



## NACUA Current Insights

### FERPA and Immigration with Steve McDonald: Your FERPA Responsibilities During Times of Increased Immigration Enforcement on Campus

President Trump's second term has focused heavily on immigration policy and enforcement, launching questions and challenges on student privacy and the Family Educational Rights and Privacy Act (FERPA) into the spotlight. Taylor Zelman, Legal Resources Attorney at NACUA, explored the intersection of FERPA and immigration law on campus with Steve McDonald, known to many as NACUA's resident FERPA expert. We're pleased to share Steve's insights on this important issue.



Steven J. McDonald was General Counsel at Rhode Island School of Design from 2002 until his retirement in 2021 and previously served as Associate Legal Counsel at The Ohio State University. He is the editor of NACUA's *The Family Educational Rights and Privacy Act: A Legal Compendium*; the author of articles on FERPA for *The Chronicle of Higher Education*, *Inside Higher Education*, and other publications; and a frequent speaker on FERPA. He also is a NACUA Fellow, a past member of the NACUA Board of Directors, and a recipient of the NACUA Distinguished Service and Life Membership Awards. He received his A.B. from Duke University and his J.D. from the Yale Law School. In *State, ex rel. Thomas v. The Ohio State University*, the Ohio Supreme Court ruled that he really is a lawyer.

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**Taylor: Colleges and universities have recently seen an uptick in immigration enforcement activities on campus. With this recent activity in mind, are international students covered by FERPA?**

**Steve:** Yes. FERPA draws no distinction among students based upon their citizenship status: "For the purposes of this section, the term 'student' includes *any person* with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution." 20 U.S.C. §1232g(a)(6) (emphasis added). See also 34 C.F.R. §99.3. Thus, *all* students are protected by FERPA from the moment they are "in attendance" as such, regardless of whether they are domestic or international.

**Taylor: Are *undocumented* international students covered by FERPA?**

**Steve:** Yes. For the same reason as described above, FERPA draws no distinction among students based upon their documentation status, so both documented and undocumented international students are protected by FERPA.

**Taylor: Many college and university attorneys have experienced increased requests for student information and data. If these requests occur, may schools provide information about international students to the federal government?**

**Steve:** Because international students are protected by FERPA equally with domestic students, and because FERPA generally prohibits the disclosure of a student's "education records" – as well as personally identifiable information from a student's "education records" – without the student's consent, schools may provide such records and information about international students to the federal government only if and when one of the statutory exceptions to the consent requirement applies.

In this context, the most important such exception is found in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which provides in relevant part that "[t]he Family Educational Rights and Privacy Act of 1974 shall not apply to [F and M nonimmigrant students and J nonimmigrant exchange visitors] to the extent that the Attorney General determines necessary to carry out the [Student and Exchange Visitor Program (SEVP)]." 8 U.S.C. §1372(c)(2). Pursuant to that section, the government has determined that this "waiver of FERPA . . . authorizes and requires an educational agency or institution to report information concerning an F, J or M nonimmigrant that would ordinarily be protected by FERPA, *but only to the extent that 8 U.S.C. 1372 and [8 C.F.R.] §214.3(g) (or any corresponding Department of State regulation concerning J nonimmigrants) requires the educational agency or institution to report information.*" 8 C.F.R. §214.1(h) (emphasis added).

The referenced provisions spell out the information schools are required to enter into the Student Exchange and Visitor Information System (SEVIS) in order to establish international students' initial and continuing eligibility for the relevant visas. While substantial, this "IIRIRA exception" does not encompass *all* information about international students. Among other things, it *does not* encompass such information as class schedule and location, extracurricular activities, identity of friends and acquaintances, or similar information that might assist in determining a student's real-time physical location. (8 C.F.R. §214.1(h), which contains the full list of required information, is reproduced at the end of this document, and a [2004 guidance letter](#) from the then-Family Policy Compliance Office (now Student Privacy Policy Office) discussing the "IIRIRA exception" is linked above.)

While schools must provide the listed information to DHS/ICE agents upon request (generally within three business days of the request), those agents already have immediate access to that information through SEVIS themselves. Thus, schools should review any in-person demands for international student information carefully, as they likely encompass information beyond the list and, if so, may be complied with only if the relevant student has consented or another exception to the consent requirement, beyond the “IIRIRA exception,” applies.

**Taylor: Following up on the last question, may schools provide information on undocumented international students to the federal government under the “IIRIRA exception”?**

**Steve:** No. By definition, undocumented international students are not part of SEVP and their information is not contained in SEVIS, so the “IIRIRA exception” does not apply to them. Schools may provide their information to the federal government only with their consent or when another exception to the consent requirement applies.

