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EDUCATING THE ADULT UNDOCUMENTED IMMIGRANT - by Jana R. Burk

This article is part two of a two-part series in which we address the Oklahoma Immigration Bill's application to school districts by answering frequently asked questions with respect to the bill. In this article, we address the issue of educating adult undocumented students. In part one of this series, we addressed the obligation of educating children regardless of their immigration status. Should you need more specific advice about any of the provisions in the bill or of federal immigration law and its impact on education, feel free to contact your attorney at our firm, and we will be happy to discuss the issues with you.

May a school district provide education services to an adult student without verifying that the student is in the country legally?

The United States Supreme Court decision of *Plyler v. Doe,* which unambiguously protects minor students' rights to a public education, does not apply to adult students, and there is no Supreme

" . . . the Oklahoma Taxpayer and Citizen Protection Act of 2007 . . . does not affect the legality of providing education services to adult students."

Court ruling or federal statute specifically addressing immigration and the education of adult students. Nonetheless, no state or federal law requires that a school district only serve adult students who can verify their lawful presence in the country. In fact, as explained below, several lower court decisions caution against a school district denying education services to an adult student because of his or her immigration status.

Notably, the recent Oklahoma law regarding immigration (HB 1804, the Oklahoma Taxpayer and Citizen Protection Act of 2007, "the Oklahoma Act") does not affect the legality of providing education services to adult students. The provision of the law most relevant to this education service is Section 8 of the Oklahoma Act, codified at OKLA. STAT. tit 56, § 71. This provision requires that state agencies and political subdivisions of the state verify the "lawful presence" of applicants over age 14 for certain "public benefits" as defined by federal law. The federal provisions to which HB 1804 refers are

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EFFECTIVELY INVESTIGATING AND REMEDYING RACIALLY HARASSING CONDUCT by Andrea R. Kunkel

One Oklahoma school district recently received welcome news. Following an investigation, the Office for Civil Rights determined that there was insufficient evidence to establish that the District discriminated against a student on the basis of race by creating or permitting a racially hostile environment. That district's experience can help other school districts deal effectively with racial incidents between students in compliance with the law.

In that case, an African American student ("Student A") and a non-minority student were involved in "horseplay," which escalated to a physical altercation and ended with the non-minority student calling Student A a racial epithet. Student A then punched the non-minority student. A teacher who was in the hallway intervened and brought the incident to the principal's attention. The students met briefly with the principal, but because the incident occurred at the end of the day, the principal advised the students that she would address the situation the following day.

Student A's parents went to see the principal the following morning to discuss the incident. The parents alleged that the principal made what they believed to be insensitive and inappropriate remarks about the incident. Specifically, the parents claimed that the principal minimized the incident by commenting that much music students listened to contained the racial slur used and that the slur was often used by black students. The parents also complained that the principal would not agree to having the non-minority student publicly apologize to their son. The principal advised the parents that she would begin her investigation of the incident and contact the parents with the results. The parents claimed that the principal did not follow the timeline for investigating and contacting them that was initially set. The parents claimed that they ultimately con-

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in the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996" ("PRWORA") at 8 U.S.C.A. § 1611 and § 1621. In general terms, these provisions of the PRWORA—which have been law for 11 years—prohibit state, federal and local governments from providing certain public benefits to aliens who are in the country unlawfully.

The Oklahoma Act does not modify PRWORA or otherwise create new substantive prohibitions as to the services that may be provided to undocumented immigrants. Instead, the Oklahoma Act establishes certain verification procedures on state and local governments when they provide "public benefits"—again, as defined by the PRWORA—to any individual over 14 years of age. PRWORA provides that "public benefits" are:

> any grant, contract, loan, professional license, or a commercial license; and
>
> any retirement, welfare, health, disability, public or assisted housing, *postsecondary education*, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by the federal, state or local government. 8 U.S.C.A. §§ 1611, 1621.

At first reading, the restrictions placed upon public benefits relating to "postsecondary education" appear highly relevant—at least with regard to traditional postsecondary education (if not to adult education ESL or GED classes). But several cases and administrative opinions interpreting the Act provide clear authority for the position that "public benefits" do *not* include the actual provision of educational services to post-secondary or traditional adult education students. In particular, in the decision *Equal Access Educ. v. Merten*, 305 F.Supp.2d 585 (E.D. Va. 2004), which dealt exclusively with post-secondary education, the court explained that PRWORA prohibits governmental entities from providing financial assistance to a post-secondary student who is an illegal alien, but it does not affect his or her ability to enroll in those educational programs. *See also Caballero v. Martinez,* 897 A.2d 1026, 1031 (N.J. 2006) (explaining that benefits restricted by PRWORA are those in which an applicant's eligibility is needs-based and determined by his or her income-level); *Rajeh v. Steel City Corp,* 813 N.E.2d 697, 707 (Ohio App. 2004) (same).

