

Frequently Asked Questions Regarding Undocumented Students, Sanctuary Schools and Immigration Enforcement

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Following his inauguration, President Trump issued several executive orders that direct a significant change in the enforcement of federal immigration law. Collectively, these orders are referred to as "Protecting the Homeland." The Department of Homeland Security ("DHS") then issued comprehensive policy orders implementing these executive orders. In this new environment, school districts are grappling with urgent questions about how to address immigration enforcement activities, whether to become a "sanctuary" district, and how to ensure all students are safe at school. These complex issues arise within a fast-moving, highly controversial legal and political environment. This FAQ handout provides an overview of the pertinent law and gives general guidance about key issues for districts to consider when evaluating the response to these concerns.

1. What is the impact on public schools of President Trump's executive order regarding sanctuary jurisdictions?

On January 25, 2017, President Trump issued an executive order entitled "Enhancing Public Safety in the Interior of the United States." This order asserts that the federal government will increase immigration enforcement against "removable aliens" and focuses on "sanctuary jurisdictions." The order finds that sanctuary jurisdictions "willfully violate Federal law in an attempt to shield aliens from removal from the United States," and provides that the federal government "shall ensure that [sanctuary] jurisdictions ... are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes..." The full text of this executive order can be found here: <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>

Several lawsuits have been filed challenging the legality of this order, primarily on the grounds that enforcement of immigration law is the responsibility of the federal government, and that under the Tenth Amendment to the United States Constitution, state or local governments cannot be penalized for refusing to enforce federal law. Enforcement of immigration law is generally carried out by the federal Immigration and Customs Enforcement agency ("ICE"). These complex constitutional questions are likely to reach the Supreme Court. While the order's

legal status is under review, it is important for schools to be aware of the fundamental laws regarding students and their families in order to ensure that important rights are not violated.

2. What is being done to enforce the executive orders?

On February 21, 2017, DHS Secretary John Kelly released several new Implementation Memos and FAQs regarding immigration enforcement related to Protecting the Homeland. These memos and FAQs can be found here: <https://www.dhs.gov/executive-orders-protecting-homeland>. These memos and FAQs order a much more intensive response to immigration enforcement, and overturn some key policies of the Obama administration. The new policies eliminate most of the previously exempt categories for enforcement. The use of parole in lieu of detention will only be “sparingly” used in the case of “demonstrated urgent humanitarian reasons or significant public benefit.” Asylum claims will be subject to a higher level of proof. The privacy rights that have been afforded to undocumented persons who were in immigration proceedings are being revoked. Significant resources will be directed to enforcement agents and detention centers.

There are anecdotal reports of a significant increase in enforcement activity in Oregon, including at locations that have not experienced enforcement activity in many years.

3. Do the DHS Orders discuss immigration enforcement at schools?

The DHS Orders indicate that there will not be a change to the "sensitive location enforcement" policy. <https://www.dhs.gov/news/2017/02/21/qa-dhs-implementation-executive-order-border-security-and-immigration-enforcement> (see question 28).

School districts should be aware that the 2011 “sensitive location enforcement” policy memo does not prohibit ICE enforcement at sensitive locations such as schools, hospitals and churches. Rather, the policy memo states: “This policy 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 as outlined below.” Further, the policy against enforcement at sensitive locations only applies to some enforcement actions: “The enforcement actions covered by this policy are (1) arrests; (2) interviews; (3) searches; and (4) for purposes of immigration enforcement only, 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 [etc.]” <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>

4. What is a "sanctuary" jurisdiction?

"Sanctuary" is a broad term that means different things in different contexts. In the last several months, a growing number of cities, colleges, and school districts have passed "sanctuary" policies, and some entities have had such policies in place for years. Typically, such a policy establishes that the jurisdiction will not affirmatively cooperate with ICE agents, except as required under state or federal law. Sanctuary policies in school districts may also provide for additional supports for students who may be undocumented, require training for teachers and administrators to ensure that all students feel safe at school, and establish procedural requirements for ICE agents and other law enforcement agencies.

There is some concern that the term "sanctuary" is misleading, since it may imply that a school can keep undocumented students and families "safe" from immigration enforcement actions. A school district that passes a sanctuary policy should be explicit about what actions the district will and will not take, and should clearly convey this information to the community.

