UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

Hispanic Interest Coalition of Alabama, et al.,

Plaintiffs,

Governor Robert Bentley, et al.,

v.

Defendants.

Case No. 5:11-CV-02484-SLB

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AND THE ALABAMA EDUCATION ASSOCIATION AS AMICI CURIAE SUPPORTING PLAINTIFFS

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INTRODUCTION

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

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

The public statements of the Act's chief sponsors make this crystal clear. In describing the Act's purpose, Alabama House Majority Leader Micky Hammon, chief sponsor of HB 56, explained, "When this bill passes

and is signed into law, I think you will see illegals leaving north Alabama and going elsewhere…. This bill is designed to make these people export themselves."[1] "We really want to prevent illegal immigrants from coming to Alabama and to prevent those who are here from putting down roots," he said.[2] After HB 56 was passed, Hammon boasted, "by ridding this state of illegal immigrants we will open up thousands of jobs for Alabama citizens who were unemployed."[3] He later crowed that the reason the instant lawsuit was filed was that the law was having its intended effect because illegal aliens "are packing up and leaving Alabama…. That was the intent of the bill in the first place, to protect our borders and our jobs."[4]

Scott Beason, the Act's chief sponsor in the Senate, amplified these sentiments with a chilling analogy. Speaking to the Cullman County Republican Party, Beason explained to his fellow Republicans that the

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[1] MJ Ellington, *House OKs Immigration Bill*, The Times Daily, April 6, 2011, *available at* http://www.timesdaily.com/article/20110406/NEWS/110409882?Title=House-OKs-immigration-bill (last visited July 26, 2011).

[2] R. Cort Kirkwood, *Alabama Gov Signs Immigration Bill; Leftists Outraged*, New American, June 10, 2011, *available at* http://www.thenewamerican.com/usnews/immigration/7817-alabama-gov-signs-immigration-bill-leftists-outraged (last visited July 26, 2011).

[3] Tamika Bickham, *The Alabama Legislature Approves Immigration Bill*, CBS 8 News WAKA Montgomery, June 2, 2011, *available at* http://www.waka.com/news/7688-the-alabama-legislature-passes-immigration-bill.html (last visited July 26, 2011).

[4] Reuters.com, *Groups Seek to Block Tough Alabama Immigration Law*, July 21, 2011, http://www.reuters.com/article/2011/07/21/us-immigration-alabama-idUSTRE76K63C20110721 (last visited July 26, 2011).

legislature has to "empty the clip, and do what has to be done."[5] Beason later claimed that he was not urging violence against immigrants.[6]

The resulting Act (HB 56) imposes an array of restrictions on immigrants designed to drive those without proper documentation from the state. Those restrictions include several – sections 8, 11, 13, 15 and 28 of the statute – that will particularly undermine the role our public schools play in providing an education and a place of safe harbor to all children, both documented and undocumented. Consistent with their long commitment to public education for all, Amici AEA and NEA submit this brief to detail the respects in which the provisions of HB 56 related to the operation of public schools are unconstitutional.[7]

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[5] Sam Rolley, *Beason: Dems Don't Want to Solve Illegal Immigration Problem*, The Cullman Times, February 6, 2011, *available at* http://www.cullmantimes.com/local/x2072622472/Beason-Dems-don-t-want-to-solve-illegal-immigration-problem (last visited July 26, 2011).

[6] Charles J. Dean, *Sen. Scott Beason Catching Flak Over "Empty the Clip" Comment*, The Birmingham News, February 6, 2011, *available at* http://blog.al.com/spotnews/2011/02/sen_scott_beason_catching_flak.html (last visited July 26, 2011) (reporting on speech by Beason to a gathering of the Cullman County Republican Party).

