

ICE Age: Preserving Access to Public Education for Undocumented Immigrants

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I. INTRODUCTION

“Don’t take my dad away.”¹ Jorge Hernandez’s four-year-old daughter pleaded with Immigration and Customs Enforcement (“ICE”) agents who had pulled Jorge Hernandez over in an unmarked car outside of his daughter’s school.² The agents followed Jorge and Hector Orozco Villa from their homes to their children’s schools and arrested Jorge in front of his daughter, son, and wife.³ Hector was also detained near the elementary school that his children attended.⁴

ICE has grown increasingly aggressive in their enforcement actions,⁵ including in sensitive locations like schools.⁶ In 2011, ICE deported 396,906 individuals, which was the largest annual number in the agency’s history at the time.⁷ In 2018, 396,448 people were initially

1. Amanda Peterson Beadle, *ICE Agents Detain Undocumented Immigrants Taking Their Kids to School*, THINKPROGRESS (Oct. 18, 2012, 10:00 PM), <https://thinkprogress.org/ice-agents-detain-undocumented-immigrants-taking-their-kids-to-school-20d3bb99666a/>.

2. *Id.*

3. *Id.*

4. *Id.*

5. See Julia Carrie Wong, ‘*Psychological Warfare*’: *Immigrants in America Held Hostage by Fear of Raids*, THE GUARDIAN (Feb. 18, 2017, 6:00 AM), <https://www.theguardian.com/us-news/2017/feb/18/us-immigration-raids-fear-trump-mexico>. This article outlines how a leaked memo from the Trump administration, which recommended a militarization of immigration enforcement, has created fear in immigrant communities.

6. See Memorandum from Director John Morton on Enforcement Actions at or Focused on Sensitive Locations to Field Officer Directors, Special Agents in Charge, and Chief Counsel of U.S. Immigration and Customs Enforcement (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>.

7. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE ANNOUNCES YEAR-END REMOVAL NUMBERS, HIGHLIGHTS FOCUS ON KEY PRIORITIES (2011), <https://www.ice.gov/news/releases/fy-2011-ice-announces-year-end-removal-numbers-highlights-focus-key-priorities>.

booked into an ICE detention facility, an increase of 22.5% from 2017.⁸ ICE's interior enforcement efforts led to a 10% increase in book-ins resulting from ICE arrests.⁹ Juanita Molina, who is the executive director of Border Action Network, described the uptick in immigration enforcement as "psychological warfare that's being waged against people of color to create a constant feeling of fear and uncertainty."¹⁰

In 2011, ICE released a memo regarding enforcement around "sensitive locations."¹¹ In that memo, the director of ICE implemented a policy that would "ensure that . . . enforcement actions do not occur at nor are focused on sensitive locations such as schools and churches . . ."¹² The memo purports to protect undocumented immigrant students from enforcement action at schools. However, it does not provide comprehensive protections for those students. Enforcement actions covered under the memo are arrests, interviews, search, and surveillance "for [the] purposes of immigration enforcement only."¹³ Further, the memo explicitly includes a number of actions not considered enforcement actions.¹⁴ And, the memo does not create a private right of action,¹⁵ limiting the effectiveness of the memo in assuring students that schools are safe.

Even if ICE were to technically comply with this memo, ICE has left a reasonable impression that schools are not safe places for undocumented immigrant students.¹⁶ ICE has created a toxic environ-

8. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT (2018), <https://www.ice.dhs.gov/features/ERO-2018>.

9. *Id.*

10. Wong, *supra* note 5.

11. Memorandum from Director John Morton, *supra* note 6.

12. *Id.*

13. *Id.*

14. Non-enforcement activities include "obtaining records, documents and similar materials from officials or employees, providing notice to officials or employees, serving subpoenas, engaging in Student and Exchange Visitor Program (SEVP) compliance and certification visits, or participating in official functions or community meetings." *Id.*

15. *Id.*

16. See George Foulsham, *Deportation, Loss of Health Care Raise Concerns in L.A. County, According to UCLA Survey*, UCLA NEWSROOM (Apr. 4, 2017), <http://newsroom.ucla.edu/releases/deportation-loss-of-health-care-raise-concerns-in-l-a-county-according-to-ucla-survey>.

ment such that they effectively deprive students of the right to education based on their immigration status through increasingly aggressive enforcement actions and the inflammatory rhetoric from the current administration. While the procedure related to these potential lawsuits might differ depending on the parties,¹⁷ the substantive question in either case is whether ICE's immigration enforcement deters students from attending school to such a degree that ICE is essentially depriving students' access to public schools.

Protecting equal access to public education promotes a stronger society, regardless of whether the person is a citizen or an undocumented immigrant. In *Plyler v. Doe*, the United States Supreme Court held that under the Equal Protection Clause, states could not deprive undocumented immigrant students of their access to public schools.¹⁸ The policy justifications are clear—depriving these students of education based on their immigration status could create a permanent underclass and leave an entire class of people who might become lawful citizens at a significant disadvantage.¹⁹ ICE's increasingly aggressive enforcement activity could prevent students from becoming active participants in our society because they will be deprived access to education. Providing a way for both students and school districts to sue ICE is one way that students can advocate for themselves and fight against discriminatory conduct by schools and ICE, and it would allow schools to control their educational system and serve the people living in their communities both in the present and in the future.

l-a-county-according-to-ucla-survey. According to this survey, 37% of respondents to a social science poll said that they were afraid that they, a family member, or friend would be deported. *Id.* Additionally, 80% of those polled stated that they believed that the deportation was more likely if someone were enrolled in a governmental health, education, or housing program. *Id.*

17. If the school has done something to deny access to public schools or is complicit in ICE enforcement around schools, then the student can sue the state for depriving him or her of access to public education. This posture is appropriate because it is the state who provides the education, so its level of control over policies and practices makes it a proper defendant if the school district's conduct deprives access to education on the basis of immigration status. However, if liability is based on ICE's conduct, then the student could sue the school for its failure to act, or the state can sue ICE to keep immigration officers off of their campuses.

18. See *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that States could not deny enrollment to public schools based on immigration status).

19. *Id.* at 230.

Part II of this Note analyzes *Plyler v. Doe* and the policy justifications for its holding that states cannot deprive access to public schools from undocumented immigrants based on their immigration status.²⁰ Part III of this Note details the various obstacles that students face in exercising their right to attend school.²¹ Part IV details the potential litigation that could arise,²² explaining both the procedural²³ and substantive²⁴ aspects of the suit and the available remedies,²⁵ including a preliminary injunction²⁶ and a permanent injunction.²⁷ Part V, the Conclusion, offers some brief closing remarks.²⁸

II. PLYLER V. DOE

States provide and control public education.²⁹ So, the Equal Protection Clause is implicated when states implement laws or practices that treat residents in their respective states differently.³⁰ In 1982, the Supreme Court addressed whether a Texas statute that denied access to public schools for undocumented immigrants constituted a violation of the Equal Protection Clause.³¹

20. *Infra* Part II.

