

# Ensuring Every Undocumented Student Succeeds:

A Report on Access to Public Education for  
Undocumented Children

A Product of the Georgetown Law Human Rights Institute Fact-Finding Project

**Zenande Booi, Caitlin Callahan, Genevieve Fugere, Mikaela Harris, Alexandra Hughes,  
Alexander Kramarczuk, Caroline Kurtz, Raimy Reyes, Sruti Swaminathan**  
Authors, Editors

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Most of all, we would like to thank all the children and families who shared with us their stories. Our hope is that conveying their experiences will help bring about change so that all students in the United States can pursue a meaningful education.

## EXECUTIVE SUMMARY

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An estimated 2.4 million school-aged immigrant children live in the United States<sup>1</sup> and an estimated 770,000 of them are undocumented.<sup>2</sup> Since 2014, more than 100,000 unaccompanied children under the age of 18 have entered the United States in search of protection. Upon taking up residence in a community, children, including undocumented children, have the right, and in fact have a legal obligation, to enroll in school. Because many of these new arrivals are settling in areas that have not traditionally had immigrant communities, schools are facing new challenges in serving their rapidly changing population. This report is the product of an investigation into how schools and communities have met these challenges in ensuring access to education for undocumented children. In particular, this report examines enrollment procedures and services available to undocumented students once they are enrolled.

The fact-finding team also examined undocumented children's ability and willingness to attend school in the wake of the Immigration and Customs Enforcement's (ICE) 2016 enforcement operations. These operations are part of the Obama Administration's efforts to detain and deport adults and children who arrived during the 2014 influx across the southern border.<sup>3</sup> In the first four days of 2016, ICE officers apprehended and detained over 100 individuals to be deported, primarily from Georgia, North Carolina, and Texas.<sup>4</sup> The report documents the effect these actions have had on undocumented children's enrollment in school and how school districts and schools have responded to these actions.

This report is the culmination of a year-long research project conducted by members of the Georgetown Law Human Rights Institute Fact-Finding Project and two attorneys from the Women's Refugee Commission. The fact-finding mission was conducted in January of 2016 in Texas, a state with a long history of immigration from Central America and Mexico, and North Carolina, a state that has a more recently arrived immigrant population.

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<sup>1</sup> *Selected Characteristics of the Foreign-Born Population by Period of Entry into the United States*, U.S. CENSUS BUREAU (Jan. 31, 2016), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_14\\_5YR\\_S0502&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_5YR_S0502&prodType=table).

<sup>2</sup> JEFFREY S. PASSEL ET AL., PEW RESEARCH CTR., AS GROWTH STALLS, UNAUTHORIZED IMMIGRANT POPULATION BECOMES MORE SETTLED 4 (2014), [http://www.pewhispanic.org/files/2014/09/2014-09-03\\_Unauthorized-Final.pdf](http://www.pewhispanic.org/files/2014/09/2014-09-03_Unauthorized-Final.pdf).

<sup>3</sup> See Statement by Secretary Jeh C. Johnson on Southwest Border Security (Jan. 4, 2016), <https://www.dhs.gov/news/2016/01/04/statement-secretary-jeh-c-johnson-southwest-border-security> [hereinafter *January Press Release*]; Statement by Secretary Jeh C. Johnson on Southwest Border Security (Mar. 9, 2016), <https://www.dhs.gov/news/2016/03/09/statement-secretary-jeh-c-johnson-southwest-border-security> [hereinafter *March Press Release*].

<sup>4</sup> Josh Gerstein & Seung Min Kim, *Obama Administration Kicks Off Family Deportation Raids*, POLITICO (Jan. 4, 2016), <http://www.politico.com/story/2016/01/obama-family-deportation-raids-217329>.

Our research found that undocumented children encounter the following barriers when attempting to access education:

- Satisfying rigid documentation requirements, such as proof of residence and proof of guardianship, poses a unique set of challenges for undocumented families and children.
- Even if a student is able to obtain all of the required documentation for enrollment, some schools still discourage enrollment of undocumented students due to ancillary considerations, such as testing, grade placement, and prospects of graduation.
- Many schools lacked a clear understanding of how the McKinney Vento Act, which requires immediate enrollment for students who qualify as homeless, applies to undocumented children, and in some instances misapplied the law. Similarly, while some districts have sought to facilitate enrollment through a grace period, which allows for the immediate enrollment of a child despite gaps in documentation, families are not always informed of this policy.
- Some school districts, rather than creating programs to accommodate undocumented students, particularly older children, in the general public school system, forcibly enrolled those students in alternative schools intended for children with correctional or behavioral needs.
- Some schools fail to effectively communicate with parents and sponsors regarding critical information, including student records such as: report cards, education programs, and disciplinary proceedings.
- ICE's recent enforcement actions have fostered fear and anxiety for undocumented children and have had a chilling effect on children's ability to meaningfully participate in their education.
- Schools have experienced detrimental effects from the recent ICE raids, yet are unaware of and have little or no information on how to respond.

Based on these conclusions, the fact-finding team makes a series of recommendations to the United States Government, states, school districts, and schools. In general, the report advocates for improved dissemination of guidance and training materials distributed by federal and state authorities to the relevant teachers, registrars, administrators, or other officials to ensure seamless compliance with the law. Additionally, the report encourages districts and schools to evaluate and improve policies that may discriminate against undocumented students and inhibit their ability to receive a meaningful education. Finally, both ICE and educational bodies should develop and implement policies that protect a child's access to education from the chilling effects of ICE enforcement actions.

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## I. METHODOLOGY

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This report is the culmination of a year-long research project undertaken by nine Georgetown University Law Center students, a Human Rights Institute fellow, and two attorneys from the Women's Refugee Commission. The findings and subsequent recommendations of this report are derived from a week-long fact-finding mission and desk research.

The fact-finding mission was conducted in January of 2016 in Texas and North Carolina. The week was spent interviewing government and school officials, practitioners, and families with undocumented children. We selected Texas as a fact-finding location due to its extensive history of immigration from Central America and Mexico. Our research in Texas highlights the dichotomy between access to public education for undocumented children living in urban districts with that in rural districts. We selected North Carolina as our second location to diversify the geographic breadth of this report and to include a state that has more recently received a large immigrant population. Research prior to our mission revealed that North Carolina, in recent decades, experienced an exponential growth in this population. Further, in September 2014, a number of counties in North Carolina were accused of affirmatively discouraging undocumented children from attending schools.<sup>5</sup> This report highlights some variation in the experiences of states with long-standing immigration populations in comparison to states with a more recent immigrant population.

In both Texas and North Carolina, the purpose of conducting interviews was to identify and document the lived experiences of families and children in enrolling into, and participating in, the U.S. public education system. We conducted our interviews using convenience sampling and snowball sampling by first coordinating with non-profit social and legal services organizations; those organizations were able to help us arrange meetings with families by describing our research to prospective interviewees and inviting them to participate in our research. We arranged to meet with school officials and administrators at the elementary, middle, and high school levels, as well as local government officials and staff at non-profit social service organizations. A total of forty-three interviews were conducted: nine with families, eleven with school officials, four with government officials, and nineteen with service providers.

Our research methods were reviewed and approved by the Georgetown University Institutional Review Board. All interviews began with a thorough informed consent process that was communicated to all prospective interviewees in either English or Spanish – based on their language preference. We also communicated that involvement in the study would not result

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<sup>5</sup> George Eppsteiner, *Some NC Counties Discourage School Enrollment of Immigrant Children*, THE NEWS & OBSERVER (Sept. 10, 2014), <http://www.newsobserver.com/opinion/op-ed/article10056308.html>.

in any direct benefit to the interviewee, including legal assistance. The interviews took place in private rooms or outside of the earshot of others in order to maintain the privacy of the interviewee and ensure confidentiality. The interviews of all families are reported anonymously in order to reduce personal risks and maintain the confidentiality of all interviewees. All other interviewees, including school officials and administrators, practitioners, and government officials, were given the option to participate anonymously or to provide information such as their name, title, and a description of their occupation. In order to protect the identity of interviewees and their clients, pseudonyms and anonymous citations are used throughout the report.

Prior to, and concurrent with, the fact-finding mission, we researched Florida's and New York's experiences with this issue. Both are states in which legal or state action has been taken to address the prevention of enrollment by schools and school districts. With respect to Florida, we focused on the agreement reached between the Department of Justice and the Palm Beach County School District. Our research on New York focused on the review of school districts by the New York State Board of Regents and subsequent regulations, as well as the lawsuit filed by the New York Civil Liberties Union and the New York Attorney General against the Utica School District.

## II. INTRODUCTION

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“Times are changing—school practices evolve, but not the right to education.”<sup>6</sup>

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*Juan,<sup>7</sup> a sixteen-year-old boy, traveled alone from Honduras to the United States. In Honduras, his schooling had been interrupted by the pervasive violence in his community. When he arrived to his new home in Texas, he tried to enroll in school with the help of a local community advocate. The principal was unwilling to let the teenager enroll, fearing Juan would be unable to pass the state tests, which would reflect badly on the school. If Juan attempted to enroll alone, he might have been discouraged, convinced that there was no place for him in the school. Luckily, he had someone to help him, and Juan was eventually allowed to enroll.*

*Once in school, however, he encountered new challenges as he tried to learn English and acclimate to school in a new country. Juan knew little English, and had academic skills equivalent to an average second grader in the United States. The school was unable to provide the one-on-one support he needed, and as a result the classes were confusing, and he frequently did not know what was going on. Eventually Juan's confidence was crushed and he dropped out.<sup>8</sup>*

Many districts are receiving students like Juan in their schools. In states and communities with historically small immigrant populations, schools may have trouble adapting and adequately serving their rapidly changing populations, and even communities with established immigrant populations are faced with new challenges. Recently arriving undocumented children from Honduras, Guatemala, and El Salvador often come with trauma from having fled intense violence, and with little formal education. Most arrive with little to no English, and some may be illiterate even in their native language. These children are unaccustomed to the culture and expectations of the American education system.<sup>9</sup> Schools and teachers are being presented with a new challenge in attempting to accommodate the many difficulties and struggles these children present.

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<sup>6</sup> Interviews with community advocates in Charlotte, North Carolina (Jan. 12, 2016).

<sup>7</sup> Pseudonyms will be used throughout this report to protect the identity of interviewees and their clients.

<sup>8</sup> Interviews with community advocates in Houston, Texas (Jan. 11, 2016).

<sup>9</sup> See Interview with social worker in Houston, Texas (Jan. 11 2016) (discussing that many migrant students have never been asked to sit and listen for eight hours straight in a single day because, back in their home countries, they were forced to be adults and go to work and now want to be adults in the United States, too).

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## OVERVIEW OF IMMIGRATION TRENDS

While immigration is by no means a new phenomenon in the United States, changing demographics and heightened media coverage have brought increased awareness and attention to immigrant populations, particularly those from Latin America. Between 2010 and 2014, an estimated 5.2 million foreign-born individuals entered the United States both with and without authorization.<sup>10</sup> Arriving from every inhabited continent, these individuals contributed to the estimated 42 million foreign-born persons residing in the United States as of 2014, approximately 2.4 million of whom are school-aged.<sup>11</sup>

Undocumented immigrants are those who enter or remain in the United States without legal immigration status.<sup>12</sup> Though difficult to precisely quantify, data suggests that there are currently 11.3 million undocumented immigrants residing in the United States.<sup>13</sup> Approximately 775,000 of these undocumented immigrants are below the age of 18.<sup>14</sup> Furthermore, there are an estimated 4.5 million U.S.-born children with at least one undocumented parent.<sup>15</sup> Upon entrance, many undocumented children and families are apprehended by the U.S. Department of Homeland Security, and ultimately released into communities to await further immigration proceedings to determine their ability to remain lawfully in the United States.

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<sup>10</sup> *Selected Characteristics of the Foreign-Born Population by Period of Entry into the United States*, U.S. CENSUS BUREAU (Jan. 31, 2016), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_14\\_5YR\\_S0502&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_5YR_S0502&prodType=table).

<sup>11</sup> *Id.*

<sup>12</sup> See Undocumented Worker Transitions, *Undocumented Migration Glossary: Work Package*, ROSKILDE UNIV. & WORKING LIVES RESEARCH INST. 5, 19 (Sept. 2008) (defining “undocumented migrant” as, “foreign citizens present on the territory of a state, in violation of the regulations on entry and residence, having crossed the border illicitly or at an unauthorized point: those whose immigration/migration status is not regular, and can also include those who have overstayed their visa or work permit, those who are working in violation of some or all of the conditions attached to their immigration status: and failed asylum seekers or immigrants who have no further right to appeal and have not left the country. It has been argued that the term is ambiguous as it refers both to migrants who have not been documented (recorded) and those without documents (passports etc).”).

<sup>13</sup> JEFFREY S. PASSEL ET AL., PEW RESEARCH CTR., AS GROWTH STALLS, UNAUTHORIZED IMMIGRANT POPULATION BECOMES MORE SETTLED 4 (2014), [http://www.pewhispanic.org/files/2014/09/2014-09-03\\_Unauthorized-Final.pdf](http://www.pewhispanic.org/files/2014/09/2014-09-03_Unauthorized-Final.pdf).

<sup>14</sup> *Id.* at 14.

<sup>15</sup> *Id.*

Much public attention is focused on immigration across the southern border, especially regarding the number of children entering over the last several years.<sup>16</sup> Though there has been a recent decline in overall unauthorized migration across the southern border, Customs and Border Patrol (CBP) has apprehended a significant number of Central American child migrants along the United States-Mexico border in each successive year between FY 2009 and FY 2016.<sup>17</sup> Between 2013 and 2014, the number of unaccompanied children to cross the southern border increased by 90%.<sup>18</sup>

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<sup>16</sup> The influx of unaccompanied children received heightened attention due, in large part, to this stark increase and the subsequent policy choices of the Obama administration and other politicians' political discourse. See *generally* Press Release, White House, Presidential Memorandum – Response to the Influx of Unaccompanied Alien Children Across the Southwest Border (June 2, 2014), <https://www.whitehouse.gov/the-press-office/2014/06/02/presidential-memorandum-response-influx-unaccompanied-alien-children-acr>; Josh Gerstein & Seung Min Kim, *Obama Administration Kicks Off Family Deportation Raids*, POLITICO (Jan. 4, 2016), <http://www.politico.com/story/2016/01/obama-family-deportation-raids-217329>; CNN/Salem Republican Debate, Las Vegas, NV (Dec. 15, 2015) (Donald Trump, 2016 Republican Primary Candidate: "We are not talking about isolation. We're talking about security. Our country is out of control. People are pouring across the southern border. I will build a wall. It will be a great wall. People will not come in unless they come in legally . . ."), <http://cnnpressroom.blogs.cnn.com/2015/12/16/rush-transcript-second-debate-cnn-facebook-republican-presidential-debate/>; Iowa Fox News Republican Debate, Des Moines, IA (Jan. 28, 2016) (Ted Cruz, 2016 Republican Primary Candidate: "Listen, we can solve immigration . . . We can build the fence. We can triple border control. We can end sanctuary cities by cutting off funding to them . . . [W]e will secure the border and we will end the illegal immigration." Marco Rubio, 2016 Republican Primary Candidate: "I know that securing our borders is not anti-immigrant and we will do it. We'll hire 20,000 new border agents . . . We will finish the 700 miles of fencing and walls our nation needs."), <https://www.washingtonpost.com/news/the-fix/wp/2016/01/28/7th-republican-debate-transcript-annotated-who-said-what-and-what-it-meant/>; ABC News Republican Debate, Manchester, NH (Feb. 6, 2016) (John Kasich, 2016 Republican Primary Candidate: "Look, the situation is, we need to finish the [southern] border. It has to be completed. Just like we lock our doors at night, the country needs to be able to lock its doors."), <https://www.washingtonpost.com/news/the-fix/wp/2016/02/06/transcript-of-the-feb-6-gop-debate-annotated/>.

<sup>17</sup> KAREN MUSALO, LISA FRYDMAN & PABLO CERNADAS, CTR. FOR GEND. & REFUGEE STUDIES, UNIV. OF CAL. HASTINGS COLL. & JUSTICE & HUMAN RIGHTS. CTR., NAT'L UNIV. OF LANÚS, CHILDHOOD AND MIGRATION IN NORTH AND CENTRAL AMERICA: CAUSES, POLICIES, PRACTICES AND CHALLENGES 47 (2015), [http://cgrs.uchastings.edu/sites/default/files/Childhood\\_Migration\\_HumanRights\\_FullBook\\_English.pdf](http://cgrs.uchastings.edu/sites/default/files/Childhood_Migration_HumanRights_FullBook_English.pdf).

<sup>18</sup> See, e.g., Haeyoun Park, *Children at the Border*, N.Y. TIMES (Oct. 21, 2014), [http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html?\\_r=0](http://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html?_r=0); *Rising Child Migration to the United States*, MIGRATION POL'Y INST., <http://www.migrationpolicy.org/programs/us-immigration-policy-program/rising-child-migration-united-states> (last visited Oct. 19, 2015); *US: Surge in Detention of Child Migrants*, HUMAN RIGHTS WATCH (June 25, 2014), <https://www.hrw.org/news/2014/06/25/us-surge-detention-child-migrants>.

Currently, most children and families that cross through the southern border come from the Northern Triangle, which includes El Salvador, Guatemala, and Honduras.<sup>19</sup> The Northern Triangle is marked by organized crime, high levels of violence, and significant poverty rates.<sup>20</sup> El Salvador, Guatemala, and Honduras continually rank among the most violent countries in the Western Hemisphere, and all three countries are considered among the most dangerous in the world for women and girls.<sup>21</sup> El Salvador in particular has experienced a sharp increase in violence in the past several years.<sup>22</sup> The murder rate spiked to an average of one homicide per hour in August of 2015, making the month the most deadly in the country since 1992.<sup>23</sup> Individuals, especially children, are fleeing the Northern Triangle countries seeking respite from extreme violence.<sup>24</sup>

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<sup>19</sup> Silva Mathema, *They Are Refugees: An Increasing Number of People Are Fleeing Violence in the Northern Triangle*, CTR. FOR AM. PROGRESS (Feb 24, 2015), <https://www.americanprogress.org/issues/immigration/news/2016/02/24/131645/they-are-refugees-an-increasing-number-of-people-are-fleeing-violence-in-the-northern-triangle/>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* The homicide rate per 100,000 individuals in El Salvador is 108.5; in Honduras, 62.5; and, in Guatemala, 29.2. The United States, in contrast, has a homicide rate of only 4.5 per 100,000 individuals. El Salvador, Honduras, and Guatemala are ranked 1, 2, and 4, respectively, for highest rates of female homicide in the world.

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

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

<sup>24</sup> Francesca Fontanini, *As Gang Violence Worsens, More Salvadorians Flee*, UNHCR (Feb. 3, 2016) <http://www.unhcr.org/56b1d54f6.html>.

The table below shows the numbers of unaccompanied children<sup>25</sup> CBP apprehended along the border between FY 2009 and FY 2016.<sup>26</sup>

**Unaccompanied Children and Adolescents, by Fiscal Year and Nationality<sup>27</sup>**

COUNTRY	2009	2010	2011	2012	2013	2014	2015	2016*
EL SALVADOR	1,221	1,910	1,394	3,314	5,990	16,404	9,389	6,621
GUATEMALA	1,115	1,517	1,565	3,835	8,068	17,057	13,589	8,329
HONDURAS	968	1,017	974	2,997	6,747	18,244	5,409	3,608
MEXICO	16,114	13,724	11,768	13,974	17,240	15,634	11,012	4,658

\* Through January 31, 2016<sup>28</sup>

In addition to this group, CBP also apprehends large numbers of family units.<sup>29</sup>

**Family Unit Apprehensions Encountered by Fiscal Year<sup>30</sup>**

COUNTRY	2015	2016*
EL SALVADOR	10,872	9,314
GUATEMALA	12,820	8,823
HONDURAS	10,671	6,965
MEXICO	4,276	1,312

\* Through January 31, 2016

<sup>25</sup> *Who We Serve – Unaccompanied Alien Children*, OFFICE OF REFUGEE RESETTLEMENT, <http://www.acf.hhs.gov/programs/orr/resource/who-we-serve-unaccompanied-alien-children> (last visited Feb. 29, 2016) (defining Unaccompanied Alien Child as, “one who has no lawful immigration status in the United States; has not attained 18 years of age, and with respect to whom; 1) there is no parent or legal guardian in the United States; or 2) no parent or legal guardian in the United States is available to provide care and physical custody.”).

<sup>26</sup> These numbers do not capture the total population of undocumented children and families now residing in the United States, omitting, for example, individuals who enter the United States undetected, those who overstay authorized visas, and those who entered the country prior to 2009.

<sup>27</sup> *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, CUSTOMS & BORDER PATROL, <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children> (last visited Feb. 1, 2016).

<sup>28</sup> The typical Fiscal Year is measured from the start of October through September of the following calendar year. Typically, more migration occurs in the spring, suggesting that numbers for FY2016 may exceed the previous year.

<sup>29</sup> *A Guide to Children Arriving at the Border: Laws, Policies, and Responses*, AM. IMMIGRATION COUNCIL (June 26, 2012) (defining “family unit” as an individual who is apprehended as part of a family consisting of one or more children with a parent or legal guardian”).

<sup>30</sup> *Supra*, note 27.

Because pending immigration proceedings can take several years and new arrivals continue despite efforts aimed at deterrence, the number of undocumented individuals awaiting further proceedings is increasing across the country.<sup>31</sup> Over 50% of the children arriving from the Northern Triangle are eligible for international protection, and many are eligible to receive legal immigration status in the United States upon completion of these proceedings.<sup>32</sup> While some regions and states have had significant immigrant populations for decades, other areas of the country are encountering this group in significant numbers for the first time, as individuals seek out employment, stability, and community.<sup>33</sup> States such as California, Florida, Illinois, New York, New Jersey, and Texas continue to have large immigrant populations.<sup>34</sup> For example, between October of 2013 and December of 2015, over 12,000 unaccompanied children were released to sponsors in Texas.<sup>35</sup> There has also been increased settlement in states with traditionally small immigrant populations, particularly on the east coast, where Maryland, Pennsylvania, Virginia, and North Carolina have seen recent increases.<sup>36</sup>

Our report focuses on the experiences of undocumented immigrant children who have crossed the southern border. These children are often the most vulnerable and ostracized due to fear of deportation. Many of our observations, however, could be transferable to children, whether documented or undocumented, emigrating from other parts of the world.

