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## ARTICLES

### BUCKING UP BUCKLEY I: MAKING THE FEDERAL STUDENT RECORDS STATUTE WORK

*Lynn M. Daggett\**

For more than twenty years, a federal statute and its regulations have comprehensively, and in great detail, governed access to, and accuracy of, student records. This statute, the Family Educational Rights and Privacy Act (FERPA), also known as the Buckley Amendment (Buckley),<sup>1</sup> regulates student records kept by most United States schools, both public and private, at the elementary, secondary, or higher education (including law school) levels.<sup>2</sup>

Although Buckley's level of regulation is comprehensive, it has largely been a congressional afterthought. Congress passed Buckley as a floor amendment to other educational legislation without the benefit of public hearings, committee reports, or much floor debate.<sup>3</sup> Since its passage, Buckley has been substantively amended four times. Each of the four amendments was, like the original bill, a provision inserted into a larger piece of legislation.<sup>4</sup> In particular, it was amended substantially in 1994, with the identified twin goals of (1) increasing parental access to records, and (2) lightening the burden on schools.<sup>5</sup> In short, in enacting and

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1. 20 U.S.C. § 1232g (1994); *see also* 34 C.F.R. §§ 99.1-99.67 (1996) (Family Educational Rights and Privacy). Buckley is part of the General Education Provisions Act, 20 U.S.C. §§ 1221-1235 (1994).

2. For a discussion of the educational agencies covered by Buckley, see *infra* notes 41-44 and accompanying text.

3. For a discussion of Buckley's legislative history, see *infra* notes 22-40 and accompanying text.

4. For a discussion of the amendments to Buckley, see *infra* notes 23-36 and accompanying text.

5. See *infra* notes 30-36 and accompanying text (discussing the 1994 amendment).

amending Buckley, Congress has never focused its attention specifically on student records.

Like Congress, litigants also treat Buckley largely as an afterthought.<sup>6</sup> Buckley itself provides for enforcement solely through filing complaints with a federal office.<sup>7</sup> There is no timeline for processing these complaints, no administrative hearing provision, and no framework for judicial review. There are no remedies for parties injured by Buckley violations and the only sanction available against schools has never been imposed. After an early, and singularly unsuccessful, attempt to get courts to recognize a private cause of action,<sup>8</sup> case law dealing with Buckley consisted largely of secondary claims added to other claims, such as a special education statutory claim.<sup>9</sup> Recently, however, a growing number of courts have held or suggested that a civil rights claim under 42 U.S.C. § 1983 may be used to redress alleged Buckley violations.<sup>10</sup>

Although the legal system has largely ignored Buckley, its provisions are significant to the schools and parents covered by it. Schools invest considerable staff time to comply with Buckley.<sup>11</sup> Buckley also impacts the way schools perform routine tasks, and sometimes conflicts with other laws that schools must follow. Buckley's detailed provisions, as well as its requirement that parents be annually informed of their Buckley rights,

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6. Scholars too have largely ignored Buckley. The author could find only two law review articles published in 1980 or later on Buckley, and both pre-date the 1994 statutory amendments. See Charles R. Tremper & Mark A. Small, *Privacy Regulation of Computer-Assisted Testing and Instruction*, 63 WASH. L. REV. 841, 860 (1988); Alexander C. Papanreou, Comment, *Krebs v. Rutgers: The Potential for Disclosure of Highly Confidential Personal Information Renders Questionable the Use of Social Security Numbers as Student Identification Numbers*, 20 J.C. & U.L. 79, 92 (1993). There are also three post-1980 articles on Buckley issues, some by educators without law degrees. See Mary H.B. Gelfman & Nadine C. Schwab, *School Health Services and Educational Records: Conflicts in the Law*, 64 W. EDUC. L. REP. 319 (1991); T. Page Johnson, *Managing Student Records: The Courts and the Family Educational Rights and Privacy Act of 1974*, 79 W. EDUC. L. REP. 1 (1993); Ralph D. Mawdsley, *Litigation Involving FERPA*, 110 W. EDUC. L. REP. 897 (1996). A fourth law review article, promisingly titled *To Disclose or Not To Disclose: The Dilemma of the School Counselor*, inexplicably does not mention Buckley. See Stephen R. Ripps et al., *To Disclose or Not To Disclose: The Dilemma of the School Counselor*, 13 MISS. C. L. REV. 323 (1993).

7. For a discussion of the complaint process provided by Buckley, see *infra* notes 179-92 and accompanying text.

8. For those court decisions rejecting a private cause of action under Buckley, see *infra* note 200 and accompanying text.

9. See, e.g., *Odom v. Columbia Univ.*, 906 F. Supp. 188, 195 (S.D.N.Y. 1995) (adding a Buckley claim to a suit primarily alleging violation of 42 U.S.C. § 1981).

10. For a list of the cases in which Buckley-based § 1983 claims have been brought, see *infra* note 201.

11. For a discussion of the responsibilities imposed on schools by Buckley, see *infra* Part III.B.

create high parent expectations with regard to accessing, challenging, and keeping confidential, their child's school records.<sup>12</sup>

This Article attempts to remedy Congress's and the courts' lack of systematic attention, and to consider school concerns and parent expectations. In so doing, this Article presents a comprehensive overview of the statute and regulations, and identifies areas of concern and inconsistencies, both internal to Buckley and between Buckley and other laws. Initially, student records may not appear to be a particularly complicated issue, but in fact this topic involves complex legal terrain, as not only Buckley, but a number of other laws regulate student records.

Section I of this Article provides a review of Buckley, as it is the federal law that most comprehensively governs student records. It describes Buckley's coverage, as well as its provisions for parents to access, keep confidential, and challenge their child's school records. Section II summarizes other laws that regulate student records. Certain laws govern only some students' records. For example, the Individuals with Disabilities Education Act (IDEA)<sup>13</sup> sets out additional requirements for the records of many disabled students. Another federal statute sets out requirements for the records of homeless students.<sup>14</sup> Other laws, such as those regulating confidentiality of substance abuse communications, concern certain kinds of student information.<sup>15</sup> Finally, relevant state laws and public records retention schedules are noted.<sup>16</sup>

Section III of the Article assesses whether Buckley currently meets the goals Congress identified in its 1994 amendments, namely, meaningful access for parents without placing an unreasonably heavy burden on schools. It concludes that Buckley currently fulfills neither purpose. From the parent's perspective, Buckley does not provide meaningful access. First, schools are not required to give parents prompt access to records. Second, access does not include the right to a copy (for a fee) of records. Third, and most importantly, parents have no meaningful enforcement mechanism to redress Buckley violations.<sup>17</sup>

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12. For a discussion of parental rights provided by Buckley (about which schools must annually inform parents), see *infra* notes 173-76 and accompanying text.

13. 20 U.S.C. §§ 1400-1491 (1994).

14. For a discussion of the requirements for records of homeless students, see *infra* notes 260-61 and accompanying text.

15. For a discussion of the conflicting requirements concerning substance abuse communications, see *infra* notes 233-38 and accompanying text.

16. For a summary of state law requirements concerning public records and meetings, see *infra* notes 248-51 and accompanying text.

17. The limited potential of § 1983 civil rights claims to redress Buckley violations is explored in detail in a companion article by the author. See Lynn M. Daggett, *Bucking Up*

The situation is no better from the perspective of schools that must shoulder unnecessarily heavy burdens as a result of Buckley. These burdens may be grouped into four categories: compliance with Buckley itself, Buckley's impact on routine school activities, Buckley's dated premises concerning student records and school practices, and Buckley's many conflicts, internally and with other laws. The Article makes specific recommendations for necessary changes to Buckley to provide parents meaningful access and schools a reasonable burden, as Congress intended. It concludes by urging Congress to focus its attention on Buckley and to consider these suggestions for change.

### I. OVERVIEW OF BUCKLEY/FAMILY RIGHTS AND PRIVACY ACT

Enacted in 1974, the Family Rights and Privacy Act<sup>18</sup> or Buckley provides that to receive federal educational funds, educational agencies' student records:

- 1) are to be kept confidential, normally requiring parental consent for access by third parties,
- 2) may be accessed on request by the student's parents, and
- 3) may be challenged by parents if claimed to be misleading, inaccurate, or in violation of students' privacy rights.<sup>19</sup>

This statute also requires schools to annually notify parents of their Buckley rights.<sup>20</sup> Buckley is part of the General Education Provisions Act, and operates as a condition on the receipt of federal education funding, rather than a direct mandate.<sup>21</sup> No specific federal funds are provided to schools to subsidize their compliance with Buckley.

Senator James Buckley introduced this law as a Senate floor amendment to legislation extending the Elementary and Secondary Education Amendments of 1965.<sup>22</sup> It was adopted after some discussion on the floor, but without public hearings or committee study and reports, and for its first fifteen years, Buckley remained essentially free of changes. In

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*Buckley II: Using Civil Rights Claims to Enforce the Federal Student Records Statute*, 21 SEATTLE U. L. REV. (forthcoming 1997).

18. See 20 U.S.C. § 1232g (1994).

19. See *id.* § 1232g(a), (b).

20. See *id.* § 1232g(e).

21. See *id.* § 1232g(a), (b).

22. See Education Amendments of 1974, Pub. L. No. 93-380, § 513, 88 Stat. 484, 571 (1974) (codified as amended in scattered sections of 20 U.S.C.); see also S. CONF. REP. NO. 93-1026 (1974). After problems with the initial statutory language became apparent, the Act was amended in the same congressional session by Pub. L. No. 93-568, § 2, 88 Stat. 1855, 1858 (1974); see also S. CONF. REP. NO. 93-1409 (1974), reprinted in 1974 U.S.C.C.A.N. 6793. A detailed summary of Buckley's early legislative and administrative history can be found in Johnson, *supra* note 6, at 1-2.

1979, however, it was amended slightly to add a provision permitting disclosure of records without parental consent to educational authorities conducting audits and program evaluations.<sup>23</sup> Then in 1986, a Buckley reference to the Internal Revenue Code was updated.<sup>24</sup>

In the 1990s, Buckley was substantively amended three times, always as a small part of much larger legislation not concerned primarily with student records.<sup>25</sup> In 1990, the Student Right to Know, Crime Awareness, and Campus Security Act required higher education institutions to publish statistics on campus crime for applicants and current students.<sup>26</sup> A single provision of this act modified Buckley to permit higher education schools to disclose the outcome of school disciplinary proceedings to victims of crimes of violence.<sup>27</sup> For example, a college could inform a student who was raped by another student that the school had expelled her attacker. In 1992, Congress passed massive legislation reauthorizing the Higher Education Act of 1965.<sup>28</sup> A single section of this legislation changed Buckley's language concerning law enforcement records.<sup>29</sup>

In 1994, Congress passed another lengthy and comprehensive law, the Improving America's Schools Act of 1994, which reauthorized the Elementary and Secondary Education Amendments for five years.<sup>30</sup> Two sections of this Act amended Buckley in a number of respects,<sup>31</sup> and were

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23. See Pub. L. No. 96-46, § 4(c), 93 Stat. 338, 342 (1979) (codified as amended at 20 U.S.C. § 1232g(b)(5) (1994)).

24. See Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986) (replacing in subsection (b)(1)(H) "Internal Revenue Code of 1954" with "Internal Revenue Code of 1986").

25. Buckley regulations were first issued in 1976. See Family Education Rights and Privacy Act, 41 Fed. Reg. 24,662 (1976) (codified at 45 C.F.R. pt. 98). Major revisions were adopted in 1988. See Family Educational Rights and Privacy Act, 53 Fed. Reg. 11,942 (1988) (codified at 34 C.F.R. pt. 99). Regulations were recently finalized to implement the 1994 statutory changes. See Family Educational Rights and Privacy Act, 61 Fed. Reg. 59,292 (1996) (codified at 34 C.F.R. pt. 99).

26. See Student Right-to-Know and Campus Security Act, Pub. L. No. 101-542, § 204, 104 Stat. 2381, 2385-87 (1990) (codified as amended at 20 U.S.C. § 1092 (1994)).

27. This amendment is now codified at 20 U.S.C. § 1232g(b)(6).

28. See Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448 (1992) (codified as amended in scattered sections of 20 U.S.C.).

29. See Pub. L. No. 102-325, § 1555(a), 106 Stat. 448, 840 (1992) (codified as amended at 20 U.S.C. 1232g(a)(4)(B)(ii) (1994)).

30. See Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994) (codified as amended in scattered sections of 20 U.S.C.). There appears to be a sole committee report dealing with the 1994 Buckley changes and it contains three unenlightening paragraphs in its section-by-section analysis of the conference committee's bill. See H.R. CONF. REP. NO. 103-761, at 1 (1994). The sole floor discussion appears to be a comment by Senator Grassley, apparently the initiator of the 1994 changes. See 140 CONG. REC. S10,290 (daily ed. Aug. 2, 1994) (statement of Senator Grassley).

31. See Pub. L. No. 103-382, §§ 249, 261(h), 108 Stat. 3518, 3824-26, 3928 (1994) (codified as amended at 20 U.S.C. 1232g (1994)).

designed to provide greater parental access, while lightening Buckley's enforcement burden on schools.<sup>32</sup> The 1994 amendments changed the requirements for complying with subpoenas of school records;<sup>33</sup> replaced the general exception for unconsented disclosures pursuant to the pre-1974 state statute with an exception for reporting to juvenile justice authorities without consent;<sup>34</sup> added required penalties for violations by persons to whom schools disclose records;<sup>35</sup> and added language permitting schools to notify staff members of disciplinary actions against a student where safety or other risks are involved.<sup>36</sup>

Buckley itself contains no preface or statement of purpose. Senator Buckley, the bill's principal sponsor, stated that the statute was intended to redress "the growing evidence of the abuse of student records across the nation,"<sup>37</sup> and to serve the purposes of assuring parent and student access to education records, and protecting the privacy of those records.<sup>38</sup> More recently, another purpose of Buckley was identified: enhancing student achievement through greater parent involvement in their children's education.<sup>39</sup> In addition, there is some dispute about whether Buckley's purpose is to address individual records violations, or merely to prevent systemic violations.<sup>40</sup>

#### A. Schools and Other Agencies Covered by Buckley

Any educational agency, public or private, state or local, at the elementary, secondary, or higher education level, receiving federal education

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32. See 140 CONG. REC. S10,290 (daily ed. Aug. 2, 1994) (statement of Senator Grassley).

