

OUT OF THE SHADOWS: UNDOCUMENTED CHILDREN'S ACCESS TO EDUCATION IN THE UNITED STATES AND GERMANY

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Children who do not have a legal immigration status, also known as undocumented children, struggle to receive equal access to equal education in both the United States and Germany. While public education is regulated at the state level in both countries, undocumented children in the United States have a distinct advantage over those in Germany: a federal mandate. In the United States, all public schools must allow all children to enroll, regardless of immigration status, after a decision handed down by the Supreme Court in *Plyler v. Doe*. However, no such federal regulation exists in Germany, which has resulted in constitutional and international human rights violations as individual states in Germany can decide whether or not to allow undocumented children to enroll in local public schools. To rectify these violations, Germany must heed the example of countries that enforce education for all and should pass a federal regulation ending the discrimination and segregation of students based on their immigration status.

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I. INTRODUCTION	167
II. NON-CITIZEN ENTRANTS' ACCESS TO EDUCATION IN GERMANY.....	170
A. The Education System in Germany	170
B. Germany's Commitment to Human Rights	171
C. Access to Free Public Education in Germany	173
III. NON-CITIZEN ENTRANTS' ACCESS TO EDUCATION IN THE UNITED STATES.....	177
A. The History of <i>Plyler v. Doe</i>	179
B. Pushback and Retaliation from the Individual States	180
C. Current Challenges for Undocumented Students in the United States.....	183
IV. MOVING FORWARD: WHAT GERMANY CAN DO TO IMPROVE ACCESS TO EDUCATION FOR UNDOCUMENTED ENTRANTS	187
V. THE FUTURE OF GERMANY AS A LAND OF IMMIGRANTS	194
VI. PREVAILING WISDOM.....	195

I. INTRODUCTION

Education is a universal human right that should be afforded to all children across the globe, regardless of a child's claim to or lack of documented immigration status. While first-world countries generally agree with this premise,¹ some developed nations, such as the United States of America and Germany, are not fulfilling their promise of education for all.² In the United States, all children are entitled to free public education, regardless of whether they are citizens or have a legal immigration status.³ Similarly, while public education in Germany is regulated by the states without significant federal intervention,⁴ Germany has been a signatory to international declarations proclaiming that all children possess the right to an education, including the United Nations Educational, Scientific, and Cultural Organization's Convention Against Discrimination in Education⁵ and the United Nations Convention on the Rights of the Child.⁶ Furthermore, the right to due process is guaranteed

1. See Jody Heymann, *Children's Right to Education: Where Does the World Stand?*, HUFFINGTON POST (Jan. 6, 2015), http://www.huffingtonpost.com/dr-jody-heyman/childrens-right-to-educat_b_6101600.html.

2. See Samuel Loewenberg, *Second-class Citizens: Germany's immigrant children have the worst education record in the developed world*, THE GUARDIAN (Sept. 5, 2006, 6:45 AM), <https://www.theguardian.com/education/2006/sep/05/schoolsworldwide.schools>; see also 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>.

3. Plyler v. Doe, 457 U.S. 202, 202 (1982).

4. See *Survival Guide: Unwelcome in Germany*, HUMANITY IN ACTION, <https://www.humanityinaction.org/knowledgebase/276-survival-guide-unwelcome-in-germany> (last visited Oct. 1, 2017).

5. United Nations Educational, Scientific, and Cultural Organization, Convention Against Discrimination in Education art. 3, Dec. 14, 1960, 429 U.N.T.S. 93 [hereinafter UNESCO]; List of State Parties and Type of Instrument to the, *Convention against Discrimination in Education*, UNESCO (1960), <http://www.unesco.org/eri/la/convention.asp?KO=12949&language=E&order=alpha> (Germany ratified the Convention on July 17, 1968).

6. Annette Sinn et al., *Illegally resident third-country nationals in Germany*, FED. OFF. FOR MIGRATION & REFUGEES, MIGRATION & INTEGRATION RES. DEP'T 58 (2005) (Ger.),

in the United States⁷ and Germany,⁸ and completing secondary education or attending school up until the age of majority is compulsory in both countries,⁹ which further emphasizes the fundamental nature of the right to education. However, access to this right can be difficult to obtain for undocumented entrants in both countries. American states such as California and Alabama have passed measures requiring public school administrators to confirm the immigration status of children who enroll,¹⁰ and in some German states, administrators are required to report instances of undocumented children who attempt to enroll in primary and secondary schools.¹¹ Yet, even when undocumented children do obtain the opportunity to attend school, they are often discriminated against¹² and can quickly fall behind their peers due to a lack of second language acquisition support.¹³

Thus, while both the United States and Germany claim that all children deserve and are entitled to free public education, the children in

https://www.bamf.de/SharedDocs/Anlagen/EN/Publikationen/Forschungsbericht/e/fb02-illegale-drittstaatsangehoerige.pdf?__blob=publicationFile.

7. See generally Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501 (1999).

8. *Rule of Law: Country Studies – Federal Republic of Germany*, DEMOCRACY WEB, <http://democracyweb.org/rule-of-law-germany> (last visited Mar. 3, 2018) (stating that basic due process rights under the Basic Law are similar to those in the U.S. Constitution).

9. *The German School System*, GERMAN WAY & MORE, <https://www.german-way.com/history-and-culture/education/the-german-school-system/> (last visited Oct. 1, 2017).

10. Theresa Davidson & Karlye Burson, *Keep Those Kids Out: Nativism and Attitudes Toward Access to Public Education for the Children of Undocumented Immigrants*, 16 *J. LATINOS & EDUC.*, 41, 41 (2016).

11. Heidi Schmidt, *Illegals in Germany Face Similar Problems as Those in US*, DEUTSCHE WELLE (May 2, 2006), <http://www.dw.com/en/illegals-in-germany-face-similar-problems-as-those-in-us/a-1987607>.

12. Loewenberg, *supra* note 2.

13. See generally Jessica Sperling, *Improving Immigrants' Access to Public Services in the United States: Language Access Policy and Policy Implementation*, 10 *CURRENT ISSUES IN LANGUAGE PLANNING* 405, 407 (2009).

the shadows are being left behind.¹⁴ The landmark decision in *Plyler v. Doe* ensures that all children in the United States have the right to public education and must be allowed to enroll in the public school system.¹⁵ This federal mandate handed down by the Supreme Court protects illegal entrants' access to education as state and local level administrators are forced to allow children to enroll regardless of their immigration status.¹⁶ However, no such federal protection provision exists in Germany, and without a federal directive, state-level administrators have the authority to implement policies¹⁷ that instill fear and deter undocumented children and their parents from coming forward and attempting to obtain a basic human right.¹⁸

Therefore, it is imperative that Germany implement a federal mandate stating that all children in the country have the right to free, public education and must be allowed to enroll in the public-school system regardless of immigration status, or this extremely vulnerable subsection of the immigrant population will continue to suffer a violation of their human rights. This article presents a brief overview of the rights and barriers regarding access to public education that children without a documented immigration status have in both the United States and Germany¹⁹ while shining a spotlight on the deficiencies littered throughout Germany's policies.²⁰ These undocumented children are currently living in the shadows, yearning for an opportunity to step forward into the light and receive an education equal to that of citizen children. Yet, Germany has been ranked at the very bottom of a study comparing seventeen Western countries when it comes to offering access

14. See Loewenberg, *supra* note 2; see also Walker, *supra* note 2; See generally Sperling, *supra* note 13, at 407.

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

16. See Nancy Manougian, *Plyler v. Doe: Equal Protection for Illegal Aliens*, 12 CAP. U. L. REV. 143, 150–51 (1982).

17. *Survival Guide: Unwelcome in Germany*, HUMANITY IN ACTION, <https://www.humanityinaction.org/knowledgebase/276-survival-guide-unwelcome-in-germany> (last visited Oct. 1, 2017).

