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ATTORNEY GENERAL GUIDANCE:
RIGHTS AND OBLIGATIONS OF SCHOOLS IN RESPONSE TO
ICE REQUESTS FOR ACCESS OR INFORMATION

The Office of the Attorney General of Massachusetts provides this guidance to public K-12 schools in the Commonwealth regarding their rights and obligations with respect to requests for access or information by U.S. Immigration and Customs Enforcement (“ICE”). In recent weeks, this Office has heard from many in our local communities who are concerned about the possibility of ICE conducting enforcement activities on school grounds, or requesting information from schools about students and their families. While we do not currently have reason to believe that ICE will take any of these actions, it is nonetheless important for schools to know what the law both permits and requires of them with respect to protecting students and their information.

BACKGROUND

Under ICE’s current 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.¹ The purpose of this 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.”² Schools are among the places defined 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. So long as this policy and associated practices remain in effect, schools are unlikely to face the questions addressed in this guidance.³ We have no present reason to believe that ICE intends to change this policy, but provide this guidance to answer some of the questions we have received and to help schools to take whatever proactive steps they deem appropriate.

¹ See Memorandum of ICE Director, John Morton, Policy Number 10029.2, October 24, 2011, <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>.

² Immigration and Customs Enforcement, Sensitive Locations FAQs, <https://www.ice.gov/ero/enforcement/sensitive-loc>.

³ Although the “sensitive locations” policy does not prohibit ICE from requesting information from schools, ICE has not historically made such requests.

Our schools are first and foremost responsible for providing a safe learning environment for all students. Indeed, as this office recently advised (see attached), schools are required under both state and federal law to provide equal access to education to all students regardless of race, color, sex, gender identity, religion, national origin, sexual orientation, disability, or **immigration status**. See Plyler v. Doe, 457 U.S. 202 (1982); McDuffy v. Secretary of the Executive Office of Educ., 415 Mass. 545 (1993). As a general matter, and in accordance with the guidance provided herein, schools must take care in all circumstances to meet this fundamental obligation and to avoid policies or practices that may adversely affect the ability of undocumented students to obtain a public education.⁴ Such policies and practices include not only those whose intent or effect is to deny undocumented students access to school, but also those that may chill or dissuade students from enrolling or fully participating in public education.

QUESTIONS AND ANSWERS

1. *What should a school do if ICE requests access to the school to interview or take custody of a student?*

If an ICE official requests access to a student for any purpose, contact the student's parent or guardian as well as your school superintendent and legal counsel immediately to discuss the appropriate course of action. Request that the ICE official wait while you do so (or, if possible, return later). Generally, schools should not permit an ICE official to question or remove a student from school without the consent of a parent or guardian, *unless* the official produces a valid, judicial warrant.⁵ If the official presents the school with a warrant, the school (or, preferably, its legal counsel) should review it to confirm that it is a judicial rather than administrative warrant and to determine the scope of search or arrest authority the warrant provides.

⁴ Federal law prohibits state and local government entities from imposing restrictions on information-sharing with federal immigration authorities specifically concerning an individual's citizenship or immigration status. See 8 U.S.C. § 1373. Nothing set forth in this guidance proposes a violation of the statute. First, the statute does not *require* information-sharing, but rather prohibits policies that preclude the release or sharing of information. More importantly, the statute does not require the collection or maintenance of any particular information—and, as set forth herein, schools should *not* collect information concerning students' citizenship or immigration status. Finally, the statute applies only to "citizenship or immigration status," not any other student information protected by FERPA.

⁵ A judicial warrant is a warrant signed by a judge or judicial officer of either a state or federal court. In contrast, a warrant issued by ICE is an administrative warrant, typically authorized and signed by an ICE officer rather than a judge or judicial officer. Whenever possible, schools should not undertake to determine on their own whether a particular document is a judicial warrant authorizing the access ICE seeks. Schools should immediately contact their superintendent and legal counsel if an ICE official requests access to a student.

2. *What should schools do if ICE requests information regarding a student or his/her family?*

The Family Education and Privacy Rights Act of 1974 (“FERPA”), 20 U.S.C. § 1232g, prohibits schools from disclosing a student’s personally identifiable information (“PII”) contained in education records to third parties without the written consent of a parent or guardian (or the student if he/she is 18 years of age or older).⁶ There are certain exceptions under which schools *may* disclose information without consent.⁷ Most significantly, schools are permitted to disclose information they have designated as “directory information” without consent, provided that the school has notified parents and eligible students that the school may disclose this information and has given them the opportunity to opt out of the disclosure. See 34 C.F.R. § 99.31(a)(11). Directory information is defined as “information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.” 34 C.F.R. § 99.3. Directory information may include, among other things, a student’s name, address, phone number, grade level, dates of attendance, participation in officially recognized activities and sports, and honors and awards received.⁸ Directory information does *not* include citizenship or immigration status.

