

IMMIGRATION POST-ELECTION Q & A: DACA Students, “Sanctuary Campuses,” and Institutional or Community Assistance

The presidential election has jolted campuses with speculation and concern about undocumented community members and other issues impacting international populations. The roughly 750,000 young people who have been approved for the Obama administration’s Deferred Action for Childhood Arrivals (DACA) program have been the subject of particular attention. More broadly, there have been some calls to create “sanctuary campuses.” Statements and petitions have been circulated by college and university presidents,¹ student groups,² and policymakers.³ This Issue Brief is offered as a “current moment” aid in framing discussion and assessment by campus leaders, in the hope that it provides information that may assist in situational response, campus policy review, and engagement on the issues addressed here.

Why is this complicated and the future uncertain?

As explained below, DACA is not a law or regulation, it is simply an executive order. It does not confer legal status or a pathway to citizenship, it is only relevant to a small portion of undocumented individuals in the United States, and it can be modified or ended at any time. Many individuals with DACA status are college or university students. Much of the pre-election campaign discussion regarding immigration enforcement was not focused on this group. In addition, it is unlikely that all of an institution’s faculty and staff who are concerned about its DACA students know exactly who

-
- 1 E.g., [“Statement in Support of the Deferred Action for Childhood Arrivals \(DACA\) Program and Our Undocumented Immigrant Students,”](#) Pomona College (CA), Nov. 2016.
 - 2 See a [partial list of statements](#) in support of DACA and campus sanctuary petitions.
 - 3 E.g., [Statement of U.S. House of Representatives Democrats in support of DACA students.](#)

This issue brief was prepared by Dan Berger of the immigration law firm Curran & Berger (Northampton, MA), with contributions from Stephen Yale-Loehr of Miller Mayer (Ithaca, NY) and the higher education and immigration practices at the international law firm Hogan Lovells US LLP; edited by Peter McDonough, ACE Vice President and General Counsel. (Dec. 2016)

DISCLAIMER

This Issue Brief does not constitute legal advice. It incorporates and reflects high-level observations based on non-exhaustive research, and does not analyze any specific factual scenarios taking into account potentially relevant details, such as whether an institution is public or private, state and local laws, and the legal status and role of a campus police department. Institutions should examine issues addressed here based on the context and facts of each situation, institutional policies, geographical and political context, and on their own counsel’s interpretation of applicable law. This is a fluid environment and topic, including the potential for changes in current law, federal agency interpretations of current law, or current enforcement practices.

these students are. Similarly, it is unlikely that the balance of a campus's undocumented population—students and others—is known.

There has never been large-scale immigration enforcement directed at undocumented individuals at American colleges and universities. It is far from clear whether the new administration's immigration policies and enforcement practices will target, include, or exclude current DACA students and other undocumented members of our nation's campus communities.

Nor is it known what form such actions might take. How long it would take to design, resource, organize, and implement governmental policy changes or enforcement actions is anyone's guess. The likelihood of success of judicial challenges to such policies and enforcement actions is speculative as well, even if the certainty and vigor of such challenges are not. In short, it is inevitable that there will be more questions than definitive answers for some time, but it is prudent to anticipate that the new administration may usher in changes in current laws, regulations, and policies.

What is the big picture?

Millions of undocumented immigrants have entered the United States during the last quarter century. Many arrived as infants or young children; they have grown up in the United States but without legal status. Added to their ranks are those who came and overstayed visas, who had poor immigration representation, or whose parents did not follow through on immigration applications.⁴

In 2003, the Immigration and Naturalization Service (INS) ceased to exist, and its functions were transferred to three new entities under the Department of Homeland Security (DHS): U.S. Citizenship and Immigration Services (USCIS); U.S. Immigration and Customs Enforcement (ICE); and U.S. Customs and Border Protection (CBP). ICE is largely responsible for enforcement of immigration laws within U.S. borders.

ICE's officers and agents currently conduct their enforcement actions consistent with a DHS November 2014 memorandum⁵ which prioritizes threats to national security, border security, and public safety. ICE's own Sensitive Locations Policy provides that enforcement actions should be avoided at sensitive locations, which are defined to include "post-secondary schools up to and including colleges and universities, and other institutions of learning such as vocational or trade schools."⁶ However, these policies can be modified or rescinded at will by the new administration.