18. Schmidt, *supra* note 11.

19. See Loewenberg, *supra* note 2; see also Walker, *supra* note 2.

20. See Schmidt, *supra* note 11.

and quality education to non-citizen children.²¹ While the United States has a far from perfect immigration system, Germany could heed some of the directives implemented by the United States federal government to ensure that all children are allowed access to education.²²

II. NON-CITIZEN ENTRANTS' ACCESS TO EDUCATION IN GERMANY

A. The Education System in Germany

The public education system in Germany “is the responsibility of each of the 16 German states” (better known as the sixteen *Länder* in German) and is regulated without much interference from the federal government.²³ Article 70 of the German constitution states that each “*Länder* shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation.”²⁴ Thus, the power to pass legislation regarding education lies with the individual states.²⁵ The *Kommunen*, or local authorities, have some involvement as well as they determine where schools will be located, the capacity of each school, and who can attend local schools based on the student’s home address.²⁶

However, the Standing Conference of the Ministers of Education and Cultural Affairs, or Kultusministerkonferenz (KMK), “is a national conference of state education ministers” that coordinates education at the national level, similar to the United States Department of Education.²⁷ The KMK “is a consortium of ministers responsible for education and schooling, institutes of higher education and research and cultural affairs, and in this capacity formulates the joint interests and objectives of all 16

21. See Loewenberg, *supra* note 2.

22. See Manougian, *supra* note 16.

23. *The German School System*, *supra* note 9.

24. Udo Michallik, *The Education System in the Federal Republic of Germany 2015/2016*, SECRETARIAT OF THE STANDING CONF. OF THE MINISTERS OF EDUC. & CULTURAL AFF. OF THE LÄNDER IN THE FED. REPUBLIC OF GER., Oct. 2016, at 16.

25. *Id.*

26. *Id.* at 104.

27. *The German School System*, *supra* note 9.

federal states.”²⁸ The KMK is a consortium made up of members from each of the states²⁹ that develops and publishes nationwide standards and curricula for both primary and secondary education.³⁰

Germany’s public school system is extensive, and after primary school, students are placed on one of five different tracks, which determines what type of secondary school they will attend.³¹ German students complete the compulsory portion of their academic journey when they finish lower secondary education, which usually occurs around the age of fifteen.³² Once students enter upper secondary school, they will pursue a course of general education, vocational education, or a combination of both based upon the educational pathway on which they are placed.³³ The track onto which a student is placed is based upon his or her achievement and performance at the time of completing lower secondary education.³⁴

B. Germany’s Commitment to Human Rights

While parts of Germany have been seen as a haven for refugees and undocumented immigrants, as well as “a model for integration,”³⁵ the German education system is not so all-inclusive. Belgian, Italian, and Dutch legislation all specifically reference the right to education for undocumented children, and references to “all children” in French,

28. *The Standing Conference of the Ministers of Education and Cultural Affairs (KMK)*, KULTUSMINISTER KONFERENZ, <https://www.kmk.org/kmk/information-in-english/standing-conference.html> (last visited Jan. 14, 2018).

29. *See id.*

30. Michallik, *supra* note 24, at 110.

31. *See The German School System*, *supra* note 9; *see also* NAT’L INST. ON STUDENT ACHIEVEMENT, CURRICULUM, & ASSESSMENT, U.S. DEP’T OF EDUC., *THE EDUCATIONAL SYSTEM IN GERMANY: CASE STUDY FINDINGS 5–10* (Mark A. Ashwill ed., 1999).

32. *See* Michallik, *supra* note 24, at 25.

33. *See id.* at 117.

34. *See id.*

35. Jan van der Made, *Immigration an Issue in Germany’s Refugee Haven*, RFI (Sept. 20, 2017), <http://en.rfi.fr/europe/20170920-immigration-issue-germanys-refugee-haven>.

Spanish, and Polish legislation include those who are undocumented.³⁶ However, the dossier published by the German KMK in 2015 qualifies access to education for “all” by following it with the word “citizens.”³⁷ Thus, children residing in Germany without proper paperwork to give them a legal status in the country are often discriminated against and either reported to federal officials³⁸ or not allowed to enroll at all when they present themselves at a public school.³⁹

Germany has ratified numerous international human rights treaties that declare the right to education to be universal and that outline policy for implementing legislation.⁴⁰ Specifically, Germany was a signing member of the UNESCO Convention Against Discrimination in Education, which states that signing parties undertake “to give foreign nationals resident within their territory the same access to education as that given to their own nationals.”⁴¹ The UNESCO Convention also stipulates that signatories should “ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions.”⁴² Furthermore, Germany is a signatory to the United Nations Convention on the Rights of the Child (CRC), which declares that access to both primary and secondary school should be free and available to all children.⁴³ However, the rights and obligations set forth in these international treaties have not been viewed as enforceable by the federal government of Germany.⁴⁴ After signing the CRC, “the federal government [of Germany] has added some explanatory remarks to the effect that, with regard to the rights and duties, Germans and foreigners as well as persons with or without residence status can be

36. Eve Geddie, *Undocumented Migrants’ Right to Health and Education in Europe: Protection Needs vs Immigration Control*, in EUR. SOC. WATCH REP. 29, 30 (2009).

37. Michallik, *supra* note 24, at 24.

38. *See* Schmidt, *supra* note 11.

39. *See* Sinn, *supra* note 6, at 51.

40. Vernor Muñoz (Special Rapporteur on the Right to Education), *Mission to Germany*, U.N. Doc. A/HRC/4/29/Add.3 (Mar. 9, 2007).

41. UNESCO, *supra* note 5, art. 3.

42. *Id.*

43. Sinn, *supra* note 6, at 58.

44. *See id.*

differentiated.”⁴⁵ Thus, the federal government has left the decision up to the individual states to determine whether or not they will enroll students without a documented legal status in their public schools.⁴⁶ There has not yet been any federal requirement, policy, or even encouragement directed at ensuring that the country abides by its obligation to allow all children in all states the opportunity to access free public education, and states are currently free to choose if, when, and where undocumented children are allowed to attend school.⁴⁷

C. Access to Free Public Education in Germany

Although there are some districts in Germany that will allow all students to enroll, many undocumented children live in the shadows and never even make it to the schoolhouse door for fear that they or their parents will be reported to federal authorities.⁴⁸ In some states, if a child attempts to enroll in a public school without a proper legal residence permit, school administrators are required to notify local law enforcement officials.⁴⁹ While this obligation to report could apply to all school officials that come into contact with an undocumented child, some states place the duty only on the official who determines whether or not the child is admissible.⁵⁰ For example, the law in Berlin specifically states that only administrators who deal with admissions have this obligation, and teachers or other school employees who may come to know that a child is undocumented are not required to contact the authorities.⁵¹ However, since it is safe to surmise that most children will encounter an admissions coordinator during the registration process, knowing that even one person has the obligation to report them is enough to scare many parents and children from attempting to access education.⁵²

45. *Id.*

46. *See id.*

47. *See id.*

48. *See* Schmidt, *supra* note 11.