33. See 20 U.S.C. § 1232g(b)(1)(J)(1994).

34. See *id.* § 1232g(b)(1)(E).

35. See *id.* § 1232g(b)(4)(B) (providing that the school would be banned from allowing "access to information from education records to that third party for a period of not less than five years").

36. See *id.* § 1232g(h).

37. 121 CONG. REC. S7974 (daily ed. May 13, 1975).

38. See 120 CONG. REC. S39,863 (daily ed. Dec. 13, 1974); see also *Belanger v. Nashua*, 856 F. Supp. 40, 46 (D.N.H. 1994) (noting these dual purposes); *Student Press Law Center v. Alexander*, 778 F. Supp. 1227, 1228 (D.D.C. 1991) (same); *Zaal v. State*, 602 A.2d 1247, 1255 (Md. 1992) (same).

39. See 140 CONG. REC. S10,290 (daily ed. Aug. 2, 1994) (statement of Senator Grassley).

40. See *Smith v. Duquesne Univ.*, 612 F. Supp. 72, 80 (W.D. Pa. 1985) (noting that FERPA was designed to address systematic violations); *Zaal*, 602 A.2d at 1255 (citing *Smith*).

funds under most programs,<sup>41</sup> is subject to Buckley.<sup>42</sup> Although governmental agencies that do not provide educational services are not covered,<sup>43</sup> if one part of an educational agency receives funds, Buckley applies to the entire agency.<sup>44</sup> For the sake of simplicity, this Article refers to the various educational agencies covered by Buckley as "schools."

### B. "Students" under Buckley

Records covered by Buckley are those of the school's current and former "students."<sup>45</sup> Employee records are not covered.<sup>46</sup> Moreover, "students" do not include applicants who have not attended a school.<sup>47</sup> For example, a student who is not accepted to law school, or who is accepted but does not enroll, has no Buckley right to access her application file.<sup>48</sup> Similarly, a student whose application to a graduate school is rejected,

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41. For the brief list of Department of Education funded programs which do not trigger Buckley obligations, see Family Educational Rights and Privacy Act of 1994, 34 C.F.R. § 99.1(b) (1996).

42. See 20 U.S.C. § 1232g(a)(3) (1994); 34 C.F.R. § 99.1 (1996). Language added in 1994 clarified that Buckley applies to state educational agencies. See 20 U.S.C. § 1232g(a)(1)(B)(1994). Receipt of federal funds other than through the Department of Education does not subject a school to Buckley. See 34 C.F.R. § 99.1(a) (1996). For example, receipt of school lunch funds, which flow from the Department of Agriculture, does not trigger Buckley.

43. See *Kneeland v. NCAA*, 650 F. Supp. 1076, 1089-90 (W.D. Tex. 1986) (holding that the NCAA and athletic conference are not educational agencies subject to Buckley), *rev'd on other grounds*, 850 F.2d 224 (5th Cir. 1988); see also *Arkansas Gazette Co. v. Southern State College*, 620 S.W.2d 258, 259 (Ark. 1981).

44. See 34 C.F.R. § 99.1(e) (1996). For example, receipt of federally-funded or guaranteed student financial aid makes a university subject to Buckley. See *id.* § 99.1(d)(2).

45. See 20 U.S.C. § 1232g(a)(6)(1994); 34 C.F.R. § 99.3 (1996) (stating that attendance may include enrollment in a correspondence class or work-study program). Employee records of students who are also employed by a school, for example, in a work-study program, are still covered.

46. See 20 U.S.C. § 1232g(a)(4)(B)(iii) (1994); see also *Klein Indep. Sch. Dist. v. Mattox*, 830 F.2d 576, 579-80 (5th Cir. 1987) (indicating that a teacher's college transcript is not an education record under Buckley); *Brouillet v. Cowles Publ'g Co.*, 791 P.2d 526 (Wash. 1990) (noting that teacher records are not Buckley records).

47. See 20 U.S.C. § 1232g(a)(6) (1994).

48. See *United States v. Brown Univ.*, No. Civ. A. 91-3274, 1992 WL 2513, at \*2 (E.D. Pa. Jan. 3, 1992) (finding that federal government subpoena of financial aid records of accepted students who chose not to attend did not meet the statutory definition set forth in Buckley); *Norwood v. Slammons*, 788 F. Supp. 1020, 1026 (W.D. Ark 1991) (maintaining that unenrolled law student had no standing under Buckley to complain of school's refusal to release student records); *Vandiver v. Star-Telegram, Inc.*, 756 S.W.2d 103, 107 (Tex. App. 1988) (indicating that records about an athlete recruited by a school were not Buckley records absent proof that recruit had become a student at a school; and thus making records subject to disclosure under state open records law).



but who audits classes, is not a student at that school for Buckley purposes.<sup>49</sup>

### C. "Records" Under Buckley

"Records" are defined quite broadly by the statute. Any recorded information that is created or maintained<sup>50</sup> by a school, school employee, or a person "acting for"<sup>51</sup> a school, that is directly related to a particular student, is a record for Buckley Amendment purposes.<sup>52</sup> The record must contain "personally identifiable" information about a student, such as the individual's name, parent or other family member's name, address or family's address, "personal identifiers such as social security num-

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49. See *Tarka v. Franklin*, 891 F.2d 102, 107 (5th Cir. 1989).

50. When a school once had a record, but no longer has a copy, there is no Buckley record. See *Olsson v. Indiana Univ. Bd. Of Trustees*, 571 N.E.2d 585, 589 (Ind. Ct. App. 1991) (holding that a letter written by university faculty member evaluating student's performance as student teacher was not a Buckley record where no copy of the letter was kept by the school). In this case, the request for records was apparently made after the school had decided not to keep a copy of the letter. See *id.* Of course, if a Buckley request for records is pending, the records cannot be destroyed. See 34 C.F.R. § 99.10(e)(1996).

51. See 20 U.S.C. § 1232g(a)(4)(A)(ii) (1994). One court has held that student information maintained by the NCAA and an athletic conference are not records maintained by them on behalf of member schools. See *Kneeland v. NCAA*, 650 F. Supp. 1076, 1089 (W.D. Tex. 1986), *rev'd on other grounds*, 850 F.2d 224 (5th Cir. 1988). Although the *Kneeland* court did not address this issue, it would seem that records sent by schools to the NCAA would be subject to Buckley obligations regarding "rediscovery," as recently strengthened by 1994 amendments. See 20 U.S.C. § 1232g(b)(4)(B) (1994). As amended in 1994, Buckley now requires that organizations receiving student records from schools lose that access to such records for at least five years if the receiving organization provides access to them without parent consent. See *id.*

Persons "acting for" schools do include an independent contractor, as well as privately retained attorneys. For example, many schools contract with professionals, such as physical therapists, to provide related services to disabled students. Such persons, and their records related to this contract, would be covered under Buckley. See *Belanger v. Nashua*, 856 F. Supp. 40, 48 (D.N.H. 1994) (holding that juvenile court records maintained not at school but at school's attorney's office are Buckley records); Letter to Dr. Thomas Fihe, Superintendent, West Lafayette Cnty. Sch. Corp., 17 Educ. Handicapped L. Rep. (LRP) 701, 708 (Mar. 15, 1991) (finding that school's attorney's records are Buckley records). But see *Red & Black Publ'g Co. v. Board of Regents*, 427 S.E.2d 257, 261 (Ga. 1993) (suggesting that university student records kept at its Office of Judicial Programs about nonacademic discipline rather than "individual student academic performance, financial aid, or scholastic probation" are not Buckley records). In direct contrast to the *Red & Black* court's definition of records, and rejecting public comments it received on the matter, the Department of Education correctly maintains that Buckley governs all records of students, specifically including records of school disciplinary proceedings. See Family Educational Rights and Privacy Act, 60 Fed. Reg. 3465 (1995).

52. See 20 U.S.C. § 1232g(a)(4) (1994); 34 C.F.R. § 99.3 (1996). An invoice from a school's attorney, naming a student who was the subject of a special education hearing, is a record under Buckley. See Letter to Dr. Thomas Fihe, *supra* note 51, at 707-08.

bers,"<sup>53</sup> lists of personal characteristics that would result in easy traceability,<sup>54</sup> or other similar information.<sup>55</sup> School records that do not contain information about any individual student are not Buckley records.<sup>56</sup>

The information need not be in words or even contained in written documents. Any permanent recording such as a tape or film, a picture, or a computer file<sup>57</sup> can be a record.<sup>58</sup> Unrecorded information, however, such as something heard by a teacher, is not a Buckley record, nor is information about a student obtained from an external source such as a newspaper article.<sup>59</sup> Moreover, student information does not have to be in the official student file to be a Buckley record. For example, the information may be found in a teacher's desk, nurse's office, or principal's file. Records also need not be created by the school; it is sufficient that the school maintains them. For instance, if the school receives an outside psychiatric evaluation or juvenile court records concerning a student, these documents are records for Buckley purposes.<sup>60</sup> Finally, records containing information about more than one student, such as a teacher's grade book, must be edited prior to access, so that information about other identifiable students is not disclosed.<sup>61</sup>

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53. For a discussion of the problems associated with school use of social security numbers as identifiers, see *Krebs v. Rutgers*, 797 F. Supp. 1246, 1258-59 (D.N.J. 1992). See generally Papandreou, *supra* note 6 (discussing *Krebs* and FERPA).

54. See, e.g., *Doe v. Knox County Bd. of Educ.*, 918 F. Supp. 181, 184 (E.D. Ky. 1996) (finding the disclosure of information to media about unnamed student with hermaphroditism presents triable issue of fact on Buckley claim). As this case illustrates, students' Buckley rights may be violated even though the students are never named.

55. See 34 C.F.R. § 99.3 (listing the categories of personally identifiable information).

56. See *Obersteller v. Flour Bluff Indep. Sch. Dist.*, 874 F. Supp. 146, 149 (S.D. Tex. 1994) (holding that letter to editor written by school secretary does not violate Buckley where student referred to is not named or otherwise identified); see also *Red & Black*, 427 S.E.2d at 261 (concluding that records of university disciplinary charges against fraternities and sororities for hazing violations are not Buckley records, and are thus subject to disclosure under state open records and meetings laws).

57. For a discussion of Buckley and other privacy-related concerns involved in computerized school (and other) records, see *Tremper & Small*, *supra* note 6, at 843.

58. See 34 C.F.R. § 99.3; *MR ex rel. RR v. Lincolnwood Bd. of Educ.*, 843 F. Supp. 1236, 1239 (N.D. Ill. 1994) (holding that videotape of special education student made by school without parent's consent was a record, and its admission in special education hearing did not violate Buckley Amendment), *aff'd*, *Rheinstrom v. Lincolnwood Bd. of Educ.*, 56 F.3d 67 (7th Cir. 1995).

59. See *Frasca v. Andrews*, 463 F. Supp. 1043, 1050 (E.D.N.Y. 1979) (concluding that Buckley did not provide protection for information contained in a student newspaper because such a source is independent of school records).

60. See, e.g., *Belanger v. Nashua*, 856 F. Supp. 40, 50 (D.N.H. 1994) (determining that juvenile court records in school attorney's file are Buckley records).

61. See 20 U.S.C. § 1232g(a)(1)(A) (1994); 34 C.F.R. § 99.12(a) (1996). A parent's request for a teacher's grade book could be handled in two ways. First, the teacher could provide access to only the information about that child. Second, a teacher could conceal

#### D. Non-Records Under Buckley

Four kinds of school documents are explicitly excluded as records under Buckley. First, records under Buckley do not include "sole possession notes."<sup>62</sup> Documents prepared by a single school employee (one who instructs, supervises, or administrates) or ancillary personnel to those employees, that are neither accessible to nor actually accessed by<sup>63</sup> anyone else<sup>64</sup> including other school employees, are sole possession notes. This exception can keep school counselor treatment notes or teacher notes confidential. Once the notes are accessed by a third party, however,<sup>65</sup> they lose their status as sole possession notes and become Buckley records. Notes created with the understanding that they will be accessible to a third party may also lose their status as sole possession notes, even if no third party has actually seen them.<sup>66</sup> Second, for students aged eighteen and over, or in higher education, records under Buckley do not encompass health treatment records accessible only to treatment staff, even if not sole possession notes.<sup>67</sup> Access is available, however, to a treatment professional of the student's choosing.<sup>68</sup>

Third, as a result of recent amendments to the statute and regulations, Buckley records do not include records created and maintained for law enforcement purposes by a law enforcement unit<sup>69</sup> within an education

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all the names except the child's and show the entire page, as long as the information about other students was not easily traceable to them.

To take this point one step further, if the names or any other identifying information for all students in the grade book were redacted, the grade book presumably could be shown to anyone without violating Buckley. *Cf. Mattie T. v. Johnston*, 74 F.R.D. 498, 501 (N.D. Miss. 1976) (finding that subpoenaed special education records with all identifying information redacted could be disclosed without violating Buckley).

62. See 20 U.S.C. § 1232g(a)(4)(B)(I); 34 C.F.R. § 99.3. Apparently, this is also the case under section 504 of the Rehabilitation Act. See *Millis (MA) Publ. Schs.*, 21 Indiv. Disabilities Educ. L. Rep. (LRP) 1064, 1066 (Sept. 1, 1994) (holding that teacher's notes of meeting between two students are not accessible under section 504 or the ADA).

63. See 34 C.F.R. § 99.3 (1996).

64. Access by a substitute teacher does not undo records' sole possession status.

65. This access includes that by a school administrator or the student.

66. See *Parents Against Abuse in Schs. v. Williamsport Area Sch. Dist.*, 594 A.2d 796, 803 (Pa. Commw. Ct. 1991) (holding that notes of school psychologists' interviews with students are not "sole possession notes" and may be accessed under Buckley where parents permitted interviews on the condition that they would receive a copy of the notes).

