EXHIBIT 3

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

THE UNITED STATES OF AMERICA,

Plaintiff,

Case No.:

v.

THE STATE OF ALABAMA &
GOVERNOR ROBERT J. BENTLEY

Defendants.

DECLARATION OF TONY MILLER

Pursuant to 28 U.S.C. §1746, I, Tony Miller, declare and state as follows:

1. I am the Deputy Secretary and Chief Operating Officer at the U.S. Department of Education (Department). I make this declaration based on my personal knowledge and on information I have received in my official capacity.

2. I have served as Deputy Secretary at the Department since 2009. Prior to joining the Department I was an operating partner with Silver Lake, a leading private equity firm. From 2003 to 2006, I was executive vice president of operations for LRN Corporation, a compliance software and eLearning company. Prior to working at LRN, for 10 years I was a partner at McKinsey & Company, where I specialized in growth strategies, operating performance improvement, and restructuring for companies throughout the United States, Europe, and Asia. I began my professional career with Delco Electronics, a subsidiary of GM Hughes Electronics, where I managed regional channel marketing. In addition to my private-sector experience, I

advised the Los Angeles Unified School District from 1997 to 2000, on developing student achievement goals and strategies, aligning budgets and operating plans, and designing metrics and processes for overseeing district-wide performance. I undertook similar work with the Santa Monica-Malibu Unified School District in 2001. My service in those capacities as well as my service as an ex-officio member of the Los Angeles Unified School District Board of Education Budget and Finance Committee in 2002–03, deepened my understanding of district programs, state funding and school district budgeting matters.

3. In my capacity as Deputy Secretary, I assist the Secretary of Education in managing a broad range of operational, management, and program functions and play a pivotal role in overseeing and managing the development of policies, recommendations, and initiatives that help define a broad, coherent vision for achieving the President's education priorities. I also provide general supervision and direction to all elementary and secondary programs administered by the Department.

4. The mission of the Department is to promote student achievement and prepare students for global competitiveness by fostering educational excellence and ensuring equal access. It was created to strengthen the federal commitment to equal educational opportunity for every individual.[1] Consistent with that mission, a large proportion of individual programs that it administers focus on improving education for populations with special educational needs. That has been true of the federal role for education at least since 1965 -- when the Elementary and Secondary Education and Higher Education Acts were first enacted – some 15 years before the Department was created.

[1] Department of Education Organization Act, 20 U.S.C. §3401.

5. The Department administers elementary and secondary education programs that provide financial assistance to States, school districts, and other eligible recipients to assist all children, including children with disabilities; those who are illiterate, disadvantaged, or gifted; and those who may be from immigrant backgrounds and are English learners (EL), a term synonymous with the term limited English proficiency (LEP).[2] The creation of these programs in every instance reflects a judgment by Congress and the Executive Branch that these educational needs were not being adequately addressed by States and school districts, and that there is a national interest in assisting these entities to serve these children.

6. I am aware that the State of Alabama has enacted new immigration legislation, known as HB 56.

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[2] The term limited English proficient (LEP), is defined in Section 9101(25) of the Elementary and Secondary Education Act, which provides:

> (25) LIMITED ENGLISH PROFICIENT- The term limited English proficient', when used with respect to an individual, means an individual —
> (A) who is aged 3 through 21;
> (B) who is enrolled or preparing to enroll in an elementary school or secondary school;
> (C)(i) who was not born in the United States or whose native language is a language other than English;
> (ii)(I) who is a Native American or Alaska Native, or a native resident of the outlying areas; and
> (II) who comes from an environment where a language other than English has had a significant impact on the individual's level of English language proficiency; or
> (iii) who is migratory, whose native language is a language other than English, and who comes from an environment where a language other than English is dominant; and
> (D) whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individual —
> (i) the ability to meet the State's proficient level of achievement on State assessments described in section 1111(b)(3);
> (ii) the ability to successfully achieve in classrooms where the language of instruction is English; or
> (iii) the opportunity to participate fully in society.

