What's a School to Do?
Undocumented Students, Sanctuary Districts, and ICE Activities

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Overview

During the first few months of the new Administration, the federal government has been revising key policies regarding immigration law enforcement and undocumented persons.

Local school districts have raised questions about how such federal directives might affect their student and family populations.

To address these areas of inquiry, it is necessary to start from the beginning.

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The Roadmap for Today's Discussion

- Equal Access to Education
- Current State of the Law
- "Sanctuary Jurisdictions"
- What to Do When ICE Comes to School
- Best Practices
Equal Access to Education


In *Plyler*, the U.S. Supreme Court held that under the Equal Protection Clause, Mexican school-aged children who had filed a class action suit, who could not establish that they were in this country legally, were entitled to the same free public education that was made available to other residents of the same school district, irrespective of their immigration status.

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**Plyler v. Doe**

The Supreme Court said:

“By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”
*Plyler v. Doe*

"Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."

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*Plyler* policy considerations

Under *Plyler*, schools should not take actions that would discourage enrollment and success of students based on immigration status:

- Do not ask about immigration status
- Do not request or maintain records related to immigration status (i.e.: birth certificates being used as proof of citizenship, as opposed to proof of age, Social Security Numbers, etc.)
Current State of the Law

ICE “Sensitive Location Enforcement” Policy

In October 2011, ICE issued its “Sensitive Enforcement Location” policy that “is meant to ensure that ICE officers and agents exercise sound judgment when enforcing federal law at or focused on sensitive locations and make substantial efforts to avoid unnecessarily alarming local communities. The policy is not intended to categorically prohibit lawful enforcement operations when there is an immediate need for enforcement action ....”

ICE “Sensitive Location Enforcement” Policy

It is important to note that the “Sensitive Location” policy only applies to arrests, interviews, searches, and surveillance. “Actions not covered by this policy include actions such as obtaining records, documents and similar materials from officials or employees, providing notice to officials or employees, serving subpoenas....”

ICE “Sensitive Location Enforcement” Policy

“Schools” are defined in the policy as:

“schools (including pre-schools, primary schools, secondary schools, post-secondary schools up to and including colleges and universities, and other institutions of learning such as vocational or trade schools; ....”
ICE “Sensitive Location Enforcement” Policy

Under this policy, “any planned enforcement action at or focused on a sensitive location … must have prior approval” from senior DHS officials.

However, the memorandum states that this “policy is not intended to categorically prohibit lawful enforcement operations when there is an immediate need for enforcement action ....”

ICE “Sensitive Location Enforcement” Policy

Exigent circumstances permitting enforcement action without such approval include:

- national security or terrorism matter;
- imminent risk of death, violence, or physical harm to any person or property;
- immediate arrest or pursuit of a dangerous felon, terrorist suspect, or any other individual(s) that present an imminent danger to public safety; or
- imminent risk of destruction of evidence material to an ongoing criminal case.
Executive Order: “Protecting the Homeland”

In January 2017, President Trump issued an Executive Order that impacts immigration law enforcement: “Enhancing Public Safety in the Interior of the United States.”

- Federal government will increase enforcement efforts against “removable aliens”
- Federal government "shall ensure that [sanctuary] jurisdictions ... are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes."


Under this Administration’s Executive Order, “Enhancing Public Safety in the Interior of the United States,” jurisdictions deemed by the Attorney General or the DHS Secretary to have willfully refused to comply with 8 U.S.C. 1373 will not be eligible for federal grants.

Section 1373 relates to the sharing of information between governmental entities and the INS regarding an individual’s citizenship or immigration status.
Department of Homeland Security Implementation Orders

On February 21, 2017, DHS issued comprehensive policy guidance implementing the Executive Orders, signaling more intensive law enforcement:

* Elimination of most of the previously exempt categories for enforcement
* "Sparring" use of parole in lieu of detention and only in the case of "demonstrated urgent humanitarian reasons or significant public benefit"
* Higher level of proof for asylum claims
* Elimination of privacy rights for immigration proceedings
* Goal of rapid resolution of immigration matters
* Significant new resources for enforcement agents and detention centers

Existing Federal Agency and NSBA Guidance on Student Rights

* NSBA Guidance, Legal Issues for School Districts Related to the Education of Undocumented Children (2009), available at (this document is currently being updated).
Operational Tips

* Check your state for statutes, regulations, and state department of education guidance.
* Inform students and families about how to report.
* Take concerns seriously and investigate promptly.
* If harassment is found, take effective remedial action.
* When First Amendment issues come into play, be ready to navigate carefully and seek legal guidance.
* If concerns arise, be prepared for media attention and potential legal action.

Sanctuary Jurisdictions
What is a “Sanctuary” School District?

Under the Executive Order, “Enhancing Public Safety in the Interior of the United States,” the current Administration specifically identifies “sanctuary jurisdictions” as those that may lose eligibility for federal grants.

However, there is no common definition of a “sanctuary” jurisdiction. It depends on the jurisdiction and context.

This is a political term in the vernacular, but not a legal term of art, and means different things to different people.

“Sanctuary” School Districts

For school districts, the term is commonly applied when the district has proactively stated it will take some or all of the following actions:

* will not provide student or family information to ICE agents except as required by law
* will establish procedural safeguards for ICE agents engaging at school or with students
* will take other actions to support immigrant students
“Sanctuary” School District Designations

- Self-Designated “Sanctuary” School Districts
- School Board Adoption of Resolution (Re)Affirming Protecting All Students
- School Districts Making a Public Statement
- School Districts That Choose to Make No Such Designation

“Sanctuary” School District Designation

A major concern with such a designation is that the term “sanctuary” may convey more power to protect students and families than schools actually have.

