



# The Education of Undocumented Children

BY LETICIA D. MCGOWAN



Immigration reform continues to be a controversial issue on the national and state level. Educators and those who advise them often are asked why school districts are required to educate undocumented children. Individuals who have been connected to the public education system, whether as a parent, employee, student, or legal counsel since the early 1980s largely take for granted that school districts educate all students regardless of citizenship status. However, this has not always been true.

## Background

The education of undocumented children was the focus of a 1982 U.S. Supreme Court decision. The Court in *Plyler v. Doe* reviewed the legality of the 1975 revision of Texas Education Code Section 21.031 by the Texas Legislature, which withheld state funds from school districts for the education of children who were not “legally admitted” into the United States.<sup>1</sup> In relevant part, the revision provided the following: “(a) All children who are citizens of the United States or legally admitted aliens and

who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.”<sup>2</sup>

Thus, local school districts were authorized by the revised statute to deny public school enrollment to children who were not legally admitted into the country. In response to this revision, the Tyler Independent School District adopted a policy in 1977 requiring undocumented children to pay a “full tuition fee” to enroll.<sup>3</sup> The plaintiffs, representing a class of undocu-

mented school-aged children, challenged the law based on equal protection grounds. In a 5-4 decision, the Court held that the Fourteenth Amendment's protections extended "to anyone, citizen or stranger, who was subject to the laws of a state."<sup>4</sup> The majority held that a denial of an education was an "affront to one of the goals of the Equal Protection Clause, which was the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit."<sup>5</sup> Further, the majority found that the "Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."<sup>6</sup>

The Court had a lengthy discussion on the appropriate standard of review. Finding that undocumented individuals could not be treated as a "suspect class" and that an education is not a "fundamental right," thus deserving greater judicial scrutiny and requiring the state to demonstrate a compelling governmental interest, the Court held that the state was required to demonstrate the statute was reasonably adapted to achieve the desired purpose.<sup>7</sup> The majority was troubled that the statute would impose a lifetime hardship on a distinct class of individuals who did not themselves create their illegal status.<sup>8</sup> Significantly, the Court held, "[T]he deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual and poses an obstacle to individual achievement."<sup>9</sup>

The Texas statute failed because the state could not demonstrate that the exclusion of undocumented students would effectively stem illegal immigration in comparison to alternative prohibitions,<sup>10</sup> nor was there evidence that the exclusion of these students would improve the overall quality of education in the state.<sup>11</sup> The Court also rejected the notion that the preservation of limited resources alone was sufficient to justify the practice.<sup>12</sup> Further, the Court noted that the "illegal alien of today may well be the legal alien of tomorrow."<sup>13</sup> Allowing the statute to stand would result in a population of children permanently locked into the lowest socioeconomic group.

## Recent Developments

As this past legislative session demonstrated, limited financial resources remain a concern. A common assertion is that the cost to educate undocumented students is a drain on the school system. However, identifying an accurate count of undocumented students remains a challenge.

In December 2006, then-Texas Comptroller Carole Keeton Strayhorn issued a special report, *Undocumented Immigrants in Texas: A Financial Analysis of the Impact to the State Budget and Economy*.<sup>14</sup> Included in the report was a review of the cost of educating undocumented children to the state education system. The report is based on the 2000 Census data and 2005 population estimates. For purposes of the report, "undocumented immigrants" are defined as, "foreign-born individuals who reside in the U.S. who are not U.S. citizens or do not possess permanent resident status."<sup>15</sup> These individuals may also be "foreign-born individuals who entered the U.S. legally but overstayed the authorized time period."<sup>16</sup>

As indicated in the report, the total count of foreign-born residents in the United States, per the 2000 Census, was 31.1 million. Six states, including Texas, accounted for more than two-thirds of the foreign-born resident count.<sup>17</sup> Texas had the third-highest total of foreign-born residents, after California and New York, with a total of 2.9 million.<sup>18</sup> As of 2005, the estimated number of undocumented immigrants was 11.1 million in the United States, of which approximately 1.4 million to 1.6 million resided in Texas. The estimated number of the foreign-born population, who were undocumented, was 30 percent.<sup>19</sup> Texas had an estimate of approximately 14 percent of all undocumented immigrants living in the United States in 2005.<sup>20</sup>

