IMMIGRATION STATUS AND THE RIGHT TO
A FREE PUBLIC EDUCATION

Prepared by
the NEA Office of General Counsel
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I. INTRODUCTION

The 2007 NEA Representative Assembly adopted a new business item dealing with immigration. A copy of this NBI – designated as NBI 2007-B – is attached as Attachment A. NBI 2007-B begins by reaffirming NEA’s support for an effective and equitable immigration process that, among other things, protects the integrity of the family unit and assures that every child, regardless of his or her immigration status or the immigration status of his or her parents, has the right to a free public education in a safe and supportive environment. The NBI then turns specifically to undocumented immigrants, and directs NEA to take various actions, including the following:

NEA will work with its affiliates and other groups to ensure that states and school districts adopt and vigorously enforce policies that protect the right of undocumented immigrant children and the children of undocumented immigrant parents to obtain a free public education in a safe and supportive environment.\(^1\)

The purpose of this memorandum is to provide NEA members and affiliates with information that will be helpful to them in implementing this directive. The Discussion section of the memorandum is divided into three sections. We begin – in Part II(A) – by addressing a matter that is of immediate concern to many NEA members, and that was referenced during the Representative Assembly debate leading to the adoption of NBI 2007-B. Recent enforcement efforts by the federal Immigration and Customs Enforcement agency (“ICE”) have resulted in the arrest, confinement, and deportation of many undocumented workers, and this in turn has created problems for the children that are left behind and the public schools that these children attend. This memorandum offers practical

\(^1\) As used in NBI 2007-B and in this memorandum, the term “undocumented immigrant” means a person who is in the United States without the required documents for lawful residence, and the term “public education” means a Kindergarten through 12th grade education.
advice for NEA members and affiliates who may be involved in dealing with these latter problems. We then summarize – in Part II (B) – the legal rights that undocumented immigrant children and the children of undocumented immigrant parents have under the United States Constitution and various federal statutes to attend a public school and receive educational services and benefits. Finally we discuss – in Part II(C) – actions that NEA members and affiliates can take in an effort to ensure that the education-related rights of undocumented immigrant children and the children of undocumented immigrant parents are protected. We also indicate whether, and under what circumstances, NEA assistance is available to NEA members who may be facing adverse employment action or other personal liability because of their activities in this regard.

Before turning to substance, two preliminary comments are necessary to establish a context:

1. It is not the purpose of this memorandum to discuss the legal status of undocumented immigrants generally, or to offer advice to NEA members and affiliates as to how they can assist undocumented immigrant children or the children of undocumented immigrants in dealing with the wide-range of problems that may confront them because of their immigration status. Consistent with the above-quoted directive from NBI 2007-B, this memorandum is more focused, and deals with “the right of undocumented immigrant children and the children of undocumented immigrants to obtain a free public education in a safe and supportive environment,” and what NEA members and affiliates can do to protect this right. The broader question of what NEA members and affiliates may or may not choose to do to otherwise assist undocumented immigrants is beyond the scope of this memorandum; and

2. NBI 2007-B refers to “undocumented immigrant children and the children of undocumented immigrant parents.” The problems confronting these two categories of children are not in all respects the same, and in this memorandum we sometimes note the distinction. On other occasions, however, we use the combined reference, and leave it to the reader to draw such distinctions as may be appropriate on the basis of context. Moreover, although this memorandum, like NBI 2007-B, deals with undocumented immigrants, certain of the matters discussed – such as the obligations imposed on school districts to take affirmative steps to meet the special needs of students with limited English language proficiency, see infra at p.10 – obviously would be relevant to all immigrant children, regardless of the documented/undocumented status of the children or their parents.
II. DISCUSSION

A. ICE Enforcement Efforts

In 2006, the ICE implemented a “get tough” immigration enforcement policy, providing for the arrest, confinement, and deportation of undocumented workers. On December 12, 2006, the ICE launched “Operation Wagon Train,” which involved coordinated raids on Swift & Co. meatpacking plants in Nebraska, Iowa, Colorado, Texas, Utah, and Minnesota. According to the ICE, those raids resulted in the arrest of 1,297 undocumented workers. In March 2007, the ICE conducted workplace raids in Louisiana, Tennessee, Mississippi, Massachusetts, and Maryland. And, on June 19, 2007, a factory in Pennsylvania was targeted. The ICE claims to have made 3,226 workplace arrests during the first five months of 2007, as compared to 685 such arrests during all of 2004.

The arrest, confinement, and deportation of undocumented workers are highly disruptive and stressful for the children that are left behind – and this in turn presents problems for the school districts that these children attend. The December 12, 2006, ICE raid on the Swift & Co. meatpacking plant in Grand Island, Nebraska, illustrates the point.