What is DACA?

DACA, the Obama administration's Deferred Action for Childhood Arrivals policy, provides administrative relief from deportation for specific individuals who apply for and receive DACA status. It was announced on June 15, 2012.⁷

4 ["County-Level View of DACA Population Finds Surprising Amount of Ethnic & Enrollment Diversity,"](#) Migration Policy Institute, Sept. 2014.

5 ["Policies for the Apprehension, Detention and Removal of Undocumented Immigrants,"](#) Department of Homeland Security, Nov. 20, 2014.

6 ["Enforcement Actions at or Focused on Sensitive Locations,"](#) U.S. Immigration and Customs Enforcement, Oct. 24, 2011.

7 ["Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,"](#) Department of Homeland Security, June 15, 2012.

As noted earlier, DACA is not a law, or even a regulation. It does not grant a legal status, nor does it offer a pathway to permanent residency or citizenship. It simply reflects the Obama administration's priorities regarding deportations.

With roughly 11 million undocumented immigrants in the United States, the administration chose to put those with criminal records or outstanding deportation orders at the top of the list for removal, and those with DACA status at the bottom. The hope by many has been that DACA can be a bridge to comprehensive immigration reform by Congress.

DACA reflects the USCIS's exercise of its prosecutorial discretion to permit approved individuals to stay for two years at a time without fear of deportation. Those granted DACA status also may receive a Social Security number and are eligible for two-year employment authorization documents.

DACA status may be given to undocumented young people who had no lawful status on June 15, 2012. To qualify, applicants must:

- have been physically present in the United States on June 15, 2012;
- have been under the age of 31 as of June 15, 2012;
- have come to the United States before reaching their 16th birthday;
- have continuously resided in the United States since June 15, 2007;
- currently be in school, or have graduated or obtained a certificate of completion from high school, or have obtained a general education development (GED) certificate, or have been honorably discharged from the Coast Guard or the Armed Forces of the United States; and
- 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.⁸

In 2014, the Obama administration attempted to expand DACA eligibility, but was prevented by a federal court from doing so on the day it was to go into effect in 2015. So, today on our campuses there are: (i) individuals who have DACA status; (ii) individuals who have DACA applications pending; (iii) individuals who would have been eligible for the expanded DACA; and (iv) other undocumented individuals who never were going to be eligible for DACA.

What would the end of DACA look like?

Since DACA is not codified by law or regulation, it can be modified or rescinded at any time by the new administration.⁹ If that were to happen, one approach could be a gradual phase out by approving no new applications and granting no DACA renewals for individuals currently in DACA status.

Completely rescinding DACA for nearly 750,000 young people could have more immediate implications for those who possess DACA status, including DACA students currently employed by institutions. USCIS could begin a formal process of revoking current employment authorization documents issued to DACA recipients (or perhaps it would take a more practical approach and

8 [“Consideration of Deferred Action for Childhood Arrivals,”](#) U.S. Citizenship and Immigration Services.

9 [“New Questions and Answers About DACA Now That Trump Is President-Elect,”](#) National Immigration Law Center, Nov. 15, 2016.

simply let them expire).¹⁰ Upon revocation or expiration, former DACA students would lose their work eligibility. Furthermore, without the benefits of DACA status, former DACA recipients could be ordered to appear in federal immigration court to face deportation proceedings. As a practical matter, however, this would be a major undertaking for deeply backlogged immigration courts, as well as for under-funded and under-resourced immigration enforcement officials.

Importantly, no specific plans for ending DACA have been proposed by President-Elect Trump to date, and it is far from clear that the new administration will prioritize immigration enforcement against DACA students (if DACA were rescinded) or other undocumented students. Indeed, the president-elect recently said that his administration will focus deportation efforts on criminal immigrants.¹¹ The Obama administration had the same priority,¹² and even with unprecedented resources that effort has taken years and still has far to go.¹³

What might be sensible for DACA students to consider doing now, and how can institutions be supportive?