21. *Infra* Part III.

22. *Infra* Part IV.

23. *Infra* Section IV.A.

24. *Infra* Section IV.B.

25. *Infra* Section IV.C.

26. *Infra* Section IV.C.1.

27. *Infra* Section IV.C.2.

28. *Infra* Part V.

29. States will generally include in their state constitutions an education provision, but they are far from uniform. For example, the North Carolina state constitution provides that “[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.” N.C. CONST. art. 1, § 15. On the other hand, Michigan’s education clause specifies that “[e]very school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.” MICH. CONST. art. 8, § 2.

30. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

31. See *Plyler v. Doe*, 457 U.S. 202 (1982).

A. Undocumented Immigrants Are Persons Under the Equal Protection Clause

The Texas Legislature revised its education laws to withhold state funding from school districts for education of undocumented immigrant children.³² The applicable statute authorized schools to deny these students enrollment in public schools.³³ In *Plyler v. Doe*, a group of students filed a class action in the United States District Court of the Eastern District of Texas on behalf of “certain school-age children of Mexican origin . . . who could not establish that they had been legally admitted into the United States.”³⁴ This suit challenged the constitutionality of the Texas statute, alleging that the law violated the Equal Protection Clause of the Fourteenth Amendment.³⁵ The Supreme Court

32. *Id.* at 205. The old version of this Texas statute stated 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.
- (b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.
- (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

TEX. EDUC. CODE ANN. § 21.031 (West Supp. 1981).

33. *Plyler*, 457 U.S. at 205.

34. *Id.* at 206.

35. *Id.* at 209. The District Court determined that the “absolute deprivation of education should trigger strict judicial scrutiny, particularly when the absolute deprivation is the result of complete inability to pay for the desired benefit.” *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 582 (S.D. Tex. 1980). Applying this standard, the District Court held that Texas’s concern for fiscal integrity was not a compelling state interest, exclusion was not necessary to improve education within the state,

held that states may not deprive undocumented immigrant students of education based on their immigration status.³⁶

At the outset, Texas argued that undocumented immigrants, because of their immigration status, are not “persons within the jurisdiction,” so they have no right to equal protection under Texas law.³⁷ The Court rejected this argument, citing that undocumented immigrants are considered “persons” in the ordinary sense of the term as well as persons who are guaranteed due process of the law under both the Fifth and Fourteenth Amendments.³⁸ The appellants sought to emphasize that the Equal Protection Clause of the Fourteenth Amendment directs the states to afford protection to persons within its jurisdiction, while the Due Process Clauses lack such a limitation.³⁹ Thus, the appellants argued that persons who illegally enter their jurisdiction are not “within the jurisdiction” of a State.⁴⁰

However, the Supreme Court noted that neither case law nor logic support this proposition, reasoning that the Court has “never suggested that the class of persons who might avail themselves of the equal protection guarantee is less than coextensive with that entitled to due process.”⁴¹ Further, the Court recognized that “[i]n concluding that ‘all persons within the territory of the United States,’ including aliens unlawfully present . . . we reasoned from the understanding that the Fourteenth Amendment was designed to afford its protection to all within the boundaries of a State.”⁴² To allow states to identify classes of persons as beyond a given jurisdiction relieves the states of the obligations to ensure that laws are written and applied equally to all persons.⁴³

and the educational needs of the excluded children were no different from the needs of the children who were not excluded. *Id.* at 582–83. Thus, the District Court held that the state had failed to show that the statute was carefully tailored to advance its stated interests. *Id.* at 583–84.

36. *Plyler*, 457 U.S. at 230.

37. *Id.* at 210.

38. *Id.* (citing *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

39. *Id.* at 211.

40. *Id.*

41. *Id.*

42. *Id.* at 212 (citing *Wong Wing*, 163 U.S. at 238).

43. *Id.* at 213.

B. Policy Justifications For Protecting Access to Public Schools

Public policy, which is at the heart of the decision in *Plyler*, demands access to public schools for everyone, including undocumented immigrants. America has “always regarded education and [the] acquisition of knowledge as matters of supreme importance.”⁴⁴ The Court recognized that “public schools as a most vital civic institution for the preservation of a democratic system of government . . . [are] the primary vehicle for transmitting the values on which our society rests.”⁴⁵ Because of the significant value that education has in the flourishing of American civic life, “denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”⁴⁶ Depriving these students of access to public education will profoundly harm an entire group of people:

The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.⁴⁷

By denying access to students based on immigration status, “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.”⁴⁸

44. *Id.* at 221 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923)) (internal quotation marks omitted).

45. *Id.* at 221 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76 (1979)) (internal quotation marks omitted).

46. *Id.* at 221–22.

47. *Id.* at 222.

48. *Id.* at 223.

Preserving access to public schools remains a critical policy objective. One author considered access to public schools the key civil rights issue in the 21st century because of the following reality:

Our nation's knowledge-based economy demands that we provide young people from all backgrounds and circumstances with the education and skills necessary to become knowledge workers. If we don't, we run the risk of creating an even larger gap between the middle class and the poor. This gap threatens our democracy, our society and the economic future of America.⁴⁹

The policy justifications from *Plyler* are still at play because meaningful access to public education is one way to combat generational poverty and the creation of a permanent underclass. Even though access to education is not a guaranteed federal right, “[there] is a basic public expectation that all children have the right to attend public school and be treated with dignity and social equality.”⁵⁰ Broadly speaking, “public education [is] more than just a commodity . . . [it] give[s] their students ‘an opportunity to escape from the limitations of the social group in which [they were] born, and to come into living contact with a broader environment . . . different races, differing religions, and unlike customs.’”⁵¹

Thus, exclusion from school has a significant impact on the life of a student.⁵² In *Goss v. Lopez*, the Supreme Court examined the effect

49. India Geronimo, *Deconstructing the Marginalization of “Underclass” Students: Disciplinary Alternative Education*, 42 U. TOL. L. REV. 429, 430 (2011).

50. A.C.L.U., RACE & ETHNICITY IN AMERICA: TURNING A BLIND EYE TO INJUSTICE 137 (2007), http://www.aclu.org/pdfs/humanrights/cerd_full_report.pdf.

51. Augustina H. Reyes, *Alternative Education: The Criminalization of Student Behavior*, 29 FORDHAM URB. L. J. 539, 539 (2001).

