Memorandum to Presidents

Date: February 6, 1975

From: Office of the University Counsel
and Vice Chancellor for Legal Affairs

Subject: Family Educational Rights and Privacy Act of 1974
Amendments and Proposed Rules

The Family Educational Rights and Privacy Act of 1974 (P.L. 93-380, as amended by Senate Joint Resolution 40) added new section 438 to the General Education Provisions Act (20 USC 1232-g) and became effective on November 19, 1974. On December 31, 1974 amendments were enacted which require substantial revision of the November 12, 1974 Memorandum to Presidents (74-38) from this office. In addition, the Department of Health, Education and Welfare has proposed regulations which define and interpret some of the provisions of the law. I've attached a copy of the amended legislation along with the proposed regulations, the latter of which are subject to change before becoming effective.

The Department of Health, Education and Welfare is soliciting comments and criticism from affected parties regarding the proposed regulations. In order to make our comments responsive to the needs of the various campuses, we solicit your advice and recommendations.

Applicability

The intent of the law remains essentially unaltered. Each student has a right to examine his records, and no records may be given out except upon consent of the student, with certain limited exceptions. The new version of the law makes it clear that all students, past and present, are covered so long as their records are kept. Specifically excluded are those students who applied, but never attended the institution. (438(a)(1)(A); 40 Fed. Reg. 1210, proposed regulations §99.1).

Records

The definition of the documents covered by the law has been radically changed. Records over which a student may exercise his rights now include all "records, files, documents, and other materials which 1) contain information directly related to the student; and 2) are maintained by an educational
agency or institution, or by a person acting for such agency or institution." (438(a)(4)(A)(i), (ii); 40 Fed. Reg. 1210, §99.3). A student may inspect, challenge, and refuse to release to third parties all those records which fall within this broad category.

Acknowledging the difficulties pointed out in the original bill, the amendment excludes certain records from the students' right of access and challenge, while generally preserving privacy. The exceptions include (See 438(a)(4)(B))

1. institutional records which are in the sole possession of the maker, and which are not accessible to any other person except a substitute;

2. certain security force records which are segregated from other student records, to which only law enforcement personnel have access, and provided the custodian law enforcement personnel do not have access to other educational records of a student;

3. employee records of non-student employees;

4. medical or para-medical records used only for treatment purposes and not available to third parties. (438(a)(4)(B)(i); 40 Fed. Reg. 1210, §99.3)

Although included within the term educational records, and therefore discoverable only by authorized third parties, certain documents are not available to students. These include:

1. confidential letters and statements of recommendation which were placed in the students' education records before January 1, 1975, provided they are used only for those purposes for which they were specifically intended (438(a)(1)(B)(ii); and

2. financial records of the students' parents. (438(a)(1)(B)(i)).

Hearings

The amended legislation provides for a hearing to permit a challenge to records alleged to be inaccurate misleading or otherwise inappropriate. (438(a)(2)). The proposed regulations set forth the necessary procedures in
greater detail, but leave the formalization of rules to the institution. (40 Fed. Reg. 1213, §99.22). The only mandatory criteria are: 1) hearing and decision in writing within a reasonable time; 2) hearing held and decision rendered by an official with no personal stake in the outcome; 3) student is afforded a full and fair opportunity to present evidence on the issues. (Id.)

Release of Records

The new amendment continues the prohibition on release of records unless student consent is given. (438(b)(1) (A)-(I); 40 Fed. Reg. 1214-15, §§99.35-.40). The categories of persons to whom education records may be released, however, have been modified. Those who may receive documents irrespective of student consent are:

1. school officials, central administration and other SUNY colleges who have been determined to have legitimate educational interests;

2. officials of other schools in which the student seeks to enroll, provided the student is given a copy of the record if he desires;

3. authorized representatives of certain state and federal agencies, where such access is necessary to evaluate federally funded programs and the collection of personally identifiable data is specifically allowed by federal law;

4. in connection with students' applications for, or receipt of, financial aid.

These exceptions substantially restate the original law. The following were added in the December amendment. These groups may also receive records irrespective of consent:

5. research organizations conducting studies for the educational institution in relation to predictive tests, administering student aid programs, or instruction, if the records are destroyed when no longer needed in the research, and identification of students or parents by persons outside the research organization is not permitted;

6. accrediting organizations, solely to carry out their accrediting functions;
7. parents of dependent students if the students are listed as deductible dependents for income tax purposes;

8. in connection with an emergency where release of records is necessary to protect the health or safety of the student or others. The proposed regulations enumerate factors to be considered in determining whether the emergency exception is applicable in a given instance. These include: the seriousness of the threat, the need for the records to meet the specific emergency, the power of the person to whom records are released to deal with the emergency, and the extent to which time is of the essence in dealing with the emergency. The proposed regulations further indicate the "emergency" is intended to mean extreme cases.

9. directory information such as name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities, etc. (438(a)(5)(A); 40 Fed. Reg. 1215 §99.40).

The institution is required to give public notice (undefined) of those categories of information which it will consider as directory information, and the student must be given a reasonable opportunity to require his or her prior consent to inclusion. This power may effectively defeat the publication of directories.

