



Promoting a Safe and Secure Campus for All

Guidance to Assist New Mexico's Colleges and Universities in
Responding to Immigration Issues

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Introduction

New Mexico's higher education system includes five public segments: (1) the research institutions—The University of New Mexico (UNM), New Mexico State University (NMSU), and the New Mexico Institute of Mining and Technology (Tech); (2) the comprehensive institutions—Eastern New Mexico University (ENMU), New Mexico Highlands University (NMHU), Northern New Mexico College (NMMC), and Western New Mexico University (WNMU); (3) the branch and independent community colleges; (4) the tribal colleges; and (5) the New Mexico Military Institute.¹ Higher education in New Mexico also includes private nonprofit colleges and for-profit institutions.

In total, the State's colleges and universities enroll more than 100,000 students from a wide range of backgrounds.² As reported by the Migration Policy Institute, there are currently 4,500 Deferred Action for Childhood Arrivals (DACA) recipients in New Mexico.³ The State's postsecondary schools effectively provide a safe and encouraging learning environment for all students, regardless of nationality or immigration status.

Threats of immigration enforcement on postsecondary campuses result in a disruption to the learning environment, a chilling effect on seeking postsecondary education, and a concern about the disclosure of student information held by state colleges and universities. New Mexico's colleges and universities can implement policies to support the educational rights and opportunities of all students and protect student information in accordance with state and federal law.

Although federal law does not protect undocumented immigrants from discrimination in admission to postsecondary education,⁴ New Mexico law expressly provides that “[a] postsecondary educational institution shall not deny admission to a student on account of the student's immigration status.”⁵ New Mexico also grants resident tuition rates regardless of immigration status as long as the student attended a New Mexico secondary school for at

¹ <https://hed.nm.gov/data-reports/data-reports-1/student-enrollment> (last accessed Jan. 7, 2025).

² *Id.*

³ <https://www.migrationpolicy.org/programs/data-hub/deferred-action-childhood-arrivals-daca-profiles> (last accessed Jan. 7, 2025).

⁴ See *Estrada v. Becker*, 917 F.3d 1298, 1308-09 (11th Cir. 2019) (addressing a university policy to verify the lawful presence of admitted students such that DACA recipients were not eligible to attend); *Regents of Univ. of Cal. v. Superior Court*, 276 Cal. Rptr. 197, 202 (Cal. Ct. App. 1990) (distinguishing *Plyler v. Doe*, 457 U.S. 202 (1982) based on the “significant difference between an elementary education and a university education”).

⁵ NMSA 1978, § 21-1-4.6(A) (2015).

least one year and either graduated from a New Mexico high school or received a New Mexico high school equivalency certificate.⁶ These provisions show New Mexico’s commitment to equal educational access and confidentiality of student records and information, regardless of a student’s immigration status. Indeed, “[u]ndocumented students enrich the diversity of higher education institutions through their varied national origins, languages, and religious backgrounds.”⁷

This Guidance is intended to assist higher education institutions in developing policies to provide equal educational opportunities in the context of increased federal immigration enforcement activities. This Guidance is not legal advice. College and university administrators should consult with their attorneys when formulating their policies and practices—and in addressing any questions—regarding the issues covered in this guide.

RESPONDING TO LAW ENFORCEMENT REQUESTS FOR ACCESS TO CAMPUSES AND RESIDENTIAL UNITS FOR IMMIGRATION ENFORCEMENT PURPOSES

Governing Law

Fourth Amendment Principles

Immigration agents, like law enforcement officers, must comply with the Fourth Amendment. In a public place, the Fourth Amendment allows law enforcement officers to approach an individual and ask questions without any level of suspicion as long as the officer does not act in a manner that would cause a reasonable person to believe they are not free to leave.⁸ This includes immigration officers asking questions about a person’s citizenship or immigration status.⁹ Officers may not detain an individual in the absence of reasonable suspicion.¹⁰ Law enforcement officers may make a warrantless arrest in a public place based on probable cause without violating the Fourth Amendment even in the absence of exigent circumstances.¹¹ Immigration officers are permitted to make a warrantless arrest if they witness a person entering or trying to enter the United States

⁶ Section 21-1-4.6(B).

