

Immigration: Legal Guidance and Best Practices to Support Students

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How did we get here?

President's 2017 Executive Order

- 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.”

DHS 2017 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 DHS 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 ...”**

Memorandum from John Morton, U.S. Immigration and Customs Enforcement Director, to Field Office Directors et al., Policy No. 10029.2 (Oct. 24, 2011), available at <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>

Sensitive Location Enforcement Policy

- 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.

Immigration Enforcement in Schools

- Increase in general 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
- Significant fear and confusion for immigrant students and families

New “Public Charge” Rule

- Immigration law establishes that a person is “inadmissible” if that individual is likely to become a “public charge.”
- The rule affects individuals applying for a green card (permanent resident) through a family member or an immigrant visa at a U.S. consulate based on a family petition, as well as certain temporary visas.
- New rule goes into effect on Oct. 15

Public Charge Standard

- Previously, the types of public assistance that counted towards whether an individual was likely to become a “public charge” was fairly narrow; generally applied to cash assistance (i.e.: TANF, SSI).
- New rule expands the list of public assistance that can be considered in a “public charge” determination.

Public Charge Standard

- “Public charge” includes receipt certain public benefits for more than an aggregate of 12 months over a 36-month period of time.
- Now includes: Medicaid (OHP) for non-pregnant adults, SNAP (food stamps), Section 8 housing assistance, all cash aid (including state and local)
- Other criteria considered, including skills, English proficiency, etc.

Public Charge: Benefits Considered

- Under new rule, benefits expanded to include:
 - Medicaid (OHP) for non-pregnant adults
 - SNAP (food stamps)/ Oregon Trail Card
 - (no exemption for minors)
 - Section 8 housing assistance
 - All cash aid (including state and local)
 - (May include other benefits)

Public Charge: Exempt Benefits

- Benefits that do not count toward “public charge” determination
 - Free & Reduced Lunch
 - Head Start
 - WIC
 - Billing Medicaid for school-based services

Public Charge: Other Exemptions

- Benefits received by family members will not be considered in a “public charge” determination.
- New rule does not affect refugees or those seeking asylum, most permanent residents, or citizens

Public Charge: Concerns for Schools and Students

- If parents don't apply for SNAP, no automatic eligibility for F&R lunch program
- Fear of applying for F&R lunch program
- Risk of losing Community Eligibility Provision status
- Less access to food, housing, and health services
- May discourage access to services for students with disabilities

Public Charge: Legal Challenges

- Multiple lawsuits challenging the new Rule, one of which was filed by a coalition of states including Oregon
- Lawsuits seek injunction against implementation of the Rule
- Courts have yet to rule, but stay tuned...

Ongoing Impacts on Immigrant Students

- Increased stress, anxiety, and panic
- Distraction from school work
- Depression and withdrawal
- Fighting and anger
- Fear during the school day of parent's being detained
- Increase in general and targeted bullying and harassment

Impacts Virtually Every School District

- Approximately one in four children in the United States live in immigrant families.
- An estimated 5.1 million children in the U.S. live in a family where at least one parent is undocumented.
- In Oregon, an estimated 8.6% of k-12 students have at least one undocumented parent (2014)
- **Most children are themselves U.S. citizens.**
 - Estimates are that only 1.5-2% of school-age children are undocumented.

Sources: The Pew Research Center: <http://www.pewhispanic.org/interactives/unauthorized-immigrants/>; The Children's Partnership: <http://www.childrenspartnership.org/wp-content/uploads/2017/03/The-Effect-of-Hostile-Immigration-Policies-on-Childrens-Mental-Health.pdf>

Legal Rights of Undocumented Students

- *Plyler v. Doe*, 457 US 202 (1982): U.S. Supreme Court affirmed the right of undocumented students to attend public school.
- 14th Amendment provides that no state shall “deny **to any person within its jurisdiction** the equal protection of the laws.”
- Court held that illegal aliens and their children are people "in any ordinary sense of the term".

Plyler v. Doe

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

Plyler v. Doe

- Under *Plyler*, schools should not take actions that would discourage enrollment, participation and success of students based on immigration status.
 - Do not ask about immigration status, or request or maintain records related to immigration status.
 - Protect the rights of immigrant students (including students that staff believe may be undocumented) to the same extent as other students.

