Key Immigration Issues in the Educational Setting – Supporting All Students

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The Need to Reaffirm Support of Students in the Face of the New Presidential Administration

Diversity of Population


Key Privacy Protections, i.e., Family Educational Rights and Privacy Act ("FERPA")

Status Update: Deferred Action for Childhood Arrivals ("DACA")

Current Federal Immigration Enforcement Policy at Sensitive Locations
OVERVIEW (CONTINUED)

✓ January 25, 2017 Executive Order regarding “Sanctuary Jurisdictions”—Threat to Federal Funding?
✓ February 20, 2017 Implementing Memorandum
✓ Actions Taken to Support Students at Federal, State, and Local Levels
UNDERSTANDING THE DIVERSITY OF THE IMMIGRANT POPULATION

Federal immigration status may vary substantially from person to person based upon personal circumstances. The range of immigration status categories includes, but is not limited to:

- **Lawful Permanent Resident** — “Any person not a citizen of the United States who is living in the U.S. under legally recognized and lawfully recorded permanent residence as an immigrant. Also known as ‘Permanent Resident Alien,’ ‘Resident Alien Permit holder,’ and ‘Green Card holder.’” Source: USCIS.

- **Undocumented** – A foreign national residing in the United States without legal immigration status.

- **Refugee** – “Generally, any person outside his or her country of nationality who is unable or unwilling to return to that country because of persecution or a well-founded fear of persecution based on the person’s race, religion, nationality, membership in a particular social group, or political opinion.” Source: USCIS.

- **Asylee** – “A foreign national in the United States or at a port of entry who is unable or unwilling to return to his or her country of nationality, or to seek the protection of that country because of persecution or a well-founded fear of persecution. Persecution or the fear thereof must be based on religion, nationality, membership in a particular social group or political opinion.” Source: USCIS.
Equal Access to Public Elementary and Secondary Education Regardless of Immigration Status


- **Landmark U.S. Supreme Court Case**: No state may deny access to a public elementary and secondary education to any child based on immigration status under the Equal Protection Clause of the 14th Amendment of the United States Constitution.


Federal Anti-Discrimination Laws

- No student, moreover, should be subject to discrimination, harassment, and/or bullying under Title VI of the Civil Rights Act of 1964 and other federal anti-discrimination laws. See Guidance on Harassment and Bullying issued by OCR on October 26, 2010 here: https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf
**EQUAL ACCESS TO PUBLIC ELEMENTARY AND SECONDARY EDUCATION REGARDLESS OF IMMIGRATION STATUS**

**California Law**

- Education is a fundamental right under the California Constitution.
- All students between the ages of 6-18 are mandated to attend school pursuant to compulsory attendance laws. Cal. Educ. Code § 48200.
- All students have a right to be in a public school learning environment free from discrimination, bullying, violence, and intimidation. Cal. Educ. Code §§ 220 and 234 *et seq.*

**Bona Fide Residency Requirements**

- A student’s citizenship or immigration status is not relevant to satisfy bona fide residency requirements. See OCR Guidance on School Enrollment Procedures.
- Reasonable evidence of residency can be established by all students by documentation showing the name and address of parent/guardian within the District. Such documents, among others, include: property tax receipts, rental property lease, pay stubs, declaration of residency. Cal. Educ. Code 48204.1. Caregiver Affidavit also can be used.
EQUAL ACCESS TO PUBLIC ELEMENTARY AND SECONDARY EDUCATION REGARDLESS OF IMMIGRATION STATUS

Establishing Minimum Age

• Districts are permitted to request documentation to show that a student falls within the minimum and maximum age requirements. Cal. Educ. Code § 48002. See also Cal. Code. Regs., tit. 5, § 432, subd. (b)(1)(B).

• Acceptable documents for establishing age include, but are not limited to: a certified copy of a birth record, a baptism certificate duly attested, a passport, or, in certain instances, an affidavit of the parent, or previously verified school records.

