



Maryland
Hospital Association

February 26, 2020

To: The Honorable William C. Smith Jr., Chairman
Senate Judicial Proceedings Committee

From: Jennifer Witten, Vice President, Government Affairs
Maryland Hospital Association

Re: Letter of Information- Senate Bill 903- Immigration Enforcement - Public Schools,
Hospitals, and Courthouses - Policies

Dear Chairman Smith:

On behalf of the Maryland Hospital Association's (MHA) 61 member hospitals and health systems, we appreciate the opportunity to comment on Senate Bill 903. Maryland's hospitals protect the rights of all individuals, including our immigrant population, and ensure access to quality health care. In 2017, at the request of members of the Maryland General Assembly, MHA asked Maryland's hospitals to review their policies related to undocumented individuals and non-U.S. citizens and update them to reflect guidance from the Maryland Office of the Attorney General (OAG).ⁱ

Notably, the guidance references federal requirements, including the Health Insurance Portability and Accountability Act (HIPAA) and the Emergency Medical Treatment and Active Labor Act (EMTALA). Title VI of the federal Civil Rights Act of 1964 and Section 1557 of the Affordable Care Act prohibit discrimination based on race, color, and national origin in programs and activities that receive federal financial assistance, including Medicaid and Medicare. Maryland law also prohibits discrimination by health care providers.ⁱⁱ

The guidance issued by the OAG noted the Department of Homeland Security has a policy against enforcement and removal of any individual at "sensitive locations." These include medical treatment and health care facilities, such as hospitals, doctors' offices, accredited health clinics, and emergent or urgent care facilities.ⁱⁱⁱ Prior approval by DHS in limited circumstances allows federal agents access to patients if there is imminent threat or national security concerns.

Maryland's hospitals complied with this request and updated their policies to align with the OAG guidance. Hospitals in Maryland went beyond the initial request and agreed to a reporting protocol with the OAG if the U.S. Immigration and Customs Enforcement (ICE) agency contradicts its own policy by enforcing federal immigration laws in "sensitive locations," including hospitals. This process was conducted in coordination with other stakeholders such as Casa de Maryland, which generously offered to provide technical assistance to hospitals. The

OAG guidance, ICE policy, and a form hospitals received are attached to this letter. To date, we are not aware of a single instance of ICE enforcement in Maryland's hospitals.

Though well intentioned, SB 903 may attract the attention of parties such as ICE, which could create the very issue this legislation seeks to prevent. Further, any requirement to publicly publish a policy effectively provides the means for actors to circumvent it. For these reasons, we urge the committee to consider the unintended consequences of this legislation. We respectfully ask the public publishing to be reconsidered as a requirement.

For more information, please contact:

Jennifer Witten

Jwitten@mhaonline.org

ⁱ In addition, in a July 12, 2017 letter to Attorney General Frosh, John Barsa, Acting Asst. Secretary, DRS Office of Partnership and Engagement, stated the policy was still in effect.

ⁱⁱ Md. Code, Health-Gen. § 19-355

ⁱⁱⁱ US Immigration and Customs Enforcement. (n.d.) FAQ on Sensitive Locations and Courthouse Arrests. <https://www.ice.gov/ero/enforcement/sensitive-loc#wcm-survey-target-id>

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September 21, 2017

The Honorable Brooke E. Lierman
Maryland General Assembly
311 House Office Building
Annapolis, Maryland 21401

Dear Delegate Lierman:

You asked for guidance about immigration enforcement in hospitals and other health care facilities. Although personnel at hospitals and other health care facilities should consult with their institution's legal counsel about that institution's policy regarding interaction with federal immigration and other law enforcement officials, below I have outlined information that I hope you will find helpful. This information is not a formal Opinion of the Attorney General and should not be construed as legal advice to any health care provider or patient.

