

Educating Undocumented Students



2019 Board Member Institute

Cuddy & McCarthy, LLP

John F. Kennedy

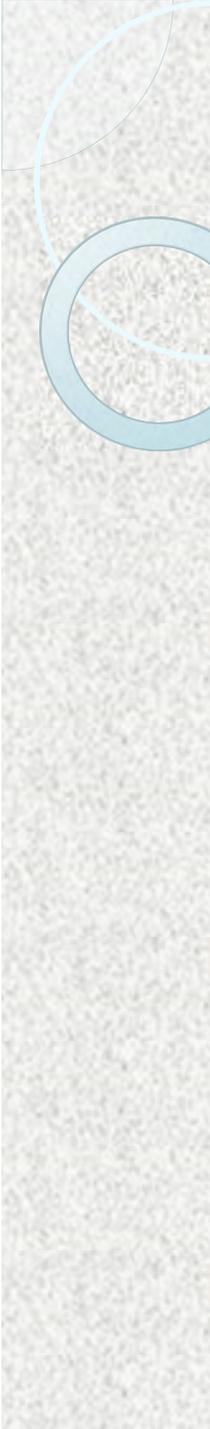
Y. Jun Roh

February 23, 2019



***Plyler v. Doe*, 457 U.S. 202 (1982)**

U.S. Supreme Court ruled that immigrant children in the United States are entitled to attend public elementary and secondary schools, regardless of whether or not their parents are legally admitted into this country.



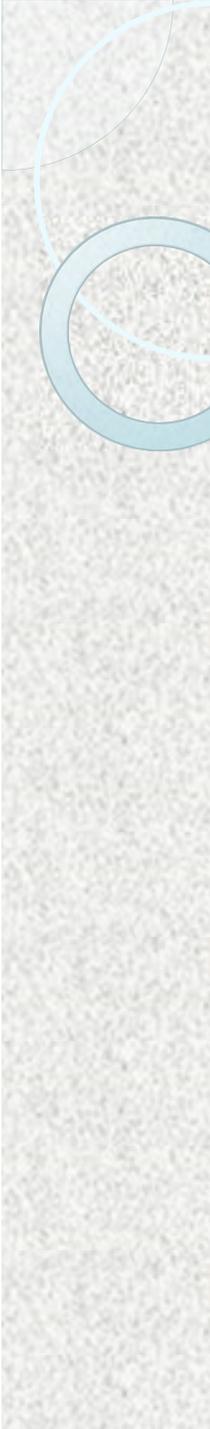
***Plyler v. Doe*, 457 U.S. 202 (1982)**

In *Plyler*, the U.S. Supreme Court held that under the Equal Protection Clause, Mexican school-aged children who had filed a class action suit and who could not establish that they were in this country legally, were entitled to the same free public education that was made available to other residents of the same school district, irrespective of their immigration status.



***Plyler v. Doe*, 457 U.S. 202 (1982)**

- “Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.”
- **This decision mirrored the practice in New Mexico – Certain school districts along the border have enrolled and educated students living in Mexican border communities for decades.**

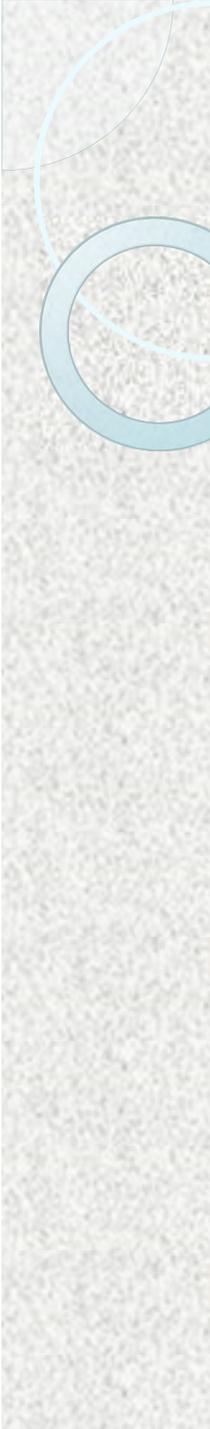


***Plyler v. Doe*, 457 U.S. 202 (1982)**

Under *Plyler*, schools should not take action that would discourage enrollment and success of students, based on immigration status.

- Do not ask about immigration status.
- Do not request or maintain records related to immigration status (i.e., birth certificates being used as proof of citizenship, as opposed to proof of age, Social Security numbers, etc.)

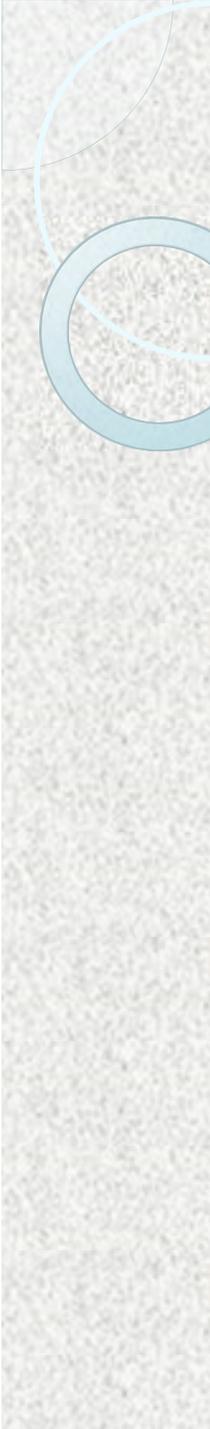
See *Hispanic Interest Coal of Ala.*, 691 F.3d 1236 (11th Cir. 2012) (struck Alabama statute which required verification of citizenship and immigration status for enrollment in public schools).



