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LIFTING THE LAMP

Beside the Schoolhouse Door

A Legal Guide to Serving Undocumented Students in Public Schools



“Public schools should provide equitable access and ensure that all students have the knowledge and skills to succeed as contributing members of a rapidly changing, global society, regardless of factors such as race, gender, sexual orientation, ethnic background, English proficiency, immigration status, socioeconomic status, or disability.”

Article IV, Section 1.3

Beliefs & Policies of the National School Boards Association



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Beside the Schoolhouse Door*

A Legal Guide to Serving Undocumented Students in Public Schools

A PUBLICATION OF
The National School Boards Association (NSBA)

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This publication does not offer legal advice. When faced with a question regarding the legal rights of undocumented or foreign students in school, school districts should seek the advice of their COSA attorney.

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**Adapted from the last line of the Emma Lazarus poem, New Colossus, as inscribed on the pedestal of the Statue of Liberty.*

FOREWORD

Nearly a decade after the National School Boards Association (NSBA) first published a guide on legal issues surrounding undocumented students, public schools continue to face questions in an ever-shifting landscape. Indeed, a reinvigorated national debate has led to new questions requiring schools to navigate carefully many competing interests. From so-called “sanctuary” school districts to renewed federal enforcement efforts around immigration, students and schools can find themselves at the intersection of challenging and nuanced legal choices with real impact on the lives of undocumented students.

Despite the considerable attention to immigration issues on the national stage, in the intervening years since our first publication, little established case law or other legal authority has emerged to inform the choices of public schools in this area. Now, as then, this reality both highlights the need for writing this publication, and the difficulty in doing so. The 1982 U.S. Supreme Court ruling in *Plyler v. Doe*, which held that undocumented students have a constitutional right to attend public elementary and secondary schools for free, remains the sole High Court decision regarding the rights of undocumented students in school. Save a 1995 federal district court case from California, *League of Latin American Citizens v. Wilson*, *Plyler* is the *only* federal court decision directly on point.

As with our previous guide, this publication relies heavily on a careful and yet expansive consideration of *Plyler*. Why? Because *Plyler* is still good law. And because, simply put, reliance on *Plyler* is the single best way to approach questions surrounding the constitutional rights of undocumented students and to limit legal liability. But, *Plyler*, for all its expansive constitutional analysis, does little to help us understand and navigate the operational difficulties that school districts face today around immigration questions. What, for instance, are schools to do when federal enforcement agents seeking to interview students appear in the main office? What are sanctuary schools, and should school boards choose to declare themselves as such? What kinds of policies should school boards adopt to comply with the law? Is federal funding at risk? What is the current federal posture toward undocumented students and what does it mean for schools?

These are some of the questions that this guide seeks to address. It builds on our previous guide in an accessible FAQ format. And, because so much of this area of law is evolving rapidly, our guide will be an electronic publication updated as significant changes in the field arise.

We hope you will find this guide useful as you navigate the uncharted territory of this timely topic.

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I. CURRENT STATE OF THE LAW

1 Do public elementary and secondary schools have a constitutional duty to provide undocumented children with a free education?

Yes. The U.S. Supreme Court's landmark decision in *Plyler v. Doe*¹ established the principle that undocumented children have the constitutional right under the Equal Protection Clause of the Fourteenth Amendment to receive a free public education from kindergarten to the 12th grade. The Court emphasized, "education prepares individuals to be self-reliant and self-sufficient participants in society,"² and "perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists."³ More information regarding the rights of undocumented students is available in NSBA's 2009 *Legal Issues for School Districts Related to the Education of Undocumented Children* ("2009 Undocumented Children").⁴

2 Should a school district enroll an undocumented minor who is also unaccompanied?

Yes. The law does not permit a school district to deny an undocumented student access to a public education on the basis that he or she is unaccompanied.⁵ According to a memorandum issued jointly by the U.S. Departments of Justice, Education, and Health and Human Services, when such unaccompanied children⁶ come into federal custody, they typically are released by the Office for Refugee Resettlement to an appropriate sponsor, usually a parent, family member, or family friend.⁷

"While residing with a sponsor, unaccompanied children, like other children, are required to attend school up to a certain age established under State law. Sponsors must help unaccompanied children to enroll in school immediately following family reunification."⁸

Pursuant to state and local law, school officials may request proof that the adult enrolling the child lives within the boundaries of the school district.⁹ But a school district is prohibited from asking about citizenship or immigration status of the child or of the adult enrolling the child as a means to establish residency within the district.¹⁰ The memorandum also states school districts may not deny a homeless child (including a homeless child who is also an unaccompanied child) enrollment solely because he or she cannot provide the required documents to establish residency.¹¹

KEY TO ACRONYMS

CBP — U.S. Customs and Border Protection (part of DHS)

COSA — NSBA Council of School Attorneys

DACA — Deferred Action for Childhood Arrival program

DAPA — Deferred Action for Parents of Americans and Lawful Permanent Residents

DHS — Department of Homeland Security

FERPA — Family Education Rights and Privacy Act

ICE — U.S. Immigration and Customs Enforcement (part of DHS)



Additional information regarding enrollment is available in NSBA's 2009 *Undocumented Children Legal Guide*.¹²

3 What kinds of documents may a school request to determine a student's residency for purposes of attending school without violating *Plyler*?

Most states require that students reside within the boundaries of a school district to enroll in that district's schools. In *Martinez v. Bynum*,¹³ the U.S. Supreme Court upheld states' rights to enforce such residency requirements for public school attendance.

Problems arise when school districts ask for documents to prove residence, such as social security cards, which implicate a student's immigration status. *Plyler* clearly indicates that requiring a student to prove that he is a United States citizen to enroll tuition free in a public school violates the U.S. Constitution. Although the Supreme Court did not indicate what types of documents a school district may require of a student to prove residency, requiring students to present documents that reveal their immigration status that could "chill" or dissuade undocumented students from enrolling in school is impermissible under *Plyler*.

