

Immigration Issues for School Districts

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UNDOCUMENTED STUDENTS' RIGHT TO AN EDUCATION

Plyler v. Doe. In 1982, the United States Supreme Court issued an opinion *Plyler v. Doe*, 475 U.S. 202 (1982), which held that states cannot constitutionally deny a free public education to students because of their immigration status.

Holding

The Supreme Court therefore found that the school district had no rational basis to deny children a public education based upon their immigration status, given the harm that would be inflicted on these children and society as a whole.

The Supreme Court rejected the following goals that the state argued were the “substantial goals” of the law:

- Protecting the state from an influx of illegal immigrants;
- Relieving the state of the added, unique costs of educating undocumented children, thus retaining resources for legal resident children; and
- The claim that undocumented children are “less likely than other children... to put their education to productive social or political use within the state.” *Id.* at 230.

What *Plyler* means for school districts

Plyler holds that school districts cannot deny enrollment to a student simply because the student is undocumented. This requirement also applies to other types of undocumented students, such as a student who overstays a tourist visa on which they originally entered the country.

Neither the Minnesota Department of Education (“MDE”) nor the Minnesota Attorney General has issued formal guidance on an undocumented student’s right to an education in Minnesota.

MDE program staff cite the May 6, 2011 Dear Colleague Letter related to Plyler v. Doe in advising districts that...

1. A birth certificate cannot be required for enrollment.
2. School and district staff cannot ask about a family's immigration status.
3. Schools and districts must ensure that students are not barred from enrolling in K-12 public districts and charter schools on the basis of their own citizenship or immigration status or that of their parents or guardians.
4. District and school staff need to review the documents they require for school enrollment to ensure that the requested documents do **not** have a chilling effect on enrollment in school.

Based upon this expansive reading of *Plyler*, school districts should not take actions that could be seen as chilling or discouraging undocumented students from attending school.

School districts should also permit these students to participate in extracurricular activities and receive services that other students in the district receive, such as free and reduced meals, special education services, counseling, etc.

There is no federal law that requires school districts to report undocumented students to immigration authorities. In fact, there is a strong argument that under *Plyler*, school districts cannot voluntarily report such information either, as that may discourage undocumented families from enrolling.

Related school scenarios

- MDE Title III and English Learner program compliance monitoring
- District reporting for Title III, Part A Immigrant Children and Youth Grant
- Identification for student participation in the Refugee School Impact Grant
- Identification of students with “English Learner” status

Proof of Residency

In order to ensure that its educational services are enjoyed only by residents of a school district, the district may require students or their parents provide proof of residency within the district. *See e.g., Martinex v. Bynum*, 461 U.S. 321, 328 (1983)

Note that inquiries into the immigration status of a student or parents are not relevant to establishing residency within a school district. Therefore, these types of inquiries are not allowed.

Proof of Age

As with residency, school districts may require that students show that they fall within State-mandated minimum and maximum age requirements. School districts may accept a variety of documents for that purpose.

The most common document used to satisfy the age requirement is a birth certificate. A school district cannot bar a student from enrolling because his or her birth certificate indicates a foreign place of birth. Additionally, school districts cannot bar enrollment if a student is unable to produce a birth certificate.

Again, a school district should not inquire into the immigration status of a student or parent during the process of confirming the student's age.

Student Social Security Numbers or Visa Status

Some school districts request a student's social security number at enrollment for use as a student identification number. With certain limited exceptions, a school district may not deny enrollment to a student if he or she, or his parent or guardian, chooses to not provide a social security numbers. 5 U.S.C. § 552a.

Recent Changes to Federal Immigration Law

On January 25, 2017, President Trump signed two executive orders affecting federal immigration law.

- The first is the Enhancing Public Safety in the Interior of the United States Executive Order (the “Public Safety Executive Order”) and the second is the Border Security and Immigration Enforcement Improvements Executive Order (the “Border Security Executive Order”).

Public Safety Executive Order

- The biggest potential concern for undocumented parents and students is the significant changes to the way ICE prioritizes enforcement and deportation actions.
 - Under President Obama, ICE focused its immigration enforcement on serious criminals, including individuals convicted of an aggravated felony, felony, significant misdemeanor, or three or more misdemeanors, and individuals who posed threats to national security or public safety.
- The concern for undocumented parents and students is the third item regarding committing acts that constitute a chargeable criminal offense. This is because entering the country without inspection (or, in other words, being undocumented) is a chargeable criminal offense in and of itself. Thus, undocumented immigrants with no criminal history could still be deported under that provision.

Impact of the Public Safety and Border Security Executive Orders

Enforcement of Immigration Laws and Concerns for School Districts

Background in Enforcement of Immigration Laws

ICE is the investigative branch of the DHS charged with enforcing the U.S. immigration and customs laws.

- ICE was created in 2003 and took over the responsibility of enforcing the immigration laws from the Immigration Naturalization Service.
- ICE has over 20,000 employees in over 400 offices throughout the United States.

“Sensitive Locations” Policy

Under ICE policies, certain places are deemed “sensitive locations” where enforcement activities such as surveillance, interviews, searches, and arrests are generally prohibited absent exigent or special circumstances or prior approval from high-level leadership. *See* Memorandum of Ice Director, John Morton, Policy No. 10029.2, Oct. 24, 2011. Because ICE rarely conducts enforcement activities on school property, there is very little case law addressing issues with ICE activities on school grounds.

Schools, including licensed day cares, pre-schools, and early learning programs, are listed as sensitive locations.

- This includes the school grounds themselves, locations where scholastic or education-related activities or events are taking place, and school bus stops during the times of day when students are present.
- This means ICE agents will generally not conduct enforcement activities on school grounds.

