



## How to Protect Undocumented School Children and Their Families in a Time of Stepped-Up Immigration Enforcement

**Elizabeth M. McCormick**, University of Tulsa College of Law

In a May 2018 Congressional hearing, Education Secretary Betsy DeVos was asked whether a public school principal or teacher who finds out that a child or his family members are undocumented immigrants has a responsibility to make a report to Immigration and Customs Enforcement – called ICE for short. Secretary DeVos responded that decisions about reporting children and families to ICE were up to individual schools and communities. But the Secretary was wrong. Federal law and the Constitution prohibit public school officials from sharing student information with federal immigration authorities. Public school officials who report immigrant children or families to authorities, not only interfere with student rights to public education, they may expose themselves and their districts to civil and criminal penalties.

### Federal Law Protects Immigrant Student Information

The Family Educational Rights and Privacy Act of 1974 prohibits school officials and employees from disclosing education records, or personally identifiable information from those records, without the prior written consent of the parent. There are exceptions, under which disclosure of otherwise protected student information and records may be made without prior parental consent – but such exceptions *do not* include reporting immigration status or any other information to a federal immigration agency or even to local law enforcement.

Schools may disclose, without consent, certain “directory” information including a student’s name, address, telephone number, date and place of birth, honors and awards, and dates of attendance, but families must be given notice and an opportunity to object. In the context of immigration enforcement, place of birth could very well be among the usual “directory” facts an immigrant family would not want disclosed.

The collection and dissemination of student personal information and records has been a source of debate since the 1982 Supreme Court ruling in *Plyler v. Doe*. This ruling overturned a 1975 Texas statute that authorized school districts to deny enrollment to unauthorized immigrant children and withheld state funding for their education. In declaring the Texas law unconstitutional, *Plyler* held that unauthorized-immigrant children must have the same access to public primary and secondary education as U.S.-citizen children. The Court held that denying unauthorized immigrant children access to public education is a violation of equal protection under the Fourteenth Amendment to the U.S. Constitution.

In the more than three decades since the *Plyler* decision, attempts have been made to overturn or circumvent it. [Some state legislatures have mandated certain forms of identification or proof of residence for all children enrolling in public school – including social security numbers, driver’s licenses, green cards, or visas – items that an unauthorized immigrant child would be unable to provide.](#) Rights have also been threatened by state laws requiring public schools to collect information about the immigration status of students and their parents. These measures also require the state Department of Education to report to the legislature the costs associated with educating unauthorized immigrant children. A bill like this was passed in Alabama in 2011, and a federal court invalidated the provision requiring immigration status checks and information gathering for public school students. The court’s decision acknowledges the reality that unauthorized immigrant children and their families will be discouraged from enrolling in public schools if, in order to do so, they have to reveal their immigration status.

### The Department of Education’s Role in Protecting Immigrant Schoolchildren

In a 2014 response to reports that many school districts discouraged enrollment by unauthorized immigrant children, the U.S. Departments of Justice and Education issued a guidance memo detailing the types of documentation that can legally be required for enrollment in public schools. That guidance reminded state and local education agencies of their obligation under federal law to provide all children with equal access to primary and secondary education and encouraged states and school districts to implement policies to create a welcoming and inclusive environment for all students. The guidance also made clear that schools may not inquire about a student's or parent's citizenship or immigration status; nor may schools refuse to enroll a student who does not provide a social security number or one from a parent, or prevent or discourage a child from enrolling because he does not have a birth certificate or has a foreign birth certificate.

Contrary to Secretary DeVos' recent comments, the 2014 guidance memo made clear that the Family Educational Rights and Privacy Act controls the circumstances under which a school district may disclose personal information about students without the consent of a parent, noting the very limited circumstances in which disclosure is permitted. The memo also directed school districts not to concern themselves with the immigration status of their students and to take steps to ensure that they not act in a way that would discourage or prevent any child from enrolling in school.

At a time of heightened immigration enforcement, the federal government's role in championing the protections in the Supreme Court's *Plyler* decision, as well as the privacy protections afforded by the Family Educational Rights and Privacy Act, is more critical than ever. That all children residing in the United States have a right to schooling is an important message not just for immigrant children and families seeking to enroll in public schools, but also for school officials and employees who may misunderstand their obligations as state and local governments step up immigration enforcement against undocumented adults. The 2014 federal guidance on this issue was an important first step, but greater efforts must be made by the Department of Education to ensure that the constitutional and legal protections for confidential student information are not violated.

Although Secretary DeVos has recently issued a statement confirming that undocumented students cannot be denied a public education, she should send a very clear and emphatic message that schools are prohibited from sharing student information with immigration enforcement bodies. She should also reissue the 2014 guidance memo, emphasizing the important protections mandated by *Plyler* and the Family Educational Rights and Privacy Act, and reiterating the overriding necessity of ensuring safe learning environments for all children.

**Read more in Christopher N. Lasch, Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick, and Juliet P. Stumpf, "[Understanding 'Sanctuary Cities'](#)" *Boston College Law Review* 59 (2018).**