Because federal law does not speak directly to the issue, school districts must consult their state laws or their state department of education regulations to determine what kind of documents they can request to establish a student's residency without violating *Plyler*. Laws in most states, or the guidance provided by their state education agencies, specifically prohibit school districts from requesting documents that implicate a child's immigration status when attempting to determine residency for enrolling the child in school.¹⁴

In states that allow school districts to ask for social security numbers for registering or enrolling students, districts must inform the student and parent that providing the social security number is voluntary, and that refusing to provide it will not bar the child from enrolling in or attending school. School districts that request social security numbers also are required to explain the purpose for which the social security number will be used.¹⁵

Absent state law or guidance indicating the documents districts may request to verify residency when enrolling students, districts should develop a policies specifying the documents that will be required as proof of residence. The documents should be relevant only to determining whether a child lives within district attendance boundaries. Because a variety of documents may satisfy this requirement, schools may want to be flexible in what they ask parents to provide. However, districts should not require any documents with the intent of declining enrollment based on a child's immigration status. Like many district's Tulsa Public Schools has adopted a [regulation](#) that provides an example of the kinds of documents schools can request to verify residency without implicating a child's immigration status, including "proof of provisions of utilities, payment of ad valorem taxes, local agreements or contracts for purchasing/leasing housing, income tax returns, notes, mortgages and contracts."¹⁶



II. THE FEDERAL POSTURE

Executive Branch Enforcement Activities

4 **What is the current federal enforcement posture regarding undocumented immigrants and what are the implications for schools?**

In early 2017, the Executive Branch of the U.S. Government issued several directives concerning undocumented immigrants that raise concerns for public schools, though their legal ramifications remain unclear.

- On January 25, 2017, the White House issued Executive Order No. 13768, *Enhancing Public Safety in the Interior of the United States*.¹⁷ The Executive Order provides that the federal government will increase enforcement efforts against “removable aliens,” and “shall ensure that [sanctuary] jurisdictions ... are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes.”¹⁸
- On February 20, 2017, the Department of Homeland Security (DHS) published a memorandum, *Implementing the President’s Border Security and Immigration Enforcement Improvements Policies*¹⁹ implementing the January 2017 executive order.
- On February 21, 2017, the Department of Homeland Security issued a Q&A on the January 2017 executive order, *DHS Implementation of the Executive Order on Enhancing Public Safety in the Interior of the United States* that contains additional guidance regarding implementation.²⁰
- On May 22, 2017, the U.S. Department of Justice issued its own memorandum regarding implementation of the January 2017 executive order.²¹

Neither the January 2017 executive order nor the implementing documents following it directly discuss how the order might apply to undocumented students, beyond a general discussion of sanctuary jurisdictions. This leaves states and local school districts on their own to interpret the executive order’s possible impact on schools.

State Responses

5 **What guidance have states provided to school districts concerning their responsibilities to undocumented children in the context of increased immigration enforcement activities?**

Taking into account state law and policy, as well as the federal “Sensitive Location Enforcement Policy” issued in 2011 (see Question 12), states have issued to local school districts a variety of responses and guidance concerning the January 2017 executive order. A few examples are provided below.



Connecticut

The Governor of Connecticut, along with the state's Commissioner of Education, issued to superintendents a letter including this guidance on interactions with U.S. Immigration and Customs Enforcement (ICE):

If the [Immigrations and Custom Enforcement] agent does have a warrant, the school official should review it carefully to determine exactly what it authorizes ICE to do, and who issued it. Please note that, depending on the situation, ICE agents may have 'administrative warrants' that are not court orders signed by a judge. School officials should not assume that an ICE agent has the authority to enter school facilities or obtain information or records based on an administrative warrant. In the Connecticut State Department of Education's view, a variety of situations could arise in the school setting, including when ICE agents demand records or information concerning a student, where a warrant signed by a judge or other appropriate court order likely would be required by law. In planning for interactions with ICE, districts should consult with their attorneys about these issues.²²

Virginia

Virginia's Superintendent of Public Instruction issued to school division superintendents a memorandum noting student privacy requirements had not changed:

Schools also have a legal responsibility to protect the privacy of student education records pursuant to the Family Educational Rights and Privacy Act (FERPA). The recent executive orders and Department of Homeland Security (DHS) guidance memorandums relating to immigration and deportation do not alter these legal obligations in any way. The recent executive actions on immigration do not include any provisions that require local school divisions to develop new policies or procedures, alter existing policies or procedures, or enter into any type of agreements with Immigration and Customs Enforcement (ICE) officials.

The memo reminds superintendents of their obligation to provide undocumented students with access to free public schools, and explains that while "harboring" a person illegally in the U.S. is not permitted, providing educational opportunities, keeping student forms up to date, providing families information, and planning in advance for placing the child safely if his parents were detained, do not constitute "harboring." The memo identifies what obligations schools have towards ICE agents, and recommends that districts review policies and procedures. It briefly discusses the obligations schools have toward students whose parents have been picked up in ICE enforcement actions and provides a few ideas on how to assist children with no home to which they can return.²³

Michigan

Michigan's State Superintendent, with the state's Department of Civil Rights Director, issued a letter suggesting proactive steps schools could take to prepare for immigration enforcement actions, including:

- review existing policies;
- seek legal advice before an enforcement action takes place at or near the school;
- understand what obligations school staff may or may not have to cooperate with ICE or CBP agents, "especially where. . .an immediate demand is being made;"
- review the sensitive locations policy (see Question 12) with staff;
- "share educational resources with families in [the] district that enhance family emergency preparedness, in the event of an abrupt separation of a family unit."²⁴

Texas

On December 5, 2016, Texas Attorney General Ken Paxton issued a statement warning that sanctuary cities are contrary to established law.²⁵ After praising lawful immigration as a proud American tradition, he said "[s]anctuary cities, however, implicate different concerns."²⁶ Paxton warned that "by cutting holes into the federal government's enforcement fabric, sanctuary cities imperil public

safety”²⁷ by harboring criminals.²⁸ On May 7, 2017, Governor Gregg Abbott signed S.B. 4 into law. The bill allows law enforcement to investigate a suspect’s immigration status and demands that municipalities implement immigration laws. The law becomes effective on September 1, 2017 and does not apply to school districts or police who are working under contract with schools.²⁹

Local School District Responses

6 How have local school districts responded to heightened federal enforcement activities involving undocumented immigrants?