[7] The National Education Association (NEA) is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges and universities. As expressed in Resolution B-24, NEA has long supported the right of undocumented students and the children of undocumented immigrants to a free public education: "The National Education Association believes that, regardless of the immigration status of students or their parents, every student has the right to a free public education in an environment free from harassment. The Association opposes Immigration and Customs Enforcement (ICE) operations on school property. The Association supports access to higher education for undocumented students and access to financial aid and in-state tuition to state colleges and universities in the

THE KEY HB 56 PROVISIONS RELATING TO PUBLIC EDUCATION

The cornerstone of HB 56's provisions relating to education is section 28 of the Act. Section 28 requires school employees to ask the parents of a student seeking to enroll in a public school whether their child "was born outside the jurisdiction of the United States" or whether the parents themselves are "not lawfully present in the United States." Subsection (a)(2) requires the parents to provide a valid birth certificate of the child. In the absence of a valid birth certificate showing birth in the U.S., a document establishing citizenship or immigration status, or a sworn declaration from his parent that the child is a "citizen or an alien lawfully present in the

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states where they reside. The Association also believes that neither educational systems nor their employees are responsible for the determination and enforcement of legal residency status."

The Alabama Education Association (AEA) is a statewide employee organization with more than 104,000 members employed at all levels of public education. AEA's members range from high school students planning for an education career to retirees, but the vast majority are active classroom teachers and education support professionals. AEA's membership includes educators employed in each and every one of Alabama's city and county boards of education and two-year community colleges. AEA is the Alabama affiliate of the NEA, and supports those resolutions adopted by our national organization. Alabama's Hispanic and Latino population is nearly 4% according to the 2010 census, and is rapidly increasing. There are concentrated pockets where a substantial number of school children are of that ethnic background, based upon their proximity to certain agricultural industries. AEA believes that in an era of diminishing resources for public education, adding law enforcement duties to educators will take valuable instructional time and resources away from Alabama students. AEA believes that educators' time is best spent educating, not trying to enforce immigration laws.

United States," the child is deemed to be "an alien unlawfully present in the United States." § 28(a)(5).

Based on these enrollment disclosures, each school district in the state must prepare an annual report to the State Department of Education regarding the number of undocumented students enrolled in each school in the district. § 28(a)(5)(b) and (c). The State Department of Education is then required to use this data to prepare an annual report to the state legislature setting forth the costs to school districts and the state of educating undocumented students, including an assessment of the effects of the provision of such educational services on "the standard of quality" of educating students who are U.S. citizens. § 28(d).

These enrollment disclosure requirements will result in school employees learning information about the immigration status of students, and their families, that they are obligated to report under HB 56 or face criminal sanction. Moreover, section 28 expressly permits state and local authorities to relay such information to federal immigration authorities. § 28(e)

Section 5(f) requires employees of political subdivisions of the state—including public school employees—to report any violations of the Act. That provision also makes it a state crime (obstructing governmental

operations) for such employees to "willfully fail[]" to report a violation of the Act. Thus, if in the course of inquiring into the legal status of a student seeking enrollment in a public school or the status of his/her parents, a school employee learns that a parent is undocumented and has a job in violation of HB 56 (section 11 of the statute makes it a state crime for undocumented aliens to work in the state of Alabama), the school employee must report the violation or risk being prosecuted for a crime.

The interaction of the Act's enrollment disclosure requirements and its reporting requirements will deter undocumented immigrants from enrolling their children–documented or not–in Alabama's public schools. As the record evidence demonstrates, parents will decline to enroll their children due to fear that the enrollment process will result in the child's or the parents' deportation. In his declaration (Exhibit 32 to the complaint), John Doe #2 states that HB 56 will require him to reveal the undocumented status of him and his son, and he has a great fear that "school officials will call the federal immigration authorities and cause me or my son to be deported." (Ex. 32, ¶5). He adds, "that is a risk that I cannot take" (*Id*.), and it "would practically force my children out of school." *Id*., ¶6. Jane Doe #5 states flatly, "As a result [of HB 56], I will not be able to enroll my child in school…. I fear HB 56 will seriously hurt my son's future." (Ex. 29, ¶6).

