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HAPPY NEW YEAR!

No. It is not January 1, 2019 so do not fret that you did not break out any bubbly last night. It is, however, the start of another school year which you may have been anxiously awaiting all summer long. With this in mind, we dedicate this issue of our newsletter to topics relating to things to know and do before or as the new school year begins.

Addressing the Unique Needs of Incoming Students with an IEP in Tow

By Chris Schulz

When new students show up and enroll on the first day of instruction, it is important to understand the rules regarding transfer students. For students that transfer to a new school district or charter school within the state in the same school year and if the parents verify that the student was receiving special education services in the previous district or the previous district verifies in writing or by telephone that the student was receiving special education services, the new school must provide comparable services until such time that the school adopts the child's previous individualized education program (IEP) or develops a new IEP. This must be done within 30 school days of verification that the student received special education services. For students that transfer to a new school district or charter school from a different state in the same school year and if the parents verify that the student was receiving special education services in the previous school district or the previous school district verifies in writing or by telephone that the student was receiving special education services, the new school must conduct an evaluation, if necessary, or develop a new IEP. If it is determined to a new evaluation should be conducted, the timelines for initial evaluations apply and

comparable services must be implemented in the interim.

Under the rules adopted by the commissioner of education, transfer students are considered students that transfer schools within "the same school year." The Texas Education Agency (TEA) interprets the transfer rules to apply in situations when a student moves from one local education agency (LEA) to another LEA within the same academic year. However, TEA has a different view when students change LEAs over the summer. When students attend a new LEA at the beginning of a school year, TEA has determined that the student is not a transfer student. Accordingly, schools should consider that a new student with an IEP that enrolls on the first day of the academic year should have the IEP implemented from the date of enrollment. However, if a student enrolls on the second day of the academic year, that student should be considered a transfer student, and implementation of comparable services would be appropriate.

To ensure that current practices are consistent with law and rule, your school should ensure that it has a procedure in place to guide staff and that it provides training to staff as the new school year begins on how to properly address a new or transfer student with an existing IEP.

Quick Reminder for Onboarding Employees

By Adam Courtin

As the start of the school year comes into view, school administrators and human resources professionals are scrambling to finish last minute employee hiring and are starting to “onboard” new employees. Here are some quick last-minute pointers that will hopefully keep you on track to another successful school year.

Tip number one, no matter how busy you are, always (always, always, always) treat all applicants and new hires (and existing employees) the same (no favoritism and no retaliation), and always follow all of your checklists and best practices for hiring and onboarding.

All employers face the same risk: hiring bad employees. While there is no cure all for avoiding a bad employee, common sense can help minimize the possibility of hiring a bad actor. First, don't forget pre-employment affidavits—one must be completed with the application for employment, and another must be completed when an applicant is offered employment.¹ Take the time to call references and listen closely for hints that suggest that the applicant was let go due to performance or personality issues. Have at least three to four trusted employees interview all applicants for a position, and then listen to and consider everyone's honest thoughts about the applicant (bonus hint: having a diverse group of interviewers can help reduce the risk of losing a discrimination lawsuit). An applicant's vague and evasive answers, and willingness to trash talk a former employer, can be a sign of trouble. Finally, try to not hire out of desperation (easy for me to say)—if time and resources permit, keep looking instead. A few hassles now to find a good hire may spare you many headaches and much

heartburn later in dealing with a problematic employee.

Onboarding is probably a fairly efficient process for most schools as they welcome new teachers and staff. Should key employees be treated any differently? Not really. As with all other employees, your key employees must complete all required forms, agreements, pre-employment affidavits, and background checks (and take care of that before the employee starts work, because even key employees have to complete their paperwork). If your key employees will be employed pursuant to a contract, make sure that the contract is executed by an authorized school official and the employee before the employee starts work. Also, as is the case with all other employees, make sure that your key employee's job description is truly accurate, and that expectations and obligations for the employee have been clearly explained in writing. Finally, your key employees will likely have supervisory authority, which can create liability for the school if they wind up being a bad actor or if they do not understand and follow policies; thus, train key employees thoroughly and promptly upon hiring.

¹ for information published by TEA regarding the affidavits that are required by law, go to

https://tea.texas.gov/interiorpage_wide.aspx?id=51539618294.