In the aftermath of the Grand Island raid, The Wall Street Journal published a front page story describing how local school officials dealt with the problems that the raid created. NEA also interviewed Grand Island School District Superintendent Stephen Joel about his experience, and solicited Superintendent Joel’s views about best practices. Based on what we have learned from these and other sources, NEA offers the following advice for dealing with this kind of crisis:

1. Before all else, a school district should reach out to the immigrant community and establish a climate of trust. Some undocumented immigrants may fear that, as a “government agency,” the school district is likely to turn them in. Superintendent Joel successfully put these fears to rest in Grand Island by

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hiring more bilingual staff and creating a “multi-cultural coalition” of agencies and major employers to try to make immigrant residents feel welcome. These outreach efforts should also include appropriate faith-based and other community organizations.

2. Parents\(^3\) should be notified that their children are entitled to enroll in school even if they and/or the children are undocumented immigrants. The parents should be assured that, when enrolling their children, they will not be required to answer any questions about their immigration status or provide social security numbers.

3. All communications with immigrant parents should be in a language the parents can understand. As noted below, this is not just sound educational practice; it is also required by federal law.

4. A school district should consider how it will address the emotional trauma that many children suffer in the aftermath of an ICE raid, including eating disorders, disengagement, and other symptoms of post-traumatic stress disorder. Superintendent Joel arranged to have bilingual counselors and social workers provide group counseling and one-on-one therapy at school for those children who requested it.

5. One of the consequences of the ICE raids was a dramatic drop-off in school attendance by the children of immigrant parents. A school district should adopt a comprehensive plan for persuading immigrant parents to send their children back to school. In Grand Island, teachers volunteered to make telephone calls to immigrant parents, and principals literally went door-to-door to inform immigrant parents that it was safe for their children to return to school. In addition, Superintendent Joel held several press conferences and provided statements in Spanish for the local Spanish language radio and TV stations reassuring immigrant parents that school would continue as usual. He also set up a special hotline staffed by the school district’s bilingual department to answer immigrant parents’ questions about the schools.

6. Before a crisis arises, a school district should develop a protocol to address these issues and, in particular, to provide education employees with guidance as to what actions to take in various contingencies. At a minimum, the protocol should address the following issues:

   a. What arrangements should be made to ensure that a student is picked up by a responsible adult? Many schools require parents to identify more than one emergency contact person, and to provide addresses, telephone numbers, and other possible means of contact.

\(^3\) The term “parent” is used in this memorandum to include a guardian or other adult who is responsible for the care of a child.
b. What should an education employee do if a student is stranded at school because the parent has failed to show up?

c. Whether, and under what circumstances, should an education employee drive a student home, and what action should the employee take if there is not a responsible adult at home?

d. What arrangements should be made if a student cannot return home because his or her parents are not there, and there is no other responsible adult available? At what point should child protective services or the police be called, and who should make that decision?

e. What role, if any, should an education employee play in contacting absent students and their families to secure the students’ return to school?

f. How should an education employee respond to inquiries and concerns expressed by parents in a crisis situation?

Although this protocol could apply to all students and all crisis situations, it should as appropriate address issues that may be unique to undocumented immigrant children and the children of undocumented immigrant parents.

When asked by NEA to share any lessons he learned from the experience, Superintendent Joel cited three. “Be prepared,” he warned, “you better have a plan.” The crisis made him think of Columbine and how that event has prompted school districts to adopt emergency plans. Superintendent Joel also cautioned that it was “critical that schools stay out of the politics” of immigration raids. As he put it, “it’s all about the kids, not politics.” Finally, Superintendent Joel was impressed by the outpouring of support from both education employees and the community, and the fact that “so many people were willing to help.” He noted that some sixty teachers offered to house students whose parents had been taken away, although that ultimately proved unnecessary because all of the children were cared for by relatives or friends.
B. The Right of Undocumented Immigrant Children to a Free Public Education

1. Constitutional Rights

In 1982, the United States Supreme Court decided *Plyler v. Doe*. At issue in that case was a Texas statute authorizing local school districts to deny admission to children not “legally admitted” into the United States, and withholding state education funds from any school district that chose to educate such children. By a 5-4 vote, the Supreme Court struck down the statute, holding that it would violate the Equal Protection Clause of the 14th Amendment to the United States Constitution for a state to deny a free public education to undocumented immigrant children. Justice Brennan’s decision for the Court was an eloquent tribute to the value of public education.