The possible changes to DACA could have serious implications for DACA students studying abroad. If DACA were rescinded while a DACA student is out of the United States, there may be no way to return. Anyone with DACA status studying abroad for the fall semester or temporarily out of the country during winter break should make plans to return to the United States before the new administration takes office on January 20, 2017. DACA students who intend to study abroad next semester should fully understand the risks of leaving the country; they should be encouraged and supported to make alternative in-country plans. Institutional study abroad advisers should be certain that every DACA student is aware of the uncertainties, advised regarding other educational opportunities on campus or elsewhere within the United States, and assisted in obtaining refunds as necessary.

DACA students who are within 180 days of the end of their status period are eligible to apply for renewal of their status, and may do so now. However, processing times for renewal applications filed today are well over two months; there is no guarantee that the new administration will continue to grant DACA renewals, and the application fee is \$465. Some institutions have considered providing or identifying funding for these applications; however, this requires having a careful eye on state law (particularly for public institutions) and other potential restrictions on private use of institutional funds.

Assuring that DACA students and other undocumented campus community members know where to turn for knowledgeable, accessible, and affordable legal advice can be helpful. ImmigrationLawHelp.org is an online directory of nearly 1,000 free or low-cost nonprofit immigration legal services providers in all 50 states. Its website¹⁴ is searchable by state, county, or

¹⁰ 8 CFR 274a.14, AILA-NSC Liaison Minutes (Jan. 25, 2007) Question 11.

¹¹ See “[Trump: Criminals Will Be Deported First](#),” *Politico*, Nov. 6, 2016.

¹² “[Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens](#),” U.S. Immigration and Customs Enforcement, March 2, 2011.

¹³ See “[President Obama To Donald Trump On DACA: Think ‘Long And Hard’ On Endangering Dreamers](#),” NBC News, Nov. 15, 2016.

¹⁴ <https://www.immigrationlawhelp.org>.

detention facility, and searches can be refined by types and areas of legal assistance provided, populations served, languages spoken, other areas of legal assistance, and non-legal services provided. Institutions might assess whether there is a practical and beneficial means of identifying and publicizing pro bono on-campus or alumni legal services with expertise, or making funding available for individual legal consultations, consistent with the potential restrictions on private use of institutional resources noted above.¹⁵ Timely and informed advice and representation can be critical.¹⁶

Institutions should ensure that student health and counseling services are alerted and prepared to address the needs of DACA recipients and other undocumented students who may find themselves physically or emotionally challenged, particularly since many grew up with the fear of deportation.

DACA students who are on an educational and training path that requires employment authorization documents should evaluate backup options. For example, medical students will not be able to do residency training without the appropriate documentation.¹⁷

Is there anything preventing ICE or CBP from using an individual's DACA data to facilitate their deportation?

Current USCIS internal policy indicates that DACA data will not be disclosed to ICE or CBP for the purpose of immigration enforcement proceedings unless certain criteria are met, such as national security concerns, fraud or misrepresentation, or specific criminal offenses.¹⁸ However, USCIS has said that this policy “may be modified, superseded, or rescinded at any time without notice.”¹⁹ If this policy were to change, it is likely that attempts to use DACA data for broader enforcement efforts would be challenged legally, but it is too soon to assess the nature and chances of success of those challenges.

If DACA students come into contact with ICE or CBP, will they be placed into removal proceedings?

As noted above, DACA is intended, in part, to allow ICE and CBP to focus on priority cases. Unless and until there is a policy change, ICE and CBP officials and agents can be expected to exercise their prosecutorial discretion not to apprehend individuals with DACA status, have them placed into removal proceedings, or be removed. It is important to keep in mind, however, that DACA may change at any time.

What do people mean when they refer to a “sanctuary campus”?

The post-election concern about DACA students and other undocumented individuals on our nation's campuses has led to coast-to-coast protests and pleas for colleges and universities to offer sanctuary to protect undocumented community members from deportation. While the word “sanctuary” is commonly associated with either a sacred place or a refuge, the idea of a “sanctuary campus” has no clear meaning; it is an extension of the “sanctuary city” concept, another term with

15 [“Post-Election: Recommendations for School Administrators, Educators, Counselors, and Undocumented Students,”](#) My Undocumented Life, Nov. 13, 2016.

16 [“Do DREAMers really need a lawyer?”](#) AILA Leadership Blog, Aug. 3, 2012.

