



## MEMORANDUM

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**TO** School District Clients and Friends

**FROM** Maree Sneed  
Esther Haley Walker  
Sejal Jhaveri 1/

**DATE** October 10, 2014

**SUBJECT** *Undocumented Students: Are you prepared to enroll them in accordance with Office for Civil Rights and Department of Justice guidance?*

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A number of school districts recently have come under attack for documents that they have required students to produce when enrolling in their districts. For example, the American Civil Liberties Union sued seven districts in New Jersey for requiring government-issued photo identification as part of their student enrollment process. 2/ The lawsuit alleged that, even after notice that their policies may not have complied with the law, these districts continued to require documentation that might have prevented undocumented students from attending public school. 3/ The ACLU reported one week after filing the suit that all seven districts had come into compliance. 4/

On May 8, 2014, the U.S. Department of Education's ("ED") Office for Civil Rights ("OCR") and the U.S. Department of Justice, Civil Rights Division ("DOJ") released a Dear Colleague Letter, Fact Sheet and Questions and Answers document (collectively, the "DCL") to school districts to make clear that districts cannot prevent students from attending school because of their (or their parent's/guardian's) immigration status. 5/ In addition, ED published two Fact

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1/ Ms. Jhaveri was a summer associate working under the supervision of licensed attorneys in our Washington, D.C. office.

2/ "ACLU-NJ Files Seven Lawsuits Against School Districts' Discriminatory Enrollment Policies" (June 2, 2014), available at <https://www.aclu-nj.org/news/2014/06/02/aclu-nj-files-seven-lawsuits-against-school-districts-discr>.

3/ Id.

4/ "ACLU-NJ Statement on Successful Resolution of 7 School District Suits" (June 10, 2014), available at <https://www.aclu-nj.org/news/2014/06/10/aclu-nj-statement-successful-resolution-7-school-district-su>.

5/ See Dear Colleague Letter on Nondiscriminatory Access to Public Schools for Undocumented Students (May 8, 2014) ("May 8 DCL"), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf>; "Information on the Rights of All Children to Enroll in School: Questions and Answers for States, School Districts and Parents" (May 8, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201405.pdf>; "Fact Sheet:

Sheets addressing educational services for immigrant children and those who have recently arrived in the United States. <sup>6/</sup> This memorandum discusses the legal background underpinning the guidance, its implications for school districts, and recent application of the guidance to a school district.

## Background

The May 8 DCL supersedes a prior DCL, dated May 6, 2011, and responds to comments and questions received by the agencies about undocumented students.

The legal basis for this guidance comes from Titles IV and VI of the Civil Rights Act of 1964 and the Supreme Court case, Plyler v. Doe, 457 U.S. 202 (1982). In general, Title IV, Title VI and their implementing regulations prohibit intentional discrimination or the implementation of policies that have the effect of discriminating on the basis of race, color or national origin. <sup>7/</sup> The U.S. Supreme Court addressed undocumented students specifically in Plyler. In brief, the Court held that districts cannot prohibit children from attending public schools because of their undocumented status (or the undocumented status of a parent/guardian). <sup>8/</sup>

## Implications for School Districts

The guidance requires school districts to take at least three steps, each of which are described in greater detail below:

- Review and revise current policies so that they do not directly bar, chill or discourage school participation based on immigration status.
- Consider the reasons for asking for certain documentation like social security numbers or birth certificates.
- Consider the reasons for asking for race and ethnicity data.

1. *Review and revise current policies so that they do not bar, chill or discourage school participation based on immigration status.*

The May 8 DCL is aimed at eliminating policies that actively bar undocumented students from attending public schools as well as policies that inadvertently do so. The guidance instructs school districts to:

- consider the intent of their documentation and enrollment policies to ensure that the policies do not have the intent to discover immigration status or prevent students from enrolling based on that status.

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Information on the Rights of All Children to Enroll in School” (May 8, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201405.pdf>.

<sup>6/</sup> “FACT SHEET: Educational Services for Immigrant Children and Those Recently Arrived to the United States” (undated), available at <http://www2.ed.gov/policy/rights/guid/unaccompanied-children.pdf>; “FACT SHEET II: Additional Questions & Answers on Enrolling New Immigrant Students” (undated), available at <http://www2.ed.gov/policy/rights/guid/unaccompanied-children-2.pdf>.

