IMMIGRATION & THE LAW

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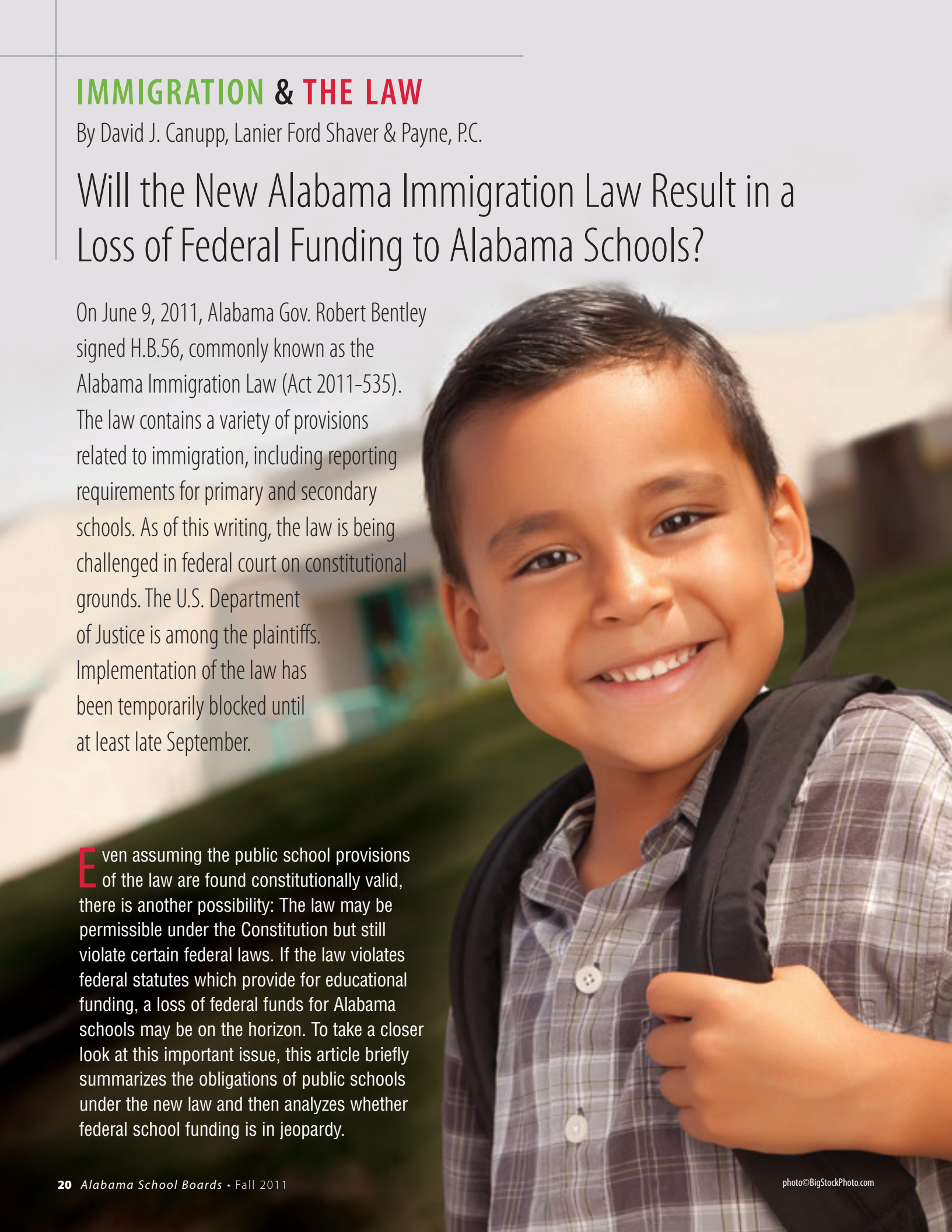
Will the New Alabama Immigration Law Result in a Loss of Federal Funding to Alabama Schools?

On June 9, 2011, Alabama Gov. Robert Bentley signed H.B.56, commonly known as the Alabama Immigration Law (Act 2011-535). The law contains a variety of provisions related to immigration, including reporting requirements for primary and secondary schools. As of this writing, the law is being challenged in federal court on constitutional grounds. The U.S. Department of Justice is among the plaintiffs. Implementation of the law has been temporarily blocked until at least late September.