Remember, Under the Current Law

• A District or its schools should not inquire into the immigration or citizenship status for establishing bona fide residency.

• An affirmative duty does not exist for District/school personnel to assist U.S. Immigration and Customs Enforcement (“ICE”) agents or other law enforcement officials with enforcing immigration laws.

• District/school personnel should not release student records unless there is parental consent, or there is a lawful court order or subpoena.
KEY PRIVACY PROTECTIONS AND RELATED RESTRICTIONS

• What are key student privacy protections and related restrictions on sharing information under federal and state law?

  – Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g
FERPA

Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g

What is an Education Record?

- Education records are records that are directly related to a student and that are maintained by an educational agency or institution or a party acting for or on behalf of the agency or institution. They include but are not limited to grades, transcripts, class lists, student course schedules, health records (at the K-12 level), and student discipline files. The information may be recorded in any way, including, but not limited to, handwriting, print, computer media, videotape, audiotape, film, microfilm, microfiche, and e-mail.

Source: http://familypolicy.ed.gov/faq-page
Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g

What must a consent to disclose education records contain?

• FERPA requires that a consent for disclosure of education records be signed and dated, specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom the disclosure may be made. 34 CFR § 99.30. As such, oral consent for disclosure of information from education records would not meet FERPA’s consent requirements. In addition, districts can designate what constitutes directory information. 99 CFR § 99.37(d).

Source: http://familypolicy.ed.gov/faq-page
May schools comply with a subpoena or court order for education records without the consent of the parent or eligible student?

• Yes. FERPA permits disclosure of education records without consent in compliance with a lawfully issued subpoena or judicial order. See 34 C.F.R. § 99.31(a)(9)(i) and (ii).

• However, a school must generally make a reasonable effort to notify the parent or eligible student of the subpoena or judicial order before complying with it in order to allow the parent or eligible student the opportunity to seek protective action, unless certain exceptions apply.

Source: http://familypolicy.ed.gov/faq-page
FERPA

Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g

- Exceptions to the requirement of prior notification apply to:
  
  1) a federal grand jury subpoena or other subpoena issued for a law enforcement purpose if the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed;

  2) an ex parte order obtained by the United States Attorney General (or designee not lower than Assistant Attorney General) concerning investigations or prosecutions of an act of terrorism or other specified offenses. See 34. C.F.R. § 99.31(a)(9)(ii).

Source: http://familypolicy.ed.gov/faq-page
What is DACA?

- DACA is neither law nor regulation, but rather the result of executive action taken by the President Barack Obama Administration on June 15, 2012.
- DACA provides deferred removal (deportation) action for qualifying undocumented individuals for a two-year period, subject to renewal. DACA beneficiaries are also eligible to receive work authorization.
- DACA does not provide lawful status or otherwise provide any pathway to citizenship for its beneficiaries.
- Since its announcement on June 15, 2012, an estimated 861,000 undocumented individuals have benefited nationwide from DACA. An estimated 180,000 are DACA eligible in Los Angeles County.
WILL THE FUTURE OF DACA?

- It is unclear. President Donald Trump had repeatedly criticized DACA as being “unconstitutional” and vowed to end it when he assumed the Office of the Presidency.
- However, no clear timeline has been provided with respect to when DACA would come to an end or whether any relief would be provided to the estimated 750,000 individuals who have benefited from DACA to date. President Trump has made statements that some relief may be provided to DACA recipients, but there is no certainty on this front.
- Unlike a federal law or regulation, President Trump can take immediate action and rescind the June 15, 2012 Department of Homeland Security memorandum on DACA.
- When questioned during his January 10, 2017 U.S. Senate confirmation hearing for U.S. Attorney General, then U.S. Senator Jeff Sessions refused to respond directly about the future of the 750,000 DACA recipients.
SHOULD ELIGIBLE INDIVIDUALS STILL APPLY FOR DACA?

