

Education
CLIENT ADVISORY



ALERT

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Public Education and Student Immigration Law

I. Introduction

In the wake of September 11, 2001, school districts across the nation are struggling with the fallout from the highly charged national debate on the issue of immigration reform. Prior to the terrorist attacks of 9/11, many foreign nationals would enter the United States on a B-2 visa, which allows individuals to enter the U.S. for an extended period of time for the purposes of visiting with friends, family or touring the country, only to later apply to change his or her visa status to that of a student. The old policy allowed the applicant to remain in the U.S. and take classes while his or her student visa application was pending. However, when it came to light that many of the 9/11 hijackers had entered the U.S. on B-2 visas and attended flight school while their student visa applications were pending, immigration laws were quickly amended. As a result, foreign born visitors admitted to the U.S. under B-2 visas are prohibited from taking classes at any public school or vocational school until their change in visa application has been approved.¹ Due to the travesties of 9/11, discussions have once again emerged among the nation's lawmakers on the issue of allowing states to deny public education to alien students altogether. Naturally, these discussions may cause school districts some confusion on how to properly handle such matters. Student immigration laws can be complex and seemingly inconsistent in their application. It is important for school districts to be aware of the protections afforded to both legal and illegal alien students and to be aware of the significant legal and educational distinctions between those protections. This advisory serves as an overview of the applicable, and at times very confusing, laws concerning the responsibility for educating legal and illegal alien children.

II. Schools and Illegal Aliens - (i.e., Students whose Documented Status is Unknown)

In 1982, in Plyler v. Doe, the Supreme Court of the United States ruled that states and school districts could not deny education to illegal alien children residing within their borders. More specifically, the decision allowed illegal alien children, who reside in a school district, to attend grades K-12 at a public school on the same terms as resident children who are American citizens.²

As of now, Plyler stands as good law, and state education departments and local school districts are advised to broadly interpret the Plyler decision and the Family Educational Rights and Privacy Act ("FERPA") to assure that illegal alien students receive a public education and receive maximum protection of their identities.

¹ Marcia N. Needleham & Laura L. Veal, Basic Immigration Law: F, J, and M Nonimmigrants, 158 PLI/NY 203, 209 (2006).

² Plyler v. Doe, 457 U.S. 202, 223 (1982).

An Overview of the Plyler Decision

In Plyler, the Supreme Court struck down a Texas statute which required children of illegal immigrants to pay tuition in order to receive a public school education, deeming the statute to be a violation of the Equal Protection Clause. The Plyler Court asserted that regardless of a person's status under immigration law, he or she is still a person under the Constitution and is thus guaranteed equal constitutional protection under the fourteenth amendment. The Court further concluded that persons who have entered the country illegally are still "within the jurisdiction of a state," because Congress intended the jurisdictional phrase to be broad in scope.³

The Plyler Court weighed these public policy implications heavily. It applied an intermediate level of scrutiny⁴ and concluded that although education is not a fundamental right and illegal aliens are not a suspect class, education is a crucial component to achieving success in life. The Court further reasoned that children of illegal immigrants should not be punished for a status they did not choose on their own volition. It stated that 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."⁵

School Compliance with the Plyler Standard and FERPA

As a result of the Plyler decision, illegal alien students have been afforded heightened protection, and local school districts have been encouraged to change their record-keeping policies to protect their undocumented status. State education departments around the country have issued memoranda interpreting the Plyler decision. In general, the prevailing wisdom is that complying with Plyler means not only that local school districts must provide education for the student, but also means that the districts "may not require students or parents to disclose or document their immigration status, or make inquiries that may expose their undocumented status."⁶

Similarly, the United States Department of Education's Institute of Education Sciences sponsors an information center called the Education Resources Information Center ("ERIC"). ERIC has advised school districts that FERPA prohibits public schools, without parental consent, from providing information from a student's file to federal immigration agents if the information would potentially expose a student's immigration status. Under FERPA, schools may disclose directory information without consent, but they are required to allow parents and eligible students a reasonable amount of time to request that the school not disclose directory information about them. Schools are required to notify parents and students of their FERPA rights on an annual basis.⁷ Some school districts have further interpreted Plyler to prohibit schools from requiring students to provide social security cards or birth certificates as a condition of enrollment, test taking or

³ Id. at 210.