ICE Agents on School Grounds

- If an ICE agent comes onto school district property as part of an investigation, the school district should have a plan for how it will respond. Below is a proposed response that school districts may choose to adhere to:
 - If an ICE agent approaches a school asking for student information or for access to a student, the school district should adhere to its visitor policy as far as signing the agent in and requiring the agent to present valid identification.
- The agent should then be referred to the Superintendent or to the office for an appropriate administrator designated by the Superintendent.
- Generally, the Superintendent or designee should immediately contact the school district's attorney before taking any action or providing any information in response to a request or visit from an ICE agent

- The Superintendent or designee should ask the ICE agent to state the reason and authority for the visit, whether the sensitive locations policy is being followed, and, if so, why the sensitive locations policy is being followed, and, if so, why the sensitive locations policy permits the visit.
- The Superintendent or designee should ask the ICE agent to confirm that the agent has a warrant or subpoena and to see the document. If the agent does not have a warrant or subpoena, the Superintendent or designee should decline entry.
- After the Superintendent or designee reviews the subpoena or warrant and consults with the school district attorney, the Superintendent or designee can determine appropriate next steps, including whether to allow the ICE agent to move forward with his or her request and notifying appropriate parties, such as the student's parents.

Requests for Student Records

Release of Directory Information

Subpoena Student Records

Under federal law, ICE agents have the power to subpoena school district records. *See* 8 U.S.C. § 1225(d).

If a subpoena is lawfully issued, FERPA requires school districts to provide the requested information. 34 CFR § 99.31(a)(9)(i). But FERPA requires that prior to turning over the requested student information, the school district should use reasonable efforts to inform the student's parents of the request. 34 CFR § 99.31(a)(9)(ii). Upon notifying the parents of the subpoena and requested information, the school district should provide the information to ICE.

Student Interviews on School District Property

While ICE's sensitive locations policy states that agents will not conduct interviews on school property, there are certain exceptions to that policy. Therefore, there is a small chance that ICE agents could come to a school district with a warrant to interview a student.

Warrants for Arrest

While unlikely, ICE agents may come on school district property to execute a warrant for arrest. There are two types of arrest warrants ICE may use: administrative and judicial/criminal.

Sanctuary School Districts

Ramifications of Becoming a Sanctuary District

Because most school districts do not receive funding from the Departments of Justice or Homeland Security, the districts would not be at risk of losing any federal funding. Therefore, it's unclear what actions the federal government could take against school districts with these types of policies or resolutions in place.

Deferred Action for Childhood Arrivals Program

PRACTICAL CONSIDERATIONS

- Limiting Types of Data Collected and Maintained by the District.
- Review Policies Regarding Directory Information.
- Create Policies for Handling ICE Requests.
- Create a Crisis Management Team or Plan in the Event Parents are Detained.
- Ensure that Contact Information is Up-to-Date.
- Provide Information or Educational Opportunities.
- Investigate All Allegations of Bullying.

'Public Charge' Informational Letter for Parents

Participation in the following programs will **not** impact immigration status for students or families:

- Free and reduced priced breakfast and lunch programs
- Educational programs offered at school
- 'Public Charge' Informational Letter for Parents is Available in English, Arabic, Karen, Somali, Spanish, and Vietnamese.

More information is available at:

<https://www.transact.com/public-charge-letter>

January 9, 2019 Executive Order from Governor Walz Establishing the One Minnesota Council on Diversity, Inclusion, and Equity

“Our state must be a leader in ensuring that everyone has an opportunity to thrive. Disparities in Minnesota...keep our entire state from reaching its full potential. As long as inequities impact Minnesotans’ ability to be successful, we have work to do. Our state will recognize its full potential when all Minnesotans are provided the opportunity to lead healthy, fulfilled lives.”

Resources

Free Resource: Public Charge Informational Letter and Webinar

The recent proposed changes to how “Public Charge” will be determined for immigrants applying for visas or green cards has caused some confusion and fear in the immigrant community. This has resulted in some of these families withdrawing or refusing services that are not part of the “Public Charge” determination. These services and programs include enrolling in school, free and reduced price breakfast and lunch, Title I, Part C, Migrant Education Programs, English Learner and Bilingual programs, Title I Programs, and other educational programs. To help inform the public and clear up some misunderstandings, TransACT Communications is hosting a webinar on April 15th on this topic led by Roger Rosenthal, attorney and executive director of the Migrant Legal Action Program and expert on the “Public Charge” Policy.

Resources (continued)

Public Charge Webinar Link

https://www.transact.com/public-charge?hs_preview=jLVvRCxK-8166567563

Public Charge Information Letter Link

<https://www.transact.com/public-charge-letter>

Questions?

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Immigration Issues for School Districts

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I. INTRODUCTION

With immigration issues at the forefront of the national political dialogue, many questions have been raised by schools about undocumented families, a school district's obligations towards these families, and what to do if an Immigration and Customs Enforcement ("ICE") agent comes to a school to obtain student information or conduct an interview. This presentation will review the legal framework regarding an undocumented student's right to an education, a school's rights if an ICE agent comes on school property, policies school districts can adopt to proactively address these issues, and other issues affecting undocumented students.

II. UNDOCUMENTED STUDENTS' RIGHT TO AN EDUCATION

A. Plyler v. Doe. In 1982, the United States Supreme Court issued the opinion *Plyler v. Doe*, 457 U.S. 202 (1982), which held that states cannot constitutionally deny a free public education to students because of their immigration status.

NOTE: These materials and the corresponding presentation are meant to inform you of interesting and important legal developments. While current as of the date of presentation, the information that is provided may be superseded by court decisions, legislative amendments, rule changes, and opinions issued by bodies interpreting the area of law. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts addressed in this outline or discussed in the presentation, you should consult with your legal counsel.

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1. Facts.

