

Enrolling Undocumented Children in Public Schools and in Catholic Schools*

Bishops, Catholic Charities staff, and Catholic school officials have inquired about whether Catholic schools can legally enroll undocumented children. As states and municipalities have taken an increasing interest in immigration issues over the last few years, some Catholic school officials have expressed concern that the enrollment of undocumented children in Catholic schools will raise legal issues. This article responds to those concerns and provides an overview of the relevant law.

Can undocumented children enroll in kindergarten through twelfth grades?

Yes, all children living in the United States have the right to a free K-12 public education.¹ In fact, every state requires children to enroll in public or private education or to be home-schooled. While the age-requirement differs by state, all children are required to continue their education into their high school years.²

Do undocumented children have a right to a free public school education?

Yes. Children in the U.S., regardless of their immigration status, have a right under the U.S. Constitution to an elementary and secondary education in public schools. This right was established in 1982 with the U.S. Supreme Court's decision in Plyler v. Doe.³ In this case, the Supreme Court struck down a Texas state statute that barred undocumented children from public education. According to the majority opinion, the Texas statute was unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment. (The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the law.")

In the decision, Justice Brennan, writing for the majority, notes the importance of education in preventing an underclass and in promoting integration into society. The court noted, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."⁴ It also pointed out that America has long recognized public schools as "'a most vital civic institution for the preservation of a democratic system of government'" and "as the primary vehicle for transmitting 'the values on which our society rests.'"⁵ The court held that, "In sum, education has a

* The information in this document is current as of September 8, 2009. The information contained in this document is for general informational purposes only. It is not intended to serve as legal advice and it does not substitute for legal counsel.

¹ See Plyler v. Doe, 457 U.S. 202 (1982).

² See, for example, Ala. Code § 16-28-3; Alaska Stat. § 14-30-010; D.C. Code Ann. § 38-202; Mass. Gen. Laws Ann. § 76-1; and Neb. Rev. Stat. § 79-201.

³ 457 U.S. 202 (1982). See also National Education Association memorandum, Immigration Status and the Right to a Free Public Education, July 2007.

⁴ Plyler v. Doe, 457 U.S. at 223.

⁵ Id. at 221, citing Abington School District v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring); and Ambach v. Norwick, 441 U.S. 68, 76 (1979).

fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”⁶

Additionally, the court recognized the unfairness of denying education to undocumented children who lacked responsibility or culpability for their undocumented status. It stated that the Texas law “imposes a lifetime hardship on a discrete class of children not accountable for their disabling status.”⁷

Does Plyler v. Doe directly apply to private and parochial school?

No. The Plyler v. Doe decision specifically addresses whether undocumented children have the right to a free public school education. It does not discuss private or parochial school education and there is no subsequent court case or law that requires private or parochial schools to provide free education to undocumented children. However, it is important to note that a school that denies access to children based solely on the immigration status would likely invite litigation based on violations of federal and state civil rights laws.

Is the crime of harboring something that schools should be concerned with?⁸

No. While some parochial school educators have asked whether educating undocumented children could be construed as “harboring,” this outcome seems highly unlikely for a number of reasons. First, Plyler v. Doe is the established law and our national policy. For the past 27 years, the courts and the political process have worked to remove impediments to education for undocumented children at the federal and state level. Second, the harboring statute has never been applied in the education context. No school has ever been prosecuted or charged with harboring based on the immigration status of the students it educates. Third, due to the strong public policy reasons discussed in Plyler -- the importance of education to the development of children and our democratic society -- it is extremely unlikely that any school would be prosecuted for enrolling undocumented children.

Are there practices that a school may not engage in?

Yes. As undocumented children have the same right to attend school as other children, there is no reason for a school to inquire into a child’s immigration status. The school cannot ask questions or take actions that would deter parents from enrolling their children in school. Therefore, a school may not:

- Request students or parents to disclose their immigration status;
- Request documentation of the students or parents immigration status;
- Require a Social Security Number from students or parents; and,
- Engage in any practices that would chill a student’s access to education.⁹

⁶ Id. at 221.

⁷ Id. at 223.

⁸ To learn more about the crime of harboring, please access CLINIC’s website at: www.cliniclegal.org under the Immigrant Worker Justice Project.

Can a school ask for a child's Social Security Number?

