

# Noncitizen Youth in the Juvenile Justice System

2018 UPDATE

A GUIDE TO JUVENILE DETENTION REFORM

Juvenile Detention Alternatives Initiative

A PROJECT OF THE ANNIE E. CASEY FOUNDATION

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## INTRODUCTION

Recent shifts in U.S. policy have put noncitizen youth involved in the juvenile justice system at greater risk of arrest, detention and deportation by federal immigration authorities, including U.S. Immigration and Customs Enforcement (ICE).<sup>1</sup> The threat of deportation of noncitizen parents or other family members of both noncitizen and U.S. citizen youth alike causes high levels of anxiety in young people and threatens the stability of their families.<sup>2</sup>

This brief highlights the most important changes made in policy affecting youth in the juvenile justice system since 2014, when the Foundation issued the Juvenile Detention Alternatives Initiative® (JDAI) Practice Guide *Noncitizen Youth in the Juvenile Justice System*.<sup>3</sup> The overview of the changes is followed by revised policy recommendations for those working with noncitizen youth and young people with noncitizen parents or other family members. These issues are relevant to many juvenile justice professionals because an estimated 11 million people are living in the United States without documentation and more than 5 million children in the United States currently live with at least one parent living in the country without legal documents.<sup>4</sup>

This update provides jurisdictions and individual employees with information to assist in developing informed policies and procedures consistent with JDAI core strategies.<sup>5</sup> For its 25-year history, JDAI has aimed to minimize the unnecessary separation of youth from their families and communities. The more local governments understand their options for promoting the well-being of young people within

their systems, the more effectively they can serve their local communities while promoting public safety.

Ideally, jurisdictions should partner with local immigration attorneys and other advocates with expertise in this arena to help develop policies and protocols and assist in resolving individual cases.

### Changes in Enforcement Priorities Increase Challenges for Youth

Immigration law is made by Congress, but the executive branch has leeway to determine the extent to which they will implement these laws and set other immigration policy, particularly where Congress has not spoken. One such area is immigration enforcement, where the federal government sets priorities for deportation.

President Donald Trump's executive orders<sup>6</sup> and the Department of Homeland Security memoranda implementing them have created policies that affect youth directly and indirectly in multiple ways — including making all undocumented immigrants a target for deportation, threatening to pull federal funding from so-called “sanctuary” jurisdictions and calling for more involvement of local law enforcement in immigration enforcement.

Under a 2017 executive order and Department of Homeland Security (DHS) memorandum focused on immigration enforcement in the interior of the United States<sup>7</sup> (“DHS Memo on Interior Enforcement”), DHS has been directed to expand its priorities for immigration

enforcement. While DHS previously had a policy of focusing its resources on removing people with certain criminal convictions, now DHS will take action to deport anyone it considers to violate immigration laws, including anyone it labels as a “removable alien.”<sup>8</sup> This includes both undocumented immigrants and immigrants with legal status, including long-term lawful permanent residents. The administration’s priorities include, but are not limited to, people with any criminal conviction(s), as well as those charged with a criminal offense or who have committed an act that could potentially be charged as a criminal offense.<sup>9</sup>

Immigration law has long treated juvenile delinquency differently from criminal convictions, and that law is unchanged.<sup>10</sup> However, given the scope of the new enforcement plan, delinquency has proven to be and will likely continue to be an immigration enforcement priority (even though it may not have the same legal consequences as a conviction). Thus, noncitizen youth involved in

the juvenile justice system are at increased risk of arrest, detention and deportation by ICE.<sup>11</sup>

Beyond the broad enforcement priorities pertaining to criminal offenses, the DHS Memo on Interior Enforcement also mentions a possible focus on people “involved in gang activity.”<sup>12</sup> The memo contains no exception or special treatment for youth. Under the enforcement priorities of President Barack Obama’s administration, people with alleged gang affiliation were a priority for immigration enforcement if they were 16 or older. Based on the elimination of this age designation in the current memo, the current administration does not view youth differently from adults when it comes to alleged gang affiliation.<sup>13</sup> Given that most gang membership or association — alleged or real — occurs in adolescence,<sup>14</sup> the impact on undocumented youth could be far-reaching, especially for those involved with the juvenile justice system.

