

Stetson University College of Law
26th National Conference on Law and Higher Education
February 20 -22, 2005

The International Student, Emerging Legal Issues and Policies:
Towing the “FERPA” Line

Jocelind E. Gant, Ph.D.
Assistant to the President
and Director of International Programs

In the aftermath of September 11, and the ensuing “war on terrorism”, a majority of US institutions of higher education were faced with the challenge of “towing the line “ between two competing mandates: security and safety on the one hand, and the integrity of educational mission on the other. No where was the challenge posed by these competing mandates more evident than with regard to the basic privacy rights guaranteed by the Family Educational Rights and Privacy Act of 1974 (FERPA) and the relevant immigration reporting requirements of F-1, M-1 students and J-1 exchange visitors. NAFSA’s scenario “Eye On Ethics: SEVIS Options For Out-Of -Status Students”, published in the September/October, 2004 issue of the *NAFSA Newsletter*, is illustrative of the complexity of post/911 tensions that hold significant educational policy and ethical implications specific to students’ rights (privacy and First Amendment rights in particular). For discussion purposes, an excerpt is listed below.

Further details on the scenario itself are referenced in the NAFSA Code of Ethics, provision #3 (a-h):

EYE ON ETHICS: SEVIS OPTIONS FOR OUT-OF- STATUS STUDENTS

Scenario:

A student from Saudi Arabia at University Rolando is a very good student and mixes well with both U.S. and international students. He feels very comfortable with the staff of the International Office and spends a lot of time in the International Office where he often expresses his political sentiments. While he has never advocated terrorist activity, he has expressed an understanding of the reasons for Palestinian suicide bombers in Israel and support for what they are doing. A new DSO becomes alarmed with his views and reports him to the FBI.

Q Has this DSO Violated the Code of Ethic by reporting the student to the FBI?

A Yes. While the DSO should report any actual knowledge of terrorist activity, this wasn't the case in this scenario. Students come from different cultural backgrounds and have very different political views. While these views may not be popular in the United States, students still have a right to express them. The adviser has compromised her position with the student and needs to be careful not to overact to students' political opinions.

As demonstrated by the foregoing **Scenario**, the post 9/11 legal obligations to monitor or otherwise collect and disclose information on international students have served to redirect the focus away from the Students' privacy to security of international programs. In so doing, the college's relationship with its international students and scholars continues to be redefined. In this context, a

fundamental question arises: “Where do the student rights, afforded by FERPA, end and where does the institution’s right to disclosure begin?” The challenge of maintaining this delicate balance compels well- informed leadership by senior management and legal teams, and carefully constructed policies. In the absence of such policies, the risks associated with institutional liability and/or the diminution of FERPA privacy rights increase exponentially. Equally important, the college’s commitment to international education runs the risk of being compromised.

From a practitioner’s vantage point, this paper attempts to contextualize the FERPA “rights” of F, M and J students given the post 9/11 exceptions to the law, and to highlight relevant policy implications that are worthy of constructive dialogue among university legal counsel, leadership teams and college administrators serving as P/DSOs and A/ROs.

Immigration Record-keeping Requirements for F, M and J Students

In the context of international education, colleges that are INS (USCIS) or DOS certified are required to collect, maintain, and report specific information regarding F, M, and J students and scholars. The manner in which the information or educational record is maintained or disclosed is usually governed by requirements that are delineated in a combination of governing immigration laws, regulations or rules. Section 641 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), as amended by the PATRIOT Act

of 2001 and the Enhanced Border Security and Visa Entry Reform Act of 2002 (Border Security Act) are the federal statutes that constitute the basis for the record-keeping and reporting requirements of SEVIS. The corresponding federal regulations for F, M, and J students consist of the Federal Regulations, 8 C.F.R. § 214.3(g), 22 C.F.R. § 62.10 (e), and §.62.70. 67 Fed. Reg. 76256, (Dec.11.2002) was the final rule that implemented SEVIS and amended the recordkeeping and reporting requirements for F, M, students and J exchange visitors.

