



# Legal Guidance

Providing All Children Equal Access to Education,  
Regardless of Immigration Status

**This legal guidance is intended to give governing boards clarity regarding their responsibilities and options under federal and state law to ensure all students have equal access to school, regardless of their immigration status.**

Students, families, and education leaders have expressed concern for undocumented students in California schools since President Trump signed Executive Orders on January 25, 2017. The President's actions have raised questions about the laws affecting undocumented students in California schools, and what actions schools should take to serve all students regardless of their immigration status.<sup>1</sup>

All students, regardless of immigration status, have equal access to an education under the laws of the United States. However, families that fear an increase in immigration enforcement by the federal government may act on these concerns by keeping their children home from school. Many school boards are responding to the concerns raised by students and parents by approving resolutions declaring schools "sanctuaries" or "safe havens" from federal immigration enforcement activities. While these resolutions do not provide legal protection for students beyond existing law, they create protocols that direct staff on how to uniformly respond to potential requests related to immigration enforcement, and help Governing Boards utilize their lawful discretion to establish policies and procedures to ensure that the district is providing equal access to public education to all students. In large part, information requested about students is protected from disclosure absent parental consent or a court order or judicial warrant. Additionally, under current federal policy, schools are generally insulated from immigration enforcement activities. However, board resolutions declaring the safety and sanctity of school sites and activities may be challenged by the actions of federal immigration officers and agents responding to urgent or "exigent" circumstances or after requesting information about the students and their parents.

This legal guidance and the sample resolution are being published by CSBA to inform board members about the rights of students and their parents and guardians under state and federal law and of the capability of the federal government to interpret and enforce the immigration laws, regulations and policies affecting schools. Public schools and the students they educate may well be in the middle of a collision between federal and state authority respecting the rights of non-citizen students and their families. CSBA, in acknowledging this potential conflict, is distributing this guidance and sample resolution to its members to share with their superintendent and legal counsel and to use at their discretion.

## **School districts and county offices of education must provide all children equal access to school, regardless of their immigration status**

In 1982, the U.S. Supreme Court ruled in *Plyler v. Doe*, 457 U.S. 202 (1982) that under the Fourteenth Amendment of the U.S. Constitution, if a state provides a free public education to U.S. citizens, it cannot deny such an education to undocumented children. The Court found that denying students a basic education because of their immigration status was denying 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."

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<sup>1</sup> Article I, Section 8, clause 4 of the U.S. Constitution entrusts the federal legislative branch with the power to "establish a uniform Rule of Naturalization." This has long been interpreted to give Congress sole responsibility for crafting the laws that determine how and when noncitizens can become naturalized citizens. Immigration and Customs Enforcement (ICE) and the US Customs and Border Protection (Border Patrol), as managed and directed by the executive branch, are responsible for enforcing federal immigration laws.

The U.S. Department of Justice and U.S. Department of Education echo the basic tenet of *Plyler v. Doe* in their jointly published fact sheet: “All children in the United States are entitled to equal access to a basic public elementary and secondary education regardless of their actual or perceived race, color, national origin, **citizenship, immigration status, or the status of their parents/guardians**. School districts that either prohibit or discourage, or maintain policies that have the effect of prohibiting or discouraging, children from enrolling in schools because they or their parents/guardians are not U.S. citizens or are undocumented may be in violation of Federal law.” [Emphasis added.]<sup>2</sup>

All children in California between the ages of 6-18 years old are required under California law to attend school. (Ed. Code § 48200 et seq.) Undocumented children in California not only have a right to attend school but are mandated to do so under state law. In addition, every student in California has the right to attend public school in the state free from discrimination, harassment, violence, intimidation, and bullying. (Ed. Code §§ 220, 234 et seq.)

## Schools should not ask about a student’s immigration status

Schools should not inquire about a student’s immigration status for establishing residency in the district as it is unnecessary to collect this information to establish residency. Any such inquiry may also violate federal law, and may put the school in a position of being challenged by federal agents to release such information if collected.<sup>3</sup>

To comply with federal civil rights laws and the holding of the Supreme Court in *Plyler v. Doe*, school districts must ensure that they do not discriminate on the basis of race, color, or national origin, and that students not be barred from enrolling in schools on the basis of their immigration status or that of their parents. Critically, districts may not request information such as visas or passports that may be used to deny access to compulsory education. See CSBA’s newly revised sample board policies BP 5111 - Admission and BP 5111.1 - District Residency for policy language reflecting appropriate enrollment procedures.

