

Approved: \_\_\_\_\_

4-5-96

Date

## MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Chairperson Tim Emert at 10:00 a.m. on February 22, 1996 in Room 514-S of the Capitol.

All members were present except: Senator Rock (excused)  
Senator Moran (excused)  
Senator Vancrum (excused)

Committee staff present: Michael Heim, Legislative Research Department  
Jerry Donaldson, Legislative Research Department  
Gordon Self, Revisor of Statutes  
Janice Brasher, Committee Secretary

Conferees appearing before the committee: Kyle Smith, KBI  
Patricia Baker, Kansas Association of Schools Boards  
Sue Chase, NEA  
Paul Shelby, OJA

Others attending: See attached list

The Chair called the meeting to order at 10:00 a.m.

A motion was made by Senator Bond, seconded by Senator Reynolds to approve the minutes of February 7, 1996. The motion carried.

### **SB 511--Identification of witnesses**

The Chair related that Kyle Smith, Ron Wurtz and staff reconsidered language contained in **SB 511** and developed an amendment incorporating different language. A copy of that language was distributed to Committee members.

A motion was made by Senator Feleciano, seconded by Senator Bond to reconsider Committee action on **SB 511**. The motion carried.

Kyle Smith discussed language received from Ron Wurtz, which was more appropriate. The language would insert on line 13, page 2, "*but in no event shall identification of a witness be delayed beyond arraignment without further order of the court after hearing and an opportunity of the defendant to be heard.*" (Attachment 1)

A motion was made by Senator Feleciano, seconded by Senator Bond to amend the bill with the above language and to recommend the bill favorably for passage. The motion carried.

### **SB 709--Sharing of information among agencies dealing with juveniles.**

The Chair related that the intent of the bill is to allow people who deal with juveniles in any capacity, to share information. The Chair stated that there may be some problems with the language used in **SB 709**. The Chair stated that there are other problems with this bill. The Chair related that if this bill does not pass, that possibly the concept of the bill could be included in one of the Youth Authority bills. The Chair stated that one of the recommendations of the Youth Authority regarded the capability of agencies dealing with juveniles to be able to access information from those agencies. The Chair stated that information access among agencies dealing with juveniles was not addressed in **SB 618** or in **HB 2900**.

Patricia Baker, Kansas Association of School Boards, testified in support of the concept of **SB 709**. The conferee stated that school districts have faced real problems in sharing of information with other agencies dealing with juveniles. The conferee stated that while her organization supports the concept such a law might conflict with the Family Educational Rights and Privacy Act (FERPA) of 1994, also known as the "Buckley

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY, Room 514-S Statehouse, at 10:00 a.m. on February 22, 1996.

Amendment." The conferee referring to Section 1(d) and Section 3(c) stated that those sections could put Kansas schools at odds with Federal law as well as other Kansas laws. (Attachment 2)

In response to the Chair's question, the conferee stated that the schools would feel more comfortable with a court order for the release of records.

The conferee and a Committee member discussed the use of waivers as cited in Tampa, Florida. The Chair made a formal request for the conferee to research the issue of waivers as used in Tampa, Florida. The conferee discussed issues of disclosure as those issues would affect truancy boards. The conferee stated that one of the problems is that part of problem is with one of two parts, the part that protects student records. In response to the request of the Committee, the conferee stated that she will contact Washington and Florida for information concerning the release of records.

Sue Chase, KNEA spoke in support of SB 709, and related that a KNEA task force recommended legislative changes to provide for the sharing of information among agencies dealing with youth. The conferee stated that the concept used in the state of Washington is essentially what is contained in SB 709. (Attachment 3)

Paul Shelby testified in support of the concept of SB 709. Mr. Shelby stated that there are some serious mechanical problems with this proposed bill. The conferee related that there is a problem with the term, "juvenile court" because in this state, district or municipal courts are the agencies that generate juvenile records. The conferee noted that there are several statutes relating to the subject matter that are not listed for repeal in this bill. (Attachment 4)

The Chair adjourned the meeting at 10:55 a.m.

The next meeting is scheduled for February 23, 1996.



SB 511

1 fendant to prepare a defense the court may, on written motion of the  
2 defendant, require the prosecuting attorney to furnish the defendant with  
3 a bill of particulars. At the trial the state's evidence shall be confined to  
4 the particulars of the bill.

5 (g) Except as otherwise provided, the prosecuting attorney shall en-  
6 dorse the names of all witnesses known to the prosecuting attorney upon  
7 the complaint, information and indictment at the time of filing it. The  
8 prosecuting attorney may endorse on it the names of other witnesses that  
9 may afterward become known to the prosecuting attorney, at times that  
10 the court may by rule or otherwise prescribe. ~~If the witness testifies~~  
11 ~~XX~~, the  
12 prosecuting attorney may delay identifying such informant witness until  
13 such informant witness actually testifies.

14 Sec. 2. K.S.A. 22-3201 is hereby repealed.  
15 Sec. 3. This act shall take effect and be in force from and after its  
16 publication in the statute book.

← Is to testify but the prosecuting attorney believes the witness who has provided information is in danger of intimidation or retaliation

└ but in no event shall identification of a witness be delayed beyond arraignment without further order of the court after hearing and an opportunity of the defendant to be heard.

Sen. Judd  
2-22-96  
Attach. 1



Testimony on S.B. 709  
Before Senate Judiciary

February 22, 1996  
Patricia E. Baker, Associate Executive Director/General Counsel  
Kansas Association of School Boards

Thank you, Mister Chairman. I appreciate the opportunity to appear before you to comment on Senate Bill 709. On behalf of our member school districts, I want to tell you that we appreciate any efforts to encourage the sharing of information by persons or organizations who are dealing with the well-being of our youth. Our schools have faced frustration over the years in trying to give or get information to help students. Duplications of efforts and potentially counter-productive actions are always a possibility.

Despite our support for the concept of S.B. 709, we feel obligated to advise the committee that such a law might well conflict with the Family Educational Rights and Privacy Act of 1974. Also known as "The Buckley Amendment," this federal statute puts severe limitations on a school's right to share educational records with anyone. I have attached copies of the Federal Regulations pertaining to FERPA, an outline of the issue and a copy of the Kansas conformity law, K.S.A. 72-6214.

Section 1(d) requires each school to implement procedures to facilitate inquiries. Section 3(c) allows release of records to other participants. It appears that adherence to these sections could put Kansas schools at odds with Federal law as well as other Kansas laws.

We would be happy to work with any groups to address concerns regarding children "in the system." We hope the committee understands the dilemma faced by Kansas schools.

Thank you.

Sen. Jud.  
2-22-96  
Attach 2

## EHLR SPECIAL REPORT: Family Rights and Privacy

*Following is the full text of the final regulations for 34 CFR Part 99, Family Rights and Privacy, as published in 53 Federal Register 11942 (April 11, 1988).*

### DEPARTMENT OF EDUCATION

#### 34 CFR Part 99

#### Family Educational Rights and Privacy

**AGENCY:** Department of Education.

**ACTION:** Final regulations.

**SUMMARY:** The Secretary revises and renames the Department of Education regulations formerly titled the Privacy Rights of Parents and Students. These regulations are retitled Family Educational Rights and Privacy and eliminate some of the regulatory requirements placed on educational agencies and institutions. The regulations have also been rewritten for clarity.

**EFFECTIVE DATE:** These regulations take effect either 45 days after publication in the Federal Register or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person.

**FOR FURTHER INFORMATION CONTACT:** Ellen Campbell or Connie Moore, Family Policy and Regulations Office, Office of Management, U.S. Department of Education, 400 Maryland Avenue, SW, (Room 3021, Federal Office Building No. 6), Washington, DC 20202. Telephone: (202) 732-2057.

**SUPPLEMENTARY INFORMATION:** Under Executive Order 12291, the Department of Education regularly reviews its regulations to determine whether the Department can decrease burdens on the public and otherwise simplify and clarify existing regulations. As part of

this process, the Department has reviewed the regulations implementing the Family Educational Rights and Privacy Act (FERPA).

The FERPA regulations of the former Department of Health, Education, and Welfare (HEW) (45 CFR Part 99) were transferred to the Department of Education (ED) and recodified in Part 99 of Title 34 of the Code of Federal Regulations on May 9, 1980 (45 FR 30802). These regulations implement FERPA, which was enacted as section 438 of the General Education Provisions Act (GEPA) (20 U.S.C. 1232g).

The FERPA sets out requirements designed to afford parents and students privacy and other rights with respect to education records. The statute applies to educational agencies and institutions that receive funds under an applicable program administered by ED. For purposes of FERPA an applicable program is a program that was either formerly administered by the Commissioner of Education prior to the establishment of ED on May 4, 1980 or any program that came into existence after ED was established, unless the law creating the new program has the effect of making FERPA inapplicable.

Educational agencies and institutions to which FERPA applies must maintain education records consistent with the requirements of FERPA. In brief, FERPA requires those agencies or institutions to provide parents and eligible students access to records directly related to the students; to permit parents and eligible students to challenge those records on the grounds that they are inaccurate, misleading, or otherwise in violation of the student's privacy or other rights; to

obtain the written consent of parents and eligible students before releasing personally identifiable information about the students contained in education records to other than organizations or individuals described in statutory exceptions; and to notify parents and eligible students of these rights.

On June 10, 1987, the Secretary published a notice of proposed rulemaking (NPRM) for this part in the Federal Register (52 FR 22250). The NPRM included a discussion of the numerous revisions and invited public comment. The revisions are intended to simplify and clarify the regulations and not to alter any interpretation under existing regulations.

In response to the Secretary's invitation in the NPRM, educational associations, organizations, universities, and individuals submitted 20 letters, which contained a total of 113 comments. More than half of the letters were from institutions of higher education and were transmitted through an organization representing the higher education community. An analysis of the comments and of the changes in the regulations since publication of the NPRM is published as an appendix to these final regulations.

#### Executive Order 12806

The Secretary has reviewed these regulations in accordance with Executive Order 12806, "The Family." The regulations were assessed in light of the criteria set forth in the Executive Order to determine whether they have any potential negative impact on the family. They were found to have no

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**EHLR SPECIAL REPORT: Family Rights and Privacy (Continued)**

negative impact. In fact, the regulations will strengthen the autonomy, stability, and rights of the family unit.

The criterion of the Order which is most applicable to these regulations asks: "Does this action strengthen or erode the authority and rights of parents in the education, nurture, and supervision of their children?" The statute and the implementing regulations strengthen the rights of parents by reaffirming their basic right to have access to the education records of their children, their right to be assured of the privacy of their children's records, and their right to challenge records believed to be inaccurate, misleading, or otherwise in violation of the student's privacy.

Another criterion which is applicable to these regulations asks: "Does this action by government strengthen or erode the stability of the family and, particularly, the marital commitment?" Overall, these regulations are found to strengthen the stability of the family. In particular, the FERPA provisions which afford parents the right to have access to and some control over the education records of their children serve to encourage parents to be involved in the education of their children. Furthermore, by affording both parents (whether custodial or non-custodial) the right to have access to the records, the regulations serve to encourage joint parental involvement in their children's education.

**Executive Order 12291**

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

**Assessment of Educational Impact**

In the NPRM, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered from any other agency or authority of the United States.

Based on the response to the proposed rules and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

**List of Subjects in 34 CFR Part 99**

Administrative practice and procedure, Education department, Family educational rights, Privacy.