⁷ Jennifer Safstrom, Note, *An Analysis of Sanctuary Campuses: Assessing the Legality and Effectiveness of Policies Protective of Undocumented Students and of Potential Government Responses*, 106 Geo. L.J. 1523, 1530 (June 2018).

⁸ *State v. Williams*, 2006-NMCA-062, ¶ 11, 139 N.M. 578.

⁹ *INS v. Delgado*, 466 U.S. 210, 220-21 (1984).

¹⁰ *Terry v. Ohio*, 392 U.S. 1 (1968).

¹¹ See *Payton v. New York*, 445 U.S. 573, 590-91 (1980). The New Mexico Constitution provides greater protection and requires probable cause and either exigent circumstances or a warrant to make a public arrest, *Campos v. State*, 1994-NMSC-012, ¶ 14, 117 N.M. 155, and the New Mexico Constitution applies to the actions of federal officers for purposes of determining whether evidence is admissible in a state court proceeding. See *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 18, 130 N.M. 386. These heightened constitutional protections, however, do not restrict the ability of federal agents to follow and enforce federal law. *Id.* ¶ 19.

unlawfully or if they have reason to believe the individual has committed a federal felony. Otherwise, they may only arrest someone without court order if they have reason to believe a person entered the country unlawfully and “is likely to escape before a warrant can be obtained.”¹²

The Fourth Amendment applies to law enforcement activities on the grounds of colleges and universities, but its application depends on the level of privacy associated with different locations on a campus. Student dormitories receive the same heightened Fourth Amendment protection reserved for homes.¹³ Entry into a home requires consent, a warrant, or probable cause together with exigent circumstances or another exception to the warrant requirement.¹⁴

Law enforcement officers do not need any particularized suspicion under the Fourth Amendment to be present on the parts of a university or college campus that are open to the public. Colleges and universities can, for educational, operational, or other purposes, use policies, restricted access signs, security key cards, and the like to limit certain areas to school personnel or to school personnel and registered students. Such restrictions would be applicable to law enforcement officers and immigration agents. Regardless of access restrictions, however, law enforcement officers are entitled to be on campus grounds to execute a warrant or to make a warrantless arrest if exigent circumstances exist.¹⁵

Protected Area Policies

Under previous presidential administrations, both Republican and Democrat, postsecondary schools, colleges, universities, and vocational or trade schools were considered “protected areas” warranting caution before any immigration actions were taken on such grounds.¹⁶ Healthcare facilities, including those on a college or university campus, were similarly designated protected areas.¹⁷ This policy did not prohibit enforcement actions at such locations but sought to avoid such activity on or near protected areas unless prior

¹² 8 C.F.R. § 287.8(c).

¹³ See *State v. Rodriguez*, 521 S.W.3d 1, 9 (Tex. Crim. App. 2017) (stating that a dorm room is analogous to an apartment or hotel room).

¹⁴ See *State v. Yazzie*, 2019-NMSC-008, ¶¶ 17-18.

¹⁵ See *State v. Veith*, 2022-NMCA-039, ¶ 20.

¹⁶ See Alejandro N. Mayorkas, *Memorandum, Guidelines for Enforcement Actions in or Near Protected Areas* (Oct. 27, 2021)

https://www.dhs.gov/sites/default/files/publications/21_1027_opa_guidelinesenforcement-actions-in-near-protected-areas.pdf (last accessed Jan. 7, 2024); see also U.S. Customs and Border Protection, DHS Protected Areas FAQs (April 11, 2024) <https://www.cbp.gov/border-security/dhsprotected-areas-faqs> (last accessed Jan. 7, 2025).

¹⁷ See Mayorkas, *Memorandum, Guidelines for Enforcement Actions in or Near Protected Areas* (Oct. 27, 2021), https://www.dhs.gov/sites/default/files/publications/21_1027_opa_guidelines-enforcementactions-in-near-protected-areas.pdf (last accessed Jan. 7, 2025).

approval was obtained from an appropriate supervisory official or exigent circumstances necessitated immediate action.

Because federal policies are subject to change and the current administration has announced a focus on immigration enforcement and mass deportation, educational institutions may decide to implement policies that would ensure a safe and effective learning environment for all students.