**Taylor: Does the health and safety emergency exception apply in the case of government requests for information about international students?**

**Steve:** Possibly, depending upon the specific circumstances, and as determined by the relevant school.

FERPA allows – *but, unlike the “IIRIRA exception,” does not require* – schools to “disclose personally identifiable information from an education record to appropriate parties . . . in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.” 34 C.F.R. §99.36(a). The decision whether to invoke this exception is entirely up to the relevant school, which “must make this determination on a case-by-case basis, taking into account the totality of the circumstances pertaining to a threat to the health or safety of a student or others.”<sup>1</sup> Moreover, “[t]his exception to FERPA’s general consent requirement is limited to the period of the emergency and generally does not allow for a blanket release of PII from a student’s education records. Rather, these disclosures must be related to an actual, impending, or imminent emergency, such as a natural disaster, a terrorist attack, a campus shooting, or the outbreak of an epidemic disease.”<sup>2</sup>

Information provided by a government agent to support a request for information under this exception certainly may be relevant to a school’s determination, but vague, unsubstantiated assertions of “possible danger” are insufficient, and a student’s lack of

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<sup>1</sup><https://studentprivacy.ed.gov/fag/how-does-school-know-when-health-or-safety-emergency-exists-so-disclosure-may-be-made-under>

<sup>2</sup><https://studentprivacy.ed.gov/fag/when-it-permissible-utilize-ferpas-health-or-safety-emergency-exception-disclosures>

documentation or the revocation of a student's visa does not itself constitute a health or safety "emergency." "[T]he determination by [a school] that there is a specific emergency is not based on a generalized or distant threat of a possible or eventual emergency for which the likelihood of occurrence is unknown."<sup>3</sup> A school is free to – and should – refuse to invoke this exception if it is not comfortable both that there is a legitimate emergency and that the disclosure of the requested information to the requesting party would help to address that emergency.

**Taylor: Does an ICE administrative arrest warrant qualify as a "lawfully issued subpoena" for purposes of that exception to FERPA's consent requirement?**

**Steve:** No. While FERPA does allow a school to disclose education records "to comply with a judicial order or lawfully issued subpoena" (though generally "only if the [school first] makes a reasonable effort to notify the . . . student of the order or subpoena in advance of compliance, so that the . . . student may seek protective action"), 34 C.F.R. §99.31(a)(9), an arrest warrant authorizes the detention of a person, not the seizure of documents.

**Taylor: May schools respond to requests for "directory information" about international students?**

**Steve:** Yes, *but*. Schools are free to disclose the elements of information that they have designated as "directory information" to anyone at any time, but (a) they may do so only for those students who have not "opted out" of directory information disclosures, (b) they may not "link" the disclosed directory information to non-directory information, and (c) they may not designate as directory information any information "that would . . . generally be considered harmful or an invasion of privacy if disclosed," 34 C.F.R. §99.3, such as race, ethnicity, national origin, citizenship, religion, and the like. So, for example, a school could provide a list of the names and addresses of all of its students who have not opted out (assuming that it has designated names and addresses as directory information), but it could not provide a list of the names and addresses of only its undocumented students or its Muslim students or its Hispanic students or its Venezuelan students, as providing directory information about subsets of students so defined would (at least implicitly) disclose non-directory information about them.

**Taylor: Do you have any tips, related to FERPA or otherwise, on how colleges and universities should respond when ICE comes to campus?**

**Steve:** Above all, don't panic. The best approach is to have a protocol already in place designating a limited number of people who are authorized to interact with and respond to ICE agents and requests and requiring everyone else on campus to simply (and

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<sup>3</sup>[https://studentprivacy.ed.gov/sites/default/files/resource\\_document/file/FERPA%20and%20Coronavirus%20Frequently%20Asked%20Questions.pdf](https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPA%20and%20Coronavirus%20Frequently%20Asked%20Questions.pdf) at p.3

politely) refer such agents and requests to those designees. Potential designees include campus legal counsel, public safety, and the DSO. Advice on establishing such a protocol can be found [here](#), and numerous sample institutional protocols can be found by running the following Google search: “site:.edu ferpa ice protocol.”

**Taylor: Do FERPA protections still apply if a student has been arrested or deported by ICE?**

**Steve:** Yes. Once attached, FERPA rights continue to apply to education records until either the records are destroyed or the student to whom the records pertain dies. A student’s departure from campus and/or loss of student status, whether by graduation, suspension, dismissal, arrest, deportation, or otherwise, makes no difference to the application of FERPA.

