

March 7, 2014

Hon. Stephan C. Hansbury, P.J.Ch.  
Superior Court of New Jersey, Chancery Division  
Washington and Courts Street  
Morristown, NJ 07960-0910

Re: *American Civil Liberties Union of NJ v. Butler Public School District*  
Civil Action No. \_\_\_\_\_

**Letter Brief in Support of Order to Show Cause  
with Temporary Restraints**

Dear Honorable Judge Hansbury,

Pursuant to *R. 2:6-2(b)*, please accept this letter-brief in lieu of a more formal brief in support of Plaintiff’s Order to Show Cause which seeks to immediately enjoin Defendant from requiring parents to produce particular forms of photo identification in order to register their children for public school.

**TABLE OF CONTENTS**

**Preliminary Statement.....2**

**Statement of Facts.....3**

**Argument.....3**

**I. PLAINTIFF IS LIKELY TO SUCCEED ON ITS CLAIMS, AS  
DEFENDANT’S REGISTRATION POLICY REQUIRING  
PARENTS TO PROVIDE PHOTO IDENTIFICATION  
VIOLATES THE STATE AND FEDERAL CONSTITUTIONS  
AND THE ADMINISTRATIVE CODE.....4**

**II. PLAINTIFF EASILY MEETS THE REMAINING STANDARDS  
FOR GRANTING TEMPORARY RESTRAINTS .....8**

**A. Restraints are necessary to prevent irreparable harm.....8**

B. The relative hardship favors entering immediate injunctive relief.....10

C. The restraint does not alter the *status quo ante*.....12

D. The public interest requires entering injunctive relief.....13

III. PLAINTIFF HAS STANDING TO BRING THIS CHALLENGE BECAUSE IT IS IMPACTED AS AN ORGANIZATION AND ITS MEMBERS ARE IMPACTED .....14

Conclusion .....16

**PRELIMINARY STATEMENT**

While the children of undocumented parents have an unquestionable right to a free, public education that is guaranteed through the State and Federal Constitutions and implemented through New Jersey’s Administrative Code, New Jersey school districts have not always abided by their legal obligations. When the American Civil Liberties Union of New Jersey surveyed many New Jersey school districts in 2008, it found that 139 school districts either required students or parents to produce Social Security numbers or produce documents that indicate immigration status.<sup>1</sup>

In the years since that study, the New Jersey Commissioner of Education has reminded school districts about their obligations to ensure access to education for the children of immigrants.<sup>2</sup> When districts have failed to heed these reminders, the ACLU has been able to inform districts of the state of the law<sup>3</sup> and resolve disputes without the

<sup>1</sup> Letter to Commissioner Davy, available at: <http://www.aclu-nj.org/files/4713/1540/4575/091508letterdavy.pdf>.

<sup>2</sup> October 25, 2010 Letter from Rochelle Hendricks, available at: [http://www.aclu-nj.org/download\\_file/1365](http://www.aclu-nj.org/download_file/1365).

<sup>3</sup> See American Civil Liberties Union of New Jersey, *Legal Backgrounder on Equal Access to Education in New Jersey*, August 29, 2008, available at: <http://www.aclu-nj.org/files/4113/1540/4574/090308facts.pdf>.

need to resort to litigation.<sup>4</sup> This is the rare case where, faced with the unambiguous state of the law, a school district insists that it may exclude children – even citizen children – from access to a free, public education by imposing barriers to registration that prevent immigrant parents from completing the registration process. This Court must intervene to abate a great injustice.

### **STATEMENT OF FACTS**

Several parents seek to enroll their school-aged children in the Butler Public Schools. Some of the parents are undocumented immigrants and do not possess a Social Security number. *Verified Complaint*, ¶ 20. Because they lack a Social Security number and valid immigration status, they are prohibited from obtaining any of the three forms of photo identification required by the Defendant. *Id.* at ¶¶ 16 and 17. The parents have all other pieces of documentation required to register their children. *Id.* at ¶ 19. Without a change in policy, the parents will be unable to register their children for school. *Id.* at ¶ 21.