Some local school districts have responded to the January 2017 executive order with resolutions and guidance, including those listed below.



Los Angeles Unified School District

The Los Angeles Unified School District has adopted policies that provide students with sanctuary protections.³⁰ The school board passed a resolution urging Superintendent Michelle King to reaffirm that LAUSD schools are a safe place for students.³¹ The board also asked the superintendent to strengthen a series of protections for students.³² The resolution came after the school district already had declared its schools “safe zones,”³³ and instructed school officials to obtain the district’s permission before allowing immigration agents onto school property.³⁴ Under the policy, the district will train staff not to enter into agreements with immigration agents or share students’ confidential information, including their immigration status, unless students or their parents give permission.³⁵

New York City

Through its Chancellor, the New York City Department of Education issued guidance to building principals on handling the arrival of non-local law enforcement, including ICE agents, at schools.³⁶ It discusses access to school facilities (consent requirements, proper warrants, exigent circumstances), sensitive location policies, access to student records, and an order of operations for front office staff when an ICE agent comes into the building.³⁷

Denver Public Schools

The Denver Public Schools (DPS) board unanimously approved a resolution, titled “The Safe and Welcoming School District Resolution,” stating that DPS will do everything “in its lawful power” to protect students’ confidential information and ensure that “students’ learning environments are not disrupted” by immigration enforcement actions.³⁸ The resolution is intended to assure families that the school district will protect students’ constitutional rights.³⁹

In the resolution, DPS directs its officials:

- To continue its practice of not collecting or maintaining any information about students’ immigration status.
- To contact the district’s general counsel immediately about any request by a federal immigration official to talk to a student while in school or at any school activity or using district transportation.
- To respond to any such request through the district’s general counsel, who will refrain from sharing information or providing access to students unless required by law, and will fight to protect students’ constitutional and legal rights.⁴⁰

7 Does the executive order or implementing guidelines impact DACA?

Yes. The Deferred Action for Childhood Arrival (DACA) program granted applicants (between the ages of 15 and 31) who arrived in the U.S. as children special protection by deferring action on potential immigration removal proceedings for two years. In a February 21, 2017 Q&A, DHS indicated that its February 20, 2017 memorandum implementing the January executive order would not affect DACA recipients.

However, on September 5, 2017, President Donald J. Trump announced that he was terminating the DACA program. In terminating the program, the Administration has indicated that it will no longer accept initial DACA requests from individuals who had not been previously granted DACA protections. It also indicated that individuals whose DACA protection would terminate between September 5, 2017 and March 5, 2018 had to apply to renew such protection before October 5, 2017 and individuals whose DACA protection expired after March 5, 2018, were ineligible to extend their DACA protection. The administration also indicated that DACA applications that had been filed as of the announcement date, whether initial applications or renewals, would be adjudicated following usual procedures. Additionally, previously issued employment authorization cards would remain valid until the date listed on the face of the cards.

As a practical matter, individuals will begin to lose their DACA protection in 2018, with all those having such protections losing it by 2020, unless the President reconsiders the issue or Congress changes the law. As a practical matter, a person whose DACA protection has lapsed becomes subject to removal in the same way as other individuals who lack legal status in the United States.⁴¹

Numerous lawsuits have been filed as a result of the President’s actions. Fifteen states filed a lawsuit in the federal district court for the Eastern District of New York alleging that the termination of the DACA pro-

gram violates the Equal Protection Clause because it is racially motivated. The state of California has also filed a lawsuit in the federal district court in the Northern District of California alleging that the termination of the DACA program violates the Administrative Procedures Act and fails to meet Fifth Amendment due process requirements.⁴²

8 Does the newly announced federal focus on transnational gangs affect undocumented students in schools?

It is unclear. On February 9, 2017, the President issued an executive order calling for a “comprehensive and decisive approach” in dismantling transnational criminal groups.⁴³ To the extent undocumented students become involved in such groups in or out of school, the following three policy goals articulated in the executive order could affect them: (1) strengthened enforcement of federal law to hinder the efforts of groups including “criminal gangs”; (2) funding to identify, interdict, disrupt, and dismantle the organizations and either prosecute in the United States or ensure a “swift removal from the United States”; and (3) increased coordination between domestic and abroad entities to dismantle and prosecute gangs.⁴⁴

In a separate executive order, the President authorized the U.S. Attorney General to create a task force to “develop strategies to reduce crime” through brainstorming new ideas, focusing on existing law, and evaluating possible improvements to data collection.⁴⁵ The Attorney General has yet to offer any new strategies regarding transnational gangs in schools.

In 2013, the Departments of Justice and Health and Human Services, focusing on prevention of gang membership generally, issued *Changing Course: Preventing Gang Membership*, a guide that offers specific steps for schools:⁴⁶

- Providing a safe environment so that students are not fearful may be the single most important thing schools can do to prevent gang involvement.
- Recognize or admit there’s a gang problem. In a large sample of secondary schools with gang problems (defined as more than 15 percent of students reporting that they belonged to a gang), only one-fifth of principals said their school had a problem.
- Data show that youths at the greatest risk of gang participation are not reached by traditional, school-based prevention programs; youths who have left school require alternative learning environments to engage them in learning and prevention programs.
- Carefully consider whether gang prevention programs (1) make efficient use of educational time, (2) use state-of-the-art methods, (3) have been shown to be effective in preventing problem behavior or gang involvement, and (4) are implemented as designed.
- Assessments of gang risks are necessary to guide future action. Use systematic self-reporting of gang-involvement and victimization surveys to supplement existing mechanisms.

Given the lack of federal guidance on responding to the presence of transnational gangs in local



communities and schools, district leaders may want to consider adopting new or expanding current agreements between education and law enforcement officials that address cooperative measures to counteract transnational gang activity. Below are some examples that may prove helpful.