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<sup>31</sup> *Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts*, TRAC, SYRACUSE UNIV., [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/) (last visited Mar. 15, 2016) (indicating that, as of February 1, 2016, there are over 440,000 immigration cases pending in U.S. immigration courts and that the average wait time for a first hearing is over 650 days).

<sup>32</sup> UNITED NATIONS HIGH COMM'R FOR REFUGEES REG'L OFFICE FOR THE U.S. AND CARIBBEAN, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* 9-10 (2014), [http://www.unhcrwashington.org/sites/default/files/1\\_UAC\\_Children%20on%20the%20Run\\_Full%20Report.pdf](http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf) (finding that 72% of migrant children from El Salvador, 38% of migrant children from Guatemala, and 57% of migrant children from Honduras raised concerns from their country of origin that would qualify them for international protection).

<sup>33</sup> See Jens Manuel Krogstad & Jeffrey S. Passel, *5 Facts About Illegal Immigration in the U.S.*, PEW RESEARCH CTR. (Nov. 19, 2015), <http://www.pewresearch.org/fact-tank/2015/11/19/5-facts-about-illegal-immigration-in-the-u-s/>.

<sup>34</sup> *Id.*

<sup>35</sup> *Unaccompanied Children Released to Sponsors by State*, OFFICE OF REFUGEE RESETTLEMENT, <http://www.acf.hhs.gov/programs/orr/programs/ucs/state-by-state-uc-placed-sponsors> (last visited Feb. 2, 2016).

<sup>36</sup> Krogstad & Passel, *supra*, note 33; Jeffrey S. Passel & D'Vera Cohn, *State Unauthorized Immigrant Populations*, PEW RESEARCH CTR. (Nov. 18, 2014), <http://www.pewhispanic.org/2014/11/18/chapter-1-state-unauthorized-immigrant-populations/>.

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## UNDOCUMENTED CHILDREN IN SCHOOLS

Upon taking up residence in a community, children have the right – and in fact have a legal obligation – to enroll in school. All states and U.S. territories have laws that make education compulsory for all children.<sup>37</sup> Though the age range varies, most states require schooling for children beginning at age five or six and extending to age sixteen, seventeen, or eighteen.<sup>38</sup> Education is a powerful tool by which economically and socially marginalized adults and children can lift themselves out of poverty and participate fully as citizens.<sup>39</sup> The inclusion of immigrant children in the education system is important to ensure their successful assimilation; schools provide critical support to these children as they begin integrating into their new communities.

Under federal law, schools are not allowed to discriminate against children due to their racial or ethnic background, including in relation to their immigration status.<sup>40</sup> In every state, education is offered for free to all qualifying children beginning at age four or five and extending to students with a maximum age ranging from seventeen to twenty-six.<sup>41</sup> And yet, some communities have barred immigrant children from enrolling or meaningfully participating in school by creating intentional and unintentional barriers.<sup>42</sup> In a 2014 letter, the U.S. Department of Education noted that they were “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.”<sup>43</sup>

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<sup>37</sup> EDUC. COMM’N OF THE STATES, *Compulsory School Age Requirements*, 1-3 (June 2010), <http://www.ecs.org/clearinghouse/86/62/8662.pdf>.

<sup>38</sup> *Id.*

<sup>39</sup> *The Right to Education*, UNESCO, <http://www.unesco.org/new/en/right2education> (last visited Mar. 3, 2015).

<sup>40</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>41</sup> Additionally, attendance is compulsory for children at least up to age sixteen, though some states have extended the requirement to age eighteen. *Table 5.1 Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2015*, NAT’L CTR. FOR EDUC. STAT., [https://nces.ed.gov/programs/statereform/tab5\\_1.asp](https://nces.ed.gov/programs/statereform/tab5_1.asp) (last visited Feb. 4, 2016).

<sup>42</sup> See, e.g., Benjamin Mueller, *Requirements Keep Young Immigrants out of Long Island Classrooms*, N.Y. TIMES (Oct. 21, 2014), [http://www.nytimes.com/2014/10/22/nyregion/rules-and-paperwork-keep-long-islands-immigrant-children-from-classroom.html?ref=nyregion&\\_r=0](http://www.nytimes.com/2014/10/22/nyregion/rules-and-paperwork-keep-long-islands-immigrant-children-from-classroom.html?ref=nyregion&_r=0).

<sup>43</sup> Letter from Catherine E. Lhamon, Assistant Sec’y, Office for Civil Rights, U.S. Dep’t of Educ., Philip H. Rosenfelt, Deputy Gen. Counsel, & Jocelyn Samuels, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice (May 8, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf>; Appendix E: United States Department of Education Dear Colleague Letter on School Enrollment Procedures.

Despite federal involvement in some areas, education in the United States is decentralized and highly localized. States and local authorities retain power and oversight over education within their jurisdiction.<sup>44</sup> The division of duties, oversight, and control within each state and territory can vary greatly, and depends upon the constitution, regulations, and statutes of the particular area.<sup>45</sup>

With the continuing growth and movement of immigrant families and children, the obstacles undocumented children face when trying to access education is a pressing area of concern. Although there has been substantial research conducted about the arrival of children in the United States and the conditions of detention upon arrival, much less is known about children's access to education once they settle into communities throughout the United States.

This report strives to fill that gap by answering two questions:

1. What are the formal, informal, and systemic barriers to entry into the United States public education system facing undocumented children?
2. When these children are able to enter the education system, are schools ensuring that they are able to meaningfully participate in their education, by providing both a meaningful education and the supplemental services these children are entitled to under the law?

In response to the findings of our investigation, this report also outlines recommendations to improve schools' accommodation of the growing population of undocumented children from the perspectives of the local community, state, and federal government. We intend for this report to serve as a resource for families, students, schools, practitioners, and government officials.

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<sup>44</sup> *Organization of U.S. Education*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/offices/list/ous/international/usnei/us/edlite-org-us.html> (last visited Feb. 4, 2016).

<sup>45</sup> *Id.* (follow "State Role I – Primary and Secondary Education" hyperlink).

### III. LEGAL FRAMEWORK

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This report investigates the right to education as it is actually experienced by undocumented children in the United States. In so doing, we seek to showcase the strong legal precedent that serves to protect the educational rights of this population and the standards for which states, districts, and schools are accountable.<sup>46</sup> That legal precedent includes federal and state law, civil rights-based frameworks, including anti-discrimination law, and funding structures that promote equal access to and meaningful participation in education. International human rights law supports and supplements federal and state law by protecting education as a fundamental human right.

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#### FEDERAL LAWS PROHIBITING DISCRIMINATION BASED ON RACE AND/OR NATIONAL ORIGIN

Federal judicial and legislative precedent guarantees all children equal access to education regardless of their race and/or national origin. In the landmark case of *Plyler v. Doe*, the Supreme Court first recognized that, under the Equal Protection Clause of the Fourteenth Amendment, local school districts could not deny children enrollment due to their immigration status.<sup>47</sup> In so ruling, the Court recognized that, “[i]n addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some [sic] isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”<sup>48</sup> Courts and advocates continue to point to *Plyler* as affirmation that immigrant children are guaranteed equal protection with respect to the right to education under the United States Constitution.<sup>49</sup>

There are several important pieces of legislation that realize the *Plyler* Court’s holding, including Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1974. The Civil Rights Act of 1964 prohibits discrimination in many areas of public administration; Title VI of that law relates specifically to recipients of federal funds. Interpreted in light of current Fourteenth Amendment Equal Protection Clause jurisprudence, Title VI of the Civil

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<sup>46</sup> See Appendix A: Children Have the Right to Go to School.

<sup>47</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>48</sup> *Id.* at 221-22.

<sup>49</sup> Anthony D. Romero, *School is for Everyone: Celebrating Plyler v. Doe*, ACLU (June 11, 2012), <https://www.aclu.org/blog/washington-markup/school-everyone-celebrating-plyler-v-doe>.

Rights Act of 1964 prohibits recipients of federal funds from discriminating based on “race, color, or national origin [in] any program or activity receiving federal financial assistance.”<sup>50</sup> School districts, therefore, are bound by these terms if they receive federal funding directly from the United States Department of Education or if federal funds are allocated to them by their state or local educational agencies.<sup>51</sup>

Additionally, in 1974, the Supreme Court held in *Lau v. Nichols* that under Title VI of the Civil Rights Act of 1964, all institutions that receive federal funding must ensure that English Learners (EL)<sup>52</sup> are given the same meaningful opportunity to participate in their education. The Court recognized that “there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.”<sup>53</sup> Shortly after the *Lau* decision, Congress passed the Equal Educational Opportunities Act (EEOA) of 1974. Section 1701 of the Act prescribes that, “all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin.”<sup>54</sup> The EEOA, as enforced by the Department of Justice,<sup>55</sup> requires states and school districts “to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.”<sup>56</sup>

The U.S. Department of Education, in collaboration with the U.S. Department of Justice, has issued guidance in response to the increase in enrollment of immigrant children and the practices at the local level that violated the laws and principles cited above.<sup>57</sup> These interpretive

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<sup>50</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 241, 252 (codified as amended at 42 U.S.C. § 2000d). Discrimination is defined as “treat[ing] an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet.” See 34 C.F.R. § 100.3 (West, Westlaw through 2016).

<sup>51</sup> All states receive some version of federal educational assistance. *Fiscal Years 2015-2017 State Tables for the U.S. Department of Education*, U.S. DEP’T OF EDUC. (Feb. 19, 2016), <http://www2.ed.gov/about/overview/budget/statetables/index.html>.

<sup>52</sup> This report utilizes the phrase “English Learners” to refer to students whose home language is not English. Other common phrases that refer to this population include English Language Learner (ELL), Limited English Proficiency (LEP), and English as a Second Language (ESL).

<sup>53</sup> *Lau v. Nichols*, 414 U.S. 563, 566 (1974).

<sup>54</sup> 20 U.S.C.A. § 6825(a) (West, Westlaw through 2015).

<sup>55</sup> *Types of Educational Opportunities Discrimination*, DEP’T OF JUSTICE, <https://www.justice.gov/crt/types-educational-opportunities-discrimination> (last updated Aug. 7, 2015).

<sup>56</sup> 20 U.S.C.A. § 1703 (West, Westlaw through 2015).

<sup>57</sup> The following are examples of recent violations: California passed Proposition 187 in 1994 mandating that schools notify immigration authorities of any student reasonably believed to be residing in the U.S. unlawfully; Alabama enacted a state law in 2011 requiring schools to determine the immigration status of all enrolling students. *Public Education for Immigrant Students: States Challenge Supreme Court’s Decision in Plyler v. Doe*, AM. IMMIGRATION COUNCIL (June 15, 2012), <http://www.immigrationpolicy.org/just-facts/public-education-immigrant-students-states-challenge-supreme-court%E2%80%99s-decision-plyler-v-do>.

rules were designed to provide best practices to facilitate enrollment and to measure schools' compliance with the law.<sup>58</sup> For example, in response to school practices of requiring student social security numbers to enroll, the May 2014 "Dear Colleague"<sup>59</sup> letter reasserts that "[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 . . . 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."<sup>60</sup>

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## FEDERAL FUNDING STRUCTURES FOR PUBLIC SCHOOLS

Additionally, federal funding cannot be used to discriminate. Generally, the Constitution leaves the design and management of education systems to the states. However, the federal government contributes about 10.8 percent of the total funding spent on elementary and secondary education.<sup>61</sup> As a result, whenever federal funding is used by a state, the state is mandated to comply with the federal non-discrimination requirements, which have been determined to include meeting the needs of undocumented children.

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<sup>58</sup> See, e.g., *Fact Sheet: Information on the Rights of all Children to Enroll in School*, U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201405.pdf> (last visited Nov. 24, 2015), available at Appendix D. The May 2011 and May 2014 "Dear Colleague" letters are particularly important. The 2014 letter refers to 5 U.S.C. §552a and explains that school districts are legally prohibited from denying a student enrollment because s/he chooses not to provide a social security number. See Letter from Catherine E. Lhamon, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., Philip H. Rosenfelt, Deputy Gen. Counsel, & Jocelyn Samuels, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice (May 8, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf>, available at Appendix E.

<sup>59</sup> Appendix E: May 8 Dear Colleague Letter on School Enrollment Procedures.

<sup>60</sup> *Id.*; see also, Appendix D: United States Department of Education Fact Sheet: Information on the Rights of All Children to Enroll in School.

<sup>61</sup> That 10.8 percent of funding includes funds "not only from the Department of Education but also from other Federal agencies, such as the Department of Health and Human Services' Head Start Program and the Department of Agriculture's School Lunch program." *The Federal Role in Education*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/overview/fed/role.html> (last modified Feb. 13, 2012).

The Elementary and Secondary Education Act (ESEA) is the primary source of federal funding for primary and secondary education.<sup>62</sup> The ESEA was reauthorized by the No Child Left Behind Act (NCLB) in 2002 and more recently by the Every Student Succeeds Act (ESSA) in 2015.<sup>63</sup> ESEA and its progeny categorize funding into different programs. The programs specifically relevant to undocumented children are Title I and Title III. Title I provides funding for the education of migratory children and intervention programs for at-risk youth.<sup>64</sup> Title III allocates specific assistance for language instruction for English learners and immigrant students.<sup>65</sup> ESSA will maintain these two Titles, thereby guaranteeing the provision of specific programs designed to accommodate the needs of immigrant children.<sup>66</sup>

NCLB was criticized for its extensive oversight of states' performance.<sup>67</sup> Replacing the NCLB, ESSA aims to reverse NCLB's legacy of stringent accountability mechanisms<sup>68</sup> by restoring control to the hands of the states. Under ESSA, "the states will take the lead on issues of accountability, resources, interventions and teacher evaluation systems."<sup>69</sup>

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<sup>62</sup> *10 Facts about K-12 Education Funding*, DEP'T OF EDUC. (June 2005), <http://www2.ed.gov/about/overview/fed/10facts/index.html?exp>.

<sup>63</sup> At the time of the writing of this report, ESSA had not been fully implemented. *Every Student Succeeds Act: Frequently Asked Questions*, AM. FED'N OF TEACHERS 7, [http://www.aft.org/sites/default/files/essa\\_faq.pdf](http://www.aft.org/sites/default/files/essa_faq.pdf) (last visited Feb. 28, 2016).

<sup>64</sup> 20 U.S.C.A. §§ 6391, 6421 (West, Westlaw through 2015).

<sup>65</sup> 20 U.S.C.A. § 6801 (West, Westlaw through 2015).

<sup>66</sup> *Comparison of Programs Under ESSA and ESEA*, AM. FED'N OF TEACHERS, [http://www.aft.org/sites/default/files/essa\\_comparison-chart.pdf](http://www.aft.org/sites/default/files/essa_comparison-chart.pdf) (last visited Feb. 28, 2016).

<sup>67</sup> Under NCLB, "the federal government aggressively policed public school performance." Emmarie Huetteman & Motoko Rich, *House Restores Local Education Control in Revising No Child Left Behind*, N.Y. TIMES (Dec. 2, 2015), [http://www.nytimes.com/2015/12/03/us/house-restores-local-education-control-in-revising-no-child-left-behind.html?\\_r=0](http://www.nytimes.com/2015/12/03/us/house-restores-local-education-control-in-revising-no-child-left-behind.html?_r=0). For a helpful comparison of the two laws, see *Every Student Succeeds Act: Accountability Provisions*, ALLIANCE FOR EXCELLENT EDUC. (Jan. 2016), <http://all4ed.org/wp-content/uploads/2015/12/ESSAAccountabilityChart2.pdf>.

<sup>68</sup> American Federation of Teachers, *supra* note 66, at 1.

<sup>69</sup> *Id.* For a critique of the actual effect ESSA will have, see Alia Wong, *The Bloated Rhetoric of No Child Left Behind's Demise*, THE ATLANTIC (Dec. 9, 2015), <http://www.theatlantic.com/education/archive/2015/12/the-bloated-rhetoric-of-no-child-left-behinds-demise/419688/>.

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## THE INTERNATIONAL HUMAN RIGHT TO EDUCATION WITHOUT DISCRIMINATION

In addition to the protections afforded by federal law, the right to education has been codified and developed through a number of international treaties produced by the United Nations and other regional organizations.<sup>70</sup> Under these treaties, governments are obligated to provide free education for every person in their territory. Countries around the world recognize that international human rights law has protected the right to education since the adoption of the Universal Declaration of Human Rights in 1948, requiring countries to provide free and compulsory primary education and to prohibit discrimination in schooling.<sup>71</sup>

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<sup>70</sup> Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, art. 24, U.N. GAOR, 61st Sess., Supp. No. 69, at 06-50079, 14, U.N. Doc. A/RES/61/106 (2006), 2515 U.N.T.S. 3, *entered into force May 3, 2008* [hereinafter *Disabilities Treaty*]; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, art. 30, U.N. GAOR, 45th Sess., Supp. No. 49, at 261, 266, U.N. Doc. A/RES/45/158 (1990), 2220 U.N.T.S. 3, *entered into force July 1, 2003* [hereinafter *Migrant Workers and Their Families*]; Convention on the Rights of the Child, G.A. Res. 44/25, arts. 28-29, 40, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, 170-71, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3, *entered into force Sept. 2, 1990* [hereinafter *CRC*]; Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, arts. 10, 14, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, 195-96, U.N. Doc. A/34/46 (1979), 1249 U.N.T.S. 13, *entered into force Sept. 3, 1981* [hereinafter *CEDAW*]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), arts. 13-14, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, 51, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force Jan. 3, 1976* [hereinafter *ICESCR*]; International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), art. 5, U.N. GAOR, 20th Sess., Supp. No. 14, at 47, 48, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force Jan. 4, 1969* [hereinafter *CERD*]; Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, art. 22, adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened July 28, 1951 under General Assembly resolution 429 (V), *entered into force Apr. 22, 1954* [hereinafter *1951 Refugee Convention*]; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 26, U.N. Doc. A/RES/217(III), at 71, 76 (Dec. 10, 1948); American Convention on Human Rights, O.A.S. Treaty Series No. 36, art. 26, 1144 U.N.T.S. 143, *entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), 1144 U.N.T.S. 143* [hereinafter *American Convention*]; American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, art. 12, adopted by the Ninth International Conference of American States (1948), *reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992)* [hereinafter *American Declaration*].

<sup>71</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 26, U.N. Doc. A/RES/217(III), at 71, 76 (Dec. 10, 1948) [hereinafter *UDHR*]. United States diplomats were influential in drawing up the 1948 Universal Declaration of Human Rights (UDHR). *Drafting of the Universal Declaration of Human Rights*, UNITED NATIONS, <http://research.un.org/en/undhr/draftingcommittee> (last updated Jan. 27, 2016, 9:06 AM). Under the chairmanship of Eleanor Roosevelt, the United Nations' Human Rights Commission drafted the document that became the UDHR. *Id.*

International human rights law also recognizes a country's obligation to prevent such discrimination. Governments are required to ensure that all people are treated without discrimination on the basis of race, ethnicity, disability, social origin, nationality, gender, or other status.<sup>72</sup> Within this context, the United States government has the obligation to protect individuals against discriminatory behavior within their territory. This duty extends to protect all children's right to education without distinction as to race, color, or national or ethnic origin.<sup>73</sup>

Several relevant international treaties bind the United States, including the Convention on the Elimination on All Forms of Racial Discrimination and the Convention Relating to the Status of Refugees. As a party to the Convention on the Elimination on All Forms of Racial Discrimination, the United States has an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights. In effect, the United States must ensure that public education is accessible to undocumented children and the children of undocumented immigrants.<sup>74</sup>

The right to education is not only a fundamental right in itself, but it also enables individuals to realize other basic civil, political, economic, social, and cultural rights. Because education promotes individual freedom and empowerment and yields important development benefits,<sup>75</sup> it has been strongly suggested that countries cannot take retrogressive measures in relation to the right to education on the basis of availability of resources.<sup>76</sup> In practice, that means that the United States cannot argue that a lack of funding prohibits the implementation of a policy to help counter discrimination, including those in the education sector.<sup>77</sup> Under international human rights law, it is the duty of every country to ensure full access to education under equal conditions to every person within its territory.

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<sup>72</sup> See *CRC*, *supra* note 70; *ICESCR*, *supra* note 70; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 8(3)(a), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, 54, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter *ICCPR*]; *CERD*, *supra* note 70; *1951 Refugee Convention*, *supra* note 70; *American Declaration*, *supra* note 70; *UDHR*, *supra* note 71; see also U.N. Educational, Scientific and Cultural Organization [UNESCO] Convention Against Discrimination in Education, 429 U.N.T.S. 93, entered into force May 22, 1962 [hereinafter *CADE*].

<sup>73</sup> See *CERD*, *supra* note 70.

<sup>74</sup> Comm. on the Elimination of All Forms of Racial Discrimination, Rep. of the Sixty-fourth and Sixty-fifth Sessions, *CERD General Recommendation XXX on Discrimination Against Non-Citizens*, U.N. Doc. A/59/18, at 93 (Oct. 1, 2002).

<sup>75</sup> *The Right to Education*, UNESCO, <http://www.unesco.org/new/en/right2education> (last visited Mar. 3, 2015).

<sup>76</sup> See U.N. Comm. on Econ., Soc. & Cultural Rights, Comm. on the Right to Education, U.N. Doc. E/C.12/1999/19, at ¶ 45 (1999).

<sup>77</sup> See *id.* ¶ 31.

## IV. BARRIERS TO ENROLLMENT

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Over the course of our research, we encountered school and district practices that both discourage and delay the enrollment of undocumented children into the public school system. Satisfying rigid documentation requirements, such as proof of residence and proof of guardianship, poses a unique set of challenges for undocumented families and children. Ancillary considerations, including the age of the child or testing performance, are sometimes used as a rationale for delaying, and ultimately, discouraging enrollment. Sometimes these ancillary considerations are obstacles despite applicable laws that mandate immediate enrollment. Further, some students experience forced enrollment in alternative schools or learning programs that are intended to serve as correctional facilities rather than academic environments.