67. See 20 U.S.C. § 1232g(a)(4)(B)(iv)(1994); 34 C.F.R. § 99.3 (1996).

68. See 20 U.S.C. § 1232g(a)(4)(B)(iv); 34 C.F.R. § 99.3; *id.* § 99.10(f).

69. A law enforcement unit is one that is charged with enforcing laws, or maintaining school safety and security. See 34 C.F.R. § 99.8(a)(1). Law enforcement units may also perform other tasks such as investigations for school discipline purposes. See *id.* § 99.8(a)(2). Records created only for these non-law enforcement purposes, however, are Buckley records. See *id.* § 99.8(b)(2)(ii). Hence, school security staff, without any specific

agency.<sup>70</sup> This exception was created for campus police records at colleges and universities.<sup>71</sup> Similarly, however, if an elementary or secondary school district creates a separate security unit, that unit's records would be exempt. Security-related records maintained by other school employees, such as building administrators who are not part of the law enforcement unit, however, are records under Buckley.<sup>72</sup> Furthermore, school records in the possession of school law enforcement units do not lose their status as education records.<sup>73</sup> Fourth and finally, records created about former students, such as records of the achievement of alumni, are not Buckley records.<sup>74</sup>

There are several consequences of sole possession notes, treatment records, school security documents, and alumni records being excluded as Buckley records.<sup>75</sup> First, parents have no Buckley right to access exempted records. Second, if sole possession notes were shown to an outsider without parental permission, they would no longer be sole possession notes, and would become Buckley records, thus violating Buckley. Security documents presumably could be shown to outside persons, such as police, without parental consent.<sup>76</sup> Third, law enforcement records may be accessible to the public under state "open public records" laws.<sup>77</sup>

Whether test protocols and associated raw test data containing personally identifiable information must be released under Buckley is a matter of controversy. School employees are concerned with the integrity and security of the tests and copyright restrictions as well as ethical standards, which limit release only to qualified professionals. Parents may assert two theories in support of access. First, a test protocol may contain personally identifiable information, such as the student's responses to indi-

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law enforcement authority, can be subject to this exception. However, only records made at least partially for law enforcement purposes are not Buckley records. *See id.*

70. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8(b)(2).

71. *See* H.R. REP. 102-447, at 128 (1992).

72. *See* 34 C.F.R. § 99.8(b)(2).

73. *See id.* § 99.8(c)(2).

74. *See id.* § 99.3.

75. Note that although these records are not accessible via a Buckley request, they are subject to subpoena. Courts will consider, however, the student's privacy interests in deciding whether to permit subpoena of student records. *See, e.g.,* Rios v. Read, 73 F.R.D. 589 (E.D.N.Y. 1977); *see also infra* discussion at Part I.G.2.f. (discussing subpoena responses).

76. *See* Bauer v. Kincaid, 759 F. Supp. 575, 594 (W.D. Mo. 1991), *aff'd sub nom.* 964 F.2d 853 (8th Cir. 1992) (holding that if Buckley did not permit public access of campus law enforcement unit records, it would be unconstitutional).

77. *See id.* (holding university law enforcement records must be disclosed under state public records law).

vidual items. Second, even if it contains no personally identifiable information, the protocol may serve to explain the resulting test scores. Explanations and interpretations of records are part of Buckley access rights.<sup>78</sup> Regarding the release of test protocols, a recent Office of Special Education Programs opinion letter indicated that protocols without personally identifiable information need not be released under Buckley.<sup>79</sup> At least one court, however, has required their release.<sup>80</sup>

### E. "Parents" Under Buckley

Buckley gives rights to "parents." It defines "parents" broadly to include caretakers who are not biological parents, as well as adult students.<sup>81</sup> Under Buckley, "parent" includes any parent, including non-custodial parents, unless there is a court order or law to the contrary.<sup>82</sup> In addition, persons "acting as a parent in the absence of a [natural] parent," such as a guardian, stepparent, or grandparent are included.<sup>83</sup> Thus, one divorced parent cannot prevent the other parent from accessing a child's records without a court order, despite the wishes or beliefs of some divorced custodial parents.<sup>84</sup> A school, however, has no Buckley obligation to provide immediate access, and could arrange access for the noncustodial parent a few days later, providing the custodial parent time to obtain a court order.

Buckley parent rights are transferred to students at the age of eighteen, or when they enroll in a higher education institution.<sup>85</sup> Thus, college and

78. See 34 C.F.R. § 99.10(c) (1996).

79. See Letter to MacDonald, 20 Indivs. Disabilities Educ. L. Rep. (LRP) 1159, 1160 (Oct. 25, 1993) (also noting that test information such as answer sheets with personally identifiable information would be Buckley records subject to release).

80. See *John K. v. Board of Educ.*, 504 N.E.2d 797, 804 (Ill. App. Ct. 1987) (requiring release of raw Rorschach test data). The Office For Civil Rights (OCR) also takes the position that test protocols can be records subject to access. See, e.g., *St. Charles (IL.) Community Sch. Dist. #303*, 17 Educ. Handicapped L. Rep. (LRP) 18, 20-21 (1990); *Allegheny (PA) Intermediate Unit*, 20 Indivs. Disabilities Educ. L. Rep. (LRP) 563, 573 (1993). One possible way to comply with professional obligations, and also with Buckley, would be to release test protocols to a qualified professional of the parent's choosing, such as the parent's independent evaluator in a special education dispute.

81. This Article uses "parent" to refer to persons with Buckley rights, including adult and college students.

82. See 34 C.F.R. §§ 99.3, 99.4.

83. *Id.* § 99.3.

84. See *Page v. Rotterdam-Mohonasen Cent. Sch. Dist.*, 441 N.Y.S.2d 323, 325 (Sup. Ct. 1981) (allowing a non-custodial parent access to school records after school refused access according to wishes of custodial parent).

85. See 20 U.S.C. § 1232g(d) (1994); 34 C.F.R. §§ 99.3, 99.5(a) (1996). Thus, when a student accelerates her education and enters college at a young age, her parents' Buckley rights transfer to her. See, e.g., Lynn Daggett Pollins, *The Effects of Acceleration on the Social and Emotional Development of Gifted Students*, in *ACADEMIC PRECOCITY: ASPECTS*

adult students have the right to access their own records. Parents of these students lose their Buckley rights. If an adult or higher education student is declared as a dependent on a parent's income tax returns, however, the school may disclose records to the parent without student consent, but it is not required to do so.<sup>86</sup>

Schools may choose to give students additional rights, and may disclose records to them without parental consent.<sup>87</sup> If a student has attended one component of a school, however, she does not have Buckley rights to access records of other components of a school.<sup>88</sup> For example, an undergraduate student who applies to her university's law school does not have the right to see her law school records until she attends the law school.

#### F. Right to Access Records Under Buckley

Buckley does not require schools to send parents notices of specific records created about their child. It does give parents the right to, upon request, access their child's records within a "reasonable" time, and no later than forty-five days after a parent's request.<sup>89</sup> Access may not be refused because a parent recently inspected a child's records.<sup>90</sup> No records may be destroyed while a request for access is pending.<sup>91</sup> Buckley gives no other persons the *right* to access student records.

##### 1. Copies of Records

Parents do not have a general right to copies of their child's records, nor to free copies if the school makes a copy available. Parents are entitled to a copy of their child's records only if denying the copy "would effectively prevent the parent . . . from exercising the right to inspect and review the records."<sup>92</sup> Parents have a right to a free copy of records only

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OF ITS DEVELOPMENT 160-78 (Camilla Persson Benbow & Julian C. Stanley eds., 1983) (examining mental health of 21 students in college at age 15 or younger).

86. See 20 U.S.C. § 1232g(b)(1)(H).

87. See 34 C.F.R. § 99.5(b).

88. See *id.* § 99.5(c).

89. See 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.10(b). A parent's refusal to pay a reasonable copy fee may excuse a delay. *Cf.* Nantucket (MA) Pub. Sch., 23 Indiv. Disabilities Educ. L. Rep. (LRP) 117, 118 (June 28, 1995) (finding that section 504 was not violated when school delay in providing school budget records was due to parent's failure to pay copy fee).

90. See Huntsville City (AL) Sch. Dist., 24 Indiv. Disabilities Educ. L. Rep. (LRP) 82, 83 (Feb. 23, 1996) (Buckley requires parent access "no matter how many times she may ask for access").

91. See 34 C.F.R. § 99.10(e).

92. *Id.* § 99.10(d). See Huntsville, 24 Indiv. Disabilities Educ. L. Rep. (LRP) at 83. Presumably, this would be the case when a parent lives too far away to go to school to view records.

if charging a copy fee would “effectively prevent” access.<sup>93</sup> In other cases, schools may charge parents a modest copy fee, as well as fees for secretarial time and postage. This fee may not include costs to search for and retrieve the records.<sup>94</sup>

## 2. Interpretations of Records

Parents have the right to an interpretation of their child’s record. Access includes the right to “reasonable” explanation and interpretation of records.<sup>95</sup> For example, a parent has the right to a conference with a teacher about a report card grade.

## 3. Letters of Recommendation—Waiver of Access

Students in, or applicants to, higher education institutions can forego access to letters of recommendation for admission, employment, or honors, by signing a waiver before the letter is written.<sup>96</sup> If such a letter is written without a signed waiver, it is a record that can be accessed by the student under Buckley. The student may obtain a list of persons who wrote recommendation letters.<sup>97</sup> Waivers can be revoked prospectively<sup>98</sup> and cannot be required as a condition of admission, financial aid, or other benefits or services.<sup>99</sup> Access is deemed to be waived for recommendations prior to 1975.<sup>100</sup> This exception applies only to post-secondary students.<sup>101</sup> Thus, access to high school recommendations is available and cannot be waived.

## 4. Parent Financial Records

For students in higher education institutions, access rights do not include access to parent financial records.<sup>102</sup>

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93. See 34 C.F.R. §§ 99.10(d), 99.11(a).

94. See *id.* § 99.11(b).

95. See *id.* § 99.10(c).

96. See 20 U.S.C. § 1232g(a)(1)(C)(iii),(D); 34 C.F.R. § 99.12(b)(3).

97. See 20 U.S.C. § 1232g(a)(1)(D); 34 C.F.R. § 99.12(c)(2)(i).

98. See 34 C.F.R. § 99.12(c)(3). The revocation must be written. See *id.*

99. See 20 U.S.C. § 1232g(a)(1)(D); 34 C.F.R. § 99.12(c)(1)(i).

100. See 20 U.S.C. § 1232g(a)(1)(C)(ii); 34 C.F.R. § 99.12(b)(2).

101. See 34 C.F.R. § 99.12(b).

102. See 20 U.S.C. § 1232g(a)(1)(C)(i); 34 C.F.R. § 99.12 (b)(1). Because this rule applies only to students in higher education institutions, students age 18 and over in secondary schools could view their parents’ financial records. While public secondary schools are unlikely to have such data, private schools requiring tuition and offering financial aid do. Thus, for example, an eighteen-year-old prep school student could view her parents’ financial records kept at the prep school.

### G. Confidentiality of Records as to Third Parties

In general, third parties cannot access student records without written parental consent.<sup>103</sup> It is equally prohibited by Buckley to orally disclose information contained in student records.<sup>104</sup>

#### 1. Requirements for Valid Consent Forms

Under most circumstances, written and dated consent of a parent is required to release student records.<sup>105</sup> The consent must specify the records to be released, the person to whom they are to be released, and the reason for the release.<sup>106</sup> When records are released pursuant to written consent, the parents and student are entitled to receive a copy of the records upon request.<sup>107</sup>

#### 2. Exceptions to the Written Consent Requirement

The many exceptions to the consent requirement are described in detail at 34 C.F.R. § 99.31. Schools may disclose student records without consent in several circumstances, but they are not required to do so.<sup>108</sup>

##### a. Disclosure to Other Officials/Employees of the Educational Agency with a Legitimate Educational Interest

Schools may make internal disclosures of records to other officials/employees with a "legitimate educational interest." It is the school's responsibility to determine when there is a legitimate educational reason for inspecting student records.<sup>109</sup> For example, a teacher concerned about a student's performance may look at that student's standardized test scores without consent. A teacher who simply is curious to know which students have high intelligence quotients (IQs), however, likely would not have a legitimate educational interest in reviewing those scores.<sup>110</sup> A school's

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103. See 20 U.S.C. § 1232g(b)(1), (2).

104. See 34 C.F.R. § 99.3 (defining "disclosure" as including the oral or other release of information contained in records).

105. See 20 U.S.C. § 1232g(b)(2); 34 C.F.R. § 99.30(a).

106. See 20 U.S.C. § 1232g(b)(2); 34 C.F.R. § 99.30(b).

107. See 34 C.F.R. § 99.30(c). Normally, a school may charge a fee for this copy.

108. See 34 C.F.R. § 99.31(b).

109. See 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1). Pursuant to 1994 amendments, the child's own educational interests must be considered. See 20 U.S.C. § 1232g(b)(1)(A).

110. Similarly, a university's use of social security numbers on student identification cards used for the campus post office and meal services may not be permitted under the "legitimate educational interest" exception. *Krebs v. Rutgers*, 797 F. Supp. 1246, 1259 (D.N.J. 1992) (enjoining this practice preliminarily).



attorney can access student records under this exception.<sup>111</sup> Moreover, when transmitting documents to persons with legitimate educational interests, care must be taken that the records are not accessible to others.<sup>112</sup> This exception cannot be used to disclose records to non-school employees or officials, though they may have a legitimate interest in the student.<sup>113</sup>

Language newly added to Buckley provides that teachers and school officials who have a legitimate educational interest in the behavior of a student who has been disciplined for dangerous conduct affecting others, may know about disciplinary actions and other related "appropriate information" about the student.<sup>114</sup>

*b. Disclosure to Other Educational Agencies*

Records may be sent to a school in which the student seeks to enroll, or in which the student is also enrolled or receiving services,<sup>115</sup> with a "reasonable attempt" to provide advance notice to the parents unless they have consented, or if the school's annual notice to parents regarding student records includes a statement that student records are forwarded in this manner.<sup>116</sup> Parents may request a copy of the records,<sup>117</sup> and may ask for a hearing to challenge the records.<sup>118</sup> Their consent is not re-

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111. See *Aufox v. Board of Educ.*, 588 N.E.2d 316, 319 (Ill. App. Ct. 1992); Letter to Ms. Nancy J. Diehl, Program Director, Support and Training for Exceptional Parents, 22 Indivs. Disabilities Educ. L. Rep. (LRP) 734, 736 (Oct. 1, 1993). As a corollary, records about a child in her school's attorney's possession which are not privileged are subject to parent access under Buckley. See *Belanger v. Nashua*, 856 F. Supp. 40, 48 (D.N.H. 1994).

112. Cf. *Sieck v. Oak Park-River Forest High Sch. Dist.*, 807 F. Supp. 73, 77 (N.D. Ill. 1992) (stating that the practice of having students deliver unsealed student records to teachers, and of giving students access to staff mailboxes, where records may be delivered, may violate state student records law).