Plan Now for Bond-Financed Facilities

By Janet Vaughan Robertson

The first day of the 2018-2019 school year is right around the corner and you are eagerly anticipating seeing all those bright shiny faces in place on the big day. You have finally gotten all the kinks out of the schedule to provide classroom space for your floating teachers (who actually have no classrooms of their own) and you have converted that extra supply room and the old teacher lounge into classroom space in anticipation of your increased enrollment, but it will still be a tight fit. You are providing your students with a great education and as a consequence have been growing more rapidly than you could have possibly imagined. In fact, you are bursting at the seams! What if you have students that want to transfer in during the school year? Where on earth will you put them? And what about next year?

The good news is that facilities funding will at last be available to open enrollment charter schools on September 1, 2018. Open enrollment charter schools whose most recent overall performance ratings are at least acceptable will receive an aggregate of \$60 million annually for charter facilities funding to be divided on a per ADA basis. As of May 1, 2018, TEA estimated that eligible charter schools would receive approximately \$200 per student. A Commissioner's rule is forthcoming that will define the most recent rating that will be used to determine funding eligibility. What we already know is that, pursuant to Texas Education Code Section 12.06(f), facilities funds may only be used:

- (1) to lease an instructional facility;
- (2) to pay property taxes imposed on an instructional facility;
- (3) to pay debt service on bonds issued to finance an instructional facility; or
- (4) for any other purpose related to the purchase, lease, sale, acquisition, or maintenance of an instructional facility.

The extra funding will be a real benefit to charter schools that choose to finance the purchase and improvement of new instructional facilities through the issuance of tax-exempt bonds (see items (3) and (4) above). And it is definitely not too soon to begin planning for a bond issue to finance school facilities that will be put into service for the 2019-2020 school year. The bond issuance process itself can take from three to six months (or more) and of course you need to leave time for the actual construction and/or renovation of the facility. Basically, you will be running the bond issue and the pre-construction work simultaneously, along with getting the necessary approvals you need from TEA and your local municipality. The purchase price of the real property will be paid on the date the bonds close and a construction fund will be established with the trustee out of bond proceeds. Only then can construction move forward on the new facility, so it pays to get an early start.

Here's what to do and why to do it now:

1. Assemble your bond team

- (a) Financial advisor (acts as a fiduciary to the school in assisting with financial analysis, sizing and structuring of the bond issue).
- (b) Bond counsel (represents the school and works with the governmental "conduit" issuer, documents the process, negotiates Attorney General approval, provides state enforceability and federal tax-exemption opinions and basically "runs the deal").
- (c) Real estate counsel (assists with the property purchase, survey, appraisal, environmental assessment and title policy issues).

- (d) Underwriter (markets and sells the bonds).
- (e) Trustee (holds and disperses the bond funds as well as receives debt service payments from the school and makes payments to the bondholders).

II. Reimbursement

Have your School Board meet to pass a reimbursement resolution early (so you can reimburse yourself for permitted expenses out of bond proceeds). The reimbursement resolution establishes the school's official intent to reimburse itself out of the proceeds of bonds to be issued in the future and covers qualified expenditures made up to 60 days prior to the date of the resolution.

III. Investor, tax and real estate due diligence

Due diligence is a key driver of the bond issuance process. In order to have a reasonable basis to believe that the school will be able to pay debt service on the bonds (a Securities and Exchange Commission requirement), the underwriter on behalf of the investors will help the school to assemble an offering document that will provide a wealth of historical, financial and business information about the school, its academic and financial performance and its administration. In addition, bond counsel will need to confirm compliance with all IRS rules in the operation of the school and the anticipated use of bond proceeds. Further, the typical due diligence involved in any real estate purchase – surveys, appraisals and environmental assessments – takes time. Bottom line: pick an administrator to act as liaison with the bond team on all these matters and get started early – it makes everything go much more smoothly.

IV. Bid out the construction early

Having done a lot of leg work already, don't stop or pause just yet. Keep the process moving and consider the following factors as you solicit bids for construction services.