• Each individual should make his/her own personal decision in consultation with his/her immigration attorney, but a growing consensus exists in support of the following recommendation:

  – Individuals should not submit first-time DACA applications because it remains unclear how the Trump Administration will use the information requested by the application for immigration enforcement purposes, i.e., residential address; also, the DACA application approval process takes an estimated three months and DACA may no longer exist by that time.
USE OF INFORMATION SUBMITTED BY DACA FOR ENFORCEMENT PURPOSES?

• Another area of concern is whether the Trump Administration will use the information provided by DACA beneficiaries during the application process for immigration enforcement purposes.

• The policy of the prior administration had been not to share this information for immigration enforcement purposes unless serious criminal, fraud, or national security concerns are presented.

• However, whether or how the information submitted by DACA beneficiaries will be used by the Trump Administration for immigration enforcement purposes is pure guesswork at this time.
IMMIGRATION ENFORCEMENT AT SENSITIVE LOCATIONS, I.E., SCHOOL DISTRICTS

- Immigration enforcement at “Sensitive Locations” is guided by the Memorandum on Enforcement Actions at or Focused on Sensitive Locations issued on October 24, 2011 by U.S. Immigration and Customs Enforcement (“ICE”) and Memorandum on Enforcement Actions at or Near Certain Community Locations issued on January 18, 2013 by U.S. Customs and Border Protection (“CBP”).

- The Sensitive Location Memoranda of ICE and CBP remain in effect and provide that enforcement actions at locations such as schools “should generally be avoided,” and “require either prior approval from an appropriate supervisory official or exigent circumstances necessitating immediate action.”

IMMIGRATION ENFORCEMENT AT SENSITIVE LOCATIONS

• Enforcement actions covered include: “(1) arrest; (2) interviews; (3) searches; and (4) for purposes of immigration enforcement only, surveillance.”

• However, ICE, may carry out enforcement actions under the Sensitive Locations Memorandum “when one of the following exigent circumstances exists:
  – the enforcement action involves a national security or terrorism matter;
  – there is an imminent risk of death, violence, or physical harm to any person or property;
  – the enforcement action involves the immediate arrest or pursuit of a dangerous felon, terrorist suspect, or any other individual(s) that present an imminent danger to public safety; or
  – there is an imminent risk of destruction of evidence material to an ongoing criminal case.”
Immigration Enforcement at Sensitive Locations

- It is important to highlight once again that, like DACA itself, the Sensitive Locations Memoranda are not governing law.

- However, the principles set forth in the Sensitive Locations Memoranda have been followed by past Democratic and Republican administrations.

- Recent statements made by the Trump administration have indicated that the Sensitive Locations Memoranda remain in effect.

- However, note that the Sensitive Locations Memoranda can be rescinded or amended at any time by the Trump administration.
WHAT IS A SENSITIVE LOCATION?

Locations covered by these policies would include, but not be limited to:

- Schools, such as known and licensed daycares, pre-schools and other early learning programs; primary schools; secondary schools; post-secondary schools up to and including colleges and universities; as well as scholastic or education-related activities or events, and school bus stops that are marked and/or known to the officer, during periods when school children are present at the stop

- Source: Sensitive Locations FAQs, https://www.ice.gov/ero/enforcement/sensitive-loc
TRANSPORTING UNDOCUMENTED STUDENTS

• Section 1324 of Title 8 of the United States Code sets forth immigration offenses, including, transporting or moving an undocumented immigrant within the United States.

• Under governing law, no violation of Section 1324 will be found where the evidence does not establish that a direct and substantial relationship exists between the transportation and the furtherance of the undocumented immigrant’s presence in the United States.

• The “mere transportation of a person known to be [an undocumented immigrant] is not sufficient to constitute a violation.” The “transportation must be ‘in furtherance of such violation of law.’” United States v. Moreno, 561 F.2d 1321 (9th Cir. 1977).