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### CHALLENGES MEETING DOCUMENTATION REQUIREMENTS

Our research shows that undocumented children encounter unique hurdles when attempting to establish requisite proof of residence or proof of guardianship during the enrollment process. Districts with rigid or narrow processes for determining residency and guardianship have the effect of delaying or preventing the enrollment of children when undocumented families are unable to comply, despite being residents of the districts. Flexibility in the types of documents accepted to establish both residency and guardianship would facilitate the timely enrollment of these children.

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#### Legal Overview

States are afforded discretion when determining specific residence and guardianship requirements for enrollment in the public school system.<sup>78</sup> In most states, the determination of what documents are necessary to establish residency for enrollment are left to the discretion of school districts within the context of state-mandated minimums. For example, both Texas and North Carolina require a residency or domiciliary link with the school district in which a child

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<sup>78</sup> In *Milliken v. Bradley*, 418 U.S. 717 (1974), the Supreme Court articulated the policy rationale for, and importance of, local control of public schools, noting that “local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages experimentation, innovation, and health competition for educational excellence.” *Id.* at 742.

intends to enroll. The various school districts, however, are free to determine what they will accept for the purposes of proving residency in their district.<sup>79</sup>

Nevertheless, a state's power to regulate its school enrollment processes is not unlimited. In *Martinez v. Bynum*, the Supreme Court established that *bona fide* residency requirements, like those that require a child or her parent to prove they moved to the district to do more than just go to school, are legitimate. However, the Court suggested that there is a threshold where requirements become too burdensome; requiring that a child prove domiciliary status to attend school, for example, would probably be too high a bar.<sup>80</sup> The Supreme Court held in *Plyler v. Doe* that it was unconstitutional to deny a child access to public education on the basis of his or her actual or perceived immigration status or that of his or her parents.<sup>81</sup> Both decisions place limitations on the types of requirements that a state and district can adopt for the purposes of enrollment.

In both Texas<sup>82</sup> and North Carolina,<sup>83</sup> a child is entitled to enroll in school if he or she meets the age and residency requirements. Texas state law directs districts to set residency requirements by taking into account the best interests of the child,<sup>84</sup> in line with the standards recognized under both international and domestic law. The Texas Education Agency further encourages districts to be flexible when seeking documentation to establish residency. As a result, the residency documentation requirements vary by district in Texas; some districts rely on drivers' licenses, signatures on a lease, or the address on a utility bill. North Carolina does not reference the best interests of the child and instead requires a domiciliary link with the district that a child intends to enroll in, which is, in theory, a stricter standard than simply requiring residency. The North

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<sup>79</sup> State laws do not expressly state that districts are free to determine what is necessary for the purposes of establishing residency and domicile. This is a conclusion reached from the fact that state law does not say what each district must ask for, only that a child needs to be a resident or domiciled there. Furthermore, guidelines issued by state education departments make only recommendations about what documents could be required.

<sup>80</sup> 461 U.S. 321, 331-32 (1983).

<sup>81</sup> 457 U.S. 202 (1982).

<sup>82</sup> TEX. EDUC. CODE ANN. § 25.001 (West, Westlaw through 2015). Under § 25.001 of the Texas Education Code, a person being enrolled must: live in the district with his or her parents; not live in the district but have a parent that has a court ordered conservatorship over the child living in the district; live with a legal guardian in the district; be a foreign student living with a host family in the district; live in a residential facility in the district; live in the district alone and is over 18 or an emancipated minor; or have a grandparent living in the district who provides primary after school care.

<sup>83</sup> N.C. GEN. STAT. ANN. § 115C-364 (West, Westlaw through 2015). In North Carolina, a student that, for reasons including parental or guardian abandonment, abuse, or neglect, is not domiciled in the school district can still enroll in a particular school for free if the student lives with an adult caregiver that is domiciled in the district. N.C. GEN. STAT. ANN. § 115C-366(a3)(1) (West, Westlaw through 2015). The adult caregiver (with or without a corresponding affidavit from the parents or guardian) can complete and sign an affidavit setting out the circumstances of the child living with him or her. *Id.* at (a3)(3).

<sup>84</sup> TEX. EDUC. CODE ANN. § 25.001(d) (West, Westlaw through 2015).

Carolina Education Department defines domicile as one's permanent and established home, but defines residency as a person's actual place of abode, whether permanent or temporary.<sup>85</sup> The Supreme Court in *Martinez v. Bynum* strongly intimated that the strict definition of domicile could not be applied to school-age children and that proving residency by showing physical presence and an intention to remain should be enough for the purposes of enrollment.<sup>86</sup> North Carolina's more stringent requirement that children or their parents prove domiciliary status, instead of basic residency, to attend school in a particular district appears to be at odds with the Court's language in *Martinez v. Bynum*.

Under international human rights law, governments must take steps to promote the care and wellbeing of children, and adhere to the guiding principles of respect for children, including their right to education.<sup>87</sup> Undocumented children face hardships that place them in a situation of vulnerability in comparison to other children. The hurdles that face undocumented children when attempting to establish proof of residency or guardianship during their enrollment process interfere with their right to education in violation of a government's obligation to promote access.

Furthermore, the 'best interests of the child' principle also provides legal grounds for ensuring access to education for all children.<sup>88</sup> The principle has been a guiding standard in United States domestic law since the late 1800s<sup>89</sup> and has been incorporated into international law. In fact, it is said that the reference to the standard in Article 3 of the UN Convention on the Rights of the Child was derived from United States law.<sup>90</sup> Consequently, under both domestic and international law, particularly the Convention on the Rights of the Child – which is widely considered the most comprehensive legal statement on the rights and protections children are entitled to – the best interests of the child standard is to be applied in all actions concerning children, including with relation to the education system.<sup>91</sup>

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<sup>85</sup> *School Attendance and Student Accounting Manual 2015-2016*, PUBLIC SCHOOLS OF NORTH CAROLINA, <http://www.ncpublicschools.org/docs/fbs/accounting/manuals/sasa.pdf> (last visited Mar. 25, 2016).

<sup>86</sup> 461 U.S. 321 (1983).

<sup>87</sup> *American Declaration*, *supra* note 70, at art. 7; Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶ 63 (Aug. 19, 2014).

<sup>88</sup> R. BRIAN HOWE & KATHRINE COVELL, EDUCATION IN THE BEST INTERESTS OF THE CHILD: A CHILDREN'S RIGHTS PERSPECTIVE ON CLOSING THE ACHIEVEMENT GAP 16 (2013).

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

<sup>90</sup> See generally Lynne Marie Kohm, *Tracing the Foundations of the Best Interest of the Child Standard in American Jurisprudence*, 10 J. L. & FAM. STUD. 337, 347-48 (2008) (attributing the modern iteration of the contemporary best interests of the child standard to the confluence of U.S. and English common law jurisprudence in the late 18th and early 19th centuries).

<sup>91</sup> The Convention on the Rights of the Child is a widely recognized standard for the treatment of children, however the United States has only signed, not ratified, the Convention. See, e.g., 11. *Convention on the Rights of the Child*, UNITED NATIONS, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en) (last visited March 2, 2016); see also COVELL & HOWE, *supra* note 88, at 16.

More specifically, the United States is obligated to ensure that public educational institutions are open to non-citizens and children of undocumented immigrants residing in their territory,<sup>92</sup> which is in the best interest of the child.<sup>93</sup> Consistent with these human rights norms, the United States must provide access to public preschool educational institutions or schools without prejudice to the immigration status of the child concerned or parents of the child.<sup>94</sup>

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## Findings

Our research identified several difficulties that undocumented children and their families face in obtaining the requisite documentation for enrollment, particularly to establish residency. Undocumented children can face multiple hurdles in establishing residency. Many families lack formal documentation linking their name to a residence. Furthermore, guardianship is often used to establish residency, and obtaining adequate proof of such a relationship is especially challenging for unaccompanied children with no parents or legal guardians in the United States.

We found that many undocumented families have no formal documentation linking their name to their residence, and therefore, may fail the proof of residency requirements even when they do live in the district. One reason for this obstacle is that undocumented or mixed-status families sometimes live in combined, “doubled-up” households with other family members or individuals. Sometimes the individuals sharing the residence are also undocumented and are therefore wary of providing documentation that would demonstrate proof of residence.<sup>95</sup>

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<sup>92</sup> Comm. on the Elimination of All Forms of Racial Discrimination, Rep. of the Sixty-fourth and Sixty-fifth Sessions, *CERD General Recommendation XXX on Discrimination Against Non-Citizens*, U.N. Doc. A/59/18, at 93 (Oct. 1, 2002).

<sup>93</sup> Comm. on the Rights of the Child [CRC Comm.], *Gen. Comment No. 1: Article 29 (1): The Aims of Education*, U.N. Doc. CRC/GC/2001/1 (Apr. 17, 2001), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2001%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2001%2f1&Lang=en) [hereinafter *CRC General Comment No. 1*].

<sup>94</sup> See *Migrant Workers and Their Families*, *supra* note 70, at art. 30. European countries have interpreted the Convention’s terms regarding access to public schools without prejudice to the migration status of the children or parents as barring them from enacting residency and citizenship restrictions that prevent undocumented children access to school. See, e.g., *Timishev v. Russia*, App nos 55762/00; 55974/00; 2005-XII Eur. Ct. H.R., paras. 63–67, *Dec. 13, 2015*; see also European Union, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, Europ. T.S. No. 009, [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>95</sup> Interviews with community advocates in Houston, Texas (Jan. 11, 2016); interviews with two social workers in Houston, Texas (Jan. 12, 2016).

The challenges faced by these families to document residency is illustrated by Ana<sup>96</sup> who attempted to enroll her recently arrived child in school. Ana and her son Felix,<sup>97</sup> lived with her employer in a doubled-up household. The school required a bill, lease, pay slip, or an affidavit from the person she was living with. Ana's boss, however, was unwilling to provide an affidavit. Felix was ultimately enrolled with the support of a social services provider<sup>98</sup> who expressed concern for the thousands of undocumented families that do not have access to someone to advocate on their behalf in such situations.<sup>99</sup>

Our research also highlighted the unique challenges in cases where a child is enrolled by someone other than a parent, guardian, or person with legal custody over them.<sup>100</sup> Many children arriving in communities have migrated alone. The difficulties of proving guardianship for purposes of residency are heightened for these unaccompanied children. The Office of Refugee Resettlement (ORR), which has the primary responsibility for the care and placement of unaccompanied children apprehended by the Department of Homeland Security,<sup>101</sup> requires the timely release of children to qualified parents, guardians, or other sponsors.<sup>102</sup> When releasing an unaccompanied child, ORR prioritizes parents or legal guardians over unrelated sponsors, but many unaccompanied children have no parent or legal guardian in the United States and are released to relatives or family members that are not legal guardians, or to sponsors who are neither relatives nor family members. Often these caretakers do not meet the guardianship requirements prescribed by the school districts, creating challenges for the enrollment of the child.

Efforts have been made to overcome the lack of a legal nexus between ORR sponsors and the released children. The *Verification of Release* form and sponsor care agreement<sup>103</sup> given

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<sup>96</sup> Pseudonym is used to protect confidentiality of interviewee.

<sup>97</sup> Pseudonyms are used to protect confidentiality of interviewees.

<sup>98</sup> Interview with social worker in Houston, Texas (Jan. 12, 2016).

<sup>99</sup> Interviews with community advocates in Houston, Texas (Jan. 11, 2016); interviews with two social workers in Houston, Texas (Jan. 12, 2016).

<sup>100</sup> Interviews with community advocates in Houston, Texas (Jan. 11, 2016); interviews with two social workers in Houston, Texas (Jan. 12, 2016).

<sup>101</sup> *Unaccompanied Children's Services*, OFFICE OF REFUGEE RESETTLEMENT, <http://www.acf.hhs.gov/programs/orr/programs/ucs> (last visited Mar. 6, 2016).

<sup>102</sup> *Children Entering the United States Unaccompanied: Section 2 Safe and Timely Release from ORR Custody*, OFFICE OF REFUGEE RESETTLEMENT, <http://www.acf.hhs.gov/programs/orr/resource/children-entering-the-united-states-unaccompanied-section-2> (last visited Mar. 2, 2016).

<sup>103</sup> Under this agreement, sponsors are required to "[p]rovide for the physical and mental well-being of the minor, including . . . education." *Sponsor Care Agreement*, OFFICE OF REFUGEE RESETTLEMENT, [http://www.acf.hhs.gov/programs/orr/resource/unaccompanied-childrens-services#Family Reunification Packet for Sponsors](http://www.acf.hhs.gov/programs/orr/resource/unaccompanied-childrens-services#Family%20Reunification%20Packet%20for%20Sponsors) (last visited Mar. 2, 2016).

to a sponsor when a child is released from ORR custody do not establish legal guardianship. Nevertheless, these are usually the only documents a sponsor has available to show a link with the child.<sup>104</sup> Since the dramatic increase of unaccompanied minors entering the school system, some schools have begun to accept the *Verification Release* form as type of affidavit attesting to guardianship and residency because children might not have any other documentation. For example, Charlotte-Mecklenburg County in North Carolina accepts the ORR release documents for the purposes of establishing residency and has established an appeal process for persons having difficulty establishing residency through traditional mechanisms.<sup>105</sup>

Although the use of the *Verification of Release* form to establish residency will help facilitate the enrollment of children who are released to sponsors that do not have legal guardianship, several social service providers told us that children sometimes leave their formal sponsors. Their new caretakers do not have legal guardianship, nor do they have access to the ORR release documents for the purposes of establishing residency. For example, when an undocumented 14-year-old girl decided to leave the sponsors she was released to from ORR custody to live with her 18-year-old sister, officials barred her enrolment when she attempted to attend school, explaining that her sister could not be the caretaker because she was also enrolled in school.<sup>106</sup>

In New York, a number of reports across the state emerged detailing the inability of undocumented students to access public education due to enrollment procedures. For example, a mother from Honduras paid her rent to another tenant living in the same home.<sup>107</sup> School officials refused to accept this as proof of residency.<sup>108</sup> After not being able to secure an affidavit from the homeowner, she was left with no alternatives. The school administrator went so far as to suggest that she move so that she could establish residency.<sup>109</sup>

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<sup>104</sup> Interviews with community advocates in Houston, Texas (Jan. 11, 2016); interviews with two social workers in Houston, Texas (Jan. 12, 2016); Interview with two teachers in Greensboro, North Carolina (Jan. 15, 2016).

<sup>105</sup> *Proof of Residency*, CHARLOTTE-MECKLENBURG SCH., <http://www.cms.k12.nc.us/cmsdepartments/Student-Placement/Pages/ProofofResidency.aspx> (last visited Feb 3, 2016).

<sup>106</sup> Interview with social worker in Houston, Texas (Jan. 12, 2016).

<sup>107</sup> Benjamin Mueller, *Requirements Keep Young Immigrants out of Long Island Classrooms*, N.Y. TIMES (Oct. 21, 2014), [http://www.nytimes.com/2014/10/22/nyregion/rules-and-paperwork-keep-long-islands-immigrant-children-from-classroom.html?\\_r=0](http://www.nytimes.com/2014/10/22/nyregion/rules-and-paperwork-keep-long-islands-immigrant-children-from-classroom.html?_r=0).

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

<sup>109</sup> *Id.*

Recognizing the pervasiveness of these challenges, the New York State Board of Regents recently passed amended regulations to clarify districts' obligations and to provide guidance on how districts can best accommodate the unique needs of undocumented families.<sup>110</sup> The regulations

- Set out the documents that a school is not permitted to request as a condition of enrollment, including social security numbers and documents that may reveal immigration status.<sup>111</sup>
- Provide a non-exhaustive list of appropriate documents to prove residency, including a pay slip or library membership.<sup>112</sup>
- Provide that an affidavit attesting to parental relation or that the child lives with the person attempting to enroll him or her is enough for the purposes of proving the required link with the child for enrollment purposes.<sup>113</sup>

While the effect of these new regulations has yet to be determined, they provide a helpful model as districts assess deficiencies in their enrollment procedures.

Similarly, the federal government has released guidance on potential alternative forms of documentation to prove both residency and guardianship.<sup>114</sup> However, we found that while district-level officials, especially in cities, appear to be aware of the guidance, front-desk administrators responsible for the actual enrollment of children are sometimes unaware of the guidance or do not feel comfortable making the decision to accept alternative forms of documentation without pressure from an advocate.<sup>115</sup>

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## Recommendations

- States and districts should evaluate and revise their enrollment procedures to ensure residency requirements do not discriminate against undocumented families who may be unable to produce traditional residency documents due to living circumstances, such as doubled-up households. Alternative residency documents could include pay stubs or membership documents from social service or religious organizations based on residency.
- States and districts should amend their enrollment guidance to recognize alternative or non-traditional means by which an individual can show responsibility over a child who is registering in a public school for the purposes of meeting guardianship requirements, such as the Verification of Release form, the sponsor care agreement, or an affidavit attesting to the relationship and residence.

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<sup>110</sup> N.Y. COMP. CODES R. & REGS. tit. 8 § 100.2 (2016).

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

<sup>112</sup> *Id.*

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

<sup>114</sup> *Fact Sheet: Information on the Rights of All Children to Enroll in School*, U.S. DEP'T OF EDUC. (May 8, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201405.pdf>.

<sup>115</sup> Interview with social worker in Houston, Texas (Jan. 12, 2016).

- Districts should ensure all enrollment information materials list alternative options for documentation and express a flexible documentation policy to prove guardianship and residency.

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## AGE DISCRIMINATION

We found that even if a student is able to obtain all of the required documentation for enrollment, some schools still discourage or otherwise bar enrollment of undocumented students due to ancillary considerations such as the child's age. Because many recently arriving undocumented students have missed years of formal education, or speak little or no English, schools are concerned some undocumented students may "age out," or pass the maximum age cut off before graduating. As a result, schools sometimes discourage older students who are likely to "age out" from enrolling or encourage them to enroll in alternative educational programs. If schools do enroll undocumented older students, our fact-finding revealed that schools struggle to place older students in classes that are both appropriate for their age and learning level.

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## Legal Overview

Federal civil rights law expressly prohibits discrimination on the basis of age in school systems. Under the Age Discrimination Act of 1975, age discrimination in programs or activities that receive federal financial assistance is expressly prohibited.<sup>116</sup> At the state level, laws generally outline the range of ages that qualify students for the benefits of the public school system. For example, both North Carolina and Texas state regulations guarantee free public school education for all children in the district in which they are domiciled until age 21.<sup>117</sup> In Texas, districts may enroll 21-26 year olds, as well, but are not required to do so.<sup>118</sup> Additionally, a Texas school district may not prohibit a student from attending school pending receipt of transcripts or records from the school district the student previously attended.<sup>119</sup> Although not statutorily required for students without transcripts, methods like those used for homeless students can be used to identify the proper grade level for placement.<sup>120</sup> These methods include talking to students and parents about prior school experiences.<sup>121</sup>

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<sup>116</sup> 42 U.S.C.A. 6102 (West, Westlaw through 2015).

<sup>117</sup> N.C. GEN. STAT. ANN. §115C-364 (West, Westlaw through 2015); TEX. EDUC. CODE ANN. §§ 25.001-.002 (West, Westlaw through 2015).

<sup>118</sup> TEX. EDUC. CODE ANN. §§ 25.001-.002 (West, Westlaw through 2015).

<sup>119</sup> The failure of a prior district or the person enrolling the student to provide identification or school records under section 25.002 does not constitute grounds for refusing to admit an otherwise eligible student. TEX. EDUC. CODE ANN. §25.002 (West, Westlaw through 2015).

<sup>120</sup> Prompt and Proper Placement: Enrolling Students without Records, UNIV. OF TEX., DANA CTR. (Fall, 2006) [http://www.utdanacenter.org/theo/downloads/factsheets/RP23\\_Placement\\_without\\_records.pdf](http://www.utdanacenter.org/theo/downloads/factsheets/RP23_Placement_without_records.pdf).

<sup>121</sup> *Id.*

The United States is also obligated under international law to eliminate discriminatory practices towards undocumented children.<sup>122</sup> In the case of United States federal immigration law, a child is an unmarried person under 21 years,<sup>123</sup> and some jurisdictions (including Texas and North Carolina)<sup>124</sup> guarantee access to free public education until the age of 21. Because U.S. law extends the definition of children up to the age of 21, international obligations against discrimination also extend to guarantee free public school education to all undocumented children up to the age of 21 where guaranteed for children generally.<sup>125</sup>

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## Findings

Due to interrupted formal education or discrepancies in the educational standards of their home countries, undocumented children frequently do not satisfy or have difficulty proving that they meet the academic standards or credit requirements expected for their age. As a result, older students are often placed in lower grades with younger children, which makes them uncomfortable and decreases their chances of graduating before “ageing out.”

Our fact-finding revealed that young adults in Texas and North Carolina are sometimes discouraged from enrolling despite being within the legally permitted age range. In an urban North Carolina district we visited, counselors, teachers, and school district administrators explained that schools are motivated by district policies that reward high graduation rates. Schools may not only assume that older students are at a higher risk of dropping out, but schools also consider students’ age when enrolling because children that “age out” (i.e. surpass the 21-year-old mark before graduating) count towards the school’s “drop out” rate.<sup>126</sup> According to a school district official in Texas working with the newcomer community, age-related discrimination in enrollment was the most prevalent issue in 2015.<sup>127</sup>

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<sup>122</sup> See generally *CERD*, supra note 70, at art. 5 (v); *ICCPR*, supra note 72, at art. 24; *1951 Refugee Convention*, supra note 70, at art. 22; *UDHR*, supra note 71, at art. 26; *American Declaration*, supra note 70, at art. XII; Comm. on the Elimination of All Forms of Racial Discrimination, Rep. of the Sixty-fourth and Sixty-fifth Sessions, *CERD General Recommendation XXX on Discrimination Against Non-Citizens*, U.N. Doc. A/59/18, at 93 (Oct. 1, 2002).