17 See <http://www.phdreamers.org/>.

18 Id.

19 [“Policy Memorandum on Revised Guidance for the Referral of Cases and Issuances of Notices to Appear in Cases Involving Inadmissible and Removable Aliens,”](#) U.S. Citizenship and Immigration Services, Nov. 7, 2011.

no consistent or agreed upon definition. Neither concept involves a legal status that is recognized under federal law.

“Sanctuary city” policies and practices vary around the country. One motivation and benefit is to encourage undocumented immigrants to feel secure going to the police for help or cooperating if they have information that can aid law enforcement. In a “sanctuary city,” police and municipal employees may be instructed not to inquire about an individual’s immigration status, and the city’s resources are not allocated to enforce federal immigration laws.²⁰

Requests that institutions declare their campuses as sanctuaries have included a broad range of actions. Students at over 100 colleges and universities currently have petitions circulating, calling for some level of sanctuary.

Is it relevant that an institution is geographically within a “sanctuary city”?

Federal law enforcement authorities could act in a range of ways regarding DACA students and other undocumented individuals who are part of higher education communities without involvement by local authorities. In those circumstances, a campus’s location within a sanctuary city may not matter.

How have institutions responded to calls for sanctuaries on campuses?

Immediate institutional responses typically have included reaffirming institutional or community principles or values, underscoring policies of inclusion and free expression, expressing continued support for DACA, and committing to support community members as much as possible while complying with the law. Some schools have stated that they will not voluntarily (without a court order) assist the federal government in immigration enforcement.²¹

Many sanctuary campus petitions incorporate uncontroversial demands for support and counseling to students and other undocumented community members. It is likely that institutions already have resources and practices in place that may align with such demands. Quickly and clearly organizing, cataloging, and publicizing them, as well as basic informational and “know your rights” materials, is one sensible immediate and beneficial response.²²

Anticipating—and having clear, consistent, and accurate and ready answers to—questions about policies and practices is important. This can be a challenge on a campus with several schools and distinct student populations (undergraduate schools, PhD candidates, business schools, medical schools, etc.).

As suggested below, understanding campus police department policies and practices—and being transparent about them where appropriate—should not be overlooked. For example, it may be helpful to understand and be able to accurately explain whether, when, and how fingerprints taken by

20 See “[The Limits of Sanctuary Cities](#),” *The New Yorker*, Nov. 23, 2016 and “[What Are Sanctuary Cities and How Are They Bracing for Trump’s Proposed Immigration Crackdown?](#)” KQED News, Nov. 17, 2016.

21 See “[In Defense of DACA](#),” *Inside Higher Ed*, Nov. 21, 2016.

22 See, e.g., “[Supporting Undocumented Youth](#),” U.S. Department of Education, Oct. 20, 2015. See e.g., [here](#) and [here](#) about knowing your rights. See e.g., information about [immigration news, advocacy and statistics](#), [business migration](#), and resources about undocumented students [here](#) and [here](#).

campus or local law enforcement will be added to the national fingerprint file maintained by the Federal Bureau of Investigation, since such fingerprints are likely to be forwarded to the DHS/ICE fingerprint database.²³ State law generally determines the circumstances when law enforcement, including campus police departments, may fingerprint individuals; and those laws evolve.²⁴

Are campus chapels and other houses of worship sanctuaries?

Again, “sanctuary” has no clear, consistently understood and applied meaning. At some institutions students have called for establishing campus chapels as sanctuaries from law enforcement officials for those facing deportation. Providing church sanctuary for criminal offenses was abolished by statute in England in the seventeenth century and never became part of the common law in the United States. There is no federal statute or judicial recognition of houses of worship, or particular portions of them, as sanctuaries.

While the notion of sacred places as sanctuaries in this country derives from custom, rather than law, and houses of worship enjoy no immunity from prosecution, there is a general law enforcement tradition to forgo entering churches to arrest non-violent criminals. Thus, some congregations have historically publicized their houses of worship as sanctuaries for individuals who fear deportation.²⁵

What about institutions being asked to pledge non-cooperation?