- (a) Comply with applicable state law requirements for a public school.
- (b) Architect and construction contracts should be signed before the bonds can be marketed (usually 4 to 6 weeks before closing) - plan for time to negotiate.
- (c) A schedule of anticipated expenditures is necessary to comply with 501(c)(3) tax requirements.
- (d) Payment and performance bonds are typically required.
- (e) Construction typically cannot start until after the bond closing.

V. TEA approvals

Other considerations important to any bond issuance and construction project includes:

- (a) Where do you stand on your charter renewal process?

Underwriters often advise that bonds sell best for a school that has at least one renewal under its belt. At a minimum, the school's charter should be currently active and not in the middle of a renewal process.

- (b) Will you need an expansion amendment to increase your enrollment and/or add grades at the new facility?

Be mindful that expansion amendments for the upcoming school year can only be submitted between February and April and that TEA can take up to 60 days to respond.

(c) Will you be relocating a campus?

While a relocation amendment can be submitted at any time, the TEA approval ideally will be received before the bonds are marketed, so it is best to submit the request as early as possible.

(d) Is your school the subject of a complaint or an ongoing investigation?

Although not necessarily authorized under state law, TEA has, in the past, delayed a decision on a charter amendment pending the result of a complaint or investigation.

(e) Attorney General Approval.

The Texas Attorney General will not approve the bonds until all applicable TEA requirements have been met.

VI. Local approvals

In addition to the above considerations and factors, school officials should also think of the potential impact to their bond issuance and construction project of the following local forces:

(a) TEFRA (Tax Equity and Fiscal Responsibility Act of 1982) notices, hearings and approvals.

Notices must be published in a newspaper of general circulation no less than 14 days prior to the hearing. After the hearing is held, official approval of applicable elected representatives for the location where the facility is to be located and the location of organization of the governmental issuer (if different) must be obtained - a process dependent on city and county schedules. Bond counsel orchestrates.

(b) Zoning and variances.

First determine whether the property is properly zoned (or deed-restricted, as the case may be) for a school. If a variance or new zoning ordinance is needed, timing will vary from location to location. Zoning ordinances can be done in as little as a month but could take three or more months because they require input from city management, the city planning and zoning committee and city council (often two readings are required to clear planning and zoning and city council), not to mention notice requirements and city attorney review and approval - all of which takes time.

(c) Building permits.

Again, timing will vary from location to location, but one to two months is typical, with negotiations between the developer and the city sometimes dragging things out.

(d) Traffic studies.

We are seeing more and more localities require this type of study and these too can be time consuming and typically require city approval once completed. The usual time frame is one to two months, but it is best to plan on a third month in case more information is required.

The moral of the story? Start planning today for the bond-financed facilities of tomorrow!

Finishing the Job: Ensure that Your New School Is Built on Time

By Bryan Dahlberg

As a new school year is set to start, we are approaching critical deadlines for many schools to complete campus construction projects in time for classes to begin. In addition to starting your planning early enough to give contractors plenty of time to finish the job, we recommend incorporating several different provisions into the construction contract that will make it much easier to hold your contractor's feet to the fire when finishing the job.

First and foremost, your project should set a specific date for the contractor's achievement of "Substantial Completion" that gives plenty of cushion, not only for delays in construction, but also for the logistics of preparing a campus for students after the last nail is hammered into place. This includes working with local authorities to get a certificate of occupancy, moving in and setting up all the furniture for classrooms, and putting the building's plumbing, electrical, security, communications and other systems through the paces to make sure everything works appropriately. It is much easier to get this done in the dog days of summer than the hectic days at the start of the school year.

The Substantial Completion date should be coupled with a "liquidated damages" provision that sets a specific day-for-day dollar amount reduction in the contract price if the contractor is late in finishing the project. But that is only part of the picture when dealing with the financial implications of unexpected delays, which is one reason why we also recommend not agreeing to a waiver of consequential damages in the contract. This threat to the contractor's bottom line is the single biggest leverage a school has to make sure the contractor does whatever he can to finish the job on time. Construction crews can do amazing work on short

schedules, but they have to be appropriately incentivized.

It is equally important to stay on top of the project throughout the construction phase. Establish a comprehensive construction schedule with intermediate milestones and compare this schedule to progress reports so that any delays can be identified. If a delay is observed, meet with the construction team immediately to address how to get back on schedule.