<sup>123</sup> 8 U.S.C. § 1101(b)(1) (West, Westlaw through 2015).

<sup>124</sup> N.C. GEN. STAT. ANN. § 115C-364 (West, Westlaw through 2015); TEX. EDUC. CODE ANN. §§ 25.001-.002 (West, Westlaw through 2015).

<sup>125</sup> United Nations Human Rights Committee, *CCPR General Comment No. 17: Article 24 (Rights of the Child)*, U.N. Doc. HRI/GEN/1/Rev.6, at 144, ¶ 4 (April 7, 1989), [http://www.un.org/ga/search/viewm\\_doc.asp?symbol=HRI/GEN/1/Rev.6](http://www.un.org/ga/search/viewm_doc.asp?symbol=HRI/GEN/1/Rev.6); Comm. on the Elimination of All Forms of Racial Discrimination, Rep. of the Sixty-fourth and Sixty-fifth Sessions, *CERD General Recommendation XXX on Discrimination Against Non-Citizens*, U.N. Doc. A/59/18, at 93 (Oct. 1, 2002).

<sup>126</sup> Interview with district officials in Durham, North Carolina (Jan. 15, 2016).

<sup>127</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

According to a school district official in Texas working with the newcomer community, age-related discrimination in enrollment was the most prevalent issue in 2015.

As a result, schools discourage older students from enrolling if they are not expected to graduate by the time they reach the maximum age eligible for public school education. We heard reports from parents in North Carolina that schools did not respond to their children's enrollment efforts because of the students' older age.<sup>128</sup> Similarly, in New York, six refugees filed a class action lawsuit against the Utica City School District Board of Education alleging that the district discriminates against refugee students older than 16.<sup>129</sup>

Due to concerns of "ageing out," schools sometimes encourage older students to enroll in alternative education programs. In Texas, for example, we learned that despite the presence of a long-standing immigrant community, school officials traditionally referred older children, typically 16-, 17-, or 18-years old to a primary school that handles young adult education or a community college instead of enrolling them in traditional high schools.<sup>130</sup> It appears that this practice had been prevalent in North Carolina, as well. For example, in 2014, two children filed a civil rights complaint against Buncombe County and Union County Schools for discrimination in North Carolina public schools against unaccompanied children. Both students were directed to GED programs, even though they were 17 years old. The complaint details examples of older children being turned away from schools because they are "too old to enroll." Importantly, the complaint asserts that "age is used as a pretext for denying enrollment based on national origin or limited English proficiency," implicating other discriminatory violations.<sup>131</sup>

The practice of encouraging older students to enroll in alternative educational programs was mirrored in other states, including New York and Florida. In New York, despite a state law that guarantees residents access to public education until 21 years of age,<sup>132</sup> the State Attorney General opened an investigation into claims that the Westbury School District of Long Island was delaying enrollment for students older than 16 years old or redirecting them to non-degree programs. In response to the Attorney General's investigations, the Westbury School District recently "agreed to end its unwritten policy of delaying or denying school enrollment to

<sup>128</sup> Interview with mother in Greensboro, North Carolina (Jan. 14, 2016.).

<sup>129</sup> Complaint, Patrick Tuyizere, et al. v. Utica City School District Board of Education, Index No. 15-cv-488(TJM) (TWD) (N.D.N.Y. filed Apr. 23, 2015), <http://www.scribd.com/doc/293374717/NYCLU-LAWSUIT>.

<sup>130</sup> Interview with district official in Houston, Texas (Jan. 11, 2016).

<sup>131</sup> Consolidated Civil Rights Complaint, C.V. & F.C. v. Buncombe County Schools & Union County Public Schools (Feb. 13, 2014), [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/case/doj\\_complaint\\_-\\_letter\\_to\\_nc\\_dpi\\_and\\_board\\_of\\_education.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/doj_complaint_-_letter_to_nc_dpi_and_board_of_education.pdf).

<sup>132</sup> N.Y. EDUC. LAW § 3202 (McKinney, Westlaw through 2015).

children arriving from Central and South America.”<sup>133</sup> In Florida, a Guatemalan national sued the School Board of Palm Beach County after he was ejected from a local high school shortly after he turned 18.<sup>134</sup> The School Board cited safety concerns, lack of credits, his GPA, and age as the justification for its actions, and funneled him into a nighttime adult program that only offered classes to learn English and through which he would be unable to obtain a high school diploma.<sup>135</sup> In 2015, concurrent with the development of the *Roblero* case (which was later settled), the Department of Justice issued a letter citing the district’s failure to comply with the terms of a 2013 Settlement Agreement, which was reached after a series of complaints alleged discriminatory enrollment and discipline procedures. That letter explicitly referenced the continued age-based discrimination pervasive throughout the school district.<sup>136</sup>

“[I]t was an open secret that refugees just knew within the community that once you were at a certain age and you’re arriving in the country, you’re just not going to get a chance to go to high school.”<sup>137</sup> – Student’s Attorney

Our research revealed that if older students are enrolled, they are often placed in a lower grade than their peers of the same age. As a result, older students are enrolled into classes with students who are much younger than they are; making older students feel uncomfortable. This practice also makes it very difficult to graduate before “ageing out.” We spoke with Gabriela,<sup>138</sup> who emigrated from Honduras in 2011, where she was enrolled in 10th grade as a 17 year-old. She enrolled in a high school in an urban district with an established immigrant population, and was placed in the 9th grade rather than moving on to the 11th grade. Once enrolled, she felt discriminated against because she was three years older than most students, explaining that if a

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<sup>133</sup> Andrea Sears, *Agreement Opens School Doors to Immigrant Children*, PUBLIC NEWS SERVICE (Mar. 1, 2016), <http://www.publicnewsservice.org/2016-03-01/education/agreement-opens-school-doors-to-immigrant-children/a50639-1>.

<sup>134</sup> Complaint at 3-4, *Roblero v. Sch. Bd. of Palm Beach Cnty.*, Fla. (2015) (No. 9:15-cv-80874-KAM), <https://dockets.justia.com/docket/florida/flsdce/9:2015cv80874/465596>.

<sup>135</sup> *Id.* Roblero asserted that the School Board’s actions violated school policies, Title VI of the Civil Rights Act of 1964, and the Equal Educational Opportunities Act.

<sup>136</sup> *Id.* “Some immigrant students reported being turned away at schools because they did not have a parent who could enroll them. Yet others, particularly students whose formal education has been interrupted, report being counseled that a regular comprehensive high school would not be appropriate for them, and feeling pushed into charter schools, alternative schools, or adult education. Although some of these students and families eventually receive help from the District office or find their way to advocacy groups, we are deeply concerned about school and District personnel impeding, rather than assisting, immigrant and [Limited English Proficiency] families in navigating the registration and enrollment process.”

<sup>137</sup> Hansi Lo Wang, *Refugees Say N.Y. School District Blocked Them From Going to High School*, NPR (Mar. 1, 2016), <http://www.npr.org/2016/03/01/468246903/refugees-say-n-y-school-district-blocked-them-from-going-to-high-school>.

<sup>138</sup> Pseudonym is used to protect confidentiality of interviewee.

student is older, the school imposes a no-leniency attendance policy; if an older student misses a day of class, the repercussions are more pronounced than if a younger student did the same.<sup>139</sup> We also found in at least one Texas district that if children could not provide their transcripts or their transcripts were not easily interpreted by the district, the general practice was to enroll older children in ninth grade by default.<sup>140</sup>

“I was told by a school administrator that I did not have a right to education.”  
– Gabriela

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## Recommendations

- States and school districts should redefine performance metrics to exclude those children that “age out” of school before graduation from schools’ “drop-out” rates to remove an incentive to bar older children from enrollment.
- In determining grade placement, schools should balance age and academic-level, with the goal of creating an opportunity for students to graduate before “ageing out.”
- Districts should use institutions, like accountability committees, to accommodate students with interrupted formal education (SIFE) and to fairly administer exams to this particular population, which, because of migration schedules, tends to enroll later in the year.
- States should issue guidance to districts on their obligation to enroll students who are within the age range for whom free education must be offered, and districts should ensure that schools fulfill their obligation to enroll all eligible students.

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## DELAYED ENROLLMENT DUE TO EXPECTED TESTING PERFORMANCE

In addition to deterring enrollment outright, schools and districts sometimes implement intentional and unintentional policies that effectively delay, and ultimately discourage, enrollment. One such practice is the consideration of performance standards in deciding whether to enroll a child. The performance of school districts and individual schools is evaluated through the use of state-wide, standardized tests. We found that schools are sometimes reluctant to admit immigrant children, especially right before or during a testing period, for fear that their testing scores will negatively impact the schools’ performance reviews. As a result, students are told or

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<sup>139</sup> Interview with mother in Houston, Texas (Jan. 12, 2016).

<sup>140</sup> Interview with district official in Houston, Texas (Jan. 11, 2016).

encouraged to return to enroll following testing. This deterrence can leave a negative impression on students and their families, creates confusion if language translation services are not provided, and can jeopardize the eventual successful enrollment of the student. By deferring enrollment, the school creates an additional step in the process, requiring families to travel again to school, costing them a great deal in travel expenses and missed work. This extra step can be one step too many, especially for undocumented families, causing families to not return to enroll.

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## Legal Overview

Federal law prohibits the anticipation of poor performance on tests as a factor for consideration in enrollment decisions. Deterrence from enrollment due to testing considerations is inconsistent with the spirit of federal legal precedent, including under *Plyler* and Title VI of the Civil Rights Act of 1964, which mandates non-discrimination in enrollment processes. Indeed, states generally do not include testing considerations in their enrollment policies. For example, Texas, North Carolina, and New York all provide that children are entitled to entry if they meet residency and age requirements.<sup>141</sup>

Testing, however, plays a large role in the monitoring and evaluation of state educational systems, particularly of high school students. The No Child Left Behind Act (NCLB) was frequently criticized for its emphasis on testing.<sup>142</sup> Under the NCLB, states were required to set “challenging”<sup>143</sup> academic standards and assessments of both English proficiency and core subjects (math, reading or language arts, and science).<sup>144</sup> States were able to apply for a waiver,<sup>145</sup> which exempted newly enrolled students for the first academic year they are enrolled from either participating in testing or counting their results towards the schools’ performance.<sup>146</sup> At the end

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<sup>141</sup> See, e.g., N.C. GEN. STAT. ANN. § 115C-364 (West, Westlaw through 2015); N.Y. EDUC. LAW § 3202 (West, McKinney 2015); TEX. EDUC. CODE ANN. §§ 25.001-.002 (West, Westlaw through 2015).

<sup>142</sup> See, e.g., Joy Resmovits, *Teachers Rally Against Standardized Testing At No Child Left Behind Hearing*, HUFFINGTON POST (Jan. 21, 2015), [http://www.huffingtonpost.com/2015/01/21/standardized-testing-no-child-left-behind\\_n\\_6517102.html](http://www.huffingtonpost.com/2015/01/21/standardized-testing-no-child-left-behind_n_6517102.html); Steve Inskeep, *Former ‘No Child Left Behind’ Advocate Turns Critic*, NPR (July 15, 2011), <http://www.npr.org/templates/story/story.php?storyId=124209100>.

<sup>143</sup> 20 U.S.C. § 6311 (West, Westlaw through 2015).

<sup>144</sup> NCLB Testing: Frequently Asked Questions, U.S. DEP’T OF EDUC. (Feb. 24, 2016), <http://www2.ed.gov/nclb/accountability/ayp/testing-faq.html>.

<sup>145</sup> 20 U.S.C.A. § 7861 (West, Westlaw through 2015).

<sup>146</sup> Both Texas and North Carolina have been approved for the flexibility waiver program. *NCLB-ESEA Waiver Information*, TEX. EDUC. AGENCY, [http://tea.texas.gov/Texas\\_Schools/Waivers/NCLB-ESEA\\_Waiver\\_Information/](http://tea.texas.gov/Texas_Schools/Waivers/NCLB-ESEA_Waiver_Information/) (last visited Mar. 17, 2016); Lynn Bonner, *NC Waiver on No Child Left Behind Extended*, NEWS & OBSERVER (Mar. 31, 2015), <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article17016326.html>.

of the academic year in which they are enrolled, however, the students must be counted in performance data. While a temporary solution, the waiver does not solve the issues surrounding testing because it is likely difficult for a student to learn a new language and be proficient in the information that is being tested within the academic year of enrollment. This time limit is especially challenging because the majority of recently arriving undocumented children travel in the spring, so at the time of their enrollment and testing, there is only a short time left in the United States academic year.

Importantly, the Every Students Succeeds Act (ESSA), in replacing NCLB, reorganized teacher evaluation and school accountability systems. Although ESSA still mandates extensive testing, the receipt of federal funds is no longer contingent upon satisfactory performance of rigid federal teacher evaluation requirements. Instead, the states will have the autonomy to set their own accountability systems, which can include non-test measures in the assessments of student performance.<sup>147</sup> Although ESSA has yet to be implemented, this new structure presents an opportunity to redefine teacher and school performance metrics, effectively minimizing the incentives of excluding English Learners.

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## Findings

The incidence of accounts of enrollment deterrence due to testing considerations varied across state lines. In states or districts that have experience in working with newcomer populations, testing-related barriers seemed to be less frequent. For example, we did not encounter many instances of testing considerations as barriers to student enrollment in Texas. This difference may be due in part to the system-wide programs that are in place to better accommodate English Learners (EL) within the testing framework. Officials of an urban district with a long-standing immigrant population pointed us to the fact that non-native and native English speakers learn using the same curriculum, but are held to different standards.<sup>148</sup> Specific institutions, like accountability committees, help districts and schools to accommodate students with interrupted formal education (SIFE) and to fairly administer exams to this particular population, which tends to enroll later in the year.<sup>149</sup>

“[Y]ou are going to fail, it is probably better if you just wait [to enroll].”  
 – Anonymous social service provider recounting what her client was told.<sup>150</sup>

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<sup>147</sup> *How Will the New ESEA/ESSA Affect Schools in Your State*, AM. FED’N OF TEACHERS, [http://www.aft.org/sites/default/files/how\\_will\\_esea\\_essa\\_affect\\_schools\\_in\\_your\\_state\\_113015.pdf](http://www.aft.org/sites/default/files/how_will_esea_essa_affect_schools_in_your_state_113015.pdf) (last visited Feb. 2, 2016).

<sup>148</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>149</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>150</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

In contrast, we found that delays in student enrollment due to testing considerations were relatively common in North Carolina. One 17 year-old student was told that she could not start school until after exams, delaying her enrollment by four weeks.<sup>151</sup>

School officials in one North Carolina district explained that “there is not a lot of opportunity for students to be successful if they come in at the end of the school year,” citing the detrimental effect of failing grades on the students’ transcripts if they do enroll.<sup>152</sup> These officials further pointed to the fact that if students are told to return after testing, most families do return to enroll, so there is less risk of complete deterrence; if they do not, the district EL officials make an effort to reconnect with them.<sup>153</sup> Those officials are aware of the inadvertent barriers that the testing framework creates, and they are working to find a solution, including the possibility of students temporarily auditing classes.<sup>154</sup> Even though administrators may believe that by denying enrollment they prevent the addition of failing grades to the students’ transcripts, their actions can prevent many students from receiving the education they are entitled to. As one social service provider explained, “there is a fine line between discouraging and denying enrollment.”<sup>155</sup>

“There is a fine line between discouraging and denying enrollment.”

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## Recommendations

- In order to discourage discriminatory practices, states should take advantage of ESSA’s expanded discretion to dictate teacher and student performance metrics that are less dependent on testing scores.
- As with addressing age discrimination, districts should use institutions, like accountability committees, to accommodate students with interrupted formal education (SIFE) and to fairly administer exams to this particular population, which tends to enroll later in the year.
- The U.S. Department of Education should provide a blanket exemption from testing requirements for all recently arrived undocumented students, instead of placing the burden on states to apply for the waiver.

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<sup>151</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>152</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>153</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>154</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>155</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

- The U.S. Department of Education should provide guidance to states on the use of performance metrics other than testing when evaluating the performance of schools and teachers.
- The U.S. Department of Education should extend waivers for at least a full year for newly enrolled students rather than just the academic year of enrollment.

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## SOLUTIONS TO ENROLLMENT THAT ARE NOT FULLY IMPLEMENTED: THE MCKINNEY VENTO ACT AND STATE-MANDATED 30 DAY DELAY

Despite the availability of tools that can help schools overcome some of the administrative challenges of enrolling undocumented immigrant children, such as proof of residency, our research indicates that such tools are not always used effectively. One such tool is the McKinney Vento Act, which requires the immediate enrollment of children who qualify as homeless. Many schools lacked a clear understanding of how the Act applies to undocumented children, and in some instances they misapplied the law. Similarly, while some districts have sought to facilitate enrollment through a grace period, which allows for the immediate enrollment of a child despite gaps in documentation, this option is not always conveyed to families.<sup>156</sup> We found that both the federal McKinney Vento Act and state laws provide needed flexibility for undocumented students in satisfying documentation requirements<sup>157</sup> and add legal protections against excuses to delay or deter enrollment.

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### Legal Overview

Under the McKinney-Vento Act, a child who qualifies as homeless must be immediately identified and permitted to enroll in school.<sup>158</sup> The Act defines a homeless child as one who “lacks a fixed, regular, and adequate night-time residence.”<sup>159</sup> This definition includes children who are “sharing the housing of other people due to loss of housing, economic hardship, or a similar reason” and “children or youth who have a primary night-time residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human

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<sup>156</sup> *Documents Required for Enrollment*, HOUS. INDEP. SCH. DIST., <http://www.houstonisd.org/Page/31538> (last visited Feb. 12, 2016).

<sup>157</sup> Interview with social worker in Houston, Texas (Jan. 12, 2016); see also Benjamin Mueller, *Requirements Keep Young Immigrants out of Long Island Classrooms*, N.Y. TIMES (Oct. 21, 2014), [http://www.nytimes.com/2014/10/22/nyregion/rules-and-paperwork-keep-long-islands-immigrant-children-from-classroom.html?\\_r=0](http://www.nytimes.com/2014/10/22/nyregion/rules-and-paperwork-keep-long-islands-immigrant-children-from-classroom.html?_r=0).

<sup>158</sup> 42 U.S.C.A. § 11434a (West, Westlaw through 2015).

<sup>159</sup> 42 U.S.C.A. § 11434a(2)(A) (West, Westlaw through 2015).

beings.”<sup>160</sup> If a child qualifies as homeless under this definition, the school selected on the basis of a “best interest determination”<sup>161</sup> must immediately enroll the child, even if the child lacks normally required documents, such as previous school records, medical or immunization records, proof of residence, birth certificate, proof of guardianship, or other documents.<sup>162</sup> If a child is missing documentation, the school homeless liaison must assist with obtaining immunizations and records.<sup>163</sup>

Although unaccompanied status does not automatically convey homeless status, many unaccompanied youth will meet the homeless criteria. The law’s definition of homeless extends to children who are living with family members in doubled-up housing, a common situation for many unaccompanied children and undocumented families (as described above).<sup>164</sup> The immigration status of a child found to be homeless under the McKinney-Vento Act is irrelevant.

Some state laws supplement the flexibility mandated under the McKinney-Vento Act. For example, Texas guidance provides for provisional enrollment of homeless children under the McKinney-Vento Act; this provisional enrollment allows a child to be enrolled in school for up to 30 days until immunizations are obtained.<sup>165</sup> There is no similar timeline outlined for school records.<sup>166</sup>

Similarly, even for non-homeless children, Texas guidance provides that a parent or legal guardian must present records for enrollment “no later than the 30th day after the date the child is enrolled.”<sup>167</sup> Although this guidance does not require school administrators to enroll a child and then give parents thirty days to furnish necessary documentation, the guidance provides districts

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<sup>160</sup> 42 U.S.C.A. § 11434a(2)(B) (West, Westlaw through 2015).

<sup>161</sup> The “best interest standard” requires that a school (a) Continue the child’s or youth’s education in the school of origin for the duration of homelessness when a family becomes homeless between academic 13 years or during an academic year; or for the remainder of the academic year if the child or youth becomes permanently housed during an academic year; or (b) Enroll the child or youth in any public school that non-homeless students who live in the attendance area in which the child or youth is actually living are eligible to attend. *Education for Homeless Children and Youth*, U.S. DEP’T OF EDUC. 13 (July, 2004), <http://www2.ed.gov/programs/homeless/guidance.pdf>.

<sup>162</sup> *Id.* at 16.

<sup>163</sup> *Id.*

<sup>164</sup> Interview with social worker in Houston, Texas (Jan. 12, 2016).

<sup>165</sup> *Letter Re: New Immunization Requirements for School Admittance*, TEX. DEPT. OF HEALTH AND TEX. EDUC. AGENCY (July 9, 2004), [http://www.utdanacenter.org/theo/downloads/factsheets/RP43\\_Immunizations.pdf](http://www.utdanacenter.org/theo/downloads/factsheets/RP43_Immunizations.pdf).

<sup>166</sup> Prompt and Proper Placement: Enrolling Students without Records, UNIV. OF TEX., DANA CTR. (Fall, 2006) [http://www.utdanacenter.org/theo/downloads/factsheets/RP23\\_Placement\\_without\\_records.pdf](http://www.utdanacenter.org/theo/downloads/factsheets/RP23_Placement_without_records.pdf).

<sup>167</sup> *Attendance, Admission, Enrollment Records, and Tuition 2015-16*, TEX. EDUC. AGENCY (Aug. 11, 2015), [http://tea.texas.gov/About\\_TEA/News\\_and\\_Multimedia/Correspondence/TAA\\_Letters/Attendance,\\_Admission,\\_Enrollment\\_Records,\\_and\\_Tuition\\_\\_2015-16/](http://tea.texas.gov/About_TEA/News_and_Multimedia/Correspondence/TAA_Letters/Attendance,_Admission,_Enrollment_Records,_and_Tuition__2015-16/).

the flexibility to institute such policies.<sup>168</sup> Unlike in Texas, North Carolina state law does not contain a similar 30-day provision. North Carolina State law, however, does explicitly provide thirty days for parents to present immunization records.<sup>169</sup>

While the McKinney-Vento Act and 30 day provisions work independently of each other, they are both mechanisms that if fully implemented can assist with the enrollment of undocumented children both through successful identification as “homeless” and by giving parents and guardians a window to provide documentation to schools.