Warrants and Subpoenas for Immigration Enforcement

A college campus may have areas that are open to the public, areas that have restricted access, and areas, such as residences, that cannot be accessed by law enforcement or immigration officers absent valid consent or a judicial warrant.

ICE Administrative Warrant

Immigration officers frequently rely on ICE administrative warrants. These documents authorize an immigration enforcement officer to arrest a person suspected of violating immigration laws when that person is in a public location and are issued by a specifically authorized immigration official. An ICE administrative warrant is not a warrant within the meaning of the Fourth Amendment, like a traditional arrest warrant, because it is not issued by a neutral magistrate and is not based on a finding that probable cause exists to believe that someone committed a criminal offense.

ICE warrants do not authorize immigration officials to access nonpublic, restricted areas of a university or college campus or to search school records. An ICE administrative warrant also is not a “court order” that would allow a school to disclose a student’s educational records without the consent of a parent or guardian. The Family and Education Rights and Privacy Act of 1974 (FERPA) generally requires that schools withhold information that could identify students to third parties, including federal immigration officials.¹⁸ Although school personnel should not interfere with an immigration officer’s enforcement duties, school personnel are not required to assist with the apprehension of a person identified in an ICE administrative warrant and cannot be required to help enforce federal immigration law.¹⁹

Federal Court Warrant

A judicial warrant issued by a federal district or magistrate judge based on a finding of probable cause satisfies the Fourth Amendment for purposes of authorizing the search or seizure of property, entry into a nonpublic place to arrest a person named in an arrest warrant known to be in that place, and the arrest of a named person. School personnel should

¹⁸ 20 U.S.C. § 1232g; 34 C.F.R. part 99.

¹⁹ See *Printz v. United States*, 521 U.S. 898 (1997).

promptly comply with a federal court warrant, and school policies may instruct school personnel to alert administrators when such a warrant is executed.

Administrative Subpoena

An administrative subpoena is a document that requests production of documents or other evidence and is typically issued by an immigration officer.

As with most subpoenas, including those issued by a federal court or federal grand jury, Immediate compliance with an administrative subpoena is not typically required because subpoenas can be challenged in court. It would be advisable to instruct school personnel to alert administrators about the service of an administrative subpoena to allow for consultation with counsel before compliance. Because an administrative subpoena is issued by an immigration officer, the subpoena is not a court order that would, under FERPA, allow a school to disclose educational records for a student without the student's consent.

Notice to Appear

A Notice to Appear (NTA) is a charging document issued by ICE, Customs and Border Patrol (CBP), or the United States Customs and Immigration Service (USCIS) seeking to commence formal removal proceedings against an individual before an immigration court. An NTA contains allegations about a particular person's immigration status. An NTA notifies an individual that he or she is expected to appear before an immigration judge on a certain date. An NTA does not authorize an individual's arrest by immigration enforcement authorities or local law enforcement authorities.²⁰

An NTA does not require college or university staff to take any action or grant an officer engaged in immigration enforcement any special power to compel the college or university to cooperate. An NTA does not authorize access to nonpublic areas of the campus. An NTA does not legally require college or university staff to allow authorities to search student or other school records.

GATHERING AND HANDLING STUDENT INFORMATION

Governing Law

Federal law does not impose a duty on colleges and universities to collect, hold, or process information establishing a student's citizenship or immigration status. Given New Mexico's policy against discrimination based on immigration status for admission to postsecondary education,²¹ colleges and universities do not need to request citizenship or immigration information in the admission process.

²⁰ *Arizona v. United States*, 567 U.S. 387, 407 (2012).

²¹ Section 21-1-4.6(A).

Federal law provides that state and local government entities and officials cannot prohibit or restrict any government entity or official from sharing immigration information with the Immigration and Naturalization Service.²² However, federal law also protects the privacy of student information, including immigration status. FERPA protects the privacy of students by prohibiting all colleges and universities that receive federal funds from disclosing personally identifiable information contained in education records to any third party without the student's permission.²³

Financial Aid

Financial aid offices collect, manage, and have access to a large amount of confidential data about students and their parents. This information is often obtained through the Free Application for Federal Student Aid (FAFSA) or by the submission of family tax returns or other documentation necessary to help establish financial aid eligibility. It can include a student's information about citizenship or immigration status.