52. See Jamie Doward, *School Exclusion ‘Linked to Long-term Mental Health Problems’ – Study*, THE GUARDIAN (Aug. 19, 2017, 4:54 PM), <https://www.theguardian.com/education/2017/aug/19/school-exclusion-linked-to-long-term-mental-health-problems>. This study focused primarily on how exclusion from school as punishment affects students’ mental health. The study found that exclusion “contribute[s] to a range of mental disorders, such as depression and anxiety as well as behavior disturbance.” *Id.* One of the researchers indicated that “[e]xclusion often marks a turning point during an ongoing difficult time for the child, parent and those trying to support the child in school.” *Id.* While this study focuses on the effect that punitive exclusion has on students, the underlying premise can apply for undocumented immigrants, in

that a lengthy suspension has on a student in assessing the validity of punishments.⁵³ The Court recognized that “total exclusion from the educational process for more than a trivial period [of time] . . . is a serious event in the life of the suspended child,” and that even suspensions as short as ten days “could seriously damage the students’ standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.”⁵⁴ The Court has recognized that any exclusion from school has a substantial negative effect on students.⁵⁵

While *Goss* addresses total exclusion from school, any absence is significant. ICE enforcement that significantly deters attendance at school may have a similarly negative effect on an entire class of children.⁵⁶ In fact, in 2012, authors Cecilia Menjívar and Leisy Abrego conducted a study on the effect that legal violence and immigration enforcement has on undocumented immigrants.⁵⁷ The authors made the following finding:

Within the school, legal violence makes young people and their families fear schools as a place where family members may be detained. Immigration and Customs Enforcement officers in October 2012, for example, detained parents after they dropped their children off at two Detroit-area schools. Other students underperform or exit school early based on fears of detention or the knowledge

that being denied access to school out of fear of immigration enforcement could have the same psychological effects on the individual students.

53. *Goss v. Lopez*, 419 U.S. 565 (1975).

54. *Id.* at 575–76.

55. *Id.*

56. See Doward, *supra* note 52.

57. Leisy Abrego & Cecilia Menjívar, *Legal Violence in the Lives of Immigrants: How Immigration Enforcement Affects Families, Schools, and Workplaces*, CTR. FOR AM. PROGRESS (Dec. 11, 2012, 4:10 AM), <https://www.americanprogress.org/issues/immigration/reports/2012/12/11/47533/legal-violence-in-the-lives-of-immigrants/>.

that without legal status, higher education and a good job are inaccessible.⁵⁸

Immigration enforcement around schools has a negative effect on these students, and these enforcement actions may trigger liability if this form of legal violence becomes so pervasive and aggressive that the deterrence rises to the level of deprivation.

III. OBSTACLES UNDOCUMENTED STUDENTS FACE IN EXERCISING RIGHT TO ATTEND SCHOOL

Despite the Supreme Court's determination that undocumented immigrants have a right to attend public schools, school districts and ICE have prevented students from fully enjoying that right. Schools have exhibited open hostility towards undocumented immigrants, and school districts have participated with ICE in immigration enforcement. Additionally, there is testimonial evidence to show that immigration enforcement negatively impacts school attendance. Finally, there are no obvious protections in place for these students, despite ICE's stated policy against immigration activity in sensitive locations.

58. *Id.* This conclusion is based on more than a decade of observation and more than 200 interviews conducted between 1998 and 2010 in Los Angeles and Phoenix among immigrant youth and adults with relatives of migrants in El Salvador, Guatemala, Honduras, and Mexico. The authors of the article made the following recommendations to Congress and the Obama administration:

In the realm of the school:

- The government should ensure that the right to K-12 education regardless of immigration status, enshrined in the 1982 *Plyler v. Doe* decision, is neither watered down nor legislated away.
- The government should also ensure that schools are safe places, free of Immigration and Customs Enforcement intrusion. Parents must not fear that they could be detained or deported for bringing their children to school.
- Finally, Congress should support legislative changes that can give undocumented students who want to pursue higher educational degrees access to in-state tuition and the opportunity to apply for financial aid.

A. Hostility by Schools

Several news stories have showcased aggressive conduct towards undocumented immigrants by ICE and schools alike, and this reporting provides testimonial evidence that enforcement actions occur in and around schools. Some schools have expressed explicit hostility toward undocumented immigrants. In 2011, the Southern Poverty Law Center (the “SPLC”) sent a letter to the Durham Public Schools demanding an end to discrimination in their school district.⁵⁹ The SPLC indicated that a teacher pushed a Latino student against the wall, telling the student to “go back to your own country,” and a substitute teacher made all students with Spanish surnames stand up while he took a video of them on his phone.⁶⁰ In 2014, the SPLC sent a demand letter to a New Orleans school alleging that they discourage enrollment based on immigration status.⁶¹ Apparently, New Orleans schools were requiring Social Security numbers for enrollment, without explaining to the students that such a disclosure is voluntary rather than required for enrollment.⁶²

Other school districts have found more subtle ways of discouraging attendance by requiring students to go through unnecessarily rigorous obstacles.⁶³ For example, schools may not waver from overly rigid residency and guardianship requirements.⁶⁴ Even if a student meets these requirements, schools may block those students who have

59. *SPLC Demands End to Discrimination in North Carolina School District*, S. POVERTY LAW CTR. (Apr. 12, 2011), <https://www.splcenter.org/news/2011/04/12/splc-demands-end-discrimination-north-carolina-school-district>.

60. *Id.*

61. *New Orleans School Violating Federal Law by Discouraging Enrollment Based on Immigration Status*, S. POVERTY LAW CTR. (Oct. 15, 2014), <https://www.splcenter.org/news/2014/10/15/new-orleans-schools-violating-federal-law-discouraging-enrollment-based-immigration-status>.

62. *Id.*

63. See Jenna D. Tidwell, Note, *Out of the Shadows: Undocumented Children’s Access to Education in the United States and Germany*, 27 MICH. ST. INT’L L. REV. 165, 184 (2018).

64. Tim Walker, *How Undocumented Students are Turned Away from Public Schools*, NEATODAY (Apr. 22, 2016, 7:54 AM), <http://neatoday.org/2016/04/22/undocumented-students-public-schools/>.

missed years of schooling from enrolling because they are too old to start in their appropriate grade level.⁶⁵

B. Cooperation Between ICE and Schools

Additionally, there is some concern that ICE is pressuring schools to provide them with student information.⁶⁶ Emily Van Hoffmann reported that “families with undocumented members are wary of using their real home address on school forms for fear that their information could be shared with [ICE].”⁶⁷ ICE spokesperson, Bryan Cox, stated that “ICE has not approved any enforcement actions at any school under the ‘exceptions to the general rule’ section in recent history.”⁶⁸ Nevertheless, a number of school districts have expressly affirmed that schools will remain a safe place for students.⁶⁹ Van Hoffmann acknowledges that “efforts by affected school districts to assert the safety of their campuses despite ICE’s reassurances may indicate

65. *Id.*

66. Emily Von Hoffman, *Does ICE Pressure Schools for Student Info?*, THE ATLANTIC (Apr. 11, 2016), <https://www.theatlantic.com/education/archive/2016/04/does-ice-pressure-schools-for-student-info/477600/>.