Justice Brennan began by noting that “[w]e have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government,” which “play a pivotal role in sustaining our political and cultural heritage.” If undocumented immigrant children are denied an education, he added, they will be denied the “basic tools” necessary to better themselves. “Illiteracy,” Justice Brennan wrote, “is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life,” and will impose “a lifetime hardship on a discrete class of children not accountable for their disabling status.” “The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and

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5 NEA filed a friend-of-the-court brief in *Plyler*, urging the Court to strike down the Texas statute.
foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”

Because the Plyler decision is based on the United States Constitution, it is controlling at the national, state, and local levels, and neither Congress, a state legislature, nor a school district can deny a free public education to undocumented immigrant children. Thus, when in 1994 voters in California passed Proposition 187 – a ballot initiative that would have prohibited “illegal aliens” from attending the state’s public schools – a federal court ruled that the initiative was unconstitutional under Plyler, and enjoined its implementation.

The explicit holding of Plyler is that a child cannot be denied admission to a public school because he or she is an undocumented immigrant, but Plyler does not stop at the schoolhouse door. The Court’s reasoning supports the broader proposition that undocumented immigrant children must as public school students be treated in all respects the same as other students. As Justice Brennan put it, the Texas statute at issue in Plyler “is directed against children, and it imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States.” Thus, in the aforementioned Proposition 187 case, the California federal district court relied on Plyler in holding that a school district could not question students or their parents about immigration status.

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6 457 U.S. at 221-23.


8 457 U.S. at 221.

9 One of the provisions of Proposition 187 would have required schools to verify the immigration status of children and their parents, and to report any “illegal aliens” to the Immigration and Naturalization Service. The federal court in the LULAC case specifically ruled that this provision is both unconstitutional under Plyler and preempted by federal immigration law. 908 F. Supp. at 774.
The fact that there has been almost no litigation on the right of undocumented immigrant children to equal treatment in all aspects of public education suggests that, as a practical matter, distinctions are not being drawn in this regard – but there is no available research to confirm that this is the case in all states, much less in all school districts.\textsuperscript{10} We can, however, speak with certainty about the federal government.

2. Federal Statutory Rights

Although Congress has in certain other contexts limited the services and benefits that are available to undocumented immigrants\textsuperscript{11}, we are aware of no federal statute relating to public education in which it has done so\textsuperscript{12} – and, indeed, the United States Department of Education (“ED”) and other federal agencies have in several instances issued regulations, guidelines and rulings expressly indicating that such distinctions are impermissible. Stated affirmatively, all federal education statutes are fully applicable to undocumented immigrant children, and we discuss below certain statutory provisions that may be of particular relevance to such children – and also to the children of undocumented immigrant parents.

a. English Language Learners

\textsuperscript{10} On July 10, 2007, the Prince William County, Virginia, supervisors approved a resolution that attempts to limit the access of undocumented immigrants to public services. On the advice of county attorneys, the resolution applies only to those public services that can be denied to undocumented immigrants without violating state or federal law, and it does not include the services and benefits that undocumented immigrant children receive as public school students. If NEA members become aware of any situations in which states and/or school districts are treating undocumented immigrant children differently than other students they should notify their UniServ representative.

\textsuperscript{11} Subject to a number of exceptions, a 1996 federal law makes undocumented immigrants ineligible for most “Federal public benefits,” including: “any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, [and] unemployment” benefits funded by the United States government. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. L. 104 – 193), 8 U.S.C. § 1611 (a) and (c)(1)(B).

\textsuperscript{12} As indicated in footnote 1, supra, the term “public education” means Kindergarten through grade 12. Congress has drawn this type of distinction in the higher education context. See, e.g., reference to “postsecondary education” in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, supra, at n.11.
English is unlikely to be the native language of most undocumented immigrant children and children of undocumented immigrant parents. Accordingly, among the most important federal statutes for these children are those that require school districts to take affirmative steps to meet the special needs of students with limited English language proficiency (English language learners or “ELL students”).

Title VI of the Civil Rights Act of 1964 prohibits any entity that receives federal funds, including school districts, from discriminating on the basis of “national origin.”13 In the 1974 case of Lau v. Nichols,14 the United States Supreme Court upheld federal Title VI guidelines requiring school districts to take affirmative steps to help ELL students overcome language barriers and ensure that they can participate meaningful in the districts’ educational programs. The Equal Educational Opportunities Act of 1974 also prohibits school districts from discriminating on the basis of national origin, and requires them to “take appropriate action” to help ELL students “overcome language barriers” that hamper their participation in educational programs.15 The No Child Left Behind Act (“NCLB”) imposes similar obligations, and in addition requires school districts to provide specific notices to the parents of ELL students in their native language.

Over the years, ED and other federal agencies have issued regulations and guidelines describing school district responsibilities to ELL students and/or their parents.