Parents, Reporting and recordkeeping requirements, Students.

(Catalog of Federal Domestic Assistance number does not apply.)

Dated February 19, 1988.

William J. Bennett,  
*Secretary of Education.*

The Secretary revises Part 99 of Title 34 of the Code of Federal Regulations to read as follows:

**PART 99—FAMILY EDUCATIONAL RIGHTS AND PRIVACY**

**Subpart A—General**

- Sec.
- 99.1 To which educational agencies or institutions do these regulations apply?
- 99.2 What is the purpose of these regulations?
- 99.3 What definitions apply to these regulations?
- 99.4 What are the rights of parents?
- 99.5 What are the rights of eligible students?
- 99.6 What information must an educational agency's or institution's policy contain?
- 99.7 What must an educational agency or institution include in its annual notification?

**Subpart B—What are the Rights of Inspection and Review of Education Records?**

- 99.10 What rights exist for a parent or eligible student to inspect and review education records?
- 99.11 May an educational agency or institution charge a fee for copies of education records?
- 99.12 What limitations exist on the right to inspect and review records?

**Subpart C—What are the Procedures for Amending Education Records?**

- 99.20 How can a parent or eligible student request amendment of the student's education records?
- 99.21 Under what conditions does a parent or eligible student have the right to a hearing?
- 99.22 What minimum requirements exist for the conduct of a hearing?

**Subpart D—May an Educational Agency or Institution Disclose Personally Identifiable Information from Education Records?**

- 99.30 Under what conditions must an educational agency or institution obtain prior consent to disclose information?
- 99.31 Under what conditions is prior consent not required to disclose information?
- 99.32 What recordkeeping requirements exist concerning requests and disclosures?

- 99.33 What limitations apply to the redisclosure of information?
- 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?
- 99.35 What conditions apply to disclosure of information for Federal or State program purposes?
- 99.36 What conditions apply to disclosure of information in health and safety emergencies?
- 99.37 What conditions apply to disclosing directory information?

**Subpart E—What are the Enforcement Procedures?**

- 99.60 What functions has the Secretary, delegated to the Office and to the Education Appeal Board?
- 99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?
- 99.62 What information must an educational agency or institution submit to the Office?
- 99.63 Where are complaints filed?
- 99.64 What is the complaint procedure?
- 99.65 What is the content of the notice of complaint issued by the Office?
- 99.66 What are the responsibilities of the Office in the enforcement process?
- 99.67 How does the Secretary enforce decisions?

Authority: Sec. 438, Pub. L. 90-247, Title IV, as amended, 88 Stat. 571-574 (20 U.S.C. 1232g), unless otherwise noted.

**Subpart A—General**

§ 99.1 To which educational agencies or institutions do these regulations apply?

(a) This part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary of Education that—

(1)(i) Was transferred to the Department under the Department of Education Organization Act (DEOA); and

(ii) Was administered by the Commissioner of Education on the day before the effective date of the DEOA; or

(2) Was enacted after the effective date of the DEOA, unless the law enacting the new Federal program has the effect of making section 438 of the General Education Provisions Act inapplicable.

(Authority: 20 U.S.C. 1230, 1232g, 3467, 3507)

(b) The following chart lists the funded programs to which Part 99 does not apply as of April 11, 1988:

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Name of program	Authorizing statute	Implementing regulations
1. High School Equivalency Program and College Assistance Migrant Program	Section 418A of the Higher Education Act of 1965 as amended by the Education Amendments of 1980 (Pub. L. 96-374) 20 U.S.C. 1070d-2).	Part 206.
2. Programs administered by the Commissioner of the Rehabilitation Services Administration, and the Director of the National Institute on Disability and Rehabilitation Research.	The Rehabilitation Act of 1973, as amended. (29 U.S.C. 700, et seq.).	Parts 350-359, 361, 365, 366, 369-371, 373-375, 378, 379, 385-390, and 395.
3. Transition program for refugee children.	Immigration and Nationality Act, as amended by the Refugee Act of 1980, Pub. L. 96-212 (8 U.S.C. 1522(d)).	Part 538.
4. College Housing	Title IV of the Housing Act of 1960, as amended (12 U.S.C. 1749, et seq.).	Part 614.
5. The following programs administered by the Assistant Secretary for Educational Research and Improvement: Educational Research Grant Program, Regional Educational Laboratories Research and Development Centers. All other research or statistical activities funded under Section 405 or 406 of the General Education Provisions Act.	Section 405 of the General Education Provisions Act (20 U.S.C. 1221a), and section 406 of the General Education Provisions Act (20 U.S.C. 1221-1).	Parts 700, 706-708.

Note: The Secretary, as appropriate, updates the information in this chart and informs the public.

(c) This part does not apply to an educational agency or institution solely because students attending that agency or institution receive non-monetary benefits under a program referenced in paragraph (a) of this section, if no funds under that program are made available to the agency or institution.

(d) The Secretary considers funds to be made available to an educational agency or institution of funds under one or more of the programs referenced in paragraph (a) of this section—

- (1) Are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract; or
- (2) Are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Pell Grant Program and the Guaranteed Student Loan Program; Titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended).

(e) If an educational agency or institution receives funds under one or more of the programs covered by this section, the regulations in this part apply to the recipient as a whole, including each of its components (such as a department within a university).

(Authority: 20 U.S.C. 1232g)

§ 99.2 What is the purpose of these regulations?

The purpose of this part is to set out requirements for the protection of privacy of parents and students under section 438 of the General Education Provisions Act, as amended.

(Authority: 20 U.S.C. 1232g)

(Note: 34 CFR 300.560-300.576 contain requirements regarding confidentiality of information relating to handicapped children, who receive benefits under the Education of the Handicapped Act.)

§ 99.3 What definitions apply to these regulations?

The following definitions apply to this part:

"Act" means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as section 438 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232g)

"Attendance" includes, but is not limited to—

- (a) Attendance in person or by correspondence; and
- (b) The period during which a person is working under a work-study program.

(Authority: 20 U.S.C. 1232g)

"Directory information" means information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to 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.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

"Disclosure" means to permit access to or the release, transfer, or other communication of education records, or the personally identifiable information contained in those records, to any party, by any means, including oral, written, or electronic means.

(Authority: 20 U.S.C. 1232g(b)(1))

"Educational agency or institution" means any public or private agency or institution to which this part applies under § 99.1(a).

(Authority: 20 U.S.C. 1232g(a)(3))

"Education records" (a) The term means those records that are—

- (1) Directly related to a student; and
- (2) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include—

- (1) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record;
- (2) Records of a law enforcement unit of an educational agency or institution, but only if education records maintained by the agency or institution are not disclosed to the unit, and the law enforcement records are—

- (i) Maintained separately from education records;
- (ii) Maintained solely for law enforcement purposes; and
- (iii) Disclosed only to law enforcement officials of the same jurisdiction;

- (3)(i) Records relating to an individual who is employed by an educational agency or institution, that—
- (A) Are made and maintained in the normal course of business;
- (B) Relate exclusively to the individual in that individual's capacity as an employee; and
- (C) Are not available for use for any other purpose.

- (ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition.

- (4) Records on a student who is 18 years of age or older, or is attending an

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institution of postsecondary education, that are—

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;

(ii) Made, maintained, or used only in connection with treatment of the student; and

(iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records that only contain information about an individual after he or she is no longer a student at that agency or institution.

(Authority: 20 U.S.C. 1232g(a)(4))

"Eligible student" means a student who has reached 18 years of age or is attending an institution of postsecondary education.

(Authority: 20 U.S.C. 1232g(d))

"Institution of postsecondary education" means an institution that provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided as determined under State law.

(Authority: 20 U.S.C. 1232g(d))

"Parent" means a parent of a student, and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.

(Authority: 20 U.S.C. 1232g)

"Party" means an individual, agency, institution, or organization.

(Authority: 20 U.S.C. 1232g(b)(4)(A))

"Personally identifiable information" includes, but is not limited to—

(a) The student's name;

(b) The name of the student's parent or other family member;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number or student number;

(e) A list of personal characteristics that would make the student's identity easily traceable; or

(f) Other information that would make the student's identity easily traceable.

(Authority: 20 U.S.C. 1232g)

"Record" means any information recorded in any way, including, but not limited to, handwriting, print, tape, film, microfilm, and microfiche.

(Authority: 20 U.S.C. 1232g)

"Secretary" means the Secretary of the U.S. Department of Education or an official or employee of the Department of Education acting for the Secretary under a delegation of authority.

(Authority: 20 U.S.C. 1232g)

"Student", except as otherwise specifically provided in this part, means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records.

(Authority: 20 U.S.C. 1232g(a)(6))

#### § 99.4 What are the rights of parents?

An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.

(Authority: 20 U.S.C. 1232g)

#### § 99.5 What are the rights of eligible students?

(a) When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student.

(b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents.

(c) If an individual is or has been in attendance at one component of an educational agency or institution, that attendance does not give the individual rights as a student in other components of the agency or institution to which the individual has applied for admission, but has never been in attendance.

(Authority: 20 U.S.C. 1232g(d))

#### § 99.6 What information must an educational agency's or institution's policy contain?

(a) Each educational agency or institution shall adopt a policy regarding how the agency or institution meets the requirements of the Act and of this part. The policy must include—

(1) How the agency or institution informs parents and students of their rights, in accord with § 99.7;

(2) How a parent or eligible student may inspect and review education records under § 99.10, including at least—

(i) The procedure the parent or eligible student must follow to inspect and review the records;

(ii) With an understanding that it may not deny access to education records, a description of the circumstances in which the agency or institution believes

it has a legitimate cause to deny a request for a copy of those records;

(iii) A schedule of fees (if any) to be charged for copies; and

(iv) A list of the types and locations of education records maintained by the agency or institution, and the titles and addresses of the officials responsible for the records;

(3) A statement that personally identifiable information will not be released from an education record without the prior written consent of the parent or eligible student, except under one or more of the conditions described in § 99.31;

(4) A statement indicating whether the educational agency or institution has a policy of disclosing personally identifiable information under § 99.1(a)(1), and, if so, a specification of the criteria for determining which parties are school officials and what the agency or institution considers to be a legitimate educational interest;

(5) A statement that a record of disclosures will be maintained as required by § 99.32, and that a parent or eligible student may inspect and review that record;

(6) A specification of the types of personally identifiable information the agency or institution has designated as directory information under § 99.37; and

(7) A statement that the agency or institution permits a parent or eligible student to request correction of the student's education records under § 99.20, to obtain a hearing under § 99.21(a), and to add a statement to the record under § 99.21(b)(2).

(b) The educational agency or institution shall state the policy in writing and make a copy of it available on request to a parent or eligible student.

(Authority: 20 U.S.C. 1232g(e) and (f))

(Approved by the Office of Management and Budget under control number 1680-0508)

#### § 99.7 What must an educational agency or institution include in its manual notification?

(a) Each educational agency or institution shall annually notify parents of students currently in attendance, and eligible students currently in attendance, at the agency or institution of their rights under the Act and this part. The notice must include a statement that the parent or eligible student has a right to—

(1) Inspect and review the student's education records;

(2) Request the amendment of the student's education records to ensure that they are not inaccurate, misleading, or otherwise in violation of the student's privacy or other rights;

(3) Consent to disclosures of personally identifiable information

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contained in the student's education records, except to the extent that the Act and the regulations in this part authorize disclosure without consent:

(4) File with the U.S. Department of Education a complaint under § 99.64 concerning alleged failures by the agency or institution to comply with the requirements of the act and this part; and

(5) Obtain a copy of the policy adopted under § 99.6.