5. What is the status of Oregon state law regarding assistance with ICE agents?

Oregon law provides, "No law enforcement agency of the State of Oregon or of any political subdivision of the state shall use agency moneys, equipment or personnel for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws." ORS 181A.820(1). The Governor recently issued an executive order expanding that prohibition to include other state agencies. *See* <http://www.oregon.gov/newsroom/Pages/NewsDetail.aspx?newsid=1536>.

Neither the state statute nor the Governor's executive order applies to most school district employees. There have been inaccurate reports that state law bans school districts from cooperation with ICE agents. The law is limited to law enforcement agencies. If a school district has a designated law enforcement agency, then those agents cannot cooperate with ICE agents, but other school employees are not constrained under the law. Thus, state law does not explicitly prohibit school districts from assisting ICE or other federal law enforcement agents.

The DHS Orders do not address the intent in the Executive Order "Enhancing Public Safety In the Interior of the United States" that sanctuary jurisdictions will be subject to loss of federal funds. However, the memos do indicate an intent to revive the "287(g)" program which allows local law enforcement to be deputized to assist with federal immigration enforcement. As discussed above, Oregon has existing law prohibiting any law enforcement agents from assisting with federal immigration enforcement.

6. What are the rights of undocumented students?

In *Plyler v. Doe*, 457 US 202 (1982), the United States Supreme Court held that undocumented students are entitled to a free public education. In doing so, the Court made important findings about the importance of access to education for all children. The Court stated that "[b]y 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." The Court also observed that "[e]ven 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."

In accordance with *Plyler*, schools must not deny undocumented students the right to attend school, nor should schools take actions that could discourage such students from attendance. For instance, a school district should not ask about a student's or family's immigration status, nor should the district maintain records about immigration status.

Importantly, all students also have the right to be safe at school. Since the election of President Trump, there has been a documented rise in incidents of bullying and harassment at schools across the country. Schools must take such incidents very seriously. Oregon law requires school districts to have policies against bullying and harassment, to provide mechanisms for reporting and investigating claims of harassment and bullying, and to remedy any substantiated incidents. ORS 339.351 - .364. Schools can face significant legal liability if they fail to take appropriate action when students face harassment based on perceived or actual race or national origin, or any other protected status. Such incidents can also create significant media and public scrutiny and, most importantly, can impact the student's ability to succeed in school.

7. Can student educational records be released to ICE agents?

The Family Educational Rights and Privacy Act ("FERPA") prohibits school districts from releasing student education records without prior parental consent except in limited circumstances. FERPA has no specific exemption that allows school districts to release student education records to ICE agents without prior parental permission. Generally, the health and safety exemption under FERPA, which allows for release without prior consent only when necessary to protect the health and safety of the student or other individuals, would not apply to ICE agents who are enforcing immigration law.

It is generally best practice to collect only the information that a school needs to enroll a student, such as proof of residency. The school generally does not need to collect a social security number or information directly related to the student or family's immigration status for the purposes of enrolling or supporting the student.

8. Can -- and must -- a district release directory information to ICE agents?

Under FERPA, school districts can designate certain categories of information as "directory information," which may then be released without prior parental consent. "Directory information" can include a variety of information, such as student and family names, contact information, and photographs. FERPA provides that a school district may release information that it designates as directory information, but it is not obligated to do so. School districts should have standard practices in place to determine when directory information will be released. There may be a distinction between release to federal and local law enforcement. If directory information is not typically released to federal law enforcement, schools should not release information to ICE agents without first reviewing established policies and practices.

9. Are schools obligated to comply with a subpoena for student information?

ICE has the authority to issue subpoenas, which are judicially enforceable demands for information. Under FERPA, school districts can provide confidential student information in response to a properly issued subpoena. However, FERPA requires schools to make a reasonable effort to notify parents about the subpoena before producing information, so the parent can object or otherwise seek protection from the subpoena. If a school receives a subpoena, they should not directly release student information but should contact their supervisor for guidance. Schools should consult with counsel if specific questions arise.

10. If an ICE agent comes to a school to interview a student, must the school provide immediate access to that student?

Under the Obama Administration, it was ICE policy that agents would not use school districts as forums for immigration law enforcement. It is unclear whether the Department of Homeland Security will maintain that policy. School districts may face a legal challenge if they make a student available to law enforcement without prior parental notice, except in a case of child abuse or other imminent harm or if the officer has a warrant. There have been a number of lawsuits regarding this practice, and districts should evaluate their policies.