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By way of summary:

- School districts cannot discriminate against ELL students because of their limited English proficiency or segregate them from other students based solely on that characteristic;¹⁶

- School districts must take “appropriate action” and “affirmative steps” to “overcome language barriers” and “rectify the [students’] language deficiency”;¹⁷

- School districts must implement a process for identifying and assessing ELL students;¹⁸

- In determining whether a school district has met its legal obligations to serve the special needs of ELL students, ED will examine whether the district’s program is based on sound educational theory, is adequately funded and staffed with properly trained and qualified teachers, and is periodically evaluated and, if necessary, revised;¹⁹

- ELL students cannot be denied admission to college preparatory or advanced placement courses “on a basis directly related to the failure of the school system to inculcate English language skills”;²⁰

- School districts cannot prohibit students from having casual conversations in their native language at school;²¹

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¹⁷ Id.


²⁰ May 25, 1970, Memo, supra, note 16.

²¹ OCR Letter to Joint Technical Education District (OCR Docket No. 08041022-D), dated June 21, 2004 (“June 21, 2004, OCR Letter”), posted on the ED website at http://www.ed.gov/about/offices/list/ocr/letters/evit08041022-d.html. (declining to rule on whether teacher’s policy of allowing students to speak only English while in class violates Title VI based on school district’s assurance that the teacher’s policy had been rescinded
• Under the NCLB, school districts must provide the parents of ELL students with notice about the services that their children are receiving, including information about the children’s level of English proficiency, the method of instruction used in the language program, and the parents’ right to have their children opt out of the program. And, the parents of undocumented immigrant children have the same rights as other parents under the NCLB to be informed of their child’s progress on assessments, to be notified about his or her school’s progress on meeting standards, to know whether their child’s teacher is “highly qualified,” and to transfer their child to another public school in the district if the school that he or she attends fails to make adequate yearly progress.

• In most circumstances, school districts must ensure that written school notices are provided to the parents of ELL students in their native language. A school district’s obligation to communicate with parents in their native language can require it to provide qualified interpreters for meetings between the parents and teachers or other education employees.

b. Pre-K Education

The federal Head Start program provides grants to local public and private non-profit and for-profit entities to provide comprehensive child development services to

and that the district had no rule prohibiting students from speaking in their native language in casual conversations).


24 In one case, ED’s Office of Civil Rights entered into a Corrective Action Agreement that required an Arizona school district to provide “qualified in-person interpreters and telephone interpreter services” to assist ELL parents in communicating with school personnel. June 21, 2004, OCR Letter, supra, n.20. And, the United States Department of Health and Human Services has warned that the failure to provide interpreters “may violate Title VI.” See, “Office for Civil Rights: Limited English Proficiency Guidance Title VI Prohibition Against National Origin Discrimination as it Affects Persons with Limited English Proficiency,” posted at: http://www.hhs.gov/ocr/lep/guide.html.
economically disadvantaged children and families, with a special focus on helping preschoolers develop the early reading and math skills they need to be successful in school.\textsuperscript{25} The Office of Head Start has issued two directives specifically advising schools and other providers not to ask applicants for Head Start services about their immigration status.\textsuperscript{26}

c. Children with Disabilities

The Individuals with Disabilities Education Act ("IDEA") provides that "all children with disabilities" are entitled to a "free and appropriate education."\textsuperscript{27} Under the IDEA, school districts are required to create an Individualized Education Program designed to meet the special needs of each disabled student, and provide all "related services" necessary to meet the student’s unique needs and prepare him or her for further education, employment, and independent living. The statute includes no exceptions for undocumented immigrant children or the children of undocumented immigrant parents.

d. Privacy

The privacy rights of undocumented immigrant children and the children of undocumented immigrant parents are protected by the Family Educational Rights and Privacy Act.\textsuperscript{28} This statute prohibits school districts from disclosing the "education records" of any student without his or her parent’s permission. The term "education records" is broadly defined to include records dealing with a child’s academic performance,

\textsuperscript{25} For further information about Head Start, see, \url{http://www.acf.hhs.gov/programs/hsb/}.

\textsuperscript{26} These directives are contained in two Office of Head Start “Program Instructions” issued in 1998 (ACYF-PI-CC-98-08 11/25/98 and ACYF-PI-HS-98-03 11/30/98). Both documents are posted at \url{http://www.eclkc.ohs.acf.hhs.gov/hslc/Program%20Design%20and%20Management/Head%20Start%20Requirements/PIs/1998}.

\textsuperscript{27} 20 U.S.C. §§ 1400 \textit{et seq}.

\textsuperscript{28} 20 U.S.C. § 1232g.
as well as personal information about the child and his or her family. The only relevant exception to this prohibition is if a school district is served with a lawfully-issued subpoena.

The Privacy Act of 1974, which is a federal statute not limited to education, may provide additional protection for undocumented immigrant children and the children of undocumented immigrant parents. With certain limited exceptions, this statute makes it unlawful for federal, state, or local agencies to deny any individual any right, benefit, or privilege provided by law because he or she refuses to disclose his or her social security number. If the agency asks the individual to disclose his or her social security number, it must inform the individual whether the disclosure is mandatory or voluntary, pursuant to what statutory authority the request is being made, and for the purpose for which the social security number will be used.