67. *Id.*

68. *Id.*

69. For example, The San Francisco United School District issued a press release reaffirming a 2007 resolution which was committed to providing education to immigrant children and opposing ICE raids. *See SFUSD Advises Schools, Reassures Families Re. Procedures in the Event of Immigration and Customs Enforcement Raids*, S.F. UNITED SCH. DISTRICT (Jan. 7, 2016), <http://www.sfusd.edu/en/news/current-news/2016-news-archive/01/4751.html>. In a Board of Education Meeting, the Governing Board of the Los Angeles Unified School District declared that schools in its district will be a safe place for all students and will provide access to public education to all students, regardless of immigration status. *See* Sonali Kohli, *ICE Agents Won’t Be Going Onto Los Angeles Public School Campuses*, L.A. TIMES (Feb. 9, 2016, 9:12 PM), <https://www.latimes.com/local/education/lausd/la-me-edu-ice-agents-school-campuses-20160209-story.html>. Additionally, Oregon schools began crafting guidelines for teachers and administrative staff if ICE agents show up asking for students, families, or other information. *See* Rob Manning, *Oregon Schools Prepare for Possible ICE Visits*, OPB (Feb. 1, 2017, 2:45 PM), <https://www.opb.org/news/article/oregon-schools-ice-immigration-prepare/>. Part of these guidelines included the compilation of a “frequently-asked” questions page detailing how schools and students should respond if ICE were to visit an Oregon public school. *See* OR. SCH. BOARD ASS’N, *Immigration FAQ*, http://www.osba.org/-/media/Files/News/2017-01-23_Immigration_FAQ.pdf?la=en (last visited Jan. 4, 2019).

an overabundance of caution as far as their students are concerned.”⁷⁰ The school districts are responding to a legitimate and tangible fear that undocumented immigrants feel when sending their kids to school.

Recently, the Boston Public School Superintendent resigned after a civil rights advocacy group sued the Boston Public Schools alleging that evidence used in the deportation of a high school student included a school report.⁷¹ The school allegedly shared this school report with the Boston Regional Intelligence Center, which includes local, state, and federal law enforcement agencies, including ICE.⁷² By failing to protect students from ICE enforcement, schools may be liable because they have failed to ensure that their students have equal access to public education.

C. Arrests Around Schools

ICE has made a number of arrests around schools. As stated earlier, in 2012, ICE officials pulled over and detained both Jorge Hernandez and Hector Orozco Villa.⁷³ Again, in 2017, ICE arrested Romulo Avelica-Gonzalez while he was taking his daughters to school in Los Angeles.⁷⁴ His daughter, Fatima Avelica, recorded ICE agents, who were wearing police jackets, picking up her father while he was dropping her off at school.⁷⁵

70. Hoffman, *supra* note 66.

71. See *Lawsuit Alleges Boston Public Schools Shared Information with ICE*, CBS NEWS (June 23, 2018, 10:13 PM), <https://www.cbsnews.com/news/boston-public-schools-lawsuit-alleges-ice-cooperation-superintendent-tommy-chang-resigns/>.

72. *Id.*

73. Amanda Peterson Beadle, *ICE Agents Detain Undocumented Immigrants Taking Their Kids to School*, THINKPROGRESS (Oct. 18, 2012, 10:00 PM), <https://thinkprogress.org/ice-agents-detain-undocumented-immigrants-taking-their-kids-to-school-20d3bb99666a/>.

74. Jade Hernandez, *Undocumented Dad Taken by ICE While Dropping Kids Off at School*, ABC7 EYEWITNESS NEWS (Mar. 3, 2017), <https://abc7chicago.com/news/undocumented-dad-taken-by-ice-while-dropping-kids-off-at-school/1783028/>.

75. *Id.* ICE cited a 2009 DUI among other prior criminal convictions in justifying detainment. *Id.*

These arrests are problematic for a number of reasons. First, they obviously run counter to ICE's purported policy against enforcement actions in and around schools.⁷⁶ Arrests and subsequent deportation proceedings are the ultimate end of any enforcement action. So, arrests around schools are an undeniable threat to other undocumented immigrants. Additionally, the public spectacle of an arrest could create a toxic environment for students. These arrests occurred while the parents were dropping their kids off at school, so it is fair to assume that there were plenty of other witnesses. Other parents or children who are undocumented could see arrests like these and become afraid that the school is not a safe place to go if ICE is detaining people in the drop-off line.⁷⁷

D. ICE Enforcement Prevents Students from Attending Schools

Additionally, ICE enforcement actions have forced kids to avoid schools, even when those actions did not occur at or around schools. Specifically, immigration raids of neighborhoods and places of employment have been immediately followed by low student attendance.⁷⁸ For example, in Boston, ICE officers targeted public transportation stations in neighborhoods with a high concentration of Central and South American populations.⁷⁹ The families would not allow their children to leave the house, fearing that they would be detained and deported, and a third of the student population did not attend school for more than a week.⁸⁰ Jonathan Blitzer reported a 60% increase in absences in public schools for the week following a raid in a trailer park

76. Memorandum from Director John Morton, *supra* note 6.

77. See Foulsham, *supra* note 16 (detailing how those who participated in the surveys believed that the deportation was more likely if someone were enrolled in a governmental health, education, or housing program).

78. Julian Jefferies, *Fear of Deportation in High School: Implications for Breaking the Silence Surrounding Migration Status*, 13 J. OF LATINOS & EDUC. 278 (2014) (detailing the effect of an ICE raid on public transportation stations in Boston). This piece used this anecdote as a setup to analyze the effect that ICE enforcement actions has on students, and the author provides guidance for schools in interacting with students and parents who are undocumented immigrants.

79. *Id.*

80. *Id.*

in Las Cruces.⁸¹ These stories showcase how aggressive ICE enforcement actions, even those not around schools, have created such a toxic environment that students have stopped attending school out of fear. Thus, as in *Plyler*, government action is preventing students from freely attending public school.⁸²

E. Insufficiency of the ICE Sensitive Location Memo

ICE's Sensitive Locations Memo does not provide sufficient protections for undocumented immigrants. In 2011, John Morton, Director of ICE under the Obama Administration, released a memo addressing enforcement actions at sensitive locations.⁸³ The memo is purported to:

ensure that these enforcement actions do not occur at nor are focused on sensitive locations such as schools . . . unless (a) exigent circumstances exist, (b) other law enforcement actions have led officers to a sensitive location as described in the “*Exceptions to the General Rule*” section . . . or (c) prior approval is obtained[.]⁸⁴

81. Jonathan Blitzer, *After an Immigration Raid, a City’s Students Vanish*, THE NEW YORKER (Mar. 23, 2017), <https://www.newyorker.com/news/news-desk/after-an-immigration-raid-a-citys-students-vanish>. Notably, the absences were higher in schools for younger students, where parents still have to drop kids off and pick them up every day for school.