Immigration Enforcement Generally

The U.S. Department of Homeland Security ("DHS"), mostly through the U.S. Immigration and Customs Enforcement ("ICE") agency, has primary responsibility for enforcing federal immigration laws. ICE agents are typically the federal officers who take into custody or arrest non-citizens for alleged violations of immigration law. An ICE agent may have a judicial warrant, which authorizes the arrest of a specific individual or a search of specified places or for specified information. A judicial warrant is signed by a federal judge and is supported by probable cause that the named individual committed a crime or, in the case of a search warrant, that the place where a search may take place contains evidence of a crime. In the alternative, an ICE agent may have an administrative warrant, sometimes called an ICE warrant, which allows arrest of the person named in the warrant if the person is located in a public location. 8 U.S.C. § 1357, 8 C.F.R. § 287.5. An administrative warrant is not signed by a judge and does not provide the probable cause made necessary by the Fourth Amendment to the U.S. Constitution to allow a seizure or search in private places; rather, it is signed by an ICE official who found that the named individual may be removable from the U.S. or may be arrested on the basis of an alleged violation of a federal immigration law. An

administrative warrant alone does not authorize an ICE agent to enter non-public areas without appropriate consent.¹

Immigration Enforcement in Hospital and Health Care Facilities

If staff in hospitals or other health care facilities encounter a federal officer seeking information about or the location of a non-citizen, the federal officer involved will most likely be an ICE agent. For almost six years, however, ICE has maintained a policy against enforcement and removal in “sensitive locations.” (Memorandum of ICE Director John Morton, Policy No. 10029.2, dated Oct. 24, 2011) (attached). “Sensitive locations” are specified as, among other places, “[m]edical treatment and health care facilities, such as hospitals, doctors’ offices, accredited health clinics, and emergent or urgent care facilities.”² As of the date of this letter, the website of DHS indicates the policy is still in effect.³

In an “FAQ on Sensitive Locations and Courthouse Arrests,” ICE explained that, pursuant to its policy, “enforcement actions” are not to occur at or be focused on sensitive locations unless:

1. exigent circumstances exist;
2. other law enforcement actions have led officers to a sensitive location,
or
3. prior approval is obtained from a designated supervisory official.⁴

Moreover, DHS specifies:

Enforcement actions covered by this policy are apprehensions, arrests, interviews, or searches, and for purposes of immigration enforcement only, surveillance. Actions not covered by this policy include activities such as obtaining records, documents, and similar materials from officials or employees, providing notice to officials or employees, serving subpoenas, engaging in Student and Exchange Visitor Program (SEVP) compliance and certification visits, guarding or securing detainees, or participating in official functions or community meetings.⁵

The DHS policy also makes clear that its sensitive locations policy “is not intended to categorically prohibit lawful enforcement operations when there is an

¹ DHS Federal Law Enforcement Training Center Training transcript, “ICE Administrative Removal Warrant,” <https://www.fletc.gov/audio/ice-administrative-removal-warrants-mp3>.

² See <https://www.ice.gov/ero/enforcement/sensitive-loc>.

³ In addition, in a July 12, 2017 letter to Attorney General Frosh, John Barsa, Acting Asst. Secretary, DHS Office of Partnership and Engagement, stated the policy was still in effect.

⁴ See <https://www.ice.gov/ero/enforcement/sensitive-loc>.

⁵ *Id.*

immediate need for enforcement action...” The policy goes on to list the following situations as those falling within the foregoing exception:

- the enforcement action involves a national security or terrorism matter;
- there is an imminent risk of death, violence, or physical harm to any person or property;
- the enforcement action involves the immediate arrest or pursuit of a dangerous felon, terrorist suspect, or any other individual(s) that present an imminent danger to public safety; or
- there is an imminent risk of destruction of evidence material to an ongoing criminal case.

Requests for Access

An ICE agent does not have the right to enter a non-public area, i.e., those areas not open to the public such as a treatment room, unless the agent has a judicial warrant or consent from an authorized person. The judicial warrant should specify the person or information the agent is authorized to seize. Nevertheless, if “exigent circumstances” are present, an ICE agent may enter a non-public area without a warrant. Those are emergency situations that require immediate action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a criminal suspect, or destruction of evidence. *See Mincey v. Arizona*, 437 U.S. 385 (1978).

Under the Fourth Amendment to the U.S. Constitution, if a patient or anyone else in a health care facility has an encounter with the ICE agent, the individual has the right to refuse to answer questions until they have a chance to speak to a lawyer. Additionally, an individual can refuse to share any information about where they were born or how they entered the country. In fact, an individual has a constitutional right to remain silent and can choose not to speak at all.