7. On September 1, 2011, Section 28 of HB 56 (Section 28) takes effect, and, as I understand it, will require every public elementary and secondary school in Alabama, at the time of enrollment in school, to determine whether the child enrolling in school was "born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States and qualifies for assignment to an English as Second Language class or other remedial program." To make this determination, a school official will require each child to produce an original birth certificate, or a certified copy. If the child was either born outside of the United States, is the child of an alien not lawfully present in the United States, or cannot produce a birth certificate, the parent, guardian, or legal custodian of the child must notify the school within 30 days of the date of the child's enrollment of the actual citizenship or immigration status of the child. The notice shall include both a presentation of official documentation establishing the citizenship or immigration status of the child, and an attestation of the parent, guardian, or legal custodian, under penalty of perjury, that the document states the true identity of the child. If the parent, guardian, or legal custodian does not present any documentation, the school official will presume the child is an alien not lawfully present in the United States.

8. In *Plyler v. Doe*, 457 U.S. 202 (1982), the Supreme Court held that a State may not deny access to a basic public education to any child residing in the state, whether present in the United States lawfully or otherwise. The Court held that such a denial would violate the Equal Protection Clause of the 14th Amendment of the United States Constitution. Thus, it is my understanding that since that time, the Department has provided informal technical assistance to school districts reminding them of their obligations under *Plyler,* and advising them that they should not take action to discourage the participation of students that could be viewed or would

likely result in denying access. The most recent guidance was written guidance provided earlier this year and is discussed below in paragraph 10.

Implications of Section 28 on Federal Education Programs

9. The type of documentation mandated under Section 28 is not required for participation in *any* Department program and is likely to discourage participation by some students in educational programs. Implementation of Section 28 likely will create obstacles to achieving the goals and objectives of many Department programs, and is likely to seriously undermine the administration of these programs by discouraging immigrant parents from enrolling their children in school for fear that their legal presence would be questioned. If immigrant parents do enroll their children in Alabama schools, they may be apprehensive about providing accurate information related to their child's native language status because of the stigma attached by Section 28 to otherwise benign information associated with national origin. Accurate information on a child's native language status is essential under certain federal education programs to establish eligibility for language instruction educational programs and other remedial programs. Finally, Section 28 is also likely to thwart the implementation of requirements of some Department programs to effectively engage parents in the education of their children, e.g., providing complete and accurate information about a child's native language, or actively participating in school activities.

The Dear Colleague Letter Issued by the Departments of Justice and Education

10. On May 6, 2011, the Departments of Justice and Education issued a joint Dear Colleague letter to school superintendents, reminding them of their obligation under *Plyler v.*

Doe, 457 U.S. 202 (1982), and Titles IV and VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c-6 and 2000d, to provide equal educational opportunities at the elementary and secondary level to all children residing within their school districts, and offering assistance to ensure that districts comply with the law.[3] The letter noted that the Departments have become aware 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," and that these practices contravene federal law. The letter provides that "[t]o comply with [] Federal civil rights laws, as well as the mandates of the Supreme Court, [school districts] must ensure that [they] do not discriminate on the basis of race, color, or national origin, and 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." The letter cautions that school 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."[4]

11. Contrary to the principles in the Dear Colleague Letter, implementation of Section 28 will likely discourage the participation, or lead to the exclusion, of children from school based on a child's, or his or her parents' or guardians' actual or perceived national origin, citizenship or immigration status. By rigidly imposing these documentation requirements, many parents will likely fear the consequences of having to provide birth certificates to schools and to report the

[3] Title IV prohibits discrimination on the basis of race, color, or national origin, among other factors, by public elementary and secondary schools. Title VI prohibits discrimination by recipients of federal financial assistance on the basis of race, color, or national origin. As noted above, the Supreme Court held in *Plyler* that it would violate the Equal Protection Clause of the 14th Amendment of the United States Constitution, for a State to deny access to a basic public education to any child residing in the State, whether present in the United States lawfully or otherwise.
[4] See link to Dear Colleague Letter issued on May 6, 2011, at the following Internet address: http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201101.pdf

citizenship or immigration status of their children and themselves to school personnel. Additionally, many parents will likely fear the consequences of having local school districts report to Alabama about whether their children or they are unlawfully present in the State.

Programs for English Learners and Immigrant Children.