**Record of those given access**

With respect to each of the parties listed above to whom student consent need not be given for release, the college is nevertheless required to maintain a record which will indicate all individuals, agencies or organizations which have requested or obtained access to a student's education files. This record must indicate the legitimate interest of the requesting party and is available only to the student himself and to those responsible for maintaining the record. The sole exception to this requirement is that school officials, including teachers, within the educational institution or local educational agency as listed in category (1) above need not be indicated in this record when requesting data.
Finally, records may only be released to third parties on the condition that they will not reveal them to anyone else without written student consent. \((438(b)(4)(B))\). The regulations provide that the University has satisfied its burden in this area if it includes, along with the records, a statement of the restriction. \((40\,\text{Fed. Reg.}\,1215\,§99.39(b))\). The institution is required to notify students at least annually of their ability to exercise each of the rights covered by the new section, that is, the right of access, the right to a hearing and the right to restrict release. \((40\,\text{Fed. Reg.}\,1211\,§99.5)\). The regulations set forth the information which must appear in the notice if the institution is to comply with this part. It is quite extensive, and must include policies promulgated by the institution as well as basic information on the statutory rights. \((\text{Fed. Reg.}\,1211\,§99.5)\).

**Blanket release to third parties**

Since the limitations on release to third parties are so broad and the specific exceptions allowing release are so restrictive, it would mitigate the difficulties if the college obtained blanket student consent for the release of all records. However, a waiver obtained as a condition of enrollment necessarily would be involuntary.

**Waiver of right to inspect "confidential" recommendations**

A similar problem arises with respect to letters or recommendations received after January 1, 1975 by the college. The Act states that such letters lose their confidentiality and may be inspected by the student. \((438(a)(1)(B)(ii))\). However, the Act provides that, with respect to this type of record only, the student may waive his right of access by blanket waiver. Such waivers may not be required as a condition of admission or receipt of any other service or benefits of the institution. As a practical matter, only the author of a letter of recommendation is in a position to exact the waiver, which should then be forwarded to the college for filing with the letter.

**Sanctions**

Specifics of the enforcement process are found in the proposed regulations which, of course, are subject to comment and revision. The Act does not define enforcement and termination of assistance, leaving the implementation largely to HEW. \((438(f))\). The sole significant limitation on the power of the Secretary is that assistance may be terminated only if the Secretary has determined that compliance cannot be secured by voluntary means.
Enforcement procedures

The regulations (§99.64) give HEW a largely undefined power to require an educational institution to provide and retain such reports and records "as the Office or the Review Board may require to carry out its functions under this part," or that it "may find necessary to assure the correctness of such reports and compliance...". The requirements of this section should be resolved in much greater detail. Every effort will be made by the University to obtain clarity and uniformity in this regard.

The complaint procedure (§99.65) is very loosely drawn, and fails to define the limits of the investigative powers of the office. Apparently, complete access to all files may be demanded for whatever purposes an investigator may deem appropriate to enforce the Act. The regulations allow the Secretary to cut off aid to the entire University for the transgressions of any one of its units. The necessity for uniform University-wide regulations seems apparent.

Notice of compliance

Approval of funding is conditional upon filing with the Commissioner an assurance that the institution is in compliance and will continue to comply. (40 Fed. Reg. 1215 §99.61). This requirement may be accomplished by submitting an assurance with each funding application or by referring specifically to a blanket assurance filed by the University. This, I assume, will be done by Central Administration upon the promulgation of University-wide regulations by the Trustees when the proposed regulations are finalized by HEW.

Miscellaneous

The following additional problems have been identified or tentatively resolved by the new legislation and/or proposed regulations:

1. The statute of limitations is 180 days from the date of the alleged violation. (40 Fed. Reg. 1216 §99.65(b)). With respect to a student's request to inspect his record, a question arises as to whether the violation occurs at the date the request is denied, or at the end of the 45-day period allowed for compliance. This provision appears only in the proposed regulations and, consequently, may be revised.
2. The Act requires the college to give "public notice" of the categories of information which it has designated as directory information within the limits of the statute. (438(a)(5)(B); 40 Fed. Reg. 1215 §99.40). No attempt is made to define "public notice." Since it appears from the section that the purpose of the notice is to allow students to refuse release of directory information, publication in a campus newspaper of general campus circulation may be sufficient. One questions whether students require the right to withhold directory information. The intended purpose of this Act is to prevent injury to students resulting from circulation of damaging information, and not to obliterate all public traces of the students' presence on campus. The ability of a student to withhold directory information seems to exceed necessary or desirable limits, and would hinder proper campus administration. It should be noted that the sections on directory information are a part of the Act itself, and any change would require amendment by the Congress.

3. The Act allows the student to "inspect and review" his records. (438(a)(1)(A). A question has been raised as to whether this requires the University to mail the entire requested record to the inquirer, or whether the University has satisfied its burden by holding the records available for inspection on its own premises. The legislative history indicates the intent that students should be shown the actual documents in the record. The only exception noted allows reproduction and copying to preserve the rights of other students whose names may be juxtaposed to that of the inspecting student. Keeping in mind the fact that inspection of originals is required, it is inconceivable that the law intends to deprive the University of all original documents and put originals in the permanent possession of students. In addition, the proposed regulations provide that when copies are made the student shall pay only the expense of copying. (40 Fed. Reg. 1212 §99.13). Accordingly, holding the records available on campus and allowing the student to copy desired documents at cost seems the appropriate interpretation.

4. The Act requires the institution to notify the student before complying with judicial orders or subpoenas. (438(b)(2)(A)). A difficulty arises if the residence of the student is unknown, as is often the case when students no longer attend the institution. The institution is required to give notice on peril of losing substantial funding, but cannot evade its obligation under State law to provide the courts with the information necessary to the administration of justice and the due process of the law. The requirement of communicating actual notice must yield in this instance.
Notice should be dispatched to the last known address concurrently with compliance with the subpoena.