Finally, the contractor is keeping track and will eventually tell you of all the reasons that were outside of his control that prevented him from finishing the job on time. If given the choice, he might wait to spring this on you until the end, after you've paid him out for most of the project. Don't let that happen. Demand prompt notice if a change order is needed to extend the Substantial Completion date for any reason outside of the contractor's control. Stay on top of these requests throughout the project so that everyone is on the same page.

With luck and diligence in these areas, you will hopefully finish your project on schedule.

Letters of Intent: A Legal Gray Area

By Jessica Davis

As demand for enrollment in Texas public charter schools increases², so does the demand for more space to accommodate the growing numbers of Texas charter school students. As this school year begins, many charter schools are looking forward to next year, and how to solve the problem of having too little space. Charter school administrators are scouting for potential options for campuses, whether that be in the form of leasing existing space, build-to-suit leasing, or purchase of property, either with existing improvements or for development. With lease or purchase agreements, often the first step after finding a broker and a property that suits the school's needs is the negotiation of the Letter of Intent, which is commonly referred to as an LOI. Letters of Intent are also often called Memorandums of Understanding, Agreements in Principle, Letters of Understanding, Term Sheets, and/or Transaction Outlines.

A Letter of Intent's purpose is to outline the material terms of the business agreement reached by the parties to a commercial real estate transaction, without which the parties would not proceed to spend further time, energy, or money on a transaction. Letters of Intent are typically shorter and less formal than the final agreements reached by the parties. In other words, Letters of Intent spell out the key business terms of an agreement so that the parties do not incur the cost of negotiating a purchase agreement, lease, and/or ground lease, or any of the other expenses that often accompany a commercial real estate transaction, without some assurance that the parties will be able to reach a deal in the end. Letters of Intent often outline terms such as: rent or purchase

price; term of lease and renewal options; tenant improvements; landlord improvements; feasibility periods; allocation of costs; tenant improvement allowances; broker's commissions; assignment and subletting; and, other material terms.

Letters of Intent are widely believed and represented to be non-binding, and as a result, parties often do not consider or address the legal implications of signing a Letter of Intent; however, Letters of Intent are not always non-binding. The *Enterprise Products Partners, L.P. v. Energy Transfer Partners, L.P.*³ case (the "Enterprise case") has brought this issue to the spotlight. In the *Enterprise* case, Enterprise Products Partners and Energy Transfer Partners entered into negotiations and signed a Letter of Intent expressing their agreement to enter into a joint venture to build an oil pipeline. When the deal fell through, a dispute arose as to whether or not the parties had formed a *de facto* partnership under Texas law. A *de facto* partnership is a partnership that is found to exist because it has been established by the course of actions of the parties; if they acted as partners would have acted a *de facto* partnership can be found to exist, even if the parties have not established a partnership under traditional methods (i.e. signing agreements, registering with the Secretary of State, etc.).

In an effort to decide whether or not a *de facto* partnership existed in this case, the trial court looked to Letter of Intent the parties had signed, among other evidence. This particular Letter of Intent specifically stated that "no binding or enforceable obligations shall exist between the Parties [...] until the Parties have received their respective board approvals and definitive agreements [...] have been negotiated, executed, and

² According to the Texas Charter Schools Association website, there were 141,000 students on waitlists to attend Texas public charter schools: <http://www.txcharterschools.org/what-is-a-charter-school/charters-in-texas/>.

³ *Enter. Products Partners, L.P. v. Energy Transfer Partners, L.P.*, 529 S.W.3d 531 (Tex. App.—Dallas 2017, pet. filed), *reh'g overruled* (September 13, 2017).

delivered by both Parties.” The parties announced their joint project to the public before they executed the final agreements. Enterprise Products Partners and Energy Transfer Partners ultimately were unable to agree on the details of the deal, and the deal fell through before the final documents were executed. Thus, the parties’ boards never approved the deal. Enterprise Products Partners found another company to work with on the pipeline, and Energy Transfer Partners sued Enterprise Products Partners for its loss of benefit on the deal. Despite the non-binding language specifically spelled out in this Letter of Intent, Enterprise Products Partners lost this case when the jury found that a partnership existed because, even though the conditions precedent listed in the Letter of Intent had never been satisfied (i.e. the boards had not approved the contract, and final documents had never been executed), the parties had entered into a *de facto* partnership. The trial court awarded Energy Transfer Partners a \$469,375,000.00 verdict against Enterprise.