12. Among its purposes, Title III of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001 (NCLB), 20 U.S.C. § 6801 *et seq.,* provides funding to States to help "ensure that children who are limited English proficient, including immigrant children and youth, attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet ... and to promote parental and community participation in language instruction educational programs for the parents and communities of limited English proficient children[.]" 20 U.S.C. § 6812(a)(1) and (6). In order to receive funding under Title III, a State must submit a plan that, among other things, describes how it will develop English language proficiency (ELP) standards that are aligned with the achievement of State academic content and student academic achievement standards set out in Part A of Title I of the ESEA, and the process it will follow in making subgrants to local educational agencies (LEAs or districts). In addition, the State must ensure, among other things, that the ELP of all students served under Title III will be assessed annually. 20 U.S.C. § 6823.

13. States are also required to establish annual measurable achievement objectives (AMAOs) that set targets each local educational agency (LEA or district) receiving a Title III subgrant must reach for the number or percentage of Title III served EL students who have (1)

made progress towards achieving English language proficiency, and (2) achieved English language proficiency. In addition to meeting these two AMAOs, a district's EL subgroup must also make adequate yearly progress (AYP) under Part A of Title I of the ESEA. A State must require an LEA that fails to meet all three AMAOs for two or four consecutive years to take appropriate corrective actions.

14. After it approves a State's plan, the Department awards funds to States based on their number of ELs and immigrant children and youth.[5] In determining the number of EL and immigrant children and youth in each State, the Department relies on data available from the American Community Survey, which is available from the Department of Commerce. 20 U.S.C. § 6821(c)(4)(B)(ii)(I). There are two types of Title III subgrants for which LEAs may apply to the State. Under Section 3114(a), States subgrant funds to LEAs based on the number of ELs attending both public and private schools within each LEA. 20 U.S.C. § 6824(a). These subgrants must be used to provide instructional services to EL students that increase their English proficiency and academic achievement and provide teachers and other educational personnel that serve ELs with high-quality professional development. Under Section 3114(d), States are required to reserve a portion -- not to exceed 15% of their Title III grant – to provide subgrants to LEAs that have experienced a significant increase in the percentage or number of immigrant children and youth. 20 U.S.C. § 6824 (d). As defined in the ESEA, an immigrant child or youth is an individual who is between the ages of 3 and 21, was not born in any State, and has not been attending a school in any one or more States for more than three full academic years. 20 U.S.C. § 7011(6). Although the term "immigrant" is used to identify the children

[5] Under the ESEA, a State includes the 50 States, the District of Columbia, Puerto Rico, and the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

eligible for services under this program, it does not, as defined by the ESEA, or as implemented by the Department, States, and LEAs, involve making any determination with respect to the legal presence of a child, or any member of a child's family, in the United States. Moreover, the Department has been consistent in advising State educational agencies (SEAs) and LEAs that, in accordance with *Plyler v. Doe,* determining eligibility for services under this program, inquiries raising the issue of the legal presence of parents or their children should not be made because of the chilling effect it would have. These funds must be used "for activities that provide enhanced instructional opportunities for immigrant children and youth." 20 U.S.C. § 6825(e)(1).

15. All Title III funds must be used by States and school districts to supplement the level of federal, State, and local public funds that, in the absence of such availability, would have been expended for programs for EL and immigrant children and youth and in no case to supplant such federal, State, and local public funds.

16. With respect to EL students who participate in a language instruction educational program supported with Title III funds, an LEA must provide parents of those students with the reasons for identifying their child as EL and in need of such placement, the child's level of English proficiency, the methods of instruction used in the program, how the program will meet the child's educational strengths and needs, how the program will specifically help the child learn English, the specific exit criteria for the program, and information regarding the parents' rights to have their child removed from the program or to choose another program. 20 U.S.C. § 7012(a).

17. In addition, Title III requires LEAs to implement an effective, general outreach program to promote the active participation of parents of ELs in the education of their children.

Specifically, the program should inform parents of how they can - (A) be involved in the education of their children; and (B) be active participants in assisting their children - (i) to learn English; (ii) to achieve at high levels in core academic subjects; and (iii) to meet the same challenging State academic content and student academic achievement standards as all children are expected to meet. These outreach efforts "shall include holding, and sending notice of opportunities for, regular meetings for the purpose of formulating and responding to recommendations from parents." 20 U.S.C. § 7012(e).