***Plyler v. Doe*, 457 U.S. 202 (1982)**

Although *Plyler* did not address extracurricular activities, courts probably would require equal access by undocumented students, because:

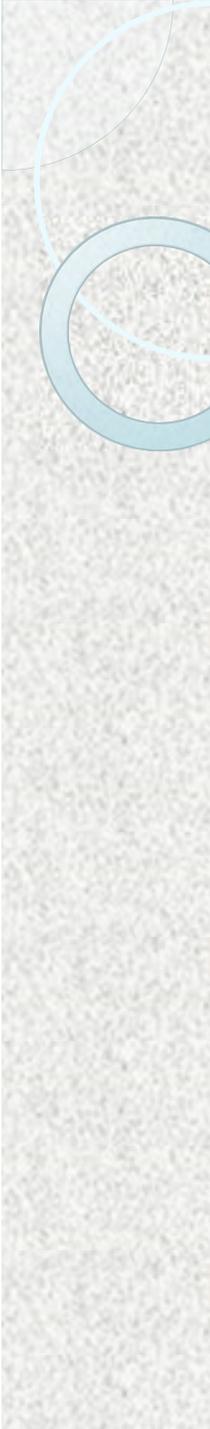
- Educational goals of *Plyler* encompass “cultural values.”
- Most extracurricular activities contribute to such cultural values as team-building and social skills.



***Plyler v. Doe*, 457 U.S. 202 (1982)**

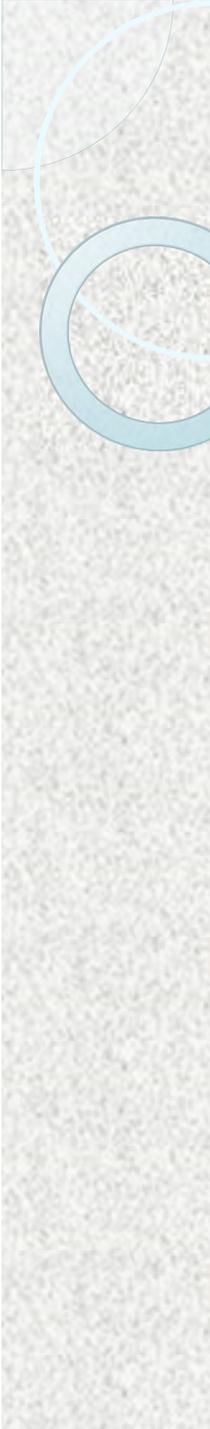
Secondary services students receive as part of their educational experience include:

- Transportation on school buses,
- Minor health treatment from school nurses, and
- Free or reduced-cost school lunches.



***Plyler v. Doe*, 457 U.S. 202 (1982)**

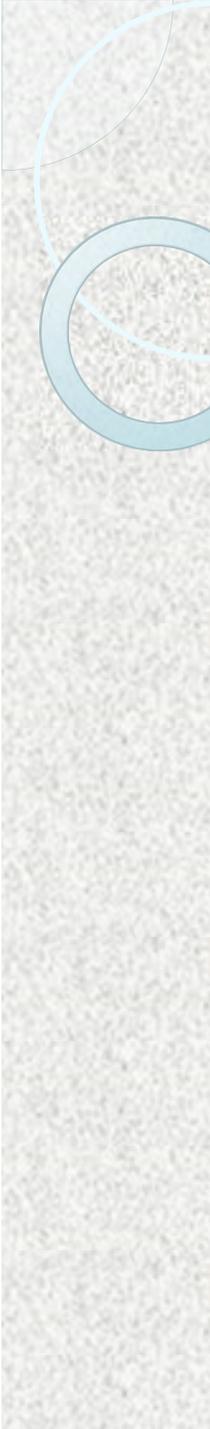
- U.S. citizenship or immigration status is not a condition of eligibility for the National School Lunch Program.
- Students who otherwise qualify for special education services under the IDEA cannot be denied such services because of their undocumented status.
- Citizenship or immigration status cannot prevent otherwise eligible students from receiving services under § 504 of the Rehabilitation Act.



Landmark decision: *Plyler v. Doe*, 457 U.S. 202 (1982)

The bottom line:

A court is likely to determine that a School District may not arbitrarily deny undocumented students access to any services without which they cannot attend school if such services are provided to other students.