**YOUTH WITH DACA TARGETED FOR DEPORTATION BECAUSE OF GANG ALLEGATIONS** When minors without citizenship or residency status came forward to the U.S. government to participate in the Deferred Action for Childhood Arrivals program (DACA)<sup>15</sup>, they took the risk of sharing their information with the government. Now even these youth with temporary protection from deportation through DACA are at risk. The situation of Daniel Ramirez Medina illustrates this dynamic. When Immigration and Customs Enforcement agents went to his home to arrest his father for an immigration violation, Daniel was also arrested based on allegations that he was gang-involved and put into deportation proceedings. Ramirez’s attorneys say that he was “repeatedly pressured by U.S. Immigration and Customs Enforcement agents to falsely admit affiliation” with a gang.<sup>16</sup> Daniel denied the gang allegations unequivocally, has never been adjudicated delinquent or convicted of any crime and, in fact, had passed the strict background check required for DACA.<sup>17</sup>

**UNACCOMPANIED CHILDREN** As conditions have worsened in Central American countries in recent years, there has been a dramatic increase in the numbers of unaccompanied children — those traveling without a parent or legal guardian — entering the United States. In recognition that these youths have often endured traumatic experiences in their countries of origin and/or during their journey to the United States and are without a parent or guardian, these children are provided special protections throughout their detention and as they face deportation. The Executive Order on Border Enforcement threatens to strip some of these protective policies, jeopardizing unaccompanied children’s ability to receive appropriate care and access to due process as they face deportation. These unaccompanied children may find themselves involved in local juvenile justice systems.

Besides the new federal deportation policy’s direct consequences for noncitizen youth, children who are U.S. citizens with undocumented parents or other family members face consequences too. The current scope of the enforcement priorities means that all undocumented people living in the United States, even those with U.S. citizen children and those without any criminal history, may be targeted for deportation. Because the DHS Memo on Interior Enforcement states that “the Department will no longer exempt classes or categories of removable aliens from potential enforcement,” every undocumented person in the United States is at risk of deportation.<sup>18</sup>

This creates a culture of fear in the immigrant community, where individuals and families are often afraid to do anything that could expose them to heightened risk, including sending children to school,<sup>19</sup> accessing necessary benefits and services for which parents or children are lawfully eligible,<sup>20</sup> participating in the census, reporting crimes to the police and cooperating

with law enforcement in the investigation and prosecution of crimes, or in case planning of their system-involved child.<sup>21</sup>

These developments may jeopardize access to early care and education, health and nutrition services and other income-stabilizing support for children of immigrant parents.

The threat of permanent separation from a family member is a serious adverse experience for any young person.<sup>22</sup> The absence of a parent — who is often the main source of income for the family — frequently sends the family into a spiral of financial instability and can result in children going into foster care. Family separation and the fear it brings harms young people’s mental and physical health, and undermines economic security, among other issues.<sup>23</sup> Juvenile justice professionals should take this circumstance into account as they make decisions about appropriate responses to situations involving youth in immigrant families.

**SPOTLIGHT ON PROMISING STATE PRACTICES** **California Values Act:** In 2017, California passed the California Values Act, which limits cooperation between local and state law enforcement and federal immigration authorities. Among its many provisions, this new law will make immigration holds, 287(g) contracts, inquiring about immigration status and using ICE agents as interpreters unlawful in every circumstance. It also places limits on the use of notification requests and transfers to ICE, extends due process protections to ICE interviews in state prisons and directs the attorney general to create model policies for certain spaces such as shelters, schools, health facilities and others.

### **Threats to Funding for “Sanctuary Jurisdictions”**

The executive order threatens to pull federal funding from “sanctuary jurisdictions” that “willfully refuse to comply with 8 U.S.C. 1373.”<sup>24</sup> Section 1373 is a federal law that prohibits local policies that limit communication with DHS about a person’s citizenship or immigration status. However, section 1373 does not require local and state governments to do anything to actively share information.

“Sanctuary jurisdiction” is not defined in the executive order, but U.S. Attorney General Jeff Sessions later clarified it applies to jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373.<sup>25</sup> Multiple cities and counties have filed lawsuits challenging the legality of defunding provisions of the executive order. These lawsuits argue that the threat to federal funding is unconstitutional because it violates separation of powers, the Spending Clause, the 10th Amendment and the 4th and 5th Amendments to

the U.S. Constitution.<sup>26</sup> Because of an injunction issued in the lawsuits, the federal government is not permitted to implement the executive order. The federal government has an appeal pending in the 9th Circuit Court of Appeals.