The exact number of current undocumented students is unknown. Previous counts have produced significant variations. The Comptroller's Office estimated that 135,000 undocumented children were in Texas public schools during the 2004-05 school year.<sup>21</sup> The Pew Hispanic Center estimated 140,000 undocumented students attended public and private schools in Texas in 2001-02. The U.S. Government Accountability Office estimated 135,013 undocumented students in Texas public schools in 2004.<sup>22</sup> Another report from the Federation for American Immigration Reform estimated the number of undocumented students in Texas to be 225,000 in 2003-04.<sup>23</sup>

Why are the exact numbers uncertain?<sup>24</sup> Federal guidelines restrict the information school districts may ask regarding legal status. This has not prevented the desire to acquire this data and the introduction of legislation nationwide to get more accurate data.<sup>25</sup>

A number of immigration-related bills were proposed during the 2011 legislative session. One that would have had a direct impact on school districts was House Bill 22.<sup>26</sup> The proposed legislation would have required public schools to determine the citizenship and the immigration status of students when initially enrolling the students. Each student would have been required to submit a birth certificate or other documents indicating residency status for inspection. School districts would have then been required to report this information in the required Public Education Information Management System (PEIMS) report.<sup>27</sup> The proposed legislation required the Commissioner of Education to adopt rules that would include sanctions against any school district that failed to include this data in its PEIMS report.<sup>28</sup> Critics argued the bill was an unfunded mandate and that the prevention of the education of any child was a direct violation of *Plyler*. A spokesman for the bill's author, Rep. Debbie Riddle, argued that the intent was not to prevent the education of any child but was meant to be a mechanism for "nose-counting."<sup>29</sup> The legislation was referred to the Texas House State Affairs Committee, where the bill died.

In response to various immigration-related state legislation, including those proposed in Texas, and numerous complaints that school districts were requiring immigration papers as a prerequisite for enrollment, federal officials have recently re-emphasized the restriction against checking the immigration status of students through a strongly worded joint letter from

the U.S. Department of Education and U.S. Department of Justice. After providing a summary of *Plyler*, the joint letter expressly states that “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.”<sup>30</sup>

The letter provides examples of permissible inquiries. For example, to meet federal mandates, schools must report the race and ethnicity of its student population. However, the inquiries may not be for the purpose of denying educational opportunities for a select group of students.<sup>31</sup>

As the debate over immigration reform and the further tightening of public funding for education continues, it is likely that the educational obligation of states and local school districts to provide a free public education to undocumented students will continue to be an area of contention. For now, *Plyler* remains the controlling law. Whatever the ultimate resolution, school children will be affected. What child, regardless of immigration status, can be successful without an opportunity for an education? As the Court expressed in *Plyler*, “[E]ducation has a 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.”<sup>32</sup>

