

DREAM BIG

Education for Immigrant Students and Children of Immigrants

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 LEGAL AID
JUSTICE CENTER

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JustChildren Program of the Legal Aid Justice Center

The Legal Aid Justice Center (LAJC) fights injustice in the lives of individual Virginians while rooting out exploitative policies and practices that keep people in poverty. LAJC uses impact litigation, community organizing, and policy advocacy to solve urgent problems in areas such as housing, education, civil rights, immigration, health care, and consumer finance. LAJC's primary service areas are Charlottesville, Northern Virginia, Richmond, and Petersburg, but the effects of its work are felt statewide.

The JustChildren Program is Virginia's largest children's law program. JustChildren relies on a range of strategies to ensure that the Commonwealth's most vulnerable young people receive the services and supports they need to lead successful lives in their communities.

This practice guide is based on JustChildren's *Education Law and Advocacy* practice book, 2015 Edition, available at www.vacle.org.



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Disclaimer

This report is not legal advice. Because of the rapidly changing nature of the law, information contained in this report may become outdated, and anyone using this material in a legal matter must always research original sources.

Introduction

Virginia has an affirmative obligation to provide a free public education to all school-aged residents. Many of these students are the children of undocumented parents who face a risk of being detained or deported by U.S. Immigration and Customs Enforcement (ICE). The threat of deportation in no way diminishes the Commonwealth's obligation and commitment to educate these students.

Schools provide an important pillar for students who face family dissolution, and they should remain available and steadfast in their support for these vulnerable children. Establishing appropriate accommodations, making use of existing protections for vulnerable student populations, and educating all staff about the tools available for parents who hope for the best, but prepare for the worst, are important components of providing education to every student.

The information in this guide was compiled from guidance provided by the Office of the Attorney General, the Virginia Department of Education's Superintendent's Memo #159-01, which addresses enrollment of undocumented students from other countries, the Code of Virginia, and JustChildren's *Education Law and Advocacy* manual.

General Enrollment Principles for Immigrant Students

Virginia school divisions have a constitutional obligation to provide K-12 education to "all children of school age throughout the Commonwealth," regardless of their immigration status or the status of their parents or caregivers.¹ Virginia's public schools must be free to all children who reside within a school division.² Residency must be "bona fide," meaning that a student may not reside a school division for the sole purpose of attending school there.³ Virginia Code sets forth a list of children who *must* be deemed to reside in a school division. Children reside in a school division if:

- A. Their biological or adoptive parents reside in the school division;
- B. Their parents are in the military and are deployed outside the United States, and their legal guardians, who have been so designated by a Special Power of Attorney pursuant to 10 U.S.C. § 1044b, reside in the school division;
- C. Their parents are deceased and they are living with someone who is acting *in loco parentis* and lives in the school division;
- D. Their parents are unable to care for them, and they live with a person in the school division who is a court-appointed guardian, has legal custody, or is acting *in loco parentis* pursuant to the placement of the children for adoption by a person or entity authorized to do so under Va. Code § 63.2-1200;
- E. They are an emancipated minor and living in the school division not solely for the purposes of attending school there; or
- F. They are homeless youth as defined by the McKinney-Vento Act and Va. Code § 22.1-3.

¹ Va. Const. art. VIII, § 1; see also *Plyer v. Doe*, 457 U.S. 202 (1982).

² Va. Code Ann. § 22.1-3(A).

³ 1987-88 Va. Op. Atty. Gen. 374 (1987); 1987 WL 271800 (Va. A.G.).

This list of students is not exhaustive. It merely constitutes a set of students who *must* be deemed bona fide residents of a school division. Any student who can provide evidence of a non-school related reason for living in the school division is a bona fide resident. Schools may *not* ask for any information related to a child's or parent's citizenship or immigration status.⁴

Questions and Answers

1. What documentation may schools require in order to enroll students?

Virginia law requires a student's birth certificate for enrollment (or, if unavailable, an affidavit stating the child's age and reason that a birth certificate is unavailable).⁵ Except in the circumstances enumerated in Va. Code § 22.1-3, the school may also require proof of residence and medical information, including documentation indicating that the child has received required immunizations.⁶ Note also that rather than requiring a Social Security Number for student enrollment, schools must now assign a unique student identification number to all students.⁷

When presented with evidence of residency, school divisions must make residency determinations "based on all pertinent facts," including in situations not listed in Va. Code §22.1-3.⁸ All children who are bona fide residents, "whether or not [they] live with [their] parents or legal guardians," so long as they do not reside in the division solely for school purposes, are entitled to tuition-free education in the school division in which they reside.⁹

2. May school divisions require non-parent caregivers to obtain court orders to enroll or maintain the enrollment of a student?

