STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

NEW YORK STATE EDUCATION DEPARTMENT
THE UNIVERSITY OF THE STATE OF NEW YORK

MARYELLEN ELIA
COMMISSIONER OF EDUCATION
PRESIDENT OF THE UNIVERSITY OF THE STATE OF NEW YORK

August 29, 2019

In February 2017, the New York State Office of the Attorney General ("OAG") and the New York State Education Department ("SED") issued guidance on school districts' duty to safeguard the rights of all students—including undocumented students—to receive a public education without fear of intervention by federal immigration officials.[1] Following the issuance of that guidance, our agencies have received questions concerning the possibility that school resource officers ("SROs") might seek to interview students or obtain access to student records in order to convey information about their (or their families') immigration status to representatives of U.S. Immigration and Customs Enforcement ("ICE"). We write to provide supplementary guidance on this issue.

SROs are responsible for preventing crime and ensuring safety in primary and secondary schools. Whether they are employed by a local police department, a sheriff's office, or a school district, SROs work with school administrators to preserve a safe learning environment for students, teachers, and staff.[2] As set forth in detail below, regardless of their employment status vis-à-vis a school district, SROs may be subject to the same restrictions as school officials with respect to (i) detaining or interrogating students, and (ii) maintaining the privacy of student education records and information.

In past guidance, our agencies have made clear that school districts must ensure that all students within the compulsory school age attend upon full-time instruction, and that undocumented children, like U.S. citizen children, have the right to attend school full-time as long

[1] *See* MaryEllen Elia and Eric T. Schneiderman, *"Dear Colleague" Letter*, New York State Education Department and New York State Office of the Attorney General (Feb. 27, 2017), available at https://ag.ny.gov/sites/default/files/2017-02-15_oag-sed_letter_re_ice_2.25.17_final.pdf.

[2] *See* U.S. Dep't of Justice, *Supporting Safe Schools: What is a School Resource Officer?*, https://cops.usdoj.gov/supportingsafeschools.

as they meet the age and residency requirements established by state law.[3] Actions or policies, even facially neutral ones, that significantly deter undocumented students from receiving such a full-time education can expose school districts to liability.[4] In the event that a school district permits SROs on its school campuses, the district is similarly responsible for ensuring that those SROs do not significantly deter the rights of students to receive an education. To clarify our February 2017 guidance as it applies to SROs, we again address the two topics of detaining/ interrogating students and accessing student records or information.

An SRO's detention or interrogation of a student in order to determine the student's immigration status could expose a school district to liability. As stated in our prior guidance letter, the New York Family Court Act ("NYFCA") and other laws generally prevent law enforcement officers from removing a student from school property or interrogating a student without the consent of the student's parent or parental relation. Accordingly, in the event that ICE or other federal immigration officials appear at a school seeking access to a student, our agencies recommend that a school district advise all staff to contact the superintendent and the district's attorney for assistance in meeting its duties under the New York Education Law, *Plyler*, and NYFCA.

The same principle governs SROs working on school campuses. As you may be aware, some police and sheriff's departments have agreements with ICE or other federal immigration agencies to share information concerning the immigration status of individuals their staff encounter. Our agencies caution districts that SROs should not detain students or otherwise interrogate them for the purpose of determining the students' (or their families') immigration status, as such status is irrelevant to the school safety objectives an SRO is tasked with ensuring. Such questioning by an SRO – or the absence of a district policy prohibiting such questioning – could subject the district to liability for significantly deterring a student's right to obtain an education, as set forth above. Furthermore, if such questioning were predicated upon a student's perceived race, nationality, color, or native language, an SRO's action could also subject a district to liability under other civil rights laws.[5]

---

[3] *See supra note* 1; *see also* Cosimo Tangorra, Jr., "*Dear Colleague" Letter,* New York State Education Department (Sept. 10, 2014), available at http://www.p12.nysed.gov/sss/documents/EducationalServicesforRecentlyArrivedUnaccompaniedChildren.pdf.