(b) The notice provided under paragraph (a) of this section must also indicate the places where copies of the policy adopted under § 99.6 are located.

(c) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents and eligible students of their rights.

(d) An agency or institution of elementary or secondary education shall effectively notify parents of students who have a primary or home language other than English.

(Authority: 20 U.S.C. 1232g(e))

(Approved by the Office of Management and Budget under control number 1880-0508)

#### Subpart B—What are the Rights of Inspection and Review of Education Records?

§ 99.10 What rights exist for a parent or eligible student to inspect and review education records?

(a) Except as limited under § 99.12, each educational agency or institution shall permit a parent or eligible student to inspect and review the education records of the student.

(b) The educational agency or institution shall comply with a request for access to records within a reasonable period of time, but in no case more than 45 days after it has received the request.

(c) The educational agency or institution shall respond to reasonable requests for explanations and interpretations of the records.

(d) The educational agency or institution shall give the parent or eligible student a copy of the records if failure to do so would effectively prevent the parent or student from exercising the right to inspect and review the records.

(e) The educational agency or institution shall not destroy any education records if there is an outstanding request to inspect and review the records under this section.

(f) While an education agency or institution is not required to give an eligible student access to treatment records under paragraph (b)(4) of the

definition of "Education records" in § 99.3, the student may have those records reviewed by a physician or other appropriate professional of the student's choice.

(Authority: 20 U.S.C. 1232g(a)(1)(A))

§ 99.11 May an educational agency or institution charge a fee for copies of education records?

(a) Unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

(Authority: 20 U.S.C. 1232g(a)(1))

§ 99.12 What limitations exist on the right to inspect and review records?

(a) If the education records of a student contain information on more than one student, the parent or eligible student may inspect, review, or be informed of only the specific information about that student.

(b) A postsecondary institution does not have to permit a student to inspect and review education records that are—

(1) Financial records, including any information those records contain, of his or her parents;

(2) Confidential letters and confidential statements of recommendation placed in the education records of the student before January 1, 1975, as long as the statements are used only for the purposes for which they were specifically intended; and

(3) Confidential letters and confidential statements of recommendation placed in the student's education records after January 1, 1975, if—

(i) The student has waived his or her right to inspect and review those letters and statements; and

(ii) Those letters and statements are related to the student's—

(A) Admission to an educational institution;

(B) Application for employment; or

(C) Receipt of an honor or honorary recognition.

(c)(1) A waiver under paragraph (b)(3)(i) of this section is valid only if—

(i) The educational agency or institution does not require the waiver as a condition for admission to or receipt of a service or benefit from the agency or institution; and

(ii) The waiver is made in writing and signed by the student, regardless of age.

(2) If a student has waived his or her rights under paragraph (b)(3)(i) of this section, the educational institution shall—

(i) Give the student, on request, the names of the individuals who provided the letters and statements of recommendation; and

(ii) Use the letters and statements of recommendation only for the purpose for which they were intended.

(3)(i) A waiver under paragraph (b)(3)(i) of this section may be revoked with respect to any actions occurring after the revocation.

(ii) A revocation under paragraph (c)(3)(i) of this section must be in writing.

(Authority: 20 U.S.C. 1232g(a)(1) (A) and (B))

#### Subpart C—What are the Procedures for Amending Education Records?

§ 99.20 How can a parent or eligible student request amendment of the student's education records?

(a) If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy or other rights, he or she may ask the educational agency or institution to amend the record.

(b) The education agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.

(c) If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under § 99.21.

(Authority: 20 U.S.C. 1232g(a)(2))

§ 99.21 Under what conditions does a parent or eligible student have the right to a hearing?

(a) An educational agency or institution shall give a parent or eligible student, on request, an opportunity for a hearing to challenge the content of the student's education records on the grounds that the information contained in the education records is inaccurate, misleading, or in violation of the privacy or other rights of the student.

(b)(1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the privacy or other rights of the student, it shall—

(i) Amend the record accordingly; and

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(ii) Inform the parent or eligible student of the amendment in writing.

(2) If, as a result of the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both.

(c) If an educational agency or institution places a statement in the education records of a student under paragraph (b)(2) of this section, the agency or institution shall—

(1) Maintain the statement with the contested part of the record for as long as the record is maintained; and

(2) Disclose the statement whenever it discloses the portion of the record to which the statement relates.

(Authority: 20 U.S.C. 1232g(a)(2))

§ 99.22 What minimum requirements exist for the conduct of a hearing?

The hearing required by § 99.21 must meet, at a minimum, the following requirements:

(a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.

(b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.

(c) The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

(d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under § 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.

(e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.

(f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.

(Authority: 20 U.S.C. 1232g(a)(2))

**Subpart D—May an Educational Agency or Institution Disclose Personally Identifiable Information From Education Records?**

§ 99.30 Under what conditions must an educational agency or institution obtain prior consent to disclose information?

(a) Except as provided in § 99.31, an educational agency or institution shall obtain a signed and dated written consent of a parent or an eligible student before it discloses personally identifiable information from the student's education records.

(b) The written consent must—

(1) Specify the records that may be disclosed;

(2) State the purpose of the disclosure; and

(3) Identify the party or class of parties to whom the disclosure may be made.

(c) When a disclosure is made under paragraph (a) of this section—

(1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and

(2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provide the student with a copy of the records disclosed.

(Authority: 20 U.S.C. 1232g (b)(1) and (b)(2)(A))

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by § 99.30 if the disclosure meets one or more of the following conditions:

(1) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.

(2) The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll.

(3) The disclosure is, subject to the requirements of § 99.35, to authorize representatives of—

(i) The Comptroller General of the United States;

(ii) The Secretary; or

(iii) State and local educational authorities.

(4)(i) The disclosure is in connection with financial aid for which the student has applied or which the student has

received, if the information is necessary for such purposes as to—

(A) Determine eligibility for the aid;

(B) Determine the amount of the aid;

(C) Determine the conditions for the aid; or

(D) Enforce the terms and conditions of the aid.

(ii) As used in paragraph (a)(4)(i) of this section, "financial aid" means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g(b)(1)(D))

(5)(i) The disclosure is to State and local officials or authorities, if a State statute adopted before November 19, 1974, specifically requires disclosures to those officials and authorities.

(ii) Paragraph (a)(5)(i) of this section does not prevent a State from further limiting the number or type or State or local officials to whom disclosures may be made under that paragraph.

(6)(i) The disclosure is to organizations conducting studies for, or on behalf of, educational agencies or institutions to—

(A) Develop, validate, or administer predictive tests;

(B) Administer student aid programs; or

(C) Improve instruction.

(ii) The agency or institution may disclose information under paragraph (a)(6)(i) of this section only if—

(A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization; and

(B) The information is destroyed when no longer needed for the purposes for which the study was conducted.

(iii) For the purposes of paragraph (a)(6) of this section, the term "organization" includes, but is not limited to, Federal, State, and local agencies, and independent organizations.

(7) The disclosure is to accrediting organizations to carry out their accrediting functions.

(8) The disclosure is to parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1954.

(9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena.

(ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or

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eligible student of the order or subpoena in advance of compliance.

(10) The disclosure is in connection with a health or safety emergency, under the conditions described in § 99.36.

(11) The disclosure is information the educational agency or institution has designated as "directory information", under the conditions described in § 99.37.

(12) The disclosure is to the parent of a student who is not an eligible student or to the student.

(b) This section does not forbid or require an educational agency or institution to disclose personally identifiable information from the education records of a student to any parties under paragraphs (a) (1) through (11) of this section.

(Authority: 20 U.S.C. 1232g (a)(5)(A), (b)(1) and (b)(2)(B))

§ 99.32 What recordkeeping requirements exist concerning requests and disclosures?

(a)(1) An educational agency or institution shall maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student.

(2) The agency or institution shall maintain the record with the education records of the student as long as the records are maintained.

(3) For each request or disclosure the record must include—

(i) The parties who have requested or received personally identifiable information from the education records; and

(ii) The legitimate interests the parties had in requesting or obtaining the information.

(b) If an educational agency or institution discloses personally identifiable information from an education record with the understanding authorized under § 99.33(b), the record of the disclosure required under this section must include—

(1) The names of the additional parties to which the receiving party may disclose the information on behalf of the educational agency or institution; and

(2) The legitimate interests under § 99.31 which each of the additional parties has in requesting or obtaining the information.

(c) The following parties may inspect the record relating to each student:

(1) The parent or eligible student.  
(2) The school official or his or her assistants who are responsible for the custody of the records.

(3) Those parties authorized in § 99.31(a) (1) and (3) for the purposes of

auditing the recordkeeping procedures of the educational agency or institution.

(d) Paragraph (a) of this section does not apply if the request was from, or the disclosure was to—

(1) The parent or eligible student;

(2) A school official under § 99.31(a)(1);

(3) A party with written consent from the parent or eligible student; or

(4) A party seeking directory information.

(Authority: 20 U.S.C. 1232g(b)(4)(A))

(Approved by the Office of Management and Budget under control number 1880-0508)

§ 99.33 What limitations apply to the redisclosure of information?

(a)(1) An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student.

(2) The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made.

(b) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of the information on behalf of the educational agency or institution if—

(1) The disclosures meet the requirements of § 99.31; and

(2) The educational agency or institution has complied with the requirements of § 99.32(b).

(c) Paragraph (a) of this section does not apply to disclosures of directory information under § 99.31(a)(11) or to disclosures to a parent or student under § 99.31(a)(12).

(d) Except for disclosures under § 99.31(a) (11) and (12), an educational agency or institution shall inform a party to whom disclosure is made of the requirements of this section.

(Authority: 20 U.S.C. 1232g(b)(4)(B))

§ 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?

(a) An educational agency or institution that discloses an education record under § 99.31(a)(2) shall—

(1) Make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless—

(i) The disclosure is initiated by the parent or eligible student; or

(ii) The policy of the agency or institution under § 99.6 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll;

(2) Give the parent or eligible student, upon request, a copy of the record that was disclosed; and

(3) Give the parent or eligible student, upon request, an opportunity for a hearing under Subpart C.

(b) An educational agency or institution may disclose an education record of a student in attendance to another educational agency or institution if—

(1) The student is enrolled in or receives services from the other agency or institution; and

(2) The disclosure meets the requirements of paragraph (a) of this section.

(Authority: 20 U.S.C. 1232g(b)(1)(B))

§ 99.35 What conditions apply to disclosure of information for Federal or State program purposes?

(a) The officials listed in § 99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements which relate to those programs.

(b) Information that is collected under paragraph (a) of this section must—

(1) Be protected in a manner that does not permit personal identification of individuals by anyone except the officials referred to in paragraph (a) of this section; and

(2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.

(c) Paragraph (b) of this section does not apply if—

(1) The parent or eligible student has given written consent for the disclosure under § 99.30; or

(2) The collection of personally identifiable information is specifically authorized by Federal law.

(Authority: 20 U.S.C. 1232g(b)(3))

§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is

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necessary to protect the health of safety or the student or other individuals.