49. *Id.*

50. *See* Sinn, *supra* note 6, at 51.

51. *Id.*

52. *See* Schmidt, *supra* note 11.

Thus, most undocumented children do not enroll in public schools, as the administration can immediately report them⁵³ and removal proceedings could be initiated.⁵⁴

Some legal experts have suggested that this obligation to report undocumented children goes too far and that school administrators can circumvent this duty if they so desire.⁵⁵ One such expert claims that “heads of schools also exercise a[n] ‘educational-pedagogical’ profession[,] and therefore inquiries about the residence status are not necessary to perform their tasks.”⁵⁶ Since these school administrators would only learn about a child’s residence status “as part of the execution of their tasks,” then “sufficient grounds for the obligation to forward information” do not exist.⁵⁷ However, if the administrator does take this approach in support of the children, he or she will need to be mindful of the possible penal consequences that could be imposed if undocumented students are admitted to his or her school.⁵⁸

Furthermore, homeschooling is illegal across Germany, which makes access to education even harder to acquire for undocumented children.⁵⁹ In 1919, Germany made attending school compulsory for all children, and in 1938, homeschooling was banned throughout the country.⁶⁰ The German government has claimed that allowing parents to homeschool their children creates two different “parallel societies” that lack a cohesive amalgamation of German traditions, values, and skills needed in the workforce.⁶¹ The fear demonstrated by the government “is that without public schooling, immigrants would not be able to integrate into

53. See *id.*

54. Edith Palmer, *Citizenship Pathways & Border Protection: Germany*, L. LIBR. OF CONGRESS (July 15, 2015), <https://www.loc.gov/law/help/citizenship-pathways/germany.php>.

55. See Sinn, *supra* note 6, at 51.

56. *Id.*

57. *Id.*

58. See *id.* at 52.

59. *The German School System*, *supra* note 9.

60. Franco Ordoñez, *Asylum for Homeschooling Enters Immigration Debate*, KANSAS CITY STAR (Apr. 8, 2015, 3:41 PM), <http://www.kansascity.com/news/politics-government/article17879258.html>.

61. *Id.*

German society, and that without full integration, the nation as a whole suffers.”⁶² Thus, while homeschooling could be an answer for some undocumented children, the German government’s ban on the practice pushes this population to seek education from administrators who could thrust them into deportation proceedings.

Even if undocumented children, and more importantly their parents, ultimately decide to face their fears, interact with a public-school admissions administrator, and are allowed to enroll, these children will still face enormous obstacles as they attempt to access an equal education.⁶³ Throughout Germany, immigrant children are placed in separate classes from native German-speaking children, which greatly hinders integration.⁶⁴ In Berlin, the decision to segregate children is based “on the putative grounds that their German language skills are inadequate for regular classes,” even when the children do have some proficiency in German as a second language.⁶⁵ When undocumented children are placed in these separate classrooms, they are not provided with sufficient additional second language acquisition support to allow them to learn, improve, and achieve admission to the regular classes.⁶⁶ Additionally, these classes offer “vastly inferior education to regular classes,” which discriminates against and stigmatizes the undocumented students, “undermine[s] their potential to integrate and participate fully in German society, and violate[s] Germany’s obligations to prohibit discrimination in education” in accordance with the international treaties that the country has signed.⁶⁷

Yet, Germany is consistently failing to meet its international obligations, and a study conducted by the Organization for Economic Cooperation and Development (OECD) indicated that immigrant children in Germany have “the worst education record in the developed

62. *Id.*

63. *See Submission to the Universal Periodic Review: Germany*, OPEN SOC’Y JUST. INITIATIVE, Apr. 22–May 3, 2013, at 2.

64. *See id.*

65. *Id.*

66. *Id.*

67. *Id.*

world.”⁶⁸ The study compared the performance of immigrant school children in seventeen industrialized countries, and of all the countries studied, Germany ranked last.⁶⁹ In most countries, second-generation students “show[ed] higher levels of proficiency compared to first-generation [immigrant] students.”⁷⁰ However, in Germany, second-generation students consistently performed below their first-generation peers.⁷¹

These results may be at least partially attributable to the “segregated performance tracks” that Germany students are placed into as early as age ten.⁷² Educational experts have found that immigrant students are three times more likely to drop out of high school than students who were born in Germany.⁷³ Furthermore, in some German states, immigrant children comprised 60% of students enrolled in *hauptschulen*, the lowest level of high school, which is reserved for the poorest performing students.⁷⁴ Educational experts have suggested that Germany’s continued segregation and “failure to integrate its immigrant population” has led to a “culturally biased” system that inhibits the growth and prosperity of one of the nation’s most vulnerable populations.⁷⁵

While similar problems also exist in other industrialized countries, Germany could drastically improve the individual access and quality of education received by non-citizen children residing inside the country by implementing a federally mandated access provision as has been done in the United States. Although the system providing education for non-citizen and immigrant children in the United States is far from ideal,⁷⁶

68. See Loewenberg, *supra* note 2; see generally OECD, WHERE IMMIGRANT STUDENTS SUCCEED: A COMPARATIVE REVIEW OF PERFORMANCE AND ENGAGEMENT IN PISA 29–54 (OCED Publishing, 2003) [hereinafter PISA STUDY].

69. See Loewenberg, *supra* note 2.

70. See PISA STUDY, *supra* note 68, at 37.

71. *Id.* at 38.

72. See Loewenberg, *supra* note 2.

73. *Id.*

74. *Id.*

75. *Id.*

76. See generally MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND 2 (N.Y. Univ. Press, 2012).

Germany could look to the United States for an example of how a decision at the federal level can increase access to education⁷⁷ and help ensure that the country continually meets its human rights obligations.⁷⁸

III. NON-CITIZEN ENTRANTS' ACCESS TO EDUCATION IN THE UNITED STATES

As in Germany, compulsory education of children and adolescents in the United States is regulated by state and local governments.⁷⁹ Each state passes its own laws regulating curriculum, attendance, personnel, and finances—all of which fall under the state's own department of education.⁸⁰ The state's department of education usually oversees many small local school districts, which usually cover one city or county.⁸¹ These local school districts are governed by a group of community members known as a school board, and the board is “responsible for coordinating education policies, planning for changing educational needs in the community, and often even establishing programs and curricula” based on community consensus.⁸² Public school expenses are usually paid for by the collection of local property taxes, which further emphasizes the involvement of the local community in determining the policies implemented by the local school district.⁸³

However, the United States federal government does play a role in the education of the country's children and contributes approximately 10% of the national education budget each year.⁸⁴ Under the United States federalist form of government,⁸⁵ state laws are subordinate to laws

