

# PRESIDENTS' ALLIANCE | ON HIGHER EDUCATION AND IMMIGRATION

## FAQs for Campuses on Immigration Enforcement and Site Visits<sup>1</sup> March 10, 2020

With the rescission of DACA on September 5, 2017, the failure to pass any legislative solution to provide DACA recipients and other undocumented students a roadmap to citizenship, and a potential Supreme Court decision in spring or summer DACA, it is critical for colleges and universities to reaffirm their full commitment to enroll, educate, and support Dreamer students. The purpose of this set of FAQs is to address questions that arose with regard to the obligations of institutions in the case of U.S. Immigration and Customs Enforcement (ICE) raids (known as “enforcement operations”) or site visits, and how campuses can protect members of the campus community. For more information on ICE, campus safety, and immigrant rights, along with links to an array of resources for students, families, and institutions, see the Informed Immigrant [website](#). **Importantly, we recommend that campuses identify a specific point person on campus to deal with immigration enforcement issues, answer questions, and coordinate trainings and campus education.**

### **I. What is the responsibility of college officials with regard to ICE raids or USCIS site visits?**

Typically, under what is known as the [sensitive locations memo](#), ICE will [refrain](#) from pursuing enforcement actions at colleges and universities, barring exigent circumstances, referral by law enforcement officers, or prior approval. However, not every action taken by an immigration officer at a college or university campus is considered an [enforcement action](#): immigration officers such as ICE or U.S. Citizenship and Immigration Services (USCIS) or others may arrive unannounced to inspect I-9 records, conduct an administrative site visit for a compliance review, request certain documents with a subpoena, or apprehend individuals. Unannounced visits by law enforcement are stressful, and employees and occupants generally feel pressure to do whatever law enforcement officers ask of them in the moment, *even if there is no legal obligation to do so*.

It is important for individuals who greet visitors to know that they are not necessarily or legally required to do whatever immigration officers request. The tension is alleviated when staff understands in advance that they do not need to give consent and may not even have the authority to give consent. In many cases, all campus staff needs to do is collect information from the law enforcement officers and then contact the appropriate

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<sup>1</sup> For questions regarding this document, please contact [jose@presidentsalliance.org](mailto:jose@presidentsalliance.org) or visit <http://www.presidentsalliance.org>. This document is an updated version of the FAQ the Presidents' Alliance released in 2018.

campus point of contact authorized to represent the institution in law enforcement situations. Typically, immigration officers are acting on civil, not criminal, authority. According to the Supreme Court, “[r]emoval is a civil, not criminal, matter.”<sup>2</sup>

## **II. Administrative warrants do not authorize officers to enter nonpublic areas of the workplace or property without proper consent of the company or property owner.**

In *See v. Seattle*, the Supreme Court held that an administrative warrant is insufficient to allow an officer entry without consent into non-public areas of a business.<sup>3</sup> Institutional staff are not required to give consent, provide documents, or help federal immigration officers access nonpublic areas of the workplace or property. In fact, most employees don’t have the authority to give consent on behalf of the institution. But once consent is given and the officers enter nonpublic areas of the premises, even if the person didn’t have authority to consent, it can be hard to unwind the damage done.

**NOTE ABOUT CALIFORNIA LAW, FOR CALIFORNIA INSTITUTIONS ONLY:** *California state law prohibits giving consent for law enforcement officers to enter nonpublic areas for immigration enforcement unless the officers present a judicial warrant (signed by a judge).<sup>4</sup> California law also prohibits release of documents or records to immigration officers unless the officers present a judicial warrant, except for I-9 Notices of Inspection.<sup>5</sup> California institutions need to be familiar with this law and have a protocol for compliance with state law during any ICE visit.*

**NOTE ABOUT TEXAS LAW, FOR TEXAS INSTITUTIONS ONLY:** *The preliminary injunction on Texas SB4 was largely vacated in City of El Cenizo v. Texas.<sup>6</sup> For information regarding Texas SB4 and its current status, please see the ACLU of Texas’s dedicated [webpage](#). The Fifth Circuit also held in City of El Cenizo that SB4 “appl[ies] broadly” to campus police.<sup>7</sup> For more information regarding the applicability of SB4 to campus police, the University of Houston has provided a set of [FAQs](#) on their website.*

## **III. What privacy protections exist for DACA and undocumented students?**

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<sup>2</sup> *Arizona v. United States*, 567 U.S. 387, 396 (2012). The warrants and subpoenas these officers use to request documents, information, and access to a workplace or private property, or to apprehend individuals, generally are administrative warrants signed by someone at their own agency (not judicial warrants signed by a judge). *See, e.g., United States v. Madrid-Quezada*, 403 F. Supp. 3d 1016, 1022 (D.N.M. 2019) (describing the administrative nature of an ICE warrant and its lack of judicial nature); *Lunn v. Commonwealth*, 477 Mass. 78 N.E.3d 1143, 1151 n.17 (2017) (distinguishing ICE warrants from judicially issued criminal warrants). *But see Tenorio-Serrano v. Driscoll*, 324 F. Supp. 3d 1053, 1066 (D. Ariz. 2018) (“[p]laintiff cites no authority suggesting that ICE must seek judicial warrants in order to arrest individuals suspected of being removable”).