Jane Doe #2 expresses her fear that HB 56 will result in school officials reporting her to the police and being arrested. (Ex. 26, ¶9). Because of that fear, she is considering home schooling her children. *Id.* Jane Doe #3 is afraid that HB 56 "will affect [her] daughter's school attendance." (Ex. 27, ¶8). She is afraid to give school officials contact information about her undocumented husband because she fears that they will turn over that information to immigration officials. *Id.*

The statute also imposes criminal liability on school employees for complying with their legal duty to supervise and protect the students who have been entrusted to their care. Section 13(1) makes it a state crime to "[c]onceal, harbor, or shield … an alien from detection in any place in this state, including any building or any means of transportation, if the person knows or recklessly disregards the fact that the alien has come to, has entered, or remains in the United States in violation of federal law." Nowhere in the statute are the terms conceal, harbor, or shield defined. Section 13(2) makes it a state crime to "[e]ncourge" someone known to be an undocumented alien to "reside in this state." And section 13(3) makes it a state crime knowingly to "[t]ransport" an undocumented alien "in furtherance of the unlawful presence of the alien in the United States." The statute leaves the operative scope of these provisions hazy, but by their terms

they place school employees in criminal jeopardy for transporting undocumented students to, or from, school; shielding such students in school by not reporting them; and encouraging such students to continue their studies.

Finally, Section 8 of the Act prohibits any undocumented immigrant and many categories of lawfully present immigrants from enrolling in, or attending, any Alabama public postsecondary education institution.

ARGUMENT

I. THE EDUCATIONAL PROVISIONS OF THE ACT VIOLATE THE EQUAL PROTECTION CLAUSE UNDER *PLYLER V. DOE*

A. Since 1982, it has been settled law that states may not deny children a public education based on their immigration status. *Plyler v. Doe*, 457 U.S. 202 (1982). Because the educational provisions of HB 56 operate to do just that, the provisions are unconstitutional in violation of the Equal Protection Clause.

At issue in *Plyler* was a state statute that withheld state funding for the education of undocumented students and that permitted school districts to deny enrollment to such students. *Id.* at 203. Students who had been excluded from public school, pursuant to a local school district policy

permitted by the state statute, challenged the statute as unconstitutional discrimination. *Id.* The case thus posed the question

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

Given the "supreme importance" of our public school system as the "primary vehicle for transmitting 'the values on which our society rests'," *id.* at 222 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76 (1979)), and the central role education plays in "preparing individuals to be self-reliant and self-sufficient participants in society," *id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)), the Court answered this question "No." "What we said 28 years ago in *Brown v. Board of Education*, 347 U.S. 483 (1954), still holds true:" *Id.* at 222.

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

equal terms. [*Id.* (quoting *Brown*, 347 U.S. at 493).]

Given the costs to society and undocumented children of denying them a free public education, the Court held that the state statute had no rational basis and therefore violated the Equal Protection Clause. *Id.* at 224. Notably, in reaching that result the Court considered, and rejected, the state's contention that denying undocumented children an education would somehow save the state money, finding it "difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare and crime." *Id.* at 229-30.

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

In line with that result, the consistent guidance of the United States Department of Education ("ED") since *Plyler* has been that school districts "should not take action to discourage the participation of students that could be viewed or would likely result in denying access" to public schools for

undocumented students. Declaration of T. Miller (*U.S. v. Alabama*, Case No. 2:11-CV-02756-WMA (N.D. Ala, Northeastern Division 2011)). ED's latest guidance to that effect was issued on May 6, 2011, in the form of a Dear Colleague letter to school superintendents issued jointly with the United States Department of Justice ("DoJ").

In that letter, ED and DoJ expressly address, and condemn as a violation of *Plyler*, any actions by school districts that deter undocumented students or their parents from enrolling the students in public school. As the letter (which is appended here as Attachment A),[8] begins:

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

Specifically, "[a]s *Plyler* makes clear, the undocumented or non-citizen status of a student (or his or her parent or guardian) is irrelevant to that student's entitlement to an elementary and secondary public education." For this reason, "districts may not request information with the purpose or result of denying access to public schools on the basis of race, color, or national origin." The letter closes by urging school districts "to review the

[8] The letter is also posted at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201101.pdf (last visited July 28, 2011).

documents your district requires for school enrollment to ensure that the requested documents do not have a chilling effect on a student's enrollment in school."