Rhode Island

In the Memorandum of Understanding between the Pawtucket School Department and Pawtucket Police Department, the following duties and responsibilities of school resource officers are listed:

S.R.O.s [school resource officers] shall be responsible for monitoring the social and cultural environment to identify emerging youth gangs. All information concerning gangs shall be provided to the Police Department's Gang Task Force. Gang prevention and early intervention strategies shall be coordinated with the Police Department's Youth Services Division.⁴⁷

New Jersey

New Jersey's *A Uniform State Memorandum of Agreement Between Education and Law Enforcement Officials* addresses the issue of gang threat and recruiting.⁴⁸ Section 8.3 states:

"Law enforcement and school officials agree to engage in ongoing discussions and training in gang prevention and intervention, as appropriate, regarding gangs that are thought to be active in the area, gang recruiting and signs of gang activity or recruiting. School officials shall inform law enforcement officials of any signs of gang activity or recruiting observed on school grounds."

Section 8.4.3.2., "Reporting of HIB by Schools to Law Enforcement," advises: "When making mandatory or voluntary referrals, school officials agree to indicate any suspicions or evidence that the conduct was gang-related."



III. “SANCTUARY SCHOOL DISTRICTS”

9 What is a sanctuary school district?

Although one court has defined a sanctuary jurisdiction (which includes counties, cities, school districts and other local political subdivisions) as a jurisdiction that “fails to adhere to ICE requests,” there is no definitive legal definition for a sanctuary school district.⁴⁹ The term, modeled after the term “sanctuary cities,” is an amorphous political designation that generally describes school districts that have adopted policies or practices intended to help protect undocumented students in their communities.⁵⁰ The Office of the Inspector General at the U.S. Department of Justice defines the term as “jurisdictions that may have state laws, local ordinances, or departmental policies limiting the role of local law enforcement agencies and officers in the enforcement of immigration laws.”⁵¹

The term means something different in every jurisdiction, but generally, districts that have adopted sanctuary status—by either a public statement or a more formal designation by their boards of education—have agreed to take certain steps to shield their undocumented students from immigration authorities and enforcement actions. Such steps may include refusing to share a student’s immigration status with immigration authorities and establishing procedural protocols for immigration agents to engage with students at school.

10 Does a school district risk losing federal funding if it declares itself a sanctuary district?

It is unclear. The executive order issued in January 2017 (see Question 4) indicates that sanctuary jurisdictions risk losing federal funds. Several lawsuits have been filed challenging this executive order. A temporary injunctive order issued by a federal court in California currently prevents a district from losing federal funding if it declares itself a sanctuary school district.

The executive order indicates “sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal by the United States” and that the federal government “shall insure that these jurisdictions are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes.”⁵² The executive order expresses the administration’s intent to withhold federal funding from jurisdictions that have declared themselves sanctuary jurisdictions.

Under the order, jurisdictions deemed by the Attorney General of the United States or the Secretary for the Department of Homeland Security to have willfully refused to comply with 8 U.S.C. § 1373 will not be eligible for federal grants. That provision of federal law prohibits federal, local, or state governmental entities from adopting policies that would restrict any governmental entity or official from communicating with the Immigration and Naturalization Service regarding the citizenship status of any individual.⁵³

It is unclear that the U.S. Attorney General or the Secretary of DHS has authority to withhold federal funds authorized by Congress under programs outside the jurisdictional power of these federal officials. Federal funds received by public schools generally fall outside their authority. In lawsuits filed by Santa Clara County, San Francisco County, and the City of San Francisco, all of which are labeled as sanctuary jurisdictions in California, the jurisdictions argued that the executive order's instruction regarding the withholding of federal funds from sanctuary jurisdictions violates the Fifth and Tenth Amendments of the U.S. Constitution and effectively usurps Congressional powers. On April 25, 2017, the court, finding that the jurisdictions are likely to succeed on the merits, issued an injunction stopping the Government from withholding federal funds from sanctuary jurisdictions until after the case is resolved.⁵⁴

This injunctive order is nationwide in scope; therefore, it applies to sanctuary jurisdictions throughout the United States. As long as it is in place, the federal government will not be able to withhold federal funding from sanctuary jurisdictions, which includes school districts. School districts should be aware that this order is temporary, however; it will be in place only until the court issues a more permanent ruling in the case. School districts should seek regular updates from an experienced COSA attorney on the status of these cases to ensure that district policies on this issue remain compliant with the law.

In July, Attorney General Jeff Sessions announced that he would require local authorities to give 48 hours' notice "where practicable" before releasing from custody people who federal immigration authorities suspect of being in the country illegally. Jurisdictions that fail to do this run the risk of losing public safety grants. On September 15, 2017, a federal judge issued a preliminary injunction that blocked Sessions' attempts to withhold federal safety grants from jurisdictions that refuse to cooperate with the 48-hour notice provision. The ruling is nationwide in scope. The Justice Department has indicated that it will appeal the court's ruling. (Jason Meisner and John Byrne, *Judge Rules in City's favor on Sanctuary Cities, Grants Nationwide Injunction*, (Chicago Tribune 2017), <http://www.chicagotribune.com/news/local/breaking/ct-chicago-sanctuary-cities-law-suit-met-20170915-story.html>).

11 **Should my school district declare itself a sanctuary school district? Why or why not?**

Whether a school district formally should declare itself a sanctuary district is a choice that should be guided by the values of the school board and the community. The term "sanctuary" is a largely undefined political designation. School districts considering becoming sanctuary districts may want to determine what value or benefit the designation will bring to the district and its undocumented families.

School districts may want to express support for undocumented students through adopting a sanctuary policy. Districts should be mindful, however, that schools cannot completely "protect" undocumented students from immigration enforcement actions. A "sanctuary" designation may overstate the level of protection or support that schools can offer. For example, even if a school district declares itself a sanctuary district, it may still be required to provide federal authorities access to students, especially when exigent circumstances exist. (See Question 12.) If a school district does declare itself a sanctuary district, it should be careful to explain what actions the district will and will not take with

respect to immigration enforcement so that students and families have clear expectations.

