NOTE: This letter was reformatted to make it more accessible on the Student Privacy Policy Office's (SPPO's) website. Please note that SPPO administers FERPA and the office's prior name was the Family Policy Compliance Office (FPCO). Some citations in this letter may not be current due to amendments of the law and regulations. SPPO has not revised the content of the original letter. Any questions about the applicability and citations of the FERPA regulations included in this letter may be directed to FERPA@ed.gov.

August 13, 2004

[Letter to Parent]

Dear Parent:

This responds to your May 13, 2004, letter, and July 26, 2004, follow-up letter asking for guidance on provisions in the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, that govern a parent's opportunity to seek amendment of the education records of a special education student. The Family Policy Compliance Office (FPCO) administers FERPA and implementing regulations found at 34 CFR Part 99. These records are also subject to the Confidentiality of Information regulations for Part B of the Individuals with Disabilities Education Act (IDEA) found at 34 CFR §§ 300.560-300.577. Part B of the IDEA is a Federal program administered by the Office of Special Education Programs (OSEP). This letter has been prepared in consultation with OSEP.

Question #1: Section 99.21 of the FERPA regulations, 34 CFR § 99.21, provides that an educational agency or institution must give a parent the opportunity for a hearing to challenge the content of the student's education records on the grounds that the information is inaccurate, misleading, or in violation of the privacy rights of the student. You asked whether the educational agency or institution can bypass this type of hearing and instead require the parent to proceed directly to a due process hearing before a state administrative law judge under state special education regulations.

Part B regulations at 34 CFR § 300.568 provide the same opportunity for a hearing to challenge the content of education records as provided in § 99.21 of the FERPA regulations. 34 CFR § 300.568 provides that a public agency shall, "on request, provide an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child." 34 CFR § 300.570 further provides that a hearing held under 34 CFR § 300.568 must be conducted according to the hearing procedures contained in § 99.22 of the FERPA regulations.

This right is not unlimited, however, and a school is not required by FERPA to afford a parent the right to seek to change substantive decisions made by school officials, such as grades or other evaluations, including decisions regarding special education students. The primary source of legislative history regarding this provision is contained in the "Joint Statement in Explanation of Buckley/Pell Amendment," Volume 120 of the *Congressional Record*, pages 39862-39866, which states that it was "not intended to overturn established standards and procedures for the challenge of substantive decisions made by an educational institution." That is, FERPA is intended to require only that educational agencies and institutions conform to fair recordkeeping practices and not to override accepted standards and procedures for making academic assessments, disciplinary rulings, placement determinations, and other evaluations. Accordingly, the right to seek amendment of education records cannot be used to challenge a grade or

evaluation unless it has been inaccurately recorded.

A hearing on the amendment of records under 34 CFR §300.568 is a separate hearing procedure from the impartial due process hearing under Part B of the IDEA. Part B provides that a parent or public agency may initiate a due process hearing on matters relating to identification, evaluation, or educational placement, and provision of a free appropriate public education. 34 CFR § 300.507(a). As such, if a parent requests that information in a student's records be amended and the public agency refuses to amend the information in accordance with the request, a public agency may not bypass a parent's right to a hearing under 34 CFR § 300.568, which is governed by FERPA, and require the parent to request an impartial due process hearing under 34·CFR §300.507(a). Questions involving a violation of FERPA requirements regarding education records are not within the jurisdiction of a hearing officer in a due process hearing convened pursuant to 34 CFR §300.507(a) of the IDEA.

Question #2: Section 99.22(c) of the FERPA regulations, 34 CFR § 99.22(c), provides that a hearing on amendment of education records "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." You asked if this requirement is permissive or mandatory, and whether there are any guidelines to help ensure an unbiased and disinterested outcome. You expressed particular concern whether a hearing on amendment of education records may be conducted by the supervisor or a colleague of the school official who made the initial decision not to amend the student's records.

The requirement in § 99.22(c) is mandatory, not permissive – the hearing official may not have a "direct interest in the outcome of the hearing." While there are no specific guidelines, the legislative history regarding this provision indicates that schools and local districts should have some flexibility in conducting these hearings consistent with a rule of reason. In particular, the Joint Statement in Explanation of Buckley/Pell Amendment as recorded at page 39864 of the December 13, 1974 Congressional Record states:

> The law is not specific concerning the format, procedure, or mechanism for the conduct of such a hearing at the local level. It is the intent of the sponsors of these amendments that again a rule of reason would be followed by those participants involved. Since the hearing is to be conducted at the local level, detailed specification of procedures cannot be drawn that could possibly apply to each of the thousands of school districts and colleges across the nation. In some cases, a school district might wish to offer the parent a hearing at the district level; in other instances, disputes about the content of records might be better handled at the local school level. It is not the intent of the amendment to burden schools with onerous hearing procedures.

We believe that § 99.22(c) does not require automatic disqualification of any employee or official of the school or agency that makes an initial decision not to amend education records.

However, a rule of reason approach suggests that the deciding official in a § 99.22(c) hearing on amendment of education records must be someone who does not have a personal or professional interest that would conflict with his or her objectivity in the hearing. Reason suggests that ordinarily a school or agency would not assign as hearing officer either the individual who determined not to amend education records or someone who is in a direct reporting or close

collegial relationship with that individual.

Question #3: Section 99.21(b) of the FERPA regulations provides that if an educational agency or institution decides against amending an education record as a result of a hearing, it must inform the parent of the right to place a statement in the record commenting on the contested information or stating why the parent disagrees with the decision. You asked whether § 99.2l(c) requires the agency or institution to place the parent's statements directly with each contested part of the record, or whether the statements may simply be placed together in the most recent dated folder with the understanding that the parent's statement will be made available when the contested parts of the record are reviewed.

Section 99.21(c) provides that an educational agency or institution must:

> (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.

The requirement is stated in plain and unambiguous language that the parent's statement must be maintained with each part of the record that is contested. The purpose of this requirement is to ensure that the parent's statement is disclosed whenever a contested portion of the student's record is reviewed or disclosed. That purpose may easily be circumvented, even unintentionally, if parental statements are placed away from the contested parts of a student's records, especially when records are complex or voluminous. Therefore, it is our opinion that separate statements contesting various parts of a student's education record may not be placed together in a single location.

Question #4: You noted that § 99.60(c) of the FERPA regulations identifies the Office of Administrative Law Judges as the Review Board for enforcement purposes and asked whether this refers to the state administrative law judges that administer due process hearings.

Section 99.60(c) refers to Federal administrative law judges at the U.S. Department of Education and not state administrative law judges responsible for conducting an impartial due process hearing pursuant to 34 CFR §300.507. FPCO enforces the requirements for a hearing under § 99.21 of the FERPA regulations.

I trust that this responds to your inquiries.

Sincerely,
/s/

LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Stephanie Smith Lee, Director
Office of Special Education Programs