C. Providing Assistance to Undocumented Immigrant Children and the Children of Undocumented Immigrant Parents

At the outset of this memorandum, a distinction was drawn between the actions that NEA members might choose to take to deal with the problems confronting undocumented immigrants generally, and the actions that they might choose to take in an effort to ensure that undocumented immigrant children and the children of undocumented immigrants “obtain a free public education in a safe and supportive environment.” Although this memorandum does not speak to the former context, we do offer the following caution.

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30 Id. at § 7(a)(1). The Privacy Act does not apply to (1) any disclosure required by federal law, or (2) any disclosure of a social security number to any federal, state, or local agency maintaining a system of records that existed and operated before January 1, 1975, if the disclosure was required prior to that date to verify the identity of an individual. Id. at § 7(a)(2)(A)-(B).

31 Id. at § 7(b).
Immigration law is complicated, and education employees should not – unless they have proper training and experience – attempt to advise undocumented immigrants as to their legal rights and obligations outside of the education context. Doing so could expose employees to personal liability from government agencies, law enforcement officials, and even the undocumented immigrants themselves (if the advice proves to have been faulty). It is, moreover, unlikely that NEA or its affiliates would provide assistance to NEA members in this type of situation. The NEA Educators Employment Liability Program, for example, only provides liability insurance for NEA members who are sued for damages due to incidents arising in the course of their employment, and would not therefore be applicable. There is a national network of advocacy organizations that have the expertise and resources to help undocumented immigrants and their families deal with the broader, non-education-related range of problems that may confront them, and the more prudent course would be for NEA members to refer those who ask them for this type of assistance to such an organization. Attached to this memorandum as Attachment B is a list of these advocacy organizations.

When an education employee engages in activity on behalf of undocumented immigrant children or the children of undocumented immigrant parents in his or her capacity as an education employee – i.e., on school grounds and/or during the school day – the risk is not so much that he or she will be subject to personal liability by government agencies, law enforcement officials, or undocumented immigrants (although this does remain a possibility), but rather that the employee will be subject to discipline by the school district for violating school district policy. Thus, an education employee has a First Amendment right to peacefully protest against what he or she believes to be a flawed immigration policy and speak out for change in this regard, but these actions would not necessarily be protected if undertaken by an education employee in the course of his or her employment. A school district could, for example, prohibit employees from using school district facilities, such as school district e-mail accounts, to lobby legislatures or engage in
other political activity, and a teacher does not have a protected right to use the classroom as a forum to proselytize students regarding his or her personal views about undocumented immigrants.

This risk of personal liability and/or adverse employment action will be significantly minimized, and education employees are likely to be most effective, if they take their lead from NBI 2007-B and direct their efforts to ensuring that “states and school districts adopt and vigorously enforce policies that protect the right of undocumented immigrant children and the children of undocumented immigrant parents to obtain a free public education in a safe and supportive environment.” Toward this end, education employees can prudently do several things.

To begin with, education employees can make sure that undocumented immigrant children and the children of undocumented immigrant parents are aware of the educational services and benefits to which they are entitled under school district policies and state and federal law. And, in at least some instances, education employees have a protected right to go beyond this and assist in taking actions that are necessary to ensure that these services and benefits are provided. This is the case, for example, with regard to the rights of such children under Title VI of the Civil Rights Act of 1964 to receive assistance in overcoming language barriers so that they can participate meaningfully in a school district’s educational program.32

Under the Title VI regulations, “anyone,” including any “person or organization,” can file an administrative complaint with ED’s Office for Civil Rights (“OCR”) alleging that a school district has violated Title VI. OCR specifically advises that the “person or organization filing the complaint need not be a victim of the alleged discrimination, but may complain on behalf of another person or group.” In practical terms, this means that

32 34 C.F.R. §§100.1 et. seq.
undocumented immigrant parents, who may understandably be reluctant to come forward, need not be involved in the complaint process. Someone else – including an education employee – can file the complaint on his or her behalf. An OCR document explaining how to file a Title VI complaint is posted on the ED website.\footnote{33}{“How to File a Discrimination Complaint with the Office for Civil Rights,” posted at \url{http://www.ed.gov/print/about/offices/list/ocr/docs/howto.html}}