Unaccompanied Undocumented Minors

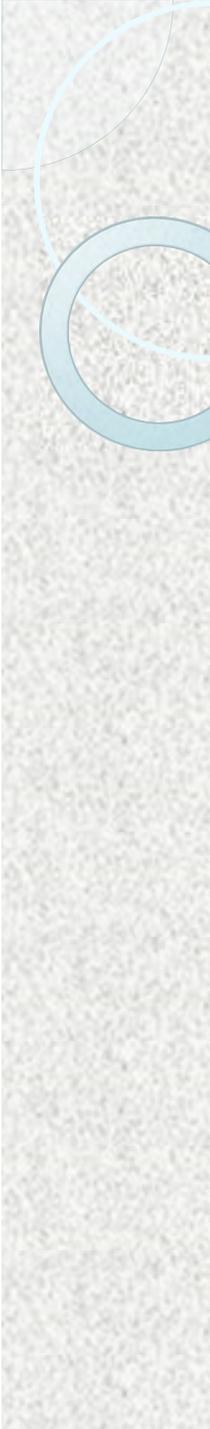
**“McKinney–Vento Homeless
Assistance Act” 42 U.S.C.A. §
11431**

**Children or youth who lack a
fixed, regular and adequate
residence.**



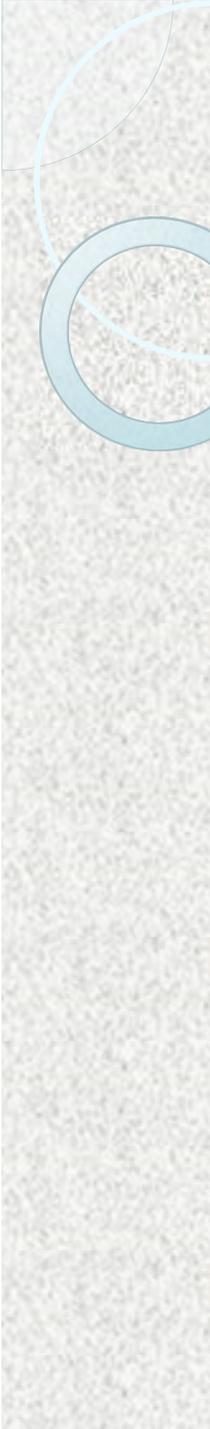
Unaccompanied Undocumented Minors

- Under *Plyer*, undocumented, unaccompanied homeless students are eligible for McKinney-Vento services.
- Immediate enrollment even if lacking paperwork.
- School selection: local attendance area school per student's best interest.
- Transportation and other services.
- Authorized use of subgrant funds under McKinney-Vento services.



Unaccompanied Undocumented Minors

- Specific IDEA provisions on Unaccompanied Homeless: surrogate parents within 30 days.
- Homeless students are located, identified and evaluated, and provided special education and related services in accordance with the IDEA, including the appointment of a surrogate parent for unaccompanied homeless youths as defined in 42 U.S.C. §§11431, et seq.



Unaccompanied Undocumented Minors

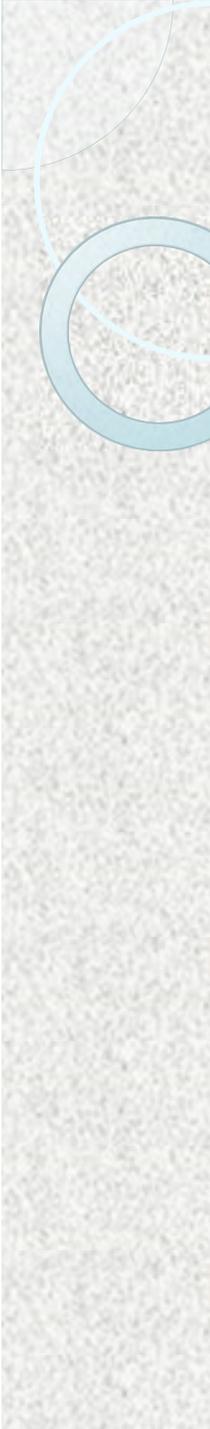
- A school district cannot require a caregiver to obtain legal guardianship at any point prior to or following an unaccompanied homeless student's enrollment.
- A school district cannot discontinue a student's enrollment due to an inability to identify a caregiver, guardian, or parent following enrollment or to produce guardianship or other paperwork.



Current State of the Law

ICE “Sensitive Location Enforcement” Policy

In October 2011, ICE issued its “Sensitive Enforcement Location” policy, that is “meant to ensure that ICE officers and agents exercise sound judgment when enforcing federal law at or focused on sensitive locations” and make substantial efforts to avoid unnecessarily alarming local communities.



Current State of the Law

ICE “Sensitive Location Enforcement” Policy

The policy is not intended to categorically prohibit lawful enforcement operations when there is an immediate need for enforcement action....”

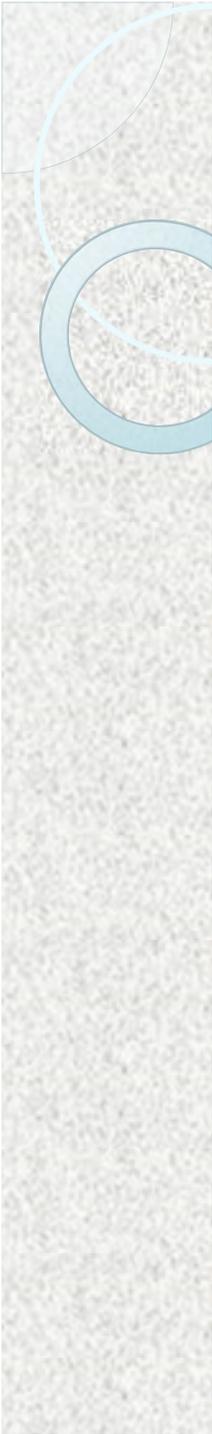
- Memorandum from John Morton, U.S. Immigration and Customs Enforcement Director, to Field Office Directors et al., Policy No. I 0029.2 (Oct. 24, 2011), available at <https://www.ice.gov/doclib/ero-outreach/pdf/I0029.2-policy.pdf>