Yes, a school can ask for a Social Security Number, but it is not required to ask for one. Under the Privacy Act of 1974, a federal state or local government agency cannot deny a person a right, benefit, or privilege provided by law because of the person's refusal to disclose her Social Security Number.¹⁰ An agency can deny a right, benefit or privilege only if disclosure is required by federal law or if it required disclosure prior to 1975. Federal law does not require a student to provide a Social Security Number to enroll in school. Therefore, a school cannot deny a student the right to attend school if the student does not present a Social Security Number. A school may request disclosure of a Social Security Number. Under the Privacy Act, however, the school must inform the parent that disclosure is not required.¹¹

Can a school require proof of address?

Yes. In terms of public schools, children are eligible for free public education only in the school district where they reside. Therefore, public schools have a right to ask for documents that prove that the student lives in the school district. In terms of private schools, these entities also have valid, nondiscriminatory reasons to require a student's address, for example, to learn if a student is registered in the parish. Therefore, private schools also have a right to require proof of address.

Can a school require a child's birth certificate?

When a child is enrolling, a school may require proof of the child's name and age. In most states, parents can present a birth certificate or other reliable evidence, such as a baptismal certificate, a family Bible, or an affidavit from a person who knows the family.¹²

Are schools required to submit information about undocumented students to the Student and Exchange Visitor Information System (SEVIS)?

No. The federal government created the Student and Exchange Visitor Information System (SEVIS) to monitor foreign students temporarily visiting the United States on a nonimmigrant student visa or visitor visa. Such foreign students typically use an F-1 or J-1 visa. Schools that enroll these students must submit information to SEVIS. Undocumented students, on the other hand, do not have a visa that is monitored by the federal government. Therefore, schools are not required to submit information about undocumented students to SEVIS. In addition, as discussed below, sharing student information with officials outside the school may violate confidentiality and privacy laws.

⁹ See Plyler v. Doe, 457 U.S. 202 (1982) and LULAC v. Wilson, 908 F.Supp. 755 (C.D. Cal. 1995). See also Jaclyn Brickman, Educating Undocumented Children in the United States: Codification of Plyler v. Doe through Federal Legislation, 20 Geo. Immig. L.J. 385, 388 (2006).

¹⁰ Privacy Act of 1974, Pub. L. No. 93-579, § 7, 88 Stat. 1896 (codified at 5 U.S.C. 55a note (Disclosure of Social Security Number) (1996)).

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¹² Jaclyn Brickman, Educating Undocumented Children in the United States: Codification of Plyler v. Doe through Federal Legislation, 20 Geo. Immig. L.J. 385, 388 (2006).

If a school official learns that a child is undocumented, can she disclose that information to a third party?

The federal Family Education Rights and Privacy Act (FERPA) protects the privacy of student education records.¹³ FERPA applies to any educational institution that receives funds under any program administered by the U.S. Department of Education.¹⁴ The law defines education records broadly to include both academic and personal information. Under FERPA, schools must obtain written permission from a student's parents prior to disclosing education records.¹⁵ There are limited exceptions, including providing records to a student's new school, in order to comply with a judicial order or a lawfully issued subpoena, and to appropriate authorities in a health or safety emergency.¹⁶

Schools that do not receive any funds from any program administered by the federal Department of Education are not subject to FERPA. Such schools may want to consider drafting and implementing their own confidentiality and privacy policies, if they have not done so already, in order to assure that they meet their mission of creating a peaceful environment that fosters spiritual growth and academic excellence.

Along with the right to a free public K-12 education, do children living in the U.S. have other educational rights in the public schools?¹⁷

Yes. There are a number of other educational rights that children and their families enjoy. These include: (1) the right to be free from unlawful discrimination; (2) the right of parents to understandable school information; (3) the right of parents to review student disciplinary actions; (4) the right of parents to inspect and review their child's education records; (5) the right of parents to review school achievement data and participate in school improvement activities; (6) the right of English language learners to have an appropriate education; (7) the right of disabled students to receive special education services; and (8) the right of children to school choice and/or free tutoring.

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¹³ 20 U.S.C. § 1232(g); 34 C.F.R. Part 99.

¹⁴ 34 CFR § 99.1(a).

¹⁵ 20 U.S.C. § 1232(g)(b)(1).

¹⁶ 20 U.S.C. § 1232(g)(b)(1).

¹⁷ Information about the K-12 educational rights of children was obtained from a pamphlet prepared by the Mexican American Legal Defense and Education Fund (MALDEF). The pamphlet, "Know Your K-12 Education Rights," can be obtained from MALDEF's website at: <http://www.maldef.org>.