If a school district attempts to retaliate in some way against an education employee who assists an undocumented immigrant parent in filing an OCR complaint accusing the school district of discrimination – and the possibility of such retaliation may be even more likely if an education employee files the complaint in his or her own name – the school district would be acting illegally. The Title VI regulations expressly prohibit a school district from intimidating, threatening, or discriminating against anyone in retaliation for filing a Title VI complaint or participating in the filing or investigation of the complaint.\footnote{34}{34 C.F.R. § 100.7(e)} An education employee who believes that a school district has engaged in such retaliatory action can file a complaint with OCR or sue the school district in federal court.\footnote{35}{See, e.g., Peters v. Jenney, 327 F.3d 307 (4th Cir. 2003) (teacher who claims she was retaliated against because of her opposition to discrimination in schools has an implied private cause of action under Title VI), reaaff’d, Peters v. School Bd. of City of Virginia Beach, 2007 WL 295618 (E.D.Va. 2007); see, Gutierrez v. State of Wash., Dept. of Social and Health Services, 2005 WL 2346956 (E.D.Wash. 2005) (recognizing that a public employee has a private cause of action under Title VI to challenge alleged retaliation taken in response to employee’s complaints about discrimination); see also, Jackson v. Birmingham Bd. of Educ., 125 S.Ct. 1497 (2005) (school employee who is punished in retaliation for complaining about sex discrimination suffered by students has a private cause of action for sex discrimination under Title IX, which is analogous statute to Title VI).} An education employee may, in addition, be able to seek redress under a “nonretaliation” or other provision in a collective bargaining agreement.

The foregoing Title VI discussion is illustrative; an education employee who assists undocumented immigrant children and the children of undocumented immigrant parents in dealing with other education-related problems would in many cases be entitled to similar

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\textsuperscript{33} “How to File a Discrimination Complaint with the Office for Civil Rights,” posted at \url{http://www.ed.gov/print/about/offices/list/ocr/docs/howto.html}

\textsuperscript{34} 34 C.F.R. § 100.7(e)

\textsuperscript{35} See, e.g., Peters v. Jenney, 327 F.3d 307 (4th Cir. 2003) (teacher who claims she was retaliated against because of her opposition to discrimination in schools has an implied private cause of action under Title VI), reaaff’d, Peters v. School Bd. of City of Virginia Beach, 2007 WL 295618 (E.D.Va. 2007); see, Gutierrez v. State of Wash., Dept. of Social and Health Services, 2005 WL 2346956 (E.D.Wash. 2005) (recognizing that a public employee has a private cause of action under Title VI to challenge alleged retaliation taken in response to employee’s complaints about discrimination); see also, Jackson v. Birmingham Bd. of Educ., 125 S.Ct. 1497 (2005) (school employee who is punished in retaliation for complaining about sex discrimination suffered by students has a private cause of action for sex discrimination under Title IX, which is analogous statute to Title VI).
protections against retaliatory action by a school district. It is important to note that in defending against any such action, NEA members may qualify for assistance under NEA’s Kate Frank/DuShane Unified Legal Services Program, which is a joint NEA/state affiliate program that provides legal defense services to protect members’ employment rights.\(^{36}\)

There may be instances in which an education employee believes that a position taken by the school district or a directive from a supervisor is ill-advised, or perhaps even in violation of his or her statutory or contractual rights. In that event, an NEA member should contact his or her UniServ representative for advice as to how to proceed. If because of time pressure or other exigent circumstances such contact is not practicable, the general rule is for the education employee to comply with the policy or directive, and then file an after-the-fact challenge. A failure to comply – even if the education employee’s concerns are valid and defensible – could subject the employee to a charge of insubordination, which could provide an independent basis for discipline.\(^{37}\)

In addition to the actions that they can take as individuals to help achieve the objective of NBI 2007-B, NEA members can work through their state and local associations. There are various things that state and local associations can do in this regard, including litigation, lobbying and other political activity, community outreach, media campaigns, etc. One of the most effective methods that local associations have for dealing with issues relating to undocumented immigrant children and the children of undocumented immigrant parents – and for protecting the rights of education employees who become involved – is collective bargaining (or, in non-collective bargaining states, whatever other

\(^{36}\) NEA members may access the Unified Legal Services Program by contacting their local UniServ representative or the legal services office of the relevant NEA state affiliate.

\(^{37}\) There may be a limited exception to the rule. An education employee arguably would have a valid defense to a charge of insubordination if the employee failed to comply with the policy or directive because he or she had legitimate cause to believe that compliance would place his or her health or safety, or the health or safety of a student, at risk.
bilateral process may be available to local associations to participate in the formulation of school district policies).