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## Findings

Our research documented several issues surrounding the application of the McKinney-Vento Act. In Texas, social service providers called the McKinney-Vento Act a “saving grace.”<sup>170</sup> Advocates recalled experiences using the McKinney-Vento Act as a tool to advocate for the immediate enrollment of undocumented children who qualify as homeless. In North Carolina, however, teachers reported that some immigrant children were denied homeless status even when they seemed to qualify as such under the definition.<sup>171</sup> At one school, for example, counselors voiced concern that the homelessness liaison often denied their requests to classify undocumented or unaccompanied children living in doubled-up housing as homeless. This situation escalated until the counselors asked for formal guidance from the liaison to try to understand the implementation of this law. Lack of guidance regarding the application of the Act to undocumented and unaccompanied children can result in the inability of these children to enroll in school in a timely fashion.

The U.S. Committee for Refugees and Immigrants (USCRI), which provides social services to unaccompanied children, also expressed this concern about undocumented children being wrongfully denied homeless status in North Carolina. A caseworker with USCRI explained that many schools seem reluctant to enroll undocumented children under McKinney-Vento, even when they qualify. In yet another example of confusion, one school asked USCRI for guidance on how the Act applies to undocumented students.<sup>172</sup> Social service providers reported that many rural schools are not aware that undocumented children may in some instances qualify as homeless under the Act.<sup>173</sup>

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<sup>168</sup> *Id.*

<sup>169</sup> N.C. GEN. STAT. §§ 130A-155 (West, Westlaw through 2015); *see also 2015-2016 School Attendance and Student Accounting Manual*, N.C. ST. BD. OF EDUC., <http://www.ncpublicschools.org/docs/fbs/accounting/manuals/sasa.pdf> (last visited Mar. 17, 2016).

<sup>170</sup> Interview with social worker in Houston, Texas (Jan. 12, 2016).

<sup>171</sup> Interview with teacher in Greensboro, North Carolina (Jan. 15, 2016).

<sup>172</sup> Interview with social worker in Raleigh, North Carolina (Jan. 15, 2016).

<sup>173</sup> Interview with social worker in Raleigh, North Carolina (Jan. 15, 2016).

The Houston Independent School District has embraced the McKinney-Vento Act and has adopted the policy that “[n]o student may be denied enrollment solely because of failure to meet documentation requirements.”<sup>174</sup> A member of the State Education Board reiterated that in Texas, schools must immediately enroll a child and permit parents and guardians to submit the required documentation within 30 days.<sup>175</sup>

The recent experience of New York State on the issue of flexibility in enrolment is instructive. As previously discussed, after several New York school districts blocked enrollment for undocumented immigrant children, the state issued updated enrollment guidance that addressed some of these issues. As part of this guidance, the State Department of Education reminded school districts “of their obligation to immediately enroll such students while McKinney-Vento eligibility determinations are being made.”<sup>176</sup> The guidance also directs school districts to assess the eligibility of each child under McKinney-Vento on a “case-by-case basis and . . . take into account the unique circumstances of each child.”<sup>177</sup> This guidance is based on provisions contained in the Regulations of the Commissioner of Education.<sup>178</sup>

Even where state laws and regulations support flexibility such as 30 day grace periods, problems with implementation can arise. Our fact-finding revealed that schools do not always convey the 30-day grace period rule to parents.<sup>179</sup> Despite the existence of a formal policy, some schools even decline to enroll a child until parents have gathered the necessary documents.<sup>180</sup> Delays in enrollment can be particularly cumbersome for undocumented families with limited resources and access to transportation;<sup>181</sup> practitioners recounted that many parents are forced to miss entire days of work to enroll their child in school.<sup>182</sup> As a result, parents and students are deterred from enrolling in school when they do not have all of the documentation on the day that they attempt to enroll.<sup>183</sup>

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<sup>174</sup> *Documents Required for Enrolment*, HOUS. INDEP. SCH. DIST., <http://www.houstonisd.org/Page/31538> (last visited Feb. 12, 2016).

<sup>175</sup> Interview with school district official in Houston, Texas (Jan. 12, 2016).

<sup>176</sup> Memorandum from Cosimo Tangorra, Jr., Deputy Comm’r for P-12 Educ., to Dist. Superintendents et. al. (Sept. 10, 2014), <http://www.p12.nysed.gov/sss/documents/EducationalServicesforRecentlyArrivedUnaccompaniedChildren.pdf>.

<sup>177</sup> *Id.*

<sup>178</sup> N.Y. COMP. CODES R. & REGS. tit. 8, § 100.2(x) (2016).

<sup>179</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>180</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>181</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>182</sup> Interview with social worker in Houston, Texas (Jan. 12, 2016).

<sup>183</sup> Interview with social worker in Houston, Texas (Jan. 12, 2016). Anonymous interview conducted by a member of the fact-finding project in January 2016.

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## Recommendations

- The U.S. Department of Education, and state education departments, should ensure school officials' awareness and understanding of existing guidance regarding the application of the McKinney-Vento Act to undocumented children, including targeted outreach to localities who have not traditionally served immigrant populations and undocumented children.
- States should ensure school officials' awareness of existing guidance regarding the application of the McKinney-Vento Act to undocumented children, including targeted outreach to localities that have not traditionally served immigrant populations and undocumented children.<sup>184</sup>
- States should also ensure that there is an effective appeals process that is easy to navigate and includes necessary language accommodations.
- States should adopt enrollment grace periods, such as Texas' 30-day window, which would allow students to immediately enroll in school while their parents or sponsors furnish required enrollment documentation and ensure that parents are informed of this option.
- The Office of Refugee Resettlement should distribute materials explaining how the McKinney-Vento Act may apply to unaccompanied children released from federal custody.

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## FORCED ENROLLMENT IN ALTERNATIVE SCHOOLS

Our fact-finding revealed that some districts, rather than creating programs to accommodate undocumented students, particularly older children, in the general public school system, forcibly enrolled English learner students and students without proper documentation in alternative schools that were meant for children with correctional or behavioral needs. Due to a lack of knowledge about the U.S. education system, an inherent fear of exposing status, facing law enforcement, and experiencing deportation, children and sponsors are reluctant to assert their rights under the law to be free from forced enrollment into alternative schools and curriculums. Further, language barriers between school officials and children, as well as between school officials and sponsors, create an intimidating environment in which undocumented children and sponsors feel unable to communicate their enrollment preferences or voice their dissatisfaction with forced enrollment in alternative schools.

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<sup>184</sup> 42 U.S.C.A. §11434a (West, Westlaw through 2015).

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## Legal Overview

Under international human rights standards, the United States is obligated to “avoid segregated schooling and different standards of treatment being applied to non-citizens on grounds of race, color, descent, and national or ethnic origin in elementary and secondary school and with respect to access to higher education.”<sup>185</sup>

Domestic civil rights law explicitly mandates equal access to education by all students. The Equal Educational Opportunities Act (EEOA) requires that “[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.”<sup>186</sup> Additionally, where such language barriers result in discriminatory practices that further disadvantage the marginalized and leave individuals voiceless, Title VI prohibits recipients of federal financial assistance from “intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Federal civil rights law.”<sup>187</sup>

Texas state law does not address the forced enrollment of students in alternative schools, but does outline the agency parents and children have in the enrollment of students in special curriculum programs. That law requires school districts to establish “standardized criteria for the identification, assessment, and classification of students of limited English proficiency eligible for entry into the program or exit from the program. The student’s parent must approve a student’s entry into the program, exit from the program, or placement in the program.”<sup>188</sup> North Carolina law, however, directly speaks to the placement of students in alternative schools or alternative learning programs. The statute requires that, “prior to referring a student to an alternative school or an alternative learning program,” the school must articulate the procedures it used to determine that a student is at risk for “academic failure” or “being disruptive or disorderly.”<sup>189</sup> The school must also provide adequate reasoning for referring the student to an alternative school or program, and must provide the alternative school with “all relevant student records, including anecdotal information.”<sup>190</sup>

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<sup>185</sup> Comm. on the Elimination of All Forms of Racial Discrimination, Rep. of the Sixty-fourth and Sixty-fifth Sessions, *CERD General Recommendation XXX on Discrimination Against Non-Citizens*, U.N. Doc. A/59/18, at 93 (Oct. 1, 2002).

<sup>186</sup> 20 U.S.C.A. § 1703(f) (West, Westlaw through 2015).

<sup>187</sup> *Policy Guidance on Retaliation*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/retaliation.html> (last visited Mar. 16, 2016).

<sup>188</sup> TEX. EDUC. CODE ANN. § 29.056 (West, Westlaw through 2015).

<sup>189</sup> N.C. GEN. STAT. ANN. § 115C-105.48 (West, Westlaw through 2015).

<sup>190</sup> *Id.*

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## Findings

Despite explicit state policies prohibiting forceful enrollment into alternative programs, we found instances contrary to the law. A community advocate in rural Texas recounted a school district's practice of forcefully placing undocumented students in a correctional school meant for students who had prior involvement in violent behavior and gang affiliation. Many families reported that the school district administrator did not provide them with a choice as to whether or not to enroll in the alternative school, completely disregarding the rights of these individuals.<sup>191</sup> One mother said, "The lady says there is no school that will be able to take him because he doesn't know anything. I can only put him in [the alternative] program . . . and it is not a safe place. My son is of good character and he shouldn't have to go to a school for correctional students."<sup>192</sup>

"My son is of good character and he shouldn't have to go to a school for correctional students."

Problems with forced enrollment even happen in urban schools with a long history of undocumented newcomer populations. A practitioner cited an example of a 14-year-old boy who was pushed to enroll at an alternative, correctional high school due to the perception that he was unable to keep up with a standard curriculum, and would be dangerous to his peers because he came from Central America. According to the administration, the boy's age was prohibitively old to place him in Junior High. This finding parallels the discussion noted above, demonstrating that a newcomer's age and the ensuing difficulties with curriculum and grade-level placement sometimes impacts a school's decision whether and how to enroll a student. Placing children into behavioral programs because of educational gaps is improper and violates their civil rights.<sup>193</sup>

Attorneys in New York and Florida also found other examples of forced enrollment. In New York, a federal class action lawsuit filed on April 23, 2015 by the New York Civil Liberties Union and Legal Services of Central New York alleged that public schools in Utica were unlawfully excluding refugee youth and segregating them into inferior alternative programs that offer no opportunity to earn a high school diploma.<sup>194</sup> The lawsuit alleged that EL immigrant students over the age of 16 were prevented from enrolling in the only high school in the district, and instead were diverted to alternative programs that provide limited educational instruction.

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<sup>191</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>192</sup> Interview with a mother in Houston, Texas (Jan. 11, 2016).

<sup>193</sup> Interview with a social worker in Houston, Texas (Jan. 11, 2016).

<sup>194</sup> Complaint, *Tuyizere v. Utica City School District Board of Education*, Index No. 15-cv-488(TJM)(TWD) (N.D.N.Y. filed Apr. 23, 2015), <http://www.scribd.com/doc/293374717/NYCLU-LAWSUIT>.

Additionally, on November 17, 2015, the New York Attorney General launched a class action lawsuit<sup>195</sup> against the Utica School District for its policy and practice of excluding immigrant students from enrolling and attending a well-known high school and diverting them to unequal educational services that do not, and cannot, yield a diploma. In Florida, the U.S. Department of Justice sent Palm Beach County a letter<sup>196</sup> alleging the district's non-compliance with a previous settlement agreement, particularly citing to issues faced by students with interrupted formal education who felt pushed into charter schools, alternative schools, and adult education.<sup>197</sup>

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## Recommendations

- The U.S. Department of Education should issue further guidance to schools regarding what practices amount to forced enrollment, and how to respect families' right to choose alternative placements.
- Districts should not force undocumented children into alternative schools and learning programs for discriminatory purposes.
- Districts and schools should cease the practice of placing children into alternative behavior programs solely based on educational gaps.
- Districts and schools need to strengthen translation and interpretation services offered to children and guardians during the enrollment process in order to ensure that consent is acquired when students are placed in alternative schools or alternative learning programs.

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<sup>195</sup> Complaint, People of the State of New York v. Utica City School District, 6:2015cv01364 (N.D.N.Y. filed Nov. 17, 2015), [http://www.ag.ny.gov/pdfs/Utica\\_City\\_School\\_District\\_Complaint.pdf](http://www.ag.ny.gov/pdfs/Utica_City_School_District_Complaint.pdf).

<sup>196</sup> Karen Yi, *Palm Beach County Schools Make It Hard for Immigrants to Enroll, Feds Say*, SUN SENTINEL (June 11, 2015), <http://www.sun-sentinel.com/news/education/fl-pb-schools-immigrant-children-20150611-story.html>.

<sup>197</sup> Complaint at 3-4, *Roblero v. Sch. Bd. of Palm Beach Cnty., Fla.*, No. 9:15-cv-80874-KAM (S.D. Fla. dismissed Dec. 3, 2015).

## V. LANGUAGE ACCOMMODATIONS

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Undocumented children and families who have limited English proficiency face specific challenges in communicating with schools. Although some undocumented individuals may speak proficient English, many documented immigrants have limited English language skills. Children often need their parents and families to assist them in accessing and realizing their right to education, beginning with enrollment and extending to support of academic goals and achievements once a child enters school.<sup>198</sup> Parents with limited English proficiency are disadvantaged in attempting to access and fully participate in the educational programs offered to their children. Our fact-finding indicates that parents and children struggle to communicate effectively with schools, which can negatively impact the performance and progress of undocumented students.

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### TRANSLATION OF ENROLLMENT DOCUMENTS

Our research indicates that a lack of translated documents and translation services creates major barriers to enrollment for undocumented children and their caretakers. Our findings also reveal that in some instances, schools are unwilling or unable to communicate enrollment procedures with Limited English Proficiency (LEP) parents verbally or in writing.

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#### Legal Overview

Under Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act (EEOA) of 1974, schools are required to “meaningfully communicate” with parents that have limited English proficiency.<sup>199</sup> LEP parents are parents or guardians who speak a primary language other than English and who have limited proficiency in speaking, listening, reading, or writing in English.<sup>200</sup>

The Department of Education has explained that districts must meaningfully communicate with LEP parents in a language that they can understand to inform them about programs and services offered in the school district.<sup>201</sup> The Department has also directed districts to offer enrollment

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<sup>198</sup> See U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 13, U.N. Doc. E/C.12/1999/10 (1999).

<sup>199</sup> 20 U.S.C.A. § 1703 (West, Westlaw through 2015); *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf> (last visited Mar. 16, 2016).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

forms, registration forms, parent handbooks, and information on district programs and schools in the parent’s primary language.<sup>202</sup> Similarly, the Every Student Succeeds Act (ESSA) recognizes that problems may arise where documentation is not translated for LEP parents and recommends school documents be translated into other languages “to the extent practicable.”<sup>203</sup>

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## Findings

Our fact-finding revealed that LEP parents and children in Texas and North Carolina faced challenges in communicating with schools because of significant language barriers. Several social service organizations in Texas noted the unavailability of translated enrollment documents and translators. Even when Spanish forms were available on school websites, they were difficult to find when the websites were primarily in English. In some instances, school officials have told family members they did not have enrollment documents translated into Spanish available for them – even when they did exist for the district.<sup>204</sup>

Urban districts with long histories of receiving immigrants can also struggle to provide translation services as the population of newcomers changes over time. For example, one district in Texas translates all enrollment forms into Spanish as a formal policy.<sup>205</sup> Despite this, with the increase of indigenous language speaking families from Central America and Mexico, there are still many families who are unable to meaningfully communicate during the enrollment process.<sup>206</sup>

We documented similar challenges regarding access to translated enrollment documents in North Carolina, where increased numbers of school-aged immigrants is relatively new. One mother said that the enrollment process brought her to tears: “It was a difficult process. I didn’t understand anything and only my husband could speak a little English. I would cry in the beginning.”<sup>207</sup> Eventually, her sister-in-law, who spoke English, was able to help enroll the children in school.

“It was a difficult process...I would cry in the beginning.”

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<sup>202</sup> *Id.*

<sup>203</sup> Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat 1802 (2015) (signed into law on December 10, 2015).

<sup>204</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>205</sup> *Documents Required for Enrolment*, HOUS. INDEP. SCH. DIST., <http://www.houstonisd.org/Page/31538> (last visited Feb 12, 2016).

<sup>206</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>207</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

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## Recommendations

- Districts should make every effort to ensure that schools have documents translated into languages most prevalent in their community.
- Schools should ensure translation is always available when needed for registration and use translation services to facilitate the enrollment process if translation is not available through staff on site.

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## COMMUNICATION TO FAMILIES AND FAMILY INVOLVEMENT

In addition to the enrollment process, we found that language barriers can impede the ability of family members to be fully involved in an undocumented child's education. Although we found that many schools struggle to interact with LEP families generally, others are making strong and unique efforts to overcome these challenges and recognize that "lines of communication and relationship building are essential."<sup>208</sup> In order for undocumented children in particular to properly exercise their right to education, the form and substance of education, including curricula and teaching methods, have to be relevant and culturally appropriate to students and – in appropriate cases such as this – to parents.<sup>209</sup>

In particular, language barriers can obstruct the successful implementation of an Individualized Education Plan (IEP) if parents are not provided with a written translation of their child's IEP. Under the Individuals with Disabilities Education Act (IDEA), IEPs are offered to students who are identified as learners who would benefit from special education and related services.<sup>210</sup> This supportive model of education is offered to children with a variety of needs including behavioral, developmental, and other learning disabilities.<sup>211</sup> We observed that at the state level there are varying approaches to implementing the criteria set forth in the IDEA, with some states taking more initiative in facilitating meaningful participation for both students and parents through translation and other language accommodations.

Additionally, our findings highlight the importance for parents to understand when their children are having behavior issues at school so that they may adequately respond and foster growth in

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<sup>208</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>209</sup> U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 13 ¶ 47, U.N. Doc. E/C.12/1999/10 (1999), at ¶ 6.

<sup>210</sup> See 20 U.S.C.A. § 1414(d)(1)(A) (West, Westlaw through 2015).

<sup>211</sup> *Disabilities Treaty*, *supra* note 70.

their children.<sup>212</sup> Disciplinary issues can prove especially detrimental to this population because undocumented children are often considered to be at-risk of dropping out of school.<sup>213</sup> The further exclusion of their parents from the disciplinary process of the school can leave both children and parents unaware of what the child did wrong.<sup>214</sup>

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## Legal Overview

The No Child Left Behind Act (NCLB) placed an affirmative obligation on schools to afford “parents substantial and meaningful opportunities to participate in the education of their children.”<sup>215</sup> However, no further explanation was provided. ESSA recently replaced NCLB and provides new protections for LEP families.<sup>216</sup> This Act adds that federal funding will become partially contingent on “effective parent and family engagement . . . [with] parents of English learners,” including the need to provide report cards, “to the extent practicable, in a language the parents can understand.”<sup>217</sup> This new standards is an improvement, although it still leaves much to an individual school district’s discretion.

The IDEA<sup>218</sup> “ensures that all children with disabilities are entitled to a free appropriate public education to meet their unique needs and prepare them for further education, employment, and independent living.”<sup>219</sup> The IDEA, requires parents of a child with a disability be allowed to, “examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child.”<sup>220</sup> This mandated ability to participate is interpreted by one district court in the Second Circuit as ensuring that parents are not just given a cursory role in their child’s IEP, but are instead able to meaningfully comprehend the document. “The substance of an IEP must be intellectually accessible to parents,” and where it is not, it amounts to a failure by the school to provide an appropriate education for the child.<sup>221</sup>

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<sup>212</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>213</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>214</sup> Interview with teacher in Houston, Texas (Jan. 12, 2016).

<sup>215</sup> 20 U.S.C.A. § 6301 (West, Westlaw through 2015).

<sup>216</sup> Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015) (signed into law on December 10, 2015) (discussing that state educational agencies will have to support local agencies and schools in “effective parent and family engagement strategies”).

<sup>217</sup> *Id.* at 1854.

<sup>218</sup> 20 U.S.C.A. §§ 1400-1482 (a) (West, Westlaw through 2015) (Synthesizing 20 U.S.C.A. §§ 1401(9), 1414(d)).

<sup>219</sup> *Individuals with Disabilities Education Act (IDEA)*, AM. PSYCHOLOGICAL ASS’N, <http://www.apa.org/about/gr/ issues/disability/idea.aspx> (last visited Oct. 18, 2015).

<sup>220</sup> 20 U.S.C.A. § 1415 (b)(1) (West, Westlaw through 2015).

<sup>221</sup> *T.K. v. New York City Dep’t of Educ.*, 32 F. Supp. 3d 405, 422-23 (E.D.N.Y. 2014).

States have implemented the provisions of IDEA in a variety of ways, with some regulations implemented to aid parental participation in languages other than English. For example, Texas law includes provisions for obtaining IEPs and an understanding that bilingual education must be available to students whose first language is not English.<sup>222</sup> Under the Texas Education Code, if a parent of a child with a disability is unable to understand English “the district shall provide the parent with a written or audiotaped copy of the child’s individualized education program translated into Spanish if Spanish is the parent’s native language; or if the parent’s native language is a language other than Spanish, make a good faith effort to provide the parent with a written or audiotaped copy of the child’s individualized education program translated into the parent’s native language.”<sup>223</sup>

In North Carolina, parents of a child with a disability are entitled to have records, data, and information with respect to that child “fully explained, interpreted, and analyzed” by staff of the education agencies.<sup>224</sup> There is no requirement, however, that a translation be written or otherwise recorded.