Regardless of whether a district declares itself a sanctuary district, it is important to remember that under *Plyler* all undocumented children have the constitutional right of access to public schools. This is a constitutional mandate that must be adhered to by all schools regardless of community sentiment or political positions. Because of the protections that school districts are required to provide under *Plyler*, school districts may determine that they can support undocumented students to the extent of the law without declaring themselves sanctuary districts. School districts may also want to consider the extent to which declaring themselves sanctuary jurisdictions could detract from other efforts to protect undocumented students by potentially inviting unwanted attention from federal and other authorities.

IV. WHAT TO DO WHEN ICE COMES TO SCHOOL

12 What should a school do if a U.S. Immigration and Customs Enforcement (ICE) agent comes to the main office seeking to interview a student?

In October, 2011, ICE issued a policy directive on enforcement actions at sensitive locations⁵⁵ that is still in effect. Under that policy, planned ICE enforcement actions are not to occur or be focused on sensitive locations, such as schools or places of worship, without prior approval from a designated supervisory officer.

There is an exception to the policy that allows such enforcement actions without prior approval if exigent circumstances exist, other law enforcement actions have led officers to a sensitive location, or the agent is seeking to interview a student as a part of the Student Exchange and Visitor Program (SEVP). The kinds of exigent circumstances that would permit enforcement action without prior approval include matters of national security or terrorism; matters that involve the imminent risk of death, violence or physical harm to any person or property; the immediate arrest or pursuit of a dangerous felon, terrorist suspect, or any other individuals that present a danger to public safety; or matters involving the imminent risk of destruction of material in an ongoing case.

This policy makes it unlikely that an ICE agent will visit a school to interview a student unless the school is in the SEVP program or there are exigent circumstances. But schools should be aware that many activities are outside the scope of the sensitive location enforcement policy, including:

- obtaining records, documents, or other materials from officials or employees;
- providing notice to officials or employees;
- serving subpoenas; or
- guiding or securing detainees.

Visits from ICE agents for one of these reasons are far more likely than a visit to interview a student.



While it appears that ICE will continue to follow the sensitive location enforcement policy, school districts nevertheless need to be prepared for visits from ICE agents to interview students. In fact, districts should have policies in place that address interviews of students at school by all types of law enforcement. Such policies should include a procedure for verifying the law enforcement officer's credentials and in the case of ICE, making certain that the request for the interview is in keeping with the sensitive location enforcement policy. The policies also should address parent notification, and outline under what circumstances parents will be notified that an ICE agent or other law enforcement officer wants to interview their student. Staff members should be trained so that they know what district policy requires them to do should they encounter an ICE agent or other law enforcement officer who wants to interview a student.

The policy also should address the protocol staff should use when ICE agents or other law enforcement officers visit schools to serve subpoenas or obtain records. It should acknowledge that the law allows any adult to serve an ICE subpoena, so the server may not carry ICE credentials. A well-drafted policy will indicate who on staff is responsible for verifying the validity of the subpoena, for determining what records the school district can appropriately provide to agents, and for

determining what processes district staff need to follow before providing the information requested in the subpoenas to the agent.

It is helpful to seek assistance from a COSA member or state school boards association when drafting a policy that adequately meets the district's needs in light of pertinent requirements of federal and state law.

13 What if ICE does not adhere to its sensitive location policy?

DHS, CBP, and ICE allow individuals to lodge a complaint about a DHS enforcement action that may have violated the sensitive locations policy.⁵⁶ Information on how to file a complaint is available on the agencies' websites.⁵⁷

The offices may also be contacted through the channels list below:

- ICE Enforcement and Removal Operations (ERO) Detention Reporting and Information Line: (888)351-4024, or ERO.INFO@ice.dhs.gov, see <https://www.ice.gov/webform/ero-contact-form>.
- ICE Office of Diversity and Civil Rights Civil Liberties Division: (202) 732-0092 or ICE.Civil.Liberties@ice.dhs.gov.
- CBP Information Center (complaint or compliment): 1-877-227-5511, or email via website at <https://help.cbp.gov>.

14 How should a district respond to an ICE request for student records?

The Family Education Rights and Privacy Acts (FERPA) is the federal law governing the way school districts maintain and handle student education records. Most states also have laws and regulations providing additional requirements regarding student information and records. With a few exceptions, FERPA prohibits the release of such records without the permission of a parent or an eligible student (18 or older).⁵⁸ No exception applies specifically to ICE enforcement activity, nor do disclosures to ICE fall within the safety and emergency provision of FERPA.⁵⁹ Therefore, generally, a school district should not provide student records to ICE agents unless a parent or the eligible student authorizes release of those records.

FERPA allows, but does not require, school districts to release designated directory information without parental consent.⁶⁰ Directory information is defined as "personally identifiable information" which includes, but is not limited to, student names, addresses, dates of birth, places of birth, and grade level.

School districts also should be aware that FERPA requires them to offer parents the opportunity to opt out of having their student's information included as a part of school district directory information. Therefore, through the opt-out process, parents can keep their students' personal information from being released to third-parties even if the school district chooses to release certain information as directory information.



FERPA does require school districts to produce education records in response to subpoenas from ICE, or other third parties, without parental consent. School districts are, however, required to make a reasonable effort to notify parents (or eligible students) in advance of complying with the subpoena so that they may seek protective action, if they desire.⁶¹

All school districts should have policies that address collection, maintenance, use, release, and destruction of student information and records, and the process to be used in handling them. A well-drafted policy will, among other things, indicate if the school district maintains directory information and if so, what kind of information constitutes directory information. It also will define what constitutes a reasonable effort in notifying parents

that student records have been subpoenaed. Baltimore County Public Schools has a well-drafted student records regulation that can serve as an example.⁶² It is imperative that school districts contact their state school boards association or a COSA attorney for assistance in drafting a student records policy that is consistent with its state's laws and meets the specific needs of the school district.