113. *Irvine (CA) Unified Sch. Dist.*, 23 Indivs. Disabilities Educ. L. Rep. (LRP) 1077, 1078 (Feb. 20, 1996) (deciding that a local school's release of student's records to his doctor, in order to obtain advice about handling the child's medical condition, violated Buckley).

114. See 20 U.S.C. § 1232g(h) (1994). Disciplinary actions and proceedings are defined at 34 C.F.R. § 99.3 (1996), and include investigations as well as actual sanctions. A school, for example, could disclose results of an investigation not leading to any actual sanctions.

115. See 20 U.S.C. § 1232g(b)(1)(B); 34 C.F.R. § 99.34(b).

116. See 34 C.F.R. § 99.34(a).

117. See *id.* § 99.34(a)(2). A fee may be charged for this copy.

118. See 20 U.S.C. § 1232g(b)(1)(B); 34 C.F.R. § 99.34(a)(3). Some states have additional requirements. See, e.g., WASH. REV. CODE. ANN. § 28A.225.330 (West Supp. 1997).

quired.<sup>119</sup> Further, Buckley does not require schools to send records to a new school.<sup>120</sup>

*c. Disclosure of Directory Information*

Relatively less private information may be released without parental consent, including the following categories: name, address, phone number, date and place of birth, educational focus (major), participation in school activities and sports, height and weight of those on athletic teams, dates of attendance, degrees and awards, and the most recent school attended.<sup>121</sup> Directory information must be designated by the school,<sup>122</sup> and parents must have an opportunity to object to the release of some or all directory information about their child within a specified

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119. See *Alexander S. v. Boyd*, 876 F. Supp. 773, 801-02 (D.S.C. 1995) (detailing problems in providing special education when Buckley was erroneously interpreted to require parent consent before student records were forwarded to educational authorities for incarcerated students).

120. See Letter to Ms. Jeanne Kincaid, Hearings Officer/Legal Specialist, Oregon Dep't of Educ., 21 *Indivs. Disabilities Educ. L. Rep. (LRP)* 271, 272 (1989). State law, however, may require schools to send records to a new school. See, e.g., *WASH. REV. CODE ANN.* § 28A.225.330(3) (West Supp. 1997) (requiring school to send records within two days of receiving a record request from a new school).

121. See 20 U.S.C. § 1232g(a)(5)(A); 34 C.F.R. § 99.3.

122. See 34 C.F.R. § 99.37(a).

deadline.<sup>123</sup> Directory information concerning former students may be released without such notice.<sup>124</sup>

*d. Disclosure to Juvenile Justice Authorities*

A new statutory provision allows the release of records to juvenile justice authorities without consent for the purpose of effectively serving a child prior to adjudication.<sup>125</sup>

*e. Disclosure Under Federal Grand Jury or Law Enforcement Subpoena*

Another recent amendment modifies the rules that allow schools to respond to subpoenas of student records. In the case of law enforcement subpoenas, the new language now states that for good cause, the issuing court or agency shall or may order the school not to disclose the existence or contents of the subpoena or the records released pursuant to the subpoena.<sup>126</sup>

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123. See 20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. §§ 99.3, 99.37(a)(2), (3). Schools that have directory information policies may face requests for large mailing lists of students for commercial purposes. See, e.g., *Oregon County R-IV Sch. Dist. v. LeMon*, 739 S.W.2d 553, 558-59 (Mo. Ct. App. 1987) (explaining that Buckley does not bar disclosure of names, addresses, and phone numbers of high school students properly designated as directory information by school; disclosure was required under state open records law); *Krauss v. Nassau Community College*, 469 N.Y.S.2d 553, 554 (N.Y. Sup. Ct. 1983) (explaining that Buckley does not permit release of a list of all enrolled students' names and addresses where such information has not been designated by school as directory information); *Kestenbaum v. Michigan State Univ.*, 294 N.W.2d 228, 233 (Mich. Ct. App. 1980), *aff'd*, 327 N.W.2d 783 (Mich. 1982) (holding that Buckley does not prohibit release of computer tape with names, addresses, and phone numbers of university's 44,000 students, pursuant to valid directory information policy).

One court appeared confused about directory information, ordering disclosure of a daily attendance list of students in a class where a student was injured. See *Staub v. East Greenbush Sch. Dist.*, 491 N.Y.S.2d 87, 87-88 (N.Y. Sup. Ct. 1985). This information was relevant to identification of possible witnesses for the personal injury claim. See *id.* However, because the list included information about attendance and enrollment in a specific class, it should not have been labeled as "directory."

Finally, state law may limit disclosure of directory information. See, e.g., WASH. REV. CODE ANN. § 42.17.260(9) (West Supp. 1997) (creating exception to access rights under state open records law for requests for mailing lists for commercial purposes unless "specifically authorized or directed by law").

124. See 34 C.F.R. § 99.37(b).

125. See 20 U.S.C. § 1232g(b)(1)(E). For a case detailing problems in providing education to incarcerated students, see *Alexander S. v. Boyd*, 876 F. Supp. 773 (D.S.C. 1995).

126. See 20 U.S.C. § 1232g(b)(1)(J).

*f. Disclosures Under Other Subpoena or Court Order*

Responding to any other subpoena or court order, student information may be released after a "reasonable effort" to provide notice to the parents before complying with the subpoena.<sup>127</sup> To avoid excessive or improper subpoenas of student records, state law may provide that the school can fulfill its obligation to respond to a subpoena by submitting records under seal so they will not be disclosed to the subpoenaing party until review by the court.<sup>128</sup> Courts asked to enforce subpoenas first review the records to ensure relevancy,<sup>129</sup> and then balance the student's privacy interest with the subpoenaing party's need for the records.<sup>130</sup> Buckley contains no exception for providing records to law enforcement authorities.<sup>131</sup> Absent an emergency, schools cannot provide non-directory student information to police without a subpoena.<sup>132</sup>

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127. See *id.* § 1232g(b)(2)(B); see also *Francois v. University of the District of Columbia*, 788 F. Supp. 31 (D.D.C. 1992) (addressing Buckley and section 1983 claims filed by student because school registrar complied with subpoena and brought educational records to student's trial on drug charges without providing advance notice to student), *aff'd*, 1993 U.S. App. LEXIS 5051 (D.C. Cir. 1993); 34 C.F.R. § 99.31(a)(9)(1996).

128. See, e.g., *CONN. GEN. STAT. § 10-15b* (1996).

129. See, e.g., *Reeg v. Fetzer*, 78 F.R.D. 34, 37 (W.D. Okla. 1976) (holding that medical school records of defendant physician were not relevant to malpractice claim); *State v. James*, 560 A.2d 426, 439 (Conn. 1989) (finding that subpoenaed school records of witnesses in criminal trial were not relevant, and therefore, trial court's refusal to conduct in camera review of them was proper).

130. See, e.g., *Zaal v. State*, 602 A.2d 1247 (Md. App. 1992) (adhering to a balancing test in which the court weighed the criminal defendant's confrontation and other constitutional rights against the student's privacy rights in the subpoenaed records); *Rios v. Read*, 73 F.R.D. 589, 598 (E.D.N.Y. 1977) (explaining that a party seeking access to student records bears a heavier burden than one seeking business records); *State v. Bruno*, 673 A.2d 1117, 1126 (Conn. 1996) (denying defense attorney access to special education records of witnesses where special education history of witnesses did not bear on their testimonial capacity); *State v. Birdsall*, 568 P.2d 1094, 1096 (Ariz. App. Ct. 1977) (allowing disclosure of student records of deceased fourteen-year-old victim of defendant's alleged assault where evidence of victims's aggressiveness was relevant to defendant's self-defense claim, but limiting disclosure to records concerning aggressiveness); *People v. Manzanillo*, 546 N.Y.S.2d 954, 957 (N.Y. Crim. Ct. 1989) (denying defendant's request for discovery of alleged sexual abuse victim's special education records, absent showing of relevance or materiality, but proceeding with in camera review of records by court); *cf. Krauss v. Nassau Community College*, 469 N.Y.S.2d 553, 555 (N.Y. Sup. Ct. 1983) (refusing to order disclosure of non-directory list of student names and addresses absent showing of need); *Staub v. East Greenbush Sch. Dist.*, 491 N.Y.S.2d 87, 87-88 (N.Y. Sup. Ct. 1985) (labeling information improperly as directory).

131. Schools regularly report to the author that police officers request information on students without subpoenas. The Department of Education has explicitly stated that Buckley does not permit access by police to student records without a court order or consent. See *Family Education Rights and Privacy*, 60 Fed. Reg. 3464, 3467 (1995).

132. If a school has a separate security unit, that unit's law enforcement records are not Buckley records, and potentially could be accessed by police. Schools need to urge police to get a subpoena for student records, which is not particularly difficult to obtain. In many

*g. Release to Federal and State Authorities for Audit and Evaluation*

Student records may be released to certain federal and state authorities for audit (e.g., special education compliance) and evaluation.<sup>133</sup> Except for the United States Comptroller General, or as specifically authorized by federal law,<sup>134</sup> this exception is limited to educational authorities, and does not apply to other federal and state governmental agencies.<sup>135</sup> Generally, when records are disclosed under this exception, the identity of students and parents must be accessible only to representatives of such organizations, and the records must be destroyed when no longer needed.<sup>136</sup> Moreover, federal and other agency audits and evaluations are subject to the Federal Privacy Act.<sup>137</sup>

*h. Disclosure Release for Student Financial Aid Assessment*

Student records may be released as needed for the application or receipt of financial aid.<sup>138</sup>

*i. Disclosure for Educational Organizations Studying Test Development, Student Aid, or Instructional Improvement*<sup>139</sup>

When disclosures are made for this purpose, identity of students and parents must be accessible only to representatives of educational organizations, and the records must be destroyed when no longer needed.<sup>140</sup>

*j. Disclosure to Accrediting Organizations*

Student records may be released to accrediting organizations to accomplish the accrediting function.<sup>141</sup>

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states, an attorney can sign subpoenas in her capacity as an officer of the court. In Washington, a statute specifically requires schools to cooperate with law enforcement authorities to the extent permitted by *Buckley*. See WASH. REV. CODE ANN. § 28A.600.475 (West Supp. 1997) (emphasis added).

133. See 20 U.S.C. §§ 1232g(b)(1)(C), (b)(3), (b)(5) (1994); 34 C.F.R. §§ 99.31(a)(3), 99.35 (1996).

134. See 34 C.F.R. § 99.35(c)(2).

135. See *Board of Educ. v. Regan*, 500 N.Y.S.2d 978, 980 (N.Y. Sup. Ct. 1986) (explaining that under this exception, the state comptroller, who is not an educational authority, could not access a list of students eligible for city dropout prevention program).

136. See 34 C.F.R. § 99.35(b)(2).

137. See § 300.576 (requiring the Federal Department of Education to comply with the Federal Privacy Act with regard to information about special education students).

138. See 20 U.S.C. § 1232g(b)(1)(D); 34 C.F.R. § 99.31(4).

139. See 20 U.S.C. § 1232g(b)(1)(F); 34 C.F.R. § 99.31(a)(6).

140. See 20 U.S.C. § 1232g(b)(1)(F).

141. See *id.* § 1232g(b)(1)(G); 34 C.F.R. § 99.31(a)(7).

*k. Parents of Dependent Students*

Student records may be released to parents of students claimed as deductions for federal income tax purposes.<sup>142</sup>

*l. Disclosure to Students*

Records may be released directly to students although they are too young to have access rights.<sup>143</sup>

*m. Disclosure in the Event of Health or Safety Emergency*

Student records may be released to "appropriate persons"<sup>144</sup> as necessary to protect the health or safety of the student, or others. This exception is narrowly interpreted.<sup>145</sup>

*n. Disclosure to Alleged Victims of Violent Crimes*

Alleged victims of violent crimes may be told of the results of any disciplinary proceedings against the alleged perpetrator.<sup>146</sup> This exception only applies to higher education institutions.

*3. Required Written Log of Disclosure Requests*

When schools release non-directory information to persons other than the parents, student, or other employees in the school system without written parental consent, the school must maintain a written log of access to the student's records, as well as requests for disclosure that were declined.<sup>147</sup> The access log must be kept with the records as long as they exist.<sup>148</sup> For each instance of access or request for access, the log must specify the name of the party to whom the records were released, their legitimate interest in the records, and any permitted redisclosures.<sup>149</sup> Availability of the log is limited to parents, custodians of records and

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142. See 20 U.S.C. § 1232g(b)(1)(H); 34 C.F.R. § 99.31(a)(8).

143. See 34 C.F.R. §§ 99.5(b), 99.31(a)(12).

144. See 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. § 99.36(a).

145. See, e.g., Irvine (CA) Unified Sch. Dist., 23 Indiv. Disabilities Educ. L. Rep. (LRP) 1077, 1078 (Feb. 20, 1996) (explaining that a student's non-urgent medical condition and associated safety concerns are not emergencies justifying sharing records with student's doctor without parental consent).

146. See 20 U.S.C. § 1232g(b)(6); 34 C.F.R. § 99.31(a)(13); see also 34 C.F.R. § 668.47(a)(12)(vi)(B)(1995) (providing that "[b]oth the accuser and the accused shall be informed of the outcome of any institutional disciplinary proceeding brought alleging a sex offense" without violating Buckley). Crimes of violence are defined at 18 U.S.C. § 16 (1994).

147. See 20 U.S.C. § 1232g(b)(4)(A); 34 C.F.R. § 99.32(d).

148. See 20 U.S.C. § 1232g(b)(4)(A); 34 C.F.R. § 99.32(a)(2).

149. See 20 U.S.C. § 1232g(b)(4)(A); 34 C.F.R. § 99.32(a)(3), (b).

their assistants, and other educational authorities for audit and evaluation purposes.<sup>150</sup>

#### 4. *Obligations of Persons to Whom Records are Disclosed*

When records are released to an outsider, the person receiving the records must be notified of their obligation not to disclose the records to anyone without written parental consent, except as permitted by the statute.<sup>151</sup> The receiver of the records must maintain his or her own written access log.<sup>152</sup> If the receiver violates Buckley with regard to the released records, the releasing school must deny further access to the receiver for at least five years.<sup>153</sup>

#### 5. *Disclosure of Records of Unnamed Students*

Release of information without a student's name may violate Buckley if the information is "easily traceable" to a student.<sup>154</sup> For example, in a small town with one blind student, telling the local paper about the costs of that student's special education program would likely violate that student's Buckley Amendment rights.<sup>155</sup>

### H. *Challenges to Records*

Parents may ask the school to amend records they believe are inaccurate, misleading, or invade the privacy rights of students.<sup>156</sup> Hearings are available to challenge the accuracy of recorded grades,<sup>157</sup> but not the fairness of grades.<sup>158</sup> The school must respond to such requests "within a

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150. See 20 U.S.C. § 1232g(b)(4)(A); 34 C.F.R. § 99.32(c).