- a. In *Plyler*, pursuant to a 1975 Texas state law that withheld state funds from local school districts that enrolled students who were not “legally admitted” to the United States, a Texas school district adopted a policy that required foreign-born students to pay tuition if they:
 - i. Did not possess documentation showing that they were legally in the United States; or
 - ii. Were unable to produce confirmation that they were in the process of securing such documentation.
- b. Shortly after the policy was adopted, a group of school district students from Mexico, who were not legally admitted to the United States, brought a class action lawsuit challenging the State law and school board policy.

2. Holding.

- a. The Supreme Court relied on the Equal Protection Clause found in Fourteenth Amendment to the United States Constitution, which states, in relevant part, that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”
- b. The Supreme Court found that undocumented students were not a protected class and education was not a fundamental right, so it applied the rational basis test. Traditionally under the rational basis test, courts only require that the government entity must show that its actions were rationally related to a legitimate governmental interest.
- c. In *Plyler*, the Supreme Court applied a modified rational basis test because it found that it “may appropriately take into account [the state law’s] costs to the Nation and to the innocent children who are victims.” *Id.* at 224. This modified rational basis test required that the “discrimination in [the state law] can hardly be considered rational unless it furthers some substantial goal of the State.” *Id.*
- d. The Supreme Court rejected the following goals that the state argued were the “substantial goals” of the law:
 - i. Protecting the state from an influx of illegal immigrants;
 - ii. Relieving the state of the added, unique costs of educating undocumented children, thus retaining resources for legal resident children; and

- iii. The claim that undocumented children are “less likely than other children . . . to put their education to productive social or political use within the state.” *Id.* at 230.
- e. The Supreme Court therefore found that the school district had no rational basis to deny children a public education based upon their immigration status, given the harm that would be inflicted on these children and society as a whole.
- f. The Supreme Court also noted that holding children accountable for their parents’ actions “does not comport with fundamental conceptions of justice.” *Id.* at 220.
- g. The Supreme Court further found that 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.” *Id.* at 223.

B. What *Plyler* means for school districts.

1. *Plyler* holds that school districts cannot deny enrollment to a student simply because the student is undocumented. This requirement also applies to other types of undocumented students, such as a student who overstays a tourist visa on which they originally entered the country.
2. When applying *Plyler* to a challenged school district action, courts will likely look at:
 - a. How central the activity in question is to the child’s education; and
 - b. Whether the state can demonstrate that any substantial goal is served by denying the child the experience or access.
3. Neither the Minnesota Department of Education (“MDE”) nor the Minnesota Attorney General has issued formal guidance on an undocumented student’s right to an education in Minnesota.
 - a. While the MDE has not issued formal guidance on an undocumented student’s right to education, it has indicated in publications that all children, regardless of their immigration status, are entitled to a public education, consistent with the ruling in *Plyler*. In its 2018 publication *Title III Immigrant Children and Youth Program*, the MDE states that public schools cannot require the production of visas or other documents to prove a child’s immigration status. A public school similarly cannot require the

production of a birth certificate or social security number for enrollment. The MDE attached the U.S. Department of Education’s Dear Colleague Letter, dated May 6, 2011, which advises that public schools cannot engage in conduct that would chill or discourage children’s participation in public education based upon immigration status. *Title III Immigrant Children and Youth Program*, (Dec. 10, 2018), available at, https://education.mn.gov/mdeprod/idcplg?IdcService=GET_FILE&dDocName=MDE085607&RevisionSelectionMethod=latestReleased&Rendition=primary.

- b. Similarly, in its MARSS Manual, citing *Plyler*, the MDE notes “undocumented aliens are entitled to enroll in school . . .” and “it is a violation of federal law to request a student’s immigration/visa status.” *Appendix K, Determining a Student’s Resident District for Students Without A Disability (No IEP or IFSP)*, at 4 (Nov. 2017), available at, https://education.mn.gov/mdeprod/idcplg?IdcService=GET_FILE&dDocName=MDE073215&RevisionSelectionMethod=latestReleased&Rendition=primary.
4. A number of Attorneys General and commissioners of education from other states have issued extensive guidance on educating undocumented students, often relying on guidance from the Obama Administration’s Department of Education, discussed in greater detail in Section II.D. These state agencies take an expansive view of *Plyler* and, similar to the MDE User Identification Guide, find that in addition to not denying undocumented students a right to an education, school districts cannot take any actions that would “chill or discourage” undocumented students from enrolling.
5. Based upon this expansive reading of *Plyler*, school districts should not take actions that could be seen as chilling or discouraging undocumented students from attending school.
 - a. For example, a school district should not ask about a student or family’s immigration status during enrollment.
 - i. Simply asking these types of questions could be seen as discouraging undocumented students to enroll and thereby infringe upon their right to an education.
 - b. Additionally, a school district should not maintain records about a student or family’s immigration status.
6. School districts should also permit these students to participate in extracurricular activities and receive services that other students in the district receive, such as free and reduced meals, special education services, counseling, etc.

- a. While this issue has not been directly addressed by courts, extracurricular activities and secondary services are likely protected under *Plyler* because undocumented students could argue that extracurricular activities and secondary services are central to a student’s educational experience.
 - b. Note that there is a federal statute, 8 U.S.C. § 1611(a), stating that an undocumented alien “is not eligible for any Federal public benefit.” “Federal public benefit” is defined as “retirement, welfare, health disability, public or assisted housing, postsecondary education, food assistance, [and] unemployment benefit.” 8 U.S.C. § 1611(c)(1)(B). Though this issue has not been addressed by courts, because the definition of Federal public benefit does not include K-12 education, this statute would likely not bar a school district from providing undocumented students with supplemental services that are federally funded.
 - c. Additionally, many federal and state programs specifically require that undocumented students receive services. For example, the United States Department of Agriculture specifically states that school districts cannot deny free and reduced lunch meals to undocumented students. U.S. Dep’t of Ag., Eligibility Manual for School Meals, at 78 (July 2017), available at https://fns-prod.azureedge.net/sites/default/files/cn/SP36_CACFP15_SFSP11-2017a1.pdf.
7. There is no federal law that requires school districts to report undocumented students to immigration authorities. In fact, there is a strong argument that under *Plyler*, school districts cannot voluntarily report such information either, as that may discourage undocumented families from enrolling.
- a. This issue was briefly addressed in *League of Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995). In *Wilson*, a federal district court in California struck down a portion of a California law that required school districts to not admit undocumented students, to verify the legal status of all students, and to report undocumented students to federal immigration authorities. *Id.* at 774. That federal court held that because immigration is a federal issue, states cannot require their school districts to perform immigration functions, such as verifying legal status and reporting undocumented students.
 - b. In May of 2018 while testifying before the U.S. House Committee on Education and the Workforce, Education Secretary Betsy DeVos stated that schools could decide whether to report undocumented students and families to Immigration and Customs Enforcement (ICE). *See*

