

PROCEDURES FOR PROTECTING SCHOOL-AGE CHILDREN WHOSE PARENTS MAY BE DETAINED BY ICE

In the current political climate, it is critical that school-based procedures are in place to protect children whose parents may be detained by Immigration and Customs Enforcement (“ICE”) during the school day. There is no uniformly adopted procedure applicable to MA public schools that allows for parents to permit other adults to pick their children up from school¹. However, individual schools and districts typically have procedures in place that permit parents to authorize another adult to pick up their child from school. If properly managed, these procedures can be used effectively without disclosing personal information about family members’ immigration status. This memorandum outlines a two-pronged process that parents and *supportive* schools/districts might follow to help ensure that children of immigrants are taken care of should their parents be detained. Churches and other trusted community organizations may be helpful in implementing the suggested procedures and serving as repositories of key documents for impacted families.

The first prong calls for the school/district to establish a non-stigmatizing procedure for parents to identify other adults who may pick up their children from school with minimal risk of disclosing personal information. Schools must inform parents of their right to “opt out” – to affirmatively deny permission for their child’s school to disclose “directory information”² – information maintained in the child’s education record that would generally not be considered “harmful” if disclosed without prior parental consent.³ The second prong calls for the parents to set up a conditional guardianship, power of attorney or designate a caregiver who will fill the role.

¹ Neither the Department of Education nor the Massachusetts Department of Education’s website contains any significant information regarding school pick-up procedures, or uniform procedures for designating and updating emergency contacts as of March 6th, 2017. *See generally*, www.ed.gov (last visited March 6, 2017); www.doe.mass.edu (last visited March 6, 2017).

² The students’ education records law known as the Family Educational Rights and Privacy Act (FERPA) states that:
Any educational agency or institution making public ‘directory information’ shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should *not be released without the parent’s prior consent*.

20 U.S.C.S. § 1232g(a)(5)(B) (emphasis added). Whether or not parents have been provided with notice of the school’s practices regarding “directory information” they should take affirmative steps to opt-out of the release of *any* “directory information” and make a record of their communication with the school.

³ 20 U.S.C. § 1232g(a)(5)(A); 34 C.F.R. § 99.3.

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It is important that the parent keep this document, along with any document that could identify one's immigration status, away from the school their child attends. Although the Family Educational Rights and Privacy Act (FERPA) protects certain personally identifiable information from disclosure without prior consent, ambiguous exemptions in the law do not provide certainty that law enforcement agencies will not compel the production of documents. By following the procedures outlined below, parents, schools, churches and other trusted agencies can establish an effective plan to help ensure that a child whose parent is detained during the school day is safely picked up from school by the person chosen by the parent without revealing personally identifiable information, and if necessary, placed in the care of the parent selected designated caregiver.

WHAT DO THESE PROCEDURES LOOK LIKE?

Procedures adopted by a *supportive* school/district should apply to *all families*, and be simple and non-demanding for school personnel and parents. The Orange County Public Schools' "Emergency Student Information Form" provides an example of a simple, effective and minimally demanding procedure. The form allows parents to update and provide additional emergency contacts and explicitly asks if the parents would like to grant permission for these individuals to pick up their child from school⁴. Other school districts allow parents to write a note to the school identifying an adult(s), with his/her contact information, who is authorized to pick

⁴See Orange Cty Public Schools, New Student Registration Packet, Student Enrollment Form: Emergency Student Form, 5-6, https://www2.ocps.net/UserFiles/Servers/Server_54619/File/Departments/Student%20Enrollment/New%20Student%20Registration/Student%20Registration%20Form%203%202023%202017%20online%20.pdf (last visited April 7, 2017).

ADDITIONAL CONTACTS

Last Name	First Name	Relationship	Contact Phone	Custody		Pick up
				<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
				<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
				<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No
				<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Yes <input type="checkbox"/> No

This chart provides schools with all the information they would need without requiring parents to reveal specific situations in which individuals could pick the child up, or any information regarding themselves, their child or the permitted adult that would reveal their immigration status.

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up their child from school. Typically, this information is entered into a data base to identify what adults may pick up which children⁵. Schools/districts should adopt procedures similar to these so that parents can arrange for their children to be picked up from school without unnecessary disclosure of personal information. To avoid attaching any stigma to the process while encouraging vulnerable families to avail themselves of the protection provided, schools should send out notices to *all* parents with instructions for updating permissions.