[4] *See Hispanic Interest Coalition v. Gov. of Ala.,* 691 F.3d 1236, 1247 (11th Cir. 2012) (holding unconstitutional a facially neutral policy that "significantly deters undocumented children from enrolling in and attending school") (citing *Plyler v. Doe*, 457 U.S. 202 (1982) (establishing a constitutional right to a free public education for undocumented and non-citizen students, and holding that school districts may not deny students a free public education on the basis of their undocumented or non-citizen status, or that of their parents or guardians)); *see also Appeal of Plata*, 40 Ed. Dep't Rep. 552, Decision No. 14,555.

[5] *See, e.g.*, Title VI, Civil Rights Act of 1964, Pub. L. No. 88-3520, 78 Stat. 252 (1964) (codified as amended at 42 U.S.C. § 2000d).

Furthermore, the Fourth Amendment to the U.S. Constitution imposes limitations on an SRO's ability to question and detain students. An SRO must have, at minimum, reasonable suspicion that the student has violated a school policy or committed an illegal act that threatens the "special needs of school safety" to warrant such detaining and questioning.[6] In light of the constitutional right of undocumented students to obtain a public education, a student's immigration status alone could not amount to a violation of school policy and has no bearing upon school safety. Accordingly, such detention/interrogation by an SRO could expose a school district to liability for a failure to train and supervise an SRO who engages in unconstitutional practices. This risk of exposure may exists even if the SRO is formally employed by a police or sheriff's department, and not directly by the district.[7]

Pursuant to the newly added subdivision 10 of Education Law 2801-a, if a school district uses any SRO on campus, such use must be formalized through a "written contract or formal memorandum of understanding" between the district and the local law enforcement department.[8] For the reasons set forth above, our agencies strongly recommend that districts incorporate into those contracts or MOUs policies and procedures to prohibit SROs from detaining or questioning students about their immigration status.

An SRO's access or re-disclosure of a student's educational records could jeopardize a school's federal funding. Our prior guidance letter advised that, should a school district receive a request from federal immigration officials to access student records or information contained therein, the district should immediately consult with its attorneys in order to ensure compliance with the Family Educational Rights and Privacy Act ("FERPA"). FERPA generally prohibits

---

[6] *See* U.S. CONST. amend. IV; *see also In re Gregory M.*, 82 N.Y.2d 888, 594 (1993) (holding that the lower "reasonable suspicion" standard for searching and questioning students only applies where the search is "conducted by school officials for the special needs of school security and not for a criminal investigative purpose"); *see also* N.Y.S.E.D. Counsel's Opinion 148 (Feb. 23, 1965) ("The school particularly does not have custody of pupils for the purpose of authorizing law enforcement officers or other third parties to interrogate pupils or to remove them from the premises for any purposes whatever.").

[7] *See, e.g.*, *Gonzelez v. Albuquerque Pub. Sch.*, No. CIV 05-580 JB/WPL, 2006 WL 1305032, at *3 (D.N.M. Jan. 17, 2006) (denying defendants' motion to dismiss and holding that an SRO's questioning undocumented students about their immigration status could "interfere[] with the students' access to education"). The Albuquerque Public School District ultimately settled with the students for monetary damages and significant revisions to school policies and procedures. *See also K.W.P. v. Kansas City Public Schools*, 296 F. Supp.3d 1111, 1120-21 (W.D. Miss. 2017) (denying summary judgment on a student's claim that school officials failed to properly train and supervise an SRO who detained the student in violation of his Fourth Amendment rights); *cf. Benacquista v. Spratt*, 217 F. Supp. 3d 588, 601-02 (N.D.N.Y. 2016) (denying a motion to dismiss a student's claim that the school district failed to act or supervise an SRO).

