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Q&A: Serving Undocumented Students

Are undocumented students entitled to a free public elementary and secondary school education?

Yes. Public schools are prohibited from denying undocumented students a free public education. (*Plyler v. Doe* (1982) 457 U.S. 202.) Under *Plyler*, the undocumented or non-citizen status of a student (or his/her parent or guardian) is irrelevant to that student's entitlement to an elementary and secondary public education.

Can I ask a student questions regarding his/her/their immigration status?

No. The District should never ask a student, or a student's parent/guardian, questions regarding citizenship or immigration status. (See Promoting a Safe and Secure Learning Environment for All: Guidance and Model Policies to Assist California's K-12 Schools in Responding to Immigration Issues at p. 8.) A student's citizenship or immigration status is not relevant in establishing residency requirements. (OCR Dear Colleague Letter, May 8, 2014.)

What kind of documents must an undocumented student provide to establish proof of residency for enrollment purposes?

Undocumented students wishing to enroll in a school may establish residency by providing the same documents as required by other students. For example, this may include a rental agreement or payment, correspondence from a government agency, a declaration of residency executed by the parent/guardian of the student, utility bills or other documents. (Ed. Code, § 48204.1.)

Schools should be cognizant, however, that school enrollment cannot be denied to a student, undocumented or otherwise, who is homeless and unable to show that he/she lives within the district's boundaries.

What kind of documents can a school request to establish an undocumented student's age?

Schools are permitted to request documentation to show that a student falls within a school's minimum and maximum age requirements. (Ed. Code, § 48002; Cal. Code Regs., tit. 5, § 432, subd. (b)(1)(B).) Acceptable documents for establishing age include a certified copy of birth record, statement by the local registrar or county recorder certifying the date of birth, passport, baptism certificate, or an affidavit from a parent. (See Promoting a Safe and Secure Learning Environment for All: Guidance and Model Policies to Assist California's K-12 Schools in Responding to Immigration Issues at p. 8.)

It should be noted, however, that although a school may request the aforementioned documents, a student cannot be prevented from enrolling or attending a school because he or she lacks a birth certificate, or has records indicating a foreign place of birth. There is no legal requirement for the district to retain a copy of the birth certificate in its records.

Are undocumented students entitled to participate in extracurricular school activities and other school services?

Yes. Unless an activity does not contribute to educational goals, *and* the denial of participation furthers a substantial state goal, the activity is likely protected under *Plyler's* guarantee of access to education. Because there are strong arguments that extracurricular activities are central to the student's educational experience, undocumented students should have the right to participate in those activities. This right extends to services related to transportation, special education, Section 504 services, and free and reduced meals.

Is an undocumented student entitled to the same privacy rights under the Family Educational Rights and Privacy Act as other students?

Yes. *All* students within a school district are entitled to privacy rights with regard to each student's educational records, under the Family Educational Rights and Privacy Act ("FERPA") (20 U.S.C. § 1232g; 34 C.F.R. § 99.1 et seq.), as well as under California law (Ed. Code, § 49060 et seq.). Under FERPA, a school district may disclose "directory information" to certain entities, so long as the school district has given the student/parents notice and an opportunity to refuse to disclose such directory information. What categories of directory information that will be released is a question determined at district level through board policy. (Ed. Code, § 49073, subd. (a).) Other records related to a student's education at the school district, and which are personally identifiable, are protected under FERPA and state law from unauthorized disclosure, unless a specific exception applies. Such limited statutory exceptions include when a student's educational records are requested by way of a lawfully issued court order, subpoena, or search warrant. If records are requested by way of a lawfully issued subpoena, the district must provide reasonable *advanced* notice to a student's parent/guardian of the intent to comply with the subpoena and turn over educational records before disclosing such records, thus providing the opportunity to object to such disclosure before it has occurred. If a student's educational records are sought by way of a court order or warrant, the terms of the court order or warrant will control on the nature of how quickly the district must turn over records and/or provide notice of the request and ordered disclosure of such records. When requesting records, the normal procedures of Immigration and Customs Enforcement ("ICE") is to do so by subpoena.