<sup>7/</sup> 42 U.S.C § 2000c-6; 42 U.S.C. § 2000d.

<sup>8/</sup> Plyler, 457 U.S. at 230.

- look at enrollment trends and determine if there has been any serious drop-off in enrollment by a particular group. If there has been drop-off, the district should determine whether documentation or enrollment policies may have had a role in the drop-off.
- be proactive about encouraging enrollment of undocumented students by notifying parents of their right to send their children to public school.

ED prepared a list of resources that may be useful for school districts enrolling immigrant children. 9/

2. *Consider the reasons for asking for certain documentation like social security numbers or birth certificates.*

A school district’s document requests should be narrowly construed to obtain the information requested (i.e., age of the student and the student’s residence) and not bar or discourage a student who is undocumented or whose parents are undocumented from enrolling.

The May 8 DCL:

- directs school districts to verify that they are not applying the documentation rules differently to certain students because of their perceived race or national origin.
- encourages school districts to be proactive by notifying parents that use of foreign birth certificates to demonstrate age will not be used to alert immigration authorities of a child with undocumented status.
- instructs school districts that ask for social security numbers to make clear that the disclosure is voluntary, provide the reason for asking for the number, and explain how it will be used. School districts cannot deny enrollment to a student if they refuse to provide a social security number.

Youth who are released from U.S. Department of Health and Human Services (“HHS”) shelters to the care of a sponsor may have a “Verification of Release” form, which shows their name and the name and address of the sponsor who is caring for them. ED has instructed that “[i]f voluntarily presented, the HHS Verification of Release form may be appropriate for schools to accept as proof of identity, residency, and age for purposes of enrolling these children.” 10/ However, a district should not have a policy of asking for the Verification of Release form. 11/

3. *Consider the reasons for asking for race and ethnicity data.*

The guidance states that school districts may request race and ethnicity data in order to comply with state and federal obligations to report such information. However, school districts

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9/ “FACT SHEET: Educational Services for Immigrant Children and Those Recently Arrived to the United States,” at 1-2; “FACT SHEET II: Additional Questions & Answers on Enrolling New Immigrant Students,” at B1 and B2.

10/ “FACT SHEET II: Additional Questions & Answers on Enrolling New Immigrant Students,” at A1.

11/ Id.

may not bar students from admission if they choose not to provide the data. Also, the May 8 DCL instructs that districts may not use the data to discriminate against students.

### Application of the Guidance to a School District

On July 9, 2014, DOJ and OCR applied the May 8 DCL in their Resolution Agreement with Jefferson Parish Public School System (“Jefferson Parish”) in Louisiana.<sup>12/</sup> The Resolution Agreement resulted from a 2012 complaint alleging national origin discrimination, which led DOJ and OCR to investigate, among other issues, Jefferson Parish’s policies and practices regarding the documentation needed for student registration, enrollment, and graduation. Citing the May 8 DCL, the Resolution Agreement requires Jefferson Parish not to “request information from parents or students with the purpose or result of denying or limiting access to the public schools on the basis of race, color, or national origin.”<sup>13/</sup> Also, Jefferson Parish acknowledges under the Resolution Agreement “its obligations under federal law to ensure that its student enrollment policies and practices do not chill or discourage the participation, or lead to the exclusion, of students based on their or their parents’ actual or perceived citizenship and/or immigration status.”<sup>14/</sup> In addition, Jefferson Parish agreed to review its registration and enrollment policies, provide training to its employees, and not condition a student’s enrollment on any document that would require “proof of citizenship or immigration status.”<sup>15/</sup>

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We hope this information is useful to you as you consider your school’s policies. If you have questions about the May 8 DCL or, more generally, Title IV, Title VI, and Plyler, please contact Maree Sneed at 202-637-6414 or [maree.sneed@hoganlovells.com](mailto:maree.sneed@hoganlovells.com).

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<sup>12/</sup> Resolution Agreement, dated July 9, 2014, available at <http://www2.ed.gov/documents/press-releases/jefferson-parish-agreement.pdf>.

<sup>13/</sup> Id. at 3.

<sup>14/</sup> Id.

<sup>15/</sup> Id.