Further, under international law, States have the obligation to ensure that children with disabilities are not excluded from the general education system on the basis of disability and can access education on an equal basis with others in their community.<sup>225</sup>

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## Findings

Our interviews indicate that many schools often struggle to communicate with parents and sponsors, including the communication of student records like report cards, IEPs, and disciplinary proceedings. In Texas, our interviews indicated that outreach to parents typically fell to newcomer programs, where they existed.<sup>226</sup> Newcomer programs often have a dedicated parent liaison. Such liaisons facilitate parent groups, assist with teacher conferences, and work to increase parent involvement.<sup>227</sup> Children and parents in schools or districts without newcomer programs or parent liaisons may lack a mechanism for interacting with schools.<sup>228</sup>

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<sup>222</sup> TEX. EDUC. CODE ANN. § 29.053 (West, Westlaw through 2015). *See also* 19 TEX. ADMIN. CODE § 89.1011 (2015) (outlining additional procedures for referrals, evaluations, and procedures for guardians).

<sup>223</sup> TEX. EDUC. CODE ANN. § 29.005 (d)(1-2) (West, Westlaw through 2015).

<sup>224</sup> N.C. GEN. STAT. ANN. § 115C-109.3(b) (West, Westlaw through 2015).

<sup>225</sup> *See CRC, supra* note 70, at art. 24(2)(a)-(b).

<sup>226</sup> Developing Programs for English language Learners: Glossary, U.S. Dep’t of Educ., <http://www2.ed.gov/about/offices/list/ocr/ell/glossary.html> (last visited Mar. 5 2016) (“Newcomer Program: Newcomer [programs] are separate, relatively self-contained educational interventions designed to meet the academic and transitional needs of newly arrived immigrants. Typically, students attend these programs before they enter more traditional interventions (e.g., English language development programs or mainstream classrooms with supplemental EL instruction).”).

<sup>227</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>228</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

Some schools have developed creative solutions for language barriers. A newcomer school we heard about in Texas offers an anonymous phone line that parents can call to leave comments and concerns.<sup>229</sup> They also created a color-coded system used to mark progress or problems in the student planners using general norms in reference to the different colors: green is good, yellow indicates a need for improvement, and red is the need for redirection.<sup>230</sup> This more easily allows LEP families to be aware of their students' academic situation and classroom performance, even where a language barrier is present.<sup>231</sup> As the focus has shifted to English immersion programs, however, some newcomer and ESL programs have been dismantled.<sup>232</sup> With the closing of newcomer programs, outreach to LEP families in some districts dropped.<sup>233</sup> When family involvement decreases, it can negatively affect the support a student will get at home.<sup>234</sup> An advocate told us, "You have to be lucky to find someone within the school system that cares. It just totally depends, school-to-school, district-to-district, you're lucky if you find someone who cares."<sup>235</sup>

Some schools in North Carolina have also implemented successful programs to address language and communications barriers. Identified best practices include: automated Spanish telephone messages when parents are identified as Spanish-speaking; sending report cards home in Spanish, with translated teacher comments; and forums where non-English speaking parents can engage with the school and each other.<sup>236</sup> For example, some schools arrange breakfasts where parents can meet with EL teachers.<sup>237</sup> Some schools also offer IEP meetings later in the day to accommodate parents' work schedules.<sup>238</sup>

Many community organizations and advocates try to step in to fill the void left in school outreach. One North Carolina organization, for example, specifically works with LEP families to provide parents with knowledge about the school system, and increase their participation in Parent Teacher Associations.<sup>239</sup> The staff at one North Carolina organization goes to school with parents to help them enroll their children; they attend individual or group parent meetings and act as translators for parents. Once a month a large parent meeting occurs at this community space for non-English speaking parents of students, particularly those that are undocumented and/or newly arrived, to provide them with information and answer questions they have in a language they understand.<sup>240</sup>

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<sup>229</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>230</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>231</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>232</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>233</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>234</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>235</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>236</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>237</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>238</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>239</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>240</sup> Interview with social worker in Raleigh, North Carolina (Jan. 15, 2016).

Even with such solutions available, our fact-finding revealed that language barriers are pervasive throughout families' interaction with schools. Our findings in North Carolina suggest parents do not always receive adequate translation services. As one example, we heard that certain schools do not translate report cards.<sup>241</sup> Occasionally, even when translation is provided, documents are so badly translated that they are not intelligible. We also learned that parents in North Carolina are not provided with written translations of their child's IEP. According to a special education teacher from North Carolina, all IEPs are created using a standardized software program selected by the state department of education.<sup>242</sup> The program can produce IEPs only in English, and because the IEP must be standardized across the state, schools are not allowed to provide individual written translations.<sup>243</sup> Some schools offer verbal translations during the IEP meetings; as one school told us, "[the IEP] is in English . . . when we have IEP [meetings] we translate the whole thing . . . and they get a copy of [the IEP], and if they have questions they can always call back."<sup>244</sup> A teacher from a different district stated that while verbal translations were offered, this was insufficient to meet the actual goals of an IEP.<sup>245</sup> IEPs often contain academic goals, as well social skills, life skills, and behavioral improvements. For successful implementation of an IEP, these skills and goals should be worked on at home as well as at school, and this cannot be accomplished when parents cannot refer back to a document because it is written in a language and manner that is incomprehensible to them.<sup>246</sup> These challenges are exacerbated when schools must communicate with parents who are not literate in their native language.<sup>247</sup> This reality requires varying and nuanced approaches to accommodating parents that allow for their meaningful participation in their children's education.

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<sup>241</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>242</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>243</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>244</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>245</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>246</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>247</sup> Interview with social worker in Raleigh, North Carolina (Jan. 15, 2016).

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## Recommendations

- The U.S. Department of Education should identify best practices and develop guidance to improve and implement effective parent and family engagement strategies as encouraged by ESSA.
- The U.S. Department of Education should support districts in leveraging their resources to help schools obtain translation services, taking budget concerns into account and in accordance with the ESSA requirement that schools communicate disciplinary issues with families.
- Districts with large immigrant populations should prioritize funds to hire parent liaisons and develop relationships with community organizations to help engage and more effectively communicate with LEP families.
- Districts should ensure schools effectively communicate and translate all student records for families, including disciplinary actions and IEPs.

## VI. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE) OPERATIONS AND THEIR IMPACT ON ACCESS TO EDUCATION

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In January 2016, Immigration and Customs Enforcement (ICE) initiated a series of immigration enforcement operations targeting recent arrivals from Central America.<sup>248</sup> The operations are part of an effort by President Obama's Administration to detain and deport adults and children who arrived as part of the 2014 increase of children and families arriving at the U.S. southern border.<sup>249</sup> Although ICE asserts that it only targets adults and children who have received orders to be removed from the U.S. and who have exhausted all their legal remedies,<sup>250</sup> some advocates have identified cases in which targeted families still had possible remedies.<sup>251</sup> The first wave of enforcement actions occurred the weekend of January 2, 2016. By Monday, January 4, ICE officers had apprehended and detained over 100 individuals to be deported, primarily from Georgia, North Carolina, and Texas.<sup>252</sup> The agency has since instituted a complimentary program to expedite apprehensions called "Operation Border Guardian."<sup>253</sup> Under the new Operation, ICE specifically targets individuals who came to the U.S. as unaccompanied minors prior to January 1, 2014 but who are now eighteen or older.<sup>254</sup> As of March 9, the Operation had already netted 336 individuals to deport.<sup>255</sup>

These operations are causing widespread fear and panic throughout immigrant communities across the nation that is severely disrupting peoples' day-to-day lives.<sup>256</sup> Our research documented

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<sup>248</sup> See Appendix C: Information for Community Stakeholders: Recent Immigration and Customs Enforcement (ICE Raids).

<sup>249</sup> See Statement by Secretary Jeh C. Johnson on Southwest Border Security (Jan. 4, 2016), <https://www.dhs.gov/news/2016/01/04/statement-secretary-jeh-c-johnson-southwest-border-security> [hereinafter *January Press Release*]; Statement by Secretary Jeh C. Johnson on Southwest Border Security (Mar. 9, 2016), <https://www.dhs.gov/news/2016/03/09/statement-secretary-jeh-c-johnson-southwest-border-security> [hereinafter *March Press Release*].

<sup>250</sup> *January Press Release*, *supra* note 249.

<sup>251</sup> S. POVERTY LAW CTR. & GA. LATINO ALLIANCE FOR HUMAN RIGHTS, FAMILIES IN FEAR: THE ATLANTA IMMIGRATION RAIDS 5 (2016), [https://www.splcenter.org/sites/default/files/splc\\_families\\_in\\_fear\\_ice\\_raids\\_3.pdf](https://www.splcenter.org/sites/default/files/splc_families_in_fear_ice_raids_3.pdf).

<sup>252</sup> Josh Gerstein & Seung Min Kim, *Obama Administration Kicks Off Family Deportation Raids*, POLITICO (Jan. 4, 2016), <http://www.politico.com/story/2016/01/obama-family-deportation-raids-217329>.

<sup>253</sup> *March Press Release*, *supra* note 249.

<sup>254</sup> "Operation Border Guardian" targets must also have been ordered removed by an immigration judge and cannot have a pending appeal or claim. *Id.*

<sup>255</sup> *March Press Release*, *supra* note 249.

<sup>256</sup> See, e.g., Liz Robbins, *Rumors of Immigration Raids Stoke Fear in New York*, N.Y. TIMES (Jan. 6, 2016), [http://www.nytimes.com/2016/01/07/nyregion/rumors-of-immigration-raids-stoke-fear-in-new-york.html?\\_r=0](http://www.nytimes.com/2016/01/07/nyregion/rumors-of-immigration-raids-stoke-fear-in-new-york.html?_r=0) ("The level of panic in the region . . . has not been seen for eight years – since the government's Operation Return to Sender program paramilitary-type raids to immigrants' homes.").

that the enforcement actions are having a chilling effects on children's ability to meaningfully participate in their education.<sup>257</sup> These children cannot afford to be missing school. As discussed previously, they are already behind because of barriers to enrollment, language challenges, and discrimination. Each additional day outside the classroom is a step backwards.<sup>258</sup>

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## Legal Overview

International<sup>259</sup> and domestic law<sup>260</sup> protect the rights of all children to attend school regardless of immigration status. However, undocumented children are still subject to domestic immigration law, including ICE immigration enforcement actions that challenge their right to remain in the country.<sup>261</sup>

ICE conducts regular enforcement operations in communities across the country. Sometimes, targeted large-scale enforcement operations are referred to as "raids." Previous examples include

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<sup>257</sup> There has been a flurry of recent news stories and reports that confirm our findings. See, e.g., ZENÉN JAIMES PÉREZ, CAROLINA CANIZALES & RAÚL ALCARAZ OCHOA, UNITED WE DREAM, IMMIGRATION RAIDS: THE REAL IMPACT 3-4, 7-8, (2016), <http://unitedwedream.org/wp-content/uploads/2016/01/Report-Hotline-raids-1.pdf>; Melinda D. Anderson, *How Fears of Deportation Harm Kids' Education*, THE ATLANTIC (Jan. 26, 2016), <http://www.theatlantic.com/education/archive/2016/01/the-educational-and-emotional-toll-of-deportation/426987/>; *Attendance Drops at Maryland High School, as Deportation Fears Rise*, NPR (Jan. 20, 2016), <http://www.npr.org/2016/01/17/463405722/attendance-drops-at-maryland-high-school-as-deportation-fears-rise> (highlighting the situation at High Point High School in Prince George's County, Maryland, where the Principal says the fear of deportation raids has caused attendance among students who enrolled over the past year, many of whom were undocumented unaccompanied minors, to plummet from 90% or higher to just above 50%); see also Liz Robbins, *supra* note 256 (quoting immigrants who said parents decided to keep children home from school out of fear surrounding the raids).

<sup>258</sup> See ROBERT BALFANZ & VAUGHAN BYRNES, JOHN HOPKINS UNIV., THE IMPORTANCE OF BEING IN SCHOOL: A REPORT ON ABSENTEEISM IN THE NATION'S PUBLIC SCHOOLS 3 (2012), [http://new.every1graduates.org/wp-content/uploads/2012/05/FINALChronicAbsenteeismReport\\_May16.pdf](http://new.every1graduates.org/wp-content/uploads/2012/05/FINALChronicAbsenteeismReport_May16.pdf); see also Tara Bahrapour, *Long Homeland Visits Can Trip Up Students, Schools Warn Immigrant Families*, WASH. POST (Dec. 22, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A17718-2004Dec21.html>.

<sup>259</sup> See Section III, *supra*; see also CERD, *supra* note 70, at art. 5(v); ICCPR, *supra* note 72, at art. 24; 1951 Refugee Convention, *supra* note 70, at art. 22; UDHR, *supra* note 71, at art. 26; American Declaration, *supra* note 70, at art. 7.

<sup>260</sup> See Section III, *supra*.

<sup>261</sup> ICE helps enforce border control, customs, trade, and immigration law. *Who We Are*, U.S. DEP'T OF HOMELAND SECURITY, <https://www.ice.gov/about> (last visited Feb. 23, 2015). Its primary subdivisions are Homeland Security Investigations (HSI) and Enforcement and Removal Operations (ERO). *Id.* ERO apprehends, detains, and removes illegal aliens. *Id.* ERO especially targets convicted criminals but families and unaccompanied children are also removal targets. See *January Press Release*, *supra* note 249.

workplace raids like the 2006 “Operation Wagon Train” and home-based actions like “Operation Return to Sender.”<sup>262</sup> Such raids leave a lasting legacy of fear in immigrant communities long after they have ended.<sup>263</sup>

In 2011, ICE issued a memo, available in Appendix F of this Report, to inform the public that its agents would generally not conduct enforcement actions in “sensitive locations,” like schools, except under emergency circumstances or with permission from top ICE officials.<sup>264</sup> U.S. Secretary of Homeland Security Jeh C. Johnson confirmed this policy in a press release as recently as March 9, 2016.<sup>265</sup> Despite this memo, during Operation Border Guardian, some children have been apprehended while on their way to school<sup>266</sup> and the fear of raids or enforcement actions at schools remains palpable. And yet, most localities have given schools little to no direction on how to respond if ICE does request to enter the school premises.<sup>267</sup> Some school districts like Durham Public Schools (DPS) in North Carolina,

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<sup>262</sup> See, e.g., Pamela Constable, *Deportation Raids to Continue, Despite Outcry*, WASH. POST (Jan. 8, 2016), [https://www.washingtonpost.com/local/social-issues/pre-dawn-raids-leave-us-immigrant-communities-paralyzed-with-fear/2016/01/08/5bdf664c-b412-11e5-a76a-0b5145e8679a\\_story.html](https://www.washingtonpost.com/local/social-issues/pre-dawn-raids-leave-us-immigrant-communities-paralyzed-with-fear/2016/01/08/5bdf664c-b412-11e5-a76a-0b5145e8679a_story.html) (January 2016 raids).

<sup>263</sup> See, e.g., Nancy Lofholm, *Fear from Swift Plant Raid Resonates in Greeley Six Years Later*, DENV. POST (Jan. 15, 2013), [http://www.denverpost.com/ci\\_22374170/fear-from-swift-plant-raid-resonates-greeley-six](http://www.denverpost.com/ci_22374170/fear-from-swift-plant-raid-resonates-greeley-six). See generally RANDY CAPPS, ROSA MARIA CASTAÑEDA, AJAY CHAUDRY, ROBERT SANTOS, THE URB. INST., *PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA’S CHILDREN* (2007) (describing the emotional toll of raids on children).

<sup>264</sup> Memorandum from John Morton, Director, ICE, to Field Office Directors, Special Agents in Charge, and Chief Counsel (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf> (“This policy is designed to ensure that these enforcement actions do not occur at nor are focused on sensitive locations such as schools and churches.”). Appendix F: United States Immigration and Customs Enforcement (ICE) Memorandum on Enforcement at or Focused on Sensitive Locations.

<sup>265</sup> *March Press Release*, *supra* note 249 (“When enforcing the immigration laws, our personnel will not, except in emergency circumstances, apprehend an individual at a place of worship, a school, a hospital or doctor’s office or other sensitive location”); see also Statement by Secretary Jeh C. Johnson on Southwest Border Security (Feb. 2, 2016), <https://www.dhs.gov/news/2016/02/02/statement-secretary-jeh-c-johnson-southwest-border-security> (“I also reiterate that, when enforcing the immigration laws, our personnel will not, except in emergency circumstances, apprehend an individual at a place of worship, a school, a hospital or doctor’s office or other sensitive location.”).

<sup>266</sup> Leyla Santiago, *ICE Agents Arrest Riverside High Student for Possible Deportation*, WRAL (Jan. 29, 2016), <http://www.wral.com/ice-agents-arrest-riverside-high-student-for-possible-deportation/15293637/>.

<sup>267</sup> Schools walk a fine line between protecting their students’ rights and obstructing law enforcement, but John W. Borkowski and Lisa E. Soronen suggest there is at least some law establishing that schools are within their means to deny immigration officials’ requests to come on campus and question them. See JOHN W. BORKOWSKI & LISA E. SORONEN, NAT’L EDUC. ASS’N, *LEGAL ISSUES FOR SCHOOL DISTRICTS RELATED TO THE EDUCATION OF UNDOCUMENTED CHILDREN 17-19* (2009), <http://www.nea.org/assets/docs/HE/09undocumentedchildren.pdf> (discussing school’s legal obligations to comply with ICE investigations).

however, have adopted resolutions opposing the recent ICE enforcement actions and demanding that ICE suspend the operations and release detained Durham children to their families.<sup>268</sup> Several school districts in California have called on their teachers and other staff not to admit ICE on campus without approval from school superintendents and district lawyers.<sup>269</sup>

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## Findings

We found that the recent ICE raids have negatively impacted undocumented children by keeping them out of the classroom and impeding their education. As news and rumors of individuals being picked up in raids or at roadblock checkpoints throughout North Carolina spread, migrant parents and children became fearful and were often afraid to leave their homes.<sup>270</sup>

Eva, a thirteen-year-old girl, who often told her caseworkers about how much she loved attending school in the United States and riding the bus with her friends, shared that she is now afraid to go to school or even just to stand at the bus stop and wait for the school bus.<sup>271</sup> Fear about the raids is also causing many children to worry about their family members and whether their parents will still be at home when they get back from school.<sup>272</sup>

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<sup>268</sup> See, e.g., *Resolution Opposing the Immigration and Customs Enforcement Actions*, DURHAM PUBLIC SCHOOLS (Feb. 11, 2016), <http://www.dpsnc.net/cms/lib011/NC01911152/Centricity/Domain/77/Resolution%20Opposing%20the%20Immigration%20and%20Customs%20Enforcement%20Actions.pdf>, available at Appendix G; see also Tim Pulliam, *Some Students Avoiding School over Deportation Fears*, ABC 11 News, <http://abc11.com/news/deportation-fears-keep-some-durham-students-at-home/1198522/> (quoting Representative Butterfield: “The Durham City Council and Durham Board of Education recently passed resolutions regarding deportation actions in the city and I support their efforts. Mr. Acosta’s case is concerning and demonstrates why Congress needs to take up comprehensive immigration reform legislation without delay. In the meantime, I encourage immigration officials to focus their enforcement priorities on those who pose a threat to our communities rather than high school students.”).

<sup>269</sup> See Press Release, S.F. Unified Sch. Dist., SFUSD Advises Schools, Reassures Families Re. Procedures in the Event of Immigration and Customs Enforcement (ICE) Raids (Jan. 7, 2015) (on file with authors), <http://www.sfusd.edu/en/assets/sfusd-staff/news-and-calendars/files/Press%20Releases/0107%20Immigration%20and%20Customs.pdf> (“The School Board has found that the presence of ICE is likely to lead to a disruption of the educational setting. Therefore, any request by ICE to visit a school site should be forwarded to the Superintendent’s Office for review before a decision is made to allow access to the site.”); Res-032-15/16, L.A. Unified Sch. Dist. (Feb. 9, 2016), <https://boe.lausd.net/sites/default/files/02-09-16OBpost.pdf> (“Any request by ICE for information or to access a school site shall be immediately forwarded to the Superintendent and General Counsel for review and a decision on whether to allow access to the site, and or the information to ensure District compliance with Plyler and other applicable laws.”).

<sup>270</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>271</sup> Interview with caseworker in Raleigh, North Carolina (Jan. 15, 2016); pseudonym is used to protect confidentiality of interviewee.

<sup>272</sup> See generally Interview with social worker in Raleigh, North Carolina (Jan. 15, 2016); interview with social worker in Raleigh, North Carolina (Jan. 14, 2016); anonymous interview conducted by a member of the fact-finding project in January of 2016.

“A lot of kids are choosing to drop out because they are so scared to even try to go to school . . . I am just trying to work with students on a daily basis and work through the fear that they feel, and it’s definitely affecting the school climate as a whole.”<sup>273</sup>

Numerous school officials, community advocates, and leaders told us that anxiety had increased and was spreading throughout the community and upending peoples’ lives.<sup>274</sup> One community program in North Carolina that partners with local schools to support undocumented children, had seen a large decrease in attendance even after only the first week of the raids.<sup>275</sup> Caseworkers for that community program were unable to get in touch with ten of their students and, while they could not be sure, believed the fear and gossip spreading about the raids was potentially responsible.<sup>276</sup> Similarly, a caseworker from a major non-governmental organization that works closely with children recently released from detention facilities indicated that she noticed that some parents were hesitant to enroll their children in school because of the raids, fearing that the school would report the child or the family to immigration authorities if they attempted to enroll.<sup>277</sup> A Durham teacher said many migrant children are so scared they are in danger of dropping out of school and some parents are keeping their children home.<sup>278</sup>

Likewise, our interviewees in Texas told us families without documentation were moving, or attempting to move, to other places to prevent ICE officials from locating them.<sup>279</sup> A school principal in an urban Texas district told us that many families would rather upend their lives and start over somewhere else than stay put and risk being deported from the United States and sent back to countries from which they fled extreme crime and violence.<sup>280</sup> A social worker told us that she has had to work hard to reassure undocumented clients that school is safe – that parents should not pull their children from school because of raids. But fear, she reported, is nagging, and not everyone listens.<sup>281</sup>

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<sup>273</sup> Pulliam, *supra* note 268.

<sup>274</sup> *See generally* Interview with social worker in Raleigh, North Carolina (Jan. 15, 2016); Interview with social worker in Raleigh, North Carolina (Jan. 14, 2016); Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>275</sup> Interview with social worker in Raleigh, North Carolina (Jan. 14, 2016).

