Date: November 12, 1974

From: University Counsel and Vice Chancellor
for Legal Affairs

Subject: Family Educational Rights and Privacy Act of 1974

The "Family Educational Rights and Privacy Act of 1974" (P.L. 93-380, section 513) adds new section 438 to the General Education Provisions Act (20 U.S.C. 1232-g) and becomes effective on November 19, 1974. Various attempts are underway to amend the law, to postpone its effective date, or, in any event, to elicit clarifying regulations from the Department of Health, Education and Welfare. A copy of the text of the legislation is attached along with a memorandum from the National Association of College and University Attorneys which recites, but does not exhaust, a list of unresolved questions of interpretation. Pending further developments, this advisory will afford such tentative information and explanation as the situation permits.

RECORDS

The amendment bars the payment of federal funds "available under any applicable program" to any college or university which prevents an attending student from inspecting or challenging the content of any official record directly related to the student. The scope of "applicable funds" presents a threshold problem. Internally, the statute apparently refers to research funds administered by the National Institute of Education. However, some sources have suggested that any and all federal education funds may be intended.

Student records, among others not specifically defined, include the following: identifying data (i.e. name, address, social security number, etc.), academic work completed, achievement scores, interest inventory results, psychological and health data, family background information, teacher or counselor ratings or observations, and verified reports of serious or recurrent behavior patterns.

HEARINGS

Any student may demand a hearing to challenge the content of any record and may seek the correction or deletion of any entry
deemed inaccurate, misleading, inappropriate, or otherwise in violation of the privacy or other rights of students.

This provision not only accords important new procedural rights to students regarding access to college records, but, more importantly, creates a substantive right to challenge the accuracy and qualitative validity of the entries contained in such records. By necessary implication, the statute also limits the unilateral prerogative of those who currently determine what facts and what opinions should be recorded.

At this writing it is not known what the procedural obligations of the institution will be. The burden of proof, traditionally, rests with the petitioner and nothing in the legislation suggests a different rule in this situation. The nature of the "hearing" is not defined. It could range from the most informal opportunity to be heard on an oral complaint, to a requirement that the institution respond in writing that the disputed records had been examined and verified, to a complete restatement of findings of fact and academic judgments which brought about the challenged entries.

Finally, the regulations may permit or require a full scale adversary proceeding with the right to the assistance of counsel, the right to call and cross examine witnesses, including the entrant or other original source of the entry, and the right to compel the production of other records relevant to the dispute. In the absence of regulations, however, it may be assumed that only the most informal hearing procedure is required.

**STUDENT RIGHTS**

The statute fails to describe "the privacy or other rights of students". Clarification will be necessary if only because there is no comprehensive body of legal opinion describing detailed student rights in respect to school records on the collegiate level. Moreover, as noted, the legislation will impinge upon other rights in these records heretofore enjoyed, in the main, only by those who made them.

The physician, psychologist, clinic and hospital have a qualified property interest in notes and records which, in many circumstances under present law, have prevailed even against the patient. Whether "health data" includes more than objective clinical findings is not yet clear, though "all official records, files, and data" suggests a broad interpretation, including diagnostic evaluations and hypotheses.
On the faculty side, the sacrosanct letter of recommendation must now yield up its secret if the letter is officially filed. More importantly, the right to challenge records containing faculty "ratings and observations" opens the way to the disputation of academic judgments. The term "inaccurate", presumably, means information which can be compared to objective sources for verification. Hence, a final grade may incorrectly reflect the average of earlier examination marks. The terms "misleading" and "inappropriate" however, raise truly portentious issues.

The remedies afforded by the statute (i.e. correction or deletion) are far better defined than the substance of "the privacy or other rights of students" upon which the availability of the remedy must depend. An undesirable grade, for example, is arguably inaccurate, misleading, or inappropriate to the academic work product in question. The mark may have been assigned for any number of reasons which cannot be verified by reference to indisputable objective criteria. Whether and how such academic judgments must be defended, under what substantive rules, and before what arbiter or tribunal, remains for future clarification.

**RELEASE OF RECORDS**

The statute also denies applicable funds to institutions which permit the disclosure of personally identifiable records without the written consent of the student.

No such permission is required where the records circulate within the institution for disclosure to those with an appropriate educational interest. In our view, this exemption would permit the sharing of campus student records with the Central Administration of the University for purposes of academic program and fiscal planning.

Similarly, personally identifiable records may be sent to another school in which the student intends to enroll without written consent. However, the sending school must notify the student, offer a copy of the record to be forwarded, and afford an opportunity for the student to challenge its content before it is sent. Due to the enrollment terminology, it is not clear whether this would permit the sharing of student records between different campuses of the University without notice and the opportunity to contest the contents of the record of transcript.

No such consent or notice is necessary in connection with the student's financial aid application. Accordingly,
communications with New York State Higher Education Services Corporation, for example, are exempt.

Student records, of course, must be furnished in compliance with any judicial order or lawfully issued subpoena. However, the institution must give notice of such compliance to the affected student.

Certain Federal and state authorities may have access to student records without consent in connection with the audit and evaluation of Federally supported education programs or in connection with the enforcement of Federal legal requirements which relate to such programs. In these cases, however, unless specifically authorized by Federal law, such data shall not include information, including social security numbers, which would permit the personal identification of such students or their parents after the data has been collected.

Whether or not a record may be obtained without notice or consent, the statute requires that those obtaining such records shall sign a form, to be kept in the student record, indicating specifically the legitimate educational or other interest which justifies the disclosure. The administrative problem created by this requirement, as regards the mass collection and abstraction of computer data, requires no comment.

The statute requires each recipient institution to inform students of their rights under these provisions, to establish appropriate procedures for the granting of requests for access to student records within a reasonable time but in no case later than 45 days after the request has been made. Since the law takes effect on November 19, 1974, access must be granted not later than January 3, 1975 for any request submitted on the effective date.

We will keep you advised of further developments as they occur.

Walter J. Relihan, Jr.

This Memorandum Addressed to:

Presidents, State-operated Campuses
Presidents, Community Colleges
Deans, Statutory Colleges

Copies for information only sent to:

Chancellor Kibbee
Dean McGrath
President Rose

President Corson
Vice President Risley
ACCESS TO STUDENT RECORDS - PRIVACY

Reference is made to the "Family Educational Rights and Privacy Act of 1974" (P.L. 93-380, §513) which added a new Section 438 (20 USC 1232-g) to the General Education Provisions Act. This was introduced by Senator James Buckley as an amendment to the "Educational Amendments of 1974" (H.R.69) during Senate floor debate last Spring. Among other things, Senator Buckley articulated the intent of the Act as restoring "parental rights and to protect privacy" by (1) insuring that "parents have the right of access to their children's school records," (2) preventing "the abuse and improper disclosure of such records and personal data on students and their products" and (3) requiring "parental consent before such records are disclosed to most third parties." (120 Cong. Rec. S8064, 8066, May 14, 1974).

Although the language of Section 438 specifically refers to access rights by parents, Section 438(d) provides that "whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student."

Section 438(a)(1) provides that Federal funds will not be available under "any applicable program" to, inter alia, any institution of higher education or any community college which prevents its students from inspecting and receiving "any and all official records, files, and data including all material that is incorporated into each student's cumulative record folder and intended for school use or to be available to parties outside the school***." Among the material specifically, but not exclusively, included are identifying data, grades, standardized achievement test scores, health data, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns. (P.L. 90-380 also added new Sections 439 and 440 as part of the new Act. Section 439 provides for inspection of "instructional*** material used in connection with any research or experimentation program or project" where students are "engaged in such program or project". It is not clear, however, whether postsecondary education is covered. Section 440 provides a "limitation on withholding of Federal funds").