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**Appendix A: Selected Excerpts****8 C.F.R. §214.3(g) *Recordkeeping and reporting requirements***

(1) *Student records.* An SEVP-certified school must keep records containing certain specific information and documents relating to each F-1 or M-1 student to whom it has issued a Form I-20, while the student is attending the school and until the school notifies SEVP, in accordance with the requirements of paragraphs (g)(1) and (2) of this section, that the student is not pursuing a full course of study. Student information not required for entry in SEVIS may be kept in the school's student system of records, but must be accessible to DSOs. The school must keep a record of having complied with the reporting requirements for at least three years after the student is no longer pursuing a full course of study. The school must maintain records on the student in accordance with paragraphs (g)(1) and (2) of this section if a school recommends reinstatement for a student who is out of status. The school must maintain records on the student for three years from the date of the denial if the reinstatement is denied. The DSO must make the information and documents required by this paragraph available, including academic transcripts, and must furnish them to DHS representatives upon request. Schools must maintain and be able to provide an academic transcript or other routinely maintained student records that reflect the total, unabridged academic history of the student at the institution, in accordance with paragraph (g)(1)(iv) of this section. All courses must be recorded in the academic period in which the course was taken and graded. The information and documents that the school must keep on each student are as follows:

(i) Identification of the school, to include name and full address.

(ii) Identification of the student, to include name while in attendance (record any legal name change), date and place of birth, country of citizenship, and school's student identification number.

(iii) Current address where the student and his or her dependents physically reside. In the event the student or his or her dependents cannot receive mail at such physical residence, the school must provide a mailing address in SEVIS. If the mailing address and the physical address are not the same, the school must maintain a record of both mailing and physical addresses and provide the physical location of residence of the student and his or her dependents to DHS upon request.

(iv) Record of coursework. Identify the student's degree program and field of study. For each course, give the periods of enrollment, course identification code and course title; the number of credits or contact hours, and the grade; the number of credits or clock hours, and for credit hour courses the credit unit; the term unit (semester hour, quarter



hour, etc.). Include the date of withdrawal if the student withdrew from a course. Show the grade point average for each session or term. Show the cumulative credits or clock hours and cumulative grade point average. Narrative evaluation will be accepted in lieu of grades when the school uses no other type of grading.

(v) Record of transfer credit or clock hours accepted. Type of hours, course identification, grades.

(vi) Academic status. Include the effective date or period if suspended, dismissed, placed on probation, or withdrawn.

(vii) Whether the student has been certified for practical training, and the beginning and end dates of certification.

(viii) Statement of graduation (if applicable). Title of degree or credential received, date conferred, program of study or major.

(ix) Termination date and reason.

(x) The documents referred to in paragraph (k) of this section [i.e., I-20 forms].

Note to paragraph (g)(1): A DHS officer may request any or all of the data in paragraphs (g)(1)(i) through (x) of this section on any individual student or class of students upon notice. This notice will be in writing if requested by the school. The school will have three work days to respond to any request for information concerning an individual student, and ten work days to respond to any request for information concerning a class of students. The school will respond orally on the same day the request for information is made if DHS requests information on a student who is being held in custody, and DHS will provide a written notification that the request was made after the fact, if the school so desires. DHS will first attempt to gain information concerning a class of students from DHS record systems.

*(2) Reporting changes in student and school information.*

(i) Schools must update SEVIS with the current information within 21 days of a change in any of the information contained in paragraphs (f)(1) and (h)(3) of this section.

(ii) Schools are also required to report within 21 days any change of the information contained in paragraph (g)(1) or the occurrence of the following events:

(A) Any student who has failed to maintain status or complete his or her program;

(B) A change of the student's or dependent's legal name or U.S. address;

(C) Any student who has graduated early or prior to the program end date listed on SEVIS Form I-20;

(D) Any disciplinary action taken by the school against the student as a result of the student being convicted of a crime; and

(E) Any other notification request not covered by paragraph (g)(1) of this section made by DHS with respect to the current status of the student.

(F) For F-1 students authorized by USCIS to engage in a 17-month extension of OPT,

(1) Any change that the student reports to the school concerning legal name, residential or mailing address, employer name, or employer address; and

(2) The end date of the student's employment reported by a former employer in accordance with §214.2(f)(10)(ii)(C)(4).

(iii) Each term or session and no later than 30 days after the deadline for registering for classes, schools are required to report the following registration information:

(A) Whether the student has enrolled at the school, dropped below a full course of study without prior authorization by the DSO, or failed to enroll;

(B) The current address of each enrolled student; and

(C) *The start date of the student's next session, term, semester, trimester, or quarter.* For initial students, the start date is the "program start date" or "report date." (These terms are used interchangeably.) The DSO may choose a reasonable date to accommodate a student's need to be in attendance for required activities at the school prior to the actual start of classes when determining the report date on the Form I-20. Such required activities may include, but are not limited to, research projects and orientation sessions. The DSO may not, however, indicate a report date more than 30 days prior to the start of classes. The next session start date is the start of classes for continuing students.

(D) *Adjustment to the program completion date.* Any factors that influence the student's progress toward program completion (e.g., deferred attendance, authorized drop below, program extension) must be reflected by making an adjustment updating the program completion date.

(3) *Administrative correction of a student's record.* In instances where technological or computer problems on the part of SEVIS cause an error in the student's record, the DSO may request the SEVIS system administrator, without fee, to administratively correct the student's record.