18. Based on data provided to the Department by Alabama in the Consolidated State Performance Report for the 2009-2010 school year, Alabama serves 20,674 EL students including 18,633 EL students served under Title III. Additionally, there are 3,647 immigrant students in Alabama including 1,053 of these immigrant students who are served by Title III immigrant subgrants to 7 LEAs. (Questions 1.6.2.1, 1.6.2.2 and 1.6.5.1 from the Consolidated State Performance Report for School Year 2009-10, submitted to the U.S. Department of Education by the Alabama Department of Education, as accessed through the EDFacts Data Warehouse (https://edfacts.ed.gov) on July 19, 2011.)

19. Section 28, by collecting information on children and parents for the purpose of determining the legal presence of those individuals in the United States, will likely severely undermine the ability of Alabama, and LEAs within Alabama, to comply with these central requirements of Title III, and achieve its primary goal of improving the English language proficiency and academic achievement of EL students. First, LEAs cannot properly implement Title III unless they can accurately identify which of the students they are responsible for serving

are eligible for services under this program. Because information relevant to a Title III eligibility determination, such as the place of birth of a child or a home language other than English, will also potentially be relevant to Section 28 determinations on "legal presence," the parents of EL students will likely not want to provide LEAs with accurate information on these points. Lack of accurate information would undermine the completeness and accuracy of Title III eligibility determinations.

20. Second, the chilling effect of Section 28 will likely cause language minority and other national origin minority parents to minimize or eliminate interaction with their child's school. This will likely undermine implementation of an important Title III requirement, parent involvement in education, which promotes improved academic achievement for students.

21. Third, concerns about the implications of Section 28 might cause language minority and other national origin minority parents to withdraw their children from school entirely. This would simultaneously undermine the implementation of Title III because EL children and youth who are not attending school cannot be served under that program, and the Supreme Court's decision in *Plyler v. Doe*.

Ensuring Equal Educational Opportunity for English Learners

22. Title VI of the 1964 Civil Rights Act prohibits recipients of Federal financial assistance from discriminating on the basis of "race, color, or national origin." The Department's Office for Civil Rights is charged with ensuring that States and school districts provide equal educational opportunity for national origin minority students who are EL. The first step in ensuring that such national origin minority students are afforded an equal educational

opportunity is the accurate identification of these students. Consistent with policy guidance from OCR, students are required to be placed in EL programs based on their individual English language proficiency, and not whether they were born in the United States or on the legal status of their parents. If these children are not identified and appropriately placed in EL programs then they will not receive remedial language services that they should be receiving. Therefore, the chilling effect of Section 28 discussed above are likely to have a negative impact on compliance with Title VI.

23. Under 20 U.S.C. § 3413(c)(1), the Assistant Secretary of the Office for Civil Rights (OCR) is authorized to collect or coordinate the collection of data necessary to ensure compliance with civil rights laws. During the 2009-10 school year, OCR conducted a data collection from over 7,000 school districts and 72,000 schools, including a number of school districts and schools in Alabama. The number of EL students at each school is among the information that OCR collected in its survey. OCR is planning on doing another survey for the 2011-12 school year, which will include all school districts and schools, including all in Alabama. H.B. 56 states that when making the determination if a student "was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States and qualifies for assignment to an English as a Second Language class" the "public school . . . shall rely upon presentation of the student's original birth certificate, or a certified copy thereof." (HB 56, Section 28(a)(1) and (a)(2)). The statute appears to equate English as a Second Language eligibility with the foreign-born status of the student or the immigration status of the student's parent. This approach has no basis in educational law or policy as it relates to the identification of EL students. As noted above, consistent with policy guidance from OCR, students are required to be placed in EL programs based on their individual English language

proficiency, and not whether they were born in the United States or on the legal status of their parents. If they are not placed in the appropriate classes and not counted as EL students as part of the survey, the Alabama law will negatively affect the accuracy of the OCR data collection.

Programs for Homeless Children

24. Under the McKinney-Vento Homeless Assistance Program (McKinney-Vento) ,42 U.S.C. § 11421 *et seq.*, SEAs must ensure that homeless children and youth have equal access to the same free public education, including a public preschool education, as is provided to other children and youth. States must review and undertake steps to revise any laws, regulations, practices, or policies that may act as barriers to the enrollment, attendance, or success in school of homeless children and youth. Homeless students must also have access to the education and other services that they need to have an opportunity to meet the same challenging State academic achievement standards to which all students are held.