[8] *See* Educ. Law § 2801-a(10). At its July 2019 meeting, the Board of Regents adopted regulatory amendments consistent with the changes to Section 2801-a(10) on an emergency basis. *See* 8 N.Y.C.R.R. § 155.17(c)(xi)(a) (*available at* http://www.regents.nysed.gov/common/regents/files/719p12a2.pdf). Additionally, any such contract or memorandum of understanding must "clearly delegate the role of school discipline to the school administration." Educ. Law § 2801-a(10); *see also* 8 N.Y.C.R.R. § 155.17(c)(xi)(a).

educational agencies and institutions—*i.e.*, school districts and their schools—that receive federal funds from releasing personally identifiable information ("PII") from a student's educational record without written consent from a parent/eligible student over the age of eighteen.[9]

The same general principles apply in the event that an SRO, operating on a school campus, seeks access to a student's educational records for the purpose of determining the student's immigration status. Unlike federal immigration officials, an SRO may—under certain circumstances—be considered a school official who is permitted access to student educational records and PII, without student/parental consent, pursuant to FERPA. In order to qualify as such a school official, however, an SRO must: (i) perform an institutional service for which the school or district would otherwise use employees (*e.g.*, ensuring school safety); (ii) be under the "direct control" of the school or district regarding the use and maintenance of education records—*e.g.*, through a written contract or MOU—that establishes data use restrictions and protection requirements; (iii) be subject to FERPA's use and re-disclosure requirements limiting the use of student PII to the purpose for which the disclosure was made—*i.e.*, to promote school safety—and prohibiting re-disclosure of such PII to others; and (iv) meet the criteria specified in the school or district's annual notification of FERPA rights for being school officials.[10]

Significantly, SROs who qualify as school officials may only use PII for the legitimate educational purpose for which the information was sought—that is, to promote school safety and the physical security of students. Further, an "SRO who is acting as a school official under FERPA may not re-disclose, without appropriate consent, PII from education records to outside parties, including other employees of his or her police department, who are not acting as school officials," unless such re-disclosure falls into a narrow FERPA exemption.[11] In light of the constitutional right of all students—including undocumented students—to obtain a public education, an SRO's request to access educational records to determine a student's immigration status would not constitute a legitimate educational purpose authorizing such access. Similarly, an SRO who managed to obtain such student information is not authorized to re-disclose that information to other law enforcement officers or federal immigration officials.

As noted above, districts that employ, contract with, or otherwise retain SROs to operate on their campuses, must enter written contracts or MOUs with the local law enforcement departments from which those SROs originate. Our agencies strongly encourage districts to incorporate into such contracts or MOUs restrictions on accessing and re-disclosing student PII in keeping with the principles set forth above. Districts should also ensure that their annual notification of FERPA rights to parents and communities clearly discloses (i) the district's

[9] *See* 20 U.S.C. §§ 1232g(b)(2)(A), 1232g(d).

[10] *See* 34 C.F.R. § 99.31(a)(1)(i); *see also* U.S. Dep't of Education, Privacy Technical Assistance Center, *School Resource Officers, School Law Enforcement Units, and the Family Educational Rights and Privacy Act (FERPA)* ("SROs and FERPA"), Question 15, at pp. 11-12, available at: https://studentprivacy.ed.gov/sites/default/files/resource_document/file/SRO_FAQs_2-5-19_0.pdf.

[11] *See id.*, SROs and FERPA, at pp. 11-12.

directory information policy, to permit parental opt-out, and (ii) which categories of individuals operating on school campuses are generally considered school officials with legitimate educational interests in education records.

SED and OAG are committed to ensuring that all students in New York enjoy a safe and supportive learning environment, regardless of their national origin or immigration status. SROs can perform an important role in maintaining this safe environment. Our agencies advise each school district to develop clear training protocols and supervisory policies in keeping with the principles set forth in this letter and our prior joint guidance, and to incorporate such policies into the required contracts or MOUs governing the activities of any SROs working at a district's school campuses. Thank you again for your dedication and hard work to support students, families and communities in our state.

Sincerely,

Commissioner of Education
President of the University of the State of New York

Letitia A. James
Attorney General