The Dallas Court of Appeals overturned the verdict in this case because the Letter of Intent had language in it that stated specifically that it was non-binding until the boards approved and the final agreements were executed, and these conditions were not satisfied.⁴ However, the parties to this case have requested that the ruling of the Dallas Court of Appeals be reviewed by the Supreme Court of Texas. Hopefully, the Supreme Court of Texas will grant the petition for review and provide guidance on this issue, but in the meantime, Texas attorneys and parties to transactions should be extremely vigilant in protecting their interests when it comes to Letters of Intent in light of the fog of confusion that the *Enterprise* case has cast over the nature of Letters of Intent.

Letters of Intent are often drafted either by the brokers involved in the real estate transaction at hand, or if no broker is involved, by the principal representatives of the parties. Letters of Intent are often reviewed by an attorney for the first time when finalized and executed by the parties and provided to a party’s legal counsel solely as a basis for the attorney to draft or review the first draft of the necessary documents to finalize a transaction. It is important to note that real estate brokers in Texas cannot give legal advice to their clients or give advice as to the legal implications of a document.

It is now more important than ever that Letters of Intent be drafted carefully, with all legal implications considered, in order to best mitigate the risk of possible liability for a party related to terms in a Letter of Intent that were never intended to be binding. All Letters of Intent should be carefully reviewed, and the parties should limit their actions in reliance of the agreements reached in a Letter of Intent until the final documents to a transaction are finalized and executed by all parties to that transaction.

⁴ *Enter. Products Partners, L.P. v. Energy Transfer Partners, L.P.*, 529 S.W.3d 531 (Tex. App.—

Dallas 2017, pet. filed), *reh’g overruled* (September 13, 2017).

Exciting World of Handbooks!

By Allen Keller

As you continue preparations for the upcoming school year, we know that one of the most anticipated “to-dos” is reviewing and updating your Employee Handbook, Student/Parent Handbook and Student Code of Conduct. When considering your updates, we recommend that you pay special attention to the following:

I. For Employee Handbooks

- (a) Be sure that, in conjunction with your non-discrimination/equal employment opportunity statement, you identify and provide basic contact information (name, address, and phone number, for example) for your designated compliance coordinators. These individuals are responsible for conducting and/or overseeing any reports of workplace discrimination, harassment, and retaliation. Also, provide a summary of how employees can report discrimination, harassment, or retaliation, and note that an employee who is dissatisfied with the results of an investigation may file a complaint under your general employee grievance process.
- (b) Include a brief summary of reported criminal histories that will disqualify an individual from employment with a charter school under state law, and note that, under EEOC guidance, a prior arrest or criminal record will not always disqualify an individual from employment.
- (c) Include a summary of the updated requirements under Senate Bill (SB) 7 to report educator misconduct.
- (d) Outline your employee complaint and grievance process and describe each step of the process leading up to a final review by the board of directors.
- (e) Outline all leave offerings available to employees, including paid personal leave, bereavement leave, paid or unpaid parental leave for new parents (non-FMLA), paid or unpaid sick leave (non-FMLA), and any other leave opportunities your school provides.
- (f) Summarize unacceptable employee conduct that may lead to disciplinary action, including termination. While a majority of charter schools are at-will employers, providing a description of unacceptable conduct is important if a former employee files an unemployment or discrimination claim, as the Texas Workforce Commission and EEOC often ask for any standards of conduct that led to the separation.
- (g) Summarize your expectations for electronic communications between students and staff members.