25. Under McKinney-Vento, a school district cannot deny a homeless child (including a homeless child who is undocumented) enrollment because he or she cannot provide the required documents to establish residency, such as a birth certificate. 42 U.S.C. § 11432(g)(3)(C)(i). The enrolling school has the responsibility to immediately contact the last school attended by the child or youth to obtain relevant records. (42 U.S.C. § 11432(g)(3)((C)). McKinney-Vento requires each State to address, as part of its State plan, enrollment delays that are caused by, among other things, residency requirements and lack of birth certificates, school records, or other documentation. (42 U.S.C.§ 11432(g)(1)(H)).

26. Section 28 will likely severely undermine the ability of Alabama, and LEAs within Alabama, to comply with the central requirements of the McKinney-Vento program. It may likely discourage a homeless parent who cannot produce a birth certificate from enrolling his or her child in school, even though having such documentation cannot be required to enroll that child in school under McKinney-Vento and simultaneously undermine the purpose of the McKinney-Vento program, and the Supreme Court's decision in *Plyler v. Doe*.

27. Although Section 28 does not expressly exclude a homeless child (or any child) from school, it would operate to place that child without documentation into the category of "an alien unlawfully present in the United States." The data that is captured and reported to the State legislature will undoubtedly be inaccurate because that category is the default for *any* student who cannot, or does not, provide the required documentation. Thus, the data reported to the State and the public would exaggerate the number of children "unlawfully present in the United States," as it would likely include many homeless children who are citizens of the United States. For example, in Alabama, for school years 2009-2010, this would likely mean that a large percentage, perhaps even all of the 13,308 homeless students served under the McKinney-Vento program (whether or not United States citizens), could be counted as aliens "not lawfully present in the United States and qualifies for assignment to an English as Second Language class or other remedial program." According to data provided to the Department by Alabama, for school years 2009-2010, only 565 of these homeless students were qualified for assignment to English as a Second language or other remedial language program. (Data submitted by the Alabama Department of Education to the U.S. Department of Education using EDFacts File Specifications X/N043-Homeless Served (McKinney-Vento) for school year 2009-10, as accessed through the EDFacts Data Warehouse (https://edfacts.ed.gov) on July 19, 2011.)

Programs for Educationally Disadvantaged Children

28. Title I, Part A of the ESEA, 20 U.S.C. §§ 6301 *et seq.*, is the federal government's largest investment in elementary and secondary education. The federal government allocated more than $14.4 billion under Title I, Part A in fiscal year (FY) 2011. Of that amount, Alabama received $225,736,068. Since the inception of NCLB in 2002, Alabama has received approximately $2,571,734,309 in Title I, Part A funds.

29. The purpose of Title I, Part A is to improve the academic achievement of students who are failing, or most at risk of failing, to meet a State's challenging academic content and student academic achievement standards. Eligible schools provide services in two types of programs. In a school with a poverty percentage of 40 percent or more, a school may operate a schoolwide program, which is designed to improve the achievement of the lowest-achieving students by upgrading the entire educational program in the school. In contrast, an eligible school may operate a targeted assistance program, which provides supplemental services to selected students who are most at risk of failing to meet the State's challenging student academic achievement standards.

30. Title I, Part A funds are allocated through SEAs to LEAs primarily on the basis of the number of children living in families below the poverty level as determined by the U.S. Bureau of the Census and each State's expenditures per pupil for free public education. Each LEA distributes Title I, Part A funds to eligible schools--i.e., those with a poverty percentage above the districtwide poverty average or above 35 percent, usually determined by the number of students receiving free and reduced price lunches.

31. One of the basic pillars of the ESEA, implemented through Title I, Part A, is accountability for improving the academic achievement of all students, including the achievement of specific subgroups of students. Title I, Part A requires each State to establish academic content standards and student academic achievement standards that are the same for all students in the State, including students in each major racial and ethnic subgroup, students with disabilities, ELs, and economically disadvantaged students. Each State must develop and implement academic assessments in reading/language arts, mathematics, and science that are aligned to its standards and must use those assessments to hold each Title I school accountable for the adequate yearly progress (AYP) of all students as well as students in each subgroup listed above. If any subgroup does not meet the State's annual measurable objectives in a given year, the school does not make AYP. If a school fails to make AYP for two consecutive years, it is identified for improvement and must incorporate strategies to address the specific academic issues that caused the school to be so identified and that have the greatest likelihood of ensuring that all subgroups of students meet the State's proficient level of achievement. If the school continues to fail to make AYP, it is subject to increasingly rigorous interventions.