### **ARGUMENT**

To be entitled to interim relief pursuant to Rule 4:52-1, a party must show (a) that the restraint is necessary to prevent irreparable harm, *i.e.*, that the injury suffered cannot be adequately addressed by money damages, which may be inadequate because of the nature of the right affected; (b) that the party seeking the injunction has a likelihood of success on the merits; (c) that the relative hardship favors the party seeking the restraint; and (d) that the restraint does not alter the *status quo ante*. *Crowe v. DeGoia*, 90 N.J. 126, 132-136 (1982). Plaintiff easily satisfies these requirements.

---

<sup>4</sup> See, e.g., *American Civil Liberties Union of New Jersey Annual Report*, 2011, page 18-19, available at: <http://www.aclu-nj.org/files/8813/1661/2977/092111annrep.pdf>.

**I. PLAINTIFF IS LIKELY TO SUCCEED ON ITS CLAIMS, AS DEFENDANT'S REGISTRATION POLICY REQUIRING PARENTS TO PROVIDE PHOTO IDENTIFICATION VIOLATES THE STATE AND FEDERAL CONSTITUTIONS AND THE ADMINISTRATIVE CODE**

Federal constitutional law is neither new nor unsettled: the right to a free public education cannot be conditioned on the immigration status of children or their parents. *Plyler v. Doe*, 457 U.S. 202, 228 (1982). The New Jersey Department of Education, in recognition of this bedrock equal protection principle, has promulgated regulations addressing those documents which can be required to register as child for public school. See *N.J.A.C.* 6A:22-3.4(d). The Butler Public School District's policy, which effectively precludes undocumented immigrants from registering their children for school is directly counter to those regulations and violates principles of equal protection embedded in the Federal and State Constitutions.

In *Plyler*, the United States Supreme Court determined that a state can only "deny a discrete group of innocent children the free public education that it offers to other children residing within its borders," 457 U.S. at 228, if the denial "furthers some substantial state interest." *Id.* Such a standard is consistent with the Court's recognition of the value of primary and secondary education. As the Court explained:

The "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). We have recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government," *Abington School District v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring), and as the primary vehicle for transmitting "the values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). "[A]s ... pointed out early in our history, ... some degree of education is necessary to prepare citizens to participate

effectively and intelligently in our open political system if we are to preserve freedom and independence.” *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). And these historic “perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.” *Ambach*, 411 U.S. at 77. In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

[*Plyler*, 457 U.S. at 222.]

Indeed, *Plyler* simply reinforced that which the Court had previously noted in *Brown v. Board of Education* about the importance of schooling: “education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.” *Id.* at 222-23, quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

The State Department of Education is clear on what *Plyler* requires. In an October 25, 2010, memorandum to all chief school administrators and charter school leaders, Acting Commissioner Rochelle Hendricks confirmed that *Plyler*: “held that undocumented children living in the United States could not be excluded from public elementary and secondary schools based upon their immigration status.” *Letter from Rochelle Hendricks*, available at: [http://www.aclu-nj.org/download\\_file/1365](http://www.aclu-nj.org/download_file/1365). “Accordingly, school districts are prohibited from . . . making inquiries of students or parents that may expose their undocumented status or engaging in any practices that ‘chill’ or hinder the right of access to public schools.” *Id.* This requirement is codified in

*N.J.A.C.* 6A:22-3.4, which prohibits conditioning enrollment on the production of documents “pertaining to criteria that are not a legitimate basis for determining eligibility to attend school. They include . . . Social Security numbers.” *N.J.A.C.* 6A:22-3.4(d)(4).