5. Although a parent may prevent the student from reviewing the parents' financial information, the Act is not clear as to whether the parent can limit access by third parties in the same fashion.

Comments and recommendations

Please communicate your advice or comments you may have regarding the enclosed proposed regulations, or the amended Act itself, at your earliest convenience. The University's comments must reach HEW by March 7, 1975.

A further advisory will be forthcoming.

Walter J. Relihan, Jr.

Attachment

This memorandum addressed to:

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

Copies for information only to:

Chancellor Kibbee
Dean McGrath
President Rose
President Corson
Mr. Tobin
DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

PRIVACY RIGHTS OF PARENTS AND STUDENTS
PROPOSED RULES

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary
[45 CFR Part 99]

PRIVACY RIGHTS OF PARENTS AND STUDENTS

Proposed Establishment of Part

Pursuant to the authority contained in section 438 of the General Education Provisions Act (Title IV of Pub. L. 90-247, as amended), added by section 513, Pub. L. 93-380, enacted August 21, 1974, and amended by Senate Joint Resolution 40 (Sen. J. Res. 40), (1974) notice is hereby given that the Secretary proposes to add a new Part 99 to Title 45 of the Code of Federal Regulations to read as set forth below.

Section 438 of the General Education Provisions Act, as amended, which is effective as of November 19, 1974, sets out requirements designed to protect the privacy of parents and students. Specifically, the statute governs (1) access to records maintained by certain educational institutions and agencies, and (2) the release of such records. In brief, the statute provides that such institutions must provide parents of students access to official records directly related to the students and an opportunity for a hearing to challenge such records on the grounds that they are inaccurate, misleading, or otherwise inappropriate; that institutions must obtain the written consent of parents before releasing personally identifiable data about students from records to other than a specified list of exceptions; that parents and students must be notified of these rights; that these rights transfer to students at certain points; and that an office and review board must be established in HEW to investigate and adjudicate violations and complaints of this section. The office has been designated by the Secretary and may be contacted at the following address:

Mr. Thomas S. McGpee
Room 5600
Department of Health, Education, and Welfare
380 Independence Avenue, SW.
Washington, D.C. 20201
Telephone (202) 385-7405

The statute further provides, under subsection (c), that the Secretary shall promulgate regulations to protect the privacy of students and their families in connection with certain Federal data-gathering activities. The proposed rules set forth below relate to all of section 438 except subsection (c), which will be the subject of further regulations to be issued at a future date.

For the convenience of readers, section 438, except subsection (c) as amended reads as follows:

Sec. 438. (a) (1) (A) No funds shall be made available under any authority of any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in an educational agency or institution which is the recipient of funds under any applicable program.

(B) The term "education records" does not include__

(1) records of institutional, supervisory, or administrative personnel not directly related to the student or student’s educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible to any other person except a substitute;

(2) if the personnel of a law enforcement unit do not have access to education records under subsection (b) or if the records of such law enforcement unit which (1) are kept apart from records described in subparagraph (b) and which are not maintained solely for law enforcement purposes, and (III) are not made available to persons other than law enforcement officials of the same jurisdiction;

(3) if the case of persons who are employed by an educational agency or institution but who are not in attendance as such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person’s capacity as an employee and are not available for use for any other purpose;

(4) records on a student who is 18 years of age or older, or is attending an institution which is a private, non-sectarian institution which is not created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or para-professional acting in a professional or para-professional capacity, or assisting in that capacity, and which are created, maintained, or used only in connection with the student’s attendance at the institution, and which are not available to anyone other than persons providing such services, provided, however, that such records can be personally reviewed by a physician or other appropriate professional of the student’s choice;

(5) (A) For the purposes of this section the term "directory information" relating to a student includes the following: the student’s name, address, telephone listing, date of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degree and awards received, and the most recent educational agency or institution attended by the student;

(6) Any educational agency or institution making public directory information shall give prior written notice to the student of the information which it has designated as such information with respect to each student attending at the institution, and such notice shall allow a reasonable period of time after such notice has been given for a student to inform the institution or agency that any or all of the information designated should not be released without the parent’s prior consent.

For the purposes of this section, the term “student” includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents or other individuals having such a relationship to the student as to make them reasonably comparable to a parent with regard to the student’s education interests;

(2) Any educational agency or institution which has a policy or practice of general policies and regulations of such agency or institution to have legitimate educational interests;
(B) officials of other schools or school systems in which the school seeks to implement the requirement that the student's parents be notified of the transfer, receive a copy of the record, and be given a hearing to challenge the content of the record;

(C) authorized representatives of (1) the Comptroller General of the United States, (2) the Secretary, (3) an administrative head of an education agency (as defined in section 438 of the Internal Revenue Code of 1954), or (4) State educational authorities, under the conditions set forth in paragraph (3) of this subsection;

(3) In connection with a student's applications for, or receipt of, financial aid;

(4) State and local officials or authorities to which such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1961.

(P) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving such education programs if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of the organizations and such data will be destroyed no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of the Internal Revenue Code of 1954; and

(3) Subject to regulations of the Secretary in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.