https://www.washingtonpost.com/news/education/wp/2018/05/23/astounding-ignorance-of-the-law-civil-rights-groups-slam-devos-for-saying-schools-can-report-undocumented-students/?utm_term=.e11619081729. After substantial backlash, Secretary DeVos testified in a subsequent hearing before the Senate Appropriations subcommittee that schools cannot report undocumented students or families to ICE. See https://www.washingtonpost.com/news/education/wp/2018/06/05/can-educators-call-ice-on-students-betsy-devos-finally-answers/?noredirect=on&utm_term=.62bd7ca4e89a.

C. Guidance from the Department of Education.

1. The Department of Education (“DOE”) occasionally issues “Dear Colleague” letters as a way to provide guidance to school districts on a variety of legal issues.
2. In 2011 and 2014, the DOE issued Dear Colleague letters on permissible and impermissible inquiries that school districts may make when enrolling students.
3. While these letters were issued during the Obama Administration, they still provide useful guidance for school districts to ensure they are in full compliance with federal law.
4. The May 8, 2014 letter, available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf>, lists the following types of permissible inquiries school districts may make:
 - a. **Proof of Residency.** In order to ensure that its educational services are enjoyed only by residents of a school district, the district may require students or their parents provide proof of residency within the district. See *e.g.*, *Martinez v. Bynum*, 461 U.S. 321, 328 (1983).
 - i. For example, a district may require copies of phone and water bills or lease agreements to establish residency.
 - ii. If a school district determines that a child is homeless, it must adhere to the requirements found in the McKinney-Vento Education for Children and Youth who are Homeless Act, 42 U.S.C. § 11301, et seq.
 - iii. Note that inquiries into the immigration status of a student or parent are not relevant to establishing residency within a school district. Therefore, these types of inquiries are not allowed.

- b. **Proof of Age.** As with residency, school districts may require that students show that they fall within State-mandated minimum and maximum age requirements. School districts may accept a variety of documents for that purpose.
 - i. The most common document used to satisfy the age requirement is a birth certificate. A school district cannot bar a student from enrolling because his or her birth certificate indicates a foreign place of birth. Additionally, school districts cannot bar enrollment if a student is unable to produce a birth certificate.
 - ii. School districts may also accept other documentation showing a student's age, including baptismal or hospital certificates, or adoption papers and passports.
 - iii. Again, a school district should not inquire into the immigration status of a student or parent during the process of confirming the student's age.
- c. **Race or Ethnicity Inquiries.** Under certain state and federal laws, school districts are required to report certain data on their students' race and ethnicity.
 - i. The DOE notes that while it requires school districts to collect and report such information, school districts cannot use the acquired data to discriminate against students. Similarly, a parent or student's refusal to respond to a request for this data cannot be a reason to deny enrollment.
- d. **Student Social Security Numbers or Visa Status.** Some school districts request a student's social security number at enrollment for use as a student identification number. With certain limited exceptions, a school district may not deny enrollment to a student if he or she, or his or her parent or guardian, chooses to not provide a social security numbers. 5 U.S.C. § 552a.
 - i. As discussed in greater detail in Section VII, school districts with concerns about immigrations issues may choose to not collect student social security numbers.
 - ii. If a school district elects to collect such information, it must inform the parent or student that the disclosure is voluntary, provide the statutory or other basis upon which it seeking the social security number, and explain what uses will be made of it. 5 U.S.C. § 552a.

- iii. If a school district collects student social security numbers, it must ensure that any request for student social security numbers is uniformly applied to all students, and that a parent or student's refusal to provide such information is not used to discriminate against the student.
- iv. While some states either require or prohibit school districts from inquiring about visa status, Minnesota law is currently silent. Therefore, similar to social security numbers, school districts may request but must not require information about a student's visa status. *See also* Student Support Data Collection Immigrant Children and Youth Identification User Guide, at 4 ("District and charter school staff may not require visas and other documents to prove a student's immigration status.").

III. RECENT CHANGES TO FEDERAL IMMIGRATION LAW

A. President Trump's Executive Orders.

1. On January 25, 2017, President Trump signed two executive orders affecting federal immigration law.
 - a. The first is the Enhancing Public Safety in the Interior of the United States Executive Order (the "Public Safety Executive Order") and the second is the Border Security and Immigration Enforcement Improvements Executive Order (the "Border Security Executive Order").
 - b. While both have implications on school districts, the Public Safety Executive Order will likely be the source of more anxiety and questions from students and parents.
2. On January 27, 2017, President Trump issued the now heavily-litigated executive order titled "Protecting the Nation from Foreign Terrorist Entry into the United States." This executive order temporarily suspended entry of certain individuals from several Muslim-majority countries. The executive order has been challenged a number of times in federal court and was subsequently revised twice by President Trump to try and address the legal challenges. The legality of the executive order was ultimately upheld by the Supreme Court in June of 2018. *Trump v. Hawaii*, 138 S.Ct. 2392 (U.S. 2018). Because this executive order has a very limited impact on educating undocumented students, it will not be discussed in detail during this presentation.