As a general proposition, the law imposes no affirmative duty on individuals or organizations to inform law enforcement authorities of illegal activity.²⁶ Furthermore, in many circumstances it is reasonable and appropriate to have, and abide by, institutional policies which require an individual’s consent, or receipt of a subpoena or warrant, before complying with requests by authorities for non-public information about campus community members. Indeed, federal and state privacy laws (such as those relating to education and medical records) may compel such a response.

However, some sanctuary campus petitions ask institutions to categorically refuse to cooperate with federal law enforcement; some propose not allowing officials to enter campus property unless they have a warrant, court order, or other lawful process. Such requests may run counter to applicable aspects of current and evolving federal or state laws, with particular challenges for public institutions. Also, they could risk termination of federal and state aid to institutions. And, as suggested below regarding campus police department discretion, they may conflict with campus law enforcement obligations, including on private campuses with sworn officers.

The Immigration and Nationality Act (INA) says that “a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [DHS, ICE, or CBP] information regarding the citizenship or immigration status,

23 See “[Privacy Impact Assessment for the Fingerprint Identification Records System \(FIRS\) Integrated Automated Fingerprint Identification System \(IAFIS\) Outsourcing for Noncriminal Justice Purposes – Channeling](#),” Federal Bureau of Investigations and “[Fingerprint Technology](#),” Federal Bureau of Investigations, July 2010.

24 See, e.g., “[Must Officers Now Arrest, Rather Than Cite, for Misdemeanor Marijuana Possession?](#)” North Carolina Criminal Law, Oct. 7, 2015.

25 See “[Trump’s Battle Against Illegal Immigrant Sanctuary May End at Church Steps](#),” Fox News, Nov. 23, 2016.

26 See *United States v. Driscoll*, 449 F.2d 894, 896 (2d Cir. 1971) (defendant aware of alien smuggling had no duty to alert authorities).

lawful or unlawful, of any individual.”²⁷ Whether this prohibition would, in fact, apply to a particular institution, just its campus police department, or not apply at all would depend on the facts, such as whether the institution is public or private, and the legal status and authority of its campus police.²⁸ In terms of consequences for violation of this federal prohibition, to date the focus has been on revocation of a state or local entity’s entitlement to certain federal funds under the Edward Byrne Memorial Justice Assistance Grant Program and the State Criminal Alien Assistance Program.²⁹

How should institutions consider requests by federal officials for records identifying undocumented students or other community members?

As a general proposition, colleges and universities have no obligation to comply with a request by officials for institutional records in the absence of a subpoena or warrant. Indeed, the Family Educational Rights and Privacy Act’s (FERPA) basic premise is that a valid legal subpoena, warrant, or court order typically is required for nonconsensual access to a student’s education records. However, exceptions exist which explicitly allow for access to some students’ records. To note just a couple:

- The Student and Exchange Visitor Program (SEVP) requires that institutions participating in SEVP are subject to on-site review at any time. An ICE Field Representative^{30 31} visiting such a campus has the authority to ask for information about students on temporary student and training visas (F and J) administered by or present at the institution, but currently not about DACA or undocumented students. While FERPA restricts access to defined “education records” (but not to employee records) absent a student’s consent, students on temporary F or J visas have largely waived their rights under FERPA through the visa process.³² Also, institutions agree to grant access to certain employment-related information by signing H-1B, O-1, and other temporary visa petitions.³³
- The USA PATRIOT Act (post-9/11 legislation) allows exceptions to FERPA to enable nonconsensual disclosure of education records, and personally identifiable information contained in such records, where there is a judicial order based on the government’s assertion of terrorist activities.³⁴

It would be prudent for institutions to review applicable policies and protocols to assess how they may be interpreted and applied in the future to requests for information from government officials, and to the protection of campus community members’ privacy. Campus administrators who are likely to be the first points of contact by immigration officials should be fully aware of institutional philosophy and policy, and know where to turn for immediate advice and direction regarding nuanced situations.

27 See 8 U.S.C. § 1373.

28 The prohibition addresses actions by government entities and officials, and no court appears to have considered whether and under what set of facts the prohibition applies to a university or college.

29 [Memorandum](#), Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients, July 7, 2016.

30 [“FAQs: SEVP Field Representatives,”](#) U.S. Immigration and Customs Enforcement.

31 [“Designated School Officials: What is Campus Sentinel?”](#) Department of Homeland Security, March 22, 2013.