That is exactly what is being done by Butler Public Schools. While the School District is not directly requiring Social Security numbers, it is requiring forms of identification that require those numbers and/or a valid immigration status. Because there is no way to obtain the required identification without a Social Security number or valid immigration status, the School District is conditioning attendance on the parents’ immigration status.<sup>5</sup> Such a result is prohibited by *Plyler*.

*Plyler* is still good law. In 2012, on the 30<sup>th</sup> anniversary of the decision, then-Assistant Attorney General Thomas E. Perez remarked that “*Plyler* represents the best of our collective ideals as a nation.” Remarks of Assistant Attorney General Thomas E. Perez at the American Civil Liberties Union’s *Plyler v. Doe* 30th Anniversary Event, Washington, D.C., June 11, 2012, available at: <http://www.justice.gov/crt/opa/pr/speeches/2012/crt-speech-120611.html>. He further explained:

For the past three decades, *Plyler* has kept the door to opportunity open for millions of children across America. *Plyler* has stood for the proposition that public schools serve all children in this country, no matter where they were born. *Plyler* has represented the promise that the American dream should be accessible to all.

[*Id.*]

---

<sup>5</sup> It is worth noting that in *Plyler*, the students were themselves undocumented. 457 *U.S.* at 206. At least some of the impacted families include American citizen children who are being denied access to public schools because of the *parents’* immigration status.

In recognition of the continued importance of *Plyler*, in 2011, the United States Department of Justice, Civil Rights Division and the United States Department of Education, Office for Civil Rights and Officer of the General Counsel issued guidance to local school districts reminding them of their obligations under *Plyler*. *Dear Colleague Letter*, May 6, 2011, available at: <http://www.justice.gov/crt/about/edu/documents/plylerletter.pdf>. The guidance was explicit: “To comply with . . . the mandates of the Supreme Court, you must ensure that . . . students are not barred from enrolling in public schools at the elementary and secondary level on the basis of their own citizenship or immigration status or that of their parents or guardians.” *Id.* at 1-2. To that end, “districts may not request information with the purpose *or result* of denying access to public schools on the basis of race, color, or national origin.” *Id.* at 2. While Butler’s policy may not have a purpose of barring undocumented immigrants from school, it certainly has that result. As such, it violates *Plyler* and must be enjoined.

The State Constitution provides an even stronger likelihood of success on the merits. While there is no right to public education found in the United States Constitution, *Plyler*, 457 *U.S.* at 221; *San Antonio Independent School Dist. v. Rodriguez*, 411 *U.S.* 1, 35 (1973), the New Jersey Constitution provides an affirmative right to public education. As the New Jersey Supreme Court has explained:

The New Jersey Constitution charges the State with the fundamental responsibility to educate schoolchildren: “The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.” N.J. Const. art. VIII, § 4, ¶ 1. In *Abbott v. Burke*, 119 *N.J.* 287, 384–85 (1990) (*Abbott II*), this Court held that students in the poorest urban

districts were deprived of their constitutional right to a thorough and efficient education due to the State's failure to provide adequate financial resources for their educational programming.

[*Abbott ex rel. Abbott v. Burke*, 206 N.J. 332, 340 n.1 (2011).]

The affirmative right to education in New Jersey suggests that the test set forth in *Plyler* might not go as far as the State Constitution requires. *See Plyler*, 457 U.S. at 230 (Marshall, J., concurring) (contending that the right to education is fundamental and requires different equal protection analysis); *see also State v. Cooke*, 163 N.J. 657, 666 (2000) (recognizing that the Court has interpreted our State Constitution as affording greater protections than those afforded by its federal counterpart). In this case, the court does not even reach the question of whether the education is “thorough and efficient”; because of the School District’s photo identification policy, there is a likelihood of a total deprivation. Such a denial of access to a public school education violates the State Constitution.

Under both the State and Federal Constitutions, the law is clear: the children of immigrants cannot be denied access to schools as a result of their parents’ immigration status. Because that is exactly what is occurring in Butler, Plaintiff is likely to succeed on the merits.