There is legal precedent for state confidentiality laws that protect juvenile court case files and information from disclosure to withstand a challenge that they violate 8 U.S.C. 1373. Because these types of laws are not immigration-specific restrictions, but instead are general confidentiality laws that control how juvenile information is shared for state-related purposes, such laws are unlikely to be found to violate section 1373.<sup>27</sup>

### **Enlisting Local Law Enforcement to Engage in Immigration Enforcement**

Additional mechanisms for implementing the expansive deportation plan in the executive orders seek to enlist the assistance and cooperation

of local law enforcement in ways that may compromise community trust in law enforcement and overall public safety. First, the administration reinstated the Secure Communities Program (S-Comm).<sup>28</sup> Instituted under President George W. Bush and later expanded under Obama before being discontinued in 2015, S-Comm relies on technology to facilitate information sharing between local and state governments and DHS. Under S-Comm, fingerprints taken after arrest by local or state law enforcement are not only checked against state and federal databases, but also forwarded to DHS by the FBI. DHS thus gets notified of every arrest and can check arrests against civil immigration databases. People who have had previous contact with federal immigration authorities will be identified through this database search.

ICE usually places an “immigration detainer,” also called an ICE hold, on anyone whom they believe is subject to deportation to ensure they may be apprehended later for removal. Nothing in the language of S-Comm exempts children and youth who are arrested. The return of S-Comm is of concern given that it was ended amid complaints about the targeting of individuals who were not designated enforcement priorities, undermining community trust and facilitating racial profiling and unconstitutional detentions.<sup>29</sup>

Second, the executive orders call for an expansion of 287(g) agreements, a memorandum of understanding process that allows state or local law enforcement officers to act as immigration officers and pursue suspected noncitizens at their

own expense.<sup>30</sup> Under 287(g) agreements, local law enforcement officials are able to perform a broad array of immigration enforcement functions, including investigation of the immigration status of individuals, access to ICE databases and the ability to issue immigration detainers.<sup>31</sup> Multiple studies have concluded that these agreements lead to racial profiling and constitutional violations.<sup>32</sup> The existence of a 287(g) agreement may impede reporting crimes and cooperating with law enforcement in investigations or prosecutions of crimes. Immigrant families may be reticent to work with juvenile justice officials in localities with 287(g) agreements.

Finally, the DHS memo on interior enforcement also calls for the expansion of the Criminal Alien Program (CAP), an older program that is already in effect in various jurisdictions, including within the juvenile justice system.<sup>33</sup> CAP allows ICE officers to receive information and/or ask probation and detention officers to share information about foreign-born arrestees and detainees, and gain access to youth either by phone or by entry into the detention facility so that they can place an immigration detainer on youth they intend to arrest and put into deportation proceedings. Youth often unknowingly share information that is used to deport them. Expansion of CAP within the juvenile justice system is likely to further undermine the willingness of immigrant families and community members to work with juvenile justice officials.



## Updated Practice Recommendations for Working With Noncitizen Youth in the Juvenile Justice System



In the current context of increased immigration enforcement, it is important for juvenile justice officials to understand the potentially serious and negative consequences of local immigration policies or lack thereof for noncitizen youth. In light of the changing federal policies on immigration enforcement, the practice recommendations below are intended to supplement those outlined in the 2014 guide *Noncitizen Youth in the Juvenile Justice System*.<sup>34</sup>

- **Do Not Enforce ICE Detainer or Hold Requests:** Under the reincarnated S-Comm, ICE may place detainers on noncitizen youth. Given the questionable constitutionality of detainers, the potential liability they create for jurisdictions and the risk that cooperating with ICE in this manner will undermine community trust in law enforcement, juvenile justice officials should not honor ICE detainer or hold requests for any youth.<sup>35</sup>
- **Do Not Enter Into 287(g) Agreements:** With increased pressure from the federal government to enter into 287(g) agreements that allow local law enforcement officials to act as immigration officers, juvenile justice officials should advocate against these agreements in their communities, both for their own officers and local police forces. 287(g) agreements further conflate local law enforcement with immigration authorities, which likely will impede the immigrant community's willingness to report crimes, cooperate in law enforcement investigations or interact with juvenile justice practitioners.
- **Do Not Violate State Confidentiality Laws in Sharing Information With ICE:** As the federal government seeks to employ "all available systems and enforcement tools" to implement its wide-scale enforcement plan, ICE and the U.S. Border Patrol may turn to juvenile justice officials seeking information about youth in their care and/or custody. Many states have juvenile confidentiality laws that protect information about youth in the juvenile justice systems, often with no exception for federal immigration officials. Juvenile justice officials should ensure compliance with all state confidentiality laws before sharing any information with ICE or Border Patrol.
- **Continue to Pursue JDAI Reforms:** JDAI seeks to safely reduce reliance on locked detention because even a short stay in detention can cause young people serious harm, both immediate and long term, in areas such as education, employment and mental health.<sup>36</sup> JDAI sites have achieved significant reductions in both juvenile detention and juvenile crime by adhering to JDAI's core strategies.<sup>37</sup> Less reliance on detention keeps noncitizen youth out of the deportation pipeline as well. Youth are typically referred to ICE by juvenile justice officials, or affirmatively sought out by ICE, while they are detained.