## Schools should not require a social security number, or other documentation that discourages undocumented students from enrolling in school

A district may not deny enrollment to a student if the student (or his or her family) chooses not to provide a social security number for anyone in the family. (See 5 U.S.C. §552a (note).) Further, requiring social security numbers may discourage undocumented students from enrolling in school. Although it is best practice not to ask, if a district chooses to request a social security number, it must inform the enrolling student/family that the disclosure is voluntary, provide the statutory or other basis upon which it is seeking the number, and explain what uses will be made of it. A school cannot prevent a child from enrolling in or attending school if the student or parent declines to provide a social security number.

Districts may require students or their parents to provide proof of residency within the district, including copies of phone or utility bills, lease agreements, etc. However, inquiring into students’ citizenship or immigration status,

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2 See “Fact Sheet: Information on the Rights of All Children to Enroll in School,” which is available at <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201405.pdf>.

3 School districts are not required to collect immigration information related to a student’s immigration status except for nonimmigrant, international students in an education program under an F-1 or M-1 visa.

or that of their parents by requesting copies of passports or visas, would not be relevant to establishing residency within the district. Districts should review their practices around establishing residency and ensure that any documents or information required for residency would not unlawfully bar or discourage a student who is undocumented or whose parents are undocumented from enrolling them in or attending school.<sup>4</sup>

## **Schools may not share student records with U.S. Immigration and Customs Enforcement (ICE) without parental consent**

Federal law, specifically the Family Educational Rights and Privacy Act (FERPA), prevents schools from sharing student information, including their citizenship status, if they know it, with ICE without parental consent. All student records, including student files, are generally exempt from disclosure or subject to redaction to prevent disclosure of personally identifiable information. This protects against the sharing personally identifiable student information except for certain narrow exceptions including in response to a court order or subpoena, or a request for “directory information.”<sup>5</sup>

FERPA broadly defines student education records as materials which contain information directly related to the student, and are maintained by an educational agency or institution. (See 20 U.S.C. § 1232g(a)(4)(A).) If a district has collected and stored information related to a student’s immigration status, this information is likely to fall within the protections of FERPA as well, and cannot be shared without parental consent. FERPA also requires prior notice to parents before responding to a subpoena or court order. (See 20 U.S.C. § 1232g(b)(2)(B); 34 C.F.R. § 99.31(a)(9).) In addition, Education Code section 49076 mandates that school districts shall not permit access to student records without written parental consent or under court order, with very limited exceptions, and does not include ICE and immigration authorities in those limited exceptions.

School leaders should review with legal counsel any request for student information submitted by ICE.

## **Schools, students and parents should be aware that immigration enforcement actions are generally avoided at schools**

ICE and Border Patrol currently have policies in place to “generally avoid” enforcement actions at “sensitive locations,” including schools, school bus stops, health care facilities, places of worship, weddings, funerals, and during public demonstrations such as a parade.<sup>6</sup> It is important to note that this policy was implemented under President Obama’s administration and it is unclear if it will continue in its current form. CSBA will monitor and advise members of any change to the policy.

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4 For a discussion of the ways to establish residency, see U.S. Department of Justice and U.S. Department of Education “Dear Colleague” letter, available at <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/08/plylerletter.pdf>, and U.S. Department of Justice and U.S. Department of Education fact sheet, available at <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/08/plylerfact.pdf>.

5 Under FERPA and state law, a district may disclose appropriately designated “directory information” without written consent, unless a parent has opted out and filed a written objection not to disclose directory information. “Directory information” means the following items: student’s name, address, telephone number, date of birth, email address, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous public or private school attended by the student. (Ed. Code § 49061 and 34 CFR 99.37(d).) See also U.S. Department of Education Laws and Guidance, FERPA, at <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html>.