## **II. PLAINTIFF EASILY MEETS THE REMAINING STANDARDS FOR GRANTING TEMPORARY RESTRAINTS**

### **A. Restraints are necessary to prevent irreparable harm**

As explained above, the District’s policy prevents those without Social Security numbers or valid immigration status from registering their children from school. There is



simply no way that an undocumented person (who lacks a Social Security number and valid immigration status), can obtain any of the three forms of identification that Butler School District is demanding.

This injury is irreparable. Plaintiff's members cannot register their children for school. There is no doubt that a delayed start to school has serious long-term implications. As President Obama has explained: "Study after study shows that the earlier a child begins learning, the better he or she does down the road." Barack Obama, *Remarks by the President on Early Childhood Education -- Decatur, GA*, February 14, 2013, available at: <http://www.whitehouse.gov/photos-and-video/video/2013/02/14/president-obama-early-childhood-education#transcript>. If these children are kept out of school they will be forever denied the benefits associated with early education.

Moreover, even if they are ultimately allowed to register their children for school, residents who are prevented from registering their children during the School District's designated days because they lack the required identification face irreparable harm of the potential exposure of their status as undocumented immigrants. Those registering later will be easily identifiable as those who were unable to produce the identification required under the current policy. As a result, they could become embroiled in the larger debate regarding national immigration policy, and subject to blackmail or threats of deportation by people who learn of their status. *See, e.g.*, Connor Radnovich, "Illegal immigrant families being broken up U.S. policy," *The Denver Post*, March 30, 2013, available at [http://www.denverpost.com/ci\\_22903920/illegal-immigrant-families-being-broken-up-u-](http://www.denverpost.com/ci_22903920/illegal-immigrant-families-being-broken-up-u-)

[s#ixzzz2vE6bYzOF](#) (describing University of Arizona study where 17% of respondent undocumented immigrants reported being blackmailed or threatened with deportation).

**B. The relative hardship favors entering immediate injunctive relief**

As described above, the Court should grant immediate temporary restraints because as described above, parents who lack state- or county-issued identification<sup>6</sup> will suffer a hardship, even if they are ultimately allowed to register their children for school. Registration for the Butler Public School District will occur the week of March 10, 2014. When the district eliminates the discriminatory policy and permits the children to be registered at a later date, the parents availing themselves of the registering at a later date will be easily identifiable as those who were unable to produce the identification required under the current policy. Not only could they be subject to blackmail or threats of deportation, but they could be thrust in to a local debate regarding national immigration policy. Access to educational benefits for children of undocumented immigrants is a public issue of significant importance, and has received media coverage in other states. *See, e.g.*, Brad Cooper, “Kansas House repeals in-state tuition for children of illegal immigrants,” *Kansas City Star*, Feb. 22, 2011, available at: <http://www.mcclatchydc.com/2011/02/22/109174/kansas-house-repeals-in-state.html>.

Brian Lyman, “Immigration Law Makes School Officials Uneasy,” *Montgomery Advertiser*, Jun. 8, 2011, available at: <http://www.montgomeryadvertiser.com/article/20110608/NEWS02/106080307>. The

---

<sup>6</sup> While undocumented immigrants are among those who lack these forms of identification, they are not alone. As we have seen in the context of voter identification laws, many populations (including the elderly, transgender people, students and the poor) have trouble obtaining these forms of identification. *See, e.g.*, Lawyers Committee for Civil Rights Under Law, *Think Getting “Free” ID Is Easy? Think Again!*, available at: <http://www.lawyerscommittee.org/page?id=0046> (documenting instances where people were kept from the polls because of insufficient identification).

possibility that these parents, many of whom have children who are United States citizens, may become enmeshed in the larger controversy involving immigration policy and the backlash against so-called “anchor babies,” is a realistic one.

