Advisory for NEA Members Engaging in Immigration Advocacy

All students have the right to a free public K-12 education in this country regardless of their immigration status.[1] NEA is actively engaged in numerous efforts to protect and advance that right and to ensure that all schools provide a welcoming and supportive environment to their entire school community. In recent months, many NEA members have been approached by students who are anxious about the termination of Deferred Action for Childhood Arrivals (DACA) and aggressive immigration enforcement. Here we provide some legal parameters for educators to consider in safely and effectively advocating for immigrant students' rights.

I. Your Protections Are Strongest When You Engage in Activism Outside of Work.

The First Amendment provides legal protection to educators when they are speaking as "citizens"—*i.e.*, outside of their role as district employees. Therefore, educators are most protected when they engage in political discussions or activism outside of work, provided it does not cause disruption at the school. If the activity creates a disruption to the educational environment, an educator may be disciplined.[2] Even speech on social media and private blogs may be unprotected if it concerns the educator's official duties.[3] For that reason, educators should focus such activity on advocacy for immigrant students and not disparage or insult students, parents, or co-workers.[4]

II. Protections That Apply to Your Speech at Work Are More Limited.

Generally speaking, the First Amendment will not protect you from discipline based on statements made in class,[5] or to students during your usual work hours but outside of class.[6] Tenured teachers are provided due process and should be protected when engaged in classroom discussions about immigration that are both age-appropriate and relevant to the coursework. In addition, some collective bargaining agreements may contain explicit protections for academic freedom, which may protect educators who discuss these issues in a manner that is both age-appropriate and relevant to the curriculum.[7]

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[1] *Plyler v. Doe*, 457 U.S. 202 (1982).
[2] *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).
[3] *Rubino v. City of New York*, 950 N.Y.S.2d 494 (N.Y. Sup. Ct. 2012), *aff'd,* 106 A.D.3d 439, 965 N.Y.S.2d 47 (2013).
[4] *Munroe v. Central Bucks Sch. Dist.*, 805 F.3d 454 (3rd Cir. 2015); *Richerson v. Beckon*, 337 Fed. Appx. 637 (9th Cir. 2009).
[5] *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Evans-Marshall v. Bd. Of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332 (6th Cir. 2010); *Mayer v. Monroe Cty. Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir 2007); *Brown v. Chicago Bd. of Educ.*, 824 F.3d 713 (7th Cir. 2016).
[6] *See Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011).
[7] *See Nalichowski v. Capshaw*, No. CIV. 95-5577, 1996 WL 548143, at *2–3 (E.D. Pa. Sept. 20, 1996) (holding that violations of a collective-bargaining agreement containing an academic freedom provision were grievable); Charlotte Garden, *Teaching for America: Unions and Academic Freedom*, 43 U. TOL. L. REV. 563, 580-82 (2012).

Still, tenure protections and academic freedom are not absolute, and teachers risk discipline for classroom discussions that administrators consider too controversial, not age appropriate, or too great a departure from established curricula.[8] School districts may also have policies restricting educators' in-school activism and use of handouts. Educators should seek the school administration's approval of advocacy materials that they plan to distribute to students and their families.

III. Engaging in Protests at School Can Be Prohibited.

Educators have even more limited protection against discipline should they engage in open displays of activism at school, or encourage students to engage in protests that involve civil disobedience or disruption of school. Because educators are considered to be acting within the scope of their job duties while at school, the First Amendment may not apply when educators wear political buttons or other activist symbols, or urge students to participate in protests.[9] Likewise, because many school districts have policies that explicitly prohibit employees from engaging in political activity during work time, violations of such a policy could qualify as insubordination that justifies discipline, even of a tenured educator.[10] Similarly, students have a right to voice their opinions and engage in certain forms of school protest, but they can be disciplined if such activities become disruptive or disorderly.[11]

IV. Congress Has Criminalized the Harboring of Undocumented Immigrants.

If you provide shelter to students or their families knowing that they are undocumented, you may face criminal consequences. Federal law prohibits a person from concealing, harboring, or shielding from detection someone who that person knows—or should know—to be undocumented.[12] This crime is referred to as "harboring" undocumented immigrants. A conviction can result in up to five years in prison for each immigrant sheltered.[13]

Harboring requires that the person charged must have intended both (a) to substantially help an undocumented person remain in the United States (such as by providing shelter, transportation, money, or other material assistance) *and* (b) to help the individual avoid detection by immigration authorities.[14] When the act of sheltering an undocumented person is done publicly—*i.e.*, a church offering sanctuary to immigrants in danger of deportation—such

[8] *Hollis v. Fayetteville Sch. Dist. No. 1*, 473 S.W.3d 45 (Ark. App. 2015); *Freshwater v. Mt. Vernon City Sch. Dist.*, 1 N.E.3d 335 (Ohio 2013).
[9] *Weingarten v. Bd. of Educ.*, 680 F. Supp.2d 595 (S.D.N.Y. 2010); *Birdwell v. Hazelwood Sch. Dist.*, 491 F.2d 490 (8th Cir. 1974).
[10] *Ca. Teachers Ass'n v. Governing Bd. of San Diego Unif. Sch. Dist.*, 53 Cal.Rptr.2d 474 (Cal. Ct. App. 1996).
[11] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).
[12] 8 U.S.C. § 1324(a)(1)(A)(iii) (2005).
[13] 8 U.S.C. § 1324(a)(1)(B)(ii) (2005).
[14] *United States v. Vargas-Cordon*, 733 F.3d 366, 382 (2d Cir. 2013); *United States v. Costello*, 666 F.3d 1040, 1047 (7th Cir. 2012); *United States v. You*, 382 F.3d 958, 966 (9th Cir. 2004).

actions are grounds to infer an intent to evade immigration authorities and would thus support a charge of criminal harboring.[15] Merely providing a place to stay for an undocumented person, however, should not constitute a criminal offense – so long as the person providing shelter does not intend to help the undocumented individual evade immigration authorities.[16]

[15] *Costello*, 666 F.3d at 1047; *United States v. McClellan*, 794 F.3d 743, 749 (7th Cir. 2015).

[16] *See, e.g.*, *Costello*, 666 F.3d at 1046 (declining to extend the prohibitions of § 1324 to prosecute a woman whose undocumented boyfriend lived in her house).