August 1, 2003 was the mandatory deadline date by which all F, M, and J colleges were to fully enroll in the Student Information and Exchange Visitor System (SEVIS) — the computer based electronic reporting system — of the Student Exchange Visitor Program (SEVP). Failure to comply resulted in the revocation of the college's designation.

SEVIS Reporting Requirements for F, M, and J Students

FERPA requires prior written consent from the student or his/her parent before a college may disclose personally identifiable information from education records to third parties, the disclosure of student information to government officials takes on added significance. It is therefore the function of “reporting” or disclosing rather than collecting information that presents unique challenges to college administrators. Most notably, is the challenge to balance the competing considerations of security and privacy.

When an F or M student is entered into SEVIS, there are two different types of reporting that occur. First, there is the “**event -based**” (NAFSA Advisory) reporting that is occasioned by the occurrence of a particular event affecting the status of one or more students, the program or the college. For example, within 21 days after the occurrence of the student -related event, colleges must update SEVIS regarding:

- ❖ Any student who has failed to maintain status or complete the program
- ❖ A change of the student’s or the dependent’s U.S. address
- ❖ A change of name of the student or dependent
- ❖ Any disciplinary action taken by the school against the student as a result of a conviction
- ❖ Any other notification request made by SEVIS with respect to the current status of the student.

In addition to the aforementioned “event -based” reporting requirements, there is also the **periodic reporting** requirement. This entails reporting an entire group of F or M students and it usually occurs at the end of the semester. The disclosure of student records may also be made via a written request received from INS. SEVIS reporting requirements for J exchange visitors, unlike those required for F and M, are required on an annual rather than periodic basis.

The Protections of and Exceptions to FERPA

The Family Educational Rights and Privacy ACT of 1974 (20 U.S.C. § 1232g) FERPA, generally known as the Buckley Amendment, applies to educational institutions that are recipients of federal funds. As promulgated by the “Joint Statement” in the Explanation of Buckley/ Pell Amendment, 120 Cong. Rec. 39862-39866, the law is intended to provide students 18 years or older, or who are attending a postsecondary institution with three basic rights: A right of access to education records; an opportunity to seek to have the records amended; and to protect the students, rights to privacy by limiting the disclosure of records without the student’s consent.”

A student’s consent must be written, signed, and dated. Further, it must also specify the records to be disclosed, the purpose for the disclosure and the individuals to whom the disclosure is being made.

Under the statute, a student’s “education records” are defined as “those records, files, documents and other materials that contain information directly related to a student; and are maintained by an educational agency or institution or by a party acting for the agency or institution.” 20 U.S.C. § 1232 g (a (.4) (A) (i) and (ii); 34 C.F.R. § 99.3. To maintain an effective educational mission and avert institutional liability, it is the latter— the disclosure of student records — that warrants a clear understanding of the laws, policy implications, and potential liability risks.

Disclosure of F, M, or J student records maintained by certified colleges under 8 C.F.R. § 214.3(g) and 22 C.F. R. § 62.15 **must** be disclosed specifically to INS or DOS in accordance with the pertinent immigration regulations. However, there are several exceptions (16 reported by DOE) that allow colleges to disclose education records without the prior consent of the student. The FERPA exceptions that are particularly relevant to F, M, and J students include the following:

- ❖ **SEVIS Reporting Requirements:** IIRIRA § 641 (c) (2) and 8.C.F.R. 214 .1 (h) allows for the SEVIS non-consensual reporting of F, M, and J students' records to INS and DOS. Of note is that this FERPA exception is limited to the information that is required to be released via SEVIS to INS.
- ❖ **Forms I-20 and DS-2019:** INS and DOS require F and J students to sign their respective Certificates of Eligibility Forms (Forms I-20 and DS-2019). These forms contain a consent proviso that essentially permits the disclosure of information to INS and DOS. For example, by signing a Form I-20, the F student agrees to the provision that expressly states, "I also authorize the name school to release any information from my records which is needed by INS pursuant to 8 CFR 214.3 (g) to determine nonimmigrant status." There is a similar proviso contained in the DS-2019 with consent to release information solely to DOS. Worthy of note is that the disclosure, under these provisions, is limited to INS for F students and DOS for J exchange visitors.
- ❖ **Directory Information:** Under FERPA, directory information is defined as "information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy" 34 C. defines
- ❖ **Ex Parte Orders:** An *ex parte* order is an order issued by a court of competent jurisdiction. The USA PATRIOT Act exception to FERPA, allows the Attorney General or an Assistant Attorney General to apply to a court for an *ex parte* order.
- ❖ **Grand Jury Subpoenas:** Education records may be disclosed to an individual designated in a Federal grand jury subpoena.

- ❖ **Law Enforcement Subpoenas:** Education records may also be disclosed to an individual designated in a subpoena for the expressed purpose of law enforcement.
- ❖ **Other Subpoenas and Court Orders:** Non-consensual disclosure of education records is permissible in response to lawfully executed subpoena (not referenced above) or court order provided that the college makes a reasonable effort to notify the student or parent of the order or subpoena in advance of the compliance.
- ❖ **Health and Safety Emergencies:** Non-consensual disclosure of education records to “appropriate parties” is also permissible in cases of emergencies where the “information is necessary to protect the health or safety of the student or other individuals”.

Concluding Thoughts

While the post 9/11 paradigm shift toward the security and safety of international programs continues to be cause for concern, it, nonetheless, offers college administrators an opportunity to reevaluate and reassess programs, policies and practices. Above all, it offers the opportunity to build on the traditions that have served the institution and its international students well.

Some considerations include:

- Sustain ongoing dialogue with governmental agencies on the imperatives of international education.
- Develop well-informed and narrowly tailored policies that are intended to comply with immigration requirements and to avoid the erosion of institutional mission.
- Reaffirm institutional commitment to traditional policies and practices that are intended to protect privacy rights of students (protocols etc.)

- Keep international students informed of the immigrations laws and institutional disclosure protocol and practices.
- Provide professional development on relevant immigration laws and policy implications to faculty and staff involved in international programs.
- Model and share Best Practices

Selected References and Resources

NAFSA Practice Advisory on Release of Student Information to Government Officials. October 1,2001. The website of NAFSA: Association of International Educators. www.nafsa.org/

Rodgers, Shelley, "FERPA Compliance Update", AACRAO, 11. 24. 02

NAFSA. "Eye on Ethics...." *NAFSA Newsletter*, Vol 55 No. 5 September/October 2004, p.10

U. S. Department of Education. "Model Notification of Rights under FERPA for Postsecondary Institutions."

<http://www.ed.gov/policy/gen/guid/fpc/ferpa/ps-officials.html>

Student and Exchange Visitor Information Systems (SEVIS) - Technical information, updates, and SEVIS login link. For SEVIS-related technical programs, contact the SEVIS Help Desk at 1-800-892-4829.

www.ice.gov/graphics/enforce/imm/imm_sevis.htm

F-1 and M-1 Student visa application documentation and procedures - Information, procedures, eligibility requirements, and what to expect at appointments with consular officials when considering F-1 and M-1 Student visa applications. travel.state.gov/visa;foreignstudent.html, travel.state.gov/foreign_student_visas_handout.html

J-1 Exchange Visitor visa application documentation and procedures - J-1 Exchange Visitor application procedures.

<http://travel.state.gov/visa;exchange.html>

Visa Information - Information about visa documentation and application and travel. travel.state.gov/visa_services.html

Federal Register - Information on federal rules, and notice published in the Federal Register and related links. www.archives.gov/federal_register