82. See *Plyler v. Doe*, 457 U.S. 202 (1982).

83. See Memorandum from Director John Morton, *supra* note 6.

84. *Id.* In the FAQ on sensitive locations, ICE expands on meaning of schools under the memo:

Schools, such as known and licensed daycares, pre-schools and other early learning programs; primary schools; secondary schools; post-secondary schools up to and including colleges and universities; as well as scholastic or education-related activities or events, and school bus stops that are marked and/or known to the officer, during periods when school children are present at the stop.

FAQ on Sensitive Locations and Courthouse Arrests, ICE, <https://www.ice.gov/ero/enforcement/sensitive-loc> (last visited Nov. 6, 2018).

This memo defines enforcement actions as including “(1) arrests; (2) interviews; (3) searches; and (4) for the purposes of immigration enforcement only, surveillance.”⁸⁵ The memo specifically excludes the following actions: “obtaining records, documents and similar materials from officials or employees, providing notice to officials or employees, serving subpoenas, engaging in Student and Exchange Visitor Program (SEVP) compliance and certification visits, or participating in official functions or community meetings.”⁸⁶

On its face, this memo should protect students’ access to schools by limiting enforcement actions in and around schools to extraordinary circumstances. However, this policy has limited what it considers enforcement actions, and some of the conduct that is not considered an enforcement action would still leave students and their families vulnerable to immigration enforcement through the schools. In addition, the memo clarifies that this policy does not create a private right of action, so there is no recourse if an ICE agent commences an enforcement action that runs contrary to the memo.⁸⁷ Furthermore, enforcement actions can still occur in and around schools if they receive prior approval

85. Memorandum from Director John Morton, *supra* note 6.

86. *Id.*

87. *Id.* Democratic Representatives Adriano Espaillat, Suzanne Bonamici of Oregon, Jose E. Serrano, and Don Beyer introduced the Protecting Sensitive Locations Act in order to codify the Sensitive Locations Memo and provide a statutory basis for protecting sensitive locations. *See* Protecting Sensitive Locations Act, H.R. 1815, 115th Cong. (2017). This bill provided a broader definition of what a sensitive location is compared to the ICE Sensitive Locations Memo:

A “sensitive location” includes all of the physical space located within 1,000 feet of:

- medical treatment or health care facilities;
- public and private schools;
- scholastic or education-related activities;
- school bus or school bus stops during periods when school children are present;
- emergency shelter or food locations;
- any organization that assists children, pregnant women, victims of crime or abuse, or individuals with significant mental or physical disabilities or that provides disaster or emergency social services;
- places of worship;
- funerals, weddings, or other public religious ceremonies;
- public demonstrations;

from an official,⁸⁸ so this discretion may render this memo powerless, especially if ICE under the Trump Administration continues its hostility and aggression towards undocumented immigrants.

IV. THE LITIGATION

Going to court may be the only way that a student may assert his or her right to a public education. The primary substantive question is whether ICE's conduct has deprived students of their access to public schools. Procedurally, each lawsuit may look different depending on the parties in the case. First, a student or a group of students can sue the school directly for depriving them of their access to public education based on their immigration status. Alternatively, the school district could sue ICE directly based on a theory that ICE enforcement actions around schools prevent the schools from providing access to public education to undocumented immigrants. While those technicalities are worth exploring, the thrust of these lawsuits will ultimately remain the same: whether ICE's conduct has denied access to public education based on immigration status.⁸⁹

A. Procedural Components of the Suit

Students have a few avenues for legal recourse. One lawsuit may involve students suing the school district. In this scenario, a student may sue the school district based on something that the school has

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- federal, state, or local courthouses;
 - congressional district offices;
 - public assistance or social security offices; or
 - motor vehicles departments.

Id. In justifying this bill, Representative Bonamici stated that “[o]ur communities are better and safer if all residents feel secure when accessing justice, seeking education and health care, or practicing their faith . . . Recent ICE action targeting immigrants has been aggressive and mean-spirited, and it does not improve the safety of our communities.” Katie Mettler, *Democrats Want to Limit ICE Power by Banning Agents from Courthouses, Bus Stops*, WASH. POST (April 3, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/04/03/democrats-want-to-limit-ice-power-by-banning-agents-from-courthouses-bus-stops/?utm_term=.8ccf4943ca2b.

88. Memorandum from Director John Morton, *supra* note 6.

89. This question is an extension on *Plyler* because it does not require a policy or statute that explicitly states that undocumented students cannot enroll in classes.

done such as providing ICE with student information or disclosing a student's immigration status to ICE agents. This lawsuit simply looks like *Plyler*, so this note will not address this case in detail.⁹⁰ Alternatively, a student could argue that a school's inaction regarding ICE enforcement around schools could trigger liability under the Equal Protection Clause. Specifically, a school district may be liable based on ICE's conduct. For example, a school district could be liable for its complicity in immigration enforcement as well as showing deliberate indifference towards increased and explicit immigration enforcement in and around schools. The school district must not deprive a student's access to public schools based on their immigration status,⁹¹ so failing to stop enforcement action could prevent the school district from ensuring equal access to public education.

However, if a school district wanted to prevent ICE's activity around schools, the school district could sue ICE to keep them off of their campuses if their enforcement activity undermines their ability to provide education to undocumented students.⁹² Many school districts want to keep ICE out of their schools in order to foster a safe academic environment for their students.⁹³ Additionally, because the school district has an obligation to provide education to undocumented immigrants, suing ICE to stop enforcement actions around its schools might be necessary to comply with the Equal Protection Clause. While the legal arguments will look similar to a suit between a student and school district, the first step in a school district's lawsuit against ICE is to establish itself as a proper plaintiff.⁹⁴

90. A student's suit against a school district ends up looking like *Plyler* because there is something that the school is doing or not doing that is interfering with the student's access to public education based on his or her immigration status.

91. See *supra* note 29 and accompanying text.

92. See *supra* note 69 and accompanying text.

93. See, e.g., Mark Keierleber, *Sanctuary Schools Across America Defy Trump's Immigration Crackdown*, THE GUARDIAN (Aug. 21, 2017, 6:00 AM), <https://www.theguardian.com/us-news/2017/aug/21/american-schools-defy-trump-immigration-crackdown> (reporting how school boards in Miami, Milwaukee, Chicago, New York City, Des Moines, and Portland have created or revised "sanctuary school" resolutions in order to assure students that their schools are safe); Kohli, *supra* note 69 and accompanying text.