In line with this longstanding guidance from ED, every state department of education that has advised local school districts regarding whether, under *Plyler*, they may inquire into the citizenship status of students seeking to enroll or their parents, has advised that such inquiries are impermissible under *Plyler*. Specifically, state departments of education in Maryland,[9] New York,[10] New Jersey,[11] Iowa,[12] Michigan,[13] Massachusetts,[14]

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[9] "We agree … that one effect of collecting information on immigration status would be to make some immigrant parents so fearful that they will not enroll their children in school. If that were to occur, the protections drawn by *Plyler v. Doe* to provide the benefit of education to immigrant children would be nullified. As the head of the public education system in Maryland, we cannot risk nor abide such a result." *Board of Frederick County Commissioners v. Frederick County Board of Education*, Maryland State Board of Education Opinion No. 09-11 (Mar. 24, 2009), *available at* *http://www.mnsmd.org/files/state-board-opinions/Frederick%20County%2009-11.pdf* (last visited July 26, 2011).

[10] "While *Plyler* did not expressly address the issue of whether a school district may inquire about a student's immigration status at the time of enrollment, the decision is generally viewed as prohibiting any district actions that might 'chill' or discourage undocumented students from receiving a free public education. Accordingly, at the time of registration, schools should avoid asking questions related to immigration status or that may reveal a child's immigration status, such as asking for a Social Security number." New York Department of Education, *Student Registration Guidance*, August 30, 2010, *available at* http://www.p12.nysed.gov/sss/pps/residency/studentregistrationguidance082610.pdf (last visited July 26, 2011).

[11] "To determine if a student meets the federal definition of 'immigrant,' a district must not require students to disclose their immigration status or make inquiries of students or parents that may expose their undocumented status." New Jersey Department of Education, *Immigrant Student County 2011* (Emphasis in original), *available at* http://www.state.nj.us/education/bilingual/data/icount.htm (last visited July 26, 2011).

Washington,[15] Kentucky,[16] Illinois,[17] and Oregon[18] all have issued opinions or guidance advising local school districts that they are prohibited by law

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[12] "Schools may not question immigrant students as to their 'legal' status and may not demand their 'documentation.' Pursuant to *Plyler v. Doe*, public school districts shall provide these students, assuming they meet residency requirement, with tuition-free educations." Iowa Department of Education, *Education of Immigrant Children*, School Leader Update (June 2008), *available at* http://www.educateiowa.gov/index.php?option=com_content&view=article&id=1420:plyler-v-doe-case&catid=411:legal-lessons (last visited July 29, 2011).

[13] "As a result of the Supreme Court decision, public schools MAY NOT: … Require students or parents to disclose or document their immigration status." Michigan Department of Education, *Foreign Students Enrolled in Public School Districts*, March 17, 2006 (Emphasis in original), *available at* http://www.michigan.gov/documents/mde/foreign_students_3-06_193217_7.pdf (last visited July 29, 2011).

[14] "It is unlawful to bar students 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, school districts may not request information with the purpose or result of denying access to public schools on the basis of race, color, or national origin …." Massachusetts Department of Education, *Avoiding Discrimination in Enrollment Based on Citizenship or Immigration Status*, Commissioner's Update June 14, 2011, *available at* http://www.doe.mass.edu/mailings/2011/cm061411.html (last visited July 29, 2011).

[15] "As a result of the *Plyler* ruling, public schools may not: … Engage in any practices to 'chill' the right of access to school. Require students or parents to disclose or document their immigration status. Make inquiries of students or parents that may expose their undocumented status. …" Washington Department of Education, *Immigrant Students' Rights to Attend Public Schools*, *available at* http://www.k12.wa.us/MigrantBilingual/ImmigrantRights.aspx (last visited July 26, 2011).

[16] "The U.S. Supreme Court, in *Plyler v. Doe*, 457 U.S. 202 (1982), held it was unconstitutional for a school to deny free public education to students who were not legally residing in the U.S., and schools could not ask any questions during the enrollment process which would have a 'chilling effect' on a student's right to education." Kentucky Department of Education, *Kentucky Department of Education Guidance on Student Identification Requirements for Initial Enrollment*, *available at* www.education.ky.gov (type in keyword Plyler) (last visited July 29, 2011).