Interpretations and proposed rulemakings by the executive branch of the federal government also support the position that the PRWORA does not restrict the ability of undocumented students to enroll in public schools. Specifically, on November 17, 1997, the Department of Justice issued an "Interim Guidance on Verification of Citizenship, Qualified Alien Status and Eligibility Under Title IV of the [PRWORA]" and explained that the PRWORA applies only to certain "public benefits" as defined under PRWORA and that state or local governments may lawfully use federal funds to provide benefits/services to such aliens if those benefits are not similar to the *monetary* benefits enumerated in the PRWORA.

Thus, while a school district may not use federal funds to provide a student loan to an undocumented student, the district's receipt of federal education funding does not thereby restrict whom the school district ultimately serves. 62 FR 61344, 61361-62. Moreover, the Justice Department explained that if the services are not "public benefits" under the PRWORA, "the benefit provider is not required to, *and should not attempt to*, verify an applicant's status, unless otherwise required or authorized to do so by law, because all aliens, regardless of their immigration status, are eligible for such benefits." *Id.* at 61361 (emphasis added). The Department of Health and Human Services also issued helpful instructions regarding the definition of "public benefits" under PRWORA, and explained that the term applied to those "public benefits" which have a highly-specific *and governmentally-mandated* eligibility criteria—usually income-based—and thus does not include services which are offered to the community at large. *See* 63 FR 41658 (August 4, 1998).

Does this mean that a school district may provide *free* education services to adult students without verifying the person's immigration status?

It depends. As indicated above, federal immigration law and the court decisions interpreting it prohibit a school district from providing public *financial aid* to individuals restricted by the PRWORA (individuals defined under the statute as "non-qualified aliens"—a term generally encompassing undocumented immigrants and some types of nonresident aliens (such as tourists)). Consequently, a school district is prohibited from providing financial scholarships or stipends to such students. However, if your school district offers a class free of charge as a matter of course—i.e., no student is asked to pay a fee for the class—there is no requirement that the school verify the students' immigration status.

May a school district choose not to serve undocumented adult students as a matter of school policy?

There have been numerous recent court decisions holding that state and local governments are preempted (and thus prohibited) from enacting laws or policies that conflict—or even relate to—the field of immigration. Consequently, a court is likely to strike any policy that restricts actual access to education programs based upon an adult student's immigration status. As such, we advise against such a policy unless the school district has consulted with us regarding the specifics of the policy and thoroughly explored the legal risks attendant with those restrictions. *See Villas at Parkside Partners v. City of Farmers Branch,* 2007 WL 1774660, *9 (N.D.Tex. 2007) (striking the city's ordinance requiring landlords to verify the citizenship or immigration status of individuals seeking to rent from them). *Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 523 (M.D. Pa. 2007) (striking the city's ordinance regarding the employment of unauthorized aliens as federally preempted); *LULAC v. Wilson,* 997 F.Supp. 1244 (C.D. Cal. 1995) (striking California's

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statute that denied post-secondary education to unlawful immigrants and holding that federal law had completely preempted the field of immigration as it relates to post-secondary education), but compare *Equal Access Educ. v. Merten*, 305 F.Supp.2d 585 (E.D. Va. 2004) (which, as explained above, interpreted the PRWORA as prohibiting only the provision of financial aid to post-secondary students, but nonetheless upholding the legality of various Virginia post-secondary institutions' policy of prohibiting enrollment to undocumented students).

In Conclusion

The various issues surrounding the education of undocumented adult immigrants remain uncertain due to the lack of clarity in federal immigration law and the absence of any Supreme Court decision on the topic. However, regulatory guidance and various lower court decisions indicate that schools should use utmost caution before implementing a policy that affects such students' access to education. Should you have any questions regarding these issues, please consult your school law attorney.

Effectively Investigating and Remedying Racially Harassing Conduct (Continued From Page 1)

tacted the principal to find out what she had decided and that they felt the principal again attempted to minimize the incident.

The parents of Student A later sent a letter to the District's Board of Education explaining their concerns about the principal's handling of the incident. The Board President sent the parents a response approximately two weeks later. The Board President explained that the principal had determined what she believed was an appropriate and fair punishment in accordance with the District's bullying policy and indicated that the Board had directed the Superintendent to research the availability of diversity training for District teachers. The parents advised OCR that they were also dissatisfied with the Board's response.

This situation presents a potential violation of Title VI. The regulation implementing Title VI provides that recipients may not, on the basis of race, exclude a person from participation in, deny a person the benefits of, or otherwise subject a person to discrimination under its program, or restrict an individual in the enjoyment of an advantage or privilege enjoyed by others. When a complainant alleges racial harassment, the benefit being denied is the ability to participate in an educational program free from racial animus or hostility. A recipient violates its duty to provide a nondiscriminatory educational environment under Title VI when a racially hostile environment is created, accepted, tolerated, encouraged or left uncorrected by the recipient.

A racially hostile environment exists when pervasive and persistent incidents of racial harassment occur, or when the incidents are of such severity that they give rise to a racially hostile environment, which adversely affects the student's enjoyment of or benefit from the recipient's educational program. If OCR finds that the recipient had or should have had notice of the alleged racially hostile environment, then OCR examines the reasonableness, timeliness and effectiveness of the District's response.