77. See *Plyler v. Doe*, 457 U.S. 202, 239–40 (1982).

78. Sinn, *supra* note 6, at 16; see also UNESCO, *supra* note 5.

79. Antonelle Corsi-Bunker, *Guide to the Education System in the United States*, U. MINN. INT'L STUDENT & SCHOLAR SERVS., <https://iss.umn.edu/publications/USEducation/2.pdf> (last visited Oct. 28, 2017).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Federalism is defined as “distribution of power in a federation between the central authority and the constituent units (as states) involving especially the allocation of

promulgated by the federal government,⁸⁶ and states are bound by United States Supreme Court decisions.⁸⁷ Thus, while the federal government's role in education is smaller than the state's, the federal role has historically been a type of "emergency response system," which includes "filling gaps in State and local support for education when critical national needs arise."⁸⁸

Whether local and state ordinances concerning immigrants and their children can be enforced is an issue that is still currently being debated. Some immigration scholars argue that "local ordinances aimed at general immigration functions are unconstitutional as a function of exclusive federal preemption powers."⁸⁹ This is a position with which the Supreme Court of the United States has agreed.⁹⁰ In *Arizona v. US*, the Court held that the individual states were precluded from regulating conduct in the field of immigration, as the federal government exclusively has that responsibility.⁹¹ Although states continue to attempt to control the effects of the *Plyler* decision by enacting their own local legislation aimed at keeping non-citizen children out of public schools, a number of common law decisions have made it clear that the field of immigration, including reporting and privileges related to immigration status, is left to the federal government.⁹² Yet, "[b]ecause the definition of immigration regulation is elusive, this principle of exclusive federal immigration

significant lawmaking powers to those constituent units." *Federalism*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2014).

86. See U.S. CONST. art. VI, para. 2. The doctrine of preemption goes beyond the scope of this article, but it is important to note that state departments of education must comply with federal laws. *Id.*

87. See *James v. City of Boise*, 136 S. Ct. 685, 686 (2016). "The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation." *Id.*

88. *The Federal Role in Education*, U.S. DEP'T EDUC., <https://www2.ed.gov/about/overview/fed/role.html> (last visited Oct. 28, 2017).

89. See *Olivas*, *supra* note 76, at 36–37.

90. See *Arizona v. United States*, 567 U.S. 387, 394–95 (2012).

91. *Id.* at 395, 416.

92. See *Olivas*, *supra* note 76, at 36–37.

authority defies precise application,” and local governments will likely continue to attempt to enforce their own legislation.⁹³

A. The History of *Plyler v. Doe*

In 1975, one critical national need was brought to light when Texas formally began discriminating against a class of children. With the passing of the Texas Education Code Section 21.031, the Texas legislature revised its education laws in an effort to keep undocumented children from attending public schools.⁹⁴ This new law withdrew funding from local school districts that was being used to educate children without a legal immigration status.⁹⁵ Additionally, the law stated that only a child who was a citizen or a legally admitted non-citizen would be admitted to attend the public schools in Texas for free.⁹⁶ The Texas legislature claimed that the law was meant to preserve the state’s resources for those students lawfully present,⁹⁷ but the consequential disparate treatment of children was quickly challenged in both state⁹⁸ and federal courts.⁹⁹

The main litigation surrounding this issue, *Plyler v. Doe*, was a class action suit filed on behalf of school-age children of Mexican origin who could not establish that they had a legal immigration status in the United States and were therefore unable to attend public school in Texas.¹⁰⁰ The action challenged the constitutionality of the Texas law under the Equal Protection Clause of the Fourteenth Amendment, alleging that, under Section 21.031, Texas was denying undocumented children equal protection by refusing to allocate funding for their education.¹⁰¹ The

93. HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 69 (Oxford University Press, 2014).

94. Manougian, *supra* note 16, at 144–45 n.13.

95. *Id.*

96. *Id.*; see generally TEX. EDUC. CODE ANN. § 21.031 (WEST 1975).

97. Manougian, *supra* note 16, at 145 n.13.

98. See *Hernandez v. San Antonio Indep. Sch. Dist.*, 598 S.W.2d 334, 335 (Tex. Civ. App. 1980).

99. See *Plyler v. Doe*, 457 U.S. 202, 205 (1982).

100. *Id.* at 206.

101. *Id.* at 215–16.

Supreme Court granted certiorari and found education to be a vital matter of civic importance.¹⁰² The Court held that the “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.”¹⁰³ Furthermore, the Court found that Texas did not have a substantial state interest in denying education to undocumented children and thus held that every child in the United States has right to free public education.¹⁰⁴

B. Pushback and Retaliation from the Individual States

In the wake of *Plyler*, backlash was widespread, and states began trying to establish new ways of keeping undocumented children out of their public schools.¹⁰⁵ Mere hours after the ruling, John G. Roberts, an assistant attorney general at the time, wrote a memo criticizing the Department of Justice’s failure to file an amicus brief in support of Texas and encouraging judicial restraint.¹⁰⁶ In 1994, California passed a law known as Proposition 187 that “prohibited public schools from admitting any student not lawfully present in the United States and required school authorities to notify immigration authorities if they suspected a violation.”¹⁰⁷ This law was immediately challenged, and in 1995, a California district court found that Proposition 187 was unconstitutional and in direct conflict with the *Plyler* decision.¹⁰⁸ Fifteen years later, Arizona attempted to pass a bill that would mandate all of the state’s 1,500 school districts to collect data on students who could not prove that

102. *Id.* at 221.

103. *Id.* at 221–22.

104. *Id.* at 230.

105. Udi Ofer, *Protecting Plyler: New Challenges to the Right of Immigrant Children to Access a Public School Education*, 1 COLUM. J. RACE & L. 187, 195–96 (2012).

106. *Id.* at 195.

107. Davidson & Burson, *supra* note 10, at 41.

108. *See* League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997).

they were lawfully present in the United States.¹⁰⁹ The bill would have also required the state's Department of Education to report all of the costs incurred by allowing undocumented children access to public education.¹¹⁰

Alabama passed the similar, yet much stricter, HB-56 in 2011, which required school administrators to determine the citizenship or immigration status of all children who attempted to utilize the public school system.¹¹¹ Additionally, HB-56 stated that undocumented students would not be able to attend any public universities in the state after graduating from high school.¹¹² The passing of HB-56 led more than 13% of Latino students in Alabama to withdraw from public schools.¹¹³ After a two year legal battle with the Southern Poverty Law Center, the government of Alabama agreed to cease enforcement of certain provisions of HB-56, including requiring public schools to verify students' immigration status, which "effectively gutted" the law.¹¹⁴ However, some provisions of HB-56 are still enforceable today.¹¹⁵

Moreover, even a state that has been considered to be a natural sanctuary for undocumented immigrants¹¹⁶ began introducing legislation to bypass the *Plyler* decision.¹¹⁷ In 2011, Maryland introduced legislation that would require public school administrators to report the number of students who did not provide adequate documentation to prove that their

109. Ofer, *supra* note 105, at 219.

110. *Id.*

111. Davidson & Burson, *supra* note 10, at 41, 49.

112. Julia Preston, *In Alabama, A Harsh Bill for Residents Here Illegally*, N.Y. TIMES (June 3, 2011), <http://www.nytimes.com/2011/06/04/us/04immig.html>.