[17] "It is important to understand that a school district cannot require you [to] provide information concerning your or your child's immigration status or Social Security number. Therefore, you should not be discouraged from enrolling your child in school." Illinois Department of Education, *The Rights of Children to Receive a Free Public*

from asking students or their parents about their immigration status. Pennsylvania has enacted a state law to the same effect.[19]

Ironically, the Alabama State Department of Education is among the state education departments that have advised local school districts not to ask about citizenship status when enrolling a child in public school. Its publication, *Equal Education Opportunity and Non-Discrimination Statement*, states, in pertinent part, "the [*Plyler*] court ruled that public schools may not: … Engage in any practice to 'chill' the right of access to school[,] [r]equire students or parents to disclose or document their immigration status[, or] [m]ake inquiries of students or parents that may expose their undocumented status."[20]

It comes as no surprise, given all of the above, that the only other state law that attempted to mandate that local school districts require students and their parents to disclose their citizenship status was struck down. In 1994,

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Education (citing *Plyler v. Doe*), *available at* http://www.isbe.net/bilingual/htmls/rightEng.html (last visited July 29, 2011).

[18] "As a result of *Plyler v. Doe*, school districts must not: … Require students or parents to disclose or document their immigration status. Make inquiries of students or parents that may expose their undocumented status." Oregon Department of Education, *Undocumented Students' Rights to Attend Public Schools*, *available at* http://www.ode.state.or.us/policy/district/schooladmission/undocsturightstoattpubsch092004.pdf (last visited July 29, 2011).

[19] "A child's right to be admitted to school may not be conditioned on the child's immigration status. A school may not inquire regarding the immigration status of a student as part of the admission process." 22 Pa. Code § 11.11(d) (2011).

[20] Available at http://alex.state.al.us/ell/node/58 (last visited July 29, 2011).

the voters of California passed a legislative referendum titled Proposition 187. Among other things, section 7 of Proposition 187 required local school districts to determine whether the parents of children seeking enrollment are "illegal aliens," and, if so, the children were to be denied admission. A federal district court easily determined that the provision was unconstitutional "in its entirety" because it conflicted with the mandates of *Plyler*. *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 774 (C.D. Cal. 1995).

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

B. What we have said thus far disposes entirely of any contention that the educational provisions of HB 56 may be defended as a matter of law. But we would be remiss if we did not add that *Plyler*'s policy underpinnings remain as sound today as they were in 1982.

Education remains "pivotal to 'sustaining our political and cultural heritage," *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003), and is now, more than ever, central to an individual's wellbeing. "[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Association for Disabled Americans v. Florida International University*, 405 F.3d 954, 957-78 (11th Cir. 2005) (quoting *Brown*, 347 U.S. at 493).

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

Moreover, these earnings–or lack thereof–translate into very real societal benefits and costs. In a study entitled *The Costs and Benefits of an Excellent Education for All of America's Children*,[21] well-respected economist Henry Levin examined the cost to government of high school dropouts. Not surprisingly, he concludes that high school graduates provide higher tax revenues as well as lower government spending on health care and crime. Specifically, when compared to high school dropouts, each new high school graduate yields a public benefit of $209,000 in higher government revenues and lower government spending. Levin further concludes that, if the number of high school dropouts were cut in half, the government would reap $45 billion in extra tax revenues and reduced costs. He writes, "If there is any bias to our calculations, it has been to keep estimates of the benefits conservative. Sensitivity tests indicate that our main conclusions are robust: the costs to the nation of failing to ensure high school graduation for all America's children are substantial." *Supra*, n.8 at 1.

These numbers prove the error in HB 56's legislative findings, which emphasize that the Act is intended to remedy the "economic hardship"

[21] http://www.cbcse.org/media/download_gallery/Leeds_Report_Final_Jan2007.pdf (last visited July 29, 2011).

allegedly inflicted on the state by "illegal immigration," including specifically the "adverse[] [e]ffect" on "public education resources" caused by the constitutional mandate that Alabama educate undocumented students. Once the true costs to society are calculated of Alabama's ill-conceived effort to push undocumented students out of its schools, the state's misguided effort to increase the number of school dropouts will actually wind up costing the state millions of dollars.