In analyzing a racial harassment allegation, OCR determines whether: (1) the student was subjected to harassing conduct based on race; (2) the harassment of the student was sufficiently severe, pervasive or persistent to create a hostile environment (i.e., it interfered with or limited the student's ability to participate in or receive the benefits, services or opportunities provided by the district); (3) the district had actual or constructive notice of the harassment; and (4) the district failed to take prompt and effective action to remedy the harassment (end the harassment, prevent it from recurring and, where appropriate, remedy the effect on the student who was harassed).

The first step in OCR's analysis was to determine whether there was racially harassing conduct. Documentation provided by the parents and the District and interviews with the parents and the principal confirmed that a non-minority student called Student A a racially derogatory epithet. OCR determined that the comments made by the non-minority student to Student A included a slur and, therefore, constituted racially harassing conduct.

The second step in OCR's analysis was to determine if the racially harassing conduct was sufficiently severe, pervasive or persistent to create a hostile environment. For the alleged conduct to be considered actionable under Title VI, the conduct must have created a hostile environment based upon the student's race that was sufficiently severe, persistent or pervasive so as to interfere with or limit Student A's ability to participate in or benefit from the services, activities or privileges provided by the District. To make that determination, OCR considers several factors, including the context, nature, frequency, duration and location of the harassment, the identity and number of the individuals involved and the relationship between the harassers and the victims of the harassment. OCR also evaluates the severity, pervasiveness and persistence of the alleged incidents in light of the student's age and impressionability. Generally, to establish a hostile environment the events must be more than casual or isolated racial incidents.

In this case, the evidence indicated that there was a single incident. Therefore, OCR found no basis for concluding that the action was pervasive or persistent. Nevertheless, to complete its analysis, OCR assumed that the one

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RF&R SPEAKERS/EVENTS SHOWCASE

John G. Moyer, Jr. will be speaking at the OSSBA School Law Institute in Oklahoma City on February 20, 2008. His topic will be Alternative Education Programs and Related Issues.

Mr. Moyer will also be speaking at the OSSBA Employment Law Workshop in Oklahoma City on March 5, 2008. His topic will be Superintendent Employment Issues.

Bryan K. Drummond will also be speaking at the OSSBA Employment Law Workshop in Oklahoma City on March 5, 2008. His topic will be Extra Duty Contracts.

Andrea R. Kunkel will be discussing Oklahoma issues at the OSSBA Special Education Issues conference in Oklahoma City on January 30, 2008.

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incident involving the racial comment did rise to a level of verbal conduct sufficiently severe as to interfere with or limit Student A's ability to participate in and/or benefit from the District's educational program.

The third step of OCR's analysis was to determine whether the District had actual or constructive notice or knowledge of the racial harassment. The evidence demonstrated that it did.

The critical fourth step was to determine whether the District took prompt and effective action to remedy the harassment. OCR found that a substitute teacher had reported the incident to the principal at the end of the school day on which it occurred. The next day, when the principal arrived at school, Student A's parents were waiting to speak with her. The principal met with them and explained that she had not had time to investigate the matter further, but that she intended to do so. The principal investigated the matter that day and on the next following school day, by talking with the substitute teachers, two other students from the classroom and the non-minority student and Student A, together and separately. Consistent with District policy regarding disciplinary actions, the principal administered punishment to the non-minority student for bullying, which includes the prohibition on the use of racial slurs. The principal also had the non-minority student apologize to Student A and call his mother to explain what he had said and done. Additionally, the District provided documentation to OCR that the staff at the school where the incident occurred participated in a power point presentation that addressed diversity issues shortly after the next school year began. District staff members were to begin studying the book, "Why Are All the Black Students Sitting Together in the Cafeteria." Also, the students at the school had been participating in weekly sessions discussing topics related to differences and bullying. Finally, the District had obtained a DVD entitled "We Must Learn From the Past" that the teachers planned to use to assist in classroom discussions regarding diversity, prejudice and respect for others. Based on this evidence, OCR found sufficient evidence to conclude that when the District learned of the incident it promptly investigated the matter and took appropriate action designed to correct the conduct of the student who made the remark and to prevent future recurrences. OCR found insufficient evidence to establish that the District discriminated against Student A on the basis of race by either creating or permitting a racially hostile environment.

There is one other issue important to OCR's decision on which OCR did not dwell in detail. OCR noted that the District had policies and procedures in place that provided for the prohibition of unlawful discrimination and harassment and a complaint procedure that complied with the requirements of Title VI. OCR typically requests copies of such policies and procedures and proof of dissemination when investigating claims of discrimination and harassment. Any district that hopes to obtain the same results in its own OCR investigation must have an appropriate non-discrimination policy and complaint procedure, both of which have been disseminated broadly to its students, parents and patrons. The combination of appropriate policies and procedures with a reasonable, timely, appropriate and effective process for investigating and responding to incidents like this one creates a school district's best chance of protecting itself from a Title VI violation.

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We welcome your comments, criticisms and suggestions. Correspondence should be directed to Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call us at (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.