May an ICE agent obtain otherwise private student records by way of a valid subpoena, search warrant, or court order?

Yes. Prior to releasing otherwise private student records to ICE, the superintendent should review the subpoena, search warrant, or court order, and consult with legal counsel to determine the scope of the subpoena, warrant or court order and whether it is genuine. In the case of search warrants, the school district will have little time to conduct a review of the documents. If the ICE agent is willing to cooperate with the school district and its legal counsel, the parties should coordinate to achieve compliance with the warrant that minimizes the disruption to school operations. Subpoenas and court orders do not present the same level of immediacy as a search warrant.

What if ICE appears on campus without a subpoena, court order, or search warrant, no exigent circumstances, and requests protected student educational records?

Under the above circumstances, the school district must refuse to produce the requested documents in compliance with FERPA and the California Education Code provisions that prevent the unauthorized disclosure of student records.

Are school district personnel required to assist ICE in the enforcement of immigration laws?

While there are no laws mandating local school districts to *assist* ICE in the enforcement of immigration laws, school personnel are nonetheless strongly discouraged from *frustrating* law enforcement purposes. Actively resisting the efforts of ICE may result in legal consequences to school personnel. Under Title 18 United States Code section 111, it is unlawful for a person to willfully resist, oppose, impede, or interfere with any officer of the United States Government who is discharging or attempting to discharge his or her official duties. Furthermore, federal law prohibits any person from intentionally concealing, harboring, or shielding an undocumented person from detection, where that person's unlawful immigration status is known. (8 U.S.C. § 1324.)

May a school resource officer ("SRO") access student records?

An SRO may be considered a "school official" and thus have access to student records if they: (1) perform an institutional service or function for which the district would otherwise use employees; (2) have a formal written agreement for their services; (3) are under the direct control of the district with respect to the use and maintenance of education records; (4) do not disclose the education records to others without prior written consent from the parent or eligible

student; and (5) only use the educational records for the purposes for which they were disclosed. (34 C.F.R., § 99.31, subd. (a)(1)(i)(B).)

However, SROs cannot access or use student records for purposes beyond the scope of their function within the District (e.g., ensuring school safety, investigating and protecting against crimes at school, etc.). (See 34 C.F.R. §§ 99.31, subd. (a)(1)(i)(B)(3), 99.33, subd. (a)(2).) SROs can only access those records to which they have a "legitimate educational interest," such as: class schedules, contact information, discipline records, and attendance records. SROs likely would not have a legitimate educational interest in a student's enrollment or health records, which could show where the student was born or emigrated from.

May an SRO provide student records which they have a legitimate educational interest in to other law enforcement personnel and agencies?

No. An SRO who is acting as a "school official" in a way that permits access to a student's education records, cannot disclose a student's protected educational records, including immigration status, to others (i.e., including other employees at the police department), without parent consent. Exceptions to these rules may apply if the SRO has a valid subpoena or court order, or if there is a health and safety emergency. School districts may want to establish technological, physical, and administrative restrictions on an SRO's ability to access records. A formal written agreement is required to specify the types of educational records the SRO may access and to clarify that, while the SRO has access, the District is in direct control of the use, maintenance, and disclosure of educational records. (Ed. Code, § 49076, subd. (a)(2)(G).)

What does it mean to be a "sanctuary," "safe haven," or "safe zone" school or school district?

Sanctuary, safe haven, or safe zone schools or school districts are committed to providing a safe and welcoming environment for everybody, regardless of immigration status. Sanctuary schools typically adopt lawful policies that protect students that are undocumented. Such policies may be developed in the form of a resolution. To be a sanctuary, safe haven, or safe zone school or school district does not mean that a school or school district can, in an absolute sense, act as a barrier to lawful access to a student or family, or student records or information regarding if such access is supported by the law.

How does the President's recent executive order that threatens to withhold federal funding from sanctuary cities impact sanctuary schools?