<sup>3</sup> 387 U.S. 541, 545 (1967).

<sup>4</sup> Cal. Gov. Code § 7285.1 (West 2020).

<sup>5</sup> *Id.* at § 7285.2(a).

<sup>6</sup> 890 F.3d 164, 185, 191–92 (5th Cir. 2018).

<sup>7</sup> *Id.* at 174.

The Personal Identifiable Information (PII) of undocumented or DACA students (along with U.S. citizen students) are protected by the Family Educational Rights and Privacy Act (FERPA). FERPA effectively prohibits schools from releasing educational records or most personally identifiable information without consent unless presented with a “subpoena issued for a law enforcement purpose[.]”<sup>8</sup>

FERPA training for campus staff, faculty, and students should include this information, and campuses should ensure that all staff, faculty, and students are provided information on campus protocols regarding ICE officers coming onto campus. Campuses should also provide training for campus police and Know Your Rights training for students and community members. Finally, campuses should provide training and information to students and campus personnel on how FERPA protections of undocumented students’ personal identifiable information still apply regardless of the Supreme Court decision.

It is important to note that FERPA does not protect the employment records of DACA recipients employed by a university or campus, though does protect their educational records if those DACA recipients are enrolled on campus. We also share this Immigrants Rising resource, [Protecting Student Data in CA](#), which provides best practices on securing and protecting sensitive student information in accordance with California higher education privacy laws.

#### **IV. What is the Institution’s responsibility with regard to ICE making an unannounced site visit with regard to sponsored foreign nationals (including students and scholars in F-1 or J-1 status)?**

ICE officers conduct unannounced site visits to confirm that sponsored foreign nationals are employed as described in the institution’s approved immigration application, and these site visits do not require a warrant or subpoena.<sup>9</sup> Federal immigration officers generally have no greater access to personnel records than any member of the public unless they have a valid subpoena or I-9 Notice of Inspection.

An important exception to privacy protections are immigration records—not the full personnel file—for foreign nationals sponsored by the institution.<sup>10</sup> F-1 and J-1 sponsoring institutions are required to maintain certain information mandated by law for F-1 and J-1 students and scholars and present this information to immigration officers upon request.<sup>11</sup> This is an exception to FERPA only for students in F-1 and J-1 status and only for the specific information required by law.<sup>12</sup>

Additionally, for F-1 students and campus employers participating in STEM OPT, the Student and Exchange Visitor Program (SEVP) may conduct visits to campuses if STEM

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<sup>8</sup> 20 U.S.C.S. § 1232g(b)(1)(J)(ii) (LexisNexis 2019).

<sup>9</sup> See 8 C.F.R. §§ 214.2, 214.3.

<sup>10</sup> See 8 C.F.R. § 214.1(h).

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

OPT students are employed by a campus-based employer. During these site visits, SEVP verifies that students are engaging in the practical training described in their STEM OPT application and in accordance with the STEM OPT program. For more information on site visits, including what to expect and how to prepare, see [DHS's Read this Overview of STEM OPT Employer Site Visits](#).

## **V. How to respond to I-9 notices of inspection?**

Federal regulations provide that those who must retain I-9 records “shall be provided with at least three business days notice prior to an inspection of Forms I-9” and that the records must be available in their original form (or a paper copy of an electronic original) at the time of inspection.<sup>13</sup> Refusal or delay is considered a violation of I-9 retention requirements.<sup>14</sup> Officers are not required to provide a subpoena or a warrant to inspect I-9 records, but they may do so.<sup>15</sup> It’s best to send the I-9 Notice of Inspection to counsel for review immediately and to discuss next steps with counsel. Employers may face significant fines for I-9 violations even if they are technical violations on I-9s for U.S. workers. Importantly, campuses should be aware of increased enforcement related to employment eligibility, e.g., DACA recipients employed on campus whose work permits expire because of the end of DACA.

## **VI. How should campuses prepare and respond to ICE site visits?**

Federal law prohibits hiding evidence, concealing individuals who are the targets of law enforcement, or interfering with an arrest. Federal law also prevents a federal, state, or local government from prohibiting or restricting “any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”<sup>16</sup> Also, it’s important for employees to avoid putting themselves in physical danger during any immigration enforcement action at the workplace.