151. See 20 U.S.C. § 1232g(b)(4)(B); 34 C.F.R. § 99.33.

152. See 20 U.S.C. § 1232g(b)(4)(B); 34 C.F.R. § 99.33.

153. See 20 U.S.C. § 1232g(b)(4)(B).

154. See e.g., 34 C.F.R. § 99.3; South Dakota, 20 Indivs. Disabled Educ. L. Rep. (LRP) 105, 106 (May 14, 1993) (holding that a school's disclosure to newspaper of details of parents' special education reimbursement for unnamed student placement violates Buckley).

155. Cf. *Carey v. Maine Sch. Admin. Dist.*, 754 F. Supp. 906, 923 (D. Me. 1990) (claiming that a school violated Buckley by providing media with confidential information about unnamed special education student who brought automatic weapon to school).

156. See 20 U.S.C. § 1232g(a)(2); 34 C.F.R. § 99.20(a). Former language allowing for challenges of records invading rights other than privacy was deleted in 1994.

157. See *Lewin v. Medical College of Hampton Roads*, 910 F. Supp. 1161, 1169 (E.D. Va. 1996) (discussing FERPA's purpose as preventing ministerial inaccuracies).

158. See *Tarka v. Cunningham*, 917 F.2d 890, 891-92 (5th Cir. 1990); see also 140 CONG. REC. S10,291 (daily ed. Aug. 2, 1994) (statement of Senator Grassley) (stating that Buckley hearings may not be used to challenge appropriateness of individual educational plans (IEP)); 120 CONG. REC. S39,862 (daily ed. Dec. 13, 1974) (issuing joint statement in support of Buckley and asserting that a Buckley hearing may be used to challenge an improperly recorded grade, but not to contest fairness of the grade assigned to student's performance).

reasonable time.”<sup>159</sup> If the school does not agree to amend the records, it must inform the parent of her right to seek an internal hearing to challenge records.<sup>160</sup> The hearing officer may be a school employee not “direct[ly] interest[ed] in the outcome.”<sup>161</sup> The hearing must be held within a reasonable time of the request.<sup>162</sup> Written notice to the parent that is “reasonably in advance”<sup>163</sup> and describes the particulars of the hearing, is required.<sup>164</sup> Parents must be given a “full and fair opportunity to present evidence,” and allowed representation by an attorney or other person at the parents’ own expense.<sup>165</sup> The hearing must result in a written decision, issued “within a reasonable period of time after the hearing.”<sup>166</sup> The outcome “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.”<sup>167</sup>

If the parent is successful at the hearing, the school must amend the records and inform the parent in writing.<sup>168</sup> If the school prevails at the hearing, the decision is final and there is no provision for appeal. The parent, however, may place a statement in her child’s records explaining what she finds to be inaccurate, misleading, or violative of privacy rights.<sup>169</sup> The statement becomes part of the child’s records, and is released whenever the challenged records are released.<sup>170</sup>

### I. Written Student Records Policy

Former regulations required schools to have a written student records policy.<sup>171</sup> As of December 1996, a written student records policy is no longer required, on the theory that the annual parent notice is a sufficient statement of the school’s Buckley policies.<sup>172</sup>

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159. See 34 C.F.R. § 99.20(b)(1996).

160. See *id.* § 99.20(c).

161. *Id.* § 99.22(c).

162. See *id.* § 99.22(a).

163. See *id.* § 99.22(b).

164. See *id.* § 99.22(b) (stating that notice must include the date, time and location of the hearing).

165. *Id.* § 99.22(d).

166. *Id.* § 99.22(e).

167. *Id.* § 99.22(f).

168. See *id.* § 99.21(b)(1).

169. See 20 U.S.C. § 1232g(a)(2)(1994); 34 C.F.R. § 99.21(b)(2).

170. See 34 C.F.R. § 99.21(c).

171. See 34 C.F.R. § 99.6, *repealed by* Family Educational Rights and Privacy, 61 Fed. Reg. 59,292, 59,295 (1996).

172. See Family Educational Rights and Privacy, 61 Fed. Reg. 59,292, 59,295 (1996) (removing former 34 C.F.R. § 99.6).



### J. Notice To Parents

Buckley requires schools to notify parents of current students annually and “effectively” of their Buckley rights.<sup>173</sup> Notice to former students is not required. Parents who have a first language other than English must be “effectively notif[ied].”<sup>174</sup> The parental notice must include their right to: (1) inspect and review their child’s records, (2) challenge records, (3) consent before records are released to third parties, except as provided by the Act, and (4) file a complaint with the United States Department of Education.<sup>175</sup>

Although not specifically required as part of the parental notice, if a school intends to disclose certain information in a directory, the annual notification should note the disclosure, list the types of directory information, and explain the deadline and process for parental objection.<sup>176</sup>

### K. Miscellaneous Conflict Requirements

If a school cannot comply with Buckley because of a conflict with state or local law, it must notify the Family Policy Compliance Office (FPC Office) within forty-five days.<sup>177</sup> Buckley does not require any action by the FPC Office when a conflict is reported, nor does it specify what a school should do in the event of a conflict. One court and the FPC office have suggested that Buckley does not preempt state laws that conflict with it.<sup>178</sup>

### L. Enforcement of Buckley

Buckley itself contains two administrative enforcement provisions. First, a complaint may be made to a federal office which may investigate and, if a violation is found, attempt to informally and voluntarily resolve it. Second, the federal office is empowered, in limited cases, to withhold federal education funds from a school. Attempts to create a private cause of action for Buckley violations have been singularly unsuccessful.

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173. See 20 U.S.C. § 1232g(e) (language added in 1994 to require effective notification); 34 C.F.R. §§ 99.7(a), (c) (notice must be by means “reasonably likely to inform”).

174. See 34 C.F.R. § 99.7(d).

175. *Id.* § 99.7(a) (listing parent notice provisions).

176. Parents must receive this notice in some format. See *id.* § 99.7(c).

177. See *id.* § 99.61.

178. See *Maynard v. Greater Hoyt Sch. Dist.*, 876 F. Supp. 1104, 1108 (D.S.D. 1995); *South Dakota, 20 Indivs. Disabilities Educ. L. Rep. (LRP) 105, 106* (May 14, 1993).

## 1. Enforcement by the Family Policy Compliance Office

### a. FPC Office Complaints

Persons who believe their Buckley rights have been violated may file a complaint with the FPC Office.<sup>179</sup> Complaints must be filed within 180 days of the alleged violation, or at the time the complainant knew or reasonably should have known of the violation, unless an extension of time is granted by the FPC Office.<sup>180</sup> The FPC Office notifies the complainant if the complaint is untimely or otherwise defective.<sup>181</sup>

When a complaint is received, the FPC Office notifies the school,<sup>182</sup> although providing an actual copy of the complaint is not required.<sup>183</sup> The FPC Office may request a written response.<sup>184</sup> The parties may be permitted to provide additional information to the FPC Office.<sup>185</sup> The FPC Office will then investigate the complaint,<sup>186</sup> make a finding, and notify the complainant and the school in writing of its reasoning.<sup>187</sup> There is no hearing.<sup>188</sup> Buckley provides no deadline for processing complaints, and resolution can take many months.<sup>189</sup>

If the FPC Office finds that the school has violated the statute, it is authorized only to seek voluntary compliance from the offending school.<sup>190</sup> The FPC Office may ask the school to meet certain conditions,

179. See 20 U.S.C. § 1232g(g)(1994); 34 C.F.R. § 99.64(a). The FPC Office's address is: U.S. Department of Education, Washington, D.C., 20202-4605. See 34 C.F.R. § 99.63.

180. See 34 C.F.R. § 99.64(c), (d).

181. See *id.* § 99.65(b).

182. See *id.* § 99.65(a). There is no requirement that schools be promptly informed of complaints against them. See, e.g., Huntsville City (AL) Sch. Dist., 24 Indivs. Disabled Educ. L. Rep. (LRP) 82, 82 (Feb. 23, 1996) (noting a four month interval between complaint and notice of complaint to school).

183. Cf. 34 C.F.R. § 99.65(a)(1) (requiring only notice to the schools of "the substance of the alleged violation").

184. See *id.* § 99.62 (giving the FPC Office authority to require schools to provide information to resolve complaints). Buckley provides no deadline for response, which can take months. See, e.g., Irvine (CA) Unified Sch. Dist., 23 Indivs. Disabled Educ. L. Rep. (LRP) 1077, 1077 (Feb. 20, 1996) (allowing seven months between notice of complaint to school and school's response).

185. See 34 C.F.R. § 99.66(a).

186. See *id.* § 99.64(b).

187. See *id.* § 99.66(b).

188. Note, however, that Buckley requires schools to conduct hearings where records are challenged. See *supra* Part I.H. (noting Buckley rights when challenges to student record arise). Also note that the statute refers to adjudication of complaints, and limits the locations for hearings involving school sanctions by the Department of Education. See 20 U.S.C. § 1232g(g) (1994).

189. See, e.g., Huntsville City (AL) Sch. Dist., 24 Indivs. Disabled Educ. L. Rep. (LRP) 82 (Feb. 23, 1996) (finding Buckley violation nearly two years after parent's letter claiming school denied access to daughter's records).

190. See 20 U.S.C. § 1232g(f); 34 C.F.R. § 99.66(c)(2).

such as removing records, or may urge the school to follow the law to resolve the complaint.<sup>191</sup> If the complaint is resolved, the parties are so notified.<sup>192</sup>

*b. Termination of Federal Education Funding*

In extreme cases, where there is a pattern of violations<sup>193</sup> and voluntary compliance has not been achieved, the FPC Office may initiate proceedings to withdraw federal funds from the school.<sup>194</sup> Refusing to provide records as violative of Buckley is not sufficient grounds to withhold federal funds,<sup>195</sup> and a school is entitled to a hearing before funds are withheld.<sup>196</sup> Apparently, the FPC Office has never attempted to withdraw federal funds based on Buckley violations.<sup>197</sup> The statute and regulations establish a Review Board, but do not assign it any responsibilities.

Several courts have noted the lack of remedies Buckley provides to aggrieved persons. One court noted that "neither the statute nor the regulations gives an explicit remedy that would be beneficial to the plaintiff."<sup>198</sup> Another court used sharper language, finding that "[t]he complete inadequacy of the Secretary's regulations, coupled with the statute's failure to require more complete relief for aggrieved individuals," means that requiring exhaustion of Buckley remedies as a prerequisite to a § 1983 claim "would have the effect of 'exhausting' the complainant without any meaningful possibility of enforcement."<sup>199</sup>

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191. See 34 C.F.R. § 99.66(c); see also Huntsville, 24 Indivs. Disabled Educ. L. Rep. (LRP) at 83 (requesting assurance from school of compliance, and notice to staff of obligations in order to resolve complaint); Irvine (CA) Unified Sch. Dist., 23 Indivs. Disabilities Educ. L. Rep. (LRP) 1077, 1078 (Feb. 20, 1996) (same).

192. See 34 C.F.R. § 99.67(b)(1996).

193. See 20 U.S.C. § 1232g(a)(1)(A) (providing circumstances when institutions are suspected of violative policies).

194. See 20 U.S.C. § 1232g(b)(2), (f); 34 C.F.R. §§ 99.62-99.67.

195. See 20 U.S.C. § 1232i(c). There is an exception to this rule for refusal to provide records to financial aid authorities. See *id.*

196. See 20 U.S.C. § 1232g(g); 34 C.F.R. § 99.60(c); see also 34 C.F.R. § 81 (regarding the General Education Provision Act (GEPA) Review Board use for hearings involving the withdrawal of federal education funds).

197. There are no reported decisions indicating that the FPC office has attempted to withdraw funds.

198. *Belanger v. Nashua Sch. Dist.*, 856 F. Supp. 40, 47 (D.N.H. 1994) (finding a section 1983 claim available and not requiring exhaustion of Buckley administrative remedies).

199. *Krebs v. Rutgers*, 797 F. Supp. 1246, 1257 (D.N.J. 1992); see also *Maynard v. Greater Hoyt Sch. Dist.*, 876 F. Supp. 1104, 1107 (D.S.D. 1995) (finding that Buckley enforcement mechanisms "do[ ] not provide a remedy to the plaintiffs . . . and in fact . . . exacerbate the community's financial burden").

## 2. No Private Cause of Action

Courts are unanimous in holding that Buckley itself does not provide the right to file a private lawsuit to challenge alleged violations.<sup>200</sup>

## 3. Section 1983 Claims to Redress Buckley Violations

When a public school violates Buckley, a civil rights lawsuit may be filed. Several courts have held that a § 1983 action may be brought to vindicate Buckley violations,<sup>201</sup> and the specter of such claims has been touted as the best way to enforce Buckley.<sup>202</sup>

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200. See, e.g., *Tarka v. Franklin*, 891 F.2d 102, 104 (5th Cir. 1989) (holding that only the Secretary of Health, Education and Welfare may file an action); *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986) (holding that a private right of action does not exist under FERPA); *Girardier v. Webster College*, 563 F.2d 1267, 1276-77 (8th Cir. 1977) (explaining that "FERPA itself does not give rise to a private cause of action"); *Odom v. Columbia Univ.*, 906 F. Supp. 188, 195 (S.D.N.Y. 1995) (dismissing an individual's private claim that Columbia violated FERPA by failing to provide a plaintiff with her transcript, other records, and a disciplining hearing after she was accused of misconduct); *Krebs*, 797 F. Supp. at 1256 (dismissing a student's claim that the university violated FERPA by releasing his academic records to the United States Attorney's Office without giving him prior notice); *Francois v. University of the D.C.*, 788 F. Supp. 31, 32 (D.D.C. 1992) (noting that FERPA alone does not provide for a private cause of action), *aff'd*, 1993 U.S. App. LEXIS 5051 (D.C. Cir. 1993).