• In light of the Moreno and Plyler decisions and related case law, transporting undocumented students or their parents by District administrators, teachers, and others during the course and scope of their District employment should not be a violation of Section 1324.
District employees are expected to perform the duties of their positions

- District employees should continue to perform the duties of their positions.
- Districts should develop a clear protocol to address any requests made by an ICE agent or other federal immigration enforcement official.
- For example, requests for access to a campus or student records should be immediately referred to the Office of the District Superintendent who, in consultation with District Counsel, will determine whether the request is lawful, e.g., supported by a judicial warrant, court order, or subpoena.
DISTRICT DEFENSE OF PERSONNEL IN CIVIL AND CRIMINAL ACTION

• **Defense of Civil Action:** “[U]pon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official or individual capacity or both, on account of an act or omission in the scope of his employment as an employee of the public entity.”
  
  Cal. Gov’t Code § 995.

• **Defense of Criminal Action:** A public entity may provide for the defense of a criminal action or proceeding if the action is brought on account of an act/omission within the scope of employment or the public entity determines that such defense would be in the best interest of the agency and the employee acted in good faith and in the apparent interest of the agency.

 WHAT DOES “SANCTUARY CAMPUS” OR “SAFE HAVEN” MEAN?

• What does “Sanctuary Campus” or “Safe Haven” mean?
  – The term “Sanctuary Campus” or “Safe Haven” has been used increasingly to describe efforts that have been undertaken by elementary, secondary, post-secondary and other educational institutions to support students, particularly those who are undocumented and fear being removed (deported) from this country, or otherwise discriminated against based on religion, i.e., members of the Muslim community.
WHAT DOES “SANCTUARY CAMPUS” OR “SAFE HAVEN” MEAN?

• Note that the term “Sanctuary Campus” or “Safe Haven” does not have a single meaning. Some educational institutions have decided to avoid the term when describing their affirmative efforts to support their undocumented students, including DACA beneficiaries, because the term is subject to multiple interpretations. The focal point is the affirmative efforts done on behalf of undocumented students—not the title assigned to a given board resolution or policy.

• Accordingly, to understand what is meant by the term “Sanctuary Campus” or “Safe Haven,” one needs to review, for example, a specific board resolution and/or policy adopted by a District Board or other educational institution to determine the scope and breadth of actions that the educational institution has decided to undertake to support its undocumented students, including DACA recipients, and other students.
On January 25th, President Trump signed an executive order that seeks, in part, to deny federal funding to “sanctuary jurisdictions” that “willfully refuse to comply with 8 U.S.C. § 1373.” Section 1373 of the Immigration and Nationality Act prohibits state and local governmental entities from restricting communication with federal immigration enforcement authorities regarding the citizenship or immigration status of individuals.

The executive order further provides that “appropriate enforcement action” will be taken by the U.S. Attorney General against any entity that violates Section 1373 or has a “statute, policy, or practice that prevents or hinders the enforcement of federal law.”

The executive order, moreover, does not define “sanctuary.”
At minimum, the executive order signals that a governmental entity would be deemed a “Sanctuary Jurisdiction” by the Trump Administration if:

- it fails to comply with Section 1373; or
- has a “statute, policy, or practice that prevents or hinders the enforcement of federal law,” which is certainly a broad definition that could be subject to multiple interpretations.

Under the executive order, the U.S. Secretary of the Department of Homeland Security has the discretion “to the extent permitted by law” to designate a governmental entity as a “sanctuary jurisdiction.” It is unclear what precise criteria will be used to make this designation.
JANUARY 25TH EXECUTIVE ORDER RE SANCTUARY JURISDICTIONS

➤ NOTE: President Trump has repeatedly described “Sanctuary Jurisdictions” as “Sanctuary Cities” that refuse to honor federal detainer requests or immigration holds made of local law enforcement by federal immigration enforcement authorities, such as agents of the U.S. Immigration and Customs Enforcement (“ICE”), before an undocumented immigrant is released from custody.
THREAT TO FEDERAL FUNDING?

– Based on the application of the 10th Amendment and related case law, a District is not likely to jeopardize its receipt of federal funding if it were to adopt a board resolution and/or related policies in support of its undocumented students.