In addition to the immediate threat facing parents without the required identification, it is impossible to overstate the harm suffered children denied access to an education to which they are entitled. The children will fall behind their peers in ways from which they may never be able to recover. The data that supports the conclusion that children do better the earlier they are exposed to school are overwhelming. Children who participated in New Jersey’s Abbott Preschool program had improved achievement in language arts, literacy, math and science, compared to children not in the Abbott program. Barnett, W. Steven, Kwanghee Jung, Min-Jong Youn, Ellen C. Frede. *Abbott Preschool Program Longitudinal Effects Study: Fifth Grade Follow-Up*. National Institute for Early Education Research, 2013 available at: <http://nieer.org/sites/nieer/files/APPLES%205th%20Grade.pdf>. The benefits transcend education: In one study, children who had received comprehensive educational support services between the ages of three and nine were less likely to have been arrested, have problems with substance abuse, and be on food stamps. Reynolds, Arthur J., Judy A. Temple, Barry A.B. White, Suh-Ruu Ou, and Dylan L. Robertson. *Age 26 Cost-Benefit Analysis of the Child-Parent Center Early Education Program*. *Child Development*, 2011. Available at: <http://ts-si.org/files/doi101111j14678624201001563x.pdf>. Another study showed that children who attended a high-quality preschool as three- and four-year-olds were more likely to graduate from high school, earn higher wages and hold a job, and less likely to have committed a crime as adults. Schweinhart, Lawrence J., Jeanne

Montie, Zongping Xiang, W. Steven Barnett, Clive R. Belfield, and Milagros Nores, *The High/Scope Perry Preschool Study Through Age 40: Summary, Conclusions, and Frequently Asked Questions*, High Scope Press, 2005. Available at: [http://www.highscope.org/file/Research/PerryProject/specialsummary\\_rev2011\\_02\\_2.pdf](http://www.highscope.org/file/Research/PerryProject/specialsummary_rev2011_02_2.pdf).

On the other side of the balance, there will be no hardship to the Defendant to force it to simply *abide by existing law*. Plaintiff does not question Defendant's right to require proof of residency. *N.J.A.C.* 6A:22-3.4(a); *Martinez v. Bynum*, 461 *U.S.* 321, 328 (1983). There are several categories of documents that are explicitly permitted to be considered for that purpose. *N.J.A.C.* 6A:22-3.4(a). There is also no doubt that the law forbids denial of "enrollment based on a failure to provide a particular form or subset of documents without regard to other evidence presented." *N.J.A.C.* 6A:22-3.4(c). That is all that Plaintiff seeks to enjoin: Defendant's policy requiring one of three specific forms of identification, all of which require a Social Security number and/or valid immigration status.

Clearly, the balance of hardships supports immediate injunctive relief.

**C. The restraint does not alter the *status quo ante***

As noted, the *status quo* is that which is permitted by the United States Constitution, the State Constitution, and New Jersey regulations. The Defendant's policy alters the *status quo*, and does so unlawfully. On information and belief, the Defendant did not require photo identification to register children for the 2013-2014 school year or any years prior.

**D. The public interest requires entering injunctive relief**

It is frequently said that in determining whether to order immediate injunctive relief, the public interest must be considered. Indeed, “courts, in the exercise of their equitable powers, ‘may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.’” *Waste Mgmt. of New Jersey, Inc. v. Union County Utilities Auth.*, 399 N.J. Super. 508, 520-21 (App. Div. 2008) quoting *Yakus v. United States*, 321 U.S. 414, 441 (1944).

Here the public interest requires injunctive relief. Individual students and their families have private interests in obtaining the education to which they are entitled. But, there is a societal value in ensuring access to education for all. As the Court explained in *Plyler*:

In addition to the pivotal role of education in sustaining our political and cultural heritage, 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. Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority.

[*Plyler*, 457 U.S. at 221-22.]

All of the factors favor the granting of temporary restraints.