32 For F visas, see 8 CFR 214.3(g), 8 CFR 214.1(h), 8 CFR 214.3(k); for J visas, see 22 CFR 62.10 (f-g).

33 See 20 CFR 655.760(a) about access files, and see [declaration](#) on page 6.

34 See 20 USC 1232g(j); 20 USC 9007(c).

What about calls for institutions to preclude ICE officials and agents from coming on campus?

As a legal and practical matter an institution may be unable to prevent ICE officials and agents from coming onto campus without a warrant. Significant portions of virtually every college and university campus—public and private—are open to anyone. While these accessible spaces can be made subject to reasonable time, place, and manner restrictions, it is difficult to imagine a court finding a targeted restriction against federal immigration officials to be reasonable. By contrast, restricted buildings or other areas (such as dormitories and other living spaces) would carry legitimate privacy interests, and therefore it could be appropriate to insist on an immigration warrant for access.³⁵ Here again, however, state and local law, as well as existing cooperation agreements between campus police and external authorities should be assessed.

Even where there may be a good-faith basis to insist on a warrant for access (or, in certain cases, a subpoena for access to records), such a request should not be seen as a license to frustrate the law enforcement purpose. For instance, if, while awaiting service of the warrant, an institution were to hide an undocumented person or destroy records, a law enforcement authority or court might very well take the position that an institution had run afoul of the “harboring” provision discussed below. Such steps could also trigger liability for obstruction of justice.³⁶

Might campus police departments have less discretion to minimize or avoid cooperation?

Federal law does not obligate local law enforcement—including sworn campus police officers—to devote resources to the enforcement of federal immigration laws. The INA provides that state or local police may enter into cooperative agreements with immigration enforcement officials and agents, though they are not compulsory.³⁷ Some college and university police departments have pledged not to sign up for a voluntary program if one is offered.³⁸

35 For DHS regulations on the enforcement powers of immigration officials see 8 C.F.R. § 287.8. The regulations describe the warrant requirement pertinent to immigration officers:

An immigration officer may not enter into the non-public areas of a business, a residence including the curtilage of such residence, or a farm or other outdoor agricultural operation, except as provided in section 287(a)(3) of the Act, for the purpose of questioning the occupants or employees concerning their right to be or remain in the United States unless the officer has either a warrant or the consent of the owner or other person in control of the site to be inspected. When consent to enter is given, the immigration officer must note on the officer’s report that consent was given and, if possible, by whom consent was given. If the immigration officer is denied access to conduct a site inspection, a warrant may be obtained.

8 C.F.R. § 287.8(f)(2). This provision recognizes that some areas of a business (much like some areas of a campus) are non-public (and therefore would require a warrant or consent to access), while other areas are clearly public, without any expectation of privacy, and without a need for warrant for entry. See [here](#) for a Q&A explaining the issues in general terms.

36 Although an individual is not required to affirmatively assist authorities, various federal statutes prohibit obstruction of civil, administrative, and criminal investigations and proceedings. See, e.g., 18 U.S.C. §§ 1505, 1510, 1512. The U.S. Sentencing Guidelines also provide for sentencing enhancements based upon obstructive conduct. See 8 U.S.S.G. § 3C1.1, “Obstructing or Impeding the Administration of Justice.” See also *United States v. Manzano-Huerta*, 809 F.3d 440 (8th Cir. 2016) (affirming the conviction of a defendant prosecuted for violating the harboring statute with an obstruction enhancement because he provided materially false information to law enforcement about the employment status of an unauthorized employee).

37 The INA says that “[n]othing in this subsection shall be construed to require any State or political subdivision of a State” to enter into such arrangements. See 8 U.S.C. § 1357(g)(9). “[Delegation of Immigration Authority Section 287\(g\) Immigration and Nationality Act](#),” U.S. Immigration and Customs Enforcement.

38 “[Bristol County Sheriff’s Office Partners with ICE, Granting Immigration Enforcement Authority](#),” ABC News 6, Nov. 21, 2016.

However, state laws often establish and inform campus police officers' authority and activities. This can be the case for private institutions' police departments as well as those of public institutions. A review and understanding of the source of campus police officers' authority and applicable state law is prudent. For example, a campus police department that is asked to consider adopting practices to implement or support sanctuary campus practices may find itself unable to do so due to applicable state law.