(b) Paragraph (a) of this section shall be strictly construed.

(Authority: 20 U.S.C. 1232g(b)(1)(I))

§ 99.37 What conditions apply to disclosing directory information?

(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of—

(1) The types of personally identifiable information that the agency or institution has designated as directory information;

(2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and

(3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

(b) An educational agency or institution may disclose directory information about former students without meeting the conditions in paragraph (a) of this section.

(Authority: 20 U.S.C. 1232g(a)(5) (A) and (B))

**Subpart E—What are the Enforcement Procedures?**

§ 99.60 What functions has the Secretary delegated to the Office and to the Education Appeal Board?

(a) For the purposes of this subpart, "Office" means the Family Policy and Regulations Office, U.S. Department of Education.

(b) The Secretary designates the Office to—

(1) Investigate, process, and review complaints and violations under the Act and this part; and

(2) Provide technical assistance to ensure compliance with the Act and this part.

(c) The Secretary designates the Education Appeal Board to act as the Review Board required under the Act.

(Authority: 20 U.S.C. 1232g (f) and (g), 1234)

§ 99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?

If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with State or local law, it shall notify the

Office within 45 days, giving the text and citation of the conflicting law.

(Authority: 20 U.S.C. 1232g(f))

§ 99.62 What information must an educational agency or institution submit to the Office?

The Office may require an educational agency or institution to submit reports containing information necessary to resolve complaints under the Act and the regulations in this part.

(Authority: 20 U.S.C. 1232g (f) and (g))

§ 99.63 Where are complaints filed?

A person may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy and Regulations Office, U.S. Department of Education, Washington, DC 20202.

(Authority: 20 U.S.C. 1232g(g))

§ 99.64 What is the complaint procedure?

(a) A complaint filed under § 99.63 must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred.

(b) The Office investigates each timely complaint to determine whether the educational agency or institution has failed to comply with the provisions of the Act or this part.

(Authority: 20 U.S.C. 1232g(f))

§ 99.65 What is the content of the notice of complaint issued by the Office?

(a) If the Office receives a complaint, it notifies the complainant and the educational agency or institution against which the violation has been alleged, in writing, that the complaint has been received.

(b) The notice to the agency or institution under paragraph (a) of this section—

(1) Includes the substance of the alleged violation; and

(2) Informs the agency or institution that the Office will investigate the complaint and that the educational agency or institution may submit a written response to the complaint.

(Authority: 20 U.S.C. 1232g(g))

§ 99.66 What are the responsibilities of the Office in the enforcement process?

(a) The Office reviews the complaint and response and may permit the parties to submit further written or oral arguments or information.

(b) Following its investigation, the Office provides to the complainant and the educational agency or institution written notice of its findings and the basis for its findings.

(c) If the Office finds that the educational agency or institution has not

complied with the Act or this part, the notice under paragraph (b) of this section—

(1) Includes a statement of the specific steps that the agency or institution must take to comply; and

(2) Provides a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution may comply voluntarily.

(Authority: 20 U.S.C. 1232g(f))

§ 99.67 How does the Secretary enforce decisions?

(a) If the educational agency or institution does not comply during the period of time set under § 99.66(c), the Secretary may take an action authorized under 34 CFR Part 78, including—

(1) Issuing a notice of intent to terminate funds under 34 CFR 78.21;

(2) Issuing a notice to withhold funds under 34 CFR 78.21, 200.94(b) or 298.45(b), depending upon the applicable program under which the notice is issued; or

(3) Issuing a notice to cease and desist under 34 CFR 78.31, 200.94(c) or 298.45(c), depending upon the program under which the notice is issued.

(b) If, after an investigation under § 99.66, the Secretary finds that an educational agency or institution has complied voluntarily with the Act or this part, the Secretary provides the complainant and the agency or institution written notice of the decision and the basis for the decision.

(Note: 34 CFR Part 78 contains the regulations of the Education Appeal Board.)

(Authority: 20 U.S.C. 1232g(g))

Note: The following appendix will not appear in the Code of Federal Regulations.

**Appendix—Analysis of Comments and Changes**

The following is an analysis of comments and changes in the regulations since publication of the NPRM. Substantive issues are discussed under the section of the regulations to which they pertain. Technical and other minor changes are not addressed.

Two issues were raised that cannot be addressed under any specific section of the regulations. In one case commenters raised the issue in the context of different sections of the regulations; in the other case the issues concerned a section that was removed from the regulations. The following is a discussion of those two issues:

• Release of records from another agency or institution.

*Comment:* Several commenters believed an agency or institution should not be required to provide a student a

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copy of a transcript or other records from another agency or institution unless the originating agency or institution is no longer in existence. Other commenters believed language should be included that would permit an educational agency or institution to decline a request for disclosure of a student's transcript or other records from another agency or institution, unless the originating agency or institution is no longer in existence.

*Discussion:* The records in question fall within the definition of education records in that they are directly related to a student and are maintained by an educational agency or institution. An agency or institution is required to provide a parent or an eligible student access to all records, including those transcripts and records it did not originate but that it maintains. This requirement is set forth in the section entitled, "What rights exist for a parent or eligible student to inspect and review education records?" The FERPA does not forbid or require an agency or institution to disclose records to a third party, nor would it prevent an agency or institution from establishing a policy of not disclosing to third parties records that had originated at another agency or institution.

*Change:* None.

- *Waiver of Rights.*

*Comment:* One commenter expressed concern about the removal of the section which set forth the conditions under which a parent or a student could waive any or all of his or her rights under the Act. While not endorsing nonstatutory waivers, the commenter believed that if nonstatutory waivers will continue to be recognized, the conditions governing those waivers are necessary in order to protect against any possible abuse. A second commenter supported the deletion of the general waiver provision, stating that there is no authority for waivers beyond the very narrow ones set forth in the statute.

*Discussion:* There was no statutory requirement for the waiver provision that was included in the regulations or the conditions under which nonstatutory waivers could be permitted. Therefore, the section was removed. However, in removing it, the Secretary does not intend to preclude educational agencies and institutions from establishing policies and conditions under which parents or students would be allowed to execute nonstatutory waivers.

*Change:* None.

The Secretary's discussion of the other comments received on the NPRM follows:

*Section 99.1 To which educational agencies or institutions do these regulations apply?*

*Comment:* One commenter questioned the specific legislative authority exempting programs from this part and the effect of exempting the programs.

*Discussion:* The statute appears in Part C of the General Education Provisions Act (GEPA). Prior to the establishment of the Department, Part C applied only to programs administered by the Commissioner of Education. The Commissioner had no authority over programs administered by the Assistant Secretary of Education and the Director of the National Institute of Education. For programs that were transferred to the Department under the Department of Education Organization Act (DEOA), the provisions of Part C continued to apply only to those programs administered by the Commissioner on the day preceding the effective date of the DEOA. Thus, FERPA does not apply to former National Institute of Education programs and the former National Center for Educational Statistics, Rehabilitation Services, National Institute of Disability and Rehabilitation Research, College Housing, and the Transition Program for Refugee Children.

*Change:* None.

*Section 99.3 What definitions apply to these regulations?*

*Definition of "Directory Information".*

*Comment:* Several commenters objected to the standard proposed in the definition of "directory information," stating there is no authority to broaden the term to include other information beyond that identified by Congress. Others stated that what may be considered an invasion of privacy by one person may not be so considered by another, which could result in inconsistency.

In contrast, an equal number of commenters stated that the standard is "most helpful," a "notable improvement" and "should be incorporated in the regulations." One commenter asked that distinguished academic performance or public service be included.

One commenter asked how the standard was developed. Others seemed to believe the standard would replace the items that have been designated by statute.

*Discussion:* The statute states that " 'directory information' relating to a student includes the following: . . . and then lists items which may be considered directory information. The Department had interpreted the word "includes" to mean the list was not

prescriptive. To clarify that interpretation, the phrase " . . . and other similar information" was added to the definition in the regulations published in 1976.

The Secretary, in revising the regulations, decided it would be preferable to establish a standard for interpreting the scope of the legislation. The standard, together with the list of items, should provide sufficient guidance for educational agencies and institutions. The standard would permit an agency or institution to mention distinguished academic performance or public service as long as it had designated that information as directory information and the parent or student had not objected to such a disclosure.

*Change:* None.

*Section 99.3 Definition of "Education Records".*

*Comment:* A commenter believed the regulations are unclear on whether the definition of education records includes or excludes records relating to an individual in attendance at an educational agency or institution who is also employed as a result of his or her status as a "student."

*Discussion:* All records relating to a student who is also an employee of an educational agency or institution are included in the definition of education records if the student's employment is contingent on the fact that he or she is a student. For example, all records, including employment records, of a student enrolled in a work-study program are education records; likewise, all records of a student who, because he or she is a student, is employed by the educational agency or institution to serve as a teaching assistant, lecturer, or in some other capacity, are education records. Excluded from the definition of education records are the employment records of an employee—including, for example, a teaching assistant or lecturer—whose employment did not result from and does not depend on the fact that he or she may also be a student at the agency or institution, provided that these employment records are made and maintained in the normal course of business, relate exclusively to the individual in that individual's capacity as an employee, and are not available for use for any other purpose.

*Change:* The definition has been rewritten for clarity.

*Comment:* One commenter believed that personally identifiable information relating to events or matters that transpire after the student is no longer in attendance should be covered by the definition of education records. The commenter was concerned that the

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exclusion of this information from the definition is without statutory authority, that it would allow an educational agency or institution to collect negative allegations or information on a former student, and that the parent or student would have no protection against release of the information to third parties.

*Discussion:* The exclusion is intended to allow educational agencies and institutions and their alumni organizations to perform their traditional functions of fund-raising and publishing information concerning the accomplishments of alumni. Most, if not all, alumni organizations perform these functions in contact with the former students. Since the collection and use of negative information about alumni is not an accepted or usual practice of educational agencies or institutions, the Secretary has decided that any expectation of abuse is minimal and would be insufficient to justify imposing an additional regulatory burden.

*Change:* None.

*Section 99.3 Definition of "Parent".*

*Comment:* One commenter believed the definition of "parent" should specifically state that a school district must provide rights to both natural parents, custodial and noncustodial. Another commenter believed that the new section "What are the rights of parents?" should specifically state that "noncustodial" parents are included in the Act's coverage. The commenters believed the proposed additions would further clarify the rights of noncustodial parents.

*Discussion:* In revising the regulations, the Secretary recognized the need to clarify the rights of custodial and noncustodial parents. Therefore, the new section was added to state specifically that the agency or institution shall give full rights under the law to either parent unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody, that specifically revokes these rights. The Secretary believes this new section provides sufficient clarification and that the definition of "parent" should remain as it appeared in the proposed regulations.

*Change:* None.

*Section 99.3 Definition of "Student".*

*Comment:* One commenter stated that the inclusion of "former student" in the definition of "student" improves the definition. Two other commenters

appeared to believe that the purpose of the revision was to extend the law's coverage to include former students.

*Discussion:* Former students are covered under the statute's definition of student and have been entitled to the same rights as students in attendance since the law's passage. The intent of the revision is to make this clear in the definition section of the regulations. Those specific provisions of the regulations where rights are limited to current students are clearly stated in the revised regulations. See § 99.7 regarding annual notification, § 99.34 regarding disclosure to other educational agencies and institutions and § 99.37 regarding directory information.