- **Encourage School and Law Enforcement Officials to Reconsider School Discipline Policies:** School discipline policies can have life-altering consequences for immigrant youth. When police are stationed in schools, they are often pulled into everyday disciplinary situations, getting involved in behavior-related matters that ordinarily would be handled by

educators. As a result, the presence of police in schools means that students are more likely to be arrested for minor issues — setting off a chain of events that often derails a student’s academic focus and progress. For immigrant youth, the ripple effect may be even more serious, as the youth could face deportation as a direct consequence.

## Useful Definitions

**ICE:** U.S. Immigration and Customs Enforcement, the federal agency responsible for interior enforcement of federal immigration laws.

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**ICE DETAINER OR HOLD:** A request that an agency, such as a juvenile detention facility, notify ICE before release of an individual and detain the youth up to 48 hours after the youth would otherwise be released so that immigration authorities can arrange to assume custody for the purpose of arresting and removing the youth.

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**SECURE COMMUNITIES PROGRAM, ALSO KNOWN AS S-COMM:** Facilitates information sharing between state and local law enforcement and the U.S. Department of Homeland Security to enforce immigration laws.

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**287(G) AGREEMENTS:** A program that allows state or local law enforcement officers to act as immigration officers and pursue suspected noncitizens at the expense of local government.

**THE QUESTIONABLE LEGALITY OF ICE DETAINERS** Since 2014, the law on immigration detainers has changed substantially. Several federal court decisions have found key aspects of ICE’s detainer system unconstitutional and in violation of federal statutes.<sup>38</sup> For example, in *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317 (D.Or. Apr. 11, 2014), the Federal District Court in Oregon ruled that the ICE detainer did not provide sufficient proof (probable cause) to allow the local jail to detain Ms. Miranda-Olivares for ICE, and that they could be held liable for unlawfully holding her. Other federal courts around the country have similarly ruled against the constitutionality of ICE detainers.

**SPOTLIGHT ON PROMISING PRACTICES: CALIFORNIA'S AB 899** California has a law indicating that federal officials, including immigration authorities, cannot access information or files about youth in the juvenile justice or child welfare systems without first filing a petition requesting access to this information from the juvenile court. See California Welfare and Institutions Code § 83I. This petitioning procedure is stringent and requires filing a petition, providing notice to the minor and the minor's family (among others) and finally allowing the juvenile court to determine whether "the need for disclosure outweighs the policy considerations favoring confidentiality." See Cal. R. Ct. 5.552(e). Pursuant to this law, it is unlawful for juvenile justice officials in California to share any information about youth in their care unless the juvenile court has first authorized the disclosure. General state confidentiality laws that limit the flow of information to federal immigration officials have been suggested not to violate 8 U.S.C. § 1373 by at least one court. See *City of New York v. United States*, 179 F.3d 29, 35-37 (2d Cir. 1999). Under 8 U.S.C. § 1373, states cannot bar the exchange of information with immigration authorities. Federal law, however, does not prohibit general confidentiality laws, such as California's, that control how juvenile information is shared.

- **Help Noncitizen Youth Obtain Immigration**

**Status:** Despite some changes to the availability of certain types of immigration relief since 2014, limited avenues allow undocumented youth to obtain lawful immigration status in the United States. Juvenile justice officials can help noncitizen youth by connecting them with local legal services providers for immigration legal assistance. Online directories such as [www.immigrationlawhelp.org](http://www.immigrationlawhelp.org) list nonprofit immigration legal services providers in a searchable database.<sup>39</sup> If a youth is able to gain legal status, the youth could work lawfully and pursue higher education and other services and benefits, contributing significantly to the youth's successful transition into adulthood. For a more comprehensive list of common forms of immigration relief for noncitizen youth, see

pages 15–17 in *Noncitizen Youth in the Juvenile Justice System*.<sup>40</sup> Some notable updates to these forms of relief include:

- Deferred Action for Childhood Arrivals (DACA), a program that was created in 2012 to provide temporary protection from deportation and work authorization to certain young people, has been eliminated by the current administration and is at the center of an ongoing national debate.<sup>41</sup> Individuals who had DACA at the time the termination of the program was announced will continue to have DACA until it expires in their respective case (DACA was granted to individuals for a two-year period), but no new applications for DACA can be submitted. Under a federal court decision issued in January 2018, youth

may renew their DACA status while that lawsuit is ongoing.

- Special Immigrant Juvenile Status (SIJS) is a path to legal status for children under the jurisdiction of a juvenile court that finds that the child cannot be reunified with one or both parents because of abuse, neglect or abandonment, and that it is not in the child's best interest to be returned to their country of origin.<sup>42</sup> Because of limits on the numbers of SIJS visas that can be given to applicants from different countries, there are currently backlogs of cases for youth from El Salvador, Guatemala, Honduras and Mexico. As a result, eligible youth from these countries may have to wait years for their application for a green card through SIJS to be considered and processed.<sup>43</sup>
- The U visa is a visa for victims of serious crime in the United States who are willing to cooperate in the investigation or prosecution of the crime.<sup>44</sup> U visas are an important path to legal status for undocumented immigrants who have been the victim of a crime and are especially beneficial because they allow the victim to apply for family members to get legal status as well. There is a cap limiting the number of U visas to 10,000 per fiscal year. The number of people eligible for this protection has exceeded the cap for several years, and there is a significant backlog for these visas.<sup>45</sup> As a result, U visa petitioners have to wait several years before receiving a final decision on their case. However, U.S. Citizenship and Immigration Services will issue preliminary determinations on cases in

the queue, which can allow petitioners to be granted deferred action<sup>46</sup> and be eligible for work authorization.<sup>47</sup> Given the volume of cases, though, it is currently taking two years or more to get this preliminary determination.

## CONCLUSION

State and local law enforcement — including the juvenile justice system — often stand on the front lines of immigration enforcement. State and local practices and policies can affect youths' access to justice as well as their outcomes, including separation from family and community and removal from the United States, a future without legal status and the inability to gain work authorization or federal financial aid for college. The more state and local governments understand their options for promoting the well-being of young people within their systems, the more effectively they can serve their communities while promoting public safety.

## ENDNOTES

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29. See, for example, Gamboa, S. (2014, November 21). And, National Immigrant Justice Center. (2014, November 21). *Obama administration ends secure communities* (Press release). Retrieved January 8, 2018, from [www.immigrantjustice.org/press\\_releases/obama-administration-ends-secure-communities](http://www.immigrantjustice.org/press_releases/obama-administration-ends-secure-communities)
30. The DHS memo on interior enforcement states that “[t]here are currently 32 law enforcement agencies in 16 states participating in the 287(g) Program. In previous years, there were significantly more law enforcement agencies participating in the 287(g) Program.” Kelly, J. (2017, February 20).
31. Kelly, J. (2017, February 20).

32. See, for example, Weissman, D. M., Headen, R. C., & Parker, K. L. (2009, February). *The policies and politics of local immigration enforcement laws: 287(g) Program in North Carolina*. Raleigh and Chapel Hill, NC: American Civil Liberties Union of North Carolina Legal Foundation and Immigration & Human Rights Policy Clinic at University of North Carolina at Chapel Hill. Retrieved January 8, 2018, from [www.law.unc.edu/documents/clinicalprograms/287g\\_policyreview.pdf](http://www.law.unc.edu/documents/clinicalprograms/287g_policyreview.pdf). And, Perez, T. E. (2011, December 15). *United States' investigation of the Maricopa County Sheriff's Office*. Washington, DC: U.S. Department of Justice. Retrieved January 8, 2018, from [www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso\\_findletter\\_12-15-11.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf). And, American Immigration Council. (2012, November 29). *The 287(g) program: An overview* (Fact sheet). Retrieved January 8, 2018, from [www.americanimmigrationcouncil.org/research/287g-program-immigration](http://www.americanimmigrationcouncil.org/research/287g-program-immigration)
33. For more information on the Criminal Alien Program, see The Annie E. Casey Foundation. (2014a).
34. The Annie E. Casey Foundation. (2014a).
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