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

As we have noted above, Section 13(1) of the Act makes it a state crime to "[c]onceal, harbor, or shield … an alien from detection in any place in this state, including any building or any means of transportation, if the person knows or recklessly disregards the fact that the alien has come to, has entered, or remains in the United States in violation of federal law." Nowhere in the statute are the terms conceal, harbor, or shield defined. Section 13(2) makes it a state crime to "[e]ncourge" someone known to be an undocumented alien to "reside in this state." And section 13(3) makes it a state crime knowingly to "[t]ransport" an undocumented alien "in furtherance of the unlawful presence of the alien in the United States."

These three provisions are unconstitutional because they directly conflict with the constitutional obligation school employees have under *Plyler* to provide an education to undocumented children and the children of undocumented immigrants. In addition, these provisions violate the legal duty of school employees to supervise and protect the students who have been entrusted to their care. Most teachers enter the profession because they love children. Their roles involve so much more than teaching. They act as confidant and counselor; they soothe hurt knees and hurt feelings; they act as the child's mom or dad while in school. There often develops a strong bond of trust that is so important in engaging the student in active learning.

It is beyond doubt that many teachers in the state will learn which of their pupils are undocumented or the children of undocumented parents. This will occur either because the student confides in the teacher or simply because, in small schools, people will talk.

That being so, there are any number of circumstances in which teachers and teachers' aides will commit acts that are unlawful under section 13. Since the statute does not define these key terms, we turn to the ordinary dictionary definition. *Webster's* defines "harbor" as "to give shelter or refuge to"[22] and defines "shield" as "to protect."[23] Thus, by allowing an

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

undocumented student to remain present in the classroom, an act required by *Plyler*, a teacher could be said to "harbor" or "shield" the student.

Moreover, if there is a school emergency, such as a tornado, and the teacher takes action to protect his/her students, then he/she has committed the crime of "protecting" or "shielding" undocumented students.[24] These are not hypotheticals. Highly publicized Immigration and Customs Enforcement (ICE) raids on workplaces in Grand Island, Nebraska, and Postville, Iowa illustrate the untenable dilemma faced by teachers and other school employees. In the course of those raids, many undocumented parents of school children were taken into custody. This meant that the children literally had no place to go. In the Grand Island ICE raid, for example, 25 children had both parents detained. The school superintendent "worked with school staff members to make sure that every child had a safe place to go."[25] At 8 p.m., a number of students remained at the school, so school officials

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[23] *Id*.

[24] In 2007, for example, a deadly tornado hit a high school in Enterprise, Alabama, killing eight students. Eric W. Robelen, *Deadly Tornado Spurs Calls for Emergency Planning*, Education Week, March 14, 2007, *available at* http://www.edweek.org/ew/articles/2007/03/14/27tornado.h26.html?qs=safe+haven+2007 (last visited July 30, 2011).

[25] Mary Ann Zehr, *With Immigrants, Districts Balance Safety, Legalities*, Education Week, September 10, 2007, *available at* http://www.edweek.org/ew/articles/2007/09/12/03safehaven.h27.html?qs=zehr (last visited July 30, 2011)

loaded them into their own cars and drove them to the homes of relatives.[26] Some schools were designated as "shelters" for the displaced children.[27] Later, school officials were dispatched to the homes of the undocumented students, delivering brown bags filled with beans, rice and other staples. Included in each bag was a note advising parents about a hotline they could call if they needed help after the raid.[28] In the aftermath of the Postville ICE raid, school officials worked until midnight to ensure that affected students "had someone to care for them."[29] When 150 Latino students failed to show up for school the next day, the superintendent sent faculty and staff to their homes to tell parents that it was safe to send their children to school.[30] A 2010 Urban Institute study of the aftermath of six ICE raids found that schools often provide assistance to families of undocumented workers affected by the raids.[31]

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[26] *Id*.