32. Each SEA and LEA that receives Title I funds must publicly report on State and district report cards, respectively, the achievement of all students as well as each subgroup in reading/language arts, mathematics, and science, and whether each subgroup made AYP. The State and its LEAs may also include optional information such as the gains in English proficiency of EL students.

33. EL students are a particular focus of Title I, Part A. All EL students must be assessed annually to determine their English proficiency (measuring their oral language, reading,

and writing skills in English). In addition, EL students specifically must be included in a State's assessments of academic achievement in a valid and reliable manner and provide reasonable accommodations including, to the extent practicable, assessments in the language and form most likely to yield accurate data on what EL students know and can do in academic subjects until they have achieved English proficiency. To ensure that a school focuses attention on improving the English proficiency of EL students so that they can achieve success in academic subjects, the school must assess, in English, the reading skills of any LEA student who has attended schools in the United States for three or more consecutive years. As noted above, an LEA must determine AYP for the EL subgroup, and a school will fail to make AYP if that subgroup does not meet the State's annual measurable objectives. Moreover, both the State and each LEA that receives Title I, Part A funds must report on their respective report cards the achievement of the EL subgroup on the State's academic assessments as well as whether the EL subgroup made AYP.

34. Each State that receives Title I, Part A funds must ensure that poor and minority students are not taught at higher rates than other students by inexperienced, unqualified, or out-of-field teachers.

35. Title I, Part A places considerable emphasis on parent involvement in the education of children who participate in Title I programs. Each LEA and Title I school must develop a written parent involvement policy to encourage the involvement of parents to improve academic achievement of their children and school performance. An LEA's policy, in particular, must identify barriers to greater participation by parents, with particular attention to parents who are economically disadvantaged, disabled, ELs, have low literacy, or are from a minority background, and use the findings to design strategies for more effective parent involvement. In

addition to a school's parent involvement policy, each Title I school must develop with parents of children served under Title I a school-parent compact that outlines how parents, the entire school staff, and students will share the responsibility for improving student academic achievement and the means by which the school and parents will build and develop a partnership to help children achieve the State's challenging standards. An LEA and each Title I school have a particular responsibility, in carrying out their parent involvement responsibilities, to provide, to the extent practicable, full opportunities for the participation of parents with limited English proficiency, parents with disabilities, and parents of migratory children, including providing information in a format and, to the extent practicable, in a language the parents can understand.

36. Beyond the general requirements that encourage and support parent involvement, Title I, Part A requires an LEA to reach out to parents of EL students, in particular, to inform the parents how they can be involved in the education of their children and be active participants in assisting their children to attain English proficiency, achieve at high levels in core academic subjects, and meet the State's challenging academic standards expected of all students. The LEA must hold regular meetings for the purpose of formulating and responding to recommendations from parents of EL students. With respect to EL students who participate in a language instruction educational program supported with Title I, Part A funds, an LEA has particular responsibilities to inform parents of those students the reasons for the identification of their child as EL and in need of such placement, the child's level of English proficiency, the methods of instruction used in the program, how the program will meet the child's educational strengths and needs, how the program will specifically help the child learn English, the specific exit criteria for the program, and information regarding the parents' rights to have their child removed from the program or to choose another program. 20 U.S.C. § 6311(g).

37. In the 2009-2010 school year, the latest year for which the Department has data, Alabama reported serving 288,354 students under Title I. (Data submitted by the Alabama Department of Education to the US Department of Education using EDFacts File Specifications X/N134 - Title I Part A Participation for school year 2009-10 and X/N037 - Title I Part A SWP/TAS Participation for school year 2009-10, as accessed through the EDFacts Data Warehouse (https://edfacts.ed.gov) on July 19, 2011) In addition, in that same year, Alabama reported that it served approximately 11,856 EL students in Title I schools (Data submitted by the Alabama Department of Education to the US Department of Education using EDFacts File Specifications X/N134 - Title I Part A Participation for school year 2009-10 and X/N037 - Title I Part A SWP/TAS Participation for school year 2009-10, as accessed through the EDFacts Data Warehouse (https://edfacts.ed.gov) on July 19, 2011.) Alabama further reported that 95% of the EL students in the State speak Spanish as a home language and approximately 15,246 students were reported in its Hispanic subgroup.. (Data submitted by the Alabama Department of Education to the U.S. Department of Education using EDFacts File Specification X/N141-LEP Enrolled for school year 2009-10, as accessed through the EDFacts Data Warehouse (https://edfacts.ed.gov) on July 21, 2011.)

