

Undocumented Students and Families: Key issues for school personnel

Jollee Patterson
Miller Nash Graham & Dunn

Immigration Enforcement – Current Status

- In January 2017, the President issued an Executive Order: “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..."

DHS Implementation Orders

- The Department of Homeland Security (“DHS”) issued policy guidance implementing the Executive Order, signaling more intensive enforcement of immigration laws:
 - **Elimination of most of the previously exempt categories** for enforcement
 - **“Sparing” use of parole** in lieu of detention and only in the case of “demonstrated urgent humanitarian reasons or significant public benefit”
 - Goal of **rapid resolution** of immigration matters
 - **Elimination of privacy rights** for immigration proceedings
 - **Significant new resources** for enforcement agents and detention centers

Sensitive Location Enforcement Policy

- 2011 Policy requiring ICE agents to “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 ...**”
- 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 [etc.]”
- 2017 DHS Orders indicate that the Sensitive Location Enforcement Policy remains in effect.

“Sanctuary” Jurisdictions

- No common definition – depends on the jurisdiction and context
- For schools, typically means that district officials:
 - will not provide student or family information to ICE agents except as required by law
 - will establish procedural safeguards for ICE agents coming to schools
 - will take other actions to support immigrant students
- Existing laws already require many of these protections.

Sanctuary Jurisdictions -- Current Status

- In April, a federal court blocked the government from enforcing the portion of the Executive Order that threatened to withhold federal funds from sanctuary jurisdictions that do not cooperate with federal immigration authorities.
- For school districts, most federal funds come through congressional appropriations; executive branch has limited ability to withhold such funds.

Oregon Law Regarding Sanctuary

- “No **law enforcement agency** 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.”
 - Governor extended this to other **state** agencies.
 - **Does not** apply to school districts employees (except if designated law enforcement agents)
- New law limits ability to request or disclose information about immigration status

Immigration Enforcement Activity in Schools

- Increase in enforcement activity impacting students and families
- No public information about significant enforcement actions at schools; some anecdotal information about sporadic enforcement at or around schools
- Fear and confusion creating for immigrant students
- Significant increase in bullying and harassment

Table Discussion

**What issues related to
immigration enforcement are
you hearing about in your
schools?**

Legal Rights of Undocumented Students

Plyler v. Doe – In 1982, the U.S. Supreme Court affirmed the right of undocumented students to attend public school.

- Court held that Texas law withholding state school funds for undocumented children, and authorizing schools to deny enrollment to those children, was unconstitutional.
- The undocumented status of the children was not a justification for denying them benefits that other children received.

“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.”

“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.”

- Under Plyler, schools should not take actions that would discourage enrollment and success of students based on immigration status.
 - Staff should not ask about immigration status.
 - Staff should not request or maintain records related to immigration status.
 - Staff must protect the rights of immigrant students (and those students they suspect may be undocumented) to the same extent as other students.

Key Issue:

ICE Requests For Student Records

- Family Education Rights and Privacy Act (“FERPA”) prohibits the release of student education records without prior parental consent except in very limited circumstances.
 - No exception that clearly applies to ICE enforcement activities – immigration enforcement is not a health and safety emergency
- If ICE agent comes to school seeking student information, staff should not respond on the spot. Refer ICE agent to designated school official.

Release of Student Records: Subpoenas

- ICE may seek student records via a subpoena
 - ICE agents have the authority to issue subpoenas
 - Issuing a subpoena does not violate the Sensitive Location Enforcement Policy
 - Parental consent not required, but FERPA requires district to make “reasonable effort” to notify parents before sending documents so parents have an opportunity to object

Responding to ICE Subpoenas

- ICE subpoenas should go through regular district procedure for responding to subpoenas:
 - Schools must produce education records in response to a subpoena after notifying parents.
 - School staff should direct subpoenas to central office to ensure consistent response in accordance with district practice.
 - Do not treat subpoenas from ICE differently than any other subpoena.

“Directory Information”

- Under FERPA, specific categories of student information (“directory information”) may be released without parental consent:
 - “Directory information” can include sensitive information such as student’s name, address, telephone number, and date and place of birth.
 - School board must adopt a policy designating which categories of information the district will treat as “directory information.”
 - Parents must be able to “opt out” of the release of directory information.

Release of Directory Information

- While school district may release directory information without prior parental consent, district is not required to do so under FERPA.
- If ICE, or any other entity, requests directory information about specific students, the district should respond consistently with other such requests.
- Districts that share directory information with local law enforcement may want to consider whether the same policy should apply to ICE.

