

Higher Education Working Group Meeting Notes

(open to all education privacy working groups)

Friday, February 17, 2017

11:30am-12:30pm

Topic: Education privacy and federal government data requests from state/local educational agencies and institutions

59 Attendees (see list of organizations at the end of the notes)

Stephanie Gold and Aleksandar Dukic (Hogan Lovells LLP)

Key Points:

- Greater attention has been paid to immigrant students, especially those on higher education campuses, following 9/11.
- Questions about federal government access to and demands for student records— both from institutions and their service providers—can be tricky. Consulting legal counsel upon receipt of these requests is recommended.
- Generally, FERPA prohibits disclosure of student records without the written consent of the student or parent. Several exceptions apply.
 - Non-consensual disclosure is permitted in response to lawfully-issued subpoenas or court orders. In this case, institutions must notify the student/parent prior to disclosure unless prohibited by law.
 - Students with F-, J-, and M-nonimmigrant visas do not have FERPA protections.
- It is a best practice for educational agencies and institutions to:
 - Ensure any legal process received is lawfully-issued prior to disclosing student records; and
 - Engage in a dialogue with the issuer regarding FERPA requirements and protections.

What is the Family Educational Rights and Privacy Act (FERPA) and what does it cover?

- FERPA, codified at [20 U.S.C. § 1232g](#), prohibits disclosure of student records without the written consent of the student (or parent if applicable) unless an exception applies.
 - FERPA broadly defines both “students” and “records.”
 - FERPA itself does not compel disclosure. Rather it defines when consent is or is not required for disclosure
- FERPA requirements apply to any education agency or institution receiving funds under any Department of Education program. This may include some private schools.

What exceptions to FERPA allow disclosure without obtaining consent?

- Educational agencies and institutions may disclose directory information (i.e. name, address, phone, email, etc.) without consent.
 - FERPA prohibits disclose where directory information is linked to non-directory information.

- For example, a school cannot respond to a request for “names and addresses of undocumented students” because the immigration status is not directory information.
- Educational agencies and institutions may disclose full student records without consent in response to:
 - A judicial order or lawfully-issued subpoena;
 - You must confirm it is lawfully-issued, which may require legal counsel.
 - A health/safety emergency;
 - A terrorism investigation; and
 - A request for law enforcement unit records.
- [2002 Department of Education guidance](#) explains these FERPA exceptions in greater detail.
- DHS regulations specifically exempt students with F-, J-, or M-nonimmigrant visas from FERPA protections.
 - Schools that enroll these students must be certified by the Student and Exchange Visitor Program (SEVP). These schools must comply with all [program guidance](#) and DHS reporting requirements to maintain this certification.
 - SEVP student records are subject to on-site review by immigration officers at any time. No legal process is required. Institutions are also required to produce documents about these students upon request.
 - Any immigration officer has the authority to interrogate any alien (without a warrant) found in a public area about his/her right to be in the country.
 - According to DHS regulations, DHS officers may request any or all of the data of any individual student or class of student upon notice.
 - If read broadly, the government could assert that this allows them to ask about any student, beyond just SEVP students.
 - However, the FERPA waiver is only applicable to F-, J-, and M- visa students. It would thus be reasonable for a school to request legal process with respect to other students.

Should I notify the student/parent of the record request?

- Generally, FERPA requires that you must make a reasonable effort to notify the student/parent before disclosing the records so that the student/parent has time to take defensive action.
 - No specific amount of time is considered reasonable. Compliance determinations depend on several factors such as the time period the institution itself was given to comply, and whether the institution put forth a good faith effort.
- However, notice is prohibited in the following circumstances:
 - When the request is through an ex parte order issued pursuant to an authorized terrorism investigation.
 - When the request is made through a grand jury subpoena or other subpoena for law enforcement purposes which specifies that the existence of the subpoena and the response are confidential
 - The issuing court or agency must have good cause to impose a confidentiality requirement. Schools may request a copy of the good cause documentation.

- Educational agencies and institutions should engage in a conversation with the issuer to remind the issuer of FERPA notification requirements. Issuers may revise subpoenas to require confidentiality.

Question & Answer

Question: What are the implications if we have student-level data housed at an institution, a quasi-governmental agency, or a private entity that acts as an agent for an institution/government agency? Could the federal government subpoena or get a warrant for all of--or a slice of--the data? If a slice, could it be for specific individuals (i.e., all hispanic students with no federal aid--in an attempt to identify undocumented students)?

Answer:

- The federal government can obtain a subpoena or warrant for any records so long as there is a lawful basis. Subpoenas need not be issued by a court. DHS regulations provide subpoena authority to a number of DHS officials. Federal subpoenas are typically very broad.
- With respect to site inspections, the federal government has enough basis to issue a subpoena where there is a reasonable suspicion that undocumented aliens are present. This is a fairly low standard. Recipients could challenge the subpoena (thereby forcing the government to prove it has reasonable suspicion), but legal counsel should advise on fact-based compliance issues.

Question: Regarding FERPA: Have any cases or opinions addressed whether or not an LEA can request the court order or subpoena specifically state its existence may not be disclosed (when it initially is not issued that way)? I handled a subpoena for the attendance records of an entire district in a sensitive district, where the data being sought was to assist with an investigation of an outside entity, and notifying every parent in the district would have raised alarm bells and concerns wholly unrelated to the actual investigation.

Answer: There is often a dialogue between the recipient and issuer. One approach for the LEA would be to de-identify the requested data. FERPA allows non-consensual disclosure of de-identified data). However, the issuer will likely want the identified data and may therefore return with a confidential subpoena.

Question: What rights do campuses/schools have to not allow ICE on campus?

Answer: The Fourth Amendment only protects areas where individuals have a reasonable expectation of privacy. Campuses often contain many public areas or public streets, so institutions are likely unable to prevent ICE agents there. However, there may be buildings or rooms where individuals do have a reasonable expectation of privacy. It would therefore likely be appropriate for the school to insist on a search warrant for those areas. This position is consistent with DHS regulations which acknowledge that immigration officers may only enter non-public areas with warrant or consent. However, even where an institution has a good faith basis to insist on warrant, the institution does not have license to frustrate a legitimate law enforcement purpose. DHS could push back on schools with violations of the harboring statutes, obstruction of justice, or other charges.

Question: I have heard it said, “ICE generally treats schools and places of worship as sensitive zones, and treads lightly in those environments.” Has that been true historically, and have we seen any shifts in that stance?

Answer:

- An [October 24, 2011 memorandum](#) from John Morton, then-Director of ICE, offered guidance for enforcement actions (i.e. searches, arrests, interviews, etc.) in sensitive locations (including schools and churches). This memo directed agents to seek approval from an ICE official before taking enforcement action at a sensitive site. The memo is policy, not law. It included a disclaimer that it did not create any substantive rights for individuals and did not intend to circumscribe agent authority.
- It is too early to know whether the Trump Administration will continue to abide by this policy.
- There is precedent for the prosecution of church officials for violating harboring provisions, despite the fact that churches are “sensitive locaitons.”

Question: How is this conversation applicable to data held by state education agencies (24 SEAs hold immigration status according to a 2009 survey, and all SEAs have proxy data points that could show someone is potentially undocumented)?

Answer: SEAs are most likely subject to FERPA, so they would be subject to the above discussion on FERPA disclosure requirements and exceptions. SEAs are also likely subject to [8 U.S.C. § 1644](#) and [§ 1373](#). These statutes prohibit state and local entities from prohibiting information flow to INS. Sanctuary cities or entities, depending on their sanctuary policy language, may be in violation of these statutes. If so, DOJ grants could be terminated.

Question: Is the 10th amendment implicated?

Answer: Constitutional implications are part of the ongoing dialogue.

Question: What are the most useful resources we can point to for non-legal experts to familiarize themselves with key issues?

Answer: Many organizations have been putting out flyers and information sheets. One example from the National School Boards Association is provided [here](#).

Question: What is the best approach for a school or institution that wants to challenge a federal government request for data? Can they stall? Challenge in court?

Answer:

- For students on F-, J-, or M-visas, refusing to provide information could be a basis for removing the SEVP-certification. No process is required for ICE to access records about these students.
- For any other students (including undocumented students), institutions should insist on a legally-issued subpoena or warrant based on the FERPA obligations discussed above.
- In any case, this is a highly fact-specific inquiry. Legal counsel should be consulted. It is unwise to simply ignore a lawful subpoena.

Question: Several school districts are declaring themselves to be “sanctuary districts.” In reality, what can they practically do beyond issuing a press release?

Answer: These statements are very nuanced, typically stating something such as: “We will not produce records of our students except in response to legal requirement.” This effectively states their current legal obligation. Declaring oneself a “sanctuary” entity is not a change in legal status. Entities exploring that declaration are simply acting within their community to understand what the community wants them to express. Careful drafting of such statements is paramount to avoid issues with the harboring statute.

Question: Apparently FAFSA applications are down in certain cities that have a large population of undocumented students (or citizen students with undocumented families) - what actions could schools/districts/institutions take to reassure students and their families?

Answer: This question appears to be referencing DACA status students (those who are subject to deferred deportation under [Obama Administration policy](#)). Unlawful immigrant students are not eligible for federal aid, but DACA students can submit a FAFSA application to apply for non-federal student aid. Many DACA status students have concerns as to whether to continue to identify themselves as having DACA status. However, these students have already provided a lot of information to the government. To the extent that information (like home address) hasn’t changed, they should not be reluctant to continue to share it.

Question: When does the fact that a student is undocumented become part of the education record? For example, if the student tells a campus therapist or is part of a club or the school knows in a way other than that data being entered into the campus SIS, would that data acquired through knowledge but not in the student’s “file” become something that has to be turned over?

Answer: This goes to the definition of “education record.” Often, immigration status may be inferred from record content, even if it is not directly expressed. Here, a memory in someone’s head is not an education record. A record kept in the sole possession of the maker and used only as a memory aid is also not an education record. Certain kinds of counseling records are also not education records and may be additionally protected by state/local law on the release of health records.

Attending Organizations

Please email Amelia Vance at avance@fpf.org if you were on the call and your organization name is not listed below.

1. Fordham University
2. The College of New Jersey
3. Data & Society Research Institute
4. Council of School Attorneys, National School Boards Association
5. National School Boards Association
6. Princeton Center for Information Technology Policy
7. National Association of State Boards of Education
8. Institute for Higher Education Policy
9. San Francisco Public Schools

10. U.S. Department of Education Privacy Technical Assistance Center
11. Wisconsin Department of Public Instruction
12. Nixon Peabody LLP
13. Pearson
14. Workforce Data Quality Campaign
15. Allegheny Intermediate Unit, Pennsylvania
16. Office of Fresno County Superintendent of Schools, California
17. California Department of Education
18. University of California at Berkeley
19. DC Public Schools
20. Cambridge Public Schools, Massachusetts
21. National Student Clearinghouse
22. Data Quality Campaign
23. Wyoming Department of Education
24. School Board of the City of Hampton, Virginia
25. Idaho State Department of Education
26. Colorado Association of School Boards
27. New America
28. University of Michigan
29. Buffalo State: The State University of New York
30. Software and Information Industry Association
31. Eduventures
32. Call for Action
33. Longwood University
34. Kentucky Department of Education
35. Rhode Island Department of Education