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Dan Baczynski

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## Education Connection: The Chilling Effects of Student Immigration Tracking Systems Violate *Plyler*

*By Dan Baczynski*

In May 1975, Texas passed a law withholding state funds from local school districts for children who were not legally admitted into the United States. The law also allowed public schools the right to deny enrollment for children who were not legally admitted. Effectively, the Texas law denied illegal aliens access to free public education.

The law was quickly challenged and made its way to the Supreme Court in the case of *Plyler v. Doe*. In a 5-4 decision, the Supreme Court found the law unconstitutional. The Supreme Court stopped short of declaring education a fundamental right, but also found the state interest to be insufficient. Texas claimed that providing an education to undocumented children created a financial burden on the state. The Court found a financial reason to be unsubstantial, considering that there was no evidence that illegal immigrant children cost substantially more to educate than legal immigrant children. Furthermore, the majority considered that the effect of the Texas law would be extremely detrimental because the law would create “a subclass of illiterates within our boundaries, surely adding to the problems and cost of unemployment, welfare, and crime.”

The *Plyler* ruling has faced numerous challenges since 1975. In the 1990s, the Republican Congress almost pushed through a bill that would have granted states the option of denying illegal immigrants access to public education. In 1994, California voters approved Proposition 187, which denied illegal immigrants access to social services, including public education. A district court declared the law unconstitutional and California decided not to appeal.

Opposition to the *Plyler* ruling continues today. States have turned to alternative means to deter illegal immigrant children from accessing public education. Instead of laws directly denying access to

### Student Immigration Tracking Systems

public education, many states have passed legislation requiring schools to record and monitor the immigration status of the children upon registration. This has the effect of deterring parents from registering children at public schools in fear that their illegal status could be made known to the U.S. Immigration and Customs Enforcement or other government agencies. Though student immigration status systems do not directly deny illegal immigrant children access to public education, these systems have a chilling and deterring effect that creates a sufficient burden on immigrant families, such that many children and parents refuse to access these resources. Due to these secondary effects, student immigration tracking systems should be found unconstitutional according to the *Plyler* ruling.

Student immigration tracking systems have gained traction in several states over the last few years. In 2010, Arizona lawmakers introduced a bill that would mandate all school districts to collect and report data on “aliens who cannot prove lawful residence.” The Arizona Department of Education would then report on the costs associated with educating undocumented children to the state legislature. In Texas, state lawmakers introduced similar legislation that would require school districts to determine whether a child is undocumented. Texas also justified its system as an analysis of the costs of illegal immigration.

Tracking systems have not passed without challenge. In 2008, Maryland lawmakers introduced legislation requiring public schools to count the number of undocumented students. Students who could not provide proof of their lawful status would be recorded and tracked. The Maryland legislature claimed the tracking system was necessary to determine the cost of providing education for undocumented students.

Later that year, the Maryland State Board of Education took under review whether the local school system had the authority to collect such data. In March 2009, the School Board decided that “the impact of illegal immigrant students on the school system's budget is not a valid public purpose under the ruling and reasoning of *Plyler v. Doe*.” Because the purpose of the legislation was not valid, the School Board ruled that schools were not authorized to collect

### Student Immigration Tracking Systems

student immigration status data.

On June 2, 2011, Alabama passed the most aggressive tracking proposal. The Beason-Hammon Alabama Taxpayer and Citizen Protection Act, also known as H.B. 56, mandates that all K-12 public schools determine whether a child wishing to enroll was born outside of the U.S. or born to undocumented parents. If a child is unable to provide a birth certificate demonstrating that the child was born within the U.S., he has to provide some other form of official documentation or attestation by a parent as to his immigration status. If neither of these is presented within thirty days, the child is deemed to be “an alien unlawfully present in the United States.” The Alabama Department of Education then uses this data to create an annual report detailing the costs associated with educating undocumented students.

