Immigration Law for School Attorneys

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The ABCs of Immigration for School Lawyers

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Immigration law frequently presents vexing challenges for U.S. public and private schools enrolling immigrant students. These challenges have become even more pressing this year due to the visibility of immigration in the political discourse and dynamic policy changes at the national and local levels. Attendees and readers interested in more advanced issues at the intersection of current education and immigration law and policy are referred to the written materials accompanying the panel on "Federal Immigration Enforcement: Sanctuary Districts, Safe Zones, Records, *Plyler* and Employees." By contrast, this panel and these written materials are intended to provide education lawyers with an understanding of fundamental concepts in U.S. immigration law, and is recommended for reading prior to attendance at the advanced panel.

I. Immigration Law for Education Lawyers

Immigration law is a complex subject that cannot be fully explained in a short article. However, it is possible to explain some basic concepts in immigration law and to provide a framework for better understanding the larger context and individual immigration issues that arise within the world of education. This article will therefore focus on providing this basic framework before proceeding to a more nuanced discussion of the key, frequently arising immigration issues in the education context. These issues include:

- The role that immigration status should play in school residency determinations
- Whether a school can play a role in sponsoring a student for a visa in the United States
- How foreign exchange students should be treated by a public or private schools
- The status of existing programs under U.S. immigration law that are most relevant to undocumented students

II. The Legal Framework Governing U.S. Immigration Law

The overarching statute governing U.S. immigration is the Immigration and Nationality Act ("INA"), which is codified at 8 U.S.C. §§ 1101, et seq. The statute is more commonly referenced by the specific provision of the INA, which begins at Section 101. The regulations governing immigration law promulgated by the Department of Homeland Security ("DHS"), which is the successor to the INS, are codified at 8 C.F.R. §§ 1, et seq. Regulations applicable to immigration law promulgated by the Department of State can be found at Title 22 of the Code of Federal Regulations ("C.F.R."), and applicable regulations promulgated by the Department of

Labor can be found at Title 20 of the C.F.R. Additional regulations applicable to U.S. immigration law can also be found at 6 C.F.R. §§ 1, et seq.

Much like education law, U.S. immigration law evolves and changes rapidly in response to new policy memoranda and interpretations issued by relevant federal agencies as well as case law. While "Dear Colleague" letters do not exist in immigration law, it is not uncommon for federal agencies to issue policy memoranda establishing significant new guidelines governing the practice of immigration law. Many of these memoranda toe a tenuous line between interpretive and legislative rules under the Administrative Procedures Act ("APA"); in general, the latter would require notice and comment whereas the former would not, and numerous "interpretive rules" have been challenged on the grounds that they are legislative rules requiring notice and comment.

Individuals in removal proceedings generally appear before the Immigration Courts, which are Article 2 courts. These courts are situated within the Executive Office of Immigration Review ("EOIR"), which is in turn a part of the Department of Justice. Appeals from the immigration courts are heard by the Board of Immigration Appeals ("BIA"), and most appeals from BIA decisions must be taken directly to a U.S. Circuit Court of Appeals on a Petition for Review. Cases before the immigration court can often take years to wind their way through these tribunals due to extensive backlogs. The current administration has indicated the intent to reduce these backlogs through a variety of means, but doing so would require a commitment of significantly more resources to the EOIR.

With respect to case law, school lawyers examining immigration issues only tangentially should also be aware of the Supreme Court's decision in *Plyler v. Doe*, 457 U.S. 202 (1982) and ensuing guidance from the Department of Education ("DOE"). The most recent guidance from the DOE is a 2014 "Dear Colleague" letter and associated FAQ.[1] Additionally, individual state boards of education may also issue clarifying guidance to ensure that public school's enrollment policies comply with *Plyler*.[2]

III. Basic U.S. Immigration Law Concepts

Terms such as "legal or lawful status," "visa," "immigrant, and "nonimmigrant" have very specific meanings under U.S. immigration law. Education lawyers who may occasionally encounter these terms while addressing an issue with a tangential immigration component should have a better and more precise understanding of their meaning.

A visa is an entry document issued to an individual outside the United States by a U.S. Consulate. A valid visa or other entry document is generally a prerequisite for an individual to enter the U.S. legally; however, a visa does not guarantee admission to the U.S. as U.S. Customs

[1] May 8, 2014 Dear Colleague Letter, available at: https://www.justice.gov/sites/default/files/crt/legacy/2014/05/08/plylerletter.pdf.