B. Public Safety Executive Order.

1. The Public Safety Executive Order announced a large expansion of immigration enforcement in the United States.
2. Among other things, the Public Safety Executive Order called for the following major changes:
 - a. Significantly revise who ICE considers to be a “priority” for enforcement and deportation;
 - b. Hire 10,000 new officers for enforcement and removal operations;
 - c. Increase the number of “287g” agreements, which are agreements wherein local enforcement officers agree to perform the functions of federal immigration agents;
 - i. A list of all counties with 287g agreements with the federal government is available at: <https://www.ice.gov/287g#signedMOA>. There are currently no Minnesota counties that have entered into these agreements.
 - d. Threaten to withhold federal funding from “sanctuary” jurisdictions.
 - i. The portion of the Public Safety Executive Order that broadly stated that the government would withhold federal funding from sanctuary cities was found to be unconstitutional by a federal court in California. *County of Santa Clara and San Francisco v. Trump*, Case Nos. 17-cv-00574, 17-cv-00485 (N.D. Cal. Apr. 25, 2017).
 1. The court therefore issued a preliminary injunction blocking the enforcement of that portion of the Public Safety Executive Order.
 2. Attorney General Jeff Sessions subsequently issued a memorandum on May 22, 2017, limiting the Public Safety Executive Order’s scope and stating that the government would only withhold federal funds from local governments that the local governments received from the Departments of Justice or Homeland Security.
 3. The Executive Branch appealed the district court’s decision, and the Ninth Circuit Court of Appeals upheld the district court’s finding that withholding federal funding is unconstitutional.

3. The biggest potential concern for undocumented parents and students is the significant changes to the way ICE prioritizes enforcement and deportation actions.
 - a. Under President Obama, ICE focused its immigration enforcement on serious criminals, including individuals convicted of an aggravated felony, felony, significant misdemeanor, or three or more misdemeanors, and individuals who posed threats to national security or public safety.
 - b. The Obama Administration therefore placed a low priority on non-violent violators of immigration laws with strong ties to the United States.
4. The Public Safety Executive Order prioritizes for deportation those undocumented citizens who:
 - a. Have been convicted of any criminal offense;
 - b. Have been charged with any criminal offense, where such charge has not been resolved;
 - c. Have committed acts that constitute a chargeable criminal offense;
 - d. Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;
 - e. Have abused any program related to receipt of public benefits;
 - f. Are subject to a final order of removal but have not departed; or
 - g. In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.
5. The concern for undocumented parents and students is the third item regarding committing acts that constitute a chargeable criminal offense. This is because entering the country without inspection (or, in other words, being undocumented) is a chargeable criminal offense in and of itself. Thus, undocumented immigrants with no criminal history could still be deported under that provision.
6. Importantly, the Public Safety Executive Order does not prioritize between the listed reasons for deportation. Thus, people who have committed acts that constitute a chargeable offense appear to have the same priority for deportation as those who have been charged or convicted of a criminal offense.

C. Border Security Executive Order.

1. The Border Security Executive Order relates primarily to issues affecting the southern United States border. The Executive Order calls for, among other things, increased border patrol officers and the construction and funding of a wall on the southern border.
2. The portion of the Border Security Executive Order that may affect undocumented immigrants throughout the country is President Trump's call for an expansion of the "expedited removal" process.
 - a. Under federal law, the Department of Homeland Security ("DHS") has the authority to remove aliens from the country who have not been admitted or paroled in the United States, who are inadmissible, and who have not been continuously physically present in the United States for the two-year period immediately prior to the determination of their inadmissibility, unless the individual is an undocumented minor. 8 U.S.C. § 1225(b).
 - b. If an alien meets those requirements, they can be subject to expedited removal without certain due process protections, such as having an attorney or getting a hearing before a judge.
 - c. The expedited removal proceedings can be move along very quickly, with undocumented immigrants sometimes being arrested and deported on the same day. Additionally, with limited exceptions, persons subject to expedited removal have no right to appeal that determination.
3. Since 2004, the expedited removal process has generally only been used on individuals apprehended within two weeks of arrival into the county and within 100 miles of the Canadian or Mexican border.
4. The Border Security Executive Order directs the DHS Secretary to expand the category of aliens subject to expedited removal. *See also* 8 U.S.C. § 1225b(1)(A)(iii) (authorizing the government to modification of the requirements for expedited removal).
5. The DHS Secretary issued a memorandum on February 20, 2017, stating that he will publish the new requirements in the Federal Register at some point in the future,
6. There is no indication on what these new requirements will be, though the February 20 memorandum from the DHS Secretary walks through a concerns he has with the number of cases pending across the country and the average length of time each case takes.

7. The DHS Secretary therefore may elect to expand the expedited removal procedures well beyond the current guidelines of within 100 miles of the border and undocumented immigrants in the country less than two weeks.
8. The DHS Secretary left office on July 31, 2017, and a new Secretary has been in office since December 26, 2017. Over two year later, the DHS has yet to issue any regulations pursuant to the Border Security Executive Order expanding expedited removals.

D. Impact of the Public Safety and Border Security Executive Orders.

1. While the long-term impact of the two executive orders is unclear, during the first 100 days of the Trump Administration, 41,300 individuals were arrested by ICE, which is an approximately 38% increase in arrests compared to the same time period in 2016. Dep't of Homeland Security, *ICE ERO Immigration Arrests Climb Nearly 40%*, May 17, 2017, available at www.ice.gov/features/100-days.
2. In addition, during the first 100 days of the Trump Administration, 10,800 undocumented individuals with no criminal records were arrested by ICE, up from 4,200 individuals during the same period in 2016. *Id.*
3. In 2018, ICE reported 158,581 administrative arrests of undocumented individuals who had no legal basis to remain in the United States. This is an 11% increase from 2017, which saw a 30% increase from 2016. *Fiscal Year 2018 ICE Enforcement and Removal Operations Report*, Dep't of Homeland Security, available at <https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf>.

