School Leaders’ Responsibilities in Protecting the Rights of Undocumented Students

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Worldwide, it has become increasingly popular for politicians to galvanize support by using anti-immigration rhetoric, which has stoked negative sentiments, fueled the spread of misinformation and divided communities. This practice has contributed to a socio-political context that highlights the need for school leaders to understand how clashes between macro and micro-environmental variables can create dilemmas that are toxic to a positive school culture. Approximately 3.9 million kindergarten through 12th-grade students in U.S. public and private schools in 2014 – or 7.3% of the total – were children of unauthorized immigrants (Passel & Cohen, 2016). This state of affairs and political discourse around immigration policies has created anxiety and uncertainty about how ongoing policy discussions will impact their future, while simultaneously leaving school leaders perplexed about what is right and what is legal.

School leaders are faced with the dilemma of ensuring student safety and privacy while also maintaining a cooperative relationship with law enforcement officials. Effectively negotiating the balance requires both ethical and legal literacy to assure compliance with the nation’s law while advocating for and facilitating students’ academic success. This dilemma has broad implications that can lead to ethical breaches and legal liabilities as school leaders go about executing their responsibilities to assure equitable access to education services. According to a February 2017 report by CNN, principals from Pennsylvania to California have increased their efforts to allay fears and uncertainty in immigrant communities and seek guidance on handling interactions with US Immigration and Customs Enforcement.

School districts play a central role in keeping communities informed and engaged during policy discussions and changes. As noted by Todd Kominiak “As you move forward, developing new policies to protect students and uphold the law, it’s important to engage your community in these discussions and seek their input. These conversations will be intense, and decisions won’t be easily made, but by making sure every community member has a voice in the conversation, you put yourself in position to address the questions and concerns of your entire district.”

While the executive branch is oath-bound to prosecute federal law, legal norms and court precedent allow it considerable room to decide how to proceed. The Trump administration’s decision to end the Deferred Action for Childhood Arrivals (DACA) program has only heightened these concerns because it has broad implications for K-12 public school students, and for young teachers and staff who may be protected under DACA. While school leaders have a legal and moral responsibility to support the benefits of education in conjunction with the social, economic, intellectual, and psychological wellbeing of individual students (San Antonio Independent School District v. Rodriguez, 1973), some are finding themselves questioned about the obligation of public schools to provide education services for the children of undocumented residents.

No student has a fundamental right to education under the U.S. Constitution. However, if states provide a free public education to U.S. citizens and lawfully present foreign-born children, they cannot deny such an education to undocumented children without “showing that it furthers some substantial state interest” (Pyler vs. Doe 1982). The Court was explicit that students should not be “accountable for their disabling status.” To do so would have the result of punishing children for their parents' choice to come to the United States illegally. This idea has also been augmented by the federal legislators through the passage of the Equal Educational Opportunities Act (1974), indicating that no State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by
the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs 20 U.S.C. § 1703(f).

While the Pyler (1982) is considered a landmark ruling, questions around the protections afforded undocumented students a historical pattern of re-emergence. However, an examination of case law appears to present a consistent message. The Court first addressed this issue over a century ago in (Wong Win v. United States (1896). But before the court may have considered the words of a principal author of the Constitution, James Madison, the fourth president of the United States when he wrote: "that as they [aliens], owe, on the one hand, a temporary obedience, they are entitled, in return, to their [constitutional] protection and advantage."(Walen, 2009)

However, the question has tasked school leaders with understanding legal principles that address whether or not “a state may choose to deny access to education to a discrete group of persons within its jurisdiction” (re Alien Children Education Litigation, 1980). In re Alien Children Educ. Litigation, 501 F. Supp. 544 (S.D. Tex. 1980) a district judge ordered that the children in the school districts involved be admitted to the schools. The Court of Appeals for the Fifth Circuit stayed the order without an opinion. The stay was lifted, however, by United States Supreme Court Justice Powell, who stated that in the absence of a showing of extreme hardship, school districts should admit the children pending further action. Certain Named & Unnamed Non-Citizen Children v. Texas, 49 U.S.L.W. 3133, 3134 (Powell, Circuit Justice, 1980).

Although the Pyler (1982) holding affirms that constitutional guarantees apply to every person within U.S. borders, including “aliens, whose presence in this country is unlawful,” many school leaders serving undocumented students are seeking clarification about rights and responsibilities of service. More recently, the U.S. Supreme Court ruled in Zadvydas v. Davis (2001) that "due process" of the 14th Amendment applies to all aliens in the United States whose presence maybe or is "unlawful, involuntary or transitory." Although the Pyler (1982) holding affirmed the Fourteenth Amendment’s “protection extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory,” the national conversation has created new apprehensions that have crossed the schoolhouse gate.

One area of concern is the intersectionality of responsibility of school resource officers who may be confronted with a situation involving Customs and Border Patrol and Immigration and Customs Enforcement agents. U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) policy from 2011 directs agents not to engage in enforcement activity at “sensitive locations” unless there are exigent circumstances or prior supervisory approval. Schools, churches, and hospitals have been designated sensitive locations and thus far the sensitive locations memos remain in effect (U.S. Immigration and Customs Enforcement, 2017).

However if ICE agents present a school with a removal warrant (deportation order), the school is still permitted to refrain from providing student information, as the warrant is administrative, not judicial. There is no legal precedent requiring or encouraging a school to be accessible to immigration officials for immigration enforcement purposes (Fair Immigration Reform, 2017). There is also no law that obligates a public school to assist immigration officials in an enforcement action, including but not limited to an effort to screen students at a school to identify who may be undocumented. Schools do not need to and should not inquire about or keep records on the immigration status of students and/or their family members. It is recommended that school Superintendents establish clear protocols for educators to
follow if an immigration official asks a school for student information or for access to a student. Under FERPA, schools may disclose directory information without consent, but they are required to allow parents and eligible students a reasonable amount of time to request that the school not disclose directory information about them.