Current State of the Law

ICE “Sensitive Location Enforcement” Policy

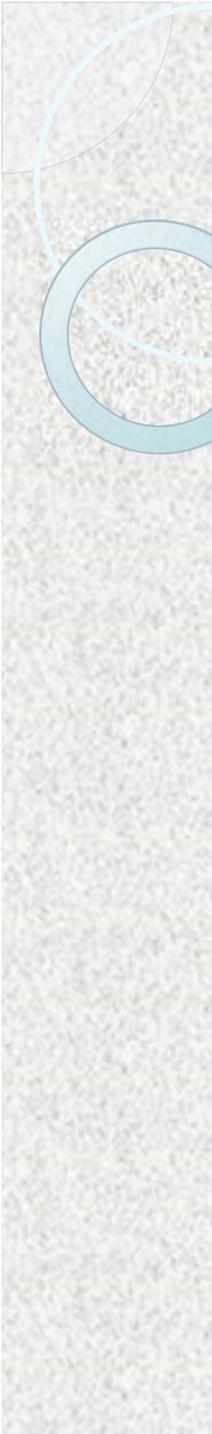
- It is important to note that the “Sensitive Location” policy only applies to arrests, interviews, searches, and surveillance.
- “Actions not covered by this policy include actions such as obtaining records, documents and similar materials from officials or employees, providing notice to officials or employees, serving subpoenas....”



Current State of the Law

ICE “Sensitive Location Enforcement” Policy

- “Schools” are identified in the policy as: “including pre-schools, primary schools, secondary schools, post-secondary schools up to and including colleges and universities, and other institutions of learning such as vocational or trade schools”
- Under this policy, “any planned enforcement action at or focused on a sensitive location ... must have prior approval” from senior DHS officials. However, the memorandum states that this “policy is not intended to categorically prohibit lawful enforcement operations when there is an immediate need for enforcement action....”



Current State of the Law

ICE “Sensitive Location Enforcement” Policy

- Exigent circumstances permitting enforcement action without such approval include:
 - national security or terrorism matter;
 - imminent risk of death, violence, or physical harm to any person or property;
 - immediate arrest or pursuit of a dangerous felon, terrorist suspect, or any other individual(s) that present an imminent danger to public safety; or
 - imminent risk of destruction of evidence material to an ongoing criminal case.



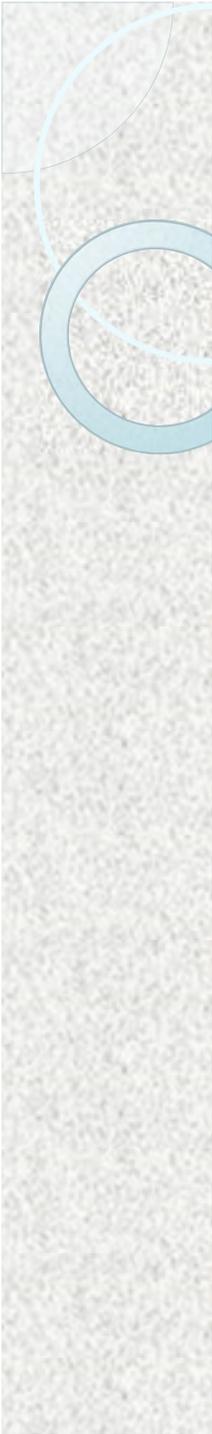
Executive Order: “Protecting the Homeland”

In January 2017, President Trump issued an Executive Order that impacts immigration law enforcement:

*“Enhancing Public Safety in the Interior of the United States.”**

- Federal government will increase enforcement efforts against “removable aliens”
- Federal government "shall ensure that [sanctuary] jurisdictions ... are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes..."

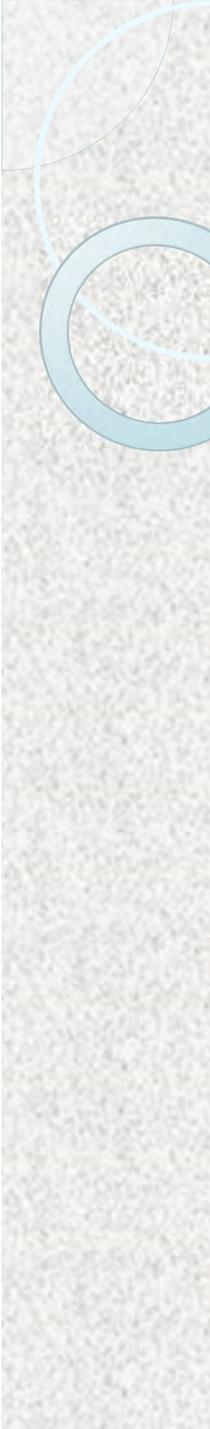
*Executive Order 13768 of January 25, 2017, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8,799 (Jan. 30, 2017). On August 1, 2018, the U.S. Circuit Court of Appeals for the Ninth Circuit struck down President Donald Trump’s executive order to end federal grant funding to sanctuary cities. No. 17-17478