113. Davidson & Burson, *supra* note 10, at 41.

114. *SPLC Victorious Against Alabama Anti-Immigrant Law*, S. POVERTY L. CTR., <https://www.splcenter.org/news/2013/10/29/splc-victorious-against-alabama-anti-immigrant-law> (last visited Oct. 28, 2017).

115. Connor Sheets, *Alabama's 2011 Anti-Immigrant Law HB-56 Still on Books, Gets New Life Under Trump*, AL.COM (Mar. 24, 2017), http://www.al.com/news/birmingham/index.ssf/2017/03/hb_56_alabamas_2011_anti-immig.html.

116. Sabrina Tavernise, *Sanctuary Bills in Maryland Faced a Surprise Foe: Legal Immigrants*, N.Y. TIMES (May 8, 2017), <https://www.nytimes.com/2017/05/08/us/legal-immigrants-who-oppose-illegal-immigration.html>.

117. *See* Ofer, *supra* note 105, at 219.

presence in the United States was lawful.¹¹⁸ The Senator who introduced the bill reportedly wanted “to send the federal government a message” that it, not the states, should be required to pay for the public education of undocumented children.¹¹⁹ However, the Maryland State Board of Education struck down the bill as lacking a valid public purpose under the *Plyler* decision.¹²⁰

Yet, the Supreme Court decision reigns over state and local regulations, and as a result of *Plyler*, public schools in the United States may not deny enrollment to any child based on immigration status, attempt to dissuade undocumented parents from enrolling their children in public schools, require social security numbers for enrollment, or make inquiries or require parents or students to disclose their immigration status in order to enroll.¹²¹ In fact, if school administrators ask for a social security number to be provided for a child, they are obligated to state that providing the number is voluntary.¹²² While local schools are allowed to ask for proof of residency in a particular school zone, they are “advised not to inquire about a student’s immigration or citizenship status, because that information, ‘is not relevant to establishing residency in the district, and inquiring about it in the context of establishing residency is unnecessary and may have a chilling or a discouraging effect on student enrollment.’”¹²³ Furthermore, school principals and administrators do not have an obligation or the right to attempt to enforce federal immigration laws while admitting, enrolling, or educating students.¹²⁴ Yet, even with all of these protections, accessing

118. *Id.*

119. *Id.*

120. *Id.* at 220.

121. *Immigrant Students’ Rights to Attend Public Schools – School Opening Alert 2017*, INTERCULTURAL DEV. RES. ASS’N, <https://www.idra.org/resource-center/immigrant-students-rights-attend-public-schools-school-opening-alert-2017/> (last visited Oct. 1, 2018).

122. Rebecca Kaplan, *Feds to Schools: You Must Accept Children of Undocumented Immigrants*, CBS NEWS (May 8, 2014), <https://www.cbsnews.com/news/feds-to-schools-you-must-accept-children-of-undocumented-immigrants/>.

123. *Id.*

124. *See id.*

free public education is still a challenge for undocumented children in the United States.¹²⁵

C. Current Challenges for Undocumented Students in the United States

While the *Plyler* decision was an enormous victory for undocumented children and human rights advocates alike, the United States Departments of Justice and Education have had to continually fight criticism and remind local school administrators that children cannot be barred from enrollment based on their immigration status.¹²⁶ As many members of the American public believe that taxpayers should not be forced to pay for the education of undocumented children,¹²⁷ some local school administrators attempt to circumvent the system by discouraging or completely barring the enrollment of children without legal status, forcing the federal government to intervene and take action.¹²⁸ However, even when undocumented children are allowed to enroll in school, they often quickly fall behind their peers due to their lower proficiency in English and lack of second language acquisition support.¹²⁹

Since the *Plyler* decision, local school administrators have faced the decision of whether to follow the law or to please their constituents. These constituents can often be tainted by ideas of nativism, which “reflects a concern about how American an individual is” and includes ideas such as resistance to individuals who appear foreign, a desire to maintain a homogeneous native culture, and “the idea that foreign culture

125. See generally Garance Burke & Adrian Sainz, *AP Exclusive: Migrant Children Kept From Enrolling in School*, ASSOCIATED PRESS (May 2, 2016), <https://apnews.com/5a144ff0a59144328d02c115036815f0/ap-exclusive-migrant-children-kept-enrolling-school>.

126. Kaplan, *supra* note 122.

127. Genevieve Wood, *Undocumented Children a Drain on U.S. Schools*, HERITAGE FOUND. (Sept. 9, 2014), <http://www.heritage.org/education/commentary/undocumented-children-drain-us-schools>.

128. See Walker, *supra* note 2.

129. See Sperling, *supra* note 13.

is both inferior to and threatening to the native culture.”¹³⁰ These feelings of cultural nativism can infect a community and influence decisions affecting undocumented children’s access to equal education.¹³¹ As local school board members are elected by the community that they serve,¹³² some may find local interests to be worthier of implementation than federal directives, which is demonstrated in part by the massive amount of state legislation enacted after *Plyler*.¹³³ Thus, each academic year, undocumented children are the victims of widespread scare tactics meant to keep them underground¹³⁴ or are turned away from public schools, even though it is their right to attend.¹³⁵

Local officials have attempted to keep undocumented children out of their school systems by requiring hard (if not impossible) to locate documentation, discriminating against students based on age, and segregating children from their U.S. citizen peers.¹³⁶ Schools in the U.S. have barred immigrant youth from enrolling in high schools because they could not locate their previous transcripts or were deemed “too old to graduate on time.”¹³⁷ Additionally, some schools enforce “rigid residency and guardianship requirements,” and have practices of sending undocumented children to alternative education programs meant for American students who have caused problems in the classroom, even if the child has shown no signs of behavioral issues.¹³⁸

Even if undocumented children pass through all of these obstacles and are allowed to enroll in a public school, they are still faced with a daunting uphill battle when it comes to accessing quality education.

130. Davidson & Burson, *supra* note 10, at 42.

131. *See generally id.*

132. *Frequently Asked Questions about School Boards and Public Education*, NAT’L SCH. BOARDS ASS’N, <https://www.nsba.org/about-us/frequently-asked-questions> (last visited Nov. 13, 2017).

133. *See discussion supra* Section II.B.

134. Ray Sanchez, *After ICE Arrests, Fear Spreads Among Undocumented Immigrants*, CNN (Feb. 12, 2017), <http://www.cnn.com/2017/02/11/politics/immigration-roundups-community-fear/index.html>.

135. *See Walker, supra* note 2.

