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CRITICS SEE 'CHILLING EFFECT' IN ALABAMA IMMIGRATION LAW

By Campbell Robertson
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ALABASTER, Ala. — The champions of Alabama's far-reaching immigration law have said that it is intended to drive illegal immigrants from the state by making every aspect of their life difficult. But they have taken a very different tone when it comes to the part of the law concerning schools.

"No child will be denied an education based on unlawful status," the state attorney general, Luther Strange, argued in a court filing.

The man who wrote the schools provision says the same thing, that it is not meant as a deterrent — at least not yet. It is, however, a first step in a larger and long-considered strategy to topple a 29-year-old Supreme Court ruling that all children in the United States, regardless of their immigration status, are guaranteed a public education.

The provision, which is known as Section 28, requires primary and secondary schools to record the immigration status of incoming students and their parents and pass that data on to the state.

Critics say it is a simple end in itself, an attempt to circumvent settled law and to scare immigrants away from school now, not at some point in the future. Weeks of erratic school attendance figures and a spike in withdrawals show that this has worked, they argue. And indeed, a federal appeals court on Oct. 14 blocked the provision pending an appeal by the Justice Department, though the court did not rule on the merits.

Michael M. Hethmon, general counsel for the Immigration Reform Law Institute in Washington, who wrote the provision, insists that its goal is much more ambitious.

The eventual target, he said, is the 1982 Supreme Court decision *Plyler v. Doe*. The case concerned a Texas statute that withheld funds for the education of illegal immigrants and allowed districts to bar them from enrollment, as well as one Texas school district's plan to charge illegal immigrants tuition.

The court ruled that this violated the Constitution's equal protection clause, saying that the statute "imposes a lifetime hardship on a discrete class of children not accountable" for their immigration status. In the decision, the court also said that the state had not presented evidence showing it was substantially harmed by giving these children — as distinct from any other children — a free public education.

Over the ensuing decades, measures have been passed in defiance of this ruling, most notably California's Proposition 187, but they have been repeatedly struck down in the courts. Mr. Hethmon said the problem with these challenges is that they have not taken the trouble to gather the evidence the court found missing in *Plyler*.

"The toughest question has been obtaining reliable — and I mean reliable for peer-reviewed research purposes — censuses of the number of illegal alien students enrolled in school districts," he said. "That information could be compared with other sorts of performance or resource allocation issues."

The Alabama law directs schools to ascertain the immigration status of incoming students, through a birth certificate, other official documents or an affidavit by the child's parents (the law also directs schools to determine the immigration status of an enrolling child's parents, but gave no mechanism by which to do so).

That information is then passed on to the State Board of Education not only to prepare an annual report with the data but also to "contract with reputable scholars and research institutions" to determine the costs, fiscal and otherwise, of educating illegal immigrants.

Because no one is actually barred from attending school and the data is not passed on to law enforcement, the provision passes constitutional muster, Mr. Hethmon said.

But it also potentially enables a fresh challenge to Plyler v. Doe, and the idea that schools are obligated to provide a free education to illegal immigrants.

Critics dismiss this as a ruse.

They say that the law instills such fear in immigrant families with schoolchildren, leading predictably to such erratic attendance figures, that it belies any claim that the state is seriously attempting an accurate measurement.

"This seems to be really a transparent attempt at a pretext to try to justify discriminatory law," said Lucas Guttentag, a professor of immigration law at Yale Law School and senior counsel of the Immigrants' Rights Project of the American Civil Liberties Union. "The idea that they're somehow going to collect this data and show anything that's conceivably relevant is a fantasy."

In Plyler v. Doe, Professor Guttentag said, the court found that the state's actions were unconstitutional on a number of grounds. The state's failure to show the impact of illegal immigration on schools was only a part of the decision, he said, and a nuanced one at that. The likelihood that the data collected by this law would lead to that decision's being overturned, Professor Guttentag said, was extremely low.

Though there has not been a direct census, there are estimates of illegal immigrants in Alabama schools. According to American Community Survey data, a little less than one-half of 1 percent of the 800,000 children in Alabama schools are in the country illegally; of the 34,000 Hispanic children in Alabama schools, according to Pew Hispanic Center estimates, roughly two thirds are American citizens.

The law also requires schools to track the enrollment of illegal immigrants in remedial English programs (though this part, too, was ignored in the state's actual execution of the law). There is existing data about the national origin of such students, at least at the district level.

Here in Shelby County, which has one of the fastest-growing Hispanic populations in the state, there are about 1,400 remedial English students, out of roughly 18,700 statewide. They came into the schools here speaking 52 languages, including Chinese and Arabic,

though the majority came in as Spanish speakers, said Leah Dobbs Black, the English as a Second Language program supervisor for the county.

Ten years ago, she said, as many as 9 out of 10 students in need of remedial English were born outside the country, a fact students already report on language assessment forms. Now, she said, "It's at least 50-50."

Ms. Black added that Shelby schools spend about \$4 million on the program out of an annual budget of \$281 million, though she acknowledged that parents tend to complain more about the money spent on that program than others.

Whether the critics are correct in arguing that the law has created a "chilling effect," inducing families to pull their children out of school, is harder to measure than it may seem.

While daily absences by Hispanic students ranged as high as 5,143, or 15 percent of the Hispanic student population, they had dropped to 1,230 the day before the provision was blocked, said a spokeswoman for the state Department of Education (on a normal day, she said, around 1,000 absences can be expected). Statewide data has not been compiled as to how many students have fully withdrawn, though interviews in several districts suggest that number could be in the hundreds.

Several parents in Shelby County who are in the country illegally said in interviews that they were less frightened about Section 28 than about other parts of the law. Their children were all United States citizens by birth, they said, and school officials had so far been reassuring.

The antagonism in schools now, they said, is mainly coming from other children.

"A little girl in my daughter's class asked when she was going to go to Mexico because she was illegal," said a 27-year-old woman who gave her name as Arelly, the mother of a fourth grader. "I think they hear their parents talking."