6 See October 24, 2011 Enforcement Actions at or Focused on Sensitive Locations Memo available at <https://www.ice.gov/doclib/ero-out-reach/pdf/10029.2-policy.pdf>. ICE’s “Sensitive Locations FAQ” is available at <https://www.ice.gov/ero/enforcement/sensitive-loc>.

According to the current policy issued by the Department of Homeland Security (DHS) in 2011, immigration enforcement actions *may* occur at sensitive locations in very limited circumstances, but should generally be avoided. DHS officers and agents from ICE may conduct an enforcement action at a sensitive location only with prior approval from an appropriate supervisory DHS official, or where the enforcement action involves urgent or “exigent” circumstances that involve national security, terrorism, or public safety, or where there is imminent risk of destruction of evidence material to an ongoing criminal case.<sup>7</sup>

According to ICE, if there are exigent circumstances, ICE will proceed with an enforcement action and agents must conduct themselves as discreetly as possible, consistent with consideration for officer and public safety, and make every effort to limit the time at or focused on the sensitive location. School personnel, whenever encountering ICE officials on school sites, should refer them to the school administration, who should contact the superintendent and district legal counsel.

## **Boards may take action to notify parents, students, and the public of the limitation of federal enforcement activities on school sites**

School districts have the right to limit disruptions to school campuses and learning environments, and to limit disruptions on school grounds to ensure the safety of their students and staff. Schools may deny an individual from accessing a campus during school hours. (Ed. Code §§ 32212, 35160.)

A number of California school districts have passed or are considering resolutions to create “sanctuary” or “safe haven” school districts. These resolutions are intended to make clear to staff, students, and their families that all students have a right to attend school regardless of their immigration status, and aim to make families and students feel safe at school, so that they continue to come to school. California State Superintendent of Public Instruction Tom Torlakson recently urged school districts throughout the state to adopt these “safe haven” resolutions.<sup>8</sup>

While these resolutions do not provide further or greater legal protection for students than already exists in the law, they do help school districts utilize their lawful discretion to establish policies and procedures to ensure that the district is providing equal access to public education to all students and to ensure the safety and security of its students attending school to the best of its ability. They also direct staff how to respond to potential immigration enforcement activities by ICE or other immigration enforcement officers or agents.

Resolutions have generally promised communities the following:

- » District staff and school police will not ask about students’ or families’ immigration status;
- » Districts will not share student information that may be used to ascertain the legal status of students;
- » Districts will not participate in any voluntary information-sharing with ICE or other immigration enforcement officers or agents;

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7 See Department of Education Fact Sheet for Families and School Staff, available at <https://www2.ed.gov/about/overview/focus/safe-spaces-fact-sheet.pdf>

8 Available at <http://www.cde.ca.gov/nr/el/le/yr16ltr1221.asp>

- » Districts, in keeping with ICE’s policy stating it will not conduct immigration enforcement activity at “sensitive” locations absent exigent circumstances, will not allow ICE to enter school sites or district property without prior written approval from the superintendent whenever possible under the law;
- » District school police and security personnel will not participate in ICE or Border Patrol or other immigration enforcement agent enforcement actions;
- » Districts will not enter into any agreements with ICE to have their school police or security personnel enforce immigration laws; and
- » Districts will support diversity, inclusion, and the values of the multicultural society.

CSBA has created a sample resolution for school boards to use. School districts can also provide additional resources for immigrant students and families seeking guidance or legal assistance. CSBA’s November 23, 2016 newsletter article, “California’s Commitment to Educate All Students, Regardless of Immigration Status,” contains links to relevant resources. It is available at [https://www.csba.org/Newsroom/CSBANewsletters/2016/Nov/ElectronicOnly/2016\\_11\\_23students.aspx](https://www.csba.org/Newsroom/CSBANewsletters/2016/Nov/ElectronicOnly/2016_11_23students.aspx).

CSBA will continue to monitor relevant federal and state legislation, and will update policies and this legal guidance as needed.<sup>9</sup>

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<sup>9</sup> For example, Senate Bill 54 before the legislature would currently, if passed, prohibit state and local law enforcement agencies and school police or other security personnel from using resources to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes.