

August 27, 2004

Mr. Jerome H. Sullivan
Executive Director
American Association of Collegiate Registrars
and Admissions Officers
One Dupont Circle, NW, Suite 520
Washington, DC 20036

Dear Mr. Sullivan:

This is in response to your letter to the Family Policy Compliance Office (FPCO), as well as follow-up to telephone conversation between Ms. Shelley Rodgers of your staff with Dr. Stephen Hunt of the International Affairs Office, in the Office of the Secretary. You asked certain questions about the applicability of the Family Educational Rights and Privacy Act (FERPA) to disclosures to the Immigration and Naturalization Service (INS). On March 1, 2003, INS ceased to exist and its responsibilities relating to student visas transferred to the Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE).

As you are aware, on April 12, 2002, FPCO issued guidance relating to disclosure of personally identifiable information from students' education records relative to anti-terrorism investigations of law enforcement officials. We noted in that Dear Colleague Letter that we anticipated that there may be a need for additional guidance in the future on ICE disclosure issues. Since that time, the Department has worked closely with ICE on several matters of mutual concern, including the applicability of FERPA to disclosures of information to ICE employees. We provided comments on ICE regulations published in the Federal Register on December 11, 2002, regarding the Student and Exchange Visitor Information System (SEVIS), and will continue to work with them as we develop additional guidance on issues relating to foreign students and exchange visitor program participants. In the interim, we believe, as is explained more fully below, that FERPA does not prohibit the disclosure of information to ICE contractors in order to certify an institution as eligible to participate in SEVIS.

Preliminarily, with regard to your apparent concern about disclosure of student information to ICE contractors rather than directly to the ICE, this Office has previously advised that FERPA does not prevent schools from outsourcing various functions. In particular, schools may disclose FERPA protected information, without consent, to contractors and other agents who have been retained to perform administrative and other professional services so long as the disclosure would be proper if made to a school official performing the same service. Similarly, FERPA does not prevent lawful recipients of protected education records, such as ICE, from using the services of outside contractors to perform services in place of regular employees, such as these site visits to certify institutions for participation in SEVIS. Accordingly, disclosures to ICE contractors retained to perform SEVIS certification visits should be treated as disclosure to ICE itself.

With regard to the broader question concerning access by ICE to education records of foreign students and exchange visitor program participants, § 641(c)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), as amended, (8 U.S.C. § 1372) provides that

FERPA shall not apply to aliens described in subsection (a) of § 641 to the extent that the Attorney General determines necessary to carry out the SEVIS program. In the December 11th regulations, the Attorney General made such a determination. 67 Fed. Reg. 76256, 76270 (December 11, 2002).¹ In effect, ICE regulations, 8 C.F.R. § 214.1(h), state that with respect to F and M nonimmigrant students and J nonimmigrant exchange visitors, the FERPA provisions that might impede the proper implementation of 8 U.S.C. § 1372 and 8 C.F.R. § 214.3(g) are waived to the extent that 8 U.S.C. § 1372 or 8 C.F.R. § 214.3(g) requires the educational agency or institution to report the information.

We also note that § 502 of the Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. 107-173, requires ICE, in consultation with the Department of Education, to conduct a review of institutions certified to receive nonimmigrants under § 101(a)(15)(F), (M), or (J) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(15)(F)(M), or (J)) to determine whether the institutions are in compliance with the recordkeeping and reporting requirements of the Immigration and Nationality Act and IIRIRA.

We believe that Congress did not intend for the privacy protections under FERPA to impede ICE in carrying out the SEVIS program. Therefore, our advice to AACRAO is that institutions generally may not use FERPA in order to refuse to comply with requests from ICE relative to participation in SEVIS.

However, you specifically asked about the collection by ICE of the following information:

Common data elements being requested by the INS (now ICE) site-visit contractors are (a) all directory information for international students (b) citizenship (c) list of courses taken by each student (d) reason for separation from an institution if the student is no longer enrolled, etc. Information is being requested on enrolling students without status yet and enrolled students with active current status. Some of the requested information is required by SEVIS, some -- like schedule of classes for each student -- is not.

First, we note that SEVIS is not limited to enrolled students with active current status. Rather, the IIRIRA, as amended, applies to aliens who either have status or are applying for the status of nonimmigrants under § 101(a)(15)(F), (M), or (J) of the Immigration and Nationality Act. 8 U.S.C. § 1372(a)(1). The IIRIRA, as amended, also requires institutions to report to ICE any failure of an alien to enroll in an institution of higher education or other approved educational institution or the scheduled commencement of participation by an alien in a designated exchange visitor program. 8 U.S.C. § 1372(a)(4).

¹ [The](#) Homeland Security Act of 2002, Public Law No: 107-296, Title IV, Section 442, transferred to the Assistant Secretary of the Bureau of Border Security the responsibility for administering the program to collect information relating to nonimmigrant foreign students and other exchange program participants described in section 641 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1372), including the Student and Exchange Visitor Information System established under that section.

Second, the issue of “directory information” is not relevant in this situation. In the instant case, ICE has broad, independent authority under the IRRIRA, as amended, (and does not need to request directory information) to receive the following information on foreign students and exchange program participants: A) the identity and current address in the United States of the alien; B) the non-immigrant classification of the alien and the date on which a visa under the classification was issued or extended or the date on which a change to such classification was approved by the Attorney General; C) in the case of a student at an approved institution of higher education, or other educational institution, the current academic status of the alien, including whether the alien is maintaining status as a full-time student, or in the case of a participant in a designated exchange visitor program, whether the alien is satisfying the terms and conditions of the program; D) in the case of a student at an approved institution of higher education, or other educational institution, any disciplinary action taken by the institution against the alien as a result of the alien’s being convicted of a crime, or, in the case of a participant in a designated exchange visitor program, any change in the alien’s participation as a result of the alien’s being convicted of a crime; E) the date of entry and port of entry; F) the date of the alien's enrollment in an approved institution of higher education, other approved educational institution, or designated exchange visitor program in the United States; G) the degree program, if applicable, and field of study; and, H) the date of the alien's termination of enrollment and the reason for such termination (including graduation, disciplinary action, and failure to re-enroll). 8 U.S.C. § 1372(c)(1).

The ICE regulations further specify that: “an approved 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-20A or I-20M while the student is attending the school and until the school notifies the Service, ... that the student is not pursuing a full course of study.... The designated school official must make the information and documents required by this paragraph available to and furnish them to any ICE officer upon request. The information and documents that the school must keep on each student are as follows:

- (i) Name.
- (ii) Date and place of birth.
- (iii) Country of citizenship.
- (iv) Current address where the student and his or her dependents physically reside. In the event the student or his or her dependents reside on or off campus and cannot receive mail at that location, the school may provide a mailing address
- (v) The student’s current academic status.
- (vi) Date of commencement of studies.
- (vii) Degree program and field of study.
- (viii) Whether the student has been certified for practical training, and the beginning and end dates of certification.
- (ix) Termination date and reason, if known.
- (x) The documents referred to in paragraph (k) of this section.
- (xi) The number of credits completed each semester.
- (xii) A photocopy of the student's I-20 ID Copy.”

8 C.F.R. 214.3(g), as amended by 67 Fed. Reg. 76256 (December 11, 2002).

Thus, FERPA does not prohibit the nonconsensual release to ICE of the alien’s field of study, degree program, number of credits, and other items of information enumerated in § 214.3(g). In

addition, we are informed that the Department of Homeland Security is presently drafting regulations governing the SEVIS certification process and identifying additional reporting requirements incident to that process. During the pendency of that rulemaking process, the Department will refrain from any enforcement action under FERPA under circumstances where an educational agency or institution has provided any education records to officers of the Department of Homeland Security at its request to carry out the SEVIS program.

I trust that this is responsive to your inquiry.

Sincerely,

/s/

LeRoy S. Rooker
Director
Family Policy Compliance Office