II. For Student/Parent Handbooks and Student Codes of Conduct

- (a) As with your employee handbook, identify and provide basic contact information (name, address, and phone number) for your designated compliance coordinators responsible for conducting and/or overseeing reports of student discrimination, harassment, or retaliation. It's also important to set out the process for students to report this prohibited conduct and note that a parent or student who is dissatisfied with the school's investigation can file a complaint through the general student and parent grievance process.
- (b) Summarize the state's compulsory attendance law and provide notice of the potential penalties for non-attendance under Chapter 25 of the Education Code and Chapter 65 of the Family Code. It's also important to set out the school's expectations for

- attendance in order to obtain credit or a final grade in a class.
- (c) Be sure to include a summary of allowable student fees. There's been an uptick in the number of TEA complaints and investigations related to student fees and charges, so it's important to have a fee policy in place and to communicate this policy to parents and students through your handbook.
- (d) Set out your policy for administering medications at school.
- (e) Be sure to include information on your anti-bullying/cyberbullying policies and procedures, as required by SB 179 ("David's Law").
- (f) Provide information on your plan for addressing sexual abuse and other maltreatment of children.
- (g) Include TEA's written statement⁵ of the options and requirements for providing assistance to students who have learning difficulties or who need, or may need, special education services.
- (h) Pay close attention to your Student Code of Conduct, especially your description of misconduct that can lead to expulsion. *If a certain form of misconduct isn't identified as expellable in your Code of Conduct, you won't be able to expel a student who engages in that conduct!!!* Along with this, you must outline the due process procedures (notice and hearing) before an expulsion recommendation is finalized and allow for an appeal to the Board of Directors.
- (i) Include a summary of your definition of "directory information" under FERPA that may be released without prior parent consent.⁶
- (j) Describe your parent and student grievance process, including a final review of complaints by the Board of Directors.

This isn't an exhaustive list of everything that should be included in your handbooks, so please feel free to contact our office if you have questions. Good luck and happy handbooking!

⁵ Go to TEA's website on the required statement to be included in the student handbook: https://tea.texas.gov/Academics/Special_Student_Populations/Special_Education/Programs_and_Services/Student_Handbook_Statement_English/.

⁶ Read Adrienne Stonecypher's article in this newsletter to understand one context in which this summary is important.

U.S. Secret Service Publishes Guide to Facilitate School Safety

By Adam Courtin

School safety is an everyday concern that requires the ongoing attention of all school employees. Given the recent number of school shootings, the United States Secret Service National Threat Assessment Center recently issued its Operational Guide for Preventing Targeted School Violence.⁷ The Guide offers six steps for administrators to consider and “provides basic instructions for schools on creating a targeted violence prevention plan, the focus of which is to decrease the risk of students engaging in harm to themselves or the school community.” The Guide recognizes that not all schools have school safety officers, and it recommends collaboration with local law enforcement agencies. Additionally, many useful links are provided at the end of the Guide related to school safety, creating safe and positive school environments, preventing bullying, and mental health. We encourage you to read the Guide, have conversations with your school’s administrators regarding the implementation of the Guide’s recommendations and the best practices found in the Guide, and sharing the Guide with your friends and colleagues in other charter schools, ISDs, and private schools.

When Fear Prompts Schools to Review Existing Plans to Ensure that Potential Immigration Issues Are Lawfully Addressed

By Adrienne Stonecypher

Undocumented and mixed-status families understandably are becoming increasingly hesitant to send their children to school. Additionally, even those families that do keep their child’s attendance records current are largely refusing to list their correct home addresses and other identifying information on school forms. With the current upheaval of the country’s immigration policy, it’s no surprise that foreign parents are even more weary of potential run-ins with Immigration and Customs Enforcement (ICE). In fact, such trepidation has resulted in parents across the country trusting our schools less and less. “There is a fear about schools no longer [being] a safe haven for undocumented students,” according to Jose Hernandez Paris, Executive Director of the Latin American Coalition in Charlotte, North Carolina.⁸

In fact, a UCLA Civil Rights Project study found that 84% of educators reported that students had expressed concerns regarding the effects of immigration enforcement affecting them or their family members.⁹ These apprehensions are not unwarranted. In 2017, ICE arrested more than 155,000 immigrants, 30% of which were not criminals.¹⁰ In the last three months of 2017 alone, that percentage jumped to 35% of immigrant arrests attributable to non-

⁷ To obtain a copy of the guide, go to https://www.secretservice.gov/data/protection/ntac/USSS_NTAC_Enhancing_School_Safety_Guide_7.11.18.pdf.