New Oregon Law Limits Ability to Request or Disclose Immigration Status

- HB 3464 provides that a public body cannot disclose, for the purposes of federal immigration law enforcement, the following information about a person:
 - Address and contact information (including social media)
 - Workplace or hours of work
 - School or school hours
 - Identity or contact information of relatives or known associates
 - Date and time of meetings with the public entity that are not otherwise public records

- Law also prohibits public entities from inquiring or requesting information about a person's citizenship or immigration status, unless required by state or federal law.
- Law requires a public body to review policies yearly to ensure compliance with the law.
- Law does not prohibit public bodies from complying the federal immigration enforcement as required by law.

Key Issue: ICE Requests for Student Interviews

- There is significant risk in not giving parents prior notice of law enforcement interviews, except in cases of child abuse, imminent harm, or a warrant.
- Review policies and practices regarding making students available to law enforcement during the school day.
- Formal or informal protocols with local law enforcement regarding access to students does not necessarily apply to federal agents.

Responding to ICE Interview Requests

- If an ICE agent comes to school seeking to interview a student, the best practice is for school staff to take agent's contact information and tell him/her that someone will be in touch promptly.
- School staff should not confirm that student is in attendance.
- School staff should not release student information or make students available for interview on the spot, except if ICE has a warrant or asserts there is imminent harm.

Key Issue: Local Law Enforcement

- Discuss immigration enforcement policies with local law enforcement to ensure clear understanding and expectations.
- Informal or formal agreements with local law enforcement regarding access to students and student information should not automatically apply to ICE agents.
 - Example: District practice regarding release of directory information to local law enforcement
- SROs generally are not involved in immigration enforcement.
- Clearly communicate roles to schools and families.

Table Discussion

Do your district policies and practices reflect these requirements related to student records, student interviews, and local law enforcement? What additional resources or support does your district need?

Key Issue: Bullying and Harassment

- Widespread concerns about increases in harassment and bullying, especially based on national origin and race. Bullying:
 - Impacts a student's ability to feel safe at school and learn
 - Increases absenteeism
 - Distracts administrators and staff from teaching and learning
 - Violates the law

Bullying – Required Policies and Procedures

- State law requires schools to have a policy prohibiting bullying, harassment, intimidation, and cyberbullying. Policy must include:
 - Definition of protected class: “A group of persons distinguished, or perceived to be distinguished, by race, color, religion, sex, sexual orientation, national origin, marital status, familial status, source of income or disability.”

- A statement that the policy applies to behavior at school, school-sponsored activities, school-provided transportation, and school bus stops
- A description of behavior expected from students
- A uniform procedure for reporting concerns
- A requirement that school employees report bullying, and a description of the consequences for failure to report
- A process allowing a student or volunteer to make an anonymous report of bullying

- A uniform procedure for investigating allegations
- A procedure for how the school will respond to confirmed instances of harassment
- A list of clear consequences and remedial action for a person found to have committed an act of harassment
- A prohibition against retaliation for reporting harassment, and consequences for such retaliation
- A prohibition against false reporting

- Required publication:
 - Policy must be made available at least annually to parents, guardians, school employees, and students
 - Policy must be otherwise readily available (ideally on website)
- Required training: Districts must provide training on the prevention of, and appropriate response to, harassment, bullying, and intimidation.
- Failure to comply can lead to a finding of school district being “nonstandard.”

Legal liability - Bullying and Harassment

- In addition to policy mandates, schools can face significant legal liability for failing to investigate reports of bullying and harassment, and taking remedial action when the investigation substantiates the allegations.
- Significant risk of negative media attention, leading to further distraction from key work.

Immigrant and Undocumented Students

- Schools must be responsive to instances of, or complaints about, bullying and harassment based on race, color, and/or national origin:
 - Set clear expectations about student conduct
 - Investigate concerns promptly
 - Apply consistent and fair disciplinary consequences
 - Address concerns about retaliation
 - In addition, consider restorative justice or other programs to increase awareness and compassion

Table Discussion

Are you hearing concerns about bullying and harassment? Do your district policies reflect these requirements related to bullying and harassment? What additional resources or support does your district need?

Is it bullying or First Amendment protected speech?

“Trump, Trump, Trump!!” “Build the Wall!!”

- In 1969, the U.S. Supreme Court held that public school students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”
- But student speech is not necessarily protected if it “collides with the rights of other students to be secure and to be let alone.”