IV. ENFORCEMENT OF IMMIGRATION LAWS AND CONCERNS FOR SCHOOL DISTRICTS

A. Background on Enforcement of Immigration Laws. ICE is the investigative branch of the DHS charged with enforcing the U.S. immigration and customs laws.

1. ICE was created in 2003 and took over the responsibility of enforcing the immigration laws from the Immigration Naturalization Service.
2. ICE has over 20,000 employees in over 400 offices throughout the United States.

B. “Sensitive Locations” Policy.

1. Under ICE policies, certain places are deemed “sensitive locations” where enforcement activities such as surveillance, interviews, searches, and arrests

are generally prohibited absent exigent or special circumstances or prior approval from high-level leadership. *See* Memorandum of ICE Director, John Morton, Policy No. 10029.2, Oct. 24, 2011. Because ICE rarely conducts enforcement activities on school property, there is very little case law addressing issues with ICE activities on school grounds.

2. The types of exigent circumstances that would permit enforcement activities on sensitive locations without prior approval include:
 - b. Matters of national security or terrorism;
 - c. Matters that involved the imminent risk of death, violence, or physical harm to any person or property;
 - d. The immediate arrest or pursuit of a dangerous felon, terrorist suspect, or any other individuals that present a danger to the public; or
 - e. Matters involving the imminent risk of destruction of material in an ongoing case.
3. The purpose of the sensitive locations policy is “to ensure that people seeking to participate in activities or utilize services provided at any sensitive location are free to do so, without fear or hesitation.” *Id.*
4. Schools, including licensed day cares, pre-schools, and early learning programs, are listed as sensitive locations.
 - a. This includes the school grounds themselves, locations where scholastic or education-related activities or events are taking place, and school bus stops during the times of day when students are present.
 - b. This means ICE agents will generally not conduct enforcement activities on school grounds.
5. Note that the sensitive locations policy does not apply to all ICE actions. Certain activities are outside the scope of the sensitive location enforcement policy, including:
 - a. Obtaining records, documents, or other materials from officials or employees;
 - b. Providing notice to officials or employees;
 - c. Serving subpoenas;
 - d. Guiding or securing detainees; or

- e. Engaging in Student and Exchange Visitor Program (SEVP) compliance and certification visits.
6. President Trump’s administration has indicated that ICE will continue to follow the sensitive locations policy.
- a. This is a self-imposed policy set by ICE that could be changed at a later date.
 - b. If a school district believes that ICE is not adhering to the sensitive locations policy, it may contact:
 - i. ICE Enforcement and Removal Operations (“ERO”) through the Detention Reporting and Information Line at (888) 351-4024 or through the ERO information email address at ERO.INFO@ice.dhs.gov, also available at <https://www.ice.gov/webform/ero-contact-form>.
 - ii. The Civil Liberties Division of the ICE Office of Diversity and Civil Rights may be contacted at (202) 732-0092 or ICE.Civil.Liberties@ice.dhs.gov.

C. ICE Agents on School Grounds. If an ICE agent comes onto school district property as part of an investigation, the school district should have a plan for how it will respond. Below is a proposed response that school districts may choose to adhere to:

- 1. If an ICE agent approaches a school asking for student information or for access to a student, the school district should adhere to its visitor policy as far as signing the agent in and requiring the agent to present valid identification.
 - a. Note that depending on whether a parent has opted out of the directory information notice, there is a chance that even student names could be protected under Family Educational Rights and Privacy Act (“FERPA”) and the Minnesota Government Data Practices Act (“MGDPA”). Thus, a school district should not immediately disclose whether a student attends the school district or is at school that day.
- 2. The agent should then be referred to the Superintendent or to the office of an appropriate administrator designated by the Superintendent.
- 3. Generally, the Superintendent or designee should immediately contact the school district’s attorney before taking any action or providing any information in response to a request or visit from an ICE agent.

4. The Superintendent or designee should ask the ICE agent to state the reason and authority for the visit, whether the sensitive locations policy is being followed, and, if so, why the sensitive locations policy permits the visit.
5. The Superintendent or designee should ask the ICE agent to confirm that the agent has a warrant or subpoena and to see the document. If the agent does not have a warrant or subpoena, the Superintendent or designee should decline entry.
6. After the Superintendent or designee reviews the subpoena or warrant and consults with the school district attorney, the Superintendent or designee can determine appropriate next steps, including whether to allow the ICE agent to move forward with his or her request and notifying appropriate parties, such as the student's parents.

D. Types of Enforcement Activities on School Grounds. ICE has a number of tools that it uses in enforcing laws, including requesting student records, issuing subpoenas, and conducting student interviews. The following provide a general framework for how a school district should respond to each type of enforcement activity.

1. **Requests for Student Records.**

- a. ICE agents may simply request that a school district provide student education records.
- b. FERPA and the MGDPA govern educational data and under what circumstances information on students may be released to requestors such as ICE.
- c. With a few limited exceptions, FERPA prohibits the release of student records without first receiving the permission of a parent or eligible student (a student who is over eighteen years old).
- d. There is no special exception for ICE agents. Thus, school districts should generally not provide student records to ICE agents unless a parent or eligible student first authorizes the release of the records.

2. **Release of Directory Information.**

- a. FERPA and the MGDPA allow school districts to designate certain personally identifiable information as "directory information." School districts may, but are not required to, share directory information without first obtaining parental consent.
- b. Examples of directory information include:

- i. Student's name
 - ii. Address
 - iii. Telephone listing
 - iv. E-mail address
 - v. Photograph
 - vi. Date and place of birth
 - vii. Grade level
- c. School districts must offer parents the opportunity to opt out of having their children's information included as part of the district's directory information.
 - d. If ICE makes a request for information on a student that the school district has designated as directory, such as a student's date and place of birth, the school district may provide such information to ICE. Because this type of information is directory, if the school district elected to provide the information, it would not need to obtain parental consent prior to providing the information.