## Notes

- 457 U.S. 202 (1982).
- Tex. Educ. Code Ann. §21.031 (Vernon Supp. 1981). In contrast, the current admission statute reads in relevant part: (a) A person who, on the first day of September of any school year, is at least five years of age and under 21 years of age, or is at least 21 years of age and under 26 years of age and is admitted by a school district to complete the requirements for a high school diploma is entitled to the benefits of the available school fund for that year. Any other person enrolled in a prekindergarten class under Section 29.153 is entitled to the benefits of the available school fund. Tex. Educ. Code Ann. §25.001 (Vernon Supp. 2011).
- Id.* at 206. It should be noted that Tyler ISD was not alone in this practice. The litigation at issue actually consists of several consolidated cases throughout the state. *Id.* at 202.
- Id.* at 215.
- Id.* at 221–22.
- Id.* at 213.
- The rational basis review tests whether a governmental action is a reasonable means to an end that may be legitimately pursued by the government. This test requires that the governmental action be “rationally related” to a “legitimate” government interest. *Id.* at 218.
- Id.* at 220. The dissenting justices were also troubled by the distinction drawn; however, they were unwilling to find that the state did not have a legitimate and rational basis for drawing the distinction. *Id.* at 242–254.
- Id.* at 222.
- Namely, prohibiting the employment of illegal aliens. *Id.* at 228–9.
- Id.* at 229.
- Id.* at 228–30.
- Id.* at 207.
- Texas Office of the Comptroller, *Undocumented Immigrants in Texas: A Financial Analysis of the Impact to the State Budget and Economy*. (December 2006), located at [www.window.state.tx.us/specialrpt/undocumented/undocumented.pdf](http://www.window.state.tx.us/specialrpt/undocumented/undocumented.pdf) (last visited Aug. 15, 2011).
- Id.* at 3.
- Id.* at 3.
- The other states are California, New York, Florida, Illinois, and New Jersey. *Id.* at 2.
- Id.* at 2.
- The 2005 estimates are based on research from the Pew Hispanic Center. *Id.* at 3. The Center, a nonpartisan research organization founded in 2001, has a stated mission of improving understanding of the U.S. Hispanic population and chronicling Latinos’ growing impact on the nation. Pew Hispanic Center, located at [pewhispanic.org](http://pewhispanic.org) (last visited Aug. 15, 2011).
- Id.* at 3.
- This number represented approximately 3 percent of the total public school population. *Id.* at 4.
- Id.* at 4.
- Id.* at 4. FAIR is a national, nonprofit organization whose membership believe the nation’s immigration policies need reform. Federation for American Immigration Reform, located at [www.fairus.org](http://www.fairus.org) (last visited Aug. 15, 2011).
- Pew Hispanic Center estimates that the number of students in 2009 was 127,390. Tawnell D. Hobbs, et al., “An Educated Guess on Texas Students in U.S.,” *Dallas Morning News*, Dec. 5, 2010, located at <http://www.dallasnews.com/news/community-news/dallas/headlines/20101205-an-educated-guess-on-texas-students-in-the-u.s.-illegally.ece> (last visited Aug. 15, 2011).
- Elise Foley, “Should Undocumented Students Be Allowed to Attend Public School?,” *The Washington Independent*, Sept. 7, 2010, located at <http://washingtonindependent.com/96731/should-undocumented-students-be-allowed-to-attend-public-school> (last visited Aug. 15, 2011); Matt Vasilogambros, “Reynolds backs Denying Education to Illegal Immigrant,” *The Iowa Independent*, Sept. 7, 2010, located at <http://iowaindependent.com/42677/kim-reynolds-backs-terry-branstad-plan-denying-education-to-illegal-immigrants> (last visited Aug. 15, 2011); Jason Hancock, “Tancredo Joins Branstad in Call for Denying Education to Illegal Immigrant Children,” *The Iowa Independent*, Aug. 11, 2010, located at <http://iowaindependent.com/40994/tancredo-joins-branstad-in-call-for-denying-education-to-illegal-immigrant-children> (last visited Aug. 15, 2011).
- H.B. No. 22, 82nd Leg., R.S. 2011.
- PEIMS is the data requested and received by the Texas Education Agency about public education, including student demographic and academic performance, personnel, financial, and organizational information. PEIMS data may be found at <http://www.tea.state.tx.us/index4.aspx?id=3012>.
- H.B. No. 22, 82nd Leg., R.S. 2011.
- Julian Aguilar, “Texas Lawmakers File Far-Ranging Immigrant Bills,” *The Texas Tribune*, Jan. 27, 2011, located at <http://www.texastribune.org/texas-legislature/82nd-legislative-session/texas-lawmakers-file-far-ranging-immigrant-bills/> (last visited Aug. 15, 2011).
- U.S. Department of Justice and U.S. Department of Education “Dear Colleague” Letter regarding Title VI of the Civil Rights Act of 1964 (May 6, 2011) at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201101.pdf>.
- Id.*
- Plyler v. Doe*, 457 U.S. 202, 221 (1982).

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