38. Section 28 will likely severely undermine the ability of Alabama, and LEAs within Alabama, to comply with these central requirements of Title I. First, LEAs cannot properly implement Title I unless they can accurately identify which of the students they are responsible for serving meet the ESEA's definition of EL and/or immigrant child or youth. Because information relevant to this determination, such as the place of birth of a child or a home language other than English, will also potentially be relevant to Section 28 determinations on

"legal presence," the parents will likely not want to provide LEAs with accurate information on these points. Lack of accurate information would undermine the completeness and accuracy of an LEA's EL identifications. As a result, students eligible for Title I services as EL students may not be served under that program. Students may not have their English language proficiency assessed annually, as required under Title I, and therefore Alabama's schools and LEAs may not properly identify all students that should be included in the Title I EL subgroup, a key component to making proper AYP determinations.

39. Second, the chilling effect of Section 28 will cause language minority and other national origin minority immigrant parents, whatever the legal status of their presence, to minimize or eliminate interaction with their child's school. This will undermine implementation of an important Title I requirement -- parental involvement in education -- which promotes improved academic achievement for students.

40. Third, concerns about the implications of Section 28 might cause language minority and other national origin minority immigrant parents to withdraw their children from school entirely. This will likely undermine not only the implementation of Title I because EL children not attending school cannot be served under that program, which simultaneously undermines the purpose of Title I, and the Supreme Court's decision in *Plyler v. Doe*.

Special Education

41. Part B of the Individuals with Disabilities Education Act (IDEA) requires that States that receive grants under the program ensure that a free appropriate public education (FAPE) is made available to all children with disabilities "residing in the State." 20 U.S.C. § 1412(a)(1)(A)

The term 'children with disabilities' includes all children who have one of a number of identified disabling conditions, and, because of that disability, need special education and related services. 20 U.S.C. § 1401(3) The term 'FAPE' means special education and related services that are provided at public expense, under public supervision and without charge to the family; meet the standards of the SEA; include an appropriate preschool, elementary and secondary school education in the State; and are provided in conformity with an individualized education program developed for the child. 20 U.S.C. § 1401(9) The IDEA does not permit a State to exclude eligible children from services based on the children's lack of citizenship, legal resident or national origin status. Part B of the IDEA also requires States to ensure that all children with disabilities residing in the State who are in need of special education and related services are identified, located, and evaluated. 20 U.S.C. § 1412(a)(3)(A) This 'child find' obligation extends to all resident children with disabilities, whether or not they are enrolled in a public education program.

42. Section 28 has the potential to seriously undermine the ability of Alabama, and LEAs within Alabama, to comply with these central requirements of the IDEA. It will likely discourage students and their parents from seeking IDEA services they are entitled to under federal law. For example, in instances when their children are in Alabama schools, language minority and other national origin minority and immigrant parents will likely be more reluctant to provide consent for evaluation and initial provision of services, and to participate in the development of individualized education programs for their children. Alternatively, concerns about Section 28 might result in parents not enrolling their children in Alabama schools at all, which simultaneously undermines the purpose of the IDEA, and the Supreme Court's decision in *Plyler v. Doe.*

Migrant Education

43. The Migrant Education Program (MEP) is authorized in Title I, Part C of the ESEA, as amended, 20 U.S.C. § 6391 *et seq.* Under the program, the Department provides annual grant awards to States that choose to participate in the program. States use the funds to provide supplemental education and support services (*e.g.*, needed medical assistance, clothing, etc.) to migrant children in order to help these children overcome the problems caused by the periodic disruption of their education and thereby achieve academically to the same standards as exist for all other children. By law, a State also must make adequate provision for addressing the unmet education needs of preschool migratory children. 20 U.S.C. § 6394(c)(7). Services are provided on the basis of a comprehensive needs assessment and service delivery plan. 20 U.S.C. § 6396(a). States must consider the needs of out of school youth for services as they are counted for eligibility purposes.