3. **Subpoena Student Records.**

- a. Under federal law, ICE agents have the power to subpoena school district records. *See* 8 U.S.C. § 1225(d).
- b. There are two different types of subpoenas that ICE may obtain: an administrative subpoena and a judicial subpoena. With either type of subpoena, the ICE agent does not have permission to access school property, other than to serve the subpoena.
 - i. An administrative subpoena is signed by an ICE official and not by a judge. An administrative subpoena does not necessarily have the same weight as an order coming from a judge. School districts should not assume that ICE agents have the authority to obtain information or records based on an administrative subpoena. In fact, in certain situations, a judicial subpoena may be required.
 - ii. A judicial subpoena, on the other hand, is signed by a judge and a school district would most likely be required to follow the subpoena request.

- c. If a subpoena is lawfully issued, FERPA requires school districts to provide the requested information. 34 CFR § 99.31(a)(9)(i). But FERPA requires that prior to turning over the requested student information, the school district should use reasonable efforts to inform the student's parents of the request. 34 CFR § 99.31(a)(9)(ii). Upon notifying the parents of the subpoena and requested information, the school district should provide the information to ICE.
- iii. Note that parental notification is not required if the request relates to the health and safety of the student or other individuals. 34 CFR § 99.31(a)(10).

4. **Student Interviews on School District Property.**

- a. While ICE's sensitive locations policy states that agents will not conduct interviews on school property, there are certain exceptions to that policy. Therefore, there is a small chance that ICE agents could come to a school district with a warrant to interview a student.
- b. If an ICE agent comes to a school district for an interview, the district should follow its policy for checking in visitors and, as discussed earlier, refer the agent to the Superintendent or designee.
- c. The school district should check its board policies to determine if there is a procedure for allowing on campus interviews by ICE or other law enforcement agencies. For example, the Minnesota School Board Association's Model Policy 519 addresses requests by law enforcement officers for interviews of students on campus.
- d. If the Superintendent or designee and school district attorney determine that the ICE agent has a valid court-issued order to interview a student on campus and the interviews is permissible under school district policy, prior to making the student available for the interview, the Superintendent or designee should give the student's parent(s) notice of the ICE interview. The parents should be given the opportunity to object to or participate in the interview.

5. **Warrants for Arrest.**

- a. While unlikely, ICE agents may come on school district property to execute a warrant for arrest. There are two types of arrest warrants ICE may use: administrative and judicial/criminal.
- b. An administrative warrant is usually used to arrest someone whose only offense is their lack of immigration status. It is issued and signed by an

ICE official. An administrative warrant for an arrest can only be executed in locations where there is not a reasonable expectation of privacy, i.e. public property. Thus, if an ICE agent comes to school to arrest an individual with an administrative warrant, a school district would be within its rights to require that the administrative warrant be presented and enforced away from school grounds.

- c. If ICE seeks to detain someone for reasons beyond just immigration violations, such as when serious criminal activity is suspected, ICE agents may secure a criminal or judicial warrant. Criminal or judicial warrants are traditional warrants that are issued and signed by judges. A criminal or judicial warrant authorizes law enforcement to enter the person's dwelling or other locations where the person has a reasonable expectation of privacy, such as a school, to arrest the person. Therefore, a school district would be required to allow the ICE agent to come on school property to execute the arrest warrant.

6. **Compliance with School and Exchange Visitor Program.**

- a. ICE personnel may enter school property to conduct compliance for the SEVP.
- b. This is only applicable to schools with F-1 visa holders that are registered with the Student Exchange Visitor Information System.

V. SANCTUARY SCHOOL DISTRICTS

A. Background.

- 1. After President Trump won the 2016 presidential election, a number of school boards across the country passed resolutions declaring their school districts to be "sanctuary districts" or otherwise formally declaring it to be school district policy to protect immigrant students to the maximum extent permitted by law.
- 2. Some school districts elect to not use the term "sanctuary district" as it can be seen as buzzword, and instead use terms such as "welcoming district" or "safe zone."
- 3. School districts that have elected to adopt these types of resolutions include Minneapolis Public Schools, St. Paul Public Schools, Denver Public Schools, Pittsburgh Public Schools, Houston Independent School District, the Santa Fe Public School District, the Los Angeles Unified School District, and many more.

B. Elements of Resolutions.

1. While each resolution is different, some common themes among the resolutions include:
 - a. Formally declaring that the school district will not collect or maintain any information about a student's immigration status, including social security numbers;
 - b. Creating a formal process for how to respond to ICE agents who come on school property;
 - c. Developing and providing training for an emergency response team to help students who are impacted by immigration enforcement actions;
 - d. Refusing to voluntarily share information with ICE agents to the extent permitted by law; and
 - e. Creating additional support and counseling for immigrant families.
2. These resolutions cannot permit school districts to refuse to comply with immigrations laws. For example, a resolution could not state that the school district will refuse to respond to any subpoena issued by ICE. That is because ICE can lawfully obtain subpoenas and FERPA permits disclosure of student records pursuant to valid subpoenas.

C. Ramifications of Becoming a Sanctuary District.

1. President Trump has taken a hard line on sanctuary jurisdictions and threatened to withhold federal funding from those jurisdictions in his Public Safety Executive Order, though a federal court issued a temporary injunction blocking the enforcement of that provision.
2. Attorney General Sessions subsequently stated that only federal funding from the Departments of Justice or Homeland Security would be withheld from sanctuary jurisdictions.
3. Because most school districts do not receive funding from the Departments of Justice or Homeland Security, the districts would not be at risk of losing any federal funding. Additionally, the Ninth Circuit Court of Appeals affirmed a lower court decision that withholding of funds was unlawful. Therefore, it's unclear what actions the federal government could take against school districts with these types of policies or resolutions in place.