[2] See, e.g., Illinois State Board of Education August 11, 2016, Registration Guidance for the 2016-17 School Year, available at: https://www.isbe.net/Documents/guidance_reg.pdf.

and Border Protection ("CBP") agents possess broad discretion under the INA to deny admission to a foreign national.[3]

Once a person who is not a U.S. Citizen or Legal Permanent Resident has legally entered the United States (also referred to as entering with inspection), the person acquires a legal "status" in the U.S. Individuals entering with a temporary visa are said to hold temporary "lawful status." Lawful status has a regulatory definition at 6 C.F.R. Section 37.3 and generally refers to a time period covered by an I-94, assuming that the individual's actions in the U.S. comply with the limitations of such status. For example, to maintain "lawful status" in the U.S., an individual entering on an F-1 student visa must generally maintain full-time attendance at school and refrain from unauthorized employment in the U.S. An individual's lawful status is often demonstrated through a document called an I-94. This is a document issued to a foreign national by CBP after the person has been legally admitted and entered with inspection. Of course, following the directives of *Plyler*, schools should not be asking for an individual's I-94 to verify lawful status because this is irrelevant to enrollment and the residency determination.

An "immigrant" visa is issued to an intending permanent resident of the United States. Many individuals processed abroad through a U.S. Consulate for permanent residency in the U.S. are issued an immigrant visa, which is stamped into their passport. Upon initial admission (entry with inspection) with this immigrant visa, the traveler is processed by CBP and admitted as a permanent resident. The individual then receives a "green card" in the mail a few weeks later. Refugees admitted to the United States are often admitted following such procedures.

A "green card" is the colloquial term for a document that serves as evidence of legal permanent residency in the U.S. Although the card is no longer green in appearance, this terminology has persisted. The technical term for this card is an I-551, and actual cards may be valid for 2 years or 10 years, with varying procedures for renewal/extension contingent upon the underlying basis for permanent residency.

DACA, or the Deferred Action for Childhood Arrivals program, was created in 2012 as a result of policy changes by the Obama administration. DACA protection is not a lawful status, but instead temporarily provides certain individuals who entered the U.S. before the age of 16, were illegally present in the U.S. on June 15, 2007, and meet several other guidelines with temporary protection from removal and the ability to apply for work authorization. On September 5, 2017, the Trump administration terminated this program.

F-1 status is reserved for foreign students admitted to U.S. educational institutions that have registered with the federal government's SEVIS (Student Exchange Visitor Information Systems) database. Under existing regulations, only high schools, ESL programs, and higher education institutions are eligible to enroll in the SEVIS program and to issue F-1 visas. Public high schools are authorized to enroll in SEVIS and to facilitate the issuance of F-1 visas to international students paying for the cost of attendance at school in the U.S. A student who has

[3] A CBP link available at https://help.cbp.gov/app/answers/detail/a_id/757/~/friend%2C-relative%2C-etc.-denied-entry-to-the-u.s. illustrates common reasons why a CBP officer might deny admission to an individual with a valid visa.

been admitted into one of these programs is issued a Form I-20, which he/she then presents to a U.S. Consulate or the Department of Homeland Security in connection with an application for an F-1 visas or F-1 status.

J-1 visa holders are exchange visitors to the U.S. whose admission is generally designed to promote cultural exchange. Teens admitted as exchange students are typically authorized to attend a public school if they meet other residency requirements.

IV. The Agencies That Enforce, Interpret, and Administer U.S. Immigration Law

Many attorneys and individuals who do not practice immigration law continue to refer to the agency tasked with enforcing and administering the immigration laws as the 'INS'. However, the INS ceased to exist in 2003 as a result of the Patriot Act and its large-scale reorganization of the federal government.

The single most important change resulting from this statute was the establishment of the Department of Homeland Security ("DHS"), the dissolution of the INS, and the diffusion of the former INS's responsibilities across different agencies within the DHS. The Patriot Act established the following agencies within DHS and assigned the responsibilities below to them:

- USCIS, or U.S. Citizenship and Immigration Services, is tasked with adjudicating applications for immigration status filed by individuals within the U.S. and other petitions filed on behalf of foreign individuals either inside or outside the U.S. The USCIS Asylum Office is also tasked with adjudicating applications for asylum filed by individuals in the U.S.
- CBP, or Customs and Border Protection, is tasked with administering and enforcing the immigration laws at the border (among other tasks), whether land-based or through an airport.
- ICE, or Immigration and Customs Enforcement, is tasked with identifying violators of immigration law. The government's prosecutorial authority to place individuals suspected of violating U.S. immigration law in removal proceedings rests with this agency. ICE is also tasked with identifying fugitives and prosecuting violations of workplace enforcement requirements that apply to all employers (including school districts), such as the requirement to complete an I-9.
- I-9/workplace enforcement responsibilities within ICE rest with a specific division known as HSI, or Homeland Security Investigations.