136. *Id.*

137. *See id.*

138. *Id.*

During the 2014-2015 academic year, 9% of students enrolled in public schools across the United States, approximately 4.6 million students, were English language learners.¹³⁹ According to the Glossary of Education Reform, English language learners (ELLs) are defined as “students who are unable to communicate fluently or learn effectively in English, who often come from non-English-speaking homes and backgrounds, and who typically require specialized or modified instruction in both the English language and in their academic courses.”¹⁴⁰ The number of ELLs in public schools in the United States has risen over the past ten years with at least one state, California, reporting over 22% of students in its public-school system as being ELLs.¹⁴¹ This number is expected to continue to rise, and by 2030, it is predicated that two out of every five students—a staggering 40% of children enrolled in public education—will be learning English as a second language.¹⁴²

However, even with ever-increasing numbers of ELLs appearing in the classroom, public schools across the country have not implemented adequate policies, directives, or programs to assist this growing population.¹⁴³ While some federal policies have been put into place to help ELLs,¹⁴⁴ they often are not being executed effectively.¹⁴⁵ President Bill Clinton signed an executive order in 2000 requiring improved access to federal services and programs for parents and students with limited English abilities.¹⁴⁶ Additionally, the law known as No Child Left Behind

139. *Fast Facts: English Language Learners*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=96> (last visited Jan. 14, 2018).

140. *English Language Learner*, GLOSSARY EDUC. REFORM (Aug. 29, 2013), <http://edglossary.org/english-language-learner/>.

141. *Fast Facts: English Language Learners*, *supra* note 139.

142. Nirvi Shah, *Educating Immigrant Students a Challenge in U.S., Elsewhere*, EDUC. WEEK (Jan. 9, 2012), <https://www.edweek.org/ew/articles/2012/01/12/16populations.h31.html>.

143. *See id.*

144. *Id.*

145. Kate Royals, *Schools Struggle to Serve Non-English Speaking Students*, MISS. TODAY (Aug. 2, 2016), <https://mississippitoday.org/2016/08/02/non-english-speaking-students-on-the-rise-in-miss.>

146. Shah, *supra* note 142.

was passed in 2002 and required schools and states to track the performance of ELLs and compare their performance on standardized tests to the performance of their native English speaking peers.¹⁴⁷ However, these policies do not appear to require enough action, as recent investigations into Los Angeles, Philadelphia, and Boston public schools have all shown disparities between the quality of education ELLs are currently receiving as compared to native English speakers.¹⁴⁸ The New York City United Federation of Teachers claims that the entire city is out of compliance with New York's new regulations to help ELLs, as thousands of teachers still needed to be hired to implement the new policies.¹⁴⁹ Similarly, in Mississippi, a high school in the Desoto County School District employs only one English Learner Specialist to assist all of the ELLs in the school, which includes an eclectic group of students who speak a variety of native dialects.¹⁵⁰ Without adequate staff to instruct the students—which includes a lack of funding to hire specialized bilingual teachers—policy reforms and new regulations fail to ameliorate the state of ELL education in the United States.¹⁵¹

While undocumented children still face challenges when they attend public schools in the United States, the win in *Plyler v. Doe* was monumental, as no American public school can deny a child access based on immigration status, unlike schools in other first-world countries. Efforts to deny children access to education based on their immigration status in the United States have been challenged in court and ultimately struck down,¹⁵² and districts across the country are implementing new regulations to ensure that equal access ultimately produces an equal education.¹⁵³ Thus, while challenges still remain, the

147. *Id.*

148. *Id.*

149. Elizabeth A. Harris, *New York Schools Struggle with New Rules to Help Students Learning English*, N.Y. TIMES (May 8, 2016), <https://www.nytimes.com/2016/05/09/nyregion/new-york-schools-struggle-with-new-rules-to-help-students-learning-english.html>.

150. Royals, *supra* note 145.

151. Harris, *supra* note 149.

152. See *SPLC Victorious Against Alabama Anti-Immigrant Law*, *supra* note 114; *Sheets*, *supra* note 115.

153. See Harris, *supra* note 149.

passage of federal and local laws in conjunction with common law decisions that require undocumented children to be allowed to attend public schools is a step in the right direction for a global first-world policy on access to education.

IV. MOVING FORWARD: WHAT GERMANY CAN DO TO IMPROVE ACCESS TO EDUCATION FOR UNDOCUMENTED ENTRANTS

Germany must make fulfilling its international commitments to education for all a national priority, and to ensure that each of the individual states abide by the same standards and regulations, the federal government and the KMK must lead the way. School administrators should not be required or even allowed to report undocumented children or their parents to federal immigration authorities for simply attempting to register in a free public school. However, for this to be a reality, a federal regulation must be implemented, or each *Länder* will be able to continue to use its power to determine education legislation¹⁵⁴ to discriminate against undocumented children.¹⁵⁵ Additionally, as the KMK has been tasked with maintaining quality assurance around the country, the consortium will need to ensure that each state is abiding by any federal regulation passed regarding admission and integration of undocumented children into the public school system.¹⁵⁶

Germany must take a stand at the federal level and ensure that the country is meeting its national and international obligations to human rights and due process by mandating that all children be allowed to enroll in public schools. In the United States, there is a “principle that school districts, as state actors, shall not deprive a student of liberty or property without due process of law, [and] courts have expanded for more than four decades the Fourteenth Amendment’s due process protection of public school students.”¹⁵⁷ In *Goss v. Lopez*, the United States Supreme Court ruled that students have a “legitimate entitlement to a public

154. Michallik, *supra* note 24, at 16.

155. Schmidt, *supra* note 11.

156. See generally Michallik, *supra* note 24, at 223.

157. Melissa Frydman & Shani M. King, *School Discipline 101: Students’ Due Process Rights in Expulsion Hearings*, U. Fla. Levin C. L. 370, 370 (2006).

education as a property interest,” and that property interest cannot be taken away from a student without proper due process of law.¹⁵⁸ While the German Constitution, known as the “Basic Law of Germany,” also mandates due process protections,¹⁵⁹ non-citizen students are still being denied access to education without any type of hearing or legally valid reasoning.¹⁶⁰ This presents serious due process issues, as each state in Germany has the ability to determine whether or not to admit a non-citizen child to enroll in a public school,¹⁶¹ and this constitutional violation must be addressed at the federal level as Germany moves forward with improving access to education for undocumented youth.

Furthermore, Germany should take the recommendations of human rights groups and follow the examples set by countries that mandate access to public education for undocumented children, such as the United States. The Open Society Justice Initiative (OSJI), “a team of human rights lawyers and staff”¹⁶² that promotes justice and equality through litigation and research,¹⁶³ has laid out several recommendations for improving undocumented children’s access to education in Germany.¹⁶⁴ These recommendations include amending the federal anti-discrimination law, amending state-level legislation to prohibit separation and segregation, and introducing mandatory teacher training concerning intercultural competency, among others.¹⁶⁵ First and foremost, OSJI suggests that the federal anti-discrimination law, the *Allgemeines Gleichbehandlungsgesetz*, should be updated so that it

158. See *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

159. See *Rule of Law: Country Studies – Federal Republic of Germany*, *supra* note 8.

160. See *Sinn*, *supra* note 6, at 51 (stating that each federal state, on its own volition, can determine whether or not to admit an undocumented child).

161. *Id.*

162. *Programs Open Society Justice Initiative*, OPEN SOC’Y. FOUNDS., <https://www.opensocietyfoundations.org/about/programs/open-society-justice-initiative> (last visited Jan. 14, 2018).

163. See *Submission to the UN Human Rights Committee: Review of Germany*, OPEN SOC’Y JUST. INITIATIVE, Oct. 18–19, 2012 (see generally “Executive Summary”) [hereinafter OSJI].