15 What authority permits ICE to request/subpoena records?

Federal statute states that “any immigration officer shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and to that end may invoke the aid of any court of the United States.”⁶³

ICE currently issues an I-138 [form](#) to subpoena records. Implementing regulations list a broad range of supervisory ICE officials as having authority to issue such subpoenas. Any person age 18 or older can be designated to serve an ICE subpoena. In case of non-compliance, U.S. district courts may issue compliance orders, punishable as contempt of court if non-compliance continues. Regulations require ICE officials to seek such court orders if subpoenas are not obeyed.⁶⁴

V. BEST PRACTICES

16

What are some best practices for school districts to be prepared to respond to issues around undocumented students?

School districts may wish to take the following steps in preparing to respond to issues regarding undocumented students:

1. **Know State Law and Policies Concerning Undocumented Children.** *Plyler* clearly requires school districts to educate undocumented resident children. It does not, however, give much specific guidance. For example, what kind of documentation does the state allow a student to provide to enroll in school? Is the district a sanctuary district, and if so, what are the district's obligations regarding undocumented students and their families? Some questions may be addressed in federal guidance, but state laws and regulations play a major role in helping a district determine how to address issues that arise in relation to educating undocumented students. For assistance in determining what the governing laws are, contact a COSA attorney and the state school boards association.
2. **Review/Draft Policies.** After determining what is required by relevant state law or state department of education regulations, districts should review existing policies and regulations and, if necessary, change them or draft new ones to comply with the law. For example, make certain that any policies regarding student enrollment provide alternative ways to obtain the information the district requires without implicating students' immigration status. Districts may wish to review policies addressing:
 - Enrollment,
 - Attendance,
 - Student records,
 - Law enforcement contact with students while in school,
 - Student discipline,
 - Harassment and bullying,
 - Homeless youth under the federal McKinney-Vento Act, and
 - Transportation to and from school.

Many state school boards associations have policy services that can help develop policies consistent with state law and customized to the district's needs.⁶⁵ As an example, a student enrollment policy like that implemented by Oklahoma City Public Schools aims to comply with both Oklahoma state law and the Supreme Court's ruling in *Plyler*.⁶⁶

3. **Train Staff.** Policies form the “law” of the district, and serve to ensure consistency in the way matters are handled by district staff. But even the best policies will be of little help if staff members do not know them or fail to follow them. Once appropriate policies are in place, staff must be trained. Every registrar in the district should know exactly what documents the policies require him or her to request when students show up to enroll. Every school principal should know exactly what to do when ICE requests student records or wants to interview a student at school. Finally, staff members who have completed the recommended training on the policies should be asked to sign a document acknowledging that they have received training. This helps staff members understand how important it is for them to comply with the policies, and it can be useful as evidence of staff training if someone files a complaint against the school district.
4. **Communicate with Parents.** Many undocumented parents and their children are confused, frightened, and uncertain about what to expect when dealing with governmental entities, including school districts. School districts may alleviate those fears by contacting parents and explaining district policies and regulations regarding undocumented students. Communications and meetings with parents in their native languages, if possible, is one way to explain the policies and answer their questions. If the school has a PTA or other parent group, it should enlist the group’s assistance in making sure that its message gets to parents. Even when people dislike certain policies, it is easier to enforce them if all stakeholders at least know what to expect.
5. **Prepare a Media Plan.** The media will always have questions about issues that are “hot.” In developing a media plan, it is advisable to appoint one district staff member as the spokesperson for the issue. That person should be trained on the law and the district’s policies on the issue of undocumented students. By appointing one well-trained person to respond to media requests about undocumented students or an issue that has arisen regarding an individual undocumented student, the district increases the chances that the information provided will be consistent and decreases the risk of providing information that violates FERPA or some other law. All senior officials, principals, and the principals’ direct supervisors should be briefed on the district’s media plan and should know how to refer media inquiries quickly to the designated staff person.
6. **Collaborate with Law Enforcement.** Many school districts contract with local police departments for security services. A school district that has such a relationship should reach out to its point of contact within the police department and discuss how the two entities might work together to handle issues related to undocumented children and their families. Those who do not have such relationships should still attempt to contact their local police departments and find out how they intend to handle issues related to undocumented families and what they expect from the school district. Some districts draft an agreement or memorandum of understanding with local police departments that outlines each party’s responsibilities in a variety of school safety and other law enforcement matters that could include provisions related to serving undocumented students.

School districts and police departments have different missions and different obligations under the law. A school district's obligation regarding undocumented students is to educate them. The police enforce laws. It is important for school districts to engage in advance conversations about the rights and responsibilities of law enforcement and the district under its own policies and federal and state laws that govern public schools. Clarifying each entity's roles and responsibilities in memoranda of understanding helps set mutual expectations before situations arise.⁶⁷



7. **Work with Social Service Agencies to Help Affected Children.**

The district should be prepared to assist a student whose parents have been detained by ICE, leaving the student without parental guidance or a place to go. School districts should contact the local department of human services and other appropriate social service agencies within the community in advance of such situations to develop a protocol for handling them. If possible, that protocol should be made a part of district policy or regulations.

8. **Review Enrollment Forms.** School districts should review all enrollment-related forms to make sure they do not contain questions that would reveal a child's immigration status and that the forms do not ask for social security numbers unless it is required by law for other reasons. Districts may include alternative questions to gather relevant information.
9. **Assign a Point Person.** School districts should train one person (or small team) to respond to all ICE requests, law enforcement requests, and all subpoenas requesting records related to an undocumented student or the student's parents. Generally, it is prudent to train school district staff members not to confirm the attendance of a student before consulting with the staff person who is designated to handle ICE requests.
10. **Update Student Records.** Make certain that all student records are updated and contain accurate emergency contact information in the event a student's parents are suddenly unable to care for their child.

Endnotes

¹ 457 U.S. 202 (1982).

² *Id.* at 222.

³ *Id.* at 221.

⁴ See FAQ 1 in NSBA's 2009 *Legal Issues for School Districts Related to the Education of Undocumented Children*, available at <http://www.nsba.org/legal-issues-school-districts-related-education-undocumented-children>.