Also worthy of consideration are a campus police department's obligations pursuant to the department's or the institution's relationship with other law enforcement authorities, particularly those detailed in increasingly common memoranda of understanding between institutions and/or their campus police departments and local police departments (and perhaps state or federal law enforcement agencies as well).

Lack of cooperation by campus police could impact unwritten, but significant, cooperative expectations among federal, state, and local law enforcement. Resulting tensions may have negative consequences for state and local police and government responsiveness on a range of other matters that significantly affect college and universities, their campuses, and their communities.

Could an institution's officials or campus community members violate federal "harboring" law?

The INA provides for the imposition of criminal penalties and fines on individuals and organizations for employing, concealing, harboring, or shielding from detection unauthorized aliens.³⁹ The statute also makes it unlawful to encourage or induce an alien to come to, enter, or reside in the United States.⁴⁰ The statute penalizes attempts to commit the prohibited acts, as well as aiding or assisting such acts.

In the past, courts have interpreted the harboring prohibition broadly, generally considering "shielding," "harboring," and "concealing" to encompass "conduct tending substantially to facilitate an alien's remaining in the United States illegally."⁴¹ This includes conduct "tending to substantially facilitate an alien's remaining in the United States illegally and to prevent government authorities from detecting the alien's unlawful presence."⁴²

Some recent court decisions have begun to limit the definitions of that which constituted "harboring" under the statute by requiring that the defendant do more than simply provide shelter to an undocumented alien. Those court cases suggest that "harboring" means keeping an alien in any place with the intent to conceal from government authorities, moving an alien, or providing physical protection to an alien. For example, in one case, a restaurant owner was convicted under the harboring provision for employing and providing housing for unauthorized aliens where the court agreed that the defendant had not simply provided housing, but rather had "deliberately safeguard[ed]

39 See 8 U.S.C. § 1324. A "person" under the statute can be either "an individual or an organization." See 8 U.S.C. § 1101(b)(3). See also *United States v. Ye*, 588 F.3d 411, 414 (2009) (noting that "'conceal,' 'harbor,' and 'shield from detection' have independent meanings, and thus a conviction can result from committing (or attempting to commit) any one of the three acts").

40 See 8 U.S.C. § 1324.

41 *United States v. Lopez*, 521 F.2d 437, 441 (2d Cir. 1975).

42 3C Am. Jur. 2d Aliens and Citizens § 2588.

members of a specified group from the authorities.”⁴³ The federal appeals court said that “a defendant is guilty of harboring for purposes of § 1324 by providing a known illegal alien a secure haven, a refuge, a place to stay in which the authorities are unlikely to be seeking him.”⁴⁴ However, there is significant variation among the federal courts as to what must be established regarding the defendant’s intent—in other words, whether the defendant must act with clandestine intent (to hide the alien), whether the defendant must “substantially facilitate” the person’s unlawful stay, or whether “simple sheltering”⁴⁵ is sufficient to trigger statutory liability. In addition, some federal courts have taken the position that a person illegally “encourages” an unauthorized alien to “reside” in the United States when the person takes some action “to facilitate the alien’s ability to live in this country indefinitely.”⁴⁶

Given the fluidity of the broader national attention to immigration issues, the various ways this is being experienced geographically and the possibility that states’ laws may be relevant, as well as the current uncertainty about the particular focus of the new administration’s immigration agenda, it would be prudent to remain attentive to future interpretations of “harboring” by governmental officials, law enforcement, and the courts.

How worried should an institution be about losing federal funding if it is perceived as non-cooperative?

A federal funds recipient certifies or represents generally that it will comply with “all applicable laws” in connection with the receipt of a federal grant or other federal funding. However, at this time, no federal grant documents or guidance have been identified indicating that the primary federal agencies that provide federal financial assistance to institutions (such as the U.S. Department of Education, the National Institutes of Health, and the National Science Foundation) have adopted policies to compel or even request cooperation with the ICE by federal funds recipients, or policies that would provide a specific basis on which to withhold federal funding for noncooperation with ICE’s investigations or requests.⁴⁷ Of course, this could change in the future.