Although court orders, including guardianship and custody orders, are one way to show prima facie residency, they are merely "factors to be considered" in determining residency and are not necessary to prove that a student is a bona fide resident of a school division.¹⁰ School officials "may not require that guardianship orders be produced for children who can establish bona fide residence by other means."¹¹ This applies to custody orders and other court orders that would establish legal guardianship over a child. It is the legal duty of school divisions to provide a free public education to all residents. Requesting or requiring a court order for school enrollment when other evidence of residency is available violates a division's obligation to educate its young residents by unnecessarily delaying school enrollment while a court process gets underway.

3. What is Special Immigrant Juvenile Status (SIJS) and how can enrollment procedures affect students who are eligible for SIJS?

For many immigrant children who have been abused, abandoned, or neglected by one or both parents, the U.S. government provides a path to citizenship through Special Immigrant Juvenile Status (SIJS).¹²

⁴ See 1999 Va. Op. Atty. Gen. 105 (1999), 1999 WL 463376; Superintendent's Memo #059-17.

⁵ Va. Code § 22.1-3.1.

⁶ Va. Code §§ 22.1-270, 271.2.

⁷ Va. Code § 22.1-287.02.

⁸ 2007-08 Va. Op. Atty. Gen. 015 (2007), 2007 WL 1958946 (Va. A.G.).

⁹ 1979-80 Va. Op. Atty. Gen. 292 (1979), 1979 WL 32015 (Va. A.G.).

¹⁰ 1987-88 Va. Op. Atty. Gen. 374 (1987), 1987 WL 271800 (Va. A.G.).

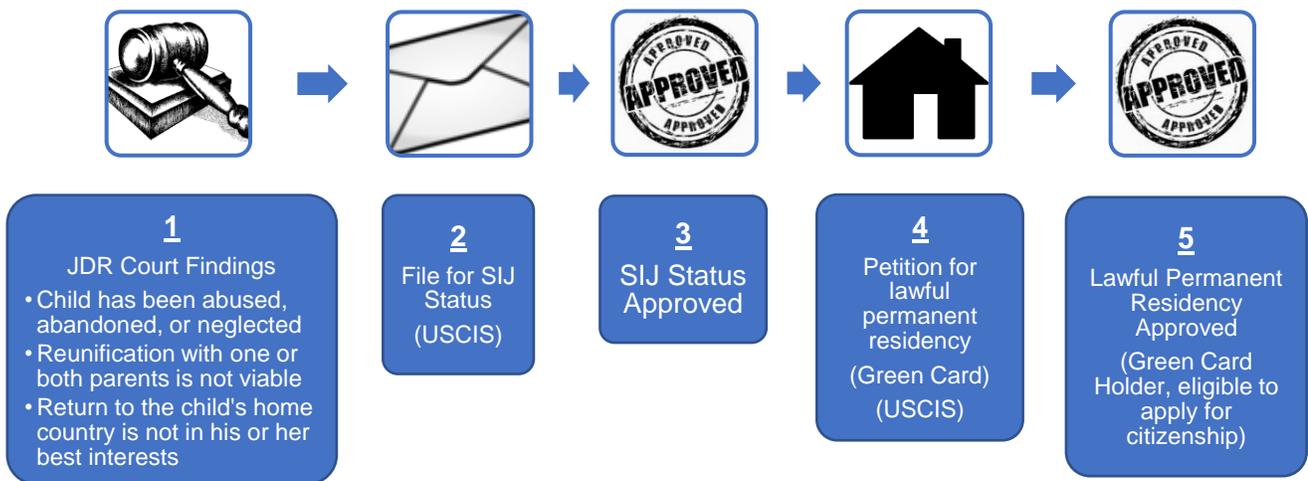
¹¹ *Id.*

¹² INA § 101(a)(27)(J).

