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 days, many NEA members have been approached by anxious students about immigration enforcement. Here we provide some legal parameters for educators to consider in safely and effectively advocating for immigrant student rights.

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

Educators are protected when they engage in political discussions or activism outside of work, provided it does not cause disruption at the school. Although the First Amendment provides greater protection to educators when they are speaking as "citizens"—*i.e.*, outside of their role as educators—even that protection is not absolute. If the activity does create disruption to the educational environment, an educator may be disciplined.[2] For that reason, educators should focus such activity on advocacy for immigrant students and not disparage or insult students, parents, or co-workers.[3]

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,[4] or to students during your usual work hours but outside of class.[5] 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. But tenure protections 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.[6] 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]

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

[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] *Munroe v. Central Bucks Sch. Dist.*, 805 F.3d 454 (3rd Cir. 2015); *Richerson v. Beckon*, 337 Fed. Appx. 637 (9th Cir. 2009).
[4] *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).
[5] *See Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011).
[6] *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).
[7] Charlotte Garden, *Teaching for America: Unions and Academic Freedom*, 43 U. TOL. L. REV. 563, 580-82 (2012).

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 protect the wearing of political buttons or other activist symbols, or urging students to participate in protests.[8] 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.[9] Students are allowed to voice their opinions and engage in certain forms of school protest, but they can be disciplined if such activities become disruptive or disorderly.[10]

IV. Congress Has Criminalized the Harboring of Undocumented Immigrants.

If you provide shelter to students or their families knowing they are undocumented, you may face criminal consequences. Federal law makes it a criminal offense for anyone who "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation."[11] This crime is referred to as "harboring" undocumented immigrants.[12] A conviction can result in up to five years in prison for each immigrant sheltered.[13]

The prevalent view is that these criminal consequences only apply if your intent is to help the undocumented immigrants avoid deportation. Two federal courts of appeals have found that this intent is required for sheltering immigrants to be a crime.[14] However, an earlier decision by another court of appeals concluded that the intent to avoid detection was not required.[15]

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[8] *Weingarten v. Bd. of Educ.*, 680 F. Supp.2d 595 (S.D.N.Y. 2010); *Birdwell v. Hazelwood Sch. Dist.*, 491 F.2d 790 (8th Cir. 1974).

[9] *Ca. Teachers Ass'n v. Governing Bd. of San Diego Unif. Sch. Dist.*, 45 Cal. App. 4th 1383 (1996).

[10] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

[11] 8 U.S.C. § 1324(a)(1)(A)(iii) (2005).

[12] *See, e.g.*, *U.S. v. Acosta de Evans*, 531 F.2d 428 (9th Cir.1976) ("construing 'harbor' to mean 'afford shelter to' and so hold").

[13] 8 U.S.C. § 1324(a)(1)(B)(ii) (2005).

[14] *See U.S. v. Vargas-Cordon*, 733 F.3d 366, 382 (2d Cir. 2013)(the "mere act of providing shelter to an alien, when done without intention to help prevent the alien's detection by immigration authorities or police" is not a criminal offense); *see also U.S. v. Costello*, 666 F.3d 1040, 1047 (7th Cir. 2012)(criminal harboring requires "some element of concealing or shielding from detection").

[15] *U.S. v. Acosta de Evans*, 531 F.2d 428 (9th Cir. 1976) (holding that "to harbor" simply meant "to shelter," without an additional intent requirement). That 1976 case was cited favorably by the same court of appeals in 1989. *See U.S. v. Aguilar*, 883 F.2d 662, 690 (9th Cir. 1989).