94. See *Hawaii v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017). While the Supreme Court case overturned the substantive holding, it assumed for the purposes

For example, in *Hawaii v. Trump*, the President issued an Executive Order restricting entry of foreign internationals from specified countries, which were—not coincidentally—majority Muslim.⁹⁵ The state of Hawaii sought a temporary restraining order, alleging that this travel ban constituted discrimination against the Muslim citizens in Hawaii for “denying them their right . . . to associate with family members overseas on the basis of their religion and national origin.”⁹⁶ Additionally, the State argued that this executive order “injured its institutions, economy, and sovereign interest in maintaining the separation between church and state.”⁹⁷

The school district may use *Hawaii v. Trump* to show that it has standing to sue ICE. In order for any plaintiff, including a state, to have standing, the plaintiff must show the following:

- (1) it has suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.⁹⁸

Essentially, the question of standing turns on “whether petitioners have ‘such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.’”⁹⁹

The school district would argue that it has standing in a lawsuit against ICE because its conduct around its schools has prevented it

of its finding that the case was justiciable before allowing the travel ban to stay in place. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2407 (2018).

95. *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017). This order was entitled “Protecting the Nation From Foreign Terrorist Entry Into the United States.” This executive order was also an updated version of a travel ban that was struck down in *Washington v. Trump*. *See* 847 F.3d 1151 (9th Cir. 2017).

96. *Hawaii*, 241 F. Supp. at 1126.

97. *Id.*

98. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

99. *Catholic League for Religious and Civil Rights v. City & Cty. of S.F.*, 624 F.3d 1043, 1048 (9th Cir. 2010) (en banc) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007)).

from being able to provide access to education in a way that is consistent with the Equal Protection Clause. ICE's aggressive enforcement around the schools has rendered schools unsafe for undocumented students. So, because the State has control over its public-school system,¹⁰⁰ the State itself will experience the harm because students who live in its jurisdiction are not receiving sufficient education in order to be a meaningful participant within the State. Therefore, seeking relief from the court system is appropriate. The State would argue that the toxicity surrounding immigration enforcement has deterred students from attending school to such a degree that it harms the State. While the procedural components may differ based on whether the suit is between a student and the school district or whether it is between the school district and ICE, the substantive question in either suit is the same.

B. Substantive Question: Does ICE's Enforcement Activity Around Schools Deprive Undocumented Students' Access to Public Schools?

The plaintiff would have to show that ICE's conduct has deprived undocumented students' access to public schools. In a suit where the school is the plaintiff and ICE is the defendant, the school could argue that ICE's immigration enforcement around schools has created such a toxic environment that undocumented students stop attending, fearing that they or their families will be subject to deportation proceedings.¹⁰¹ On the other hand, if the student is the plaintiff and the school is the defendant, then the student could argue that the school's deliberate indifference has prevented students from freely attending school.

1. The Toxic Environment Surrounding Immigration Enforcement

States recognize that school safety is critical for an effective education. For example, Georgia enacted a statute requiring public schools to "prepare a school safety plan to help curb the growing incidence of violence in schools, to respond effectively to such incidents, and to provide a safe learning environment for Georgia's children,

100. See *Epperson v. Arkansas*, 393 U.S. 97, 104 (1969) (affirming that "public education in our Nation is committed to the control of state and local authorities").

101. See *Foulsham*, *supra* note 16.

teachers, and other school personnel.”¹⁰² The statute requires schools to prepare a school safety plan and “places the responsibility upon the county superintendent and county school board to ensure that this occurs.”¹⁰³ States and courts have recognized that school safety is critical in providing a quality public education to residents of a state. Immigration enforcement around schools and the toxic environment that it creates has left the reasonable impression that schools are not safe because of the enforcement activities that might occur around schools,¹⁰⁴ such that students may have no choice but to stop attending school altogether.¹⁰⁵

Such a toxic environment where students have no choice but to stop attending school undermines their access to public schools because a safe environment that is conducive to learning is a critical component of a public school system.¹⁰⁶ Plaintiffs successfully argued this theory in *Idaho Schools for Equal Education Opportunity v. State* when they challenged a state’s funding for facilities.¹⁰⁷ The Idaho Supreme Court recognized that facilities are critical in carrying out crucial education programs, and those facilities should provide a “variety of instructional activities and programs, with the health and safety of all persons essential.”¹⁰⁸ Ultimately, the court concluded that “a safe environment conducive to learning is inherently a part of a thorough system of public, free common schools that . . . our state constitution requires the Legislature to establish and maintain.”¹⁰⁹ A student could apply that standard to show that ICE agents conducting enforcement actions on or around the school campus renders a school unsafe for

102. GA. CODE ANN. § 20-2-1185(a) (2018). The statute applies to a wide variety of instances, including natural disasters, hazardous materials, radiological accidents, acts of violence, and acts of terrorism. *Id.* The Georgia legislature recognized that there are forms of disruption other than the tragic rise in school shootings that have an adverse effect on school safety that are worth addressing through a concrete school safety plan.

103. *Leake v. Murphy*, 644 S.E.2d 328, 331 (Ga. Ct. App. 2007).

104. *See supra* Section III.B.

105. *See General Shoe Corp.*, 77 N.L.R.B. 124, 126 (N.L.R.B. 1948) (recognizing that a toxic environment may deny people meaningful choice).

106. *See Idaho Sch. for Equal Educ. Opportunity v. State*, 976 P.2d 913, 920 (Idaho 1998).

107. *Id.*

108. *Id.* at 919–20.

109. *Id.* at 920.

undocumented students. Even though this case does not involve school funding, the premise remains true—a safe environment is critical in effective learning and a crucial part of a state providing public schools.

The plaintiff could draw an analogy from elections in the labor context to illustrate a toxic environment. In *General Shoe Corp.*, the National Labor Relations Board (“the Board”) found that the employer had interfered with an election when he “engaged in a course of conduct consisting of publication . . . in letters, in pamphlets, in leaflets, and in speeches, of vigorously disparaging statements concerning the Union, which undeniably were calculated to influence the rank-in-file employees in their choice of a bargaining representative.”¹¹⁰ In its reasoning, the Board explained that “[c]onduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice.”¹¹¹

A student should be able to show that the toxicity surrounding immigration has left a reasonable impression that schools are no longer a safe place for undocumented students. Betsy DeVos stated before Congress that schools can call ICE to report students if they want.¹¹² However, when asked again at a later time whether schools can call ICE on their students, she replied, “I don’t think they can.”¹¹³ This response is not a particularly forceful renouncement of her prior statements before the House Education and Workforce Committee.¹¹⁴ This weak backtrack combined with the attitudes of the Trump Administration towards undocumented immigrants at the southern border fosters an environment where schools may no longer be a safe place for undocumented students and their parents.

A major issue in President Trump’s platform has been to curb illegal immigration, and his rhetoric reflects an open hostility toward

110. *General Shoe Corp.*, 77 N.L.R.B. at 125.

111. *Id.* at 126.

112. Moriah Balingit, *Civil Rights Groups Criticise U.S. Education Secretary for Saying Schools Can Report Undocumented Students*, THE INDEPENDENT (May 23, 2018, 8:18 PM), <https://www.independent.co.uk/news/world/americas/report-students-schools-us-civil-rights-betsy-devos-immigration-education-a8365596.html>.