⁵ 42 U.S.C. § 11432(g)(1)(H)(iv), (g)(3)(C).

⁶ Under federal law, an unaccompanied minor, referred to in the McKinney-Vento Homeless Assistance Act as an unaccompanied youth, is "a youth not in the physical custody of a parent or guardian." 42 U.S.C. § 11434a(6).

⁷ U.S. Department of Justice, Civil Rights Division, U.S. Department of Education, Office for Civil Rights and U.S. Department of Health and Human Services, Office of Refugee Resettlement, *Information on the Rights of Unaccompanied Children to Enroll in School and Participate Meaningfully and Equally in Educational Programs*, (2014), <https://www2.ed.gov/about/overview/focus/rights-unaccompanied-children-enroll-school.pdf>.

⁸ *Id.* (citing U.S. Departments of Education and Justice's May 2014 joint guidance on federal law "requiring states and school districts to provide all children in the United States with equal access to a basic public education, regardless of their or their parents' actual or perceived race, color, national origin, citizenship, or immigration status.").

⁹ *Id.*

¹⁰ *Id.*; *Hispanic Interest Coal. of Alabama v. Governor of Alabama*, 691 F.3d 1236, 1247 (11th Cir. 2012) ("We are of the mind that an increased likelihood of deportation or harassment upon enrollment in school significantly deters undocumented children from enrolling in and attending school, in contravention of their rights under *Plyler*.").

¹¹ Information on Rights of Unaccompanied Children, *supra*, n.7.

¹² See FAQs 4 and 5 in NSBA's 2009 *Legal Issues for School Districts Related to the Education of Undocumented Children*, available at <http://www.nsba.org/legal-issues-school-districts-related-education-undocumented-children>.

¹³ 461 U.S. 321 (1983).

¹⁴ E.g., Connecticut, http://www.sde.ct.gov/sde/lib/sde/pdf/digest/2016_17/guidance_for_districts_regarding_refugee_students.pdf; New Jersey, <http://www.nj.gov/education/bilingual/policy/immenrol.htm>; New York, <http://www.nysed.gov/common/nysed/files/oag-sed-letter-ice-2-27-17.pdf>; Virginia, http://www.doe.virginia.gov/administrators/superintendents_memos/2015/187-15.shtml.

¹⁵ 5 U.S.C. §552a; U.S. Department of Justice and U.S. Department of Education, *Information on the Rights of All Children to Enroll in School: Questions and Answers for States, School Districts and Parents*, <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/08/plylerfact.pdf>.

¹⁶ [http://www.tulsaschools.org/1_Administration/_board_policies/2201-R.pdf#search="2201-R"](http://www.tulsaschools.org/1_Administration/_board_policies/2201-R.pdf#search=).

¹⁷ Executive Order No. 13768, January 25, 2017, *Enhancing Public Safety in the Interior of the United States*, 82 Fed. Reg. 8,799 (Jan. 30, 2017).

¹⁸ *Id.*

¹⁹ U.S. Department of Homeland Security, Memorandum, *Implementing the President's Border Security and Immigration Enforcement Improvements Policies*, (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.

²⁰ U.S. Department of Homeland Security, Q&A, *DHS Implementation of the Executive Order on Enhancing Public Safety in the Interior of the United States*, (Feb. 21, 2017), <https://www.dhs.gov/news/2017/02/21/qa-dhs-implementation-executive-order-enhancing-public-safety-interior-united-states>.

²¹ U.S. Department of Justice, *Implementation of Executive Order, Enhancing Public Safety in the Interior of the United States*, (May 22, 2017), <https://www.justice.gov/opa/press-release/file/968146/download>.

²² Letter from Dannel P. Malloy, Governor of Connecticut, and Dianna R. Wentzell, Connecticut Commissioner of Education, to Superintendents on Immigration, Feb. 21, 2017, http://www.sde.ct.gov/sde/lib/sde/pdf/digest/2016_17/superintendent_immigration_guidance.pdf.

²³ Memorandum from Steven R. Staples, Virginia Dep't of Educ. Superintendent of Pub. Instruction, to Division Superintendents, "Guidance Regarding School Division Responsibilities and Actions Under the Law in Reference to Students and Immigration (Sup't Memo #059-17)," Mar. 1, 2017, http://doe.virginia.gov/administrators/superintendents_memos/2017/059-17.shtml.

²⁴ Letter from Brian J. Whiston, Michigan Dep't of Educ. State Superintendent, and Agustin Arbulu, Michigan Dep't of Civil Rights Director, on Immigration, Mar. 31, 2017, http://media.mlive.com/news_impact/other/2017-03-31+MDE+and+MDCR+Joint+Letter.pdf.

²⁵ Ken Paxton, *Sanctuary Cities Ignore the Rule of Law*, Attorney General of Texas (Dec. 5, 2016), <https://www.texasattorneygeneral.gov/news/editorials/sanctuary-cities-ignore-the-rule-of-law>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ TEX. GOV'T CODE §752.051 *et seq.* (2017), www.capitol.state.tx.us/tlodocs/85R/billtext/pdf/SB00004F.pdf#/navpanes=0

³⁰ Matt Reynolds, *LA Schools Adopt Sanctuary Protections for Students*, Courthouse News Service (May 10, 2017), <http://www.courthousenews.com/l-schools-adopt-sanctuary-protections-students/>.

³¹ *L.A. Unified Immigration Resolution of May 9, 2017*, Los Angeles Unified School District Board of Education (May 9, 2017), <https://assets.documentcloud.org/documents/3711265/May-9-2017-Immigration-Resolution.pdf>.

³² *Id.*

³³ *LAUSD Campuses as Safe Zones and Resource Centers*, Los Angeles Unified School District Reference Guide (Feb. 2, 2017), <http://achieve.lausd.net/cms/lib08/CA01000043/Centricity/Domain/318/REF%206767.1%20LAUSD%20SAFE%20ZONES%20w%20Attach.pdf>.