Immigration officers sometimes may exercise criminal enforcement powers or may work with criminal law enforcement officers who may present a criminal arrest or search warrant that gives greater authority to enter areas of the workplace that are not open to the public, without consent. Identifying “public” and “nonpublic” areas of campus is an important exercise in planning for ICE visits. Institutions with open campuses will need to have a different protocol than closed campuses with restricted access points where ICE officers will have to request access.

A typical protocol involves routing law enforcement officers to the campus safety office. But immigration enforcement is entirely different from criminal enforcement and a different protocol is required. When law enforcement comes to campus seeking a student in connection with a criminal matter, the student will have the opportunity to

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<sup>13</sup> 8 C.F.R. § 274a.2(b)(2)(ii) (2020).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> 8 U.S.C.S. § 1373 (LexisNexis 2019).

defend herself in a proceeding and may not even be charged with a crime at all. In immigration enforcement, an individual may have no defense against deportation or may be subject to an order of deportation already. Immigration custody may be the end of the line and a fast track to deportation, not the beginning of a process to determine whether the student is subject to deportation. If ICE presents an order of deportation against the student, not a court order or judicial warrant compelling the institution to act in the matter, the institution is not required by law to help ICE apprehend the student.

## **VII. What are the rights of individuals who may be targets of immigration enforcement actions?**

Individuals who are targets of immigration enforcement actions have civil rights under U.S. law, regardless of their citizenship or immigration status. The American Civil Liberties Union (ACLU) has prepared [Know Your Rights](#) resources, and the Immigrant Legal Resource Center (ILRC) offers [red cards](#) that individuals can slide under a door to assert their civil rights without opening the door. Additional information and resource links for both students and educators can be found on the *Informed Immigrant* [website](#).

## **VIII. What is the role of the federal prohibition “harboring” undocumented immigrants and campuses?**

Under 8 U.S.C § 1324, it is unlawful to “encourage or induce an alien to come to, enter, or reside in the United States.”<sup>17</sup> Known as the “harboring” statute and written in an overly broad manner, there are outstanding and unsettled questions regarding whether acts such as enrolling an undocumented immigrant, offering admission, or financial aid would constitute financial aid. To date, the federal government has not prosecuted nor announced its intention to prosecute campuses for enrolling undocumented students under the harboring statute. There is currently ongoing litigation regarding this constitutionality of this provision, including whether the statute is overly broad and runs afoul of the First Amendment. Most recently, in *United States v. Sineneng-Smith*, the Ninth Circuit Court of Appeals held that the provision was unconstitutionally broad and in violation of the First Amendment.<sup>18</sup> The Supreme Court heard oral arguments on this case on [February 25, 2020](#), and we expect a decision by summer of 2020.

## **IX. What are best practices in responding to voluntary detainer and notification requests?**

Voluntary detainer requests are optional requests from federal immigration enforcement to local law enforcement (such as campus police) to hold an individual suspected of being an undocumented immigrant past the time they normally would have been released so immigration officers have a greater amount of time to detain that individual. Voluntary notification requests are requests to local law enforcement to

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<sup>17</sup> See 8 U.S.C § 1324 (West 2020).

<sup>18</sup> *United States v. Sineneng-Smith*, SCOTUSblog, <https://www.scotusblog.com/case-files/cases/united-states-v-sineneng-smith/> (last visited Mar. 3, 2020).

share information regarding when and where an individual will be released to facilitate federal immigration enforcement officers detaining that individual upon release. While often framed as mandatory, both detainers and notification requests are *voluntary*. In fact, multiple federal district courts have explicitly struck down detainers as unconstitutional and a violation of the Fourth Amendment.<sup>19</sup>

*NOTE ABOUT CALIFORNIA LAW, FOR CALIFORNIA INSTITUTIONS ONLY:* California has additional protections and requirements for local law enforcement to comply with detainers. You can learn more on the California Attorney General's [website](#).

*NOTE ABOUT TEXAS LAW, FOR TEXAS INSTITUTIONS ONLY:* SB 4 requires Texas police and jails to comply with detainers, making this previously voluntary action mandatory. If campus police detain students and receive a detainer request from ICE, then they must reasonably comply and be responsive. See this [community advisory](#) from the Immigrant Legal Resource Center; and for more information regarding the applicability of SB4 to campus police, the University of Houston has provided a set of [FAQs](#) on their website.

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<sup>19</sup> *Immigration Detainers Legal Update - July 2018*, Immigr. Legal Res. Ctr., <https://www.ilrc.org/immigration-detainers-legal-update-july-2018> (last updated July 24, 2018).