### III. PLAINTIFF HAS STANDING TO BRING THIS CHALLENGE BECAUSE IT IS IMPACTED AS AN ORGANIZATION AND ITS MEMBERS ARE IMPACTED

“New Jersey courts take a broad and liberal approach to standing.” *NJ Citizen Action v. Riviera Motel Corporation*, 296 N.J. Super. 402, 415 (App. Div. 1997). As a result, “where the plaintiff is not simply an interloper and the proceeding serves the public interest, standing will be found.” *In re Quinlan*, 70 N.J. 10, 35 (1976). An organization such as the ACLU-NJ can obtain standing in one of two ways: First, “when it has a real stake in the outcome of the litigation, there is a real adverseness in the proceeding, and the complaint ‘is confined strictly to matters of common interest and does not include any individual grievance which might perhaps be dealt with more appropriately in a proceeding between the individual [member] and the [defendant].’” *NJ Citizen Action*, 296 N.J. Super. at 416 (quoting *Crescent Pk. Tenants Ass’n v. Realty Equities Corp.*, 58 N.J. 98, 109 (1971)). Standing can also be found where an association serves as the representative of its members. “In such a situation, the association must allege that its members, or any of them, ‘are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.’” *In re Ass’n of Trial Lawyers of America*, 228 N.J. Super. 180, 186 (App. Div. 1988) (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

Here, the ACLU-NJ can establish standing under each of the broad theories of organizational standing: the organization itself is impacted in a real sense, as are its members. The ACLU-NJ has a long history of advocating on behalf of immigrant communities. *See, e.g., State v. Gaitan*, 209 N.J. 339 (2012) (addressing retroactive application of *Nunez-Valdéz*, *infra*); *State v. Nuñez-Valdéz*, 200 N.J. 129 (2009)

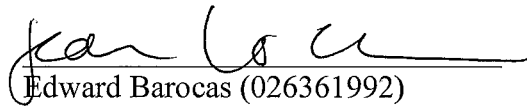
(addressing impact of bad legal advice regarding immigration consequences on the validity of a guilty plea); *ACLU-NJ v. Hudson County, et al.*, 352 N.J. Super. 44 (App. Div.), *certif. denied* 174 N.J. 190 (2002) (seeking information on immigration detainees held in county jails so as to meet with detainees and offer legal assistance); *Riverside Coalition of Business Owners, et al. v. Township of Riverside*, Dkt. No. BURL-L-2965-06 (Law. Div. 2007) (challenge to local ordinance creating penalties for renting to or hiring undocumented immigrants). The ACLU-NJ has also been specifically involved in efforts to ensure access to education for the children of immigrants. *See, e.g., A.Z. v. Higher Education Assistance Authority*, 427 N.J. Super. 389, 398 (App. Div. 2012) (challenge to denial of state financial aid to citizen students of undocumented parents); “1 in 5 NJ Schools Puts Up Barriers for Immigrant Children” available at <http://www.aclu-nj.org/news/2008/09/02/1-in-5-nj-schools-puts-up-barriers-for-immigrant-children> (describing ACLU-NJ advocacy efforts to end discriminatory registration policies for children of undocumented immigrants). In short, the ACLU-NJ has a real and demonstrated organizational interest in changing Butler’s identification policy.

But, even simpler, several ACLU-NJ members are directly impacted by Butler’s challenged policy. *Verified Complaint* ¶¶5, 18-21. Those members would certainly have standing to bring the suit individually and, therefore, the ACLU-NJ has standing to bring the suit on behalf of its members.

## CONCLUSION

For the reasons set forth above, Plaintiff request that his Order to Show Cause be granted, including immediate restraints against further implementation of the Butler Public School District's requirement of photo identification.

Dated: March 7, 2014



Edward Barocas (026361992)

Jeanne LoCicero (024052000)

Alexander Shalom (021162004)

AMERICAN CIVIL LIBERTIES

UNION OF NEW JERSEY

FOUNDATION

P.O. Box 32159

Newark, NJ 07102

(973) 854-1714