(2) No funds shall be made available under any applicable program to any education agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection unless:

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

(B) such information is furnished in compliance with the Family Educational Right and Privacy Act regulations, or pursuant to any lawful issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(4) Nothing contained in this section shall preclude authorized representatives of

(A) the Comptroller General of the United States, (B) the Secretary, (C) an administrative head of an education agency, or (D) State educational authorities from having access to student or other records which may be necessary for the conduct of the audit and evaluation of Federally supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs; Provided, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable information shall be destroyed no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4) Each educational agency or institution shall maintain a record, kept with the educational records of each student, which will indicate all individuals (other than those specified in paragraph (1) of this subsection) who have requested or obtained access to a student's education records maintained by such educational agency or institution, and with which it may be necessary to the legitimate interest that each such person, agency, or organization has in obtaining this information. Such records shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, to persons or organizations authorized in, and under the conditions set forth in clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the systems.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the student.

(c) The Secretary shall adopt appropriate regulations to protect the privacy of student and institutional records included in surveys, investigations, or other statistical studies conducted by the Federal Government, or under any other Federal agency, involving any survey or data-gathering activity conducted, assisted, or authorized by the Secretary or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

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

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

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

(g) The Secretary shall establish or designate an office and review board within the Federal, State, Education, and Welfare for the purpose of investigating, processing, reviewing, and adjudicating violations of the provisions of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

Although the amendments to section 438(a) have resulted in a number of issues originally raised about the statute, some new issues have been raised. In large part, the new statutory language has been repeated in these proposed rules. It may be necessary to further develop the rules in several areas as a result of the recent changes.

In order to facilitate comments, explanations of many of the substantive sections of the proposed rules are set out below. Comments sections following substantive sections were used as a format in lieu of a lengthy preamble for ease of reading and to highlight the substance of the proposed rules. The comments sections include several citations to the legislative history accompanying the amendments to section 438 (Cong. Rec. S. 21484—41 (daily ed., December 13, 1974) and H. Rept. No. 93—1616 (1974). Cong. Rec. H. 12157—59 (daily ed., December 17, 1974).

Reviewers should also note that where statutory language is repeated in the proposed rules, it is so indicated by use of brackets. The brackets will be deleted when the final regulations are published. With respect to the bracketed material, comments should be directed to the need for, lack of, or a need for change in the rules, rather than to its substance.

Interested persons are invited to submit written comments, suggestions, or objections regarding the proposed regulations to the School Records Task Force: c/o Room 5660, Department of Health, Education, and Welfare: 330 Independence Avenue, S.W.; Washington, D.C. 20201.

Comments received in response to this notice will be available for public inspection at the above office on weekdays during regular business hours. All relevant material received on or before March 7, 1975, will be considered.

Dated:

CASPER W. WEINBERGER, Secretary of Health, Education, and Welfare.

PART 99—PRIVACY RIGHTS OF PARENTS AND STUDENTS

Subpart A—General

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99.51 Accuracy required—general.

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99.54 Reports and records.

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99.58 Hearing before Panel or a Hearing Board.

99.59 Initial decision; final decision.

 Aren't: Sec. 438, Pub. L. 90—247, Title IV, as amended, 88 Stat. 571—574 (20 U.S.C. 1232g) unless otherwise noted.

Subpart B—General

§ 99.1 Applicability of part.

(a) This part applies to all educational institutions to which funds are made available under any Federal program for which the U.S. Commissioner of Education has administrative responsibility, as specified by law or by delegation of authority pursuant to law.

(b) This part does not apply to an educational institution solely because students attending that institution receive benefits under one or more of the Federal programs referenced in paragraph (a) of this section, if no funds under those programs are made available to the institution itself.

(20 U.S.C. 1232g)

COMMENT

This section specifies the educational institutions which are subject to the requirements of this Part. Section 4368 of the General Education Provisions Act, as amended (GEPA), sets out requirements for educational agencies and institutions receiving funds under “applicable program.” Section 450 of GEPA defines “applicable program” to include programs administered by the Assistant Secretary for Education (ASE), the Commissioner of Education, and the Director of the National Institute of Education (NIE) “except where otherwise specified.” Section 421 appears to be such a specified exception, since it limits coverage of Part C of GEPA to programs administered by the Commissioner:

The provisions of this part shall apply to any program for which the Commissioner has administrative responsibility, as specified by law or by delegation of authority pursuant to law.

Section 432 was added to Part C of GEPA by Pub. L. 92–380 and therefore the requirements imposed by this section relate only to those institutions receiving funds from programs administered by the Commissioner.

As explained in the “Joint Statement in Explanation of Buckley/Felter Amendments” which accompanied the recent amendments to section 438:

** * * * by explicitly limiting the definition to those institutions participating in applicable programs, the amendment makes it clear that the Family Educational Rights and Privacy Act applies only to Office of Education programs and those programs delegated to the Commissioner of Education for administration.**

The terms “Office” and “Review Board” mean the office and the review board described in §99.60.

(20 U.S.C. 1232g(a) (4) (A))

“Institution of postsecondary education” means an institution which 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.

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

“Office and review board”: The terms “Office” and “Review Board” mean the office and the review board described in §99.60.

(20 U.S.C. 1232g)

“Panel” means a Hearing Panel, as described in §99.67(a).

(20 U.S.C. 1232g(g))
PROPOSED RULES

§ 99.4 Student rights.

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

(b) Section 438 of the Act shall not be read to preclude educational institutions from affording to students rights similar to those afforded to parents of students under that section.

§ 99.5 Notification by educational institutions.

(a) Each educational institution to which this part applies shall maintain records on students, shall inform parents and eligible students of the rights accorded them by this part.

(b) In meeting the requirement set forth in paragraph (a) of this section, the educational institution shall provide notice to parents and eligible students, at least annually, of the following:

(1) The types of education records and information contained therein which are directly related to students and maintained by the institution;

(2) The name and position of the official responsible for the maintenance of each type of record, the persons who have access to those records, and the purposes for which they have access;

(3) The policies of the institution for reviewing and expunging those records;

(4) The procedures established by the institution under § 99.13;

(5) The procedures (including those set forth in subpart C of this part) for challenging the content of education records;

(6) The cost if any which will be charged to the parent or eligible student for reproducing copies of records under § 99.13(c);

(7) [The categories of information which the institution has designated as directory information under § 99.40];

(8) The other rights and requirements set forth in this part.

(c) The notice provided to a parent or eligible student under this section shall be in the language of the parent or eligible student.

§ 99.5a Notice by educational institutions to former students.

(a) Each educational institution to which this part applies shall maintain records on students, shall inform former students of the rights accorded to them by this part.

(b) In meeting the requirement set forth in paragraph (a) of this section, the educational institution shall provide notice to former students of the rights accorded to them by this part.

§ 99.6 Appeal by students or parents.

(a) Any student or parent may request that any content of a record that is not in the language of the parent or eligible student be translated into the language of the parent or eligible student.

(b) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(c) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(d) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(e) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

§ 99.6a Appeals by students or parents.

(a) Any student or parent may request an appeal of any content of a record that is not in the language of the parent or eligible student.

(b) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(c) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(d) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(e) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

§ 99.6b Appeals by students or parents.

(a) Any student or parent may request an appeal of any content of a record that is not in the language of the parent or eligible student.

(b) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(c) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(d) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(e) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

§ 99.6c Appeals by students or parents.

(a) Any student or parent may request an appeal of any content of a record that is not in the language of the parent or eligible student.

(b) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(c) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(d) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(e) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

§ 99.6d Appeals by students or parents.

(a) Any student or parent may request an appeal of any content of a record that is not in the language of the parent or eligible student.

(b) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(c) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(d) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(e) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

§ 99.6e Appeals by students or parents.

(a) Any student or parent may request an appeal of any content of a record that is not in the language of the parent or eligible student.

(b) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(c) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(d) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(e) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

§ 99.6f Appeals by students or parents.

(a) Any student or parent may request an appeal of any content of a record that is not in the language of the parent or eligible student.

(b) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(c) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(d) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(e) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

§ 99.6g Appeals by students or parents.

(a) Any student or parent may request an appeal of any content of a record that is not in the language of the parent or eligible student.

(b) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(c) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(d) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.

(e) The educational institution shall provide a translation of the records in the language of the parent or eligible student at the request of the parent or eligible student.
cost to make copies of any part of a record, and who must bear the cost in a given situation.

Paragraph (b) (6) is necessary to ensure that institutions inform parents of any other rights set out herein, such as access rights and when rights transfer to students.

Paragraph (b) (7) is intended to implement the notice requirement of section 438(a) (5) (B).

§ 99.6 Waivers.

(a) Educational institutions shall not require parents or eligible students to waive their rights under this part.

(Cong. Rec. S. 21489 (daily ed., December 18, 1974))

(b) [A student or a person applying for admission may waive his] or her [right of access to confidential statements described in] § 99.12(c) [except that such waiver shall apply to recommendations only if (1) the student is, upon request, notified of the names of all persons making confidential recommendations and (2) in the case of recommendations described in] § 99.12(c) [such recommendations are used solely for the purpose for which they were specifically intended;] such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution. (20 U.S.C. 1322g(a) (1) (E) and (C))

COMMENT

Since an educational institution is excluded from “effectively” preventing the exercise of access rights in section 438(a) (1), an institution could not require students to waive such rights. However, section 438(a) (1) (B) and (C) allows students to waive their rights under certain conditions.

Subpart E—Access to Records

§ 99.11 Access.

Educational agencies or institutions shall provide parents of students (or eligible students) [who are or have been in attendance at a school of such agency or institution, the case as may be] access to (the education records of) the students, except as set out in § 99.12.

(20 U.S.C. 1323g(a) (1) (A))

COMMENT

The language “shall provide parents of students (or eligible students) access” is used in place of the statutory language “shall provide copies of records” or “shall provide access” or which effectively prevents * * * the right to inspect and review “and shall establish appropriate procedures for the granting of a request.” The reason described for access was “the right to access” given that it “effectively prevented” access on an ad hoc basis or in other limited circumstances.

§ 99.12 Limitations on access.

Educational institutions are not required to make available to students in institutions as postsecondary education the following materials:

(a) [Financial records of the parents of the student or any information contained therein.]

(b) [Confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1976, if such letters or statements are not used for purposes other than those for which they were specifically intended;]

(c) [If the student has signed a waiver of the student’s right of access under this subsection in accordance with] § 99.6(b), confidential recommendations—

(1) [Respecting admission to any educational agency or institution.]

(2) [Respecting an application for employment and]

(3) [Respecting the receipt of an honor or honorary recognition].

(20 U.S.C. 1323g(a) (1) (B))

COMMENT

This section sets out the limitations on access in section 438(a) (1) (B).

§ 99.13 Access rights.

The right of access provided in § 99.11 shall include—

(a) The right to be provided a list of the types of education records which are maintained by the institution and are directly related to students;

(b) The right to inspect and review the content of those records;

(c) The right to obtain copies of those records, which may be at the expense of the parent or the eligible student (but not to exceed the actual cost to the educational institution of reproducing such copies);

(d) The right to a response from the institution for reasonable requests for explanations and interpretations of those records;

(e) The right to an opportunity for a hearing before officers of those records under subpart C of this part; and

(f) [If any material or document in the education record of a student includes information on more than one student, the right to review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material.]

(20 U.S.C. 1323g(a) (1) (A))

COMMENT

Section 438(a) (1) (A) establishes a right “to inspect and review” and provides that the right must be established for allowing access. This section attempts to make a “right of access” meaningful. Authority for making such judgments may be found in section 438(a) (5) (B) which states that the Secretary shall take “appropriate actions” to enforce provisions of the section. “Appropriate actions” may be interpreted to include the issuance of regulations which further the statutory intent.

Paragraph (a) is necessary because access could not be meaningful if parents or eligible students were not informed of what types of records the institution might have on a student.

Paragraph (b) sets out statutory requirements.

Paragraph (c) is necessary because a right to obtain copies is an essential part of a right of access. It should be noted that a counterargument may be made that including a right to copy such a right might subject parents or students to undesirable pressures from third parties to turn over their entire records (for third parties to make admission, employment, credit rating, or other decisions) and that such a right should not be included in a right of access.

Paragraph (d) is necessary so that parents or eligible students may have an opportunity to have any part of the record explained to them.

Paragraph (e) sets out the section 438 (a) (5)(B) requirements which is set out more fully in subpart C.

Paragraph (f) sets out statutory language of section 438(a) (1) (A). The Buckley/Pell statement contains the following elaboration.

In general, it is intended that the parent would be shown the actual documents contained in the child’s education records. However, under certain circumstances this might not be possible—where, for instance, it is impossible to separate information about one student from that about others. If a student’s name is one in a long list of names, it would violate the others’ right to privacy to have the entire list shown to that student’s parents. In such a situation, the responsibility of the educational agency or institution is to make the information concerning the student known to the parent without actually having to show him the document.


§ 99.14 Destruction of records.

Educational institutions are not precluded under this part from destroying any records, if not provided for by law, except that access shall be granted under § 99.11 prior to the destruction of education records where the parent or eligible student has requested such access.

(20 U.S.C. 1322g(a))

COMMENT

The statute does not by its terms preclude the destruction of records.

In a floor discussion of the amendment to section 438, the following collocation took place between Senators Mclntire and Pell:

Mr. McINTIRE. * * * I would appreciate the Senator’s telling me whether my understandings on these three points are correct.

The act is not designed to require the retention of records or to require that institutions continue to retain and use records that have been used in the past. In fact, it could be said that the provisions are not being used to prevent destruction of records that have been used in the past. This is the correct interpretation of the provisions of the act.

Mr. PELL. * * * the points he has raised are accurate.

PROPOSED RULES

§ 99.15 Procedures for granting access.

Each educational institution shall establish appropriate procedures, for the granting of a request by parents for access to the education records of their children or by eligible students for access to their own education records (within a reasonable period of time, but in no case shall access be withheld more than forty-five days after the request has been made.)

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

COMMENT

This section is drawn from section 438(a) (1) (A) of this Act.

Subpart C—Challenges to the Content of Records

§ 99.20 Right to a hearing.

Each educational agency and institution shall provide parents (or students), and eligible students, (who are over have been enrolled at a school of such agency or at such institution) an opportunity for a hearing by such agency or institution [to challenge the content of such students' education records in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for a hearing or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents and eligible students (respecting the content of such records.)

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

COMMENT

This section is drawn from section 438(a) (2) of the Act.

The Buckley/Pell Statement provides the following elaboration as to what types of hearings and challenges are contemplated by section 438(a) (2):

The amendment is intended to require educational agencies and institutions to conform to fair information record-keeping practices. It is not intended to overturn established standards and procedures for the challenge of substantive decisions made by the institution. It is intended, however, to open the doors on which decisions are made to more scrutiny by the students, or their parents about whom decisions are being made, and to give them the opportunity to challenge and to correct—or at least enter an explanation—such inappropriate, misleading, or inaccurate information about them which may be in their files and which may contribute, or have contributed, to an important decision made about them by the institution.

It seems reasonable to assume that it would be appropriate for institutions to review their record-keeping policies and remove any inappropriate or unnecessary data which should not be maintained. However, it would not be consistent with the underlying purposes of the legislation for institutions to destroy information after parents have requested access to it without allowing the parents an opportunity to review the information.

§ 99.21 Informal proceedings.

Educational institutions may attempt to settle a dispute with the parent of a student or the eligible student regarding the content of the student's education records through informal meetings and discussions with the parent or eligible student.

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

COMMENT

Section 438(a) (2), which requires "an opportunity for a hearing" does not preclude attempts to settle disputes by informal means. The hearing procedures may only be necessary when such informal means are not satisfactory to the parent (or eligible student) or the educational institution or local educational agency who will continue to have access thereto or to insert into such records a written explanation of the parents and eligible students (respecting the content of such records.)

§ 99.22 Formal proceedings.

Upon the request of either party (the educational institution or the parent or eligible student), the hearing required by § 99.20 shall be conducted under the procedures adopted and published by the educational institution under § 99.37. Such procedures shall include at least the following elements:

(a) The hearing shall be conducted and decided within a reasonable period of time following the request for the hearing;

(b) The hearing shall be conducted, and the decision rendered, by an institutional official or other party who does not have a direct interest in the outcome of the hearing;

(c) The parents or eligible student shall be afforded a full and fair opportunity to present evidence relevant to the issues raised under § 99.20; and

(d) The decision shall be rendered in writing within a reasonable period of time after the conclusion of the hearing.