– Accordingly, providing an education to undocumented immigrants cannot legally be the basis of any denial of federal funding. The same holds true with respect to any action taken by Districts to reaffirm their commitment to, for example, adhering to federal antidiscrimination or privacy laws. The District cannot be denied federal funding for following these laws.
THREAT TO FEDERAL FUNDING?

– The enforcement of immigration law is reserved to the federal government. Districts do not have an affirmative obligation to enforce our nation’s immigration laws.

• The “Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program” or scheme under the Tenth Amendment, i.e., federal immigration enforcement. See, e.g., Arizona v. United States, 132 S. Ct. 2492, 2502 (2012).


– Conditions placed on federal grants should be related to the federal interest in a particular national program. See South Dakota v. Dole, 483 U.S. 203 (1987). Providing educational services is unrelated to enforcing immigration laws.
FEDERAL LAWSUITS FILED

• January 31, 2017—City and County of San Francisco v. Donald Trump, et al., (Complaint for Declaratory and Injunctive Relief)(U.S. District Court, Northern District of California)

• February 3, 2017—County of Santa Clara v. Donald Trump, et al., (Complaint for Declaratory and Injunctive Relief)(U.S. District Court, Northern District of California)

• March 22, 2017—A total of 34 cities and counties filed an amicus brief in support of the County of Santa Clara’s motion for injunctive relief, including the County of Los Angeles, Berkeley, Oakland, Santa Anta, and City of Los Angeles.

• March 23, 2017—A total of 18 school districts, 13 charter schools, and 3 community colleges, including San Diego Community College District, Palomar College, and Southwestern College, filed an amicus brief. State Superintendent Torlakson also filed a brief.
HOME LAND S E C U R I T Y I M P L E M E N T A T I O N M E M O R A N D U M


• According to that Memorandum, regardless of the basis of removability, Department of Homeland Security personnel should prioritize removable aliens who fall within seven categories.
HOMELAND SECURITY PRIORITY CATEGORIES

1. Have been convicted of any criminal offense;
2. Have been charged with any criminal offense that has not been resolved;
3. Have committed acts which constitute a chargeable criminal offense;
4. Have engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency;
5. Have abused any program related to receipt of public benefits;
6. Are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or
7. In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.
“Abused any program related to receipt of benefits”

- Unclear what the Memorandum refers to.
- “Abuse” should not mean “use” because other federal laws define eligibility for services (e.g., emergency medical services, vaccinations, Head Start) and receipt of these benefits do not disqualify an individual from legal status.
- These programs that do not disqualify, include, among others, Head Start, nutrition programs, foster care, educational assistance, crisis counselling, use of health clinics and prenatal care.
- Never, never, never advise anyone to make a false claim to citizenship or to provide false information.

Question on Applicability to DACA Recipients

• Some news outlets and others incorrectly stated that the February 21, 2017 implementation memorandum was an affirmative position taken by the Trump administration regarding the future of DACA. It was not—the future of DACA still remains uncertain.

Impact on DACA Recipients?

• The Q&A re DHS Implementation of Executive Order states that the implementation memorandum does not impact DACA recipients;

• Need to remain ever vigilant as to potential impact on DACA recipients.
EXAMPLE OF FEDERAL ACTIONS TAKEN: NATIONAL LETTER FOR SUPPORT

• More than 600 presidents of private and public colleges and universities across the nation signed a statement in support of DACA/undocumented students, including the California State University Chancellor, the President of the University of California, and the President of Stanford University.
  – Statement in Support of the Deferred Action for Childhood Arrivals (DACA) Program and our Undocumented Immigrant Students

EXAMPLES OF STATE ACTIONS TAKEN: LEGISLATION

• CA Legislation—Senate Bill 54 (the California Values Act)
  – Introduced by California Senate President pro Tempore Kevin De Leon
  – Among other objectives, the California Values Act seeks to prohibit California law enforcement agencies from:
    • Using agency or department resources to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement.
EXAMPLES OF STATE ACTIONS TAKEN