⁸ Von Hoffmann, Emily, *Does ICE Pressure Schools for Student Info?*, THE ATLANTIC, Apr. 11, 2016, available at <https://www.theatlantic.com/education/archive/2016/04/does-ice-pressure-schools-for-student-info/477600/>.

⁹ Gándara, Patricia & Ee, Jongyeon, *U.S. Immigration Enforcement Policy and its Impact on Teaching and Learning in the Nation’s*

Schools, UCLA CIVIL RIGHTS PROJECT, Feb. 28, 2018, available at <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/u.s.-immigration-enforcement-policy-and-its-impact-on-teaching-and-learning-in-the-nations-schools/EMBARGOED-Immigration-enforcement-on-schools.pdf>.

¹⁰ Kopan, Tal, *Arrests of Immigrants, Especially Non-Criminals, Way Up in Trump’s First Year*, CNN POLITICS, Feb. 23, 2018, available at <https://www.cnn.com/2018/02/23/politics/trump-immigration-arrests-deportations/index.html>.

criminals.¹¹ And it's not just the arrestees' lives that are shaken up when they are taken into custody. In April of 2018, ICE raided a meatpacking plant in rural Tennessee and arrested 97 workers, the largest workplace raid in a decade.¹² The day immediately following this raid, 550 children were absent from Hamblen County school district.¹³ This number comprised nearly 20% of the county's Hispanic student population.¹⁴ The following Monday, 177 students were still missing from school.¹⁵

The UCLA study stated that a staggering 57.4% of teachers and school administrators reported an increase in absenteeism related to detainment and deportation fears.¹⁶ Further, a 2013 Human Impact Partners study discovered that 33% of undocumented parents stated that their child was eventually withdrawn from the education system completely prior to graduation high school, while only 24% of students whose parents were legalized faced the same outcome.¹⁷ In addition to disrupting the educational process, many of these children are deprived of other crucial resources when they are absent from schools, such as meals, stability, and mental and emotional support systems.

Schools, students, parents, and the community need to have respective plans in place to lawfully address potential immigration issues which may arise throughout the year. With the start of a new academic year around the corner, schools

should first and foremost review federal immigration and records disclosure laws, school admission and enrollment policies, and emergency contact/emergency caregiver procedures. As a direct line of support for your students, school districts and charter schools alike should be aware of their responsibilities under federal immigration law, and tailor their policies and action plans in ways that provide the most stability and continuity for students. In the 1982 landmark Supreme Court decision of *Plyler v. Doe* it was held that schools are required to provide education to all students, regardless of immigration status, and are prohibited from requiring certain types of proof of residency. In conformity with the benefits offered by educational institutions, a 2011 "sensitive locations" memorandum, published by ICE, committed the agency to not arresting, interviewing, searching, or surveying targets of investigations on school, church, or hospital properties.¹⁸ However, the memo provides the agency with a great deal of discretion in obtaining prior approval for such actions, as well as several exceptions. As such, students have been approached by ICE agents at bus-stops in full view of their classmates and parents have been detained after dropping their children off or picking them up from schools.

Further, the actions prohibited from undertaking on school grounds do not include activities such as obtaining records, documents and similar materials from school officials or employees, providing notice to

¹¹ *Id.*

¹² Scown, Caroline, *Countering the Effects of Trump's Immigration Policies in Schools*, CENTER FOR AMERICAN PROGRESS, May 3, 2018, available at <https://www.americanprogress.org/issues/education-k-12/news/2018/05/03/450274/countering-effects-trumps-immigration-policies-schools/>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *U.S. Immigration Enforcement Policy and its Impact on Teaching and Learning in the Nation's Schools*, *supra* article 2.

¹⁷ Satinsky, Hu, Heller, & Farhang, *Family Unity, Family Health: How Family-Focused Immigration Reform will Mean Better Health for Children and Families*, HUMAN IMPACT PARTNERS, June 2013, available at <https://www.familyunityfamilyhealth.org/uploads/images/FamilyUnityFamilyHealth.pdf>.