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

COMMENT

This section specifies certain due process procedures which should be followed for a full and fair hearing.

The Buckley/Pell Statement provides the following guidance:

The law is not specific concerning the format, procedure, or mechanism of the challenge to the local level. It is the intent of the sponsors of these amendments that a local level challenge should be conducted by those participants involved. Since the hearing is to be conducted at the local level, a detailed specification of procedures cannot be drawn that could possibly apply to each of the thousands of school districts and colleges across the nation. Each has a slightly different organizational structure and pattern of procedure. Obviously, the hearing mechanism must be adapted to such circumstances to conform to these individual differences. In some cases, a school district might wish to offer the parent a hearing at the district level; in other instances, disputes might be better handled at the local school level. It is not the intent of the Amendment to burden schools with onerous hearing procedures.

(Cong. Rec. S 21488 (daily ed., December 13, 1974))

Subpart D—Release of Personally Identifiable Records

§ 99.30 Consent.

Educational institutions shall not permit access to or the release of education records or personally identifiable information contained therein (other than directory information) of students without the written consent of their parents or (the written consent of an eligible student, to any party other than the following:

(a) [Other school officials, including teachers within the educational institution or local educational agency who have been determined by such agency or institution to have legitimate educational interests;]

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

(c) Subject to the conditions set forth in § 99.37, [authorized representatives of (1) the Comptroller General of the United States, (2) the Secretary, (3) the Commissioner, the Director of the National Institute of Education, or the Assistant Secretary for Education, (4) State educational authorities;]

(d) In connection with a student's application for, or receipt of, financial aid;

(e) [State and local officials or authorities to which such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974;]

[Nothing is] [this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access theretofore.]
PROPOSED RULES

§ 99.31 Content of consent.

Where the consent of a parent or eligible student, is required under this part for the release of education records, it shall be in writing, be signed and dated by the person giving such consent, and shall include (a) a specification of the records to be released, (b) the reasons for such release, and (c) the names of the parties to whom such records will be released.

20 U.S.C. 1232g(b)(1), (9)(A)

COMMENT

This section is based on section 438(b)(1) and (2) of this Act.

§ 99.32 Copy to be provided to parents or eligible students.

Where the consent of a parent or eligible student is required under this part for the release of education records, a copy of the records to be released, shall be provided on request to (a) the student's parent(s) (or the eligible student) and (b) the student who is not an eligible student, if desired by the parent(s).

20 U.S.C. 1232g(b)(2)(A)

COMMENT

This section sets out one of the requirements of section 438(b)(2)(A) and interprets the phrase "designed to be distributed by the parent(s)" as modifying both "parents" and "the student" so that copies need not be automatically sent out whether or not desired by the parents. This section sets out the requirements for providing copies to the parents if they do not want copies. In any case, the regulation provides parents and eligible students with the right to obtain copies on request.

§ 99.33 Authority of parent to give consent.

(a) Except as otherwise provided in this section, any parent of a student may give a written parental consent required under this part.

(b) Where parents are separated or divorced, a written parental consent required under this part may be obtained from either parent, subject to any agreement between such parents or court order governing the rights of such parents.

(c) In the case of a student whose legal guardian is an institution, a party independent of the institution shall be appointed pursuant to State and local law to give a written parental consent required under this part.

20 U.S.C. 1232g(b)(1), (9)(B)

COMMENT

This section attempts to make clear what is meant by "parental" consent.

Paragraph (a) provides that consent is required of only one parent.

Paragraph (b) deals with situations where court orders or separation agreements affect the rights of the parents to exercise control over decisions affecting the child.

Paragraph (c) is designed to avoid situations where institutions may have interests adverse to those of the child and should not control decisions about what information may be released about the child (for example, if the institution is approached by a researcher who will provide grant funds to the institution for a study of the children, the institution may not make a decision which adequately protects the children's privacy rights). The child/student should be represented by a third party who has no conflicting interests.

There may still be problems under this provision if the third party guardian is not duly appointed.

§ 99.35 Release of information for health or safety emergencies.

(a) Educational institutions may release information from education records to appropriate persons in connection with an emergency to protect the health or safety of a student or other persons.

(b) The facts which should be taken into account in determining whether records may be released under this section include the following:

(1) The seriousness of the threat to the health or safety of the student or other persons;
(2) The need for such records to meet the emergency;
(3) Whether the persons to whom such records are released are in a position to deal with the emergency;
(4) The extent to which time is of the essence in dealing with the emergency.

Paragraph (a) of this section will be strictly construed.

20 U.S.C. 1232g(b)(9)(1)(I)

COMMENT

This section is required by section 438(b)(1)(D) of the Buckley/Fell Statement provides the following elaboration:

"... under certain emergency situations it may become necessary for an educational agency or institution to release certain information to protect the health or safety of the student or other persons. In the case of a student, the release of an emergency snapshot is not always subject to an educational official to seek consent from every parent before a health warning can be issued. On the other hand, a blanket exception for "health or safety" could lead to unnecessary dissemination of personal information. Therefore, in order to assure that there are adequate safeguards on this exception, the amendments provided that the Secretary will promulgate regulations to implement this exception. It is expected that he will strictly limit the applicability of this exception.

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among the component units of an educational institution (such as the various colleges which may comprise a university) will be considered to be a release to other school officials of that institution.

(20 U.S.C. 1232g(b) (1) (A))

§ 99.37 Release to Federal and State officials.

(a) Nothing in this part (shall preclude authorized representatives of the officials listed in § 99.36(e) (from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs).

