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Federal Government Bars Immigration Checks By Schools

Education Law Notes

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The U.S. Departments of Education and Justice have recently issued new guidance – in the form of a "Dear Colleague" letter to school administrators nationwide – barring public schools from conducting immigration checks on students. The guidance comes about a year after the U.S. Supreme Court declined to hear an appeal of lower courts' rulings in *HICA v. Bentley* holding that an Alabama statute requiring schools to verify the immigration status of enrolling students was unconstitutional. In addition to providing more detailed direction on avoiding such checks than was available before, the letter confirms that the federal government views immigration verification efforts undertaken by individual school districts as unconstitutional even in the absence of a state-government mandate to schools like the ones at issue in *HICA* and in the Supreme Court's 1982 decision in *Plyler v. Doe*.

Attorney General Eric Holder said that the guidance was issued in response to reports from various places in the country about schools' overly elaborate requests for identification documents, and the letter focuses specifically, although not exclusively, on such requests. The essence of the guidelines is that in requesting proof of residency within a school district, or of the identity of the enrolling child, a school may not require specific documents that amount to an inquiry into citizenship or immigration status, whether of a student or a parent. Nor may it decline to enroll the child because the documents provided may suggest lack of legal immigration status. So, for example, a school may not require that a child or her parents provide the school with her U.S. social security number as a condition of enrollment, nor may it refuse to enroll a child whose identity document – a foreign birth certificate, say – reveals that he was born abroad.

Importantly, the Dear Colleague letter refers to document requests made "with the purpose or result of denying access to public schools" (although the wording is unaccountably vague on whether this portion of the guidance is meant to apply to immigration status as well as to other discriminatory factors). That is, the letter suggests that even a documentation requirement undertaken without immigration status in mind and with the motive of fulfilling an otherwise legitimate policy interest – such as enrolling only those students who genuinely reside in the district – may be prohibited if it has the effect of barring students on the basis of their immigration status. Moreover, the guidance prohibits not only policies that actually bar enrollment based on immigration status, but also those that "discourage a student who is undocumented or whose parents are undocumented from enrolling in or attending school."

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With a new academic year on the horizon, what, then, should school districts take into consideration in setting their documentation policies for enrollment? First, they should draft their policies broadly enough to give students and parents latitude to provide documents without immigration status implications to satisfy residency and identity requirements. So, for example, if a parent can furnish commonly accepted documents like utility bills to establish her residence address, a district should avoid demanding an alternate document that may be suggestive of her immigration status, such as a driver's license (at least unless it has some legitimate, non-immigration related concern about the authenticity or accuracy of the other proffered documents). More simply, a district should never refuse enrollment because the documents it receives suggest foreign birth or lack of valid immigration status. In addition to the Dear Colleague letter's explicit example of a child's foreign birth certificate, this same principle would generally apply to a parent's foreign passport offered as proof of his identity, or to a decree of a foreign court offered as proof of custody. If foreign-issued documents are otherwise sufficient to demonstrate the fact under question, they generally should be accepted. Employees responsible for enrollment should obviously be trained to avoid inquiries into a student's or parent's immigration status. And to avoid running afoul of the "discourage" prong of the guidance, even school districts fairly certain of the otherwise nondiscriminatory effects of their policies may wish to consider explicit disclaimers in their enrollment documents making clear that enrollment does not depend on immigration status. Of course, seeking legal counsel in this emerging area of the law may be advisable, as well.

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