⁴ "Intermediate scrutiny is the middle level of scrutiny applied by courts deciding constitutional issues through judicial review. The other levels are typically referred to as rational basis review (less rigorous) and strict scrutiny (most rigorous)." <http://www.answers.com/topic/intermediate-scrutiny>. Intermediate scrutiny is met if a regulation involves important governmental interests that are furthered by substantially related means.

⁵ Plyler, 457 U.S. at 223.

⁶ Jaclyn Brickman, Educating Undocumented Children in the United States: Codification of Plyler v. Doe through Federal Legislation, 20 Geo. Immigr. L.J. 385, 388 (2006).

⁷ Id. at 388.

participation in school activities.⁸ In Massachusetts, the view of the Department of Education has been that if a child resides in your district, meets the residency requirements of your district, and you are unaware of his immigration status, you must enroll him. Similarly, if you know or have reason to know that a child is an illegal immigrant, you must admit him and FERPA prevents you from reporting his status to the Immigration and Naturalization Service (“INS”) or other authorities. In other words, a default “don’t ask, don’t tell” policy is in effect.

III. Schools and Legal Aliens - (i.e., Students Whose Documented Status is Known)

Currently, the Plyler decision stands as good law and prohibits the exclusion of illegal alien children from public schools; but, somewhat ironically, it does not expressly prohibit the exclusion of legal aliens from public schools. In fact, while efforts to undercut the rights to education of illegal aliens (since Plyler) have failed,⁹ legislative efforts to restrict the rights to public education of legal aliens have been somewhat successful.

For example, the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) of 1996 incorporated Section 625 of Public Law 104-208, which placed significant restrictions on documented foreign students in United States public elementary and secondary schools. Among those classes of legal aliens most affected were F-1¹⁰ and M-1¹¹ nonimmigrant foreign students, including children who enter the United States to attend a private school, but then jump to a public school. These children are often referred to as “parachute kids.” Specifically this language:

- Prohibits documented foreign students from attending public elementary schools or publicly funded adult education programs;

⁸ Id.

⁹ Plyler has been challenged at both the state and national levels of government. In 1994, California voters overwhelmingly approved Proposition 187, an initiative which would have prevented illegal aliens from receiving public benefits, but this legislation was enjoined from enforcement by the United States District Court for the Central District of California.

Likewise, in 1996, the Gallegly Amendment was proposed to Congress as part of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”). The Amendment would have given states broad immigration regulatory powers, including the right to ban the presence of illegal aliens altogether. The Amendment was excluded from the IIRIRA when President Clinton threatened to veto the entire immigration bill over its inclusion. Brickman, supra note 6, at 390-391.

¹⁰ F-1 status is defined at INA § 101(a)(15)(F), 8 USC § 1101(a)(15)(F) “as an alien: ... (i) having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program in the United States, particularly designated by him and approved by the Attorney General after consultation with the Secretary of Education, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any such alien if accompanying him or following to join him.”

¹¹ M-1 status is defined at INA § 101(a)(15)(M) as “an individual having a residence in a foreign country which he has no intention of abandoning who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than in a language training program) in the United States particularly designated by him and approved by the Attorney General, after consultation with the Secretary of Education, which institution shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant nonacademic student and if any such institution fails to make reports promptly the approval shall be withdrawn, and (ii) the individual spouse and minor children of any individual described in clause (i) if accompanying or following to join such an individual, and (iii) an individual who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality, who is described in clause (i) except that the individual's course of study may be full or part-time, and who commutes to the United States institution or place of study from Canada or Mexico.”

- Limits secondary school attendance to twelve months; and
- Requires secondary school students to pay the school the full, unsubsidized per capita cost of education (per each student). Each Local Educational Agency (“LEA”) is responsible for determining the per capita cost.¹²

It is important to note that these restrictions apply exclusively to F-1 or M-1 visa status students who wish to attend public education programs. More specifically, they apply to F-1 or M-1 students who:

- Need a Form I-20¹³ to study in the United States;
- Who are in public schools and leave the United States and want to return to continue their studies; and
- Who want to transfer from a private school program into a public school program.¹⁴

School personnel should understand that because these restrictions on public education apply to F-1 or M-1 status visa students only and not to illegal aliens, the amendment successfully circumvented the Plyler decision.