43 *United States v. McClellan*, 794 F. 3d 743, 751 (7th Cir. 2015).

44 *Id.* at 749-50 (quoting *United States v. Costello*, 666 F.3d 1040, 1050 (7th Cir. 2012)); see also *United States v. Vargas-Cordon*, 733 F.3d 366, 381 (2d Cir. 2013) (harboring requires that the defendant intended to facilitate an illegal alien’s remaining in the United States and to prevent the alien’s detection by immigration authorities).

45 *United States v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976) (“harbor” means “to afford shelter to”).

46 See *U.S. v. Thum*, 749 F. 3d 1143, 1148 (9th Cir. 2014). Defendants have been convicted under the harboring statute for doing as little as occasionally employing an alien housekeeper and offering advice on how to avoid deportation. See *U.S. v. Henderson*, 857 F. Supp. 2d 191, 210 (D. Mass. 2012) (explaining that encouragement entails “affirmative assistance that makes an alien lacking lawful immigration status more likely to enter or remain in the United States than she otherwise might have been,” quoting *DelRio-Mocci v. Connolly Properties Inc.*, 672 F. 3d 241, 248 [3d Cir. 2012]); *Edwards v. Prime*, 602 F. 3d 1276 (11th Cir. 2010) (finding that defendants had “encouraged or induced” illegal aliens to reside in the United States by knowingly supplying them with jobs and social security numbers to facilitate their employment, because the “Court [gives] a broad interpretation to the phrase ‘encouraging or inducing’ in this context, construing it to include the act of ‘helping’ aliens come to, enter, or remain in the United States”).

47 The standard grant documents that relate to these agencies and that identify various obligations of the grantee and assurances that the grantee provides to the government (e.g., NIH Grants Policy Statement; Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards) were considered.

Should international members of our campus communities be concerned?

While media attention has focused on DACA and undocumented students, the change in administration could bring with it policies and protocols that impact international members of campus communities. For example, students from predominantly Muslim countries could face extended security delays for travel to the United States after January 20 if the new administration encourages some of its suggested policy actions. The 9/11 terrorist attacks prompted a call-in registration program that targeted anyone from 26 countries, all but one of which have predominantly Muslim populations.⁴⁸ A similar program could be implemented, or existing review for national security concerns could be expanded.

Campus leaders, as well as advisers to international students, faculty, and staff should remain attentive to the possible implementation of these or other discretionary measures.⁴⁹ They could have a significant impact on the attractiveness and accessibility of American higher education to potential undergraduate and graduate students from other countries.

Where do I turn for more information and advice?

To learn more about DACA, sanctuary, and other post-election issues that impact the higher education community, the National Association of College and University Attorneys (NACUA) will sponsor a webinar on December 8 from 12-2:00 p.m. Eastern Time. The NACUA member rate (also available to ACE members for this webinar) is \$265 per site. To review the program or to register, go to: <https://www.nacua.org/program-events/online-virtual-education/december-8-2016-webinar/home>.

More specifically, institutions would be well advised to consult with knowledgeable in-house or outside counsel. Context matters, i.e., particular facts and circumstances. So do state and local laws, and institutional (and campus police) relationships with state and local policymakers and authorities. Whether an institution is public or private may matter, as may whether students are primarily residents or commuters. These, and other potentially relevant things may require a careful assessment of a particular issue or question in the moment, in a fluid environment.

48 [NSEERS: The Consequences of America's Efforts to Secure Its Borders](#), American-Arab Anti-Discrimination Committee, March 31, 2009. The National Security Entry-Exit Registration System (NSEERS) program was implemented as a counterterrorism tool in the wake of September 11, 2001. The NSEERS program required certain non-immigrants to register themselves at ports of entry and local immigration offices for fingerprints, photographs, and lengthy questioning. The most controversial aspect of the NSEERS program was a "domestic" component that solicited registrations from more than 80,000 males who were inside the United States on temporary visas from Muslim-majority countries.

49 INA Sec. 212(f), 8 USC 1182(f) gives broad powers to designate certain groups of individuals for additional scrutiny; INA Sec. 264, 8 U.S.C. 1304 gives the government broad power to mandate registration of certain groups of people. See [here](#).