Should an ICE officer come to a school, it is best practice for school staff to take the name of the ICE agent and inform the agent that someone will get back to him or her soon. The school administrator should then work with his or her supervisor to establish a response plan, including contacting the student's parents. It is important to remember that even student names can be protected under FERPA, and the school should not immediately disclose whether a student attends the school or is at school that day.

11. Could school districts lose federal funds if they pass "sanctuary policies" or do not cooperate with ICE agents?

This is a complex question. Enforcement of immigration laws is a federal obligation. Under the Tenth Amendment and Supreme Court precedent, the common understanding is that the federal government cannot require states and local agencies to assist with federal law enforcement. However, the executive order threatens to withhold federal funds from state and local agencies that refuse to cooperate with federal immigration enforcement officials. As indicated above, there are serious questions about whether the order is enforceable under the Constitution.

Significantly, most federal grant funds allocated to school districts are approved by Congress, which has spending authority under Article I, Section 8, of the Constitution. Any substantive changes to the requirements of the grant funds -- such as conditioning receipt of funds on cooperation with ICE agents -- would likely have to be approved by Congress, and may very well violate other constitutional protections. Any attempt by the federal government to withhold funds from a state or local jurisdiction will very likely be met with complex, protracted litigation.

12. What is the status of the Deferred Action for Childhood Arrivals ("DACA") program?

DACA provides deferral from deportation for undocumented immigrants who were under age 31 as of June 15, 2012, and who came to the U.S. when they were younger than 16, if they meet specific requirements. President Trump has made statements indicating that he intends to review and/or limit DACA, but has not issued an executive orders specifically related to the DACA program.

The DHS Orders indicate that they do not apply to DACA recipients. It is unclear whether President Trump will issue additional guidance regarding DACA students.

13. What other actions can school districts take to support our students and families?

As indicated above, schools should ensure that all students feel safe and supported at school. In these challenging times, schools may need to revisit their school climate plans to ensure there are sufficient resources to address concerns about bullying, harassment and safety. Proactively addressing the need for a harassment-free environment can prevent more significant challenges. Schools should communicate clearly to families regarding policies about cooperation with ICE agents and release of student information. School districts can also maintain a list of community and legal supports available in their area for families who may need additional assistance.

14. What about school staff who are in the United States on a visa?

On January 27, 2017, President Trump issued an executive order entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." This order suspends entry into the United States of individuals, including refugees and current visa holders, from seven specific countries. It also places a number of additional conditions on the entry of other foreign-born nationals and refugees. The full text of this executive order can be found here:

<https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>

This executive order has also been challenged in a number of courts, and currently a nationwide temporary stay is in place. President Trump has indicated his intent to issue a revised executive order. The potential impact on current visa holders is complex, and staff who are in the United States on visas should seek individual counsel if necessary. It is highly recommended that any staff who are on visas from named countries should not leave the United States while their visa is current without first consulting immigration counsel.

Important caveat: As indicated above, the status of federal immigration enforcement is in a state of flux, and may rapidly change. This FAQ is current as of the date of issuance, but pending court proceedings or other activity may impact the duties of school districts and the rights of students and families. This FAQ includes general information, but is not legal advice for specific situations.

Best Practices

- Review your district's policies and procedures with regards to student educational records, including directory information.
 - Ensure school personnel know that they cannot release student or family information, unless that information is directory information and the district has a policy to release directory information to both local and federal law enforcement.
 - Assign a specific central office department/person to handle requests for information and subpoenas to ensure they are responded to consistently and in accordance with district policies.
 - Do not collect or maintain documents related to immigration status.

- Review your district's policies and procedures with regards to making a student available for an interview with law enforcement.
 - Depending on your policy, school personnel should not make a student available for an interview with law enforcement without prior parental notice, except in cases of child abuse, imminent harm, or a warrant.
 - If an ICE agent comes to a school, school personnel should take the agent's contact information and then work with the central office on an appropriate response plan.
 - This could be a good opportunity to have a discussion with your local law enforcement liaison so the agency is aware of district policies and vice versa.

- Make sure your community is informed of your district policies and procedures regarding student information and cooperation with law enforcement.

- Ensure you have updated emergency contact information for students in case of enforcement activities in your community.

- Ensure your district has strong policies and practices regarding bullying and harassment. Students should know how to report concerns, and staff should know how to respond. Concerns should be promptly investigated and appropriate steps taken if the concerns are substantiated.
 - Schools should proactively reinforce the importance of a harassment-free environment in order to prevent more significant challenges.
 - Be prepared to communicate with the media in the event there is a specific incident in your school.