Department of Homeland Security Implementation Orders

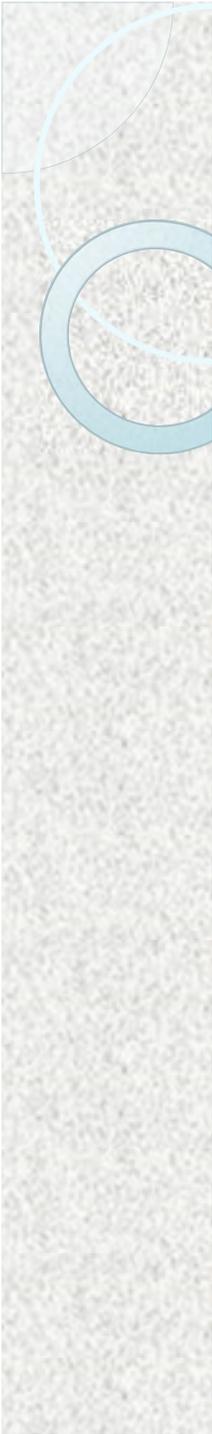
On February 21, 2017, DHS issued comprehensive policy guidance implementing the Executive Orders, signaling more intensive law enforcement:

- 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.”
- Higher level of proof for asylum claims.
- Elimination of privacy rights for immigration proceedings.
- Goal of rapid resolution of immigration matters.
- Significant new resources for enforcement agents and detention centers.



Department of Homeland Security Implementation Orders

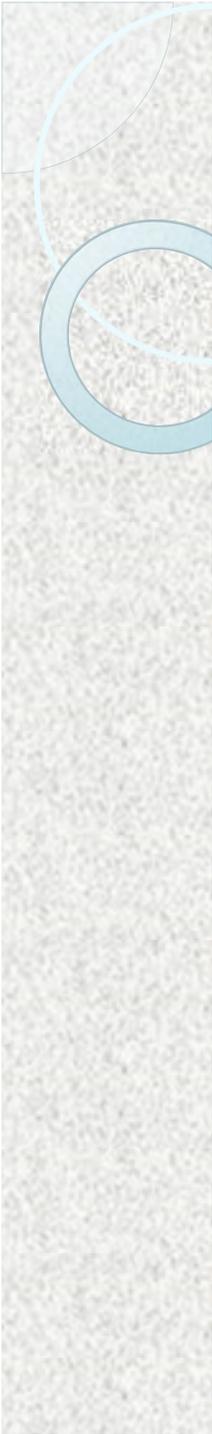
- Check statutes, regulations, and state education guidance.
- Inform students and families about how to report.
- Take concerns seriously and investigate promptly.
- If harassment is found, take effective remedial action.
- When First Amendment issues come into play, be ready to navigate carefully and seek legal guidance.
- If concerns arise, be prepared for media attention and potential legal action.



What to Do When ICE Comes to School

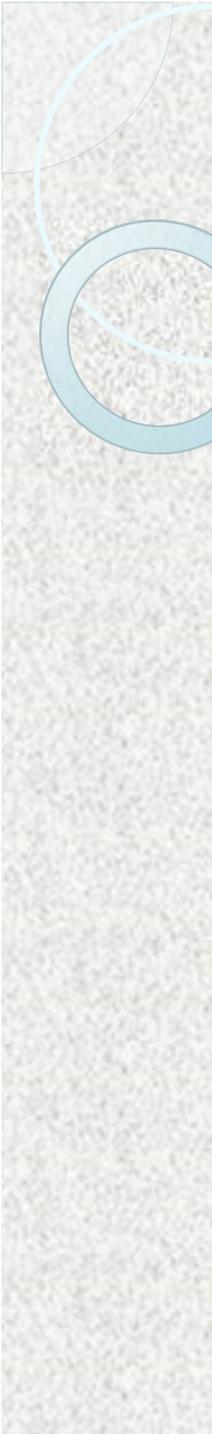
Release of Education Records

- FERPA generally prohibits release of student education records without prior parental consent.
 - No exception that clearly applies to ICE enforcement activities, nor does it fall into a health and safety emergency under 34 C.F.R. § 99.36; see NMSA 1978 Sections 32A-4-3E and 29-1-8, but you should be aware of the state law mandates of these two statutes.
- Designated directory information may be released without parental consent (34 C.F.R. § 99.31(a)) (**FERPA does not require** disclosure).
 - Current district practice regarding release of directory information may only apply to local law enforcement.
 - Decide what practice your district will follow for federal agents, and clearly communicate to your site administrators.



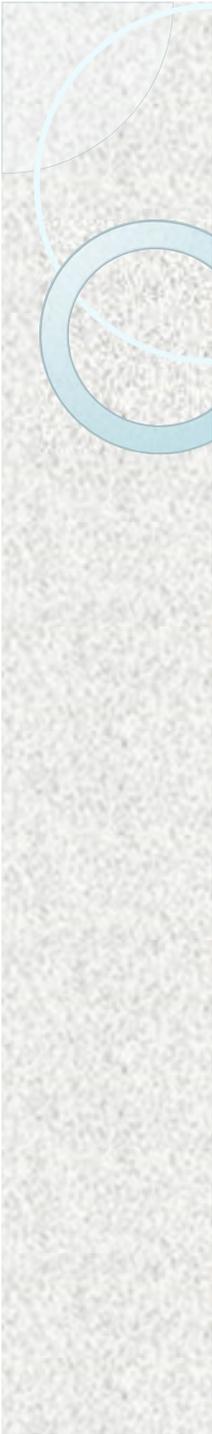
Release of Education Records - Subpoenas

- Schools must produce education records in response to a subpoena, but FERPA requires a “reasonable effort” to notify parents in advance of the school’s compliance, so that the parent (or eligible student) “may seek protective action.”
34 C.F.R. § 99.31(a)(9)(ii).
- It is strongly suggested that school staff have a process in place that directs all subpoenas to central office for processing to ensure consistent response in accordance with local school board policies and state law.