³⁴ *L.A. Unified Immigration Resolution of May 9, 2017*, Los Angeles Unified School District Board of Education (May 9, 2017), <https://assets.documentcloud.org/documents/3711265/May-9-2017-Immigration-Resolution.pdf>.

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³⁶ Carmen Fariña, New York City Dep't of Educ. Chancellor, "Guidance for Principals on Non-Local Law Enforcement Actions at NYC DOE Schools, Including Immigration Enforcement Actions," (Mar. 21, 2017), <http://schools.nyc.gov/NR/rdonlyres/F0A43102-00C5-40D3-81FD-C85818C8BD07/0/Nonlocallawenforcementprincipalsshortsummary3212017.pdf>.

³⁷ *Id.*

³⁸ Denver Public Schools, *The Safe and Welcoming School District Resolution*, (Nov. 17, 2016), <https://www.dpsk12.org/wp-content/uploads/Board-Resolution-FINAL-with-amendment-English.pdf>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ DHS Q&A, *supra*, n.20; Michael D. Shear and Julie Hirshfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, (The New York Times 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html?mcubz=1>.

⁴² Patrick McGreevy, *California Sues Trump Administration Over Decision to End DACA Protections for Young Immigrants*, (Los An-

geles Times 2017), <http://www.latimes.com/politics/la-pol-ca-daca-lawsuit-trump-20170911-story.html>; Tal Kopen, *Blue States Sue Trump Over DACA*, (CNN 2017), <http://www.cnn.com/2017/09/06/politics/daca-trump-states-lawsuits/index.html>.

⁴³ Exec. Order No. 13,773, 82 Fed. Reg. 10691 §1 (Feb. 9, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-02-14/pdf/2017-03113.pdf>.

⁴⁴ *Id.* at § 2.

⁴⁵ Exec. Order No. 13,776, 82 Fed. Reg. 10699 (Feb. 9, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-02-14/pdf/2017-03118.pdf>.

⁴⁶ Gary D. Gottfredson, What Can Schools Do to Help Prevent Gang-Joining, U.S. Department of Justice and U.S. Department of Health and Human Services (2013), <https://www.ncjrs.gov/pdffiles1/nij/239234.pdf>.

⁴⁷ *Memorandum of Understanding Between Pawtucket School Department and Pawtucket Police Department* (April 2008), http://riaclu.org/images/uploads/Pawtucket_MOU.pdf.

⁴⁸ New Jersey Department of Law & Public Safety and New Jersey Department of Education, *A Uniform State Memorandum of Agreement Between Education and Law Enforcement Officials – 2015 Revisions*, (2015), <http://www.state.nj.us/education/schools/security/regs/agreee.pdf>.

⁴⁹ *County of Santa Clara v. Donald J. Trump*, 17-cv-00574 (N.D. Cal. 2017); *County of San Francisco v. Donald J. Trump*, 17-cv-00485 (N.D. Cal. 2017), 2017 WL 1459081 (N.D. Cal. 2017).

⁵⁰ Tal Kopan, *What Are Sanctuary Cities and Can they be Defunded*, (CNN 2014), <http://edition.cnn.com/2017/01/25/politics/sanctuary-cities-explained>; Alan Gomez, *A Multimillion Dollar Question: What is a 'Sanctuary City'?*, (USA Today 2017), <https://www.usatoday.com/story/news/world/2017/04/26/multi-million-dollar-question-whats-sanctuary-city/100947440/>.

⁵¹ U.S. Department of Justice, Office of the Inspector General, Audit Division, *Cooperation of SCAAP Recipients in the Removal of Criminal Aliens from the United States* (Jan. 2007) (redacted public version), at vii, n. 44 (defining "sanctuary" policies for purposes of study).

⁵² Executive Order 13768 of January 25, 2017, "Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799 (Jan. 30, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02102.pdf>.

⁵³ 8 U.S.C. § 1373 (a), (b) (1996).

⁵⁴ *County of Santa Clara v. Donald J. Trump*, 17-cv-00574 (N.D. Cal. 2017); *City and County of San Francisco v. Donald J. Trump*, 17-cv-00485 (N.D. Cal. 2017), 2017 WL 1459081 (N.D. Cal. 2017).

⁵⁵ U.S. Department of Homeland Security, Memorandum, *Enforcement Actions at or Focused on Sensitive Locations* (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>; U.S. Department of Homeland Security, *FAQ on Sensitive Locations and Courthouse Arrests*, <https://www.ice.gov/ero/enforcement/sensitive-loc>.

⁵⁶ U.S. Immigration and Customs Enforcement, *FAQ on Sensitive Locations and Courthouse Arrests*, <https://www.ice.gov/ero/enforcement/sensitive-loc>.

⁵⁷ 20 U.S.C. § 1232g.

⁵⁸ 34 C.F.R. § 99.1 *et seq.*

⁵⁹ 34 C.F.R. § 99.36.

⁶⁰ 34 C.F.R. § 99.31.

⁶¹ 34 C.F.R. § 99.31 (a) (9) (II).

⁶² Baltimore County Public Schools regulation 5230, https://www.bcps.org/system/policies_rules/rules/5000Series/RULE5230.pdf.

⁶³ 8 U.S. Code § 1225(d).

⁶⁴ 8 C.F.R. § 2874.

⁶⁵ The following state school boards associations represent a small sample of those with policy services: California School Boards Association, <https://www.csba.org/GovernanceAndPolicyResources/DistrictPolicyServices/PolicyServicePrograms.aspx>; Illinois Association of School Boards, <http://www.iasb.com/policy/>; New York State School Boards Association, <http://www.nyssba.org/policy-services/nyssba-policy-services>; Oklahoma State School Boards Association, <https://www.ossba.org/services/policy-ser>

vices/; Texas Association of School Boards, <https://www.tasb.org/Services/Policy-Service.aspx>.

⁶⁶ https://www.okcps.org/cms/lib/OK01913268/Centricity/domain/97/board%20policies/section%20f%20-%20students/F-02_STUDENT%20ENROLLMENT.pdf.

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