To qualify for federal financial aid, a student must be a U.S. citizen, permanent resident, or eligible noncitizen.²⁴ Undocumented immigrants, including DACA beneficiaries, are not eligible for federal aid.²⁵ Eligibility is not affected if a student's parents are undocumented.²⁶ However, the FAFSA form requests parents' social security numbers. Students whose parents do not have SSNs are advised by the U.S. Department of Education to select the box that indicates they do not have an SSN.²⁷ Federal laws such as the Higher Education Act, FERPA, and the Privacy Act control and protect the use and release of student data, including information provided for financial aid.²⁸

State and federal law also generally prohibit colleges and universities from releasing personally identifiable information in education records to third parties, absent informed consent.²⁹ However, a college or university must comply with valid judicial warrants and subpoenas.³⁰

²² 8 U.S.C. § 1373(a), (b). Some courts have ruled that this provision violates the Tenth Amendment. *E.g., City of Ocean v. Grewal*, 475 F. Supp. 3d 355, 377-78 (D.N.J. 2020).

²³ 20 U.S.C. § 1232g(b)(1); 34 C.F.R. § 99.3 (defining "educational records" as records that directly relate to a student maintained by an educational institution or by a party acting for the agency or institution).

²⁴ 20 U.S.C. § 1091(a)(5).

²⁵ U.S. Department of Education, *Undocumented Students and Financial Aid* <https://studentaid.gov/applyfor-aid/fafsa/filling-out/undocumented-students> (last accessed Jan. 6, 2025).

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ 20 U.S.C. § 1090(a)(3)(E).

²⁹ 20 U.S.C. § 1232g.

³⁰ 20 U.S.C. § 1232g(b)(2)(B).

Campus Housing

University housing options vary from campus to campus, and therefore, housing offices may have cause to collect different information from students. This information may include students' pre-college home address, phone number, e-mail address, and emergency contact information. Further, applications for themed housing programs may include essay questions, in response to which some students may choose to disclose their immigration status. This information is protected under FERPA. Colleges and universities should store this information securely and inform students that this information is confidential.

Campus Police

Importantly, investigative reports and other files, documents, or records created and maintained by campus police for a law enforcement purpose are not considered education records under FERPA.³¹

University Disciplinary Records

While disciplinary records maintained by a college or university are protected as “education records” under FERPA,³² there are certain narrow circumstances in which disciplinary records may be disclosed without the student’s consent. A college or university may disclose to an alleged victim of any crime of violence or a nonforcible sex offense the final results of a disciplinary proceeding against the alleged perpetrator of that crime, regardless of the results.³³ A college or university may disclose to anyone—not just the victim—the final results of a disciplinary proceeding conducted against a student who is an alleged perpetrator of a crime of violence or a nonforcible sex offense, if the institution determines that the student has committed a violation of the institution’s rules or policies with respect to the offense.³⁴ Final results are limited to name, violation and sanction and would not include immigration status.

Campus Healthcare Facilities

Colleges and universities may provide health or medical services to students. While the records in most medical facilities in the United States are governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the HIPAA privacy rules do not extend to student medical treatment records and other records protected by FERPA.³⁵ In a health and safety emergency, FERPA permits school officials to disclose without student consent education records, including personally identifiable information from those records, if

³¹ 34 C.F.R. § 99.8.

³² 20 U.S.C. § 1232g(h)(1).

³³ 20 U.S.C. § 1232g(b)(6)(A).

³⁴ 20 U.S.C. § 1232g(b)(6)(B); 34 C.F.R. §§ 99.31(a)(13)-(14).

³⁵ 45 C.F.R. § 160.103; 20 U.S.C. § 1232g(a)(4)(B)(iv).

disclosure is necessary to protect the health or safety of students or other individuals.³⁶ However, release of information for purposes of immigration enforcement is not among the enumerated exceptions to the consent requirements within FERPA.

³⁶ U.S. Department of Education, *Balancing Student Privacy and School Safety: A Guide to the Family Educational Rights and Privacy Act for Colleges and Universities* (Oct. 2007) <https://www.govinfo.gov/content/pkg/GOVPUB-ED-PURL-gpo14871/pdf/GOVPUB-ED-PURLgpo14871.pdf> (last accessed Jan. 7, 2025); see also 34 C.F.R. §§ 99.31(a)(10), 99.36.