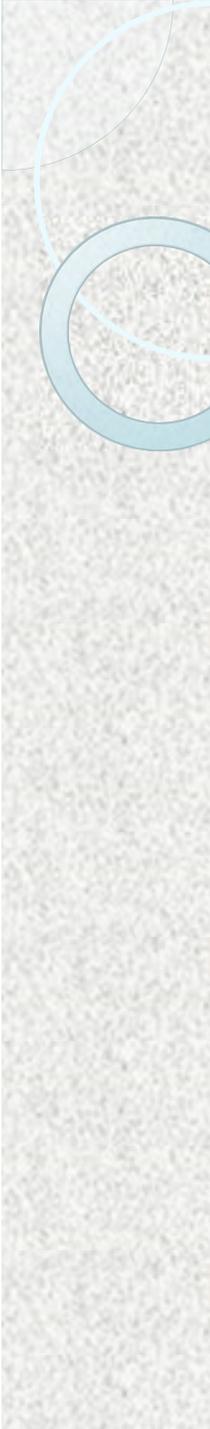
Student Interviews by ICE Agents

- Review policies and practices regarding making students available to law enforcement during the school day. Does your district have a current policy on “cooperation with law enforcement?”
- Update training of administrators, front office and teaching staff on the responses to law enforcement when they appear unannounced at school.
- Formal or informal agreements with local law enforcement may not apply to federal agents.
- Significant risk in not providing prior notice to parents of law enforcement interviews, except in cases of child abuse, imminent harm, or warrant.



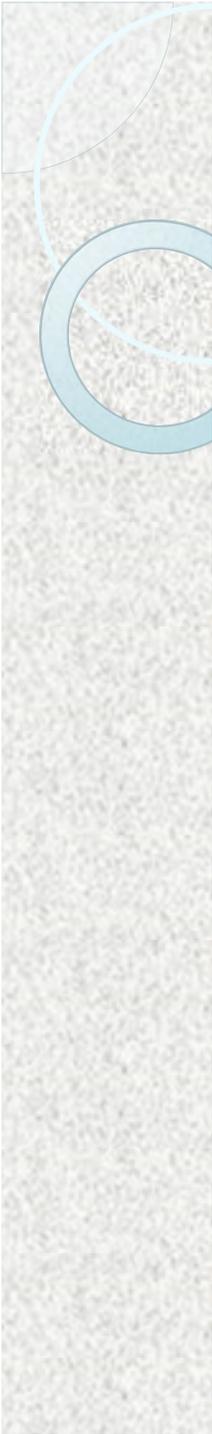
Student Interviews by ICE Agents

- If an ICE agent comes to school seeking to interview a student, best practice is for school staff to take agent's contact information and tell him/her that someone will be in touch promptly.
- Schools should not release student information or make students available for interview on the spot.
- School should not confirm that student is in attendance.



Student Interviews by ICE Agents

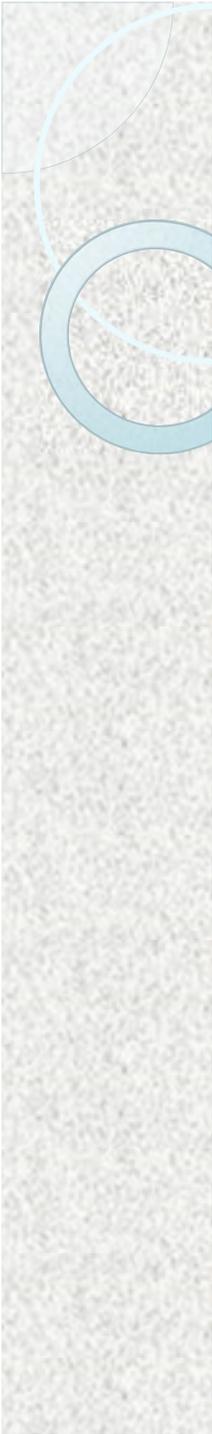
- In *Gonzalez v. Albuquerque Public Schools*, police officers and border patrol agents seized two undocumented students on campus. The case against APS and police department ultimately settled. (No. CIV 05–580 JB/WPL)
- Similar incident arose in Santa Fe when ICE agents arrested an undocumented parent in an elementary school parking lot when he was picking up his daughter.