Schools that use these procedures will obtain information about individual students on forms that qualify as “educational records” under FERPA and which should not be disclosed⁶. However, to avoid any confusion regarding the status of this information and its protection⁷, parents should affirmatively exercise their right to “opt-out” of any disclosure of “directory information”⁸. To avoid any possibility that taking this action might identify students or immigrant parents without documents, the school should make an announcement about its “directory information” policy and the corresponding “opt-out” option available to all parents under FERPA. Adoption of these procedures should ensure that the school is able to contact the parent-designated individual(s), who is responsible for picking up the child should a parent be detained by ICE while the child is at school, without revealing the immigration status of any of the parties involved.

⁵ *Student Pickup Policy*, <http://lanier.tulsa.schooldesk.net/ForParents/StudentPickupPolicy/tabid/41351/Default.aspx> (last visited March 6, 2017).

⁶ See 20 U.S.C. § 1232g (4). The basic requirements for education records are that they contain information directly related to a student and that they are maintained by the educational agency or its agent. *Id.*

⁷ Confusion may occur with regards to whether the information provided, specifically the identity and addresses of emergency contacts, is “directory information” or an “education record”. Guidance posted on the Department of Education website states that, “[a]t the elementary/secondary school level, the parents’ names may also be considered “directory information.” Family Policy Compliance Office, *Family Educational Rights and Privacy Act (FERPA) and the Disclosure of Student Information Related to Emergencies and Disasters*. http://familypolicy.ed.gov/sites/fpco.ed.gov/files/FERPA_disaster_guidance_Recreated_508.pdf (last accessed March 7, 2017). Further, the guidance notes that “[u]nder FERPA, a ‘parent’ means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian.” *Id.* Therefore, the information provided on the emergency contact list could become “directory information” once a parent is detained and a student is in the custody of one of the listed emergency contacts.

⁸ See 20 U.S.C.S. § 1232g(a)(5)(B) described in fn. 2, *supra*. Whether or not parents have been provided with notice of the school’s practices regarding “directory information,” they should take affirmative steps to opt-out of the release of any so-called harmless “directory information” and make a record of their communication with the school.

WHAT HAPPENS AFTER THE CHILD IS PICKED UP FROM SCHOOL?

In preparation for the possibility of a parent's extended detention, the parent should identify an adult who is prepared to act as the child's guardian or caregiver. Documents should typically be prepared that establish either an individual who has power of attorney over the child or confer conditional guardianship of the child to an individual.⁹ However, Massachusetts law provides a more direct, simple procedure for a parent to designate a caregiver defined as "an adult with whom a minor resides."¹⁰ The law states: "A parent, legal guardian or legal custodian of a minor, by a *caregiver authorization affidavit*, may authorize a designated caregiver to exercise certain concurrent parental rights and responsibilities relative to a designated minor's education and health care..."¹¹ The parents should prepare and sign this simple 'caregiver authorization affidavit' in the presence of two witnesses (neither of whom is the caregiver), obtain the signature of the adult caregiver, and have the document notarized. The caregiver authorization affidavit may be valid for up to two years, and may be reauthorized, amended, or revoked by the parent by notifying the caregiver in writing. Parents should not provide the child's school with copies of the caregiver authorization affidavit or guardianship documents. While any documents included in a student's education record may be protected from disclosure without prior parental consent under FERPA, ambiguities contained in the exemptions listed in law, and the effect that future legislation may have, dictate that parents should not provide any unnecessary documentation to schools which may have to comply with future subpoenas or requests from the U.S. Attorney General¹².

⁹ The validity of any conditions put on guardianship may vary by jurisdiction. E.g., in MA a minor's parent or current guardian may conditionally provide for another adult to become the child's guardian if such conditional guardianship is effected by will or other signed writing, attested by a minimum of two witnesses, and said parent or guardian may revoke or amend the appointment, and specify any limitations on the powers to be granted to the guardian. MASS. GEN. LAWS, c. 190B, §5-201, §5-202(a) (West 2017).

¹⁰ MASS. GEN. LAWS, c. 201F.

¹¹ MASS. GEN. LAWS, c. 201F, § 2 (emphasis added).

¹² 20 U.S.C. § 1232g(b) (2012) (outlining exceptions to FERPA). *See also, FERPA for Parents and Eligible Students: Frequently Asked Questions (FAQs)*,

http://familypolicy.ed.gov/sites/fpco.ed.gov/files/FPCO_Parents%20and%20Eligible%20Students%20FAQ.pdf (last visited March 6, 2017)(providing basic explanations of the various exceptions to FERPA).