As described in a previous section, the Department of Justice ("DOJ") also possesses specific immigration responsibilities. The Executive Office of Immigration Review ("EOIR") houses the vast network of immigration courts throughout the U.S. and the Board of Immigration Appeals ("BIA"). The U.S. Court of Appeals and Supreme Court also play an important role in interpreting U.S. immigration law.

V. The Constitutional Right to Attend School

A fundamental principle that has been enshrined in education law since the early 1980s is the right to a public school education, regardless of immigration status. This right stems from the U.S. Supreme Court's decision in *Plyler v. Doe*, 457 U.S. 202 (1982), which held that the denial of a free public school education to immigrant children violates the Equal Protection Clause of the 14th Amendment to the Constitution. While many excellent summaries of the Court's decision abound,[4] a short summary of the facts is that the Texas legislature in 1975 authorized local school districts to deny enrollment in public school to foreign-born children who were not legally admitted to the United States. A specific school district in Texas then adopted a policy requiring foreign-born students to pay tuition if they were not "legally admitted." A group of children who were unable to demonstrate legal admission to the U.S. then filed suit through the Mexican American Legal Defense Education Fund and challenged the Texas law at issue. This challenge wound its way through the courts and ultimately resulted in a watershed decision by the Supreme Court, which found that the different treatment of undocumented children and other children with legal status was subject to a higher level of scrutiny under the Equal Protection Clause in light of the fundamental importance of education. The Court also held that Texas had failed to demonstrate a compelling interest in this unequal treatment of different groups based on immigration status.

Since this decision, many state boards of education have issued further guidance clarifying the application of *Plyler* to their residency determinations. What has emerged is a principle that any policy, which has a potential chilling effect on the enrollment of undocumented students, risks violating *Plyler* and is subject to legal challenge. Examples of state laws/local policies that have been challenged or barred either in court or by a state board of education include:

- A requirement that parents enrolling their children provide a Social Security Number either for themselves or for their children.
- A requirement that parents provide an official, U.S. or state government issued ID during the enrollment process.
- A requirement that a school district collect information about the immigration status of students and subsequently share this information with state authorities, even if such information is not directly used for removal or enforcement purposes.
- Barring enrollment to a student who had overstayed a tourist visa and was therefore illegally present in the United States.

The dichotomy between the directives of federal immigration law and the role of school districts can be confusing, but must be clearly understood. For example, federal immigration law does not permit an individual on a tourist visa (a B-1 visa) to enroll in public school or to otherwise engage in a course of study at an elementary, middle, or secondary school, or at an institution of

[4] *See, e.g.*, https://www.americanimmigrationcouncil.org/research/plyler-v-doe-public-education-immigrant-students, https://www.aclu.org/blog/immigrants-rights/school-everyone-celebrating-plyler-v-doe.

higher education.[5] The consequences of doing so for that individual can be severe, as subsequent attempts to change legal status in the U.S. can be denied and an individual can be placed in removal proceedings for violating their status. However, what must be understood is that the school district should not play a role in enforcing this provision of federal immigration law. Even more specifically, school districts should not be adopting policies that would require an individual to disclose his or her immigration status. It is, of course, plausible that an individual could voluntarily disclose information about his or her immigration status during the course of a residency determination that becomes relevant to determining whether that individual is a resident of the district. For example, an individual who voluntarily discloses that he/she is only temporarily visiting the U.S. and intends to leave in a few months may be deemed to not be a resident of the district based on this disclosure. However, requesting immigration status documentation to verify the person's legal presence in the U.S. would violate *Plyler*, and school districts should not view themselves as responsible for enforcing the directives of federal immigration law.