*Change:* None.

*Section 99.5 What are the rights of eligible students?*

*Comment:* Two commenters believed the paragraph that was removed from this section, which is entitled "Student Rights" in the current regulations, should be reinserted. The paragraph stated that the rights of an eligible student are not affected by a provision in the regulations that allows an agency or institution to disclose information to the parents of such a student without the student's written consent. One of these commenters believed the reference should be reinserted in order to make clear the fact that the student's right to have access to his or her education records is not affected by the student's status as a dependent. The other commenter believed the removal of the reference may result in increased pressure on institutions to grant a parent's request for access without formally establishing that the student is in fact a dependent as defined in section 152 of the Internal Revenue Code.

*Discussion:* This section of the regulations clearly states that when a student becomes an eligible student, all of the FERPA rights transfer from the parents to the student. The section of the regulations entitled "Under what conditions is prior consent not required to disclose information?" provides that an agency or institution may disclose information to the parents of a dependent student without the student's consent; the provision does not require the school to do so. The paragraph that is being removed was not intended to have any effect on an agency's or institution's decision on whether to grant the parent's request for information. Nor was it intended to affect an agency's or institution's policies in establishing that a student is a dependent as defined in section 152 of the Internal Revenue Code.

*Change:* None.

*Comment:* Three commenters believed educational agencies and institutions should be required to allow the parents of dependent students to inspect and review the education records of the student. Another commenter believed that even allowing educational agencies and institutions to afford the parents the opportunity to have access undermined the intent of the law by removing the student's right to have control over the disclosure. This commenter believed that specific procedures for release of information to parents in specific circumstances were needed.

*Discussion:* The statute clearly provides that the parents' rights afforded by the law transfer to the student when the student reaches age 18 or is attending an institution of postsecondary education. The statute also clearly provides that an educational agency may disclose the education records of a dependent student to the parents of the student without the student's consent. The Secretary has no authority to change these statutory provisions. He finds nothing in the statute to indicate that Congress intended the Department to develop procedures such as the one commenter suggested and believes that to do so would impose an unnecessary regulatory burden.

*Change:* None.

*Comment:* A commenter believed the regulations should clarify the status of handicapped students over the age of 18 whose handicapping condition is such as to affect their ability to understand and/or exercise their rights under the Act.

*Discussion:* The Secretary has carefully considered this question in light of the fact that at age 18 the rights transfer from the parent to the student. He has decided that a student who is so severely handicapped as to prevent the student from exercising his or her rights under the Act would in most cases be under the legal care or guardianship of another person or entity. In the absence of a court's order of guardianship, the Secretary believes it would be reasonable to presume that the parents of such a student are the persons who are in the best position to act on behalf of the student. Therefore, the Secretary has decided that no specific provision in the regulations is necessary.

*Change:* None.

*Comment:* One commenter was concerned about the statement in the proposed regulations that provides that an individual does not have rights in components of an "agency or institution at which the individual has never been in attendance." The commenter questioned whether a student who is

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enrolled in one component of a university and takes one course in another component is considered to be a student in attendance at, and with rights in, both components. The commenter believed the provision could result in the disclosure of records by a component of the institution in which the student has never been in attendance.

*Discussion:* In revising the regulations, two significant phrases were unintentionally omitted from the statement. The statement should have read, "If an individual is or has been in attendance at one component of an educational agency or institution, that attendance does not give the individual rights as a student in other components of the agency or institution to which the individual has applied for admission but has never been in attendance." Concerning the commenter's specific question, if an individual applied for but was not admitted to a component, the individual would have no rights with regard to his or her application for admission to that component. This result is consistent with extensive legislative history on the subject. However, if an individual took a course in the component to which he or she had been denied admission, that individual would have FERPA rights with respect to that course, but still would not have rights with respect to the denied application for admission to that component.

*Change:* The phrases "is or has been in attendance at" and "to which the individual has applied for admission" have been added.

*Comment:* A commenter was concerned that an institution might misinterpret the language in this provision to mean that a student would not have rights with respect to records which happen to be maintained in a component other than the component in which the student is enrolled.

*Discussion:* A student cannot be denied access or other rights with respect to his or her education records, regardless of location.

*Change:* None.

*Comment:* A commenter suggested that the words "his or her parent" in this section be changed to "the parents" and the words "parents of students" be changed to "parents."

*Discussion:* In revising the regulations, the Secretary changed the definition of "parent" to eliminate the need to refer to "the parent of the student" or "his or her parent" throughout the regulations. The need for changing the terminology in this section was overlooked.

*Change:* The terminology has been revised to read "parents."

*Section 99.6 What information must an educational agency's or institution's policy contain?*

*Comment:* One commenter believed an educational agency or institution should be required to include in its policy a statement that grades may not be appealed.

*Discussion:* The legislative history of FERPA indicates that the Act was not intended to be used to replace previously established procedures to appeal the grade given the student's performance in a course. However, given the discretion delegated to educational agencies or institutions in implementing FERPA, an agency or institution might choose to permit parents of students or eligible students to use FERPA procedures to challenge a grade. Therefore, the Secretary has decided that it is not necessary or appropriate to require educational agencies and institutions to state in their policies that a student's grade may not be appealed.

*Change:* None.

*Comment:* Another commenter expressed agreement with the revisions made in this section with regard to the written policy each educational agency or institution must adopt. However, the commenter seemed to believe that the regulations required an educational agency or institution to publish its policy as part of its annual notification and that this requirement was being removed in revising the regulations.

*Discussion:* The only revisions made in this section, which was previously numbered 99.5, were made for the purpose of clarification. Neither the current nor the revised regulations require that an educational agency or institution include its policy in the annual notification. Both regulations require that the annual notification include a statement of where the policy may be obtained.

*Change:* None.

*Section 99.7 What must an educational agency or institution include in its annual notification?*

*Comment:* One commenter believed the intent of the law is that educational agencies and institutions be required to "make notification available" to parents or students rather than to "notify" parents or students. Therefore, the commenter suggested that the word "notify" in the first paragraph of the section be replaced by the words "make notification available."

*Discussion:* The statute requires educational agencies and institutions to inform the parents or the eligible students of the rights accorded them by

the Act. In order to inform the parents or the eligible students of their rights, educational agencies and institutions would be required to notify, not simply make notification available.

*Change:* None.

*Comment:* One commenter pointed out that the revised regulations would require educational agencies and institutions to notify parents of students in attendance "and" eligible students in attendance whereas the former regulations required that parents "or" students be notified.

*Discussion:* The use of the word "or" can connote the idea that an educational agency or institution has an option either to notify parents of all students—whether the students are eligible or not—or to notify only eligible students. Conversely, use of "and" could be construed to require disclosure to eligible students and all parents, whether or not they were the parents of noneligible students. The word "and" is used in this section with the understanding that in the phrase "parents and eligible students" the word "parents" means the parents of students who are not eligible students. Thus, the requirements in question apply both to eligible students and to parents of students who are not eligible students.

*Change:* None.

*Comment:* One commenter, writing on behalf of an institution of higher education, believed language should be inserted to relieve notification requirements with respect to parents who reside outside the continental United States. The commenter also believed agencies and institutions should not be required to notify parents of students who have a primary or home language other than English if the student has demonstrated the minimal command of the English language required for admission to the institution.

*Discussion:* The statute requires that educational agencies or institutions inform the parents or students of their rights. It does not, however, require that the parents or students be notified individually; a general notification, such as by publication in a newsletter or college bulletin, is adequate. The requirement that an agency or institution notify parents of students who have a primary or home language other than English applies only to elementary and secondary schools. Institutions of higher education are not required to inform parents of rights, just eligible students.

*Change:* None.

*Comment:* One commenter asked for information on how educational agencies and institutions are to notify



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former students of their rights and the agency's or institution's policies.

*Discussion:* Both the current regulations and the revised regulations provide that notification must be given only to parents of students in attendance or eligible students in attendance. The notification of rights and policy need not be provided to former students or their parents. In any case, as noted in the discussion of the preceding comment, a general notification by publication in a newsletter or college bulletin is adequate to satisfy the statutory and regulatory requirements.

*Change:* None.

**Section 99.10** *What rights exist for a parent or eligible student to inspect and review education records?*

*Comment:* A commenter believed there was a need to clarify the requirement that an educational agency or institution comply with a request for access to records within "a reasonable period of time, but in no case more than 45 days after it has received the request." The commenter indicated that the regulations should emphasize that it is quite often reasonable to provide access within a shorter period of time than the 45-day limit.

*Discussion:* The Secretary finds that, in practice, schools often provide access within a period of time which is considerably shorter than the 45-day limit. He has decided that the phrase "but in no case more than 45 days" serves to emphasize that 45 days is the maximum time allowed for compliance.

*Change:* None.

*Comments:* Two commenters were of the opinion that parents should be entitled to obtain copies of the education records of their children. Both commenters indicated that having copies of the records would provide protection against a school's losing or misplacing records. One of the commenters believed the provision would be particularly beneficial for families who move to a new location, in the event the education records are misplaced or lost in transit or in the event transfer of the records is delayed. The other commenter believed such a provision would also relieve schools of the necessity of determining when a denial of copies would effectively result in a denial of access.

*Discussion:* Both the current and the revised regulations set forth conditions which apply to the disclosure of information to other educational agencies and institutions in which a student seeks or intends to enroll. One of the conditions is that an agency or

institution which transfers records to another agency or institution must give the parent or eligible student, upon request, a copy of the record that was disclosed. This is required by statute.

The second case in which an educational agency or institution must provide copies is when a parent or student gives a written consent for the disclosure of information from the student's education records and requests a copy of the records disclosed. This is also a statutory requirement.

The current and the revised regulations also require an educational agency or institution to provide copies of education records if a failure to do so would effectively result in a denial of access, and to include in their written policy a description of the circumstances in which the agency or institution believes it has a legitimate cause to deny a request for a copy of education records. These requirements, while not specifically stated in the statute, are necessary to implement the statutory requirement that an educational agency or institution shall not have a policy of denying, or effectively preventing, a parent or student the right to inspect and review the education records of the student.

The Secretary has decided that it would impose an unnecessary burden to require educational agencies or institutions to provide copies except as is now required by statute and the implementing regulations. However, nothing in the statute or the regulations would preclude an educational agency or institution from adopting a policy of providing copies in other cases, if it so chooses.

*Change:* None.

*Comments:* Two commenters believed the provision that prohibits educational agencies and institutions from destroying records if there is a pending request for access should be expanded. Both commenters believed educational agencies and institutions should be required to notify parents prior to destruction of documents and afford them an opportunity to inspect and review or obtain the records.

*Discussion:* The Secretary had decided that such a requirement would impose an unnecessary burden on educational agencies and institutions. In many cases, State law or agency or institutional policies and procedures prescribe a period of time in which education records are required to be maintained. Nothing in the Act or these regulations would preclude an educational agency or institution from implementing a policy of notifying parents or eligible students prior to the destruction of any education records.

*Change:* None.

*Comments:* One commenter expressed concern about the provision that accords an eligible student the right to have his or her medical treatment records reviewed by a physician or other appropriate professional of the student's choice. The commenter questioned whether postsecondary institutions would be obligated to verify the credentials of the professional chosen by the student.