There are a limited number of INS approved schools, mostly private schools, which are eligible to enroll F-1 and/or M-1 visa status students. However, public schools are not precluded from becoming an INS approved school and may be eligible to host F-1 and/or M-1 students, provided they have complied with the INS application process. An application must consist of, but is not limited to, the following information:

- Documentation demonstrating that the prospective student qualifies statutorily;¹⁵
- The name of a designated school official who will be responsible for complying with the pertinent immigration laws; and
- Various supporting documents, including evidence that the school possesses the necessary personnel and finances to conduct courses of study.¹⁶

Prospective schools should plan in advance because certification to become an INS approved school may take up to a year. If a school district is approved by INS, the school’s designated official will have the authority to issue a Form I-20 to a prospective F-1 or M-1 student. Students enrolled in INS approved schools are required to reimburse schools with the full,

¹² Available At: http://travel.state.gov/visa/temp/types/types_1269.html.

¹³ “Form I-20 certifies the admission of the student to a program of study, and in conjunction with evidence of financial ability and an unabandoned permanent residence abroad, establishes eligibility for student status...approval of schools by the INS allows schools to issue Form I-20.” Bernard P. Wolfsdorf, Immigration Law Basics and More: Visa for Trainees, Students and Visitors, SE83 ALI-ABA 29 (2000).

¹⁴ It is important to note that these restrictions do not apply to the following: foreign students in another visa status; foreign students in F-1 status who attend private schools, private training or language programs; or F-1 students who were attending public schools prior to the effective date of this amendment, November 20, 1996. Available At: http://travel.state.gov/visa/temp/types/types_1269.html.

¹⁵ To qualify statutorily the prospective student must have obtained or be seeking F-1 or M-1 status; must have made a written application to the school; and must have supplied documents in support of the application, such as proof of financial responsibility. Previous school records must be received and evaluated at the school’s location in the United States. Wolfsdorf, supra note 13, at 65.

¹⁶ Id. at 59-65.

unsubsidized per capita cost of education in that district. Public funds are not to be expended on these students. However, this does not preclude a private organization or individual from reimbursing the school district on the student's behalf.¹⁷

Schools will most likely be confronted with this type of situation when a foreign-born child has come to visit with an American family for an extended period of time and wishes to attend the local public school in the area. This child, unless he or she has gone through the J-1 visa process (to be discussed later) that is utilized by many exchange students, is most likely in the United States on a B-2 visa.¹⁸ It is important to understand that a foreign-born visitor with a B-2 visa is not permitted to enroll in a course of study at any U.S. public school or vocational school without first obtaining an F-1 or M-1 student visa.¹⁹ Furthermore, the student may only attend an INS approved school.

Student Visa Categories which Lawfully Permit Legal Aliens to Attend Public School

Aside from the previously mentioned F-1, M-1, and B-2 visa categories, there are several other visa categories under which the vast majority of non-citizens and their children enter the United States. If a child has obtained one of these visas, he or she may not be denied a public education and may lawfully attend your school. These visa categories enable an individual to enter the United States for a particular purpose and for a definite period of time. These visas are relatively easy to obtain provided the applicant can demonstrate both a legitimate purpose for visiting, studying, or training, and his intent to return home upon completion of his chosen objectives.

Below is a description of the student visa categories which allow legal aliens to lawfully attend public school.

- **J-1 Visa**

J-1 visas are issued by the United States government to approved students who wish to participate in a wide range of visitor exchange programs sponsored by schools and other non-profit organizations. These exchange programs are controlled by the program sponsors.²⁰

- **Lawful Permanent Resident**

A Lawful Permanent Resident ("LPR") is an individual who has immigrated legally, but who is not an American citizen. LPRs have obtained a "green card" and may attend schools on equal footing with American citizens.²¹

¹⁷ Id.

¹⁸ B-2 status is defined at INA § 101(a)(15)(B) as "An alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure."

¹⁹ Needleham & Vea, supra note 1, at 219.

²⁰ Available at <http://www.usimmigrationsupport.org/visa> (Last visited October 2006).

²¹ Id.

- Derivative Status

Under Federal Immigration Laws, derivative status is available to children of parents with valid non-immigrant status. For example, a parent who has obtained L-1 visa status, meaning the individual is employed outside the United States and has been transferred to a United States branch or affiliate, may lawfully bring his children and spouse with him. The accompanying spouse and children will be issued L-2 visas, and the children will be entitled to attend public schools in the districts in which they reside.²²

If you have any questions regarding this client advisory, please contact Jessica Ritter Esq., or the attorney assigned to your account.

²² *Id.*

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