A school may also disclose personally identifiable information without consent in order to comply with a judicial order or lawfully issued subpoena. However, a request for information accompanied by a judicial order or subpoena generally may be challenged in court and therefore often need not be answered right away. Moreover, in most cases, a school *must* make reasonable efforts to inform a parent or eligible student whose information is sought before complying with a judicial order or subpoena so as to give the parent or student time to seek a protective order or other relief. See 34 C.F.R. §§ 99.30, 99.31(a)(9). A school that receives a judicial order or subpoena for information or documents should work with its legal counsel to determine how best to respond.⁹

3. *What information should schools not collect and maintain?*

Generally, schools should not collect or maintain information relating specifically to the immigration status of students or their parents, including but not limited to, passport information,

⁶ Massachusetts law similarly limits the disclosure of student records to third parties without consent. See 603 C.M.R. 23.00 et seq. However, Massachusetts regulations permit students who are 14 years of age or older, or who have entered the ninth grade, to consent to disclosure. See 603 C.M.R. 23.02.

⁷ These exceptions are *permissive* rather than mandatory. In other words, FERPA itself does not require disclosure of information under any circumstances.

⁸ At a school’s discretion, directory information may include a student’s place of birth and primary language spoken at home. However, we recommend not designating such information as directory information without a compelling reason to do so.

⁹ Additionally, to the extent ICE asserts that schools are required to disclose certain information based on some other provision of law, or that FERPA does not apply, such legal questions should be reviewed by the school’s legal counsel.

visa information, and social security numbers.¹⁰ Such information generally is not necessary to a school's educational function, and collecting it creates a risk of deterring the enrollment of undocumented and non-citizen students. See Plyler, 457 U.S. at 222 (noting that "denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit"). For purposes of certain educational programming, schools may be required to collect and maintain information that relates to participation in programs or activities and that may be associated with immigration status.¹¹ However, gathering and maintaining only the narrow categories of information necessary for schools to meet their obligations will help ensure equal access to education for all students, as required by federal and state law.

4. What proactive steps should schools take to protect students and their information?

First, schools should be proactive by reviewing the information they collect and making sure it does not exceed the scope of what is strictly necessary. Second, as explained above, information designated as "directory information" may be disclosed under FERPA without consent. Thus, schools should review their policies regarding what information they deem "directory information" and limit the scope to further protect students. For example, to the extent schools collect information on students' places of birth or primary language spoken at home, they should consider eliminating that from designated directory information. Finally, schools are required to inform students and their families of what student information is designated as directory information, and to provide them with an opportunity to opt out of having their information disclosed. Although most schools notify parents of this option annually, nothing prohibits a school from doing so more regularly (i.e., periodically throughout the school year). The notification should also be provided in parents' primary language to the extent possible. A school may not disclose a student's directory information if he or she has received notice and opted out. See 34 C.F.R. § 99.37.

We encourage schools to take these and other reasonable steps to protect students and their information. Doing so is consistent with the legal obligation to provide all students with equal access to education, and will help convey a clear message that all students are welcome and safe, regardless of immigration status. See Plyler, 457 U.S. at 221 ("[E]ducation has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne

¹⁰ There may be very limited circumstances in which schools will have a legitimate reason to collect passport or visa information—such as a school trip abroad. Additionally, to the extent schools are required to collect certain information because of their participation in particular programs—such as the Student and Exchange Visitor Program—they should continue to do so. However, passport and visa information should not be collected or maintained in the regular course, including as part of the registration or enrollment process.

¹¹ For example, schools are required to collect information to assess students' English language proficiency in order to identify English-language learners (ELLs). Such information requests should include only what is necessary to assess whether the student may be an ELL, consistent with state and federal law.

by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”).

5. *What should schools do to protect students in the event that their parents are taken into ICE custody?*

Schools should provide families with regular opportunities throughout the school year to update their emergency contact information and provide alternative contacts in the event that a parent or guardian is unavailable. Schools may also suggest that families create their own safety or preparedness plans, which the family could share with the school as well as the student. These plans could include instructions as to what should happen if parents are unavailable, including designating guardians or others authorized to pick up the student from school, and other relevant instructions. Similarly, schools should also review their policies to ensure they include appropriate steps to take if a student cannot safely return home because his or her parent or guardian is not present. Such policies should outline default rules if the family has not otherwise provided specific instructions.

If you have questions or need further assistance, you may contact the Civil Rights Division of the Office of the Attorney General at (617) 963-2917 or <http://www.mass.gov/ago/civilrights>.

Dated: May 18, 2017