VI. DEFERRED ACTION FOR CHILDHOOD ARRIVALS PROGRAM

A. Background.

1. The Deferred Action for Childhood Arrivals (“DACA”) program provides qualified immigrants with temporary deportation relief and a valid work permit.
2. There are a number of eligibility requirements that a DACA recipient must meet, including arriving in the United States before their sixteenth birthday, living continuously in the United States since June 15, 2007, being enrolled in school or graduating high school, and more.
3. The temporary deportation relief lasts for two years, subject to renewal.

B. President Trump’s Recent Actions.

1. On September 5, 2017, Attorney General Sessions announced that the Trump Administration was rescinding the DACA program. The rescission was suspended for six months, with a final date of rescission set for March 5, 2018.
2. After the announcement by Attorney General Sessions, President Trump stated that he was hoping that there could be a compromise in Congress to grant DACA recipients permanent relief, but to date no compromise has been reached.
3. On March 12, 2019, House Democrats introduced the Dream and Promise Act that includes permanent relief for DACA recipients.
4. Several lawsuits were initiated challenging the federal government’s rescission of the DACA program. Four federal district courts have issued orders hindering the federal government’s ability to rescind the DACA program. On November 8, 2018, the Ninth Circuit Court of Appeals issued a decision upholding the district court’s injunction. The federal government has appealed this decision to the Supreme Court. Two other federal courts of appeals have since heard arguments on appeal, but no decisions have been issued.
5. On May 1, 2018, seven states brought a lawsuit challenging the legality of the DACA program. Three states later joined the lawsuit. The states recently moved for summary judgment, but a ruling has not been issued.
6. It is therefore unclear what will happen with the DACA program and individuals who have previously received temporary deportation relief under DACA.

VII. PRACTICAL CONSIDERATIONS

A. For school districts with concerns about undocumented students enrolled in their district, there are a number of proactive measures that the school board can take.

1. **Limiting Types of Data Collected and Maintained by the District.**

- a. School districts can elect to not collect any data that could implicate a student's immigration status.
- b. For example, a school district could adopt a policy wherein it specifically states that it will not request student social security numbers or information about a student's birthplace.
- c. If a school district adopted this type of policy, even if ICE subpoenaed student records, there would be no data relevant to a student's immigration status to turn over.

2. **Review Policies Regarding Directory Information.**

- a. While school districts are not necessarily required to turn over directory information to ICE agents, school districts may still elect to review the types of information that are classified as directory.
- b. For example, a school district could remove a student's place of birth from its directory information classification as a means to address concerns that undocumented families may have.

3. **Create Policies for Handling ICE Requests.**

- a. While school districts may already have policies in place for law enforcement requests, a school district can adopt a formal policy for how it will interact with ICE agents and handle ICE subpoena or interview requests.
- b. As discussed earlier, the policy could require that all ICE requests must go through the Superintendent or designee and that the school district's attorney must be contacted prior to responding to a request.
- c. These policies could include an employee training element so staff, including security or front desk employees, know what to do if they receive an ICE request or learn of ICE enforcement actions from a student.

4. **Create a Crisis Management Team or Plan in the Event Parents are Detained.**

- a. School districts may elect to have a team or plan in place to handle issues that may arise if a student or student's family member is detained by ICE.
- b. For example, if a student's parents are detained by ICE while the student is at school, the school district could have a plan in place to provide support to the student, such as providing counseling services or ensuring that the student receives transportation to a safe location.
 - i. If a school district learns of an ICE raid at a specific company, the school district may decide to call parents who are employed there to see if they have been detained.
- c. If a school district learns that parents of a student are detained, it should not simply send the student home as normal. This could be seen as releasing the student into a potentially dangerous situation and open the school district up to legal liability. Instead, school districts should contact the parents or relatives to find a safe location for the student.
 - i. If the school district cannot get in contact with the student's emergency contacts, the school may decide to designate a school as an emergency shelter for children whose parents have been detained or have employees follow school buses home to ensure that students are not being left alone when they get dropped off.

5. Ensure that Contact Information is Up-to-Date.

- a. Under FERPA, parents have the right to be notified if ICE requests educational records or to interview their child. Ensuring that the school district has current contact information will help guarantee that parents can be contacted in case of an emergency.
- b. Current contact information can also be relevant if a parent or family member is detained and the school district needs to reach out to someone regarding care of the student.
 - i. School districts could also allow families to provide backup contact information for students in case the primary contacts are unavailable or detained.

6. Provide Information or Educational Opportunities.

- a. School districts can provide information or educational opportunities about immigration laws and ICE to students and parents.

- i. Note that these materials or events must be made available to all students and parents, and should not be targeted or limited to individuals who are undocumented or are of a certain race or ethnicity.
 - b. School districts can also make immigration information and other resources available in multiple languages, if it believes that this will be useful to students and parents.
 - c. Under federal law, school districts may not intentionally conceal, harbor, or shield an illegal alien from detection. 8 U.S.C. § 1324(a)(1)(A)(v)(I)-(II). While school districts can provide educational materials to families, school district employees should be cautious about assisting parents in remaining in the U.S. illegally.
 - i. For example, if an employee learns of an upcoming ICE enforcement action, the employee should not call a parent ahead of time to warn them. This type of action would go beyond simply educating students and families about immigration issues and could be seen as “shielding” an illegal immigrant from detention.
 - ii. Note that simply providing assistance to undocumented students whose parents have been detained is likely not be considered harboring or concealing an illegal alien. School districts can, for example, provide a student whose parents have been detained a ride to a relative’s home.
- 7. **Investigate All Allegations of Bullying.**
 - a. In a politically charged environment, there may be more allegations of bullying or harassment based upon race or immigration status.
 - b. School districts must ensure that they are properly receiving all allegations of bullying or harassment and that they thoroughly investigate those complaints.

VIII. QUESTIONS?

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