• CA Legislation—Senate Bill 6 (Due Process for All Act)
  – Introduced by Senator Ben Hueso
  – Among other objectives, the Due Process for All Act seeks to:
    • “[W]ould require the [California Department of Social Services] to either contract with qualified nonprofit legal services organizations, or contract with a nonprofit agency to administer funding to nonprofit legal services organization subcontractors, to provide legal services to individuals in removal proceedings who are not otherwise entitled to legal representation under an existing local, state, or federal program.”
    • “[W]ould establish the California Universal Representation Trust Fund to accept donations from private foundations and other philanthropic entities for the purpose of expanding the number of individuals that may be provided legal services pursuant to these provisions.”
EXAMPLES OF STATE ACTIONS TAKEN

• CA Legislation—Senate Bill 31 (the California Religious Freedom Act)
  – Introduced by Senator Ricardo Lara
  – Among other objectives, the California Religious Freedom Act seeks to prohibit a state or local agency or public employee from:
    • “Provid[ing] or disclos[ing] to federal government authorities personal information regarding the religious beliefs, practices, or affiliation of any individual for the purpose of compiling a list, registry, or database of individuals based on religious affiliation, national origin, or ethnicity.”
    • “Us[ing] agency money, facilities, property, equipment, or personnel to assist in creation, implementation, or enforcement of any government program compiling a list, registry, or database of personal information about individuals based on religious belief, practice, or affiliation, or national origin or ethnicity, for law enforcement or immigration purposes.”
EXAMPLES OF STATE ACTIONS TAKEN: ISSUANCE OF PRINCIPLES/STATEMENTS

• **Issuance of Principles/Statements**: Principles in Support of Undocumented Students, including DACA Recipients, and/or Against Registry Have Been Issued by:


EXAMPLES OF ADDITIONAL STATE ACTIONS TAKEN

• On November 29, 2016, the Chancellor’s Office of California Community Colleges and the UC and CSU systems issued a joint letter to then President-elect Trump in support of DACA

• The Community College League of California Reaffirmed its Commitment to Educational Opportunity for All Post-Election

• California Governor Jerry Brown has vowed to defend California.

• California Attorney General Xavier Becerra has similarly vowed to defend California.

• The California State Legislature recently hired former U.S. Attorney General Eric Holder to “to advise on potential legal challenges with the incoming Trump administration.”
EXAMPLES OF LOCAL ACTIONS TAKEN:

• Districts, postsecondary education institutions, charter schools, municipalities, and other entities are demonstrating their support for undocumented immigrants, including DACA recipients, in different ways, including the adoption of board resolutions and/or policies.

• January 2017 Los Angeles County Office of Education Resolution (Promote Safe and Healthy Learning Environments for all Students with Los Angeles County)

List of Safe Haven Districts—CalSchoolNews.org
  • http://www.calschoolnews.org/safe-haven-districts
WHAT ARE OTHER CAMPUSES DOING?

Examples

• Reaffirming to faculty, staff, students and families in your community, your college District’s values of diversity and inclusion and make clear that unlawful discrimination against students will not be tolerated.

• Distributing resources to students, educating them about their right to a safe and inclusive educational environment.

• Establishing protocols if ICE were to request access to campus or student information, i.e., immediately refer to Superintendent who will consult with counsel.

• Reminding faculty, staff, and campus security that student information is private and not to be shared except in specific legally defined circumstances and pursuant to established protocols involving consultation with legal counsel.
WHAT ARE OTHER CAMPUSSES DOING?

Examples

• Establishing a space where District personnel and students can receive updated educational/informational resources about issues affecting undocumented students.
• Developing partnerships with community stakeholders and low-cost/pro bono legal service providers.
• Cautioning students and their families about the potential dangers of using immigration consultants and notarios—who are not attorneys—to handle their immigration-related matters.
Question & Answer Session
Thank You

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