<sup>276</sup> *Id.*

<sup>277</sup> Interview with social worker in Raleigh, North Carolina (Jan. 15, 2016).

<sup>278</sup> Department of Education Listening Session, *supra* note 274.

<sup>279</sup> *See* Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>280</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>281</sup> Interview with social worker in Houston, Texas (Jan. 12, 2016). Such statements are consistent with observations from across the country. *See, e.g.*, Melinda D. Anderson, *supra* note 257.

Community advocates report that students avoid going to school because they are afraid of returning to an empty home. Teachers have told officials that some students who come to school get so worried they pretend to be sick just so they can be excused and rush back home and check if their parents were apprehended and taken away by ICE.<sup>282</sup>

Although school officials generally wanted schools to be seen as safe places for these children, we found no indication that schools knew what their options were if ICE were to show up on campus looking for an undocumented child or family.<sup>283</sup> A few school districts and individual schools, however, have crafted policy responses at the community level. These policies differ in their approach to address the threat of ICE intervention in schools. An elementary school principal in North Carolina reported that she had not been told what to do if ICE came to her school seeking a child, but stated that she would contact the school district's legal team to ask for guidance before making a decision.<sup>284</sup>

A district official outside Houston explained that if ICE officers came to her schools, administrators would need to call the legal office to determine whether to admit the officers.<sup>285</sup> Her district's schools did not have a relevant policy in place, except to treat ICE in the same manner as Child Protective Services officials would be treated.<sup>286</sup> An official in Houston stated that the district's policy would likely be to refuse to allow ICE officials on campus; however, there is little they can do before or after a child arrives at school.

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<sup>282</sup> Department of Education Listening Session at the Department of Education's D.C. offices (Mar. 14, 2016).

<sup>283</sup> Interview with social worker in Raleigh, North Carolina (Jan. 14, 2016).

<sup>284</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>285</sup> Anonymous interview conducted by a member of the fact-finding project in January of 2016.

<sup>286</sup> *Id.*

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**Recommendations:**

- The U.S. Department of Homeland Security and the U.S. Department of Education should continue engaging in an interagency conversation to discuss how ICE can conduct enforcement actions without disrupting children’s access to education.
- ICE should, consistent with its internal policies, continue to refrain from engaging in immigration enforcement on school campuses and expand protections to cover children participating in school activities, as well as children on their way to school.
- The U.S. Department of Education should administer guidance to schools regarding ICE procedures and the legal options available to them if ICE engages in enforcement activities on their campuses.
- The U.S. Department of Education should adopt mechanisms similar to the U.S. Department of Labor’s practice, allowing the department to request “stays of removal” for migrants whose complaints are being reviewed by the Department of Education’s Office for Civil Rights.
- More school districts and schools should consider adopting resolutions opposing ICE’s recent enforcement operations and condemn their negative impact on schoolchildren, such as those adopted in North Carolina and California.

## VII. RECOMMENDATIONS

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Generally, as evidenced by the findings set forth in this report, there are shortcomings in the transfer of information between educational bodies and implementing staff at the local school level. As such, from the federal level to the state and district levels, effort should be exerted to improve dissemination techniques for guidance and training materials distributed by federal and state authorities to the relevant teachers, registrars, administrators, or other officials to ensure seamless compliance with the law. This is especially important for states and localities with newly established or recently expanded populations of undocumented individuals.

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### FEDERAL

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#### **Delayed Enrollment due to Expected Testing Performance:**

- The U.S. Department of Education should provide a blanket exemption from testing requirements for all recently arrived undocumented students, instead of placing the burden on states to apply for the waiver.
  - The U.S. Department of Education should provide guidance to states on the use of performance metrics other than testing when evaluating the performance of schools and teachers.<sup>287</sup>
  - The U.S. Department of Education should extend waivers for at least a full year for newly enrolled students, rather than just the academic year of enrollment.
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#### **Solutions to Enrollment that are Not Fully Implemented: The McKinney Vento Act and State-Mandated 30 Day Delay**

- The U.S. Department of Education should help facilitate school officials' awareness of existing guidance regarding the application of the McKinney-Vento Act to undocumented children, by specifically targeting outreach to localities that have not traditionally served immigrant populations and undocumented children.<sup>288</sup>
  - The Office of Refugee Resettlement should distribute materials explaining how the McKinney-Vento Act may apply to unaccompanied children released from federal custody.
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<sup>287</sup> 20 U.S.C.A. § 3402 (West, Westlaw through 2015).

<sup>288</sup> 20 U.S.C.A. § 3402 (West, Westlaw through 2015).

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## Forced Enrollment in Alternative Schools

- The U.S. Department of Education should issue further guidance to schools regarding what practices amount to forced enrollment, and how to respect families' right to choose alternative placements.<sup>289</sup>
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## Communication to Families and Family Involvement

- The U.S. Department of Education should identify best practices and develop guidance to improve effective parent and family engagement strategies as encouraged by ESSA.<sup>290</sup>
  - The U.S. Department of Education should support districts in leveraging their resources to help schools obtain translations services in accordance with the ESSA requirement that schools communicate disciplinary issues with families.<sup>291</sup>
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## Immigration and Customs Enforcement (Ice) Operations and Their Impact on Access to Education

- The Department of Homeland Security and the U.S. Department of Education should continue engaging in an interagency conversation to discuss how ICE can conduct enforcement actions without disrupting children's access to education.<sup>292</sup>
  - ICE should, consistent with its internal policies, continue to refrain from engaging in immigration enforcement on school campuses and expand protections to cover children participating in school activities, as well as children on their way to or from school.<sup>293</sup>
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<sup>289</sup> 20 U.S.C.A. § 3402 (West, Westlaw through 2015).

<sup>290</sup> Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat 1802, 1854 (2015).

<sup>291</sup> 20 U.S.C.A. § 3402 (West, Westlaw through 2015).

<sup>292</sup> See, e.g., Memorandum of Understanding between the Department of Homeland Security and the Department of Labor, Section IV(F) (Dec. 7, 2011), <http://www.dol.gov/asp/media/reports/DHS-DOL.pdf> (outlining the best practices that the Department of Labor and the Department of Homeland Security negotiated to avoid conflict between the two agencies' respective civil workforce enforcement operations).

<sup>293</sup> Appendix F: United States Immigration and Customs Enforcement (ICE) Memorandum on Enforcement Actions at or focused on Sensitive Locations.

- The U.S. Department of Education should administer guidance to schools regarding ICE procedures and the legal options available to them if ICE engages in enforcement activities on their campuses.
- The U.S. Department of Education should adopt mechanisms similar to the U.S. Department of Labor’s practice, allowing the department to request “stays of removal” for migrants whose complaints are being reviewed by the Department of Education’s Office for Civil Rights (OCR).

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## STATES

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### Challenges Meeting Documentation Requirements

- States should provide guidance to districts on how to revise their enrollment procedures to ensure residency requirements do not discriminate against undocumented families who may be unable to produce traditional residency documents due to living circumstances, such as doubled-up households.<sup>294</sup> Alternative residency documents could include pay stubs or membership documents from social service or religious organizations based on residency.
- States should provide guidance to districts, encouraging them to recognize alternative or non-traditional means by which an individual can show responsibility over a child who is registering in a public school for the purposes of meeting guardianship requirements, such as the *Verification of Release* form, a sponsor care agreement or an affidavit attesting to the relationship and residence.<sup>295</sup>

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### Age Discrimination

- States should redefine performance metrics to exclude those children that “age out” of school before graduation from the schools’ “drop-out” rates to remove an incentive to bar older children from enrollment.<sup>296</sup>

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<sup>294</sup> 42 U.S.C. § 11432(g)(3)(C)(i) (West, Westlaw through 2015).

<sup>295</sup> 42 U.S.C.A. §§ 11432(f)(7)(A-B) (West, Westlaw through 2015).

<sup>296</sup> 42 U.S.C.A. 6102 (West, Westlaw through 2015).

- States should issue guidance to districts on their obligation to enroll students who are within the age range for whom free education must be offered.<sup>297</sup>

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## Delayed Enrollment Due to Expected Testing Performance

- In order to discourage discriminatory enrollment practices, states should leverage ESSA's expanded discretion to dictate teacher and student performance metrics that are less dependent on testing scores.<sup>298</sup>

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## Solutions to Enrollment that are Not Fully Implemented: The McKinney Vento Act and State-Mandated 30 Day Delay

- States should ensure school officials' awareness of existing guidance regarding the application of the McKinney-Vento Act to undocumented children, including targeted outreach to localities that have not traditionally served immigrant populations and undocumented children.<sup>299</sup>
- States should improve existing resources for undocumented children, as well as their parents, guardians, sponsors, and teachers to engage with district homelessness liaisons and advocate for the application of the McKinney-Vento Act.<sup>300</sup>
- States should also ensure that there is an effective appeals process that is easy to navigate and includes necessary language accommodations.<sup>301</sup>
- States should adopt enrollment grace periods, such as Texas' 30-day window, which would allow students to immediately enroll in school while their parents or sponsors furnish required enrollment documentation.<sup>302</sup>

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<sup>297</sup> Table 5.1 *Compulsory school attendance laws, minimum and maximum age limits for required free education, by state*, NAT'L CTR. FOR ED. STATISTICS, [https://nces.ed.gov/programs/statereform/tab5\\_1.asp#f2](https://nces.ed.gov/programs/statereform/tab5_1.asp#f2) (last visited Mar. 15, 2016); Appendix E: United States Department of Education Dear Colleague Letter on School Enrollment Procedures.

<sup>298</sup> *How Will the New ESEA/ESSA Affect Schools in Your State*, AM. FED'N OF TEACHERS, [http://www.aft.org/sites/default/files/how\\_will\\_esea\\_essa\\_affect\\_schools\\_in\\_your\\_state\\_113015.pdf](http://www.aft.org/sites/default/files/how_will_esea_essa_affect_schools_in_your_state_113015.pdf) (last visited Feb. 2, 2016).

<sup>299</sup> 42 U.S.C.A. § 11434a (West, Westlaw through 2015).

<sup>300</sup> 20 U.S.C.A. § 11431(2) (West, Westlaw through 2015).

<sup>301</sup> *Id.*

<sup>302</sup> *Attendance, Admission, Enrollment Records, and Tuition 2015-16*, TEX. EDUC. AGENCY (Aug. 11, 2015), [http://tea.texas.gov/About\\_TEA/News\\_and\\_Multimedia/Correspondence/TAA\\_Letters/Attendance,\\_Admission,\\_Enrollment\\_Records,\\_and\\_Tuition\\_\\_2015-16/](http://tea.texas.gov/About_TEA/News_and_Multimedia/Correspondence/TAA_Letters/Attendance,_Admission,_Enrollment_Records,_and_Tuition__2015-16/).

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## DISTRICTS AND SCHOOLS

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### Challenges Meeting Documentation Requirements

- Districts should evaluate and revise their enrollment procedures to ensure residency requirements do not discriminate against undocumented families who may be unable to produce traditional residency documents due to living circumstances, such as doubled-up households.<sup>303</sup> Alternative residency documents could include pay stubs or membership documents from social service or religious organizations based on residency.
- Districts should amend their enrollment procedures to expressly recognize alternative or non-traditional means by which an individual can show responsibility over a child who is registering in a public school for the purposes of meeting guardianship requirements, such as the *Verification of Release* form, a sponsor care agreement or an affidavit attesting to the relationship and residence.<sup>304</sup>
- Districts should ensure all enrollment information materials list alternative options for documentation and express a flexible documentation policy to prove guardianship and residency.<sup>305</sup>

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<sup>303</sup> Letter from Catherine E. Lhamon, Assistant Sec’y, Office for Civil Rights, U.S. Dep’t of Educ., Philip H. Rosenfelt, Deputy Gen. Counsel, & Jocelyn Samuels, Acting Assistant Attorney Gen., U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV. (May 8, 2015), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf> (“A district should review the list of documents that can be used to establish residency and ensure that any required documents would not unlawfully bar or discourage a student who is undocumented or whose parents are undocumented from enrolling in or attending school.”), available at Appendix E.

<sup>304</sup> 42 U.S.C.A. §§ 11432(f)(7)(A-B) (West, Westlaw through 2015).

<sup>305</sup> See 28 C.F.R. § 42.104(b)(2) (West, Westlaw through 2016); 34 C.F.R. § 100.3(b)(2) (West, Westlaw through 2016) (“A recipient . . . may not . . . utilize . . . methods of administration which 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 the program.”); Appendix D: Fact Sheet: Information on the Rights of All Children to Enroll in School.

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## Age Discrimination

- Districts should ensure schools fulfill their obligation to enroll students who are within the state or district mandated age range for whom free education must be offered.<sup>306</sup>
- Districts should redefine performance metrics to exclude those children that “age out” of school before graduation from the schools’ “drop-out” rates to remove an incentive to bar older children from enrollment.<sup>307</sup>
- Districts and schools, in determining grade placement, should balance age and academic-level, with the goal of creating an opportunity for students to graduate before “ageing out.”
- Districts should use institutions, like accountability committees, to accommodate students with interrupted formal education (SIFE) and to fairly administer exams to this particular population, which, because of migration schedules, tends to enroll later in the year.

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## Delayed Enrollment Due to Expected Testing Performance

- As with addressing age discrimination, districts should use institutions, like accountability committees, to accommodate students with interrupted formal education (SIFE) and to fairly administer exams to this particular population, which, because of migration schedules, tends to enroll later in the year.<sup>308</sup>

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<sup>306</sup> *Table 5.1 Compulsory school attendance laws, minimum and maximum age limits for required free education, by state*, NAT’L CTR. FOR ED. STATISTICS, [https://nces.ed.gov/programs/statereform/tab5\\_1.asp](https://nces.ed.gov/programs/statereform/tab5_1.asp) (last visited Mar. 15, 2016); Appendix E: United States Department of Education Dear Colleague Letter on School Enrollment Procedures.

<sup>307</sup> 42 U.S.C.A. 6102 (West, Westlaw through 2015).

<sup>308</sup> *How Will the New ESEA/ESSA Affect Schools in Your State*, AM. FED’N OF TEACHERS, [http://www.aft.org/sites/default/files/how\\_will\\_esea\\_essa\\_affect\\_schools\\_in\\_your\\_state\\_113015.pdf](http://www.aft.org/sites/default/files/how_will_esea_essa_affect_schools_in_your_state_113015.pdf) (last visited Feb. 2, 2016).

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## Solutions to Enrollment that are Not Fully Implemented: The McKinney Vento Act and State-Mandated 30 Day Delay

- Where grace periods exist, districts should conduct outreach to inform families of their right to enroll the child first and then provide the required documentation within the allotted time period.<sup>309</sup>

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## Forced Enrollment in Alternative Schools

- Districts should not force undocumented children into alternative schools and learning programs for discriminatory purposes.<sup>310</sup>
- Districts and schools should cease the practice of placing children into alternative behavior programs solely based on educational gaps.<sup>311</sup>
- Districts and schools should strengthen translation and interpretation services offered to children and guardians during the enrollment process in order to ensure that consent is acquired when students are placed in alternative schools or alternative learning programs.<sup>312</sup>

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## Translation of Enrollment Documents

- Districts should make every effort to ensure that schools have documents translated in languages most prevalent in their community.<sup>313</sup>
- Schools should ensure translation is always available when needed for registration when needed and use translation services to facilitate the enrollment process if translation is not available through staff on site.<sup>314</sup>

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<sup>309</sup> *Attendance, Admission, Enrollment Records, and Tuition 2015-16*, TEX. EDUC. AGENCY (Aug. 11, 2015), [http://tea.texas.gov/About\\_TEA/News\\_and\\_Multimedia/Correspondence/TAA\\_Letters/Attendance,\\_Admission,\\_Enrollment\\_Records,\\_and\\_Tuition\\_\\_2015-16/](http://tea.texas.gov/About_TEA/News_and_Multimedia/Correspondence/TAA_Letters/Attendance,_Admission,_Enrollment_Records,_and_Tuition__2015-16/).

<sup>310</sup> *Policy Guidance on Retaliation*, U.S. DEPARTMENT OF EDUCATION, OFFICE OF CIVIL RIGHTS, <http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/retaliation.html> (last visited Mar. 27, 2016).

<sup>311</sup> *Id.*

<sup>312</sup> *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf> (last visited Mar. 16, 2016).

<sup>313</sup> *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf> (last visited Mar. 16, 2016).

<sup>314</sup> *Id.*

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## Communication to Families and Family Involvement

- Districts with large immigrant populations should prioritize funds to hire parent liaisons and develop relationships with community organizations to help engage and more effectively communicate with LEP families.<sup>315</sup>
- Districts should ensure schools effectively communicate and translate all student records for families, including disciplinary actions and IEPs.<sup>316</sup>

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## ICE Enforcement Operations and Their Impact on Access to Education

- More school districts and schools should consider adopting resolutions opposing ICE's recent enforcement operations and condemn their negative impact on schoolchildren, such as those adopted in North Carolina and California.<sup>317</sup>

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<sup>315</sup> Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat 1802, 1854 (2015).

<sup>316</sup> 20 U.S.C.A. § 1415 (b)(1) (West, Westlaw through 2015); 20 U.S.C.A. § 1414(d)(1)(A) (West, Westlaw through 2015); Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat 1802 (2015).

<sup>317</sup> See Appendix G: Resolution Opposing the Immigration and Customs Enforcement (ICE) Actions and the Deportation of Durham Public Schools.

## CONCLUSION

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Education and immigration reform are both at the forefront of the political agenda of 2016. The recent reauthorization of the Every Student Succeeds Act in 2015 holds states more directly responsible for evaluating and addressing accountability and success in schools.<sup>318</sup> With the upcoming presidential election, immigration policy is especially highlighted in conversations among local, state, and federal authorities. In recent years, much of the focus has been on the number of children coming to the United States seeking protection.

We found that recently arriving children, particularly undocumented children, encounter numerous obstacles in school enrollment. Often, lack of documentation prohibits undocumented children from accessing education to which they have a right under U.S. and international law. In addition to overcoming barriers to enrollment, undocumented children who are able to successfully enroll are not able to access resources to meaningfully participate in their education. Many recently arriving undocumented children come from backgrounds plagued with violence and hardship, resulting in trauma and little history of formal education. The majority of children arrive with low literacy rates and little to no English language skills. In states and communities with historically small immigrant populations, school districts and staff are faced with new challenges in adapting to and adequately serving this rapidly changing population. Even in communities with a well-established immigrant presence, challenges arise in meeting the needs of undocumented children within the public education system.

Additionally, recent ICE enforcement actions targeted at school aged children have fostered fear and anxiety for undocumented children and have had a chilling effect on children's ability to meaningfully participate in their education. Although schools have witnessed the harmful effects of recent ICE raids, they lack protocols on how to properly respond.

Upon entering the United States, children, including undocumented children, have the right and legal obligation to enroll in school. We hope educators can replicate model solutions identified in this report and modify practices that currently result in shortcomings, to ensure all legal obligations, including international and domestic, are met. The United States has a long and strong history of leadership in access to education and opportunity and has the potential to be able to serve these children so that they can be productive members of our communities.

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<sup>318</sup> *Comparison of Programs Under ESSA and ESEA*, AM. FED'N OF TEACHERS, [http://www.aft.org/sites/default/files/essa\\_comparison-chart.pdf](http://www.aft.org/sites/default/files/essa_comparison-chart.pdf) (last visited Feb. 28, 2016).



## APPENDIX

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# Children Have the Right to Go to School

All children, regardless of immigration status, have the right to attend public school.



*“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.”*

- Chief Justice Earl Warren, *Brown v. Board of Education* (1954)

*“Public education has a pivotal role in maintaining the fabric of our society.”*

- Justice Brennan, *Plyler v. Doe* (1982)



## Access to School

- **Schools may not discriminate based on national origin, immigration status, or English Language Proficiency when enrolling students.**
  - Schools cannot deny education to children because of a child’s or his/her parents’ citizenship or immigration status.
  - Schools may not bar a student from enrolling because the student lacks a birth certificate or has records that indicate a foreign place of birth, such as a foreign birth certificate.
  - Families may submit utility bills or leases to show residency in a school district.
- **School districts must take action to eliminate language barriers to English Language Learner (ELL) students’ education.**
  - Schools must provide English Learning services like ESL to ELL students where appropriate.
  - Schools cannot segregate ELL students more than necessary – and only until they realize proficiency in English.

**All children are entitled to a public education, regardless of immigration status**

To report a suspected violation, see accompanying fact sheet on filing a complaint with the Department of Education, Office of Civil Rights or <http://www2.ed.gov/about/offices/list/ocr/docs/howto.html>.



## Legal Obligations

- Federal law entitles all children to public education.
- The Equal Protection Clause of the Fourteenth Amendment requires states to provide access to public education to every child (*Brown v. Board of Education*).
- A state cannot deny basic public education to children based on their immigration status (*Plyler v. Doe*).
- No entity receiving federal financial assistance – including public schools – may discriminate on the basis of race, color, or national origin (Title VI of the Civil Rights Act of 1964).
  - Title VI also prohibits practices that have a disparate *effect* on individuals of a certain race, color, or national origin, even if the actions or practices are not *intentionally* discriminatory.
  - Federal regulations explicitly prohibit certain types of discrimination, specifically:
    - Denying an individual any service or benefit provided under the program;
    - Providing any service or benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
    - Subjecting an individual to segregation or separate treatment in any matter related to his receipt of any service or benefit under the program; or
    - Restricting an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service or benefit under the program.
  - Recipients of federal financial assistance are expected to take affirmative steps to counter past discrimination on the basis of race, color, and national origin and to counteract the effects of conditions that limited participation by persons of a particular race, color, or national origin.



## Is a School Discriminating against Migrant Students? How to File a Complaint with the U.S. Department of Education's Office for Civil Rights (OCR)

### Who Can File a Complaint?

- **Anyone over the age of 18 can file a complaint with the U.S. Department of Education's OCR.** School administrators, teachers, parents, and friends – even organizations – can file a complaint on behalf of a child.