201. See, e.g., *Cuilens v. Bemis*, 979 F.2d 850 (6th Cir. 1992) (unpublished decision); *Tarka*, 891 F.2d at 104-05 (affirming summary judgment for school on § 1983 claim where plaintiff was not a student); *Fay*, 802 F.2d at 21 (affirming judgment under § 1983 for joint custodial parent for Buckley Amendment violation, where school refused to permit access to child's records and send copies of school notices); *Obersteller v. Flour Bluff Indep. Sch. Dist.*, 874 F. Supp. 146, 149 (S.D. Tex. 1994) (dismissing FERPA claim on grounds that plaintiff failed to satisfy § 1983 requirements); *Norwood v. Slammons*, 788 F. Supp. 1020, 1026 (W.D. Ark 1991) (noting that FERPA claims may be brought under § 1983); cf. *Maine v. Thiboutot*, 448 U.S. 1 (1980) (concluding that § 1983 permits claims that are based not on alleged constitutional violations, but on alleged violations of federal statutes); *Gundlach v. Reinstein*, 924 F. Supp. 684, 690 (E.D. Pa. 1996) (analyzing § 1983's applicability to FERPA claims); *Doe v. Alfred*, 906 F. Supp. 1092, 1098 (S.D.W.V. 1995) (refusing, without discussion, to dismiss Buckley-based § 1983 claim), *appeal dismissed*, 79 F.3d 1141 (4th Cir. 1996); *Krebs*, 797 F. Supp. at 1256 (examining a § 1983 FERPA-based claim).

One court has rejected Buckley-based § 1983 claims. See *Norris v. Board of Educ.*, 797 F. Supp. at 1452, 1464-65 (S.D. Ind. 1992) (finding Buckley's administrative enforcement mechanism, the FPC Office complaint, is exclusive and bars a claim under § 1983, and also rejecting a § 1983 claim based on constitutional privacy deprivation).

202. A companion article by the author explores § 1983 claims in detail. See generally Daggett, *supra* note 17.

## II. OTHER LAWS REGULATING STUDENT RECORDS

### A. Special Education Laws

Two federal special education laws, the Individuals with Disabilities Education Act (IDEA)<sup>203</sup> and section 504 of the Rehabilitation Act of 1973,<sup>204</sup> provide additional requirements for special education students' records. A third federal statute, the Americans with Disabilities Act (ADA),<sup>205</sup> prohibits discrimination against disabled students in public and private schools, but does not appear to have any specific requirements regarding student records.<sup>206</sup>

#### 1. The IDEA

Section 1417(c) of the IDEA directs the enactment of regulations protecting the privacy records of students in accordance with Buckley.<sup>207</sup> These regulations<sup>208</sup> restate many of Buckley's provisions, but also go beyond Buckley to cover all IDEA-eligible children, and apply to all agencies involved in special education, even those not educational in nature or which do not receive federal education funds. IDEA records regulations contain numerous additional requirements regarding the records of special education students.<sup>209</sup>

#### a. Provisions in State Special Education Plans Regarding Student Records

State special education plans "must include in detail the policies and procedures that the State will undertake, or has undertaken, in order to ensure the protection of the confidentiality of" student records and other information about students.<sup>210</sup>

203. See 20 U.S.C. § 1400 (1994); 34 C.F.R. pt. 300 (1996).

204. See 29 U.S.C. § 794 (1994); 34 C.F.R. pt. 104.

205. See 42 U.S.C. § 12101 (1994); 28 C.F.R. pts. 35 and 36 (1996).

206. Of course, treating a disabled student's records differently than those of nondisabled students (e.g., by divulging confidential information) could be actionable discrimination under the ADA and section 504.

207. See 20 U.S.C. § 1417(c).

208. The IDEA regulations dealing with student records are found at 34 C.F.R. § 300.129 and § 300.560-576. These regulations also apply to Part H of the IDEA, which governs services (often by agencies other than schools) to infants and toddlers up to age three. See 34 C.F.R. §§ 303.5(a)(3), (b), 303.460 (1996); cf. Letter to Mr. Rex Shipp, 23 *Indiv. Disabilities Educ. L. Rep. (LRP)* 442 (Jul. 12, 1995) (describing circumstances when Part H agencies can share information with Part B agencies without parental consent).

209. For a dated, but still useful comparison of IDEA and Buckley records requirements, see *Editorial Explanation: Comparison of Confidentiality Requirements*, *Educ. Handicapped L. Rep. (LRP)* 104:245-247 (Feb. 27, 1987).

210. 34 C.F.R. § 300.129 (1996).

*b. Period for Responding to Requests for Access*

While under Buckley a “reasonable” time, up to forty-five days, is permitted before granting access to records, the IDEA requires access “without unnecessary delay” and *before* any individualized education program (IEP) meeting or special education hearing.<sup>211</sup> This is to allow parents to prepare for those team meetings and hearings.

*c. Persons Authorized to Access Records*

Buckley provides access to parents and adult students. The IDEA provides access to parents, without explicitly providing access to adult students, perhaps because its regulations were written before adult students were covered by Buckley. A vaguely worded IDEA regulation, however, requires state special education plans to include policies so that “children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child, *and type or severity of disability*.”<sup>212</sup> The IDEA also provides the parents’ representative (normally their attorney) access rights without a signed release from the parents.<sup>213</sup>

*d. List of Types and Locations of Records*

Under the IDEA, schools must keep a list of the types of student records they maintain and their location, and provide this list to parents on request.<sup>214</sup>

*e. Storage and Destruction of Special Education Records*

Under the IDEA, schools must protect the confidentiality of records at the “collection, storage, disclosure, and destruction stages.”<sup>215</sup> The IDEA does not specify any period for which special education records must be maintained.<sup>216</sup> State public records retention laws, however, may specify a retention period for records.

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211. *See id.* § 300.562(a).

212. *Id.* § 300.574 (emphasis added). Under Buckley, age and attendance at postsecondary schools are the determining factors for transferring rights to the student; disability is not relevant.

213. *See id.* § 300.562(b)(3). Schools, however, may require proof that the requester does represent the parents. *See* Letter to Jim L. Newby, Educ. Handicapped L. Rep. (LRP) 211:254 (Feb. 3, 1981).

214. *See* 34 C.F.R. § 300.565.

215. *See id.* § 300.572(a).

216. *But see infra* note 262 and accompanying text (discussing a five year retention requirement under EDGAR which applies to certain IDEA records).

*f. Designating a Special Education Records Custodian*

The IDEA requires each school district or other educational agency to designate one person as special education records custodian. This person is responsible “for ensuring the confidentiality of any personally identifiable information” about special education students.<sup>217</sup>

*g. Staff Training on Student Records Confidentiality*

The IDEA requires training and instruction regarding student records confidentiality rules for “[a]ll persons collecting or using personally identifiable [special education student] information.”<sup>218</sup>

*h. List of Persons with Access to Student Records Information*

The IDEA requires a list of the names and positions of employees with access to student records information. The list must be available for public inspection.<sup>219</sup>

*i. Notice to Parents When Special Education Records Are No Longer Needed*

Schools and other education agencies are required to inform parents when special education records are “no longer needed to provide educational services to the child.”<sup>220</sup> For example, just before the child graduates a school should notify a parent that the records are no longer needed. Schools are encouraged to inform parents that retaining special education records may be helpful for other purposes such as obtaining social security disability benefits.<sup>221</sup> If the parents so request, the unnecessary records must be destroyed, which may be accomplished either by physical destruction or by removing personal identifiers.<sup>222</sup> With such a request, the school may maintain a permanent record of the student’s name, address, phone number, grades, attendance record, classes attended, grade level completed, and year completed.<sup>223</sup>

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217. See 34 C.F.R. § 300.572(b).

218. *Id.* § 300.572(c).

219. See *id.* § 300.572(d).

220. *Id.* § 300.573(a).

221. See *id.* § 300.573 note.

222. See *id.* § 300.560.

223. See *id.* § 300.573(b).

*j. Date of Access in Access Log*

The date of access must be included, in addition to Buckley's requirements for access logs.<sup>224</sup>

*k. Parent Notice of Special Education Records Rules*

The IDEA requires states to provide annual notice to parents including: (1) the extent to which native language notices are made for various populations in the state; (2) a description of the children for whom special education records are maintained, the types of information collected, the methods for gathering information, and the uses for the information; (3) a summary of the policies and procedures schools must follow for storing, disclosing, retaining, and destroying special education records; and (4) a description of parental rights regarding student records.<sup>225</sup> Before any major identification or other activity, this notice must be published or announced in the media, in an effort to notify parents.

*l. Remedies for IDEA Records Violations*

In addition to the enforcement options discussed above under Buckley, IDEA records violations may be redressed through a formal special education hearing, with appeals to federal or state court.<sup>226</sup> Any record violations must be raised at the hearing level.<sup>227</sup>

Special education hearings are formal administrative hearings. They include an impartial hearing officer, attorneys, witnesses, documentary evidence, a verbatim record, a written decision with findings of fact and conclusions of law, and an ability to appeal to state or federal court. Hearing officer orders may include the amendment of a student's records.<sup>228</sup> Although most courts do not award money damages for IDEA violations, plaintiffs (normally parents) who prevail at the hearing level are eligible for reimbursement of their attorney's fees from the defendant school.<sup>229</sup> Moreover, violations of the IDEA's procedural safe-

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224. *See id.* § 300.563.

225. *See id.* § 300.561.

226. *See, e.g.,* *Bruschini v. Board of Educ.*, 911 F. Supp. 104, 106 (S.D.N.Y. 1995) (challenging decision of state review officer).

227. *See id.* at 107-08 (raising records violations for the first time at court level is improper).

228. *See Prins v. Independent Sch. Dist.*, 23 Indiv. Disabilities Educ. L. Rep. (LRP) 544, 548 (D. Minn. 1995) (explaining that a special education hearing officer has authority to order suspensions erased from student's records).

229. *See* 20 U.S.C. § 1415(e)(4)(B) (1994).



guards, such as its records provisions, may constitute denial of a disabled student's right to a Free Appropriate Public Education (FAPE).<sup>230</sup>

## 2. Section 504

Section 504 itself does not address student records. Regulations for public elementary and secondary education programs, and private special education programs, require "an opportunity for the parents or guardian to examine relevant records" and suggest that the IDEA procedures satisfy this requirement.<sup>231</sup> Alleged violations of section 504 records provisions can be redressed by a complaint to the Office of Civil Rights, which enforces section 504, and/or a claim in federal or state court. Because section 504's records provisions are limited, section 504 complaints concerning records issues are sometimes not appropriate.<sup>232</sup>

### B. Federal Substance Abuse Records Laws

Specific federal laws concern the confidentiality of substance abuse records. Under limited circumstances, these laws require student communications with a school employee working in a student assistance program to remain confidential. These laws may conflict with Buckley and, in some cases, with special education law.

A detailed discussion of the federal substance abuse laws' very complex requirements is beyond the scope of this Article.<sup>233</sup> Briefly, however, to the extent a state law gives older minors the right to get treatment or counseling for substance abuse problems without parental consent, and school-based persons operate a program to provide that assistance, the federal laws require that records be kept confidential, unless the minor consents to a release.<sup>234</sup>

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230. See, e.g., *Board of Educ. v. Dielert*, 843 F.2d 813, 814-15 (4th Cir. 1988) (holding that school which committed procedural violations failed to provide proper education).

231. 34 C.F.R. §§ 104.36, 104.39(c). Schools should outline their means of complying with this requirement, and any other section 504 student records provisions, in their section 504 policies.

232. See *San Bernardino City (CA) Unified Sch. Dist.*, 16 *Educ. Handicapped L. Rep.* (LRP) 645, 648 (June 1, 1990) (holding that because section 504 does not contain provisions regarding maintenance of records, complaint is more properly made under Buckley).

233. For an in-depth examination of this problem, see Lynn M. Daggett, *Parent Access to Minors' Substance Abuse Communications* (manuscript in progress).

234. See 42 U.S.C. § 290ee-3 (1994); 42 C.F.R. § 2.14 (1996); cf. *Antioch (IL) Community High Sch. Dist.*, 17 *Educ. Handicapped L. Rep.* (LRP) 76, 76-77 (Jul. 30, 1990) (holding that where state law limited release of 12 to 18 year olds' mental health records to situations where student consented, school did not violate section 504 by refusing parents access to their child's psychological and social history reports).

These federal laws appear to be in direct conflict with Buckley's requirement for parental access to records,<sup>235</sup> and for some students, with special education laws' requirements to refer the student for possible services, a process that involves parents.<sup>236</sup> For example, in Washington before June 1996, drug intervention specialists in school-based programs faced conflicting obligations. Prior to June 1996, Washington law contained broad authority for minors aged thirteen and over with substance abuse concerns to seek help from school-based counselors without parental consent.<sup>237</sup> As of June 1996, however, new legislation modified Washington law to limit minors' ability to seek substance abuse help to state-certified chemical dependency treatment programs only.<sup>238</sup> Because most school-based persons are not part of state-certified programs, minors no longer have the right to seek assistance from school personnel without parental consent, and Buckley and section 504 both entitle parents to access records.

### C. Case Law Concerning Reproductive Rights of Minors

To the extent students confide in school personnel about pregnancy or birth control issues, case law establishing minors' reproductive rights<sup>239</sup> arguably limit schools' rights to disclose this information to parents without the student's consent.<sup>240</sup> Although there are apparently no cases dealing directly with this issue, a former school district client of the author was threatened with litigation by the American Civil Liberties Union (ACLU), with the support of the state department of education, if student communications on this topic were divulged to parents without student consent.<sup>241</sup>

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235. A joint opinion letter from the Department of Health and Human Services and the FPC Office acknowledges this conflict. Letter from Department of Health and Human Services and Family Policy Compliance Office to Dr. Allen Fossbender (September 26, 1990) (on file with author). The opinion letter suggests avoiding the conflict by either (1) conditioning services on minors' agreement to permit parent access, (2) avoiding creation and maintenance of Buckley records, or (3) seeking a court order. *See id.* at 4-5.

236. Under section 504, addiction is a disability, but current users are not covered. *See* 29 U.S.C. § 706(8)(C) (1994).

237. *See* WASH. REV. CODE. ANN. § 70.96A.095 (West 1992).

238. The legislation limiting Washington minors' right to seek help for substance abuse on their own is the "Becca Too" bill. *See* 1996 Wash. Laws §§ 2, 5.

239. *See, e.g.,* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 72-75 (1976) (discussing adolescent reproductive rights).

240. *See* Gelfman & Schwab, *supra* note 6 (discussing this issue as it pertains to school nurse records); *see also* Ripps, *supra* note 6, at 328 (discussing non-Buckley legal and professional ethical issues pertaining to student confidences regarding pregnancy).

241. One commentator also has observed the uncertainty in this area. *See* Steven R. Smith, *Privacy, Dangerousness, and Counselors*, 15 J.L. & EDUC. 121, 126-27 (1986).

#### D. *The Hatch Act*

Another federal statute, the "Hatch Act,"<sup>242</sup> imposes limits on most federally funded education programs.<sup>243</sup> In such programs, educators cannot require students to submit to "surveys, analysis, or evaluation" involving certain sensitive information such as psychological problems, illegal behavior, or sexual behavior without written parental (or adult student) consent.<sup>244</sup> Parents of minor students in such programs have inspection rights to the "instructional materials, including teacher's manuals, films, tapes, or other supplementary material[s]" which are to be "used in connection with any survey, analysis, or evaluation."<sup>245</sup> Finally, parents must be notified of their Hatch Act rights.<sup>246</sup> A proposal is pending in Congress to broaden the scope of the Hatch Act to federally funded activities outside of the Department of Education. There is also a proposal to create a private cause of action.<sup>247</sup>

#### E. *Public Records and Meetings Laws—Freedom of Information Acts*

State public records laws, also known as freedom of information acts or sunshine laws, require that records of public agencies (such as school districts) be open to the public for inspection. Schools must deal with requests for student records under these laws. Similarly, public meetings laws generally require that meetings of public agencies (such as boards of education) be open to the public and media. Schools must determine how to discuss student records in these meetings in accord with these laws, without violating the students' confidentiality rights.

Although public records and meetings laws vary from state-to-state, they typically include an exception from public access for student records,<sup>248</sup> in accord with Buckley.<sup>249</sup> Schools must be wary not to vio-

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242. See 20 U.S.C. § 1232h (1994); 34 C.F.R. §§ 98.1 - 98.10 (1996). The Act formerly applied only to research and experimentation programs, but was amended in 1994 to apply to "any program."

243. The scope of the Hatch Act appears contiguous with that of Buckley. Cf. 34 C.F.R. §§ 98.1, 99.1. Both are part of GEPA.

244. See 20 U.S.C. § 1232h(a).

245. *Id.*

246. See *id.* § 1232h(c).

247. See H.R. Res. 1271, 104th Cong. (1995). The Family Privacy Protection Act of 1995 passed the House on April 4, 1995, and was reported out of a Senate committee on August 2, 1996.

248. See, e.g., WASH. REV. CODE ANN. § 42.17.310(1)(a) (West 1991). Public records laws may not exempt *all* student records. See, e.g., *Bauer v. Kincaid*, 759 F. Supp. 575 (W.D. Mo. 1991) (holding that university security unit's criminal investigation records were not exempt from disclosure under student records provision of state public records law).

249. Alternatively, a state open records law, without an explicit provision exempting student records from disclosure, may be construed to exempt such records from disclosure

late students' Buckley rights by providing access to student records when responding to requests under public records laws. Requests for other school records, such as instructional materials, should be carefully considered.

Public meetings laws also typically make some provision for boards of education to discuss student records in private, such as when conducting an expulsion hearing, either by permitting boards to go into executive session to discuss such records, or by exempting certain meetings from these requirements.<sup>250</sup> Schools must be careful not to violate students' Buckley rights by discussing their names, or using details that make them identifiable, in public meetings.<sup>251</sup>

#### *F. Evidentiary Privileges Concerning Subpoenaed Student Records and Testimony About Them*

Student records may be subpoenaed by a court or an attorney.<sup>252</sup> School employees may be asked to testify or answer a deposition about information contained in student records. As discussed,<sup>253</sup> Buckley is not a defense to complying with a subpoena or court order for student records.<sup>254</sup> Courts will balance the privacy interests of the student and the requester's need for the records, when deciding whether to enforce subpoenas of student records.<sup>255</sup> Similarly, when the media requests courtroom access to litigation involving students, free press concerns will be balanced against student privacy interests as articulated in Buckley.<sup>256</sup>

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for public policy reasons. *See, e.g., Rathie v. Northeastern Wis. Tech. Inst.*, 419 N.W.2d 296, 299 (Wis. Ct. App. 1987).

250. *Cf. WASH. REV. CODE ANN.* § 42.30.140(2) (West 1991); *Student Bar Ass'n Bd. of Governors v. Byrd*, 239 S.E.2d 415, 419 (N.C. 1977) (interpreting North Carolina public meeting statute as not requiring open faculty meetings, which could lead to termination of federal funding under Buckley).

251. *See South Dakota, 20 Indivs. Disabilities Educ. L. Rep. (LRP) 105, 106* (May 14, 1993) (holding that state "public meetings law" was no justification for Buckley violation, although Buckley does not preempt state law).

252. In fact, in some states, it is quite easy for an attorney to fill out a subpoena, which, at times, may result in misuse of subpoenas to obtain student records. *See Cohen v. Pelagatti*, 493 A.2d 767, 771 (Pa. Super. Ct. 1985) (affirming injunction against attorney who misused subpoena process to obtain student records post-trial). Schools faced with discovery-phase subpoenas of student records pursuant to federal litigation presumably could apply for a protective order under *FED. R. CIV. P.* 26(c).

253. *See supra* Part I.G.2.f.

254. *See Rios v. Read*, 73 F.R.D. 589, 598 (E.D.N.Y. 1977) (explaining that FERPA does not confer a privilege against the disclosure of student records, "[r]ather, . . . it seeks to deter schools from adopting policies of releasing student records"); *Zaal v. State*, 602 A.2d 1247, 1255-57 (Md. 1992) (same).

255. *See supra* notes 127-32 and accompanying text.

256. *See Webster Groves Sch. Dist. v. Pulitzer Publ'g Co.*, 898 F.2d 1371, 1375-76 (8th Cir. 1990) (refusing to permit access to files after the court balanced interests).

In fact, when student records are subpoenaed by a court or attorney, or school employees are asked to testify or answer a deposition about information contained in student records, evidentiary law governs these issues. Buckley itself creates no evidentiary privilege.<sup>257</sup> With regard to subpoenaed testimony by school employees about student information, there is no general school-student privilege, such as those between attorney and client, or between physician and patient, to assert in an effort to avoid complying with a subpoena. Moreover, there is no federal, nor in many states, evidentiary privilege for school employees.<sup>258</sup> Other states, however, provide limited privileges to school personnel with regard to student information.<sup>259</sup>

### G. Records of Homeless Students

A federal statute imposes additional requirements on the school records of homeless children. States receiving grants under the Stewart B. McKinley Homeless Assistance Act must provide for timely availability of records of homeless children to new school districts in which the children may enroll.<sup>260</sup> Lack of records cannot bar enrollment of a homeless student.<sup>261</sup>

### H. Miscellaneous State Laws

This Article focuses on federal laws concerning student records. State law and school district policies may give students additional rights. Schools should be careful to examine state student records and special

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257. See *Reeg v. Fetzer*, 78 F.R.D. 34, 36 (W.D. Okla. 1976).

258. For example, Washington has no school-student privilege. In fact, Washington's psychologist-patient privilege specifically excludes school psychologists. See WASH. REV. CODE ANN. §§ 18.83.110, 18.83.200 (West 1989).

259. See, e.g., IDAHO CODE §9-203(6) (Supp. 1996) (stating that certified counselors and psychologists employed as such by public and private schools have a privilege against disclosure of communications from students in civil and criminal actions in which a student is a party); OR. REV. STAT. § 40.245(1) (1995) (stating that certified elementary and secondary school staff have privileges in civil actions as to "any conversation between the certificated staff member and a student which relates to the personal affairs of the student or family of the student, and which if disclosed would tend to damage or incriminate the student or family"); *id.* § 40.245(2) (maintaining that a certified school counselor employed in a public school has a privilege in civil and criminal proceedings, in which the student is a party, that protects communications regarding past use, abuse or sale of drugs or alcohol, obtained from students in a counseling capacity unless the student "presents a clear and imminent danger," in which event, reporting or other action is required); see also *Samson v. Saginaw Prof'l Bldg., Inc.*, 205 N.W.2d 833, 839 (Mich. Ct. App. 1973) (holding that Michigan teacher privileges do not apply to teachers' personal observations not the product of student communications), *aff'd*, 224 N.W.2d 843 (Mich. 1975).

260. See 42 U.S.C. § 11432(g)(5) (1994).

261. See *id.* § 11432(g)(1)(F)(ii)(III).

education laws to determine whether state law addresses issues not covered by federal statutes. For example, state public records retention laws may require retaining student records for a specified period before destruction.<sup>262</sup> State laws may also regulate parental access to instructional records.<sup>263</sup>

### III. MEANINGFUL PARENT ACCESS AND OTHER RIGHTS, REASONABLE BURDENS ON SCHOOLS, AND RECOMMENDATIONS FOR ACHIEVING THESE GOALS

Buckley does not truly grant any rights to parents.<sup>264</sup> In fact, as several courts have noted, it also does not impose any obligations on schools.<sup>265</sup> Instead, Buckley imposes conditions on schools in order that they may receive federal education funds.<sup>266</sup> Under one of these conditions, educa-

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262. See, e.g., CONN. GEN. STAT. ANN. § 7-109 (West 1989); CONN. AGENCIES REGS. § 10-4-10 (1987). To a limited extent, federal law governs retention of records. Under EDGAR, records necessary to show compliance with provisions of federally funded education programs must be maintained. See 34 C.F.R. §§ 76.730, 76.731 (1996); see also Letter to Sheila R. Breecher, 17 Educ. Handicapped L. Rep. (LRP) 56, 57-58 (Sep. 27, 1990) (stating that in order to document compliance with the IDEA evaluation requirements, records of special education evaluations must be maintained for at least five years); Letter to Dwayne Cossey, [1987 Transfer Binder] Educ. Handicapped L. Rep. (LRP) 211:351 (Supp. Dec. 21, 1984) (citing regulations that require retention of IEP's for five years to document compliance with the IDEA).

263. For example, Washington schools are required to have policies assuring parents the opportunity to observe their child's classes and activities in a nondisruptive manner. See WASH. REV. CODE ANN. § 28A.605.020 (West Supp. 1996). General regulations regarding Washington student records can be found at WASH. ADMIN. CODE §§ 180-52-015 to -035 (1995). For example, section 180-52-035 requires written parental consent before a child is given a personality test. Section 180-52-030 also requires parental consent for the administration of a survey or test asking about the student's personal religious or sexual beliefs or practices.

264. See *supra* note 17 and accompanying text.

265. See, e.g., Board of Educ. v. Colonial Educ. Ass'n, 152 L.R.R.M. (BNA) 2369, 2373 (Del. Ch. 1996) (stating that Buckley "did not directly proscribe or regulate . . . release . . . [of records, instead it] imposes a penalty for doing so").

266. Buckley is not the only federal education statute structured in this manner. Another well-known example is the IDEA, 20 U.S.C. §§ 1401-1461 (1994), which is also a spending legislation. The IDEA conditions receipt of federal special education funds on a state's preparation of a plan which complies with numerous substantive IDEA provisions, such as providing eligible students with a free appropriate education in the least restrictive environment, and notifying parents of their due process and other rights. See *id.* Unlike Buckley, however, the IDEA provides federal funds specifically marked for states that choose to comply with its provisions. Moreover, schools have more choice about complying with the IDEA than with Buckley, because if the IDEA funds are refused, its obligations are not triggered. New Mexico initially did not accept the IDEA funds, and was not bound by its provisions. Receipt of virtually any federal education funds, including IDEA money, triggers Buckley. See § 1232(g).

tional agencies must attempt to inform parents annually of their "rights" under Buckley.<sup>267</sup> Other conditions detail the numerous requirements for handling student records.<sup>268</sup> From the perspectives of parents and schools, Buckley seemingly provides significant rights and responsibilities. The extent to which Buckley supplies parents with meaningful rights, and imposes reasonable obligations on schools, however, is questionable and is examined below. Where Buckley falls short of these goals, specific modifications are recommended.

#### A. *Meaningful Parent Access and Other "Rights" Under Buckley*

As discussed, schools are required to notify parents annually of their rights under Buckley.<sup>269</sup> The statute and regulations are explicit in that parents must be informed of "their rights under the Act," and not merely notified of school obligations and responsibilities.<sup>270</sup> Specifically, parents receive notification that they or the "eligible student" are entitled to inspect and review records, request correction of records, consent under most circumstances before records are released to third parties, and file complaints with the FPC Office.<sup>271</sup>

Under notice of parental rights, schools are required to "effectively notify parents of students who have a primary or home language other than English."<sup>272</sup> Additionally, Congress has recently strengthened the language regarding the method of notification. An earlier version of Buckley required schools merely to "inform" parents of their rights. In 1994, Buckley was amended to require that schools "effectively inform"<sup>273</sup> parents of their Buckley rights because of concerns that notification in newspapers and by other means did not actually inform parents.<sup>274</sup> From a parent's perspective, Buckley appears to provide significant rights. Unfortunately, these rights exist largely on paper. Such concerns about Buckley are largely curable, however, since other records laws offer workable models that provide meaningful rights.

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267. See *supra* notes 173-76 and accompanying text.

268. See *supra* Part I (discussing Buckley record handling requirements).

269. See 20 U.S.C. § 1232g(e); 34 C.F.R. § 99.7; *supra* notes 173-76 and accompanying text (discussing requirement of annual parental notice).

270. 20 U.S.C. § 1232g(e); 34 C.F.R. § 99.7(a).

271. See 34 C.F.R. § 99.7(a).

272. *Id.* § 99.7(d).

273. Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 249(4), 108 Stat. 3518, 3924 (1994).