Under the Family Educational Rights and Privacy Act (FERPA), schools are prohibited, without parental consent, from providing information from a student’s file to federal immigration agents if the information would potentially expose a student’s immigration status. In general, The Family Education Rights and Privacy Act of 1974 (FERPA) requires that schools withhold information that could identify students to third parties, including federal immigration officials. In accordance with the Privacy Act of 1974, if a district requests social security numbers, it must inform individuals that the disclosure is voluntary, and must explain both the statutory or other basis for seeking the numbers and how the district intends to use the numbers.

Whether the school community consists of numerous or few undocumented immigrant families, school leaders across the country have committed to remove barriers blocking students’ access to a public education. While nativists are using the current state of socio-political turmoil and confusion to question immigrant families’ presence in our schools, constitutional and case law has been clear and consistent. All children, regardless of their legal status, are to be afforded a public education, and school leaders must do nothing to “chill” their participation. As K-12 school leaders continue to learn and lead, an enhanced level of legal literacy will inform decisions that advocate and support families impacted by immigration law enforcement to assure fully accessible student learning experiences are not at risk.
References


5 questions educators are asking about ICE raids and supporting immigrant youth. Retrieved from http://educationvotes.nea.org/2017/02/21/5-questions-educators-asking-ice-raids-supporting-immigrant-youth/


Laws and Federal Policies

Amendment XIV to the U.S. Constitution Section One
No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Enacted as part of the Civil Rights Act of 1964. It prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.

Deferred Action for Childhood Arrivals (DACA)
Secretary of Homeland Security Janet Napolitano issued a memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,” on June 15, 2012. This memorandum created a non-congressionally authorized administrative program that permitted certain individuals who came to the United States as juveniles and meet several criteria—including lacking any current lawful immigration status—to request consideration of deferred action for a period of two years, subject to renewal, and eligibility for work authorization.

§ 1703. No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin.

Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99)
School districts must maintain the confidentiality of all personally identifiable information in education records related to students. Any and all records, including emails, student files, and personnel information, are generally exempt from disclosure, absent parental consent. However, under FERPA, schools may disclose “directory information” (which does not include social security cards) without parental consent or a subpoena, but they are required to allow parents and eligible students a reasonable amount of time to request that the school not disclose directory information about them.

There is no general exemption to FERPA that grants ICE agents’ unconstrained access to student information. Unless there is an issue concerning a student who has overstayed his/her visa, ICE would not be able to make inquiry of, or seek access to, an undocumented student’s records.

Privacy Act of 1974
Sec. 7. [5 U.S.C. 552a note] (a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual’s refusal to disclose his social security account number.

The U.S. Supreme Court held that denying undocumented children of illegal immigrants the right to attend public school constitutes discrimination based on alienage that violates the Equal Protection Clause of the Fourteenth Amendment. The undocumented or non-citizen status of a student (or his/her parents) is irrelevant to that student’s entitlement to public education. “Whatever his status under immigration laws, an alien is a 'person' in any ordinary sense of the term ... the undocumented status of these children does not establish a sufficient rational basis for denying benefits that the state affords other residents.” Schools can require that a student or his/her parents establish residency within the
school district -- for example, requiring copies of utility bills or leases -- it cannot inquire into the student’s citizenship or immigration status by requesting a social security number or birth certificate. Schools may request information to establish a student meets the minimum age requirements, though schools must accept a variety of documents to establish a student’s age, including religious or medical records, bible entries of birth record, or affidavits from a child’s parents. Schools may not require a birth certificate or social security number be provided as a condition of enrollment.

The U.S. Supreme Court held that although education is one of the most important services performed by the State, it is not within the limited category of rights recognized by this Court as explicitly nor implicitly guaranteed by the federal constitution. The ruling shifted the emphasis in education litigation to state courts, as state constitutions guarantee a right to education.

U.S. Immigration and Customs Enforcement. FAQ on Sensitive Locations and Courthouse Arrests
Locations treated as sensitive locations under ICE policy would include, but are not be limited to:

- Schools, such as known and licensed daycares, pre-schools and other early learning programs; primary schools; secondary schools; post-secondary schools up to and including colleges and universities; as well as scholastic or education-related activities or events, and school bus stops that are marked and/or known to the officer, during periods when school children are present at the stop;
- Medical treatment and health care facilities, such as hospitals, doctors’ offices, accredited health clinics, and emergent or urgent care facilities;
- Places of worship, such as churches, synagogues, mosques, and temples;
- Religious or civil ceremonies or observances, such as funerals and weddings; and
- During a public demonstration, such as a march, rally, or parade.

ICE officers and agents may conduct an enforcement action at a sensitive location if there are exigent circumstances, if other law enforcement actions have led officers to a sensitive location, or with prior approval from an appropriate supervisory official.

Wong Win v. United States (1896)
The court ruled that all persons within the territory of the United States are entitled to the protection by the 5th and 6th Amendments, even aliens.

Yick Wo v. Hopkins 118 U.S. 356 (1886)
States cannot pass laws that deny equal justice, even if the law is impartial on its face, "if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." The kind of biased enforcement experienced by the plaintiffs, the Court concluded, amounted to "a practical denial by the State of that equal protection of the law" and therefore violated the provision of the Fourteenth Amendment.

Zadvydas v. Davis 533 U.S. 678 (2001)
“Due process” of the 14th Amendment applies to all aliens in the United States whose presence maybe or is “unlawful, involuntary or transitory.”