*Discussion:* This provision is based on a requirement in the statute. The provision describes the rights of inspection and review of education records in the revised regulations. Neither the statute nor the regulations prescribe any procedures for verification.

*Change:* None.

*Comments:* One commenter believed that a provision in this section lends support to parents who claim they should have the right to have access so long as they are supporting the student in college. The provision in question reads, "... each educational agency or institution shall permit a parent or eligible student to inspect and review the education records of the student." It is the phrase "parent or eligible student" that the commenter believed lends support to the parent's claim.

*Discussion:* Two word "parent" in the phrase "parent or eligible student" means the parent of a student who is not an eligible student. Thus, at the college level, FERPA affords the eligible student the right of inspection and review. FERPA does not, however, prohibit an educational agency or institution from disclosing the education records of an eligible student to the parents of the eligible student if the student is a dependent child as defined in section 152 of the Internal Revenue Code of 1954. The provision which allows educational agencies and institutions to disclose information to parents of eligible students is set forth in the section entitled, "Under what conditions is prior consent not required to disclose information?"

*Change:* None.

**Section 99.11** *May an educational agency or institution charge a fee for copies of education records?*

*Comments:* One commenter believed fees for copying should be limited to the actual cost of reproduction. The commenter believed that unless fees are limited to the actual cost of copying, an educational agency or institution might incorporate into the fee costs for search and retrieval of education records. A second commenter indicated that an educational agency or institution should

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be allowed to charge a fee for search and retrieval, if done manually, and for any other costs incurred in providing copies.

*Discussion:* Educational agencies and institutions are entitled to charge reasonable fees for the actual cost of reproduction, secretarial time, and postage. The Secretary considered whether to include a provision to allow educational agencies and institutions to charge a fee for search and retrieval. He decided that providing parents or students access to education records is a function that is generally a part of the accepted and normal business of educational agencies and institutions.

*Change:* None.

*Section 99.12 What limitations exist on the right to inspect and review records?*

*Comment:* One commenter was concerned about the removal of the provision that required educational agencies and institutions to document the confidentiality of letters and statements of recommendation that were placed in the education records of a student prior to January 1, 1975. The commenter believed that the requirement provided the only reliable way of determining that a letter or statement was indeed "confidential."

*Discussion:* The provision was removed because it placed an undue burden on agencies and institutions to expect that they would be able to document the confidentiality of letters or statements that were solicited or sent and retained more than 10 years ago.

*Change:* None.

*Comment:* A commenter raised a question relating to the provision that an educational agency or institution cannot require a waiver as a condition for admission to or receipt of a service or benefit from the agency or institution. With that in mind, the commenter asked whether a placement office would be denying a service or benefit to a student by advising the student that a professor will not write a letter of recommendation or an employer will not accept a letter of recommendation, or both, unless the student signs a waiver.

*Discussion:* A faculty member's refusal to write a reference without a waiver would be considered an action of that individual and not of the agency or institution. A placement office would not be denying a service or benefit by advising the student of the faculty member's or employer's refusal.

*Change:* None.

*Comment:* One commenter believed the provision in this section that allows an applicant for admission to waive his

or her rights under certain conditions should be removed.

*Discussion:* The provision is required by statute. Therefore, the Secretary has no authority to remove it from the regulations.

*Change:* None.

*Section 99.21 Under what conditions does a parent or eligible student have the right to a hearing?*

*Comments:* Two commenters believed that a parent or student should have the option of inserting a statement in an education record without first going through the hearing process that is provided in this section. The commenters interpreted the statute as intending that an educational agency or institution must provide a parent or a student both an opportunity for a hearing and an opportunity to insert a statement in the record. They believed the regulations misapply the statute's intent by requiring that a parent or student go through the hearing process before exercising the right to place a statement in the record. One of the commenters stated that this requirement can result in extensive delay in cases where a parent's or student's interest in inserting a clarifying statement in the record is time-sensitive.

*Discussion:* The statute provides that the parents or students must be afforded "an opportunity for a hearing . . . to challenge the content of [the] records and to provide an opportunity for the correction or deletion of [data] and to insert into [the] records a written explanation . . . respecting the content of [the] records." The statute is not definitive on the question of whether the parent's or student's right to place a statement in the records exists independent of the hearing process. However, the Secretary believes that the order in which the hearing and the statement are addressed in the statute indicates that the Congressional intent was that a parent or student should exhaust the administrative remedy afforded by the hearing process before exercising the right to place an explanatory statement in the record.

After considering this issue, the Secretary has decided that to require a hearing would be burdensome in cases where an educational agency or institution and the parent or student are clearly in agreement that an explanatory statement alone is the appropriate remedy. If one or the other of the two parties disagrees, then the parents or eligible student must exhaust the remedy afforded by the hearing process before entering an explanation in the record. The Secretary finds no reason to regulate on this issue since it may be

resolved by the two parties directly involved.

The Secretary has also considered whether an agency or institution could be required to allow a parent or student to insert a statement in the record if the parent or student considers the matter to be time-sensitive. There is no FERPA provision which would require an agency or institution to expedite the process in a situation where a parent or student believes time is a factor. The explanatory statement provided for in the regulations is not intended to serve any purpose other than to document the parent's or student's final position on the accuracy of an education record.

*Change:* None.

*Comment:* One commenter believed the statement that a parent or student inserts in the education record could provide an unlimited opportunity to enter a statement of disagreement. The commenter suggested that such a statement should be limited to a declaration of disagreement and that the educational agency or institution should have the right to refuse to include information beyond such a declaration.

*Discussion:* The statute requires that a parent or student be afforded an opportunity to insert into the records "a written explanation . . . respecting the content of [the disputed] records." The Secretary has no authority to require that the statement be limited to a declaration of disagreement.

*Change:* None.

*Comment:* One commenter suggested an amendment of the provision which requires that an educational agency or institution disclosed a parent's or a student's explanatory statement whenever it discloses the portion of the record to which the statement relates. The commenter believed that educational agencies or institutions with complex or automated recordkeeping systems should not be required to provide a copy of the explanatory statement along with a disclosed record. Instead, the commenter believed agencies or institutions should be allowed to include on the disclosed record a reference to the fact that the explanatory statement exists and will be made available on request.

*Discussion:* The statute requires that the statement be maintained with the record. The Secretary believes the regulatory requirement that the statement be disclosed whenever the contested record is disclosed is necessary to meet the statutory intent.

*Change:* None.

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**Section 99.30 Under what conditions must an educational agency or institution obtain prior consent to disclosed information?**

**Comment:** One commenter believed that it seemed inappropriate to require that a student's written consent state the purpose of the release. The commenter seemed to believe that the written consent is intended to be a mechanism to restrict what he assumes is a student's right to have information released from his or her own education records. In interpreting the provision in this way, the commenter believed that requiring the student to state the purpose of the release limited his right to have the records released.

**Discussion:** The statute requires that the purpose of the release be stated in the written consent; therefore, the Secretary has no authority to remove the provision. The purpose of the written consent is to document that the student consented to a disclosure of information from his or her education records; the consent is not intended in any way to restrict any of a student's rights.

**Change:** None.

**Comment:** Another commenter indicated that educational agencies and institutions should be able to accept requests by telephone with proper safeguards.

**Discussion:** The commenter did not specify whether he or she was referring to requests made by a third party for disclosure of information from a student's education records or a request made by a parent or eligible student to disclose information to a third party. Concerning the former, the regulations do not require that a request be in writing in order for an agency or institution to disclose information pursuant to one of the statutory exclusions permitting disclosure without consent. Concerning the latter, the statute requires an agency or institution to obtain written consent of a parent or eligible student before disclosing information to a third party.

**Change:** None.

**Section 99.31 Under what conditions is prior consent not required to disclose information?**

**Comment:** A commenter believed the term "legitimate educational interest" should be more definitive. The commenter indicated that some institutions interpret the term too broadly while others interpret it too narrowly.

**Discussion:** The Secretary believes the Department could not make a definitive statement of legitimate

educational interest that would apply to each school district and college and university across the nation. Each educational agency and institution must establish its own criteria, according to its own procedures and requirements, for determining when its school officials have a legitimate educational interest in a student's records.

**Change:** None.

**Comment:** Two commenters disagreed with the proposal to add language to clarify that education records may be disclosed without consent to a postsecondary institution in which a student seeks or intends to enroll. The commenters believed the addition expanded the scope of the statute and that the statutory purpose of the provision was to facilitate the transfer of records when a student moves from one public school system to another. In the case of postsecondary institutions, the commenters believed it would be more appropriate to require consent of the parent or the student before transferring records.

**Discussion:** The current regulations did not clearly specify that postsecondary educational institutions are covered by the exception. The provision has been applicable in practice to postsecondary institutions since enactment of the law. The change to this provision clarifies that "schools" include institutions of postsecondary education.

**Change:** None.

**Comment:** A commenter asked that the definition of "financial aid" be explicitly broadened to include all debts owed to an institution as a result of the student's participation in the institution's programs. The commenter strongly believed that Congress did not intend that an institution should be restricted by the law from collecting any and all debts owed it by students.

**Discussion:** The statute was intended to provide parents or students some control over the disclosure of information from the student's education records. With certain specified exceptions, including the provision with regard to financial aid, information cannot be disclosed without a student's written consent. The statute refers to disclosure "in connection with a student's application for, or receipt of, financial aid." In that context, the definition of financial aid could not be broadened to include other debts owed the institution.

**Change:** None.

**Comment:** One commenter, a representative of a State Department of Education, believed a provision should be included to acknowledge that State law may in some cases be more

protective of students' privacy than Federal law, particularly in restricting the conditions under which information can be disclosed without the parent's written consent.

**Discussion:** The current and revised regulations provide that a State is not prevented from further limiting the number or type of State or local officials to whom disclosures may be made without consent. The regulations also state under the section "What are the rights of eligible students?" that the law and regulations "do not prevent educational agencies or institutions from giving students rights in addition to those given to parents of students." The Secretary has decided that no regulatory purpose would be served by including a provision such as suggested by the commenter.

**Change:** None.

**Comment:** A commenter suggested a change in the provision that allows disclosure "to organizations conducting studies for, or on behalf of, educational agencies or institutions [if] the study is conducted in a manner that does not permit personal identification of parents or students by individuals other than representatives of the organization \* \* \*." The commenter believed the word "by" should be changed to "to".

**Discussion:** The word "by" is used in the statute, and the Secretary believes the meaning is clear.

**Change:** None.

**Comment:** None.

**Discussion:** In the notice of proposed rulemaking (NPRM) for these regulations the phrase "parents or students" was used in § 99.31(a)(6)(ii)(A). However, the statute requires organizations that receive information under this exception to the consent requirement to protect the information "in such a manner as will not permit the personal identification of students and their parents \* \* \*."

**Change:** The word "or" has been changed to "and" to ensure that both groups are fully protected.

**Comment:** A commenter believed the educational agency or institution should be relieved in some cases of the requirement of making a reasonable effort to notify a parent or student in advance of compliance with a subpoena. The commenter indicated that in legal actions to which the student is a party, the court process itself requires that any subpoena be served on the opposing party, thereby making any notification effort by the educational agency or institution superfluous.

