

April 10, 2002

We write to offer our assistance and to share information that can help preserve individual liberties in the academic community, in the context of the on-going investigations into the terrorism of September 11 and the subsequent anthrax attacks.

As the investigations progress, academic institutions, including administration and faculty will likely continue to receive requests from government officials for information concerning students and staff. We believe it important for the academic community to be aware of the rights of students to be protected from inappropriate inquiries or actions. While Congress has expanded government access to educational records since September 11, these measures do not automatically open all student files and in many cases require a court order.

As a general rule, post-secondary educational institutions that receive federal funds may not release a student's "education records" without the student's permission.¹ However, under certain conditions, a school may disclose "directory information" without the student's consent. Schools may also make disclosures in an "emergency" or in compliance with a court order or subpoena. Student information collected by the National Center for Education Statistics (NCES) is only accessible with a court order. However, information about foreign students is more broadly accessible to the government.

The following is a very brief summary of the major body of law governing the rights of students and academic institutions under the Family Educational Rights & Privacy Act of 1974 (FERPA), or the Buckley Amendment, 20 USC 1232g. We will also discuss the special exceptions to FERPA regarding foreign students under the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA).

- **Education records**

FERPA generally prohibits any post-secondary educational institution that receives federal funds from releasing a student's "education records" without student consent,² unless mandated by court order or lawful subpoena.³

¹ §1232g(b) and §1232g(d). Generally, for students under 18 or in secondary school or below, FERPA affords the educational record confidentiality rights to parents.

² §1232g(b) and §1232g(d). Generally, for students under 18 or in secondary school or below, FERPA affords the educational record confidentiality rights to parents.

³ §1232g(b)(2)(B). See also, §1232g(B)(1)(J).

“Education records” include any documents maintained by a school that “contain information directly related to a student.”⁴ Examples include transcripts, financial aid and work-study forms, transcripts and disciplinary records.

Students have the right to inspect and review their education records.⁵ They are entitled to correct or delete inaccurate information in their education records and may even insert written explanations.⁶ If the school declines to amend the student’s education record, the student may request a hearing.⁷ Students can avoid problems by reviewing their education records annually.

Some records found at a school are excluded from the FERPA definition of “education records.” Such records include teachers’ private notes and records not contained in a student file, records maintained by campus law enforcement units, personnel records, and medical records.⁸ Disclosure of these records is not regulated by FERPA, but might be covered by other laws, regulations or agreements. Disclosure could also be compelled by a valid court order or subpoena.

When “education records” are subpoenaed, the school must inform the student of the subpoena before releasing the information,⁹ except where the subpoena itself directs that its existence is to remain secret.¹⁰ Although a student cannot veto the disclosure, the school, student, or parent may seek to quash a subpoena in court.

▪ **Directory Information**

Notwithstanding the general prohibition against the release of personally identifiable student records, FERPA permits (*but does not require*) the disclosure of student “directory information” without specific consent. However, a school must first advise students what types of information the school has designated as “directory information” and notify students that they may object to the disclosure of “directory information.” A school may not release the information if the student or parent objects.¹¹ A school is not required to notify students of each specific request for directory information. In practice, schools typically notify students of their right to withhold directory information in a *pro forma* fashion that students often overlook or ignore.

⁴ § 1232g(a)(4).

⁵ § 1232g(a)(1)(A). Access must be provided “within a reasonable period of time” which may not exceed 45 days of the request. *Id.* As discussed below, however, not all student records are “education records” for purposes of FERPA. Such non-FERPA education records may include teacher’s private notes and records not contained in a student file, records maintained by campus law enforcement units, personnel records, and health care records of adult postsecondary students. § 1232g(a)(4)(B). In addition, FERPA exempts certain financial records and confidential recommendations from student access. § 1232g(a)(1)(C).

⁶ § 1232g(a)(2).

⁷ The purpose of the hearing is “to challenge the content of [a] student’s education records, in order to insure that the records are no inaccurate, misleading, or otherwise in violation of the privacy rights of students.” § 1232g(a)(2).

⁸ § 1232g(a)(4)(B).

⁹ § 1232g(b)(2)(B).

¹⁰ § 1232g(b)(1)(J).

¹¹ § 1232g(b)(1), (2); § 1232g(a)(5)(B).

“Directory information” may include the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.¹² Many academic institutions include a student’s email address as part of directory information.

▪ **Emergency Disclosures**

Schools may also disclose information to “appropriate persons” in connection with an emergency “if the knowledge of such information is necessary to protect the health or safety of the student or other persons.”¹³ The only regulatory guidance in defining “emergency” comes from regulations that state that the emergency exception is to be “strictly construed.”¹⁴ The Secretary of Education is supposed to develop regulations defining emergency disclosures.

Schools must keep a log of “emergency” disclosures and make it available to students.¹⁵

USA PATRIOT ACT: Disclosure of FERPA Educational Records and NCES (National Center for Education Statistics) Data Related to Federal Terrorism Investigations (court order required)

The USA PATRIOT Act of 2001¹⁶ was signed into law on October 26, 2001. It amends FERPA and the National Education Statistics Act (NESA) and **expands the authority of federal law enforcement officials to obtain educational records in connection with investigations and prosecutions of terrorism, without consent.**¹⁷

Note, however, that **these amendments to FERPA and NESA require federal law enforcement officials to obtain a court order before educational records and NCES data must be released under these provisions.** They do not expand the authority of educational institutions to release student records without student permission or a court order.