SIJS is often the only opportunity for immigrant students to obtain immigration relief and be granted lawful presence in the United States. Requiring or even requesting that caregivers obtain court orders granting custody or guardianship can seriously prejudice a child’s ability to access legal immigration relief.

There are many steps involved in securing permanent residency through SIJS (represented in the diagram below). The first step happens at the state court level, in the Juvenile and Domestic Relations (JDR) Court. In order for a child to qualify and apply for SIJS through the federal government, the JDR court must make specific findings about the child’s family situation and best interests. The findings establish eligibility to apply for SIJS. A JDR court must find that:

1. The child is dependent on the court, or the child has been placed in the care or custody of an individual, agency, department, or entity appointed by the court;
2. Reunification with one or both parents is not viable due to abuse, abandonment, neglect, or a similar basis under state law; and
3. It is not in the child’s best interest to return to the home country.¹³



A child may not bring a case in a JDR court *solely* to obtain SIJ findings. The case must be necessary for a routine reason (e.g., a parent or caregiver seeks legal custody of a child), and then a child may request SIJ findings *in conjunction* with the routine matter before the court. If a child who is otherwise eligible for SIJ status petitions the court for custody or some other reason, and does not also request SIJ findings at that time, they have lost their opportunity to obtain the necessary findings and therefore to secure an SIJS visa. Losing the opportunity to apply for the SIJS visa means a child will have to remain undocumented, cannot access important public benefits, and is at risk of deportation.

While school divisions may require proof of residency and may *accept* court orders if offered by a caregiver,¹⁴ school staff should not refer families or children, especially immigrant children, to JDR court to obtain custody orders for school enrollment. If school staff believe a caregiver intends to seek a

¹³ INA § 101(a)(27)(J).

¹⁴ 1987-88 Va. Op. Atty. Gen 374 (1987), 1987 WL 271800 (Va. A.G.) (Establishing a guardianship order as one means of establishing residency, but providing that schools may not require a court order when residency can be established in other ways).

custody or guardianship order in order to assist in proving bona fide residency, the school should make available a list of legal service providers, including immigration attorneys, along with a warning that seeking custody without consulting with an immigration attorney may prejudice some student's access to immigration relief.

For more information about SIJS practice in Virginia, please see Legal Aid Justice Center's August 2017 practice advisory, *Strategies for Obtaining SIJ Predicate Orders in Virginia Post-Canales v. Torres*.

4. What are a school division's duties if a student's parent or caretaker is detained or deported?

In light of the possibility of ICE actions in our communities, school divisions should consider the family disruption students may face if one or both parents or caretakers is unexpectedly detained or deported. Many families make for temporary alternate caregivers for their children in the event of family separation. Powers of Attorney are one legal tool that allows parents to designate and authorize these caregivers to make decisions with respect to their children while the parent or parents are unavailable. In many cases, these Powers of Attorney designate relatives, friends, and older siblings who may or may not live in the student's original school zone or division to be temporary alternative caregivers.

In the event that the student must live with a temporary alternative caregiver who resides in another school zone or division, school and community continuity for the affected student is paramount. To protect and support their student communities, divisions should develop policies to address the unique and traumatic situation of parents who may be suddenly detained or deported. School divisions should honor all legal obligations to keep students affected by family separation in familiar community and school environments. The following protections may apply to students experiencing family disruption.

A. Students living with an adult relative

Students who have moved to live with an adult relative providing temporary kinship care can enroll or remain enrolled in the division in which the relative lives, as long as the move was not solely for school purposes.¹⁵ Kinship care is "full-time care, nurturing, and protection of children by relatives."¹⁶ Powers of Attorney, particularly those that take effect exclusively if/when a parent is unavailable, may serve to alert the school division to the kinship care arrangement, the reasons that the parent(s) cannot care for their child, and provide authority for the designated caregiver to make decisions with respect to the student.¹⁷ Virginia does not require a custody order for temporary kinship care.¹⁸ Furthermore, requiring a custody order would interfere with the district's obligation to enroll and provide free education to students residing in its division. Note that students in kinship care may also be protected as unaccompanied homeless youth, discussed below.

B. Unaccompanied homeless youth

Students temporarily living with non-parent caregivers following a parent's detention, deportation, or other circumstance making a parent suddenly unavailable may fit the statutory definition of homeless

¹⁵ Va. Code § 22.1-3(A)(4).