That said, the DHS Orders do not address sanctuary jurisdictions.
“Sanctuary” School District Designations

From a public relations perspective, what does your school district gain by labeling itself as a “sanctuary” district? Think about this designation, politically versus constitutionally.

Do “Sanctuary” Schools Risk Loss of Federal Funds?

- At first glance of the Executive Order, only federal grants related to law enforcement seem to be implicated.
- If the EO is read broadly, this is a very complex question under Tenth Amendment.
- It is generally understood that the federal government cannot require states to assist with federal law enforcement.
- Most federal funds for schools come through congressional appropriation.
- Substantive changes would require congressional approval.
Challenges to “Sanctuary Sanctions”

City and County of San Francisco v. Trump, Case No. 3:17-cv-00485-WHO (N.D. Cal).

County of Santa Clara v. Trump, Case No. 5-17-cv-00574 (N.D. Cal).

Yesterday, a federal judge issued a nationwide injunction of the part of the President’s Jan. 25th EO, prohibiting the withholding of federal funds from jurisdictions that refuse to cooperate with immigration authorities.

What to Do When ICE Comes to School
Release of Education Records

FERPA prohibits release of student education records without prior parental consent

- No exception that clearly applies to ICE enforcement activities, nor does it fall into a health and safety emergency under 34 C.F.R. § 99.36.

Designated directory information may be released without parental consent (34 C.F.R. § 99.31(a)) (FERPA does not require disclosure)

- Current district practice regarding release of directory information may only apply to local law enforcement

- Decide what practice your district will follow for federal agents, and clearly communicate to your schools

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Release of Education Records - Subpoenas

- Schools must produce education records in response to a subpoena, but FERPA requires a “reasonable effort” to notify parents in advance of the school's compliance, so that the parent (or eligible student) “may seek protective action”. 34 C.F.R. § 99.31(a)(9)(ii).

- It is strongly suggested that school staff have a process in place that directs all subpoenas to central office for processing to ensure consistent response in accordance with school board policies and procedures.
Student Interviews by ICE Agents

- Review policies and practices regarding making students available to law enforcement during the school day.
- Update training of front office and teaching staff in interview policies.
- Formal or informal agreements with local law enforcement may not apply to federal agents.
- Significant risk in not providing prior notice to parents of law enforcement interviews, except in cases of child abuse, imminent harm, or warrant.

Student Interviews by ICE Agents

- If an ICE agent comes to school seeking to interview a student, best practice is for school staff to take agent's contact information and tell him/her that someone will be in touch promptly.
- Schools should not release student information or make students available for interview on the spot.
- School should not confirm that student is in attendance.
ICE Agent Compliance Checks in SEVIS program

A quick note: For schools that are in the SEVIS program, front office staff should be trained to know that ICE agents can come on to campus without a warrant or subpoena and get information specific to those students in the SEVIS program. This is part of the school’s compliance with the SEVIS program.


Implications for Agreements with Security Resource Officers (SROs)

Given the relationships between police departments and school districts regarding SROs, it may be wise to review agreements between your district and local SROs, so there is understanding about the role everyone is playing.
A Brief Note About DACA

DACA, Deferred Action for Childhood Arrivals, is an immigration policy established during the Obama Administration in June 2012.

Children who were brought to the U.S. as minors by their parents can apply for DACA status, and, as such, are granted protection from deportation so long as they meet certain requirements.

DACA

The new administration has indicated an intent to review the DACA program, but has not yet issued any orders or guidance. Also, the 2017 DHS Orders “do not affect DACA recipients.”

Note, however, that recently, the first DREAMer under the DACA program has been deported to Mexico, and is challenging his deportation in court.

Best Practices

Best Practices - School Records

- Review enrollment-related forms to ensure that questions about immigration status are not present
- Update emergency contact information for all students
- Do not collect or maintain records related to immigration status — confirm current practices
- Unless required by law, do not collect social security numbers as part of the enrollment process
- School personnel should not confirm attendance status of student before communication with central office
- School personnel should take ICE and/or law enforcement agent information and coordinate through central office before further action (i.e., compliance with information request) is taken.
Best Practices - School Board Policies

- Review policies and procedures regarding directory information (i.e., what categories of information are included), and proper release of such information.
- Direct school staff to consult with central office before responding to a request for information or a subpoena.
- Assign a central office person (that has been trained) to respond to requests to ensure correct and consistent practice.

Best Practices - Interactions with Law Enforcement

- Review policies and practices on cooperation with local and federal law enforcement personnel.
- Awareness of risk of making students available for interviews with law enforcement personnel outside of cases of child abuse, imminent harm or a warrant.
- Review district policies with local law enforcement personnel.
- Inform community of district policy.
Best Practices - School Climate

- Review policies and procedures on bullying and harassment incidents and complaints
- Ensure students are informed about how to report complaints
- Have policies and procedures that thoroughly investigate complaints of harassment and bullying, and take necessary remedial action
- Affirm importance of safe and supportive environment for all students

Best Practices – Overall

Communicate and Be Prepared!!

- Determine district policy
- Communicate to your schools, students and families
- Respond to concerns and keep documentation
- Prepare in advance for media coverage
Questions?

Thank you!