



When immigration and customs enforcement comes to your school

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Due to the current political climate and significant shifts in immigration policy, school officials have been asking how to manage encounters with Immigration and Customs Enforcement (ICE) agents on school grounds. Immigration policy changes have also raised the question of whether internal ICE guidance is still in force restricting certain actions such as arrests and interviews at schools. This article briefly answers some of those questions.

ICE policy related to schools remains in place but does not entirely prevent enforcement actions in schools

In 2011, the Director of U.S. Immigration and Customs Enforcement (ICE) issued an internal memo¹ setting forth a policy (the "Policy") prohibiting certain actions such as arrests and interviews at schools and other "sensitive locations," except in narrow circumstances. Unless one of the exceptions applies, the Policy requires ICE agents to receive prior approval from one of several senior ICE officials² before engaging in an "enforcement action" at a sensitive location such as a school.

Enforcement actions are defined in the Policy as arrests, interviews, searches and surveillance for the purposes of immigration enforcement. Schools are defined to include pre-schools, primary schools, secondary schools, post-secondary schools, and "other institutions of learning such as vocational or trade schools." The definition of "sensitive

locations” does not explicitly include bus stops or property adjacent to schools.

The Policy has not been withdrawn, but it does contain exceptions. The Policy does not prohibit lawful enforcement operations in “exigent circumstances” (a term that is subject to interpretation by ICE) or limit the statutory authority of ICE officers. Further, the Policy contains exemptions from prior approval for enforcement actions involving national security or terrorism; situations where there is an imminent risk of death, violence or physical harm; actions involving the pursuit of dangerous felons or other imminent danger to the public; and when there is an imminent risk of destruction of evidence in a criminal case.

Because any given enforcement action may have prior approval or be based on an exception to the general rule, the Policy cannot be relied upon to prevent enforcement actions by ICE agents at schools. Further, the Policy does not apply to actions by ICE agents that are not deemed enforcement actions, such as document requests or service of subpoenas.

What if ICE agents show up requesting student education records?

As noted above, requests to obtain records are not deemed “enforcement actions” under ICE internal policy, so no prior approval is required and no exception need apply. ICE agents may show up on school property demanding student records showing such things as the names of parents/legal guardians, residential address, emergency contact information, and/or forwarding information.

In that situation, ICE agents should be treated like any other person who requests student education records. The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. Section 1232g, applies, meaning that a school may not release student education records without parental consent, unless ICE agents have a court order or lawfully issued subpoena or another FERPA exception applies. Absent a court order, subpoena or other applicable exception, a school should decline to provide protected student education records.

If a subpoena is presented, a school must provide the records sought. However, FERPA requires the school to notify the parent/guardian (or student if 18 or over) of the subpoena before producing documents in response. This prior notice gives the parent/guardian/student the opportunity to file in court to attempt to have the subpoena quashed or to obtain a protective order.

What if ICE agents ask to conduct interviews of students or staff at school?

ICE agents may seek to conduct interviews of students or staff on school district property. In that circumstance, ICE agents should be treated like any other law enforcement officers who want to conduct interviews with students or staff.

A school’s policies and protocols in such matters will govern the access a school must provide. For example, does the school generally allow police to interview students on school grounds during the school day? Is prior parental permission required? With respect to requests for searches and surveillance, ICE should be provided with the same access as given to other law enforcement agencies and be subject to the same restrictions on access.

In addition, schools should keep in mind that students and staff subjected to interrogation have the right to an attorney and a Fifth Amendment right to remain silent.

What if ICE agents present an arrest warrant?

In the unprecedented situation that an ICE agent shows up at a school with an arrest warrant, the school must determine whether the warrant is an administrative arrest warrant or a valid criminal arrest warrant issued by a judge.

If it is an administrative warrant, the ICE agent can only make an arrest in a location where there is no reasonable expectation of privacy (i.e., public property). The school would not be required to permit access to school grounds.

If it is a valid criminal warrant, an arrest is authorized even within a school. A school may try to dissuade the agent from proceeding on school grounds. If the agent insists on executing the warrant on school grounds, however, a school may want to try to minimize the impact on students and staff by asking for the opportunity to provide advance notice to students and staff in the interest of safety, identifying a time and place for the arrest that will minimize disruption to students, and having an employee accompany the ICE agent at all times. It is also good practice to make and retain a photocopy of the warrant and to obtain the name(s) of the agent(s).

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¹ Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, "Enforcement Actions at or Focused on Sensitive Locations," 10029.2 (October 24, 2011).

² The Assistant Director of Operations, Homeland Security Investigations (HSI); the Executive Associate Director (EAD) of HSI; the Assistant Director for Field Operations, Enforcement and Removal Operations (ERO); or the EAD of ERO.

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