ICE Agent Compliance Checks in SEVIS program

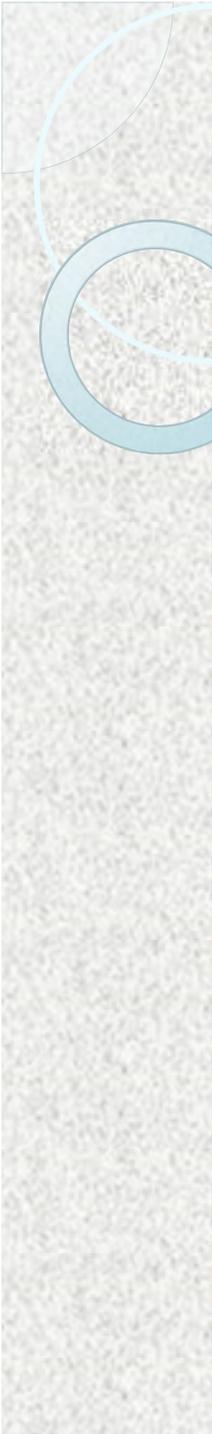
- For schools that are in the SEVIS (the Student and Exchange Visitor Information System) program*, front office staff should be trained to know that ICE agents can come on to campus **without** a warrant or subpoena and get information specific to those students in the SEVIS program.
- This is part of the school's compliance with the SEVIS program.

* Memorandum from U.S. Immigration and Customs Enforcement, U.S. Dep't of Homeland Security, to all SEVIS Users, No. I703-05 (Mar. 14, 2017), *available at* <https://www.ice.gov/doclib/sevis/pdf/bcmI703-05.pdf>.



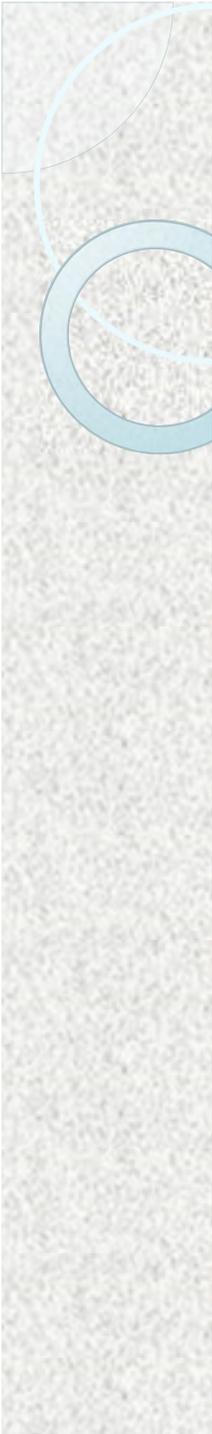
Assisting students whose parents are detained

- School districts should treat immigration enforcement activities, such as raids, similarly to any crisis.
- Have a specific crisis response plan in place for such an event.
- Plan should include:
 - District's communication plans with parents when immigration raid occurs in the district, and
 - Procedures for handling students whose parents are detained by ICE.



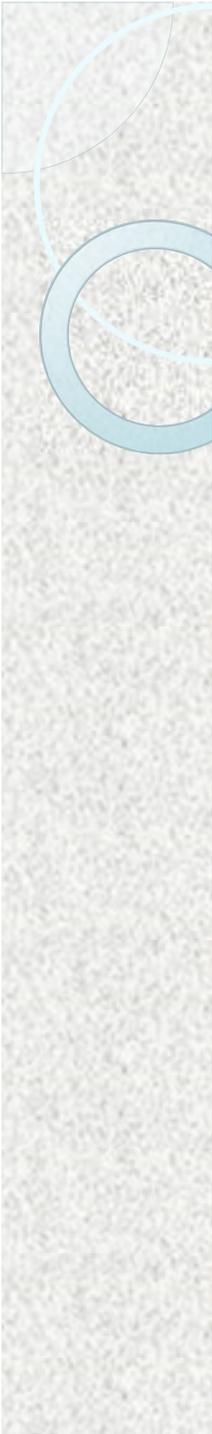
Assisting students whose parents are detained

- If a workplace raid occurs before a school has emergency contact information for students, teachers and staff should take appropriate measures to ensure that students are not left alone at the end of the school day. (Avoid claims of negligent supervision.)



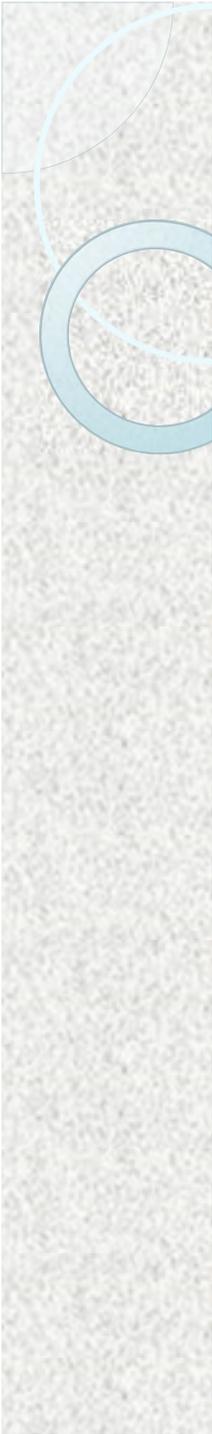
DACA

- **DACA, Deferred Action for Childhood Arrivals, is an immigration policy established during the Obama Administration in June 2012.**
- **Children who were brought to the U.S. as minors by their parents can apply for DACA status, and, as such, are granted protection from deportation, so long as they meet certain requirements.**