113. Luis Sanchez, *DeVos Backtracks, Says Schools Can’t Call ICE on Students*, THE HILL (June 5, 2018, 3:39 PM), <https://thehill.com/homenews/administration/390822-devos-reverses-position-and-says-schools-cant-call-ice-on-students>.

114. See Balingit, *supra* note 113.

Latino immigrants specifically. Trump began his campaign with his promise to build a wall at the southern border. In explaining why, Trump made the following infamous comments: “When Mexico sends its people, they’re not sending their best. They’re not sending you . . . They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists.¹¹⁵ Beginning his campaign with such inflammatory rhetoric indicates that flagrant animosity towards Mexican immigrants appears to influence his immigration policies at the southern border. During Trump’s Presidency, he released a controversial campaign ad right before the midterms which featured a Mexican immigrant who had killed two police officers.¹¹⁶ This ad was rightly condemned as racist and a shameless attempt at fear-mongering.¹¹⁷ The ad was released on the same day that Trump announced an increase in the amount of troops at the southern border in response to a migrant caravan, which he repeatedly referred to as an invasion.¹¹⁸ President Trump’s egregious attitudes towards undocumented immigrants paired with his administration’s control over immigration enforcement creates such a toxic environment that its enforcement actions effectively deprive students access to public schools.

Combatting this toxicity promotes the policy justifications that the Supreme Court relied upon in *Plyler*.¹¹⁹ Public education ensures

115. See Amber Phillips, ‘They’re Rapists.’ President Trump’s Campaign Launch Speech Two Years Later Annotated, WASH. POST (June 16, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/?utm_term=.54ed9e3739ed.

116. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 31, 2018, 3:18 PM), <https://twitter.com/realdonaldtrump/status/1057728445386539008?lang=en>.

117. See Meghan Keneally, *New Trump Ad Featuring Mexican Cop-Killer Slammed as ‘Racist’ and ‘Divisive’ by Experts*, ABC NEWS (Nov. 1, 2018, 1:23 PM), <https://abcnews.go.com/beta-story-container/US/trump-ad-mexican-cop-killer-blatant-racist-fear/story?id=58897185>.

118. See Jonathan Karl, *Trump Defends Military Presence on Border and Says ‘I Do Try’ to Tell the Truth*, ABC NEWS (Nov. 1, 2018, 6:50 AM), <https://abcnews.go.com/beta-story-container/Politics/wall-people-trump-defends-military-presence-border/story?id=58878290>.

119. See *supra* Section II.B and accompanying text.

that students who may become lawful citizens can meaningfully participate and contribute to society.¹²⁰ If this toxic environment truly prevents students from attending school, then the Equal Protection Clause should justify removal of such obstacles.¹²¹

2. A School's Deliberate Indifference

When a student is the plaintiff suing a school, a student could argue that the school's failure to prevent ICE from conducting immigration enforcement around the school makes them liable for depriving access to public schools based on their immigration status. The Supreme Court provides a potential standard for a school's liability based on ICE's conduct in *Davis Next Friend LaShonda D. v. Monroe County Board. of Education*.¹²² The Court imposed liability on a school for failure to discipline a male student who was continuously making sexual advances toward the plaintiff's daughter during school.¹²³ The plaintiff's daughter was the victim of prolonged sexual harassment by one of her classmates.¹²⁴ This conduct occurred for months, and the school failed to take strong action despite repeated reports to teachers and the principal.¹²⁵

In that case, the student alleged that the school's "deliberate indifference" towards preventing these unwanted sexual advances by one student towards another student "created an intimidating, hostile, offensive, and abusive school environment . . ."¹²⁶ The Court held that the school can be liable where the school acts with deliberate indifference "to known acts of harassment in its programs or activities . . . [but]

120. See *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (noting that denying the benefit of public education would practically prevent those students from participating in our political institutions).

121. *Id.* at 222 (recognizing that status-based distinctions that deny certain students access to public schools is irreconcilable from the principle of equality found under Equal Protection jurisprudence).

122. *Davis Next Friend LaShonda D. v. Monroe Cty Bd. of Educ.*, 526 U.S. 629, 633 (1999).

123. *Id.*

124. *Id.*

125. *Id.* at 633–35.

126. *Id.* at 629.

only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.”¹²⁷ The *Davis* standard articulates a theory of liability for a school’s inaction towards harmful behavior because of the legal violence the students experience at the hands of aggressive immigration enforcement.¹²⁸

A school’s failure to prevent ICE from conducting immigration enforcement around schools may violate the Equal Protection Clause.¹²⁹ The school is fully aware that ICE agents are surveilling the school, and they have seen that the agents have made arrests in clear view of all of the students. Such indifference creates an unsafe environment for undocumented students. As a result, undocumented students will not receive the full benefits of an education that the Supreme Court has consistently affirmed.¹³⁰ Thus, a school could be liable for failing to act appropriately in response to immigration enforcement.

127. *Id.* at 633.

128. See Cecilia Menjívar & Leisy J. Abrego, *Legal Violence: Immigration Law and the Lives of Central American Immigrants*, 117 AM. J. OF SOC. 1380 (2012). This piece described the sociological impact of the recent immigration regime using a framework that they call “legal violence.” *Id.* They described legal violence as being “motivated by positive intentions, or is the incidental by-product of other goals, or is socially accepted or lauded.” *Id.* at 1383. The authors explained the legal violence more fully as the following:

Legal violence is at once structural in that it is exerted without identifiable perpetrators, and it is symbolic in that it is so thoroughly imposed by the social order that it becomes normalized as part of the cognitive repertoire of those exposed. Importantly, this type of violence is legal, sanctioned, and legitimated through formal structures of power that are publicly accepted and respected.

Id. at 1413.

129. The Third Circuit “has indicated that a [school] supervisor may be personally liable under § 1983 if he or she ‘implements a policy or practice that creates an unreasonable risk’ that a subordinate will perpetrate a constitutional violation, provided that the supervisor’s ‘failure to change the policy or employ corrective practices’ actually causes the subordinate to violate a person’s constitutional rights.” *Douglas v. Brookville Area Sch. Dist.*, 836 F. Supp. 2d 329, 354–55 (W.D. Penn. 2011) (quoting *Argueta v. U.S. Immigration and Customs Enf’t*, 643 F.3d 60, 72 (3d Cir. 2011)).

130. See *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (detailing the benefits of a public education); *Idaho Sch. for Equal Educ. Opportunity v. State*, 976 P.2d 913 (Idaho 1998) (recognizing how critical a safe environment in a school is for a quality education).