On April 25, 2017, a federal district court for the Northern District of California granted a preliminary injunction against the enforcement provision of the Executive Order. The enforcement provision would have conditioned federal funding on cooperating with and communicating immigration status information to ICE. At this time, it is unclear as to whether this injunction will be appealed and, if such an appeal is successful, how this executive order will ultimately be carried out, or how it will affect sanctuary schools.

Despite the President's recent statements and actions, State Superintendent of Public Instruction, Tom Torlakson, continues to encourage schools to be declared safe havens. To date, ICE has indicated that its 2011 "Sensitive Locations Policy" remains in place, and thus "sensitive locations" such as schools are not an intended target for ICE enforcement efforts, and for enforcement efforts to occur at a school ICE agents must obtain prior approval from designated, high level supervisors.

Can the federal government change the law to require schools to disclose residency/immigration status of students?

The United States Supreme Court held in *Plyler v. Doe* (1982) 457 U.S. 202, that all children have the right to access public education at the elementary and secondary level, regardless of immigration status. Requiring schools to disclose the residency/immigration of students may chill or discourage school participation, or lead to the exclusion of students based on their actual or perceived citizenship or immigration status. Such a chilling effect could arguably result in some children being denied the right to a free public school education. If a federal law is passed that requires schools to disclose the residency or immigration status of students and if the information obtained is used for immigration enforcement purposes, such a law would likely be challenged in the courts as unconstitutional.

As a related matter, the Family Educational Rights and Privacy Act ("FERPA") (20 U.S.C. § 1232g; 34 C.F.R. §§ 99.1 et seq.), and the California Education Code (Ed. Code, § 49060 et seq.) provide that all students within a school district are entitled to privacy rights with regard to each student's educational records. Under FERPA, a school district may disclose "directory information" (i.e., information in a student's education records that would not be considered harmful or an invasion of privacy if disclosed) to certain entities, so long as the school district has given the student/parents notice and an opportunity to refuse to disclose such directory information. FERPA categorizes "place of birth" as directory information (34 C.F.R. § 99.3.—a potential indication as to a student's immigration status. Whether a category of directory information will be released

is a question determined at district level through board policy. (Ed. Code, § 49073, subd. (a).) In other words, a district may choose not to release information that is otherwise considered directory (e.g., place of birth). This said, as noted above, there are limited exceptions under state and federal law which permit access to student educational records pursuant to a lawfully issued court order, subpoena or search warrant.

Can the federal government negate proclamations that a school district is a "sanctuary," "safe haven," or "safe zone?"

No, but there are some caveats. As a preliminary note, States are independent and autonomous political entities from the federal government. Thus, as long as the safe haven proclamation does not violate any federal laws, the federal government cannot interfere with or negate the proclamation.

Legal consequences could arise, however, if a school district adopts a sanctuary, safe haven or safe zone resolution or policy that is in violation of federal law, or is carried out in a manner that prevents an officer of the federal government from conducting his or her official duties. (See 18 U.S.C. § 111.) For example, if ICE appears on campus to execute a valid warrant, school personnel are strongly discouraged from resisting those efforts. Furthermore, schools should be cognizant that federal law prohibits any person from intentionally concealing, harboring, or shielding an undocumented person from detection, where that person's unlawful immigration status is known. (8 U.S.C. § 1324.) There is no case law that addresses what harboring or shielding an undocumented person looks like in the context of a public school.

Lastly, it is unclear whether the President's recent executive order that threatens to withhold federal funding from sanctuary cities will impact sanctuary, safe haven or safe zone schools or school districts. Specifically, the executive order indicates that sanctuary cities that fail to comply with federal law will not receive federal funds. While the executive order may have no impact on safe haven or sanctuary schools, schools are nonetheless encouraged to adhere to all federal and state laws. Note, despite the recent executive order and the current political climate regarding immigration reform, State Superintendent of Public Instruction, Tom Torlakson, has continued to encourage schools to be declared safe havens.