for the OCR enforcement office that serves your area. For general information about equal access to public education, please visit our websites at http://www.justice.gov/crt/edo and http://www2.ed.gov/about/offices/list/ocr/index.html.

We look forward to working with you. Thank you for your attention to this matter and for taking the necessary steps to ensure that no child is denied a public education.

Sincerely,

/s/	/s/	/s/
Russlynn Ali Assistant Secretary Office for Civil Rights U.S. Department of Education	Charles P. Rose General Counsel U.S. Department of Education	Thomas E. Perez Assistant Attorney General Civil Rights Division U. S. Department of Justice