The Alabama statute encompasses more than just tracking systems. The law also requires employees of the state, including school employees, to report any violation of the law. For example, in May 2010, Michelle Obama visited a suburban Washington D.C. school. A second grader asked if “Barack Obama is taking everybody away that doesn't have papers?” Mrs. Obama replied that it is something that needs to be worked on. The young girl continued, disclosing “but my mom doesn't have any papers.” Had this occurred in an Alabama elementary school, school officials would have been required to report the child's mother's violation.

This mandatory reporting requirement puts school officials in a difficult situation. Often times, immigrant students, legal and illegal, are misinformed about what is required or the different options available to access higher education. These students' only source of information comes from school officials, teachers, and counselors. With the new Alabama legislation, school employees may be reluctant to aid likely immigrant students for fear that a violation could be innocently disclosed. The school official would then be obligated to report the violation or face the potential of a Class A misdemeanor, which can result in a sentence of up to one year in jail or a \$6,000 fine.

Section 13 of the Alabama law raises additional concerns due to its non-clarity. The section makes it a crime to “conceal, harbor, or

### Student Immigration Tracking Systems

shield an alien from detection in any building, place, or means of transportation . . . if the person knows the alien remains in the U.S. in violation of Federal Law.” Depending on the interpretation, a teacher, a principal, or even a bus driver could conceivably be held in violation of the criminal statute. Even if no one is prosecuted, the vagueness of the law is likely to create a level of fear in school officials, deterring them from their usual daily interactions with students.

The numerous provisions of the Alabama legislation create a substantial burden on undocumented children and their families. Undocumented immigrant families, often unclear about the registration process at schools, could be instantly deterred from enrolling their child simply because of the immigration questions. Even if the child is a U.S. born citizen, if the parent is an undocumented alien, the parent could be dissuaded from registering the child in fear that the parent may be found and deported. Immigration tracking systems violate *Plyler* due to their secondary effects. The information that the schools demand in order to register is so sensitive in nature that many parents decide not to register their children in the state and, instead, move out of the state. The tracking system has the effect that the *Plyler* decision sought to prevent. Undocumented children end up without access to public education due to state action. This indirect result should be sufficient to find all immigration tracking systems unconstitutional.

Even if *Plyler* does not apply to tracking systems, the laws still create a hardship on undocumented children that is not faced by non-immigrant students. As undocumented children are protected under the Equal Protection Clause, the state would still need to provide a compelling interest for the legislation. In *Plyler*, the Supreme Court found that financial concerns did not constitute a compelling interest. This opinion was also expressed by the Maryland Board of Education when deciding whether local schools could track immigration status. The purpose of the Alabama law is to determine the financial effect of undocumented students. Though undocumented students have a financial effect, there is no evidence that the effect is substantial. In *Plyler*, this was the deciding factor in determining whether Texas had a compelling interest. The Supreme

### Student Immigration Tracking Systems

Court understood that undocumented children had some effect; but with no evidence that the effect was substantial, the state's interest was not compelling. Because there is still no evidence that undocumented immigrants have a substantial financial effect on school systems, it is likely that tracking systems would be found unconstitutional under the Equal Protection Clause.

The tracking systems being implemented in Alabama, Arizona, and Texas have the effect of excluding undocumented children from the public education system. By requiring evidence of immigration status, these states deter parents from registering their children at public schools for fear that the child or the parent will be deported back to their home country. In *Plyler*, the Supreme Court determined by a 5-4 decision that undocumented children could not be denied a public education. Immigration status systems are unconstitutional because they deny undocumented students a public education. In addition, these systems are simply bad policy. Twenty-five years after the *Plyler* decision, the plaintiff from that case, Jim Plyler has changed his mind on denying access to public education. He believes that had he won the case, it "would have been one of the worst things to happen to education." Requiring a student's immigration status during registration has been found unconstitutional in Texas, Alabama, and Arizona. However, attempts are still being made by states to create a tracking system that can pass constitutional muster. To prevent serious societal harm, and because they violate *Plyler*, immigration status systems should be found unconstitutional.

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### Student Immigration Tracking Systems

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