Even assuming the public school provisions of the law are found constitutionally valid, there is another possibility: The law may be permissible under the Constitution but still violate certain federal laws. If the law violates federal statutes which provide for educational funding, a loss of federal funds for Alabama schools may be on the horizon. To take a closer look at this important issue, this article briefly summarizes the obligations of public schools under the new law and then analyzes whether federal school funding is in jeopardy.

The Public School Reporting Requirements

Section 28 of the new law says a student's parents must present a copy of the student's original birth certificate (or a certified copy) when the student enrolls. If the parents do not have a birth certificate for their child, they have 30 days in which to inform the school of the student's immigration status under federal law. This 30-day period can also be triggered if the school's review of the birth certificate leads it to conclude that the student was born outside of the United States or is the child of an unauthorized alien. In that case, the parents once again have 30 days in which to inform the school of the student's citizenship or immigration status.

To meet the requirement of establishing citizenship or immigration status, the parents may present official documentation or notarized copies of such documentation and sign a statement, under penalty of perjury, that the document states the true identity of the child. Alternatively, if the parents have no documentation and maintain the child is lawfully present in the United States, they may sign a statement, under penalty of perjury, that the child is lawfully present. If no documentation is presented or the parents do not sign a statement, the school is to presume the child is an unauthorized alien for reporting purposes.

Significantly, the bill provides no consequences for parents or guardians who simply fail to present a birth certificate or otherwise fail to comply with the school's efforts to collect data, except that the school official shall presume the student is unauthorized for data collection and reporting purposes. The law also does not make the data collection applicable only to students suspected of being foreign nationals or aliens but rather applies to *all* students enrolling. Furthermore, the bill states that it is to be enforced without regard to race, religion, gender, ethnicity or national origin.

The point of this data collection process is to assist the school in fulfilling its duty to provide the state Board of Education an annual report of all data obtained. The state board is required to submit an annual report to the Legislature. The annual report to the Legislature is apparently intended to be a tool by which the state will compile statistics about money spent on unauthorized aliens and how their presence affects education.

Before the law was temporarily enjoined, the state Department of Education provided guidance to schools on implementing it. But, the law itself provided no details about how schools were to compile and transmit the data to the state Board of Education. Schools have been given no legislative guidance about whether they should report just the number of citizens and non-citizens or also include the identities of the students and parents and the documentation obtained in the process.

The law also provides that "public disclosure" of information that personally identifies any student is unlawful, subject to certain exceptions under federal law. The law also says that any student whose identity is negligently or intentionally disclosed can sue the person or agency that has made the unauthorized disclosure. Unclear is whether "public disclosure" means providing the state Board of Education with the names of unauthorized aliens or whether "public disclosure" is only disclosure of information to anyone outside of the school or to anyone other than employees of the state board.

Analysis of Federal Law

An analysis of federal law raises questions about the legality of the activities mandated by the Alabama law. The Department of Justice filed a federal lawsuit — now merged with a pending lawsuit brought by three church groups and special interest groups — which alleges that the Alabama law "will lead to the harassment of lawfully present and unlawfully present aliens." Furthermore, the U.S. Departments of Justice and Education have recently released a letter to schools noting awareness of "student enrollment practices that may chill or discourage the participation, or lead to the exclusion, of students based on their or their parents' or guardians' actual or perceived citizenship or immigration status" (*May 6, 2011, letter, U.S. Dept. of Justice and U.S. Dept. of Education*). According to the letter, these practices "contravene federal law."

Any discussion of school enrollment practices for aliens must start with the U.S. Supreme Court's decision in *Plyer v. Doe*, 457 U.S. 202 (1982), in which the Court held that a state cannot intentionally deny a public education to aliens on the basis of their national origin or immigration status. This holding has only limited direct application to the Alabama law, which does not expressly exclude aliens from public schools. Indeed, the bill includes no provisions permitting or requiring school officials to deny enrollment to any student, regardless of the information collected.

However, multiple legislators who signed on to the bill have stated openly that the entire point of the law is to intimidate and dissuade unauthorized aliens and their children from seeking a public education. Lawyers frequently refer to the phenomenon created as a result of such a law as "disparate impact" discrimination — in other words, while the law does not expressly prevent a class of persons from exercising their rights, it does disproportionately impact a particular class of persons more directly than others. In this case, the Alabama Immigration Law very likely will discourage unauthorized aliens from seeking a public education, even though it does not prohibit them from doing so. The question thus becomes whether the "disparate impact" of this law on unauthorized aliens is sufficient to violate federal law.