Requests for Patient Information

The federal Health Insurance Portability and Accountability Act (“HIPAA”) protects a patient’s health information, sometimes referred to as “protected health information” (“PHI”). The protections in HIPAA’s privacy rule apply regardless of the patient’s immigration status. Notwithstanding, federal law allows disclosure of patient information for certain identified law enforcement purposes. 45 C.F.R. § 164.512(f). These purposes are:

- (1) to comply with a court order or judicial warrant, subpoena or summons issued by a judicial officer, or a grand jury subpoena (45 C.F.R. § 164.512(f)(1)(ii)(A)-(B));
- (2) to comply with an administrative request (45 C.F.R. § 164.512(f)(1)(ii)(C));

- (3) to respond to a request for PHI for purposes of identifying or locating a suspect, fugitive, material witness or missing person (45 C.F.R. § 164.512(f)(2));
- (4) to respond to a request for PHI about a victim of a crime, and the victim agrees (45 C.F.R. § 164.512(f)(3));
- (5) to report PHI to law enforcement when required by law (45 C.F.R. § 164.512(f)(1)(i));
- (6) to alert law enforcement about the death of the individual (45 C.F.R. § 164.512(f)(4)).⁶

The facility may disclose only that information specifically described in the subpoena, warrant, or summons. Under federal regulations,

Before disclosure in response to subpoenas or other lawful process not accompanied by an order of a court or administrative tribunal, there must be reasonable efforts to notify the patient as described in 45 C.F.R. § 164.512(e)(1). The covered entity must verify the identity of the person requesting the information and the authority of the person to have access to the information if the identity is not otherwise known to the individual. The covered entity must also obtain any documentation that is a condition of disclosure. 45 C.F.R. § 164.514(h)(1).⁷

Before responding to any request for patient information, however, it is best for staff at hospitals and other health care facilities to consult with attorneys to ensure they are in compliance with confidentiality laws.

Provision of Health Care

The federal Emergency Medical Treatment and Active Labor Act requires emergency departments to provide persons seeking emergency medical treatment with “an appropriate medical screening examination” and treatment to stabilize their condition regardless of citizenship, legal status, or ability to pay. 42 U.S.C. § 1395dd. Moreover, individuals seeking health care are not required to disclose their immigration status to receive health care. Title VI of the federal Civil Rights Act of 1964 and Section 1557 of the Affordable Care Act prohibit discrimination on the basis of race, color, and national origin in programs and activities that receive federal financial assistance, including Medicaid and Medicare. Maryland law also prohibits discrimination by health care providers. *See* Health-Gen. Article (“HG”), § 19-355(a) (“A hospital or related institution may not discriminate in providing personal care for an individual because of the race, color, or national origin of the individual.”). *See also Ehrlich v. Perez*, 394 Md.

⁶ The U.S. Dept. of Health and Human Services has more information on each of these exemptions at <https://www.hhs.gov/hipaa/for-professionals/faq/505/what-does-the-privacy-rule-allow-covered-entities-to-disclose-to-law-enforcement-officials/index.html>.

⁷ “Guidance on Immigration Enforcement,” Washington State Office of the Attorney General (April 2017) at 48-49.

691, 732 (2006) (holding that plaintiffs had sufficiently shown a likelihood of success on their claim that denying health services on the basis of national origin violated federal and State law equal protection provisions). Health care providers should ask for immigration information only if the individual wishes to apply for public benefits.

Federal law prohibits “unqualified” immigrants from receiving any State or local benefit. 8 U.S.C. § 1621(a). A “qualified” immigrant is a non-citizen who is lawfully admitted for permanent residence, a non-citizen who is granted asylum, a refugee admitted into the U.S., a non-citizen who is paroled into the U.S., a non-citizen whose deportation is being withheld, a non-citizen who is granted conditional entry, or a non-citizen who is a Cuban or Haitian entrant. 8 U.S.C. § 1641(b). The prohibition against providing benefits and services to unqualified immigrants does not apply to emergency medical care, short-term, non-cash in-kind emergency disaster relief, public health assistance for immunizations, services “such as soup kitchens, crisis counseling and intervention, and short-term shelter” that the U.S. Attorney General approves. 8 U.S.C. § 1621(b).⁸