164. *Id.* at “Recommendations.”

165. *Id.*

protects undocumented children from discrimination in attending public schools.¹⁶⁶ The initiative notes Germany's international obligations and directs Germany to ensure that education at all levels is freely available to all children, including the most vulnerable.¹⁶⁷ To achieve this goal, Germany must come together as a country, and, whether through the KMK or the justice system, implement a decision similar to the United States' *Plyler v. Doe* at the federal level. Otherwise, without federal intervention, non-citizen children will continue to be "forced to stay inside out of fear of drawing attention to themselves," missing out on education entirely.¹⁶⁸

Furthermore, Germany must begin implementing policies that not only ban segregation in classrooms, but also encourage and support language acquisition amongst the non-citizen students. The OSJI recommends that the state-level school legislation should be amended to promote integration and "explicitly prohibit separate schooling of ethnic minorities and protect against discrimination."¹⁶⁹ This would include lifting immunity and discontinuing the ban on civil suits against secondary schools that are found not to adequately support immigrant students.¹⁷⁰ German schools would then be pressured to allow non-citizen students to access the same educational opportunities as their native German counterparts. Amending the state-level legislation in this way would also offer a mechanism for school administrators to be held accountable for their actions, as parents or concerned community members would have the ability to bring civil action against perpetrators of discrimination in German schools.¹⁷¹

Integrating non-citizen students into classrooms with native German speakers would not only promote second language acquisition and intercultural competency, but it could also augment the schools' academic achievement rankings. In a study of seventeen countries with large immigrant populations, including the United States, Germany was

166. *Id.*

167. *Id.* at "Legal Obligations under the Covenant."

168. Schmidt, *supra* note 11.

169. OSJI, *supra* note 163, at "Recommendations."

170. *Id.*

171. *Id.*

found to have one of the largest disparities in academic performance between immigrant and native children enrolled in the country's public-school system.¹⁷² Additionally, second language learners often "underperform on standardized tests, drop out of school at significantly higher rates [than native speakers], and decline to pursue postsecondary education."¹⁷³ However, second language acquisition support can help boost undocumented children's overall academic achievement.¹⁷⁴ Countries with "well-established and well-structured language support programs for immigrant children, especially in early childhood," have been found to have non-citizen children who perform much closer or even equal to natural-born citizen children.¹⁷⁵ Due to the fact that more than half of non-citizen children speak a language other than German at home,¹⁷⁶ learning and practicing German at school may be the only option for some children. Therefore, while "policymakers in Germany have sought to address this issue by funding programs to encourage the recruitment and mentoring of migrant-background teachers who can then support immigrant-origin students and work as cultural intermediaries between these students and other school staff,"¹⁷⁷ non-citizen students may benefit more from being placed in direct contact with their German-speaking peers in regular classrooms while periodically attending a language support class.

Additionally, ending the segregation between the two populations of students can lead to a large reduction in the stigmatization of undocumented students, which promotes both healthier and happier students and increased academic achievement.¹⁷⁸ If non-citizen students

172. *German Schools Trail Significantly in Immigrant Education*, DEUTSCHE WELLE (May 16, 2006), <http://www.dw.com/en/german-schools-trail-significantly-in-immigrant-education/a-2020915>.

173. *English Language Learner*, *supra* note 140.

174. *See id.*

175. *German Schools Trail Significantly in Immigrant Education*, *supra* note 172.

176. JULIE SUGARMAN ET AL. *IMPROVING EDUCATION FOR IMMIGRANT-BACKGROUND STUDENTS: A TRANSATLANTIC COMPARISON OF SCHOOL FUNDING* 8 (2016).

177. *Id.* at 10.

178. OECD REVIEWS OF MIGRANT EDUCATION, IMMIGRANT STUDENTS AT SCHOOL: EASING THE JOURNEY TOWARDS INTEGRATION 34–35 (OECD Publishing, 2015) [hereinafter OECD STUDENTS].

are placed in a situation where they do not feel welcome in a country, it can be difficult for them to be motivated to learn the language and integrate into the society.¹⁷⁹ However, “[t]olerance is not the case for immigrants from third world countries whose foreign features immediately mark them as an *Asunder*,” which means “outsider” in German.¹⁸⁰ This stigma also goes further than simple student-to-student interactions amongst peers.¹⁸¹ Students have reported experiencing both mental and physical distress when they are forced to reveal their immigration status to a school official such as a teacher or a counselor.¹⁸² These non-citizen students have revealed that they frequently worry about being “publicly ridiculed and targeted”¹⁸³ if school administrators or fellow students learn that they do not have a legal status. However, integration in the classroom can significantly reduce this stress and can provide benefits for both citizen and non-citizen students.¹⁸⁴ Schools that provide “environments where immigrant students are given opportunities – and dedicated support – for socialisation and integration” report students have “similar levels of happiness as students who do not have an immigrant background.”¹⁸⁵ This sense of belonging in school and in society as a whole has been linked to both a lower school dropout rate and “healthy social and psychological development.”¹⁸⁶ Additionally, a study conducted in the United States found that “[w]hen first- and second-generation students attend more integrated schools they develop friendships and networks that encourage them to succeed and become part of the American national identity.”¹⁸⁷

179. Loewenberg, *supra* note 2.

180. *Survival Guide: Unwelcome in Germany*, *supra* note 4.

181. See Edward Graham, *How Immigration Enforcement is Negatively Affecting Schools*, NEATODAY (Dec. 19, 2012), <http://neatoday.org/2012/12/19/how-immigration-enforcement-is-negatively-affecting-schools-2/>.

182. *Id.*

183. *Id.*

184. See OECD STUDENTS, *supra* note 178, at 34.

185. *Id.*

186. *Id.* at 35.

187. John Wahala, *Immigration, Segregation, & Education*, CTR. FOR IMMIGR. STUDS. (Mar. 17, 2016), <https://cis.org/Wahala/Immigration-Segregation-and-Education>.

While the United States is still struggling to de-segregate schools across the country,¹⁸⁸ Germany should take heed of the problems in the United States and prioritize policies of integration. A mass influx of immigration into the United States has caused segregation to intensify.¹⁸⁹ Public schools in the United States are currently struggling to foster the integration of non-citizen students, which has resulted in lower test scores and higher dropout rates.¹⁹⁰ The segregation of non-citizen and citizen student populations is disadvantageous to both sectors and can result in a blockade to the upward mobility of immigrant children.¹⁹¹ Thus, Germany should consider these negative consequences of segregation and move forward with new legislation.¹⁹² To uphold its international commitment to providing equal access to education for all children, Germany should begin enforcing federal policies regarding integration and support for language acquisition to ensure that each child receives the same quality schooling across the entire country.

Stricter reporting requirements could also enhance the quality of education received by non-citizen students in Germany, as federal officials would have readily accessible data on areas of concern.¹⁹³ The OSJI recommends that all schools be required to anonymously report the ethnic makeup of their student body as well as participate in studies tracking the effects of current practices and legislative reforms on immigrant students' education in the German public-school system.¹⁹⁴ No Child Left Behind, which was seen as a landmark federal decision, requires schools to report on the academic performance of non-native English speakers.¹⁹⁵ Under Title 1 of No Child Left Behind, schools are required to report the assessment results of students with limited English

188. *See id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. OSJI, *supra* note 163, at "Germany's Continued Failure to Meet its Obligations."