44. States may provide MEP services either directly or through local school districts or other local operating agencies. The definition of a qualifying migrant (or "migratory) child is contained in 20 U.S.C. § 6399(2). Under this definition, a qualifying migrant child is a child who, in the preceding 36 months, has moved from one school district to another in order that the child, or the child's spouse, parent, or guardian, may seek or obtain agricultural or fishing work that is temporary or seasonal. The Department has issued regulations at 34 C.F.R. § 200.81, providing a definition of a migratory child and related terms. In order to qualify for services under the federal MEP, a child must meet these statutory and regulatory criteria. Consistent with the Department's guidance, a child's or parent's national origin or citizenship or immigration

status has never been, and cannot be consistent with the *Plyler* decision, and the eligibility criteria.

45. The Department awards MEP funds to States based on a statutory formula that takes into account each State's per pupil expenditure for education, as well as the State's count of eligible migratory children, ages 3 through 21, residing within the State during the 2000-2001, 12-month reporting period and the level of Congressional federal MEP appropriations. 20 U.S.C. § 6393(a). Updated annual counts of migrant children would only be taken into consideration in the award of MEP funds for fiscal years in which Congress appropriated more MEP funds than it did in FY 2002. Congress has never done so. *Id.*

46. After the passage of Arizona's immigration bill (SB 1070)[6], the Director and staff of the Office of Migrant Education (OME) learned of a decrease in participation by certain Arizona students in MEP programs or activities. Specifically, OME learned that some parents will not provide eligibility information, because they do not want their children to be labeled as "migrant" -- some officials perceive "migrant" to be synonymous with "immigrant." Some Arizona parents do not attend or participate in school parent involvement activities for fear that they will be subjected to questioning, or that school officials will request personal documents. Some parents do not want their children to be stopped and questioned at immigration or customs enforcement checkpoints. Still other families refuse to participate in MEP re-interview activities

[6] Enacted in April 2010, S.B. 1070 sought "to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States" through "enforcement the public policy of all state and local government agencies in Arizona," by, among other things, creating immigration-related state offenses. See, e.g., Section 13-2928 of Chapter 29 of Title 13 of Arizona Revised Statutes (making it "unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor of the state.")

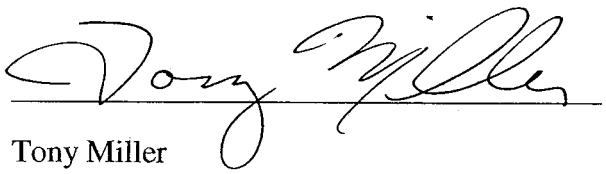
because they do not understand why MEP staff re-ask questions they have already answered. This decrease in participation occurred even though Arizona's bill did not contain any education-related provisions. By contrast, as noted above, Section 28 has numerous express requirements related to the national origin, immigration, and citizenship status of students and their parents. As a result, the chilling effect of the legislation will likely be even greater than that in Arizona.

47. Section 28 could severely undermine the ability of Alabama, and LEAs within Alabama, to comply with the central requirements of the MEP. It likely will chill participation of the intended beneficiaries of this federal program. First, parents may be less willing to provide accurate information needed to identify and recruit eligible MEP participants. As a result, some students who may be eligible for MEP services would not be served. Second, the chilling effect of Section 28 may cause parents of MEP students, whatever their legal status, to minimize or eliminate interaction with their child's school. This likely will undermine implementation of important MEP parent involvement activities, which promote improved academic achievement for students. Finally, concerns about the implementation of Section 28 might cause parents of children eligible to participate in the MEP program to withdraw their children from school entirely which simultaneously undermines the purpose of the MEP program, and the Supreme Court's decision in *Plyler v. Doe*.

48. After analyzing HB 56, in particular Section 28, in light of the Department's programs and existing federal education policy, I have concluded that the implementation of HB 56 would create significant obstacles to the effective administration of many Department's programs, and that its enforcement would undermine the education of many of Alabama's students, especially those in need of remedial and EL services. Additionally, the implementation

of HB 56, in particular Section 28, is likely to undermine the ability of State and local governments to meet their obligations under *Plyler v. Doe*, 457 U.S. 202 (1982), and Titles IV and VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c-6 and 2000d, to provide equal educational opportunities at the elementary and secondary level to all children residing within their school districts, and offering assistance to ensure that districts comply with the law.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed this 29th day of July 2011, in Washington, D.C.



Tony Miller
Deputy Secretary
U.S. Department of Education