In order to obtain a court order, a U.S. Assistant Attorney General or a higher-ranking official must certify that the records are relevant to a terrorism investigation.¹⁸

¹² §1232g(a)(5)(A).

¹³ §1232g(b)(1)(I).

¹⁴ 34 C.F.R. § 99.36. See also, Brown v. City of Oneonta, 106 F.3d 1125 (2d Cir. 1997).

¹⁵ §1232g(b)(4)(A).

¹⁶ The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, H.R. 3162 (October 23, 2001).

¹⁷ USA-PATRIOT Act, § 507, amending 20 USC 1232g.

¹⁸ §1232g(j)(1)(A). A court must grant the disclosure order once the Attorney General certifies that “the education records are likely to contain information” that relates to “an authorized investigation or prosecution” of acts of terrorism as defined by 18 U.S.C. § 2331 and 2332b(g)(5)(b).

▪ **NCES (National Center for Educational Statistics) DATA**

Under the auspices of the U.S. Department of Education, the NCES, collects a vast amount of identifiable student information for the purpose of statistical research under the National Education Statistics Act (NESA).¹⁹ NCES data includes everything from age, gender, test scores and courses to extracurricular activities, financial aid needs and personal assets, and other socioeconomic and religious information.

Prior to the USA-Patriot Act, NCES data had been held strictly confidential without exception. Now, however, it is subject to FERPA confidentiality protections and exceptions²⁰ and federal officials can obtain a court order for the release of student information from the NCES in conjunction with a federal terrorism investigation or prosecution.

Disclosures of education records pursuant to this subsection may be recorded in the log otherwise kept under §1232g(b)(4), but it is not required.²¹

Disclosures Required by the 1996 Illegal Immigration and Naturalization Act (IIRAIRA): Student and Exchange Visitor Information System (SEVIS)

The USA PATRIOT Act also amends the 1996 Illegal Immigration and Naturalization Act (IIRAIRA) to make information about foreign students available to the federal government without the student's consent.²² Throughout a foreign student's stay in the United States, the academic institution must collect and transmit specified electronic information and event notifications²³ regarding changes in the student's status to the Immigration and Naturalization Service (INS) and the Department of State.²⁴ The information is also available to the United States Attorney General.

Under this program, known as the Student and Exchange Visitor Program or SEVP,²⁵ the INS must develop a national database containing information about foreign students,²⁶ including name and address; visa status; academic standing (what program they are enrolled in, full time or

¹⁹ §1232g(b)(1)(C) (federal oversight of education statutes) or § 1232g(b)(1)(F) (educational research studies).

²⁰ §1232g(b)(1)(C) (federal oversight of education statutes) or § 1232g(b)(1)(F) (educational research studies).

²¹ §1232g(j)(4). The Justice Department's use of the records is to be "consistent with such guidelines" as are created by the Attorney General and the Secretary of Education. §1232g(j)(1)(B). No guidelines have been created yet. Therefore, at present the Justice Department as a recipient of education records arguably may not further transmit the information from education records to anyone else without written consent. §1232g(b)(4)(B).

²² It may be argued, however, that the visa application, which is signed by the student and authorizes release of information to the INS, may constitute consent.

²³ "Event notifications" include changes in a student's course load and/or major and changes of a student's address.

²⁴ 8 U.S.C. §1372(2).

²⁵ SEVP was formerly known as CIPRIS or the Coordinated Interagency Partnership Regulating International Students.

²⁶ These requirements apply to non-immigrant foreign students (F and M visa), exchange visitors (J visa), and their dependents (F-2, M-2, and J-2).

part time, etc.); and academic disciplinary action against the student.²⁷ Schools must transmit the information through the Student and Exchange Visitor Information System (SEVIS).

While the INS intends to have the program operational nationwide by June 2002, the program has not yet been funded to set up the software and electronic systems that make it possible and the implementing regulations have not yet been promulgated.²⁸

This is a very brief summary of institutional obligations to both students and the government under FERPA, the NCES, and IIRAIRA, regarding student information.

We urge you, if you have not yet done so, to inform the academic community of your policy and procedures regarding the privacy of foreign students' records. The school should let the academic community know where they can ask questions or file complaints on these issues. To that end, we have enclosed a copy of the communication from Jonathan R. Cole, Provost and Dean of Faculties at Columbia University in New York City to the Columbia University academic community that you may find useful.

The NYCLU has set up an emergency e-mail hotline address to answer questions. The address is studentprivacy@nyclu.org. As questions arise we also plan to develop a "Know Your Rights" brochure describing the rights of students under FERPA. If you think the NYCLU could provide any further assistance to you or to your student body, please contact the NYCLU at 212-344-3005 x 248 and speak with Julia Wolfson.

Sincerely,

Donna Lieberman
Executive Director

Beth Haroules
Staff Attorney

Arthur Eisenberg
Legal Director

²⁷ 8 U.S.C. § 1372.

²⁸ *A Nation Challenged: Student Visas; Efforts to Track Foreign Students are Said to Lag*, New York Times January 28, 2002, A.1.