193. *See generally* CAPPS ET AL., IMMIGRATION AND THE NO CHILD LEFT BEHIND ACT (discussing the benefits of reporting requirements under No Child Left Behind) [hereinafter IMMIGRATION & NCLB].

194. OSJI, *supra* note 163, at "Recommendations."

195. *See* IMMIGRATION & NCLB, *supra* note 193, at 1.

proficiency and are held accountable for improving the students' performances over time.¹⁹⁶ If the school does not "sufficiently improve the performance of students," the federal government may intervene by allowing the child to attend a different school, offering additional supplemental services, or even closing the school entirely.¹⁹⁷ Due to these enhanced reporting requirements, No Child Left Behind has the potential to improve the quality of the education that non-citizen children are receiving in the United States.¹⁹⁸ The model set out by this federal law is one that Germany could implement among its own states in order to hold the local school systems accountable for the quality of education being distributed to non-native German speakers.

Instructor intercultural competency is a key component to effective promotion of integration in the classroom and providing cultural training for German teachers would enhance non-citizen students' academic experiences. Another OSJI recommendation is that all teachers in Germany be required to attend mandatory teacher training concerning non-discrimination and intercultural competency and that an independent oversight body be created to record and assuage parental complaints and to advocate for the rights of minority children.¹⁹⁹ Requiring intercultural training for teachers is a viewpoint that has also been promoted in the United States.²⁰⁰ An American study found that while most teachers "generally feel confident in their ability to implement core teaching skills, many express reservations about their ability to teach students from a culture different from their own."²⁰¹ Intercultural competency training could help alleviate these concerns while enhancing public school teachers' awareness and appreciation of cultural differences encountered in their classrooms.²⁰² Therefore, the potential positive impacts demonstrate that these recommendations should be reviewed by

196. *Id.*

197. *Id.*

198. *Id.*

199. OSJI, *supra* note 163, at "Recommendations."

200. Ines Marquez Chisholm, *Preparing Teachers for Multicultural Classrooms*, 14 J. EDUC. ISSUES LANGUAGE MINORITY STUDENTS 43, 45 (1994).

201. *Id.*

202. *Id.*

the legislature and implemented, at least in part or with minor revisions, and “the wholesale discrimination in education against immigrant children should cease immediately.”²⁰³

V. THE FUTURE OF GERMANY AS A LAND OF IMMIGRANTS

Looking ahead, Germany should capitalize on the influx of immigrant students who will be entering its workforce by making their education a top national priority. As the stream of international, multilingual individuals continues at a steady pace, some German universities have allowed refugees to attend lectures and earn a degree without paying tuition.²⁰⁴ Additionally, “[m]any universities have started programs to help refugees meet enrollment requirements. A startup called Kiron allows newcomers to take online courses in English before helping them transition to traditional universities.”²⁰⁵ A college in Berlin has also started offering scholarships that geared specifically towards non-native German students who want to enroll in higher education.²⁰⁶

However, with the current state of the public schools in Germany and the lack of integration and second language acquisition support, non-citizen students are dropping out at an alarming rate.²⁰⁷ To protect and reinforce the children who are the future of Germany, the country must implement programs that identify, support, and integrate second language learners at a young age.²⁰⁸ In the 1980s, the Child-Parent Center in Chicago, Illinois launched a federally funded early-childhood

203. OSJI, *supra* note 163, at “Germany’s Continued Failure to Meet its Obligations.”

204. Rick Noack, *Why some German universities will educate refugees for free*, WASH. POST (Aug. 20, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/08/20/why-some-german-universities-will-educate-refugees-for-free/?utm_term=.2316d8108741.

205. Kristen Chick, *How do refugee students make the jump to Germany’s universities?*, CHRISTIAN SCI. MONITOR (July 24, 2017), <https://www.csmonitor.com/World/Europe/2017/0724/How-do-refugee-students-make-the-jump-to-Germany-s-universities>.

206. *See id.*

207. Loewenberg, *supra* note 2.

208. *English Language Learner*, *supra*, note 140.

intervention program, which is now, thirty years later, showing that high-quality early-childhood education leads to higher rates of educational attainment and advanced degrees.²⁰⁹ Furthermore, in the United States, only “[t]wenty-seven percent of college-educated immigrants reported limited English proficiency in 2014, compared to 50 percent of the total foreign-born population.”²¹⁰ This indicates that over 70% of immigrant students who graduated from college were proficient in English, suggesting that language proficiency is a prerequisite for success in higher education.²¹¹ Most universities in Germany offer programs in German and require some sort of proof of German language ability before offering a student acceptance or a scholarship.²¹² Thus, for non-citizen children to be able to complete a college degree in Germany, they may need to demonstrate academic proficiency in the German language,²¹³ which they should acquire at the beginning of their public school education via integration and second language acquisition support.

VI. PREVAILING WISDOM

While undocumented children in both the United States and Germany suffer from discrimination and face significant obstacles when it comes to accessing education of equal quality to that received by their native-born peers, the landmark United States Supreme Court decision in *Plyler v. Doe* grants undocumented children a huge advantage that those living in Germany do not yet have. In the United States, no school or

209. Jenny Redesky, *Improved College Graduation Rates Through Early Education Enrichment*, NEJM J. WATCH (Feb. 6, 2018), <https://www.jwatch.org/na46023/2018/02/06/improved-college-graduation-rates-through-early-education>.

210. Jie Zong & Jeanne Batalova, *College-Educated Immigrants in the United States*, MIGRATION POL’Y INST. (Feb. 3, 2016), <https://www.migrationpolicy.org/article/college-educated-immigrants-united-states>.

211. *See id.*

212. *Proof of language proficiency (German and/or English)*, STUDYING IN GER., <https://www.studying-in-germany.org/proof-of-language-proficiency-german-english/> (last visited Feb. 17, 2018).

213. *Id.*

administrator can constitutionally deny a child the right to attend a free public school and receive a primary and secondary education.²¹⁴ However, without a federal law to ensure compliance with its international treaties, individual states all across Germany can continue to deny undocumented children access or use scare tactics to keep them and their parents out of the local public schools.²¹⁵ Additionally, Germany's lack of a federal mandate allows for due process violations, as each state can choose whether or not to admit a non-citizen child, depriving children of equal access and equal protection under the law.²¹⁶

Moving forward, Germany must heed the examples of countries such as the United States that require all public schools to admit all children regardless of immigration status.²¹⁷ Germany should also seriously consider the recommendations put forth by the OSJI²¹⁸ and the findings reported in comparative studies concerning the country's performance in providing equal education to all.²¹⁹ Without making any of these changes, undocumented children in Germany will continue to live in the shadows, without equal access to education, as victims of constitutional and human rights violations that should not be occurring in the twenty-first century, industrialized world.

214. *Plyler v. Doe*, 457 U.S. 202, 224–30 (1982).

215. Schmidt, *supra* note 11.

216. See Sinn, *supra* note 6, at 51.

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

218. OSJI, *supra* note 163, at “Recommendations.”

219. See Loewenberg, *supra* note 2.