274. See 140 CONG. REC. S10,290 (daily ed. Aug. 2, 1994) (statement of Sen. Grassley).

### 1. *Meaningfully Prompt Parent Access*

Buckley provides schools with up to forty-five days to respond to parent requests for access.<sup>275</sup> "Days" are undefined by the statute, and may be school or calendar days. If school days are intended, schools have one-fourth of a typical 180-day school year to provide access. Using calendar days, schools still have more than six weeks to comply. In either case, absent extraordinary circumstances, such as requiring attorney or court involvement, or retrieving old records in storage, meaningful parent access requires a quicker opportunity to review records.<sup>276</sup> For example, a parent is likely to be concerned about her child's progress in school after a poor report card. She may wish to look at standardized test scores or meet with the teacher to better understand the problem.<sup>277</sup> If forty-five days pass before her request is granted, any chance for the child to improve in school for that grading period has been lost. Also lost, in direct contrast to a stated purpose for Buckley, is an opportunity for parent involvement in her child's education and perhaps enhanced achievement for her child.<sup>278</sup>

Similarly, a college student applying for jobs may want to review the (unwaived) letters of recommendation in her file before they are reviewed by prospective employers.<sup>279</sup> Many employers' job searches will conclude before the forty-five day delay permitted before access is granted. The student faces a choice of two unattractive options: risk the chance that the letters will not say what is hoped or even contain inaccuracies, or wait up to forty-five days for access, limiting her chances in the job hunt. Again, this contradicts an identified purpose of Buckley: to provide access to records in order to prevent inaccurate information in student records.<sup>280</sup>

Finally, a student with a pending disciplinary or other hearing (such as a meeting to consider placement in gifted or remedial classes) will want to review her file before the hearing or proceeding, which is likely to

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275. See *supra* note 89 and accompanying text. Buckley sets 45 days as an outside limit, and more generally requires access within a reasonable time. The statute is clear, however, that a 45 day delay can be "reasonable."

276. Slow access does not mean access to altered records. Records may not be destroyed while a request is pending. See 34 C.F.R. § 99.10(e); see also *supra* note 91 and accompanying text.

277. This meeting is a parent's right under Buckley because it is a request for an explanation and interpretation of a record (the report card), which are part of Buckley access rights. See *supra* note 95 and accompanying text.

278. See *supra* note 39 and accompanying text.

279. For a discussion of waiving access rights to letters of recommendation under Buckley, see *supra* notes 96-101 and accompanying text.

280. See *supra* notes 37-39 and accompanying text.



occur far sooner than in forty-five days.<sup>281</sup> In each of these cases, Buckley's forty-five day period interferes with meaningful parent and eligible student access.

The potential forty-five day access period not only weakens parent access, potentially limits parent involvement in education, and creates the possibility of inaccurate records, it also is inconsistent with other school records access obligations described under other laws.<sup>282</sup> The IDEA, for example, gives schools a shorter timeline for complying with requests for access to special education student records. Access to records for special education students is required "without unnecessary delay" and must be permitted before any special education team meeting or hearing.<sup>283</sup> Thus, a parent of a special education student has an absolute right under the IDEA to access her child's records before a disciplinary hearing.<sup>284</sup> Parents of a regular education student do not have this right under Buckley.<sup>285</sup> Further, records of public schools are subject to state open records laws typically requiring immediate access during normal agency business hours.<sup>286</sup> Hence, a member of the public seeking school district non-student records, such as instructional materials, budget records, and some parts of personnel records, can generally view them immediately while, under Buckley, a parent may have to wait forty-five days to see her own child's records.

**RECOMMENDATION:** Because schools regularly deal with requests from the public under state open records laws that require immediate inspection, more expedient access to parents should not be unduly burdensome. Buckley should be amended to define the "reasonable" time within which parental access should be provided. After a request is made, reasonable access should be defined as normally occurring within one week of the request, and before any proceeding such as an expulsion hearing or release of records to outsiders. Only in unusual cases, such as

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281. While Buckley requires access only within a reasonable time and within 45 days, the student's due process rights may require access to records before the hearing. *See generally* Goss v. Lopez, 419 U.S. 565 (1975) (discussing students' due process rights in connection with disciplinary exclusions from school).

282. *See supra* Part II (discussing the Individuals with Disabilities Education Act, section 504 of the Rehabilitation Act of 1973, and the American with Disabilities Act).

283. *See supra* note 211 and accompanying text.

284. Before disciplining a disabled student, the student's special education team must meet to decide if the alleged misconduct is related to the disability. *See* Honig v. Doe, 484 U.S. 305, 324-28 (1988). The IDEA gives parents the right to access records before this team meeting. *See* 34 CFR § 300.562(a) (1996).

285. Section 504 does not specify a timeline for access. *See supra* notes 231-32 and accompanying text.

286. *See supra* Part II.E.

a former student's request to access records which are in storage, should parents wait forty-five days to review records.

## 2. Access for Applicants

Buckley does not give access rights to applicants. Only students who have actually been enrolled at a school may view their records, including those regarding their application.<sup>287</sup> Rejected students have a legitimate interest in knowing the reason. For example, a rejection may have been caused by the receipt of an inaccurate transcript or other information from a school, or because a school did not receive all the applicant's supporting documents. It is illogical to permit enrolled applicants to view application records, but not unenrolled applicants.

RECOMMENDATION: Buckley should be amended to cover applicants' access to records. This amendment would not affect applicant waivers of the right to see letters of recommendation, in accordance with current Buckley provisions.<sup>288</sup>

## 3. Victim Access to Outcomes of Disciplinary Proceedings Against Students

A 1990 amendment to Buckley provides that results of related school disciplinary proceedings may be disclosed by higher education institutions without consent to victims of crimes of violence.<sup>289</sup> For example, a college student who is a victim of date rape could be informed, without the consent of her attacker, that her university had expelled the attacker. Unconsented access for pre-college victims is available under neither the 1990 amendment, nor Buckley's new disciplinary language, which permits disclosure only to "teachers and school officials."<sup>290</sup> As violent crimes occur in all levels of education, pre-college and college-age victims have the same interest in knowing what has happened to their attackers.

RECOMMENDATION: Buckley should be amended to allow younger victims to receive the same information. This modification would limit confidentiality for students disciplined for crimes of violence. Unconsented disclosure, however, would be limited to the results of disciplinary proceedings; related records would not be disclosed without consent. Moreover, disclosure of disciplinary measures against the attacker may provide the victim with sufficient satisfaction and closure on the incident to avoid further criminal charges or civil claims.

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287. See *supra* notes 47-49 and accompanying text.

288. See *supra* notes 96-101 and accompanying text.

289. See *supra* notes 26-27 and accompanying text.

290. See 20 U.S.C. § 1232g(h)(2) (1994).

#### 4. *Opportunity to Pay a Fee to Obtain a Copy of Records as Part of Meaningful Parent Access*

Buckley provides parents with the right to in-person access to records, not to copies of them. Copies must be provided only under limited circumstances.<sup>291</sup> As schools maintain an increasing variety of student records, a student file may become substantial. A thick folder of documents may not be conducive to in-person review, especially under time constraints. A student's records may also be more than her parent can understand, assimilate, and remember from in-person access, particularly where the records are maintained in several locations.<sup>292</sup>

As with the timelines for access described previously,<sup>293</sup> Buckley's failure to include a right to a copy of records is inconsistent with other laws addressing record access.<sup>294</sup> State public records laws, for example, typically offer the option of free access or a copy for which a per-page fee is charged.<sup>295</sup>

Parents who are familiar with Buckley's loopholes already may obtain copies by taking actions which trigger Buckley's limited obligations to provide copies. For example, Buckley gives parents the right (for a fee) to a copy of records that they consent to be released to a third party.<sup>296</sup> A parent could request and consent to the release of a set of records to a relative, and then request and pay for their own copy of the released records. Parents should not depend, however, on their knowledge of Buckley's loopholes, but should have equal access to records.

**RECOMMENDATION:** Buckley should be amended by language similar to that in state public records laws which give the public an unfettered right to pay a modest per-page fee for a copy of records they are entitled to access in person. This would give working parents the opportunity to request, pay for, and receive, copies of records by mail.<sup>297</sup>

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291. *See supra* notes 92-94 and accompanying text.

292. For example, school transcripts and standardized test scores may be located in the main office, health records in the school nurse's office, disciplinary records in the principal's desk, and the records of individual teachers in each of their offices.

293. *See supra* Part III.A.1.

294. *See supra* Part II.

295. *See supra* notes 248-51 and accompanying text.

296. *See supra* note 107 and accompanying text.

297. This would also make it easier for a working parent to review her child's records and be involved in her child's school program. *See supra* note 39 and accompanying text.

### 5. *Lack of Enforcement Mechanisms Render Parent Rights Toothless*

A complete discussion of Buckley's enforcement problems is contained in a companion article.<sup>298</sup> Briefly, Buckley's parent/student "rights" can be enforced only through FPC Office complaints, already described as ineffective.<sup>299</sup> This situation contrasts greatly with other records laws governing schools. For example, violations involving the IDEA student records can be redressed through special education hearings and appeals to a court.<sup>300</sup> Parents who prevail in these hearings can obtain attorney fees from the opposing party,<sup>301</sup> normally a school district with sufficient assets to pay the fees. Similarly, violations of the federal laws involving substance abuse records can result in criminal prosecution.<sup>302</sup> Violations of state public records and meetings laws may be redressed, depending on the state, through an administrative hearing with possible appeal to a court,<sup>303</sup> or through civil claims possibly involving attorney fee reimbursement for prevailing plaintiffs.<sup>304</sup>

Buckley's lack of enforcement provisions gives schools little incentive to comply. When schools face a conflict between Buckley and another law with stronger enforcement mechanisms, the school most likely will comply with the stronger law.

**RECOMMENDATION:** To protect parental rights and to give schools an incentive to comply, Buckley must include meaningful enforcement mechanisms. A companion article assesses various enforcement possibilities.<sup>305</sup>

### *B. Reasonable School Responsibilities*

In support of these important parental rights regarding children's school records, and as a condition of receipt of federal funds, Congress through Buckley directly assigned schools substantial responsibilities. Indirectly, Buckley imposes even further burdens. Buckley's provisions impose burdens on schools as they respond to requests for records, disseminate parental notices, and keep logs of access.

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298. See *supra* notes 179-202 and accompanying text (providing an overview of Buckley enforcement mechanisms).

299. See *supra* Part I.L.1.a.

300. See *supra* notes 226-30 and accompanying text.

301. See 20 U.S.C. § 1415(e)(4)(B) (1994).

302. See *supra* notes 233-38 and accompanying text.

303. See, e.g., CONN. GEN. STAT. ANN. §§ 1-21 i (d), 1-21 (West 1988 & Supp. 1996).

304. See, e.g., WASH. REV. CODE. ANN. § 42.17.340(4) (West Supp. 1997) (providing that "a person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record . . . shall be awarded all costs, including reasonable attorney fees").

305. See Daggett, *supra* note 17.

Other burdens imposed on schools are less obvious but substantial. Buckley's provisions burden schools' exercise of routine educational activities. For example, a school cannot simply send a copy of its honor roll or Dean's List to a newspaper. Buckley requires that parents either consent before the honor roll is released, or that schools inform parents that honors are treated as Buckley "directory information" and provide parents an opportunity to object to release of their child's records. Buckley is premised on a dated assumption that schools keep largely academic and disciplinary records about students. The statute fails to account for the special nature of student records kept by today's schools which, in the author's experience, may include detailed health records, court records, psychiatric hospitalization records, and social services reports. Finally, Buckley does not deal with the many conflicts it creates with other federal and state laws concerning confidentiality of health records, child abuse reporting, and state public records laws.

### 1. *Burdens Directly Imposed by Buckley*

Buckley requires schools to prepare the parental notice,<sup>306</sup> and disseminate it in an effective way to both English speaking and non-English speaking parents. In addition, when schools receive requests from parents to inspect their child's records, the retrieval process requires staff time. Often, a staff member must stay with the parent during the review to maintain the records' integrity.<sup>307</sup> Furthermore, any requested explanations or interpretations of the records may require additional staff time.<sup>308</sup> Buckley provides no limits on the number of times a parent may request review, nor does it establish the duration of any review.<sup>309</sup> Some students' school records are voluminous, and the reviewing process may take many hours or even days.<sup>310</sup> The current forty-five day limit on responding to requests for review of records allows schools time to decide when they can spare staff for these purposes. Buckley provides no funds, however, to schools for these labor costs.<sup>311</sup> Moreover, schools cannot charge parents for these costs except for copy fees,<sup>312</sup> and in limited cases, a parent may actually be entitled to a free copy of records.<sup>313</sup>

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306. See *supra* Part I.J.

307. These obligations are not unique to Buckley, but also are imposed by state open records laws.

308. See *supra* note 95 and accompanying text.

309. See *supra* note 90 and accompanying text.

310. For example, the author represented school districts in several special education hearings where the records of the student took up an entire four-drawer file cabinet.

311. See *supra* note 21 and accompanying text.

312. See *supra* note 94 and accompanying text.

313. See *supra* note 93 and accompanying text.

Schools must respond appropriately to a variety of family requests for records, including those by noncustodial parents, stepparents, requests by nonbiological parents, relatives, or other persons acting as parents,<sup>314</sup> and requests by students as well as requests for interpretations and explanations. While Buckley does not mandate staff training, the secretaries and office workers who receive these requests cannot be expected to understand Buckley's requirements without training.<sup>315</sup> Schools also must respond appropriately, and staff must be trained, to respond to record requests by persons outside of the student's family (such as subpoenas and requests from police, other schools in which the student is enrolled or will enroll, prospective employers, governmental authorities, the press and public, and other school employees).<sup>316</sup>

The disclosure decision is not a simple one. Whether the request is from a member of the student's family, another school employee that the school decides has a legitimate educational interest,<sup>317</sup> or an outsider, schools must determine whether the information requested is actually Buckley material or non-records, such as sole possession notes.<sup>318</sup> Second, the school must correctly determine whether disclosure is permitted or required. In the case of requests by outsiders, schools must maintain an access log of unconsented-to requests for records, and most unconsented-to actual disclosures.<sup>319</sup> If consent has been provided, the school must determine whether the consent form meets Buckley requirements<sup>320</sup> and it must maintain a copy of the form.

The determination that a document is a Buckley record has significant consequences, partly due to state "open records" laws. As a general matter, Buckley itself provides access rights only to parents; disclosure to others is a matter within the school's discretion. Because of state "open records" and meetings laws, however, documents regarding students either will be Buckley records, disclosable only upon parental consent, or public agency records that any member of the public may access upon request.<sup>321</sup> For example, a state "open records" law may exempt student records from public access only to the extent Buckley does so. If a request for access to a student record is made under circumstances permit-

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314. See *supra* notes 82-86 and accompanying text.

315. Buckley is in contrast with the IDEA, which explicitly requires staff training on legal requirements for special education records. See *supra* note 218 and accompanying text.

316. See *supra* Part I.E,F,G.

317