VI. Current Status of the DACA Program

(i) Initial establishment of the DACA program

The DACA program was established by the Obama administration in 2012 and allowed certain undocumented individuals who entered the United States as youth to temporarily apply for "deferred action."[6] Critically, DACA was established by executive order issued by the President rather than through legislation. DACA does not provide lawful status in the U.S., and instead provides temporary protection from removal and temporary work authorization. The Department of Homeland Security's complete list of DACA eligibility criteria for potential applicants included:

1. You were under the age of 31 as of June 15, 2012;
2. You came to the United States before reaching your 16th birthday;
3. You have continuously resided in the United States since June 15, 2007, up to the present time;
4. You were physically present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS;
5. You had no lawful status on June 15, 2012;
6. You are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
7. You have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

[5] https://www.ice.gov/doclib/sevis/pdf/Nonimmigrant%20Class%20Who%20Can%20Study.pdf; https://www.uscis.gov/working-united-states/students-and-exchange-visitors/students-and-employment/special-instructions-b-1b-2-visitors-who-want-enroll-school.

[6] A complete list of the program requirements can be found at: https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca#guidelines.

Eligibility for the benefit is also discretionary, *i.e.*, DHS can exercise its discretion not to grant DACA protection even if an individual is otherwise eligible and meets these criteria.

Estimates of the number of individuals enrolled in the DACA program vary; however, many observers indicate that approximately 800,000 individuals are enrolled in the program. One of the key benefits that the DACA program provided is the ability to qualify for work authorization, which in turn allowed individuals to apply for Social Security Numbers and, in most states, other benefits such as Drivers Licenses.

(ii) Termination of the DACA program

After intense speculation and uncertainty, President Trump terminated this program on Sept. 5, 2017. While the President indicated on the campaign trail that he would terminate the DACA program immediately after becoming President, he chose not to do so and instead indicated that he would treat DACA recipients "with great heart." However, in June 2017, several states that had initiated litigation against a 2014 program expansion by President Obama wrote a letter to the President asking him to terminate the 2012 DACA program. The signatories, who were the Attorney Generals or Governors of ten states[7], stated that they would amend their complaint in federal court to request that the 2012 program be declared unconstitutional. Acting on this deadline, and concluding that it would be unable to defend the program in court, the Trump administration announced termination of the program on September 5, 2017, following these parameters:

- The administration would no longer accept initial DACA requests from individuals who had never previously been granted DACA protection.
- Individuals whose DACA protection would terminate between September 5, 2017, and March 5, 2018, had to apply to renew such protection before October 5, 2017.
- Individuals whose DACA protection expired after March 5, 2018, were ineligible to extend their DACA protection.
- DACA applications that had been filed as of the announcement date, whether as initial applications or renewals, would be adjudicated following usual procedures.
- Previously issued employment authorization cards would remain valid until the date listed on the face of the card.

The practical impact of this announcement is that individuals will begin to lose their DACA protection in 2018, with all "DACAmented" individuals losing such protection by 2020, barring another change to the law. A person whose DACA protection lapses becomes subject to removal, and in light of the Trump administration's suspension of the Obama administration's enforcement priorities, is as legally at risk of removal as any other individual lacking legal status in the U.S.

Additionally, many DACA recipients may also be at risk because the program required the voluntary disclosure of an applicant's information to the federal government in the course of submitting such an application. While the Obama administration stated that information gained

[7] After initially demanding that the President terminate the program, the state of Tennessee subsequently chose to reserve itself and removed itself from the group of states making this demand.

from a DACA application would not be utilized for enforcement purposes unless it met certain enforcement priorities, this is a non-binding commitment that the administration reserved the authority to modify at any time.

Multiple lawsuits have been filed in response to the President's actions. 15 states filed a lawsuit in the federal district court for the Eastern District of New York contending that termination of the program violates the Equal Protection Clause because it was motivated by racial animus. Additionally, the complaint alleges that the termination of this program violates the Administrative Procedures Act and fails to meet due process requirements.[8] Separately, the state of California filed a lawsuit in federal district court in the Northern District of California contending that the administration's termination of the program violated the Administrative Procedures Act and failed to meet basic Fifth Amendment due process requirements.[9]

In light of such litigation and at least 4 legislative proposals in Congress relevant to individuals enjoying DACA protection, it is unclear what the future holds for the DACA program and individuals enjoying such protection.

[8] https://ag.ny.gov/sites/default/files/new_york_et_al._v._trump_et_al_-_17cv5228.pdf
[9] A copy of the complaint can be found at: http://universityofcalifornia.edu/sites/default/files/UC-DACA-Complaint.pdf.