C. Remedies

The availability of appropriate and effective remedies is crucial in ensuring that future students who are undocumented immigrants will have continued and meaningful access to public education. Generally, courts are within their power to dole out remedies, but “[t]he proper remedy for an unconstitutional exclusion from an opportunity . . . should aim to eliminate, insofar as possible, the discriminatory effects of the past and to bar like discrimination in the future.”¹³¹ Because the court has discretion in resolving equal protection issues, there are a variety of remedial options that a court can consider.

1. Preliminary Injunction

Prior to the commencement of litigation, a plaintiff can file a motion for a preliminary injunction.¹³² One of the primary purposes of a preliminary injunction is to serve as a “remedy potentially available only after a plaintiff can make a showing that some independent legal right is being infringed”¹³³ Crucially, a request for preliminary injunction does not involve a final determination on the merits because “the purpose of [a preliminary injunction] . . . is not to determine any controverted right, but to prevent a threatened wrong or any further perpetration of injury . . . until the issues can be determined after a full hearing.”¹³⁴

Alternatively, under Rule 65 of the Federal Rules of Civil Procedure, a plaintiff may seek a temporary restraining order, either with or without notice.¹³⁵ Threats to a plaintiff’s constitutional rights have

131. 16B AM. JUR. 2D *Constitutional Law* § 829 (2019).

132. 11A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2947 (3d ed. 2018). “Defined broadly, a preliminary injunction is an injunction that is issued to protect plaintiff from irreparable injury to preserve the court’s power to tender a meaningful decision after a trial on the merits.” *Id.*

133. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1098 (11th Cir. 2004).

134. *Benson Hotel Corp. v. Woods*, 168 F.2d 694, 696 (8th Cir. 1948).

135. See *Genworth Fin. Wealth Mgmt., Inc. v. McMullan*, 721 F. Supp. 2d 122, 125 (D.C. Conn. 2010) (providing that because the defendants had received adequate notice and participated in an adversarial hearing on the application for a temporary restraining order, the Court will treat the plaintiff’s request for a temporary restraining order as a motion for a preliminary injunction). FED. R. CIV. P. 65(b)(1). A court may

been considered irreparable harm.¹³⁶ A student's access to public education based on immigration status could constitute an irreparable harm because of the continued violation of that student's equal protection rights and the mental harm that the student might experience.¹³⁷ So, seeking a preliminary injunction or temporary restraining order would allow a student to continue going to school while the case is being decided on the merits.¹³⁸

2. Permanent Injunction

If a plaintiff is successful in the litigation, a court can grant a permanent injunction against either the school or ICE, depending on the posture of the litigation. Granting injunctive relief has become a

issue a temporary restraining order without notice when there are “(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (B) the movant’s attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.” *Id.*

136. *See* Baskin v. Bogan, 12 F. Supp. 3d 1137 (S.D. Ind. 2014) (holding that the plaintiffs, a married same-sex couple who were seeking a temporary restraining order against the state of Indiana requiring Indiana to recognize their out-of-state marriage, were entitled to a temporary restraining order stemming from the violation of their due process and equal protection rights); Lozano v. City of Hazleton, 459 F. Supp. 332 (M.D. Penn. 2006) (holding that the plaintiffs were entitled to a temporary restraining order against two city ordinances – one requiring occupants of rental property to obtain an occupancy permit showing proof of legal citizenship or residence, and the other preventing a business from employing undocumented immigrants).

137. *See* Plyler v. Doe, 457 U.S. 202 (1982) (protecting students' equal protection rights); Doward, *supra* note 52 (emphasizing how exclusion from school detrimentally affects students' mental health).

138. *See* 11A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2947 (3d ed. 2018).

prominent feature of the modern judiciary and has increased in availability,¹³⁹ especially in cases involving violations of civil rights.¹⁴⁰ Injunctive relief is effective primarily because courts look to the future and craft relief in order to deter future conduct.¹⁴¹ Additionally, courts will be more willing to grant relief “if public policy would be furthered by the injunction,” especially “if the challenged conduct seriously impinges on matters of public policy.”¹⁴²

Granting a permanent injunction against the party depriving an undocumented immigrant access to public schools would be an effective deterrent to aggressive immigration enforcement around schools. The Supreme Court has clearly expressed a significant policy preference towards ensuring access to public schools for undocumented immigrants,¹⁴³ and the exclusion of students from schools could create a significant barrier for children as they become active participants in our communities.¹⁴⁴ Additionally, granting injunctive relief would be an effective way of keeping ICE away from public schools and deterring schools from cooperating as a proxy for immigration enforcement agents. These potential cases are exactly where injunctive relief is appropriate as a means of ensuring equal protection for undocumented

139. See Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1991). This article lays out the historical devolution of the irreparable injury rule. The irreparable injury rule provides that “equitable remedies are unavailable if legal remedies will adequately repair the harm.” *Id.* at 689. However, the author suggests that this rule is dead because “[i]njunctions are routine, and damages are never adequate unless the court wants them to be.” *Id.* at 692. Relevant to this note, the author indicates that the principle that damages are inadequate remedies applies to intangible rights, specifically valuable constitutional rights. *Id.* at 707.

140. 11C CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2948 (1973) (stating that courts will often hold that there is no need to show irreparable injury if the plaintiff can show that there is a deprivation of constitutional rights).

141. See *Dombrowski v. Pfister*, 380 U.S. 479, 485 (1965) (recognizing that injunctive relief looks to the future); 11A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2942 (3d ed. 2018); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975) (“The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power . . . to do equity and to mould each decree to the necessities of the particular case.”).

142. 11A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2942 (3d ed. 2018).

143. See *Plyler v. Doe*, 457 U.S. 202 (1982).

144. Doward, *supra* note 52.

immigrants and deterring immigration enforcement activity in or around schools.

V. CONCLUSION

The United States Supreme Court has made it clear—states cannot deny access to public schools to persons based on their immigration status.¹⁴⁵ Undocumented students’ access to public schools improves rather than harms society, as it ensures that these students receive a proper education and will allow them to be productive members of society.¹⁴⁶ If they do become citizens, denying access to schools would create an unacceptable barrier to meaningful participation in our democracy.

ICE’s immigration enforcement may interfere with a student’s access to public education. ICE and the Trump Administration have created such a toxic environment that students may reasonably believe that attending school is not safe for them or their families.¹⁴⁷ With this current administration’s hostility towards Latino immigrants,¹⁴⁸ lawyers and judges have the ability to combat their aggressive enforcement by advocating for these students whom ICE has harmed and deterring future immigration enforcement around schools. Extending *Plyer* to impose liability for ICE’s immigration enforcement that effectively deprives undocumented students’ access to public schools would be a sensible standard for protecting students and holding ICE accountable for their aggressive behavior. Seeking an injunction against ICE would ensure that undocumented immigrants can enjoy access to public schools in a manner that benefits them and society as a whole.

145. See *Plyler*, 457 U.S. at 202.

146. *Id.* at 222.

147. See Foulsham, *supra* note 16 and accompanying text.

148. See Wong, *supra* note 5 and accompanying text.