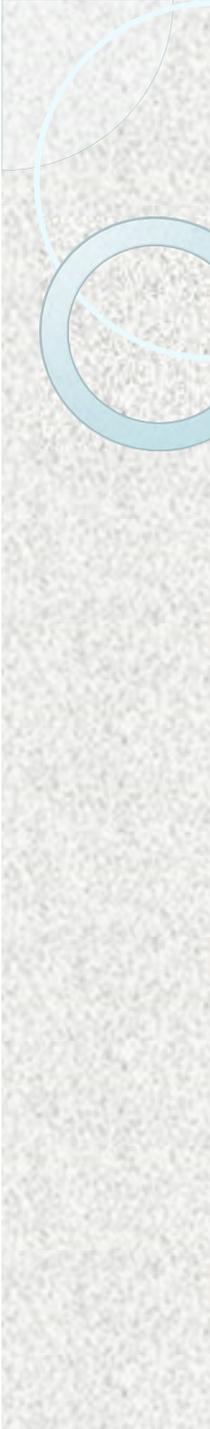
DACA

- On September 5, 2017, the new Administration terminated the DACA program.
- Under the plan, announced by Attorney General Jeff Sessions, the Trump administration will stop considering new applications for legal status.
- On May 1, 2018, Texas Attorney General Ken Paxton and six other states filed a lawsuit challenging the lawfulness of DACA. On August 8, 2018, the Court denied Plaintiff States' request to grant injunction.



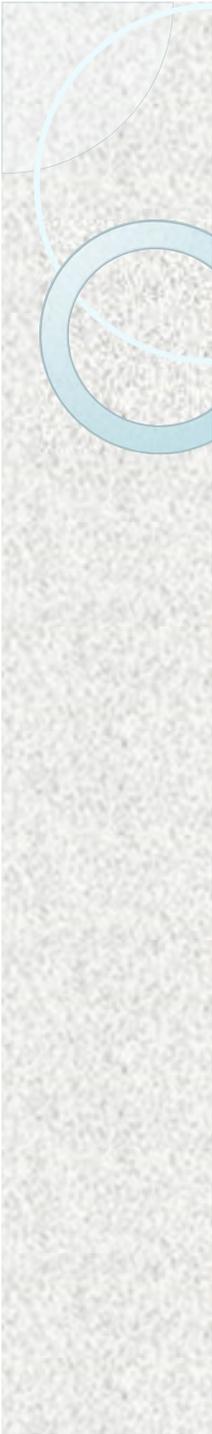
DACA

- On January 9, 2018, Judge Alsup issued a injunction requiring federal government to maintain DACA.
- DOJ filed a second request for immediate certiorari to the Supreme Court on November 5, 2018. On November 8, 2018, the Ninth Circuit affirmed Judge Alsup's decision on the injunction.



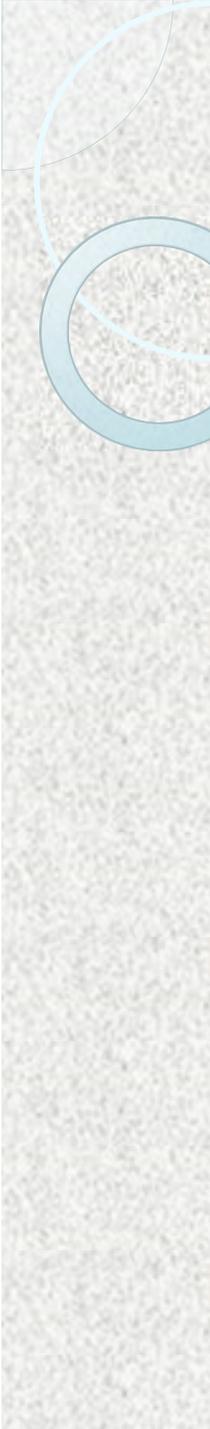
What is a “Sanctuary” School District?

- There is no common definition of a “sanctuary” jurisdiction. It depends on the jurisdiction and context.
- This is a political term in the vernacular, but not a legal term of art, and means different things to different people.



What is a “Sanctuary” School District?

- For school districts, the term is commonly applied when the district has proactively stated it will take some or all of the following actions:
 - not provide student or family information to ICE agents, except as required by law;
 - establish procedural safeguards for ICE agents engaging at school or with students; and
 - take other actions to support immigrant students.



“Sanctuary” School District Designations

- Self-Designated “Sanctuary” School Districts
- School Board Adoption of Resolution (Re)Affirming Protecting All Students
- School Districts Making a Public Statement
- School Districts That Choose to Make No Such Designation



“Sanctuary” School District Designations

- A major concern with such a designation is that the term “sanctuary” may convey more power to protect students and families than schools actually have.
- That said, the DHS Orders do not address sanctuary jurisdictions.
- From a public relations perspective, what does your school district gain by labeling itself as a “sanctuary” district? Think about this designation, politically versus constitutionally.



What To Do

- Communicate and Be Prepared!!
- Consider *Plyler* – broad constitutional mandate.
- Locate and determine district policy.
- Communicate to students and families **AND YOUR SCHOOL LAWYERS!**
- Respond to concerns and keep documentation.
- Prepare in advance for media coverage.

Contact Information



CUDDY & McCARTHY, LLP
Attorneys at Law

John F. Kennedy

jkennedy@cuddymccarthy.com

Y. Jun Roh

jroh@cuddymccarthy.com

(505) 988-4476