Under most state public sector collective bargaining statutes, any matter that directly or indirectly affects the salaries, hours, or working conditions of education employees is a mandatory subject of collective bargaining. This means, by way of example, that school districts would be required to bargain about association proposals to:

1. provide extra compensation for various services that education employees may be particularly likely to perform for undocumented immigrant children and the children of undocumented immigrant parents, such as remaining with a student after the end of the regular school day until the student is picked up by a responsible adult, providing after-school tutoring for ELL students, and holding after-school conferences with parents and making after-school home visits;

2. prohibit education employees from using their personal vehicles to transport a student home if he or she is not picked up after school. Although there may be certain circumstances under which such use is appropriate, NEA has for a variety of reasons – including the potential liability from an accident, and the risk of false accusations of sexual misconduct – discouraged the practice. It should be noted in this regard, that NEA’s Educators Employment Liability Program does not provide coverage for claims made against an NEA member as a result of an automobile accident; and

3. reinforce and expand upon the free speech and advocacy rights that NEA members have under the First Amendment to the United States Constitution and federal statutes to assist undocumented immigrant children and the children of undocumented immigrant parents. To be sure, this is to some extent the consequence of any contractual provision stating that education employees cannot be disciplined other than for “just cause,” but these protections can be made more pointed by a contractual provision that – with appropriate caveats for legitimate school district rules and regulations – specifically prohibits retaliation against education employees for assisting such children in protecting their constitutional and statutory rights to a public education, or for engaging in advocacy activities on behalf of undocumented immigrants outside of the employment context.

School districts also would be statutorily obligated to collectively bargain about most other aspects of the protocol discussed in Section II(A) above. But some aspects of a comprehensive protocol that do not directly affect the salaries, hours, or working conditions of education employees – including outreach to the immigrant community and collaborative efforts with governmental and social agencies – may in some jurisdictions not be considered
mandatory, or even permissive, subjects of collective bargaining. In this event, local
associations should use political and/or other means in an effort to participate fully in the
development and implementation of a comprehensive protocol designed to provide the
necessary assistance to undocumented immigrant children and the children of
undocumented immigrant parents, and guidance to education employees who deal with such
children.

III. CONCLUSION

This memorandum reflects the current legal and political status of undocumented
immigrants. But that status is in a state of flux, and it is for this reason that NBI 2007-B
provides that

NEA will through its regular communication vehicles, including
NEA Today, keep its members informed of legislative, judicial,
and other developments regarding the status of undocumented
immigrants.

In implementing this directive, NEA will, as appropriate, provide NEA members and
affiliates with further information to assist them in “protect[ing] the right of undocumented
immigrant children and the children of undocumented immigrant parents to obtain a free
public education in a safe and supportive environment.”

The NEA Department of Human and Civil Rights has continuing responsibility to
“advocate for social justice, equity, and equal access for public school employees and
students in order to achieve the goal of a great public school for every child,”38 and this
includes undocumented immigrant children and the children of undocumented immigrant
parents. NEA members who have particular inquiries or concerns in this regard can contact
Matthew Finucane, Sr. Outreach Liaison, NEA Executive Office of Governance & Policy—
Minority Community Outreach, at mfinucane@nea.org, or 202-822-7364.

NEA New Business Item 2007-B

NEA’s basic policies with regard to immigration are set forth in NEA Resolutions B-20 and I-18, and in the NEA Legislative Program. These policies express NEA’s commitment to, among other things, improving the immigration process, including the provision of due process, political asylum, and timely legalization; protecting the integrity of the family unit; and assuring that every child, regardless of his or her immigration status or the immigration status of his or her parents, has the right to a free public education in a safe and supportive environment.

While reaffirming NEA’s commitment to the policies set forth in these Resolutions and the Legislative Program, the Representative Assembly is particularly concerned about the ongoing national debate regarding the status of undocumented immigrants. The Representative Assembly believes that NEA should be actively involved in this debate, and toward that end directs that the following actions be taken:

1. NEA will through its regular communication vehicles, including NEA Today, keep its members informed of legislative, judicial, and other developments regarding the status of undocumented immigrants;

2. NEA will, as appropriate, participate in coalitions and otherwise support efforts to assure that the immigration process protects the human and civil rights of undocumented immigrants and their families, and treats them with dignity and respect; and

3. NEA will work with its affiliates and other groups to ensure that states and school districts adopt and vigorously enforce policies that protect the right of undocumented immigrant children and the children of undocumented immigrant parents to obtain a free public education in a safe and supportive environment.
LIST OF IMMIGRANT RIGHTS ADVOCACY ORGANIZATIONS

This list of national immigrant rights advocacy organizations is excerpted from a list provided by courtesy of the National Network on Immigrant Refugee Rights (www.nnirr.org). Many of the listed websites provide additional information on local organizations. This list is updated periodically at www.nnirr.org. In providing this list, NÉA is not endorsing the views or warranting the expertise of any of the listed organizations.

American Civil Liberties Union, Immigrant Rights Project

Includes extensive information on ACLU Immigrant Rights Project programs and lawsuits. (www.aclu.com/immigrants)

American Friends Service Committee, Immigrant Rights Program

Provides a broad overview of AFSC's many projects addressing a variety of issues in movements for social justice. Includes information about AFSC projects across the country focused on immigrant rights. (www.afsc.org/immigrants-rights)

American Immigration Lawyer's Association

National Association of Immigration Attorneys. Includes information about lawyer referral service. (www.aila.org)

Asian American Justice Center (formerly National Asian Pacific American Legal Consortium).