(Continued on page 22)

Continued from page 21

The answer to this question is clear if the analysis is limited to the result under the 14th Amendment, as it was in *Plyer*. The *Plyer* decision rested upon the notion that the 14th Amendment itself prohibited a school from intentionally and expressly excluding unauthorized aliens. After *Plyer*, it is clear schools cannot engage in such activity. However, under several longstanding court decisions, laws that present a mere "disparate impact" do not violate the 14th Amendment. *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 372-73 (2001). Under these decisions, the 14th Amendment is not violated unless a law *directly* authorizes discrimination. Thus, since the Alabama law lacks any provisions directly excluding aliens, it probably does not violate the 14th Amendment. The U.S. Department of Justice appears to recognize this as well, since its recent letter merely cites the *Plyer* case for the proposition that "the undocumented or non-citizen status of a student (or his or her parent or guardian) is irrelevant to that student's entitlement to an elementary and secondary public education."

Apart from the 14th Amendment, the bill may be unconstitutional under Art. I, § 8 of the Constitution if it usurps the federal government's exclusive power to enforce immigration policy. That is exactly what the Department of Justice contends in its recent lawsuit. Still, even assuming the bill does not violate the Constitution by denying enrollment to unauthorized aliens or by interfering with federal immigration policy, a number of other federal laws and regulations proscribing national-origin discrimination may conflict with the bill. Among the relevant laws are Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2006-c; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; and the Equal Educational Opportunity Act of 1974, 20 U.S.C. § 1703. Only litigation will definitively determine whether the bill is actually in conflict with these federal laws. However, there is cause for concern with respect to regulations promulgated under Title VI of the Civil Rights Act.

Title VI applies to any state program receiving federal financial assistance, but that includes most (if not all) public schools within the state of Alabama. Title VI outlaws discrimination based on race, color and national origin, and a section of the law allows federal agencies to issue regulations to carry out the law's directives. The U.S. Supreme Court in *Alexander v. Sandoval*, 532 U.S. 275 (2001) issued an opinion in which it assumed that this regulatory authorization permitted federal agencies to proscribe not just racially discriminatory actions, but also methods of administration which have the *effect* of discriminating against members of a particular national origin "in determining the type of services which will be provided or the class of individuals to be afforded an opportunity to participate." 42 C.F.R. § 42.104(b)(2). In other words, regulations under Title VI appear to prohibit the precise sort of "disparate impact" discrimination that the Alabama Immigration Law arguably creates.

There is good news and bad news arising out of this realization. Court decisions have held that private citizens cannot sue to enforce these regulations, so schools probably will not be inundated with private lawsuits alleging violations of Title VI. *Camellia Therapeutic Foster Agency, LLC v. Alabama Department of Human Resources*, 2007 WL 3287342, at * 3 (M.D. Ala. Nov. 5, 2007). Furthermore, there is some residual controversy as to whether the regulation is valid and consistent with the statute, and there are legitimate questions as to whether the types of data collection activities mandated by the Alabama Immigration Law actually violate the regulation.

The bad news, however, is that — at least based on present law — both the U.S. Departments of Justice and Education *can* enforce the regulations. Furthermore, assuming they establish that the mandates in the Alabama law violate the regulations, the remedy available to those departments is to terminate all or part of the federal funding provided to schools who violate the regulations. There are signs that such action may be on the horizon.

In their recent joint letter, the departments of justice and education take the position that the regulations preclude schools from inquiring into students' citizenship or immigration status. The departments claim that under the regulations, "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." This means the departments may attempt institute enforcement action pursuant to their Title VI regulatory authority. If they do, it takes little analysis to demonstrate that the potential consequences for already underfunded Alabama schools could be dire.

Conclusion

Of course, the result of any potential enforcement action cannot be predicted. The departments of justice and education may or may not take action, and if they do, there are arguments to be made that the Alabama law's requirements fall outside the regulatory proscription. But there are also powerful arguments that the law will result in clear disparate impact discrimination — especially in light of the statements of many legislators who supported and voted for the bill. With all of these uncertainties, however, one thing is plain: many challenges lie ahead for Alabama's schools, and the potential loss of federal funding as a result of the state immigration law only adds to the list. ■

United States of America v. State of Alabama
http://media.al.com/bn/other/U.S.%20Justice%20Department%20lawsuit.pdf

Departments of Justice and Education letter to schools related to immigration
http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201101.pdf

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