With regard to Medicaid and the Children’s Health Insurance Program (“CHIP”), under federal law unqualified immigrants are not eligible for these programs and qualified immigrants are ineligible for these benefits for five years after they enter the U.S., subject to some exceptions. 8 U.S.C. § 1613(a). As allowed by federal law, Maryland law extends coverage under some federal programs to legal immigrants at the State’s expense, including the Family Investment Program (Human Services Article (“HS”), § 5-308(c)), Temporary Cash Assistance (HS § 5-312(d)); and Supplemental Nutrition Assistance Program/Food Supplement Program (HS § 5-503). In addition, Medicaid provides comprehensive medical care all legal immigrants who meet Program eligibility standards and who arrived in the U.S. before August 22, 1996, and comprehensive medical care for all legal immigrant children under the age of 18 years as well as for pregnant women who meet Program eligibility standards and who arrived in the U.S. on or after August 22, 1996. HG § 15-103(a)(2)(vii) and (viii). Some coverage for lawfully residing immigrant children and pregnant women regardless of entry into the U.S. is authorized by the CHIP Reauthorization Act of 2009. Pub. L. 111-3.⁹

A child’s immigration and residency status determines Medicaid eligibility. If the parents are not U.S. citizens or legal immigrants, but the child is a citizen or legal

⁸ Federal law allows States to provide, at their own expense, benefits and services to undocumented immigrants under certain circumstances. 8 U.S.C. § 1621(d) (“A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.”) The only Maryland provision enacted under this authority appears to be the Dream Act. Education Article, § 15-106.8.

⁹ For more information about immigration status and Medicaid or Maryland Children’s Health Program coverage see <https://mmcp.health.maryland.gov/Pages/Medicaid-Immigration-Status-Requirements.aspx>.

resident, Medicaid may cover the child, even if the parents are not eligible. The information any family members provide about the child's or their immigration status when applying for health coverage may only be used to determine if the child is eligible for health insurance and in connection with fraud investigations, but not for immigration enforcement or any other purposes. *See Affordable Care Act ("ACA") § 1411(g).*¹⁰ Nevertheless, a hospital or health care facility should collect and keep only as much immigration information as necessary for treatment or compliance with applicable laws.

Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Sandra Benson Brantley". The signature is written in a cursive, flowing style with a large loop at the end.

Sandra Benson Brantley
Counsel to the General Assembly


¹⁰ *See also* DHS Memo "Clarification of Existing Practices Related to Certain Health Information (Oct. 25, 2013) ("Consistent with the ACA's, the SSA's, and implementing regulations' limitations on the use of information provided by individuals for such coverage, and in line with ICE's operational focus, ICE does not use information about such individuals or members of their household that is obtained for purposes of determining eligibility for such coverage as the basis for pursuing a civil immigration enforcement action against such individuals or members of their household, whether that information is provided by a federal agency to the Department of Homeland Security for purposes of verifying immigration status information or whether the information is provided to ICE by another source.")



U.S. Immigration
and Customs
Enforcement

OCT 24 2011

MEMORANDUM FOR: Field Office Directors
Special Agents in Charge
Chief Counsel

FROM: John Morton 
Director

SUBJECT: Enforcement Actions at or Focused on Sensitive Locations

Purpose

This memorandum sets forth Immigration and Customs Enforcement (ICE) policy regarding certain enforcement actions by ICE officers and agents at or focused on sensitive locations. This policy is designed to ensure that these enforcement actions do not occur at nor are focused on sensitive locations such as schools and churches unless (a) exigent circumstances exist, (b) other law enforcement actions have led officers to a sensitive location as described in the "Exceptions to the General Rule" section of this policy memorandum, or (c) prior approval is obtained. This policy supersedes all prior agency policy on this subject.¹

Definitions

The enforcement actions covered by this policy are (1) arrests; (2) interviews; (3) searches; and (4) for purposes of immigration enforcement only, surveillance. Actions not covered by this policy include actions such as obtaining records, documents and similar materials from officials or employees, providing notice to officials or employees, serving subpoenas, engaging in Student and Exchange Visitor Program (SEVP) compliance and certification visits, or participating in official functions or community meetings.