NOTE: The NACUA Special Report series is prepared for the information of attorneys representing institutions of post-secondary education and related agencies and organizations. Accordingly, certain kinds of information and explanatory comments are omitted which might otherwise be necessary. Non-attorney readers are cautioned that many of the reports contained herein should not be regarded as definitive or acted upon except following consultation with counsel.
Since the signing of P. L. 93-380 into law by the President on August 21, 1974, the NACUA National Office, along with other higher education associations, has received a continuous series of inquiries about the law and expressions of concern. NACUA attorneys have been seeking guidance on numerous matters of troublesome ambiguity. Unfortunately, because there were no prior hearings and because the statutory language itself gives rise to so many questions, the HEW officials responsible for preparing implementing regulations face a particularly difficult task. Indications are that proposed regulations probably cannot be prepared prior to the effective date, which is November 19, 1974. In that connection, this office has been requested to provide to HEW any comments or analyses which our attorneys may wish to make available, so as to aid the regulation drafters in understanding the legal, policy and managerial problems, as seen from the point of view of our institutions. Accordingly, this office invites receipt of memoranda suitable for submission to HEW, not as representing NACUA views, but simply to facilitate communication from the institutions.

At the time this Special Report was being drafted, an informal meeting between representatives of higher education and certain other outside groups and appropriate Congressional and HEW staff people had just taken place. At that meeting the views of higher education with respect to the special serious problems for the institutions were expressed, and NACUA attorney Daniel Steiner of Harvard presented, point-by-point, various legal questions raised by the legislation itself. Both Congressional and HEW staff persons present conceded that there were no adequate answers to many of the questions, and that these and other problems appeared to be of such a serious nature that some form of relief might well be appropriate. At this writing it is too early to know the precise form of any such relief or of the probable outcome. It is recommended that the attorneys follow developments closely with their institutions' admissions officers and registrars, since these persons are likely to be among the best informed through the efforts of their National Association, the American Association of Collegiate Registrars and Admissions Officers (AACRAO).

To facilitate the effort by higher education to obtain relief, the ACE and several other major associations are circulating a memorandum to the relevant Congressional committees and others concerned with this matter. The text is reproduced as follows:

Despite their recognition of the problems to which it is addressed, a number of colleges and universities request that the effective date of the Family Educational Rights and Privacy Act of 1974 be changed to next year to allow time for hearings. The following reasons, among others, are advanced in support of this request:

1. The Act gives student access to all existing records. Many of these records, such as letters of recommendation for admissions, were solicited from third parties with an explicit commitment that they would be confidential and with the students' understanding that they would be confidential. The Act forces institutions to choose between such options as going through hundreds of thousands of student files to destroy certain records or, despite the commitment given to third parties and the rights of the third parties, making the records available to students.

2. The Act contains important ambiguities that should be cured by legislative action. There is little solid legislative history to provide guidance. A list of some of these ambiguities is set forth at the end of this memorandum.
3. The Act appears to have consequences that the Congress may not have intended. For example,

--Students receiving financial aid would have access to confidential information, such as lists of assets and liabilities and tax returns, concerning their parents. The right of privacy of parents is very much affected.

--Students receiving psychiatric care would have access to the psychiatrists' records.

--Parents can receive no information from a college about their children without the children's consent even if the students are 16 or 17 (and in some cases 14 to 15) years old.

4. Despite its evident purpose of protecting students' privacy, the Act is likely to cause invasions of that privacy. Credit bureaus, prospective employers, governmental agencies conducting security clearances and other organizations could, as a result of the Act, now require students to obtain all their records (psychiatric, financial, disciplinary, evaluations, etc.) and turn them over. Prior to the enactment of the Act, institutions could protect students by refusing to turn over such records even if a student had given consent.

5. Hearings would provide a systematic opportunity for affected parties, such as faculty, students and parents, to express their views on the issues listed above or other important issues the Act deals with. (The Act affects in a fundamental way the rights and obligations of a number of people and institutions, and it would be appropriate to have hearings to discuss these rights and obligations.)

List of Ambiguities

a. The applicability of Section 438(b)(4)(A) of the Act is governed by its reference to subsections (c)(1), (c)(2) and (c)(3). There are no such subsections in the Act.

b. How broad is the term "any and all official records, files and data" to which students must be given access? It can be given a great variety of meanings in different institutional contexts. Is it intended to override common law privileges such as attorney-client relationships? Does it cover all records of every professor whether at home or in the office? Does it cover notes of a dean or a professor after he has talked with a student?

c. The Act requires institutions to provide hearings for students to challenge any record they consider inaccurate or misleading. Does this mean that hearings must be held if a student thinks his essay deserved an A and it is "inaccurate and misleading" for his records to show a B? Or if a professor's evaluation, filed with the student's department, says that the student showed little creativity in his written work, must the institution offer a hearing on the issue of the student's creativity? In short, what is the scope of the right to a hearing?
d. Does the Act give any rights to a person who has graduated and is no longer enrolled as a student? Or does a person who has applied to a college but was not admitted have any right to access to the college's records?

e. Is a right of private action created to enforce the Act or is the HEW compliance mechanism created by the Act the only means of enforcement?
representatives an analysis of these reports and a compilation of statistical data derived therefrom).

(b) The amendment made by subsection (a) shall be effective upon enactment of this Act.

PROTECTION OF THE RIGHTS AND PRIVACY OF PARENTS AND STUDENTS

Sec. 513. (a) Part C of the General Education Provisions Act is further amended by adding at the end thereof the following new section:

"PROTECTION OF THE RIGHTS AND PRIVACY OF PARENTS AND STUDENTS

Sec. 528. (a) No funds shall be made available under any applicable program to any State or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy of denying, or which effectively prevents, the parents of students attending any school of such agency, or attending such institution of higher education, community college, school, preschool, or other educational institution, the right to inspect and review any and all official records, files, and data directly related to their children, including all material that is incorporated into each student's cumulative record folder, and intended for use solely or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns.

Where such records or data include information on more than one student, the parents of any student shall be entitled to receive, or be informed of, that part of such record or data as pertains to their child. Each recipient shall establish appropriate procedures for the granting of a request by parents for access to their child's school records within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(2) Parents shall have an opportunity for a hearing to challenge the content of their child's school records, to enquire that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein.

(3) No funds shall be made available under any applicable program to any State or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy of permitting the release of personally identifiable records or files (or personal information contained therein) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency who have legitimate educational interests;

(B) officials of other schools or school systems in which the student intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C) authorized representatives of (i) the Comptroller General of the United States, (ii) the Secretary, (iii) an administrative head of an educational agency (as defined in section 409 of this Act), or (iv) State educational authorities, under the conditions set forth in paragraph (3) of this subsection; and

(D) in connection with a student's application for, or receipt of, financial aid.

(4) No funds shall be made available under any applicable program to any State or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy or practice of furnishing, in any form, any personally identifiable information contained in personal school records, to any persons other than those listed in subsection (b) (1) unless:

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) such information is furnished in compliance with judicial order, or pursuant to any properly issued subpoena, upon condition that the parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(5) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, (C) an administrative head of an educational agency, or (D) State educational authorities, from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: Provided, That, except when collection of personally identifiable data is specifically authorized by Federal law, any data collected by such officials with respect to individual students shall not include information (including social security numbers) which would permit the personal identification of such students or their parents after the data so obtained has been collected.

(6) (A) With respect to subsections (c) (1) and (c) (2) and (c) (5), all persons, agencies, or organizations desiring access to the records of a student shall be required to sign a written form which shall be kept permanently with the file of the student, but only for inspection by the parents or student, indicating specifically the legitimate educational or other interest that each person, agency, or organization has in seeking this information. Such form shall be available to parents and to the school official responsible for record maintenance as a means of auditing the operation of the system.
"(e) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student.

"(c) The Secretary shall adopt appropriate regulations to protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

"(d) For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of post-secondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

"(e) No funds shall be made available under any applicable program unless the recipient of such funds informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of post-secondary education, of the rights accorded them by this section.

"(f) The Secretary, or an administrative head of an education agency, shall take appropriate actions to enforce provisions of this section and to deal with violations of this section, according to the provisions of this Act, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with the provisions of this section, and he has determined that compliance cannot be secured by voluntary means.

"(g) The Secretary shall establish or designate an office and review board within the Department of Health, Education, and Welfare for the purpose of investigating, processing, reviewing, and adjudicating violations of the provisions of this section and complaints which may be filed concerning alleged violations of this section, according to the procedures contained in section 431 and 437 of this Act.

(b) (1) (i) The provisions of this section shall become effective ninety days after the date of enactment of section 438 of the General Education Provisions Act.

(2) (c) This section may be cited as the "Family Educational Rights and Privacy Act of 1974."