- “Schools may restrict speech that might reasonably lead school authorities to forecast substantial disruption of, or material interference with, school activities or that collides with the rights of other students to be secure and to be let alone.” *C.R. v. Eugene*, Ninth Circuit, 2016
- These are challenging cases, but schools can (and must) distinguish between expression of unpopular or hurtful viewpoints, and intimidation that impacts a student’s or group of students’ safety and ability to succeed at school.

Table Discussion

What are the factors that might help staff distinguish between hurtful political expression and bullying or intimidating speech? Are your schools facing challenges in addressing this issue?

Key Issue -- Complaint Procedure

- Oregon Administrative Rules require school districts to have a complaint procedure via which parents or community members can raise concerns.
- The procedure must include the steps and timelines the district will use to review concerns.
- Good option for families with concerns about school climate or other immigration issues.
- Have one, make it available, and use it.

Key Issue – Family Disruption

- While no significant increase in ICE activity at schools, immigration enforcement is having a profound impact on families:
 - More immigration enforcement resources
 - Very limited use of parole
 - Rapid resolution of cases
 - Preference for deportation

- Update emergency contact information (do this for all students, don't just single out students who staff may believe are undocumented...)
- “Protect Your Family: Information for Families in Oregon to Plan for Time of Unavailability”
 - <http://oregonlawhelp.org/files/CCDACC15-944D-570E-7F1F-7BBF3DEC0018/attachments/20A7B7F1-F37B-40F4-BC6C-A736FACD64CB/family-preparedness-plan-english.pdf>
 - <http://oregonlawhelp.org/files/CCDACC15-944D-570E-7F1F-7BBF3DEC0018/attachments/84B03370-E5C9-4A71-A6B8-E93CECBF35AE/family-preparedness-plan-spanish.pdf>
- Train counselors, provide students with crisis support if needed

Key Issue: Sanctuary designations

- School district sanctuary designations
 - Pros: Provides a strong message of support and values to students, families, and staff; reinforces existing legal protections
 - Cons: May over-promise the scope of protection a school can provide; can politicize the issue more than necessary; can put the district on the media (and federal government) radar

Options to Formal Sanctuary Designations

- Board resolution that states support for all students, but does not self-identify district as “sanctuary”
- Reinforce training for all staff on compliance with laws discussed today
- Communicate clearly with families about district policies and practices
- Provide external resources for students and families




Key Issue: DACA and Visas

- President indicated intent to review DACA (Deferred Action for Childhood Arrivals) but additional statements have been confusing. In April 2017, DHS indicated that DACA is still in effect.
- For school staff on visas, be cautious and consult legal counsel as necessary
 - Executive Order “Protecting the Nation from Foreign Terrorist Entry into the United States” still under review by the courts

Key Issue – Media Coverage

- Not if, when -- anywhere, anytime, any issue – before you know it, your district is in the news
- Immigration is a hot topic, and anything having to do with students just turns up the heat
- Advocacy groups on all sides
- Media will not wait for you to be ready

Prepare now:

-  Designated media contact
-  Key talking points that reflect district values and preserve student privacy
-  Communicate independently with school community (students, staff, and families) as rapidly as possible, even if you don't know much. "We know, we care, we are investigating, and you will hear back from us."

Bottom line

Regardless of political sentiment, undocumented and immigrant students are protected by many of the same laws that support and protect all students. Schools must enforce these laws consistently and fairly.

Best Practices- Student Information

- Review policies regarding student records and directory information
- Don't collect or maintain records related to immigration status – confirm current practices
- Ensure families have clear way to opt out from release of directory information
- Update emergency contact information
- Direct school staff to consult with central office before responding to a request for information or a subpoena
- Assign central office person to respond to records requests and subpoenas to ensure correct and consistent practice
- Inform community of district policy and practice

Best Practices – Law Enforcement

- Review policies and practices on cooperation with local and federal law enforcement
- Review policies about making students available for law enforcement interviews with law enforcement, except in cases of child abuse, imminent harm, or a warrant
- Discuss practices with local law enforcement
- School personnel should not confirm attendance status of student before communication with central office
- School personnel should take agent information and coordinate through central office
- Inform community of district policy and practice

Best practices – School Climate

- Review policies on bullying and harassment
- Affirm importance of safe and supportive environment for all students
- Ensure students are informed about how to report concerns
- Thoroughly investigate concerns of harassment and bullying; take action where substantiated
- Treat all students consistently and fairly
- Provide a complaint procedure and follow it

Best practices – communicate and be prepared!

- Communicate key policies and procedures to your schools, students, and families – and then communicate again!
- Respond to concerns and keep documentation!
- Prepare in advance for media coverage!

Thank you and
have a great
school year!