**Discussion:** The statutory language requires that parents or students be notified of "all such orders or subpoenas" in advance of compliance. The language was modified in the

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course of promulgating the current regulations to require that the agency or institution "make a reasonable effort to notify . . ." The modification was made in recognition that it would be difficult in many cases for the agency or institution to comply with the statutory requirement and in the belief that the modification was in accord with the Congressional intent.

The Secretary has decided that he has no authority to relieve educational agencies or institutions of the statutory requirement that parents and students be notified of "all such orders or subpoenas." The Secretary has also decided that even in cases where the parent or student brings the action, the notification serves to assure that the party serving a subpoena is in fact acting on behalf of the parent or student.

*Change:* None.

*Comment:* One commenter suggested that a condition be added to allow a postsecondary institution to contact a parent of an eligible student without the student's consent if the institution suspects that the student has a physical or emotional problem of which the university believes the parent may be unaware and that affects the student's academic or campus life.

*Discussion:* The Secretary has no authority to regulate an exception to the statutory requirement that at age 18 the rights afforded by FERPA transfer from the parent to the student. However, if an institution determined that the circumstances of a situation were such as to constitute a health or safety emergency and if the university decided that the parent is the party who is in the best position to deal with the emergency, then the disclosure could be made under the section of the regulations that provides for disclosure in those emergencies.

*Change:* None.

*Comment:* Four commenters believed a condition should be added to permit disclosure without a student's consent if the agency or institution has reason to believe that the student has provided inaccurate or misleading information concerning his or her academic record to another educational agency or institution, to an employer, to a professional association, or to a governmental agency to whom the student applies for benefits or services.

Another commenter believed educational agencies and institutions should be allowed to disclose information without prior written consent to government officials, including U.S. Senators and Representatives, State legislators, and governors, who have been contacted by

a parent or student who believes his or her rights under this law have been violated. The commenter indicated that the agencies or institutions are unable to respond to, or to defend themselves against, the parent's or student's allegations because they cannot release information to the government officials without the parent's or student's written consent.

*Discussion:* The Secretary understands the concerns of the commenters and has carefully considered whether provisions could be included in the regulations to address the problems. He has decided that the statute is specific in stating the conditions under which disclosure can be made without consent and that he has no authority to include the provisions proposed by the commenters.

*Change:* None.

*Section 99.32 What recordkeeping requirements exist concerning requests and disclosures?*

*Comment:* A commenter suggested that the term "list" be changed to "record" in this section. The commenter indicated that as long as a record of requests for and disclosures of information is maintained, the form of the record is irrelevant.

*Discussion:* The Secretary did not intend to prescribe the form of the record; the intent was to suggest a convenient way to maintain the information. However, in order to conform to the statutory language, the term "record" will be used.

*Change:* The term "record" has been substituted for "list."

*Comment:* One commenter stated that keeping a record of requests for disclosure is impractical and implies that a record must be kept even for requests that are denied. The commenter also believed it impractical to require the record of disclosure to be kept with the education records of the student, inasmuch as most institutions maintain records in computerized formats. Another commenter believed maintaining a record of disclosures without consent is self-incriminating. The commenter also stated that institutions should be free to establish their own retention schedule.

*Discussion:* The student requires each educational agency and institution to maintain a record, kept with the education records of each student, that will indicate all parties who have requested or obtained access to a student's education records, including those parties to whom the statute permits disclosure without consent. While the statute states that the record should be kept with the education

records of a student, it does not intend to require the agency or institution to keep it in one file or in one location. However, it does intend to require the agency or institution to make the record available to a parent or student as part of the parent's or student's general access to the education records. Since parents or students should be able to learn of those parties interested in the records, the record of disclosure should be maintained as long as the agency or institution maintains records on the student.

*Change:* None.

*Comment:* A commenter asked whether the placement office of an educational agency or institution would be required to keep a list (record) of all parties to whom a student's credential files were sent if the student had given a blanket consent to release his or her education records without specifying the individual parties.

*Discussion:* The statutory and regulatory language require an agency or institution to maintain a record of each disclosure.

*Change:* None.

*Comment:* One commenter questioned the recordkeeping requirement concerning disclosure and redisclosure of information to parties if prior written consent for disclosure is not required. An educational agency or institution may disclose information to a party if consent is not required with the understanding that that party may redisclose the information to another party to whom information can be disclosed without consent. The agency or institution must keep a record of the parties to whom the disclosure and redisclosures are made and the legitimate educational interests all parties have in the records. The commenter believed the recordkeeping requirement places an undue burden on institutions and that most reasonable approach is to assert that no information may be redisclosed.

*Discussion:* The Secretary did not intend any change in the recordkeeping requirement. At the time the final regulations were issued in 1978, the Department had considered whether student consent should be required if disclosure by a party excepted from the consent requirement is to another party excepted from the consent requirement—even though the institution could disclose information without consent to either excepted party. The Secretary considered, for example, whether an institution that disclosed information to the Department of Education under the Guaranteed Student Loan Program as permitted by the "financial aid" exception, would be

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required to tell the Department of Education not to make a future disclosure of that information to the bank that loaned the money under the program—even though the bank could obtain the information directly from the institution under the same exception.

If the Department of Education could disclose the information freely to other excepted parties, there would be no harm done to the consent requirement. However, the student would no longer have a means to discover all of the parties outside the institution who had access to his or her records without consent. To remedy this problem, the Secretary authorized an institution to disclose information to excepted parties with the understanding it would be redisclosed to other excepted parties, but only if a record of access were kept for all of those parties.

The Secretary did not intend to impose a recordkeeping burden on educational institutions. Rather, the intent was to give a better understanding of the disclosure and recordkeeping requirement with regard to excepted parties.

*Section 99.34 What conditions apply to disclosure of information to other educational agencies or institutions?*

*Comment:* A commenter believed an example should be inserted in this section to specify that the phrase "is enrolled in or receives service from the other agency or institution" encompasses consortia, cross-enrollment, joint-enrollment, work-study, and coordination of such programs among postsecondary institutions and participating agencies and institutions.

*Discussion:* The Secretary believes the provision, as it now stands, can clearly be construed to encompass the examples included in the comment.

*Change:* None.

*Comment:* None.

*Discussion:* The proposed regulations changed the definition of student to include former students in order to make clear that most rights accorded students in attendance also apply to former students. In cases where the provisions of a section do not apply to former students, the term "students in attendance" is used. The provision in this section that, in the proposed regulations, stated "an educational agency or institution may disclose an education record of a student to another educational agency or institution if the student is enrolled in or receives services from the other agency or institution" would extend the provision beyond the statutory authority and

would indicate that an agency or institution could disclose information on former students without consent to another agency or institution if the former student is enrolled in or receives services from the other agency or institution.

*Change:* The provision has been clarified to state that it applies only to students in attendance.

*Section 99.36 What conditions apply to disclosure of information in health and safety emergencies?*

*Comments:* One commenter believed that the regulations, in stating that the provisions of the section "shall be strictly construed," rightly leaves it to the educational agency or institution to develop its own definition of emergency. The commenter viewed the revision as helpful to educational agencies and institutions and as a step to assure an appropriate deregulation and an appropriate recordkeeping process within the institution on defining when an emergency may arise. Another commenter believed the factors that were removed from the health and safety emergency section in revising the regulations should be reinserted. The commenter believed that the statute specifically directs the Secretary to issue regulations concerning disclosure in a health or safety emergency and also believed that the criteria provided useful guidance.

*Discussion:* The statute, in setting forth the conditions in which personally identifiable information from an education record or records can be disclosed without a parent's or student's consent states that "[such a disclosure may be made], subject to regulations of the Secretary in connection with an emergency, [to] appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons." The regulations required that educational agencies or institutions include four specific criteria in the factors to be taken into account in determining whether personally identifiable information from the education records of a student could be disclosed under the section.

The Secretary based his decision to remove the nonstatutory criteria from the regulations on his belief that educational agencies and institutions are capable of making those determinations without the need for Federal regulation. It is the Secretary's opinion that Congress did not intend to require that regulations be promulgated that would impose burdensome requirements on agencies and institutions. He believes the requirement

that agencies and institutions strictly construe the provision fully meets the Congressional intent. Nothing in the statute or legislative history prohibits an agency or institution from considering the four specific criteria that have been removed.

*Change:* None.

*Section 99.37 What conditions apply to disclosing directory information?*

*Comment:* One commenter thought the use of the word "and" in the text of the first paragraph under the section was incorrect.

*Discussion:* In the proposed regulations the word "and" was inserted in place of the word "or" in the phrase " \* \* \* parents of students in attendance \* \* \*." However, replacing the word "or" with the word "and" does not remove all possibility for misinterpreting the provision. As clarification, we note that in the phrase "parents of students in attendance," the word "students" means students who are not eligible students. Thus, the educational agency or institution must notify both, all eligible students and the parents of all students who are not eligible students.

*Change:* None.

*Comment:* A commenter, a representative of a postsecondary educational institution, believed that the refusal that student's are allowed to exercise over the designation of directory information should be limited to the students' address and telephone number. The commenter indicated that the students' right of refusal has in some cases enabled students to commit fraudulent acts with a lessened chance of discovery.

*Discussion:* The statute provides students the right to refuse to allow the educational agency or institution to designate any or all of the items of information about the directory information.

*Change:* None.

*Section 99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?*

*Comment:* One commenter believed the Department of Education should give some direction to State schools or institutions that are mandated by State law to allow a student to have access to confidential letters of recommendation to which the student, under FERPA, has waived his or her right of access. The commenter indicated that if placement directors send a credential file that contains confidential letters of recommendation to schools or

## EHLR SPECIAL REPORT: Family Rights and Privacy (Continued)

institutions in States that have those mandates, the schools or institutions will return the file on the basis that the confidentiality of the letters cannot be protected.

*Discussion:* The Secretary is unable to advise State schools or institutions with respect to the laws of each State. With respect to the Federal law, the statute provides that the access rights afforded by the law shall not operate to make letters and statements of recommendation available to students in institutions of postsecondary education who have executed a valid waiver of the right to inspect and review the letters or statements. In implementing the law, the regulations provide that a postsecondary institution "does not have to permit" a student to inspect and review the letters and statements of recommendation provided the student has executed a valid waiver. Under these provisions, an educational agency or institution is not precluded from providing a student access to a letter or statement of recommendation. Therefore, if a State law requires that a

State institution afford a student access to letters or statements of recommendation, the Federal law would not interfere, irrespective of whether the student has executed a valid waiver of his or her right.

*Change:* None.

**Section 99.64** *What is the complaint procedure?*

*Comment:* A commenter proposed that the intended meaning of the word timely as it appears in the second paragraph of this section should be defined.

*Discussion:* The Secretary has decided not to include a definition in the regulations for two reasons. First, the word appears only once in the regulations. Secondly, the meaning of the word would depend largely on the circumstances which are peculiar to each case. A complaint might involve complex circumstances and attempts by a complainant to resolve the issue independently that might reasonably have delayed the filing of the complaint. Such a complaint would be considered timely. Another complaint might involve

an allegation of a violation that occurred many years ago and was never pursued despite the full knowledge of the student. In this case, the complaint would not be considered timely.

*Change:* None.

**Section 99.67** *How does the Secretary enforce decisions?*

*Comment:* A commenter believed the law should be changed to provide that the Secretary may decide to withhold Federal funding under programs in addition to those administered by the Department of Education.

*Discussion:* The Secretary has no authority to withhold Federal funds under programs in other Federal agencies.