¹⁶ *Id.* (referring to Va. Code § 63.2-100).

¹⁷ *Id.*

¹⁸ Va. Code § 22.1-3(A)(4).

youth per Va. Code § 22.1-3(A)(6). Homeless youth are those lacking “a fixed, regular, and adequate nighttime residence.” Further, these persons “shall include”:

children ... who are not in the physical custody of their parents who (a) are sharing the housing of other persons due to loss of housing, economic hardship, or other causes; are living in motels, hotels, trailer parks, or camping grounds due to lack of alternative adequate accommodations or in emergency, congregate, temporary, or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement; (b) are living in an institution that provides a temporary residence for individuals with mental illness or individuals intended to be institutionalized; (c) have a primary nighttime residence that is a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings; or (d) are living in parked cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings.¹⁹

A student whose parent or parents are detained or deported by ICE will likely meet the definition of a homeless student during the period of their parent’s detention and travel if:

1. The student is not in the physical custody of their parent, and
2. The student is living with an alternate caregiver and is therefore “sharing the housing of other persons due to loss of housing, economic hardship, or other causes.”²⁰

Under the McKinney-Vento Homeless Assistance Act (McKinney-Vento), school divisions must provide services to ensure that homeless youth are enrolled, attending, and succeeding in school comparably to other students in public school.²¹ The local educational agency must determine which school the student will attend based upon the best interests of the child, with direction from McKinney-Vento that the child *should be enrolled at their original school* unless it would be contrary to the wishes of the student or guardian.²² Further, the school must enroll the child immediately, even if it disputes the student’s placement within the division.²³ Thus, for students enrolling in new divisions, the school may not require additional documentation and must enroll the student immediately. For students continuing in their original division and living in another division, the two school divisions must make an accommodation to provide transportation for the student to attend school in his original division.²⁴

5. What are school divisions’ obligations if caregivers present the school with a Power of Attorney granting authority over the student to non-parent caregivers?

In many cases, immigrant parents are preparing emergency plans in case of family separation by the detention or deportation of a parent. This may include preparing Powers of Attorney by which a parent (the “principal”) grants a family member or trusted friend (the “agent”) the authority to make decisions for their children and to act on their behalf in the event of a student’s parent(s) are unavailable.

¹⁹ Va. Code § 22.1-3(A)(6).

²⁰ *Id.*

²¹ 42 U.S.C. § 11431, Va. Code § 22.1-3(A)(6) (“School divisions shall comply with the requirements of the federal McKinney-Vento Homeless Education Assistance Improvements Act of 2001, as amended (42 U.S.C. § 11431 et seq.), to ensure that homeless children and youths shall receive the educational services comparable to those offered to other public school students.”).

²² 42 U.S.C. § 11432(g)(3)(B).

²³ 42 U.S.C. § 11432(g)(3)(E).

²⁴ 42 U.S.C. § 11432 (g)(1)(J)(iii).

If a non-parent caregiver named as agent presents a school with a signed and notarized Power of Attorney, the school may accept the document as valid and allow the agent to make decisions regarding the student as set out in the Power of Attorney.²⁵ If a school doubts the validity of a signed and notarized Power of Attorney, it may only ask for specific types of additional verification as provided by law, such as an agent's certification under oath.²⁶ The school may not require an additional or different form of Power of Attorney for authority granted in the Power of Attorney presented.²⁷ Refusal to accept a signed and notarized Power of Attorney according to the requirements of the law may result in legal liability.²⁸

In order to facilitate access to education for all students in Virginia and school continuity for students experiencing a family separation, schools should recognize Powers of Attorney granting authority to temporary non-parent caregivers. This will permit students to continue to benefit from services provided through their schools, including special education services, educational field trips, free and reduced price lunch, and the many services that require parental consent and consultation for students to participate. Powers of Attorney may also assist in establishing bona fide residency (for non-school purposes) during the period of disruption when a parent is suddenly unavailable as a result of an immigration enforcement action or for other reasons. Powers of Attorney may also assist in establishing the existence of the necessary requirements for a student to be considered an unaccompanied homeless youth.

²⁵ Va. Code §64.2-1617(B).

²⁶ Va. Code §64.2-1617(C).

²⁷ Va. Code §64.2-1618(A)(3).

²⁸ Va. Code §64.2-1618(C).