[27] Miriam Jordan, *At Public Schools, Immigration Raids Require New Drill*, Wall Street Journal, June 18, 2007, available at http://online.wsj.com/article/SB118213234807638691.html (last visited July 30, 2011)

[28] *Id*.

[29] Mary Ann Zehr, *Iowa School District Left Coping With Immigration Raid's Impact*, Education Week, May 21, 2008, *available at* http://www.edweek.org/ew/articles/2008/05/21/38immig.h27.html?qs=ice+raids (last visited July 30, 2011).

[30] *Id*.

[31] Urban Institute, *Facing Our Future: Children in the Aftermath of Immigration Enforcement*, February 2, 2010 *available at* http://www.urban.org/url.cfm?ID=412020&renderforprint=1 (last visited July 30, 2011)

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

What makes § 13 even more indefensible is that it conflicts with the legal responsibility of school employees and school districts not to leave students in their care unsupervised. If they violate that duty, *e.g.*, by leaving the children of ICE arrestees stranded at school, both individuals and school

districts can be sued for damages.[32] In *Patton v. Black*, for example, the Alabama Supreme Court held that a physical education teacher could be held liable, in part, for leaving his class unsupervised, which resulted in the injury to a student.[33]

In light of this Catch-22, it is fair to ask, what should school employees do when confronted with an emergency at school caused by a

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

[33] 646 So. 2d 8 (Ala. 1994). The court held that the claim fell within the ministerial function exception to discretionary function immunity available to public officials.

natural disaster or an ICE raid? If they protect or shelter students they know to be undocumented or give them a ride home, then they are guilty of a crime. If they fail to act and to provide proper supervision, they and their employers can be held liable for damages. And if they try to remove known undocumented students from their classrooms and deprive them of an education, they have violated the constitution under *Plyler*. No school employee should ever be compelled to make such an impossible choice.

III. SECTION 8 VIOLATES THE EQUAL PROTECTION CLAUSE

Section 8 of HB 56 prohibits any undocumented immigrant from enrolling in, or attending any, Alabama public postsecondary education institution. The findings set forth in section 2 do not specifically address the justification for this debarment. But even under a rational basis test, section 8 does not pass constitutional muster.

1. As the violent rhetoric surrounding the enactment of HB 56 suggests (*supra*, pp. 1-3), the Act was motivated by virulent, anti-immigrant sentiment. As in other states, conservative politicians have used the issue of illegal immigration to fire up and appease their political base. It is comparable, in a constitutional sense, to the venomous debate involving the

rights of gay and lesbian persons. In *Romer v. Evans*,[34] the Supreme Court confronted Colorado Amendment 2, adopted by the electorate, that amended the state constitution to prohibit state and local governments from enacting laws and policies that banned discrimination against gay and lesbian persons. Applying a rational basis test, the Court ruled that the amendment violated Equal Protection.

The Court first observed that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. '[I]f the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" 517 U.S. at 634-35 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (emphasis in original)). The Court concluded:

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

[34] 517 U.S. 620 (1996).

> We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do.

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

As we have shown, HB 56 is based on a "bare desire to harm a politically unpopular group" and "reflect[s] deep-seated prejudice." It is "obnoxious" "class legislation" and a "status-based enactment" "born of animosity toward the class" of undocumented immigrants. It is intended to make them "unequal to everyone else." As such, it violates the Equal Protection Clause.

2. We also agree with plaintiffs that section 8 violates the Equal Protection Clause because it discriminates on the ground of alienage. As the Supreme Court has held, "classifications by a State that are based on alienage are 'inherently suspect and subject to close judicial scrutiny.'" *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977) (quoting *Graham v. Richardson*,

403 U.S. 365, 372 (1971)). "In undertaking this scrutiny, 'the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn.'" (quoting *Examining Board v. Flores de Otero*, 426 U.S. 572, 605 (1976)). "Alienage classifications by a State that do not withstand this stringent examination cannot stand." *Id*. Section 8 cannot withstand this "stringent examination" because its broad sweep bars from public higher education a host of aliens who are lawfully in this country, including, *e.g*., persons who have been granted asylum under 8 U.S.C. § 1158 or refugee status under 8 U.S.C. § 1157.