*Change:* None.

[FR Doc. 88-7764 Filed 4-9-88; 8:45 am]

BILLING CODE 4000-01-M

2-18

7

FERPA  
THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974  
20 U.S.C. § 1232g  
JIM GOHEEN  
MCANANY, VAN CLEAVE & PHILLIPS, P.A.  
KANSAS CITY, KANSAS

1. Background

(a) Senator James Buckley introduced the legislation (so called Buckley Amendment) which was intended to provide more comprehensive civil rights protections to students and parents.

(b) The legislation curbed apparent abuses of student privacy and addressed a need for more certain parental and student access to student records.

The legislative goals were accomplished in a two-fold manner:

First, assures access by parents of students under 18 and students to education records;

Second, protects the student's right to privacy by limiting the transferability and disclosure of information in education records without prior consent.

(c) Education Records Defined

An education record includes any information compiled by an educational agency or institution, which information is directly related to a student in present attendance at the agency or institution, regardless of the method of compiling that information, the medium in which it is presented, or the fact that the record is kept by a person acting in behalf of the educational agency or institution. 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. § 99.3. The term refers to the information contained in the records as well as the physical records themselves. Thus an education record may be handwriting, print, tapes, film, microfilm and microfiche. 34 C.F.R. § 99.3.

Education records can include board minutes, administrative correspondence and records in an attorney's office (unless covered by the attorney-client privilege) that deal specifically with a student.

(d) Applicability of FERPA

The requirements of FERPA apply to any public or private educational agency or institution that receives funds from a program which is administered by the Secretary of Education. U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.1(a). "Receipt of funds" is broadly construed to include funds received indirectly as well as funds received directly by an institution.

Most educational agencies and institutions are required to comply with the provisions of FERPA or forego funding.

- (i) Kansas Statute Mandates Compliance with FERPA (See K.S.A. 72-6214).

2. Five Basic Rights Under FERPA

- (a) Right to be informed -- This right applies only to students in attendance

An educational institution must give parents of students or eligible students (18 or over) annual notice of the various rights accorded by FERPA. The annual notice must be given by such means as are reasonably likely to inform parents and students of their FERPA rights, for example, giving notice personally, in a school catalog, newspaper, handbook, PTA bulletin, special letter or the like. 34 C.F.R. § 99.6.

- (b) Right to Inspect and Review Education Records

This right may be exercised by the student's parents or to the exclusion of a parent by a student who is 18 years of age. A copy of an education record must be provided if the failure to do so would effectively prevent a parent or student from exercising the right to inspect and review. A copy of the records would likely be required if the parent or student resides a great distance from the school.

- (c) Right to Request Amendment of and Challenge Education Records

This process is initiated by a request to amend the education record. If the school refuses to amend the record upon request, a parent or student then has the right to a formal hearing. After hearing, if the school still refuses to amend the record, the parent or student has the right to place a note or statement in the record explaining their concern regarding the record. This process can be used to challenge an incorrectly recorded grade but cannot be used to challenge the substantive educational judgment resulting in a grade that has been correctly recorded.



(d) Right to Prevent Disclosure of Education Records

If an exception does not apply, a school must obtain written consent for the release of education records. The release should be signed by the parent of a student under 18 or by a student 18 or older. To be effective, the consent must be a signed and dated writing specifying the records to be disclosed, the purpose of the disclosure and the parties to whom disclosure may be made. 34 C.F.R. § 99.30(c).

(i) Directory Information

A school may release information that it has designated as directory information without consent so long as the parent or eligible student has not objected to the designation of that information as directory. A school that wishes to designate directory information must give public notice of the specific categories of personally identifiable information which the school has designated as directory. 20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. § 99.37(c). The following information is generally regarded by schools as constituting directory information: name, address, telephone number, 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 possibly a photograph. Directory information may be disclosed by the school for any purpose in its discretion without the consent of a parent or eligible student. The parents and/or eligible student have the right to refuse to permit the designation of any or all information as directory information. In such case, the information will not be disclosed except with the consent of the parent or student or as otherwise allowed by FERPA. Any parent or student refusing to have such information designated as directory, must file written notification with the school within the period of time allowed for objections.

(ii) Exceptions to Consent Requirement for Release of Non-directory Information in Education Records

FERPA contains exceptions to the requirement of consent prior to the disclosure of non-directory information. These are to be narrowly construed. 20 U.S.C. § 1232g(b)(1); 34 C.F.R. § 99.31. Generally, the exceptions are intended to promote administrative efficiency or to protect the health and educational interests of students.

- (aa) Other School Officials With Legitimate Education Interests
  - (bb) Transfer Schools -- to which the student seeks or intends to enroll. (Parent must be notified.)
  - (cc) Educational Authorities for Audit Purposes.
  - (dd) Financial Aid -- disclosure in connection with a student's application.
  - (ee) Pre-November 1974 State Statutes -- state and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant to statute adopted prior to November 1974.
  - (ff) Organizations Conducting Studies
 

Studies through grants, etc. for the school for the purpose of improving instruction. The information must be destroyed when the study is completed. 20 U.S.C. § 1232g(b)(1)(F).
  - (gg) Accrediting Organizations in Order to Carry Out Their Accrediting Functions.
  - (hh) Emergencies -- appropriate persons may obtain personally identifiable information from education records if it is necessary to protect the health or safety of the student or other persons. 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. § 99.31(a)(10); 34 C.R.F. § 99.3(a).
  - (ii) Judicial Order or Subpoena
- (e) Right to Complain to FERPA Office Under U. S. Department of Education

There is no private remedy created under FERPA. It makes nothing unlawful. The requirements of FERPA are enforced by the Secretary of Education through the office of FERPA and the ultimate power to withdraw Department of Education funds from any educational agency or institution that fails to comply with the terms of FERPA. There are complaint, hearing and review procedures. If a finding of non-compliance is the final decision, the Secretary of Education is empowered to order termination of funding.

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3. Disclosure of Education Records Pursuant to Discovery Request Under Code of Civil Procedure

Other than obtaining a student's education records through a judicial order or subpoena, a party seeking access to student records must demonstrate a genuine need for the information sought which must outweigh the privacy interests of the students. Thus, a heavier burden is placed on the discovery of educational records than that which exists with respect to the discovery of other kinds of information. Rios v. Reed, 73 F.R.D. 589, 599 (E.D.N.Y. 1977).

4. Section 1983 Liability

In Fay v. South Colonie Central School District, 802 F.2d 21 (2d Cir. 1986), the Second Circuit Court of Appeals has recognized that even absent a private cause of action under FERPA, a claim under 42 U.S.C. § 1983 may be asserted. According to the court, "FERPA creates an interest that may be vindicated in a § 1983 action because Congress did not demonstrate an intention to preclude a remedy under § 1983." The case illustrates a school's exposure where parents are separated or divorced. The claim involved the school's failure to provide duplicate copies of school related notices to a divorced parent awarded joint custody.

## RIGHT OF PRIVACY

**72-6214.** Federal laws and regulations; right of privacy policies; definitions. (a) As used in this section, the following terms shall have the meanings respectively ascribed to them unless the context requires otherwise:

(1) "Board" means the state board of regents, the state board of education, the board of trustees of any public community junior college, the board of regents of any municipal university, the board of control of any area vocational-technical school and the board of education of any school district.

(2) "Student" means a person who has attained eighteen (18) years of age, or is attending an institution of postsecondary education.

(3) "Pupil" means a person who has not attained eighteen (18) years of age and is attending an educational institution below the postsecondary level.

(b) Every board shall adopt a policy in accordance with applicable federal laws and regulations to protect the right of privacy of any student, or pupil and his or her family regarding personally identifiable records, files and data directly related to such student or pupil. The board shall adopt and implement procedures to effectuate such policy by January 1, 1977. Such procedures shall provide for: (1) Means by which any student or parent of a pupil, as the case may be, may inspect and review any records or files directly related to the student or pupil; and (2) restricting the accessibility and availability of any personally identifiable records or files of any student or pupil and preventing disclosure thereof unless made upon written consent of such student or parent of such pupil, as the case may be. To the extent that any other provision of law conflicts with this section, this section shall control.

History: L. 1976, ch. 228, § 1; July 1.



KANSAS NATIONAL EDUCATION ASSOCIATION / 715 W. 10TH STREET / TOPEKA, KANSAS 66612-1686

Susan Chase Testimony Before  
Senate Judiciary Committee  
Thursday, February 21, 1996

Thank you Mr. Chairman and members of the committee for allowing me to speak in support of SB 709. I am Susan Chase and I represent Kansas National Education Association.

In the Fall of 1994, KNEA formed a task force to examine what actions as an association we should be taking to assist in creating a safe learning environment for students and teachers. The task force solicited responses from people outside the association as well as from our members and developed a report that we are using as a guide for the Association. One of the most frequent concerns voiced by our members was the lack of information they received from other agencies that were dealing with their students. These concerns led to the legislative recommendation on the sharing of information.

In assessing how to accomplish this recommendation, we looked to other states for ideas. The concept that appeared to be the best suited to our needs was found in the State of Washington. It is this concept that is contained in SB 709. Essentially, what SB 709 accomplishes is to allow agencies that work with juveniles to share information with other agencies that may have some responsibility for the juvenile in question. This legislation begins to break down the barriers that have prevented agencies from sharing information with each other.

We believe this is a positive step toward a more integrated approach to handling juveniles at risk. We urge the committee to support SB 709, and thank you for listening to our concerns.

Sen. Jud.  
2-22-96  
Attach 3 21

#4  
Senate Bill No. 709  
Senate Judiciary Committee  
February 22, 1996

Testimony of Paul Shelby  
Assistant Judicial Administrator  
Office of Judicial Administration

Mr. Chairman and members of the committee:

We appreciate the opportunity to appear today to discuss Senate Bill No. 709 which concerns juvenile justice and relates to juvenile justice or care agencies and the juvenile records such agencies create and maintain, as well as the conditions under which juvenile records may be released.

There are serious mechanical problems with this proposed bill. First problem is that the record regulations are aimed at those in a "juvenile court" and not the district or municipal courts which are the agencies which generate juvenile records.

Second problem is that there are now statutes which deal with the subject matter in great detail and these statutes are not listed for repeal such as:

Children in Need of Care:

K.S.A. 38-1506 - Court records; preservation of records

K.S.A. 38-1507 - Records and reports concerning child abuse or neglect; unlawful acts

K.S.A. 38-1507a - Records and reports concerning child abuse or neglect

K.S.A. 38-1507b - Sharing of records by licensed social worker

K.S.A. 38-1508 - Records of Law Enforcement agencies

Juvenile Offenders Code

K.S.A. 38-1607 - Court records; preservation of records

K.S.A. 38-1608 - Records of Law Enforcement officers and agencies and Municipal Courts concerning certain juveniles

K.S.A. 38-1609 - Records of diagnostic, treatment or medical facilities concerning juvenile offenders

K.S.A. 38-1610 - Expungement of records

Sen. Jud.  
2-22-96  
Attach. 4

The district court system has an extensive system of record keeping already installed with the Clerk of the District Court as record keeper and the Administrative Judge responsible for all records. We also have Supreme Court Rule 108 which relates to retention and destruction of district court records. We are currently in the process of updating this rule. The chairman is aware of this process for he is a member of the committee along with Rep. David Adkins.

Thank you very much.