The sensitive locations covered by this policy include, but are not limited to, the following:

¹ Memorandum from Julie L. Myers, Assistant Secretary, U.S. Immigration and Customs Enforcement, "Field Guidance on Enforcement Actions or Investigative Activities At or Near Sensitive Community Locations" 10029.1 (July 3, 2008); Memorandum from Marcy M. Forman, Director, Office of Investigations, "Enforcement Actions at Schools" (December 26, 2007); Memorandum from James A. Puleo, Immigration and Naturalization Service (INS) Acting Associate Commissioner, "Enforcement Activities at Schools, Places of Worship, or at funerals or other religious ceremonies" HQ 807-P (May 17, 1993). This policy does not supersede the requirements regarding arrests at sensitive locations put forth in the Violence Against Women Act, see Memorandum from John P. Torres, Director Office of Detention and Removal Operations and Marcy M. Forman, Director, Office of Investigations, "Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005 (January 22, 2007).

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- schools (including pre-schools, primary schools, secondary schools, post-secondary schools up to and including colleges and universities, and other institutions of learning such as vocational or trade schools);
- hospitals;
- churches, synagogues, mosques or other institutions of worship, such as buildings rented for the purpose of religious services;
- the site of a funeral, wedding, or other public religious ceremony; and
- a site during the occurrence of a public demonstration, such as a march, rally or parade.

This is not an exclusive list, and ICE officers and agents shall consult with their supervisors if the location of a planned enforcement operation could reasonably be viewed as being at or near a sensitive location. Supervisors should take extra care when assessing whether a planned enforcement action could reasonably be viewed as causing significant disruption to the normal operations of the sensitive location. ICE employees should also exercise caution. For example, particular care should be exercised with any organization assisting children, pregnant women, victims of crime or abuse, or individuals with significant mental or physical disabilities.

Agency Policy

General Rule

Any planned enforcement action at or focused on a sensitive location covered by this policy must have prior approval of one of the following officials: the Assistant Director of Operations, Homeland Security Investigations (HSI); the Executive Associate Director (EAD) of HSI; the Assistant Director for Field Operations, Enforcement and Removal Operations (ERO); or the EAD of ERO. This includes planned enforcement actions at or focused on a sensitive location which is part of a joint case led by another law enforcement agency. ICE will give special consideration to requests for enforcement actions at or near sensitive locations if the only known address of a target is at or near a sensitive location (e.g., a target's only known address is next to a church or across the street from a school).

Exceptions to the General Rule

This policy is meant to ensure that ICE officers and agents exercise sound judgment when enforcing federal law at or focused on sensitive locations and make substantial efforts to avoid unnecessarily alarming local communities. The policy is not intended to categorically prohibit lawful enforcement operations when there is an immediate need for enforcement action as outlined below. ICE officers and agents may carry out an enforcement action covered by this policy without prior approval from headquarters when one of the following exigent circumstances exists:

- the enforcement action involves a national security or terrorism matter;
- there is an imminent risk of death, violence, or physical harm to any person or property;

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- the enforcement action involves the immediate arrest or pursuit of a dangerous felon, terrorist suspect, or any other individual(s) that present an imminent danger to public safety; or
- there is an imminent risk of destruction of evidence material to an ongoing criminal case.

When proceeding with an enforcement action under these extraordinary circumstances, officers and agents must conduct themselves as discretely as possible, consistent with officer and public safety, and make every effort to limit the time at or focused on the sensitive location.

If, in the course of a planned or unplanned enforcement action that is not initiated at or focused on a sensitive location, ICE officers or agents are subsequently led to or near a sensitive location, barring an exigent need for an enforcement action, as provided above, such officers or agents must conduct themselves in a discrete manner, maintain surveillance if no threat to officer safety exists and immediately consult their supervisor prior to taking other enforcement action(s).

Dissemination

Each Field Office Director, Special Agent in Charge, and Chief Counsel shall ensure that the employees under his or her supervision receive a copy of this policy and adhere to its provisions.

Training

Each Field Office Director, Special Agent in Charge, and Chief Counsel shall ensure that the employees under his or her supervision are trained (both online and in-person/classroom) annually on enforcement actions at or focused on sensitive locations.

No Private Right of Action

Nothing in this memorandum is intended to and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

This memorandum provides management guidance to ICE officers exercising discretionary law enforcement functions, and does not affect the statutory authority of ICE officers and agents, nor is it intended to condone violations of federal law at sensitive locations.