### How Do I File a Complaint?

- **Fill out and submit OCR's online form.** The form is available at: <http://www2.ed.gov/about/offices/list/ocr/complaintform.pdf>. The form includes a section that gives OCR consent to use your identity.
- **Include as many specific details about the discriminatory acts as possible:**
  - Where did the incident happen?
  - Who are the school officials in charge?
  - What kind of discrimination is occurring (e.g., race or national origin)?
  - What services are being denied?
  - How many students are affected by the discrimination?
  - What kind of remedy are you or the victim(s) seeking?
- **File the complaint within 180 days of the discriminatory act; if you are past the deadline, explain why you could not have filed the complaint earlier.**



### Four Options for Filing Your Complaint:

Online:

<http://www2.ed.gov/about/offices/list/ocr/complaintintro.html>

By E-mail: [ocr@ed.gov](mailto:ocr@ed.gov)

Via Fax: 202-453-6012

You can also mail your complaint to your local OCR office. Look up the correct address here:

<https://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm>

## What Happens After I File My Complaint?

- Once OCR receives your complaint, they will send you a receipt and tell you whether they think they have authority to investigate your case. You may also get a consent form in case OCR needs to disclose your identity in order to resolve the complaint. If OCR finds there was discriminatory behavior they can:
  - Negotiate with the school to end the discrimination and review what steps the school has committed to or will commit to in order to fix the situation
  - Issue a plan for the school to implement to resolve the violation. OCR can monitor how the school implements the agreement.
  - Take enforcement action against the school. This may include a loss of financial support to the school or even a referral for prosecution.
- If you disagree with how OCR investigated your complaint, you can appeal the decision.



## What Are Some Examples of the Kind of Conduct that OCR Can Help Address?

- Many children from El Salvador and Honduras have migrated to the neighborhood and the school district decides not to allow them to enroll because it wants to preserve its resources.
  - This is explicit discrimination based on national origin.
- A school refuses to enroll a student because he is unable to show them a document they want, like a passport, social security number, or U.S. birth certificate
  - It is unconstitutional to refuse to enroll undocumented students.
- A school fails to provide services that are necessary for students to become proficient in English and to participate equally in school curriculum.
  - This is discrimination based on national origin because schools must take affirmative steps to provide programs for English language learners.
- Central American students are hit and called names if they attempt to use certain hallways in their high school. When they report the problem to the school, school officials simply tell them to avoid the hallways.
  - This is discrimination based on national origin because the school is failing to address harassment from other students based on national origin.



HELP ENSURE SCHOOLS ARE NOT DISCRIMINATING AGAINST CHILDREN



## Information for Community Stakeholders: Recent Immigration and Customs Enforcement (ICE) Raids

### **Who is ICE?**

- Immigration and Customs Enforcement (ICE) is the U.S. agency responsible for enforcing our country's immigration laws. ICE conducts regular enforcement operations across the country. Enforcement operations that are part of a national strategy are often called "raids."

### **What kinds of "raids" is ICE conducting?**

- On January 2-3, 2016, ICE launched raids across Georgia, North Carolina, and Texas, apprehending more than 121 migrants, many of whom were women and children. Its efforts are on-going. Beginning January 23, ICE also instituted "Operation Border Guardian," which has netted 336 individuals; all of whom are young adults who came to the U.S. from Central America as unaccompanied minors.

### **Who is ICE targeting?**

- ICE only arrests, detains, and deports undocumented migrants who have received a final deportation order from immigration court.
- ICE is targeting migrants who arrived after 2 January 1, 2014 and migrants with criminal records but may also apprehend other undocumented migrants they

encounter during the raids. ICE has recently made it a policy priority, as a part of "Operation Border Guardian" to apprehend "aged out" unaccompanied children who came to the States illegally after January 1, 2014.

### **What should undocumented migrants do upon encountering ICE?**

- **Call a lawyer!** If a person is arrested, they should immediately contact an attorney because the government may deport them. An attorney may help a person stay in the country.
- **Undocumented migrants have constitutional rights, including the right to remain silent.** Migrants do not need to answer an agent or officer's questions.
- **Don't open the door! Homeowners and landlords should refuse entry to ICE agents without a valid warrant.** If ICE agents claim to have a warrant, homeowners and landlords should ask for it be slipped under the door, and review it to see if it is signed by a judge and lists the correct address.
- **A removal order is not a warrant.** ICE officers might mislead migrants into believing they have a warrant by presenting a removal order signed by an ICE official. Only a warrant issued by a judge can legally let ICE in a home – a removal order does not authorize ICE to enter or search a home or building.

An attorney, trusted third party such as a priest or social worker, or families can reach out to ICE for information on a detained person:

Online:  
<https://locator.ice.dhs.gov/odis/homePage.do> (only searchable for detained individuals who are 18 and older)

Phone: (202) 308-2734

E-mail: [ERO.INFO@ice.dhs.gov](mailto:ERO.INFO@ice.dhs.gov)

Postal mail:  
<https://www.ice.gov/contact/ero>



**Hearing Information**

For EOIR court dates, call: (800) 888-7190.

For information about matters pending before the Board of Immigration Appeals, call: (703) 605-1007.

- **Migrants represented by a lawyer have a much greater chance of staying in the United States.** Unlike in criminal proceedings, there is no right to an attorney at government expense in immigration court. However, migrants can find a list of free or low cost lawyers on the immigration court's website: <http://www.justice.gov/eoir/list-pro-bono-legal-service-providers-map>
- **Failure to appear at even one ICE removal hearing before the EOIR could result in an EOIR deportation order.** Migrants who fail to appear are ordered deported *in absentia*, and that authorizes ICE to arrest, detain, and deport those migrants.

- **Report ICE raids to the migrant community by calling the United We Dream hotline at (844) 363-1423.** Community members can also report raids by texting messages to 877877. Take photos or video and submit those recordings to 877877.

**How does an individual's family find out when he or she has been detained?**

- **Parents and custodians of migrant minors must contact (or have a trusted third party contact) the local ICE enforcement and removal office** to find out whether the agency has detained the child. Offices are listed here: <https://www.ice.gov/contact/ero>.

**Can ICE raid my children's school?**

- **Migrants can safely visit schools, hospitals, funeral homes, or places of worship. ICE has a policy against conducting raids in these sensitive locations.** A 2011 ICE memorandum discourages raids at these places except in emergencies, during hot pursuit of a fleeing suspect, or with the prior consent of the property owner.
- **School boards across the United States have started adopting policies and resolutions requesting that**

**ICE seek permission before crossing onto school property. Recent examples include Durham Public School's February 11 resolution and Los Angeles Unified School District's February 9 resolution.** Principals, teachers, and parent-teacher associations should advocate for their school board to pass similar resolutions.

**Other Useful Resources:**

- Memorandum from John Manton, Director, ICE, to Field Office Directors, Special Agents in Charge, and Chief Counsel (Oct. 24, 2011), <https://www.ice.gov/docid/eoir/eoir-2011-02-01/10029-2-policy.pdf>.
- Statement by Secretary Jeh C. Johnson on Southwest Border Security (Mar. 9, 2018) [Re: matter March Frost Release] (on file with author), <https://www.dhs.gov/news/2018/03/09/statement-secretary-jeh-c-johnson-southwest-border-security>.
- Resolution Opposing the Immigration and Customs Enforcement Actions, Durham Public Schools (Feb. 11, 2018), <http://www.opencurl.com/ab011/NOIR1118/Document/Durham/11/Resolution%20Opposing%20the%20Immigration%20and%20Customs%20Enforcement%20Actions.pdf>.



U.S. Department of Justice  
Civil Rights Division

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



## Fact Sheet: Information on the Rights of All Children to Enroll in School

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All children in the United States are entitled to equal access to a basic public elementary and secondary education regardless of their actual or perceived race, color, national origin, citizenship, immigration status, or the status of their parents/guardians. School districts that either prohibit or discourage, or maintain policies that have the effect of prohibiting or discouraging, children from enrolling in schools because they or their parents/guardians are not U.S. citizens or are undocumented may be in violation of Federal law.

Below are some examples of acceptable enrollment policies, such as requesting proof of residency in the school district, as well as policies that may not be used by schools to deny enrollment to your child.

### **Proof of Residency in the School District.**

- School officials may request proof that you live within the boundaries of the school district. School districts typically accept a variety of documents for this purpose, such as copies of phone and water bills, lease agreements, affidavits, or other documents. A school district's requirements to establish residency must be applied in the same way for all children.
- A school district may not ask about your or your child's citizenship or immigration status to establish residency within the district, nor may a school district deny a homeless child (including a homeless child who is undocumented) enrollment because he or she cannot provide the required documents to establish residency.
- While a school district may choose to include a parent's state-issued identification or driver's license among the documents that can be used to establish residency, a school district may not require such documentation to establish residency or for other purposes where such a requirement would unlawfully bar a student whose parents are undocumented from enrolling in school.

### **Proof of Age.**

- School officials may request documentation to show that a student falls within the school district's minimum and maximum age requirements. School districts typically accept a variety of documents for this purpose, such as a religious, hospital, or physician's certificate showing date of birth; an entry in a family bible; an adoption record; an affidavit from a parent; a birth certificate; or previously verified school records.
- Although a school district might request documents such as those listed above to verify your child's age, a school district may not prevent or discourage your child from enrolling in or attending school because he or she lacks a birth certificate or has records that indicate a foreign place of birth, such as a foreign birth certificate.



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**Social Security Numbers.**

- Some school districts request a student’s social security number during enrollment to use as a student identification number. If a school district requests a student’s social security number, it must: (1) inform you and your child that providing it is voluntary and that refusing to provide it will not bar your child from enrolling in or attending school, and (2) explain for what purpose the number will be used.
- A school district may not prevent your child from enrolling in or attending school if you choose not to provide your child’s social security number.
- A school district may not require you to provide your own social security number in order for your child to enroll in or attend school.

**Race or Ethnicity Data.**

- School districts have some Federal and state obligations to report race and ethnicity data about the students in their schools. A school district may request that you provide your child’s race or ethnicity for this purpose.
- However, a school district may not bar your child from enrolling if you choose not to provide your child’s race or ethnicity.

If you want to learn more about your rights and the rights of your child when enrolling in public school, or if you believe that a school district is violating Federal law, you may contact the following government agencies:

- Department of Justice, Civil Rights Division, Educational Opportunities Section  
Telephone: (877) 292-3804 (toll-free)  
Fax: (202) 514-8337  
Email: [education@usdoj.gov](mailto:education@usdoj.gov)

- Department of Education, Office for Civil Rights  
Telephone: (800) 421-3481 (toll-free)  
Email: [ocr@ed.gov](mailto:ocr@ed.gov)  
If you wish to fill out a complaint form online with the Department of Education, you may do so at <http://www.ed.gov/ocr/complaintintro.html>

- Department of Education, Office of the General Counsel  
Telephone: (202) 401-6000  
Fax: (202) 205-2689



**U.S. Department of Justice**  
Civil Rights Division

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



May 8, 2014

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. We are writing to update the previous Dear Colleague Letter on this subject that was issued on May 6, 2011, and to respond to inquiries the Departments received about the May 6 Letter. This letter replaces the May 6 Letter.

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

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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).<sup>1</sup> 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 district should review the list of documents that can be used to establish residency and ensure that any required documents would not unlawfully bar or discourage a student who is undocumented or whose parents are undocumented from enrolling in or attending school.

As with residency requirements, rules vary among States and districts as to what documents students may use to show they fall within State- or district-mandated minimum and maximum age requirements, and jurisdictions typically accept a variety of documents for this purpose. A school district may not bar a student from enrolling in its schools because he or she lacks a birth certificate or has records that indicate a foreign place of birth, such as a foreign birth certificate.

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<sup>1</sup> 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)(1).

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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).<sup>2</sup> 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 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.

We are also attaching frequently asked questions and answers and a fact sheet that should be helpful to you. Please contact us if you have additional 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](mailto:education@usdoj.gov), the Department of Education Office for Civil Rights (OCR) at (800) 421-3481 or [ocr@ed.gov](mailto:ocr@ed.gov) or the Department of Education Office of the General Counsel at (202) 401-6000. You may also visit <http://wdcrobcopl01.ed.gov/CFAPPS/OCR/contactus.cfm> for the OCR enforcement office that serves

<sup>2</sup> Federal law provides for certain limited exceptions to this requirement. See Pub. L. No. 93-579, § 7(a)(2).

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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/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/

Catherine E. Lhamon  
Assistant Secretary  
Office for Civil Rights  
U.S. Department of Education

/s/

Philip H. Rosenfelt  
Deputy General Counsel  
Delegated the Authority to  
Perform the Functions and  
Duties of the General Counsel  
U.S. Department of Education

/s/

Jocelyn Samuels  
Acting Assistant Attorney General  
Civil Rights Division  
U.S. Department of Justice

Attachments

Policy Number: 10029.2  
FEA Number: 306-112-002b

Office of the Director

U.S. Department of Homeland Security  
500 12th Street, SW  
Washington, D.C. 20536

OCT 24 2011



U.S. Immigration  
and Customs  
Enforcement

MEMORANDUM FOR: Field Office Directors  
Special Agents in Charge  
Chief Counsel

FROM: John Morton   
Director

SUBJECT: Enforcement Actions at or Focused on Sensitive Locations

Purpose

This memorandum sets forth Immigration and Customs Enforcement (ICE) policy regarding certain enforcement actions by ICE officers and agents at or focused on sensitive locations. This policy is designed to ensure that these enforcement actions do not occur at nor are focused on sensitive locations such as schools and churches unless (a) exigent circumstances exist, (b) other law enforcement actions have led officers to a sensitive location as described in the "Exceptions to the General Rule" section of this policy memorandum, or (c) prior approval is obtained. This policy supersedes all prior agency policy on this subject.<sup>1</sup>

Definitions

The enforcement actions covered by this policy are (1) arrests; (2) interviews; (3) searches; and (4) for purposes of immigration enforcement only, surveillance. Actions not covered by this policy include actions such as obtaining records, documents and similar materials from officials or employees, providing notice to officials or employees, serving subpoenas, engaging in Student and Exchange Visitor Program (SEVP) compliance and certification visits, or participating in official functions or community meetings.

The sensitive locations covered by this policy include, but are not limited to, the following:

<sup>1</sup> Memorandum from Julie L. Myers, Assistant Secretary, U.S. Immigration and Customs Enforcement, "Field Guidance on Enforcement Actions or Investigative Activities At or Near Sensitive Community Locations" 10029.1 (July 3, 2008); Memorandum from Marcy M. Forman, Director, Office of Investigations, "Enforcement Actions at Schools" (December 26, 2007); Memorandum from James A. Puleo, Immigration and Naturalization Service (INS) Acting Associate Commissioner, "Enforcement Activities at Schools, Places of Worship, or at funerals or other religious ceremonies" HQ 807-P (May 17, 1993). This policy does not supersede the requirements regarding arrests at sensitive locations put forth in the Violence Against Women Act, see Memorandum from John P. Torres, Director Office of Detention and Removal Operations and Marcy M. Forman, Director, Office of Investigations, "Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005 (January 22, 2007).

## Enforcement Actions at or Focused on Sensitive Locations Page 2

- schools (including pre-schools, primary schools, secondary schools, post-secondary schools up to and including colleges and universities, and other institutions of learning such as vocational or trade schools);
- hospitals;
- churches, synagogues, mosques or other institutions of worship, such as buildings rented for the purpose of religious services;
- the site of a funeral, wedding, or other public religious ceremony; and
- a site during the occurrence of a public demonstration, such as a march, rally or parade.

This is not an exclusive list, and ICE officers and agents shall consult with their supervisors if the location of a planned enforcement operation could reasonably be viewed as being at or near a sensitive location. Supervisors should take extra care when assessing whether a planned enforcement action could reasonably be viewed as causing significant disruption to the normal operations of the sensitive location. ICE employees should also exercise caution. For example, particular care should be exercised with any organization assisting children, pregnant women, victims of crime or abuse, or individuals with significant mental or physical disabilities.

### Agency Policy

#### *General Rule*

Any planned enforcement action at or focused on a sensitive location covered by this policy must have prior approval of one of the following officials: the Assistant Director of Operations, Homeland Security Investigations (HSI); the Executive Associate Director (EAD) of HSI; the Assistant Director for Field Operations, Enforcement and Removal Operations (ERO); or the EAD of ERO. This includes planned enforcement actions at or focused on a sensitive location which is part of a joint case led by another law enforcement agency. ICE will give special consideration to requests for enforcement actions at or near sensitive locations if the only known address of a target is at or near a sensitive location (e.g., a target's only known address is next to a church or across the street from a school).

#### *Exceptions to the General Rule*

This policy is meant to ensure that ICE officers and agents exercise sound judgment when enforcing federal law at or focused on sensitive locations and make substantial efforts to avoid unnecessarily alarming local communities. The policy is not intended to categorically prohibit lawful enforcement operations when there is an immediate need for enforcement action as outlined below. ICE officers and agents may carry out an enforcement action covered by this policy without prior approval from headquarters when one of the following exigent circumstances exists:

- the enforcement action involves a national security or terrorism matter;
- there is an imminent risk of death, violence, or physical harm to any person or property;

## Enforcement Actions at or Focused on Sensitive Locations

Page 3

- the enforcement action involves the immediate arrest or pursuit of a dangerous felon, terrorist suspect, or any other individual(s) that present an imminent danger to public safety; or
- there is an imminent risk of destruction of evidence material to an ongoing criminal case.

When proceeding with an enforcement action under these extraordinary circumstances, officers and agents must conduct themselves as discretely as possible, consistent with officer and public safety, and make every effort to limit the time at or focused on the sensitive location.

If, in the course of a planned or unplanned enforcement action that is not initiated at or focused on a sensitive location, ICE officers or agents are subsequently led to or near a sensitive location, barring an exigent need for an enforcement action, as provided above, such officers or agents must conduct themselves in a discrete manner, maintain surveillance if no threat to officer safety exists and immediately consult their supervisor prior to taking other enforcement action(s).

### Dissemination

Each Field Office Director, Special Agent in Charge, and Chief Counsel shall ensure that the employees under his or her supervision receive a copy of this policy and adhere to its provisions.

### Training

Each Field Office Director, Special Agent in Charge, and Chief Counsel shall ensure that the employees under his or her supervision are trained (both online and in-person/classroom) annually on enforcement actions at or focused on sensitive locations.

### No Private Right of Action

Nothing in this memorandum is intended to and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

This memorandum provides management guidance to ICE officers exercising discretionary law enforcement functions, and does not affect the statutory authority of ICE officers and agents, nor is it intended to condone violations of federal law at sensitive locations.

### **Resolution Opposing the Immigration and Customs Enforcement Actions and the Deportation of Durham Public Schools Students**

WHEREAS, all children in the United States are entitled to equal access to a public elementary and secondary education, regardless of their or their parents' actual or perceived national origin, citizenship, or immigration status. This includes recently arrived unaccompanied children, who are in immigration proceedings while residing in local communities with a parent, family member, or other appropriate adult sponsor, and

WHEREAS, a letter from the US Department of Justice and Department of Education dated May 8, 2014 reaffirms that all school districts must "comply with these Federal civil rights laws, as well as the mandates of the Supreme Court" ensuring that districts "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," and

WHEREAS, many migrant families and children have fled their homes and are seeking asylum in the U.S. from grave threats of danger, and

WHEREAS, with the flow of migrants out of Central America in 2014, some are coming to the end of their review from immigration courts, and

WHEREAS, migrants who have lost their cases are being ordered deported by immigration judges and Immigration and Customs Enforcement (ICE) conducting a series of deportation actions in North Carolina and elsewhere, and

WHEREAS, the Durham Public Schools Board of Education is very concerned about Durham immigrant youth and families, and

WHEREAS, there are reports of families who are worried about sending their children to school for fear of deportation occurring while their children are in school, or that immigration officials may involve our schools, and

WHEREAS, school attendance should be encouraged and schools, churches and other sensitive locations must be safe sanctuaries for families, and

WHEREAS, the policy from the Director of Homeland Security dated October 24, 2011 entitled "Enforcement Actions at or Focused on Sensitive Locations" requires that "ICE officers and agents exercise sound judgment when enforcing federal law at or focused on sensitive locations and make substantial efforts to avoid unnecessarily alarming local communities", and

WHEREAS, "the sensitive locations covered by this policy include but are not limited to, the following:

- schools (including pre-schools, primary schools, secondary schools, post-secondary schools up to and including colleges and universities, and other institutions of learning such as vocational or trade schools);
- hospitals;
- churches, synagogues, mosques or other institutions of worship, such as buildings rented for the purpose of religious services;
- the site of a funeral, wedding, or other public religious ceremony; and
- a site during the occurrence of a public demonstration, such as a march, rally or parade.

WHEREAS, ICE policy discourages enforcement actions at schools, churches, and other sensitive locations unless special circumstances exist such as:

- The enforcement action involves a national security or terrorism matter;
- There is an imminent risk of death, violence, or physical harm to any person or property;
- The enforcement action involves the immediate arrest or pursuit of a dangerous felon, terrorist suspect, or any other individual(s) that present an imminent danger to public safety; or
- There is an imminent risk of destruction of evidence material to an ongoing criminal case.

WHEREAS, if these young people are deported, this would go against our humanitarian principles and place their lives in grave danger, and

WHEREAS, these young people are low priority for deportation, and

WHEREAS, to date, the school district has not had any contact by federal immigration authorities, and

THEREFORE, BE IT RESOLVED THAT:

That these young people be granted favorable exercise of prosecutorial discretion, and

That law enforcement honor the policy not to involve schools and other sensitive locations, and

That principals and school staff are encouraged to work with and support families and students who express concern about immigration enforcement actions at school, including students who may not be attending school because of such concerns,

That ICE actions in our local community be suspended, and currently detained Durham youth be released to their families,

This the 11th day of February, 2016

\_\_\_\_\_  
Heidi Carter, Chair

\_\_\_\_\_  
Mike Lee, Vice Chair

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Minnie Forte-Brown

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Natalie Beyer

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Matt Sears

---

Sendolo Diaminah

---

Leigh Bordley

---

Bert L'Homme, Ph.D., Superintendent