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

Doe, 457 U.S. at 228. The Court's observation in this regard is also true today.

A ground-breaking study by the College Board documents the great benefits, both to individuals and to society at large, that accompany earning a college degree. Entitled *Education Pays: The Benefits of Higher Education for Individuals and Society*,[35] the study reaches several important conclusions:

- Workers with a college degree earn much more and were much less likely to be unemployed than those with only a high school diploma;
- The annual median income of college-educated workers is $21,900 more than those with a high school diploma;
- During the recession, college degree holders were more that 50% less likely to be unemployed: 4.6 % compared to 9.7% for those with only a high school diploma;
- College degree holders contribute more to tax revenues and are less likely to depend on social safety-net programs, generating decreased demand on public budgets;
- College graduates have lower smoking rates and lower incarceration rates that non-graduates;
- Higher levels of education are correlated with higher levels of civic participation, including volunteer work;
- The children of college graduates display higher levels of school readiness than children of non-graduates and are more likely to attend college themselves;
- Statistically, Hispanics are underrepresented in the ranks of college attendees.

[35] http://www.collegeboard.com/prod_downloads/press/cost04/EducationPays2004.pdf (last visited July 30, 2011).

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

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

IV. SECTION 5 IS A MISGUIDED AND IMPERMISSIBLE EFFORT TO MAKE SCHOOL EMPLOYEES ICE POLICE

In sweeping language, section 5(f) provides that "[e]very person working for the State of Alabama or a political subdivision thereof [including public school districts] … shall have a duty to report violations of the act. Any person who willfully fails to report any violation of this act … shall be guilty of [the crime of] obstructing governmental operations" under the Alabama state criminal code. This provision applies to every public school teacher, teacher's aide, bus driver, janitor, secretary, cafeteria worker, and principal in the state, conscripting them into the ranks of the ICE police. Thus, if a six-year-old, in confidence, talks to her first grade teacher about her undocumented father who holds down a job and her fears of being arrested and deported, the teacher is required by law to report that information. If the teacher fails to do so, she can be sent to jail. Thus, in addition to preparing lesson plans, grading papers, conducting parent conferences, and writing letters of recommendation, every teacher in Alabama is now a state immigration official, charged with enforcing the prohibitions set forth in HB 56. This also means that, if a bus driver "transports" a student he knows to be undocumented, he must report *himself* for violating HB 56.

In increasing numbers, students are speaking openly about the undocumented status of themselves and their parents. In a widely-reported incident last May, First Lady Michelle Obama was visiting a suburban Washington, DC elementary school when a second grader confessed her fears for her mother. The little girl told the First Lady, "My mom... she says that Barack Obama is taking everybody away that doesn't have papers." When Mrs. Obama replied that "that's something we have to work on," the girl blurted out, "But my mom doesn't have any papers." The exchange was taped by the media covering the event and aired on T.V.[36] If this exchange had occurred in an Alabama school and if the little girl had also disclosed that her mother had a job, then the teacher of that second grade class would be compelled to report that child's mother for violating HB 56, or risk going to jail.

The fact that HB 56 leads to absurd results doesn't necessarily render it unconstitutional. In their memorandum in support of the motion for a preliminary injunction, the plaintiffs have persuasively explained why HB 56 is unconstitutional because it is a state law attempting to regulate immigration and, in any event, conflicts with federal law and is thus

[36] Stephanie Condon, *Second Grader to Michelle Obama: "My Mom Doesn't Have any Papers"*, CBS News, May 19, 2010, *available at* http://www.cbsnews.com/8301-503544_162-20005436-503544.html (last visited July 31, 2011).

preempted. There is no need to repeat those arguments here. Suffice to say that if this ill-conceived law is allowed to be implemented, it will wreak havoc in Alabama's public schools.

CONCLUSION

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

For all of these reasons, *amici* respectfully urge the court to enjoin this woefully misguided and deeply offensive legislation.

Respectfully submitted this 5th day of August, 2011.

Alice O'Brien — s/ Cecil Gardner
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ATTACHMENT "A"

U.S. Department of Justice
Civil Rights Division

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

May 6, 2011

Dear Colleague:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

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