“Sanctuary” Jurisdictions

- No common legal 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.**

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

Oregon's "Sanctuary" Law

- "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."

ORS 181A.820.

- Governor extended this to other **state** agencies via executive order. http://www.oregon.gov/gov/Documents/executive_orders/eo_17-04.pdf
- **Does not apply to school districts employees** (except if designated law enforcement agents)

Oregon Law Limits Ability to Request or Disclose Immigration Status

- ORS 180.805 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

ORS 180.805

- “Except as required by state or federal law, or as necessary to determine eligibility for a benefit a person is seeking, a public body may not inquire about or request information concerning a person’s citizenship or immigration status.”
- Requires a public body to review policies yearly to ensure compliance with the law.
- Schools should review current practices and update policies in compliance with law.

Policy Issue: Enrollment

- School districts should not require documentation for enrollment that is not available to undocumented parents or students.
 - Driver's license
 - U.S. birth certificates
- ACLU sued five school districts in New Jersey for allegedly imposing unconstitutional barriers to enrollment based on required documentation.

Policy Issue: Student Records

- FERPA prohibits the release of student records without prior parental consent except in very limited circumstances.
- No exception that clearly applies to ICE enforcement activities
 - For instance, immigration enforcement is not a health and safety emergency. *34 C.F.R. § 99.36.*
- If ICE agent comes to school seeking student information, policy should provide that staff will not give out information, but will refer ICE agent to designated school official.

Policy Issue: Release of Student Records

- 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 to respond to subpoena, but FERPA requires district to make “reasonable effort” to notify parents before sending documents so parents have an opportunity to object. *34 C.F.R. § 99.31(a)(9)(ii)*.

Policy Issue: Directory Information

- “Directory information” can include sensitive information related to immigration enforcement 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.” Board may want to review policy.
- Parents must be able to “opt out” of the release of directory information.

Policy Issue: Directory Information

- While school district may release directory information without prior parental consent, district is not required to do so under FERPA. *34 C.F.R. § 99.31(a)*.
- If ICE, or any other entity, requests directory information about specific students, the district should consider response carefully.
- While district may share directory information with local law enforcement, the same policy considerations may not apply to ICE.

Policy Issue: ICE Requests for Student Interviews

- Schools face significant risk in not giving parents prior notice of law enforcement interviews of students, except in cases of child abuse, imminent harm, or a warrant. Several recent Oregon cases on point.
- 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.

Policy Issue: Local Law Enforcement

- School districts should discuss immigration enforcement policies with local law enforcement to ensure clear understanding and expectations.
- SROs generally are not involved in immigration enforcement.
- Clearly communicate roles to schools and families.

Policy Issue: Bullying and Harassment

- Widespread reports about increases in harassment and bullying, especially based on national origin and race.
- Failure to address concerns fairly and promptly creates legal and political liability for schools.
- State law requires schools to have a policy prohibiting bullying, harassment, intimidation, and cyberbullying. *ORS 339.356.*

Bullying and Harassment: Immigrant and Undocumented Students

- Schools must be responsive to 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

Is It Bullying or First Amendment Protected Speech?

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

- *Tinker v. Des Moines*, 393 US 503 (1969): 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.” *Id.* at 508

- “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 Sch. Dist. 4J*, 835 F3d 1142 (9th Cir 2016).

Discipline For Speech-Related Issues

- Schools must distinguish between expression of unpopular or hurtful viewpoints, and intimidation that impacts a student's safety and ability to succeed at school.
- School officials should base the reason for the discipline on the disruption to the school and the impact on other students, rather than the speech's offensive content.

Policy Issue: Family Disruption

- Even if 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
 - Greater use of detention and deportation

- Schools should 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>
- Schools should train counselors to address concerns, provide students with crisis support if needed

Policy 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 your district to be ready
- Your district may want to considering preparing now:
 - Designated media contact
 - Key talking points that reflect district values and preserve student privacy under FERPA

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 student attendance status 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 schools, students, and families – and then communicate again.
- Respond to concerns and keep documentation.
- Prepare in advance for media coverage!