¹⁸ *Enforcement Actions at or Focused on Sensitive Locations*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, Oct. 24, 2011, available at <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>.

officials or employees, serving subpoenas, engaging in Student and Exchange Visitor Program (SEVP) compliance and certification visits, guarding or securing detainees, or participating in official functions or community meetings.¹⁹ Thus, while it is unlikely that ICE personnel will seek to conduct investigations or arrests on school campuses, officials may be faced with agents attempting to access student records. Legally, federal law prevents schools from sharing student information, including citizenship status, with various third parties. The Family Educational Rights and Privacy Act (FERPA) protects against the sharing of identifying student information except in a few specific circumstances which likely would not apply to immigrant students unless the student has committed a crime. However, one exception to the general commandments of FERPA is information sought “in compliance with a court order or lawfully issued subpoena.” Thus, school administration presented with a valid court order or subpoena requiring the relinquishment of such information must comply, after making a reasonable effort to notify the parent in advance of such disclosure (unless the court order or subpoena related to a federal jury investigation or law enforcement purpose relating to domestic or international terrorism). While FERPA also contains an exception for what is coined “directory information”, the definition of what constitutes “directory information” is left to the discretion of Local Education Agencies (LEAs). Thus, it is advisable for schools to develop policies which prevent disclosure of any student information without a valid court order or subpoena.

As previously stated, many immigrant parents fail to provide correct or complete contact information for their children, which can result in inadequate care and support being rendered to students during

emergency or other atypical situations. As such, schools should consider adopting policies which permit parents to designate another responsible adult as Power of Attorney and thereby be able to provide care and make decisions for their children during a crisis. Particularly, in preparing for the event of arrest or detainment of a parent while the child is at school, the power of attorney should allow an adult, other than the parents, to retrieve the child from school and thus help to ensure that the provision of student care is seamlessly transitioned from school campus to after-school hours. It should be noted that if a parent is detained as a result of immigration enforcement, schools are not required to release the student to ICE or other immigration officials.

Schools have a right to limit the amount of disruption to the educational environment and to ensure the safety of students and staff alike. This can include denying campus entry to certain individuals during school hours. In any event, school officials should require ICE personnel to comply with any current policies applicable to campus visitors. This may include having ICE personnel sign in prior to granting access, requiring proof of valid identification as well as a statement of purpose, and obtaining approval from the site administrator or Superintendent. In the event the agent produces a judicial warrant or court order, immediate access to the subject student must be granted.

Additionally, staff and faculty should be adequately trained in lawful interactions with ICE personnel. While there is nothing mandating that schools assist ICE officials in their immigration investigations, under Title 18 United States Code section 111, it is unlawful for a personal to willfully resist, oppose, impede, or interfere with any officer of the U.S. government who is discharging or attempting to discharge his or her official duties. Understanding what it means to avoid

¹⁹ <https://www.cbp.gov/faqs/what-enforcement-action>

interfering with ICE functions is important. Your school's legal counsel can help draft an immigrant parent and student policy which strictly tracks current federal law and Supreme Court precedent and provides faculty and staff immigration issue training which gives directives on the lawful interaction with ICE and other various law enforcement officials. Additionally, each school should have a designated "response team", adequately prepared to specifically handle immigration issues, including creating and executing emergency shelter plans for students, provide counseling and support services, and coordinate with immigrant resource agencies and child welfare service providers. While response teams should be the core group consulted in dealing with immigration issues as they arise, every member of the school community should be trained to handle cursory exchanges with ICE agents.

Finally, schools may seek to take advantage of the "sensitive location" designation of schools acting as a resource center, connecting families with local immigrant resource agencies and organizations through open houses. Schools should be careful, however, to not act as legal counsel for any families seeking guidance on immigration matters. Schools may utilize the opportunity have reputable immigration organizations speak to families at open houses.

Having a plan in place and training faculty and staff on their responsibilities in dealing with immigration issues as they pertain to students and parents is crucial in ensuring not only legal compliance, but student wellbeing. We advise that you contact your attorney to consult on the drafting of any policy concerning immigration issues and possibly obtain school official training. Finally, as a trusted caregiver and advisor of your students, we advise that you help make parents aware of their rights and resources concerning immigration policies and practices.

Have Questions? We'll Answer.

If you have any questions concerning the content in this e-newsletter or any other school law matter, please contact Jordan Trimble at jtrimble@slh-law.com or at (210) 538-5385.