The Consortium works to advance the legal and civil rights of Asian Pacific Americans through litigation, public education and public policy, with a focus on anti-Asian violence prevention and education, voting rights, immigration, naturalization, affirmative action, language rights and the census. (www.advancingequality.org)

Asian and Pacific Islander American Health Forum

Site for national advocacy organization dedicated to the health concerns of Asian Pacific Islanders, including immigrants and refugees. (www.apiahf.org)

Church World Service Immigrant and Refugee Program

Includes information on CWS programs to address conditions for immigrants and refugees. Includes FAQs about refugees. (www.churchworldservice.org)

Coalition to Abolish Slavery and Trafficking

Provides information about trafficking, as well as links to related articles, organizations, and research sources. (www.castla.org)
Equal Rights Advocates

Dedicated to ensuring equal rights for all women. Highlights include sections on "affirmative action and you" and "immigrant women and work." (http://www.equalrights.org)

Farmworkers Website

Bilingual website includes info on farmworker organizing, history of Bracero Program, and efforts to educate the public on the plight of agricultural workers. (www.farmworkers.org)

Human Rights First (formerly Lawyers Committee for Human Rights)

Focuses on protecting the human rights of all people, including immigrant and refugees, on both national and international levels through the creation of legal policies and institutions. (www.humanrightsfirst.org)

Immigration Equality (formerly Lesbian and Gay Immigration Rights Task Force)

Provides information on issues pertaining to bi-national couples, immigrants with HIV/AIDS, gay and lesbian immigrants, and those seeking asylum based on sexual orientation. (www.immigrationequality.org)

International Center for Migration, Ethnicity and Citizenship (ICMEC)

A scholarly-based research center operated out of the New School University. Provides information on academic research around migration. (www.newschool.edu/icmec)

ILW

"The immigration portal," provides links and information on resources for immigrants, lawyers, and employers. (business site). (www.ilw.com)

Leadership Conference on Civil Rights

Civilrights.org is a joint project of the Leadership Conference on Civil Rights and the Leadership Conference Education Fund. Features links to thousands of other organizations working to promote equal opportunity on a variety of civil and human rights issues. (www.civilrights.org)

Lutheran Immigration and Refugee Services

Home of the Detention Watch Network, and information about LIRS' asylum projects. (www.lirs.org)

Mexican American Legal Defense and Education Fund

MALDEF is a national nonprofit organization, whose mission is to protect and promote the civil rights of the more than 29 million Latinos living in the United States. Site features action alerts and policy updates. (www.maldef.org)
Migration Dialogue

Coordinated through UC Davis, offers links to a number of forums on migration issues. Features the online newsletter Migration News detailing the preceding month's immigration developments around the world. (www.migration.ucdavis.edu)

Migration Policy Institute

Independent think-tank with information on numerous issues. Extensive databank on migration trends domestically and internationally. (www.migrationpolicy.org)

National Council of La Raza

A nonprofit organization established in 1968 to reduce poverty and discrimination, and improve life opportunities for Latinos. Site features information on immigration program. (www.nclr.org)

National Immigration Forum

Provides information on activities of national advocacy organization for immigrant and refugee issues based in Washington, D.C. (www.immigrationforum.org)

National Immigration Law Center

Focuses on policy advocacy, impact litigation, and providing publications, technical assistance, and training. (www.nilc.org)

National Immigration Project of the National Lawyers' Guild

The National Immigration Project is a network of immigration lawyers, law students, jailhouse lawyers, and legal workers who work to end unlawful immigration practices. Features information on projects for immigrant women, detainees, HIV+immigrants, and more. Also includes comprehensive "brief bank" for attorneys. (www.nationalimmigrationproject.org)

National Korean American Service & Education Consortium

Focuses on culture, education, and other related issues of concern to the Korean community, including immigrant rights. (www.nakasec.org)

National Network for Immigrant and Refugee Rights

A nationwide alliance of immigrant rights groups and coalitions. Information on current issues and activities, training tools, archives of reports and analyses. Links to blogs and resources. (www.nnirr.org)

Sweatshop Watch

Provides links to sweatshop campaigns around the U.S. and the world, and offers extensive reports and articles. (www.sweatshopwatch.org)
**Tomas Rivera Policy Institute**

Provides extensive access to current research and issues facing the Latino community. ([www.trpi.org](http://www.trpi.org))

**United Methodist Committee on Relief**

Assists churches in direct ministry to persons in need in the areas of emergency response, hunger and poverty, and refugees and immigration. ([www.umcor.org](http://www.umcor.org))

**The Urban Institute**

Features non-partisan policy research on numerous social and economic issues on both local and national levels. ([www.urban.org](http://www.urban.org))