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

(b) As used in this section, the term "authorized representatives" may include

(3) Each official or employee of the Federal government who is not a parent or eligible student who shall be present or have knowledge of the information designated to be kept in a public record.

§ 99.38 Record of access.

(a) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all parties (other than those specified in § 99.36(a)) (which have requested or obtained access to a student's education records maintained by such educational agency or institution and which will indicate specifically the legitimate interest that such party has in obtaining this information.)

(b) Such record of access shall be available only to parents or eligible students, (to the school official and his or her assistants who are responsible for the custody of such records, and to per-
have an opportunity to alter the conflicting State or local law to bring it into conformity with section 438 of the Act and the regulations issued under it.

(c) During the period of a waiver under paragraph (b) of this section, the educational institution to which such waiver applies will not be penalized with regard to the availability of Federal funds.

§ 99.64 Reports and records.

Each educational institution shall (a) make such reports, in such form and containing such information as the Office or the Review Board may require to carry out its functions under this part, and (b) keep such records and afford such access thereto as the Office or the Review Board may find necessary to assure the correctness of such reports and compliance with the provisions of section 438 of the Act and this part.

§ 99.65 Complaint procedure.

(a) Complaints regarding violations of section 438 of the Act or of the regulations in this part shall be submitted to the Office in writing.

(b) A complaint must be received by the Office not later than 180 days from the date of the alleged violation unless the time for submission is extended by the Office.

(c) (1) The Office will not investigate any complaint against which the violation has been alleged, in writing, that the complaint has been received.

(2) The notification to the institution under paragraph (c) (1) of this section shall include the substance of the alleged violation and such institution shall be given an opportunity to submit a written response.

(d) (1) The Office will investigate all timely complaints received to determine whether there has been a failure to comply with the provisions of section 438 of the Act or the regulations in this part, and may permit further written or oral submissions by both parties.

(2) Following its investigation, the Office will provide written notification of its findings, and the basis for such findings, to the complainant and the institution involved.

(3) If the Office finds that there has been a failure to comply, it will include in its notification under paragraph (d) (2) of this section, the specific steps which must be taken by the educational institution to bring such institution into compliance. The notification shall set forth a reasonable period of time, given all of the circumstances of the case, for the institution to voluntarily comply.

(e) If the educational institution does not come into compliance within the period of time set under paragraph (d) (2) of this section, the matter will be referred to the Review Board for a hearing under §§ 99.66-99.69, inclusive.

§ 99.66 Termination of funding.

If the Secretary, after reasonable notice and opportunity for a hearing by the Review Board, (1) finds that an educational institution has failed to comply with the provisions of section 438 of the Act, or of the regulations in this part, and (2) determines that compliance cannot be secured by voluntary means, he shall issue a decision, in writing, that no funds under any of the Federal programs referenced in § 99.1(a) shall be made available to that educational institution or, at the Secretary's discretion, to the unit of the educational institution affected by the failure to comply until there is no longer any such failure to comply.

§ 99.67 Hearing procedures.

(a) Panels. The Chairman of the Review Board shall designate the Hearing Panels to conduct one or more hearings under § 99.66. Each such Panel shall consist of not less than three members of the Review Board. The Review Board may, at its discretion, allow any hearing or class of hearings. The Chairman of the Review Board shall designate himself or any other member of a Panel to serve as Chairman.

(b) Procedural rules. (1) With respect to hearings involving, in the opinion of the Panel, no dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the Panel shall fix a time for oral argument to be afforded to each party to the proceeding an opportunity for presenting his case at the option of the Panel in whole or in part in writing or (b) in an informal conference before the Panel which shall afford each party: (a) Sufficient notice of the issues to be considered (where such notice has not previously been afforded); and (b) an opportunity to be represented by counsel.

(2) With respect to hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the Panel shall afford each party an opportunity, which shall include, in addition to provisions required by subparagraph (1) (ii) of this paragraph, provisions designed to assure to each party the following:

(i) An opportunity for a record of the proceedings;

(ii) An opportunity to present witnesses on the party's behalf; and

(iii) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

§ 99.68 Hearing before Panel or a Hearing Officer.

A hearing pursuant to § 99.67 (b) (2) shall be conducted, as determined by the Panel Chairman, either before the Panel or a hearing officer. The hearing officer may be (a) one of the members of the Panel or (b) a nonmember who is appointed as a hearing examiner under 5 U.S.C. 3105.

§ 99.69 Initial decision; final decision.

(a) The Panel shall prepare an initial written decision, which shall include findings of fact and conclusions based thereon. When a hearing is conducted before a hearing officer alone, the hearing officer shall separately find and state the facts and conclusions which shall be incorporated in the initial decision prepared by the Panel.

(b) Copies of the initial decision shall be mailed promptly by the Panel to each party (or to the party's counsel), and to the Secretary with a notice affording such party an opportunity to submit written comments thereon to the Secretary within a specified reasonable time.

(c) The initial decision of the Panel transmitted to the Secretary shall become the final decision of the Secretary, unless, within 25 days after the expiration of the time for receipt of written comments, the Secretary modifies or reverses the initial decision of the Panel, he shall accompany such action by written statement of the grounds for such modification or reversal, which shall promptly be filed with the Review Board.

(e) Review of any initial decision by the Secretary shall be based upon such decision, the written record, if any, of the Panel's proceedings, and written comments or oral arguments by the parties, or by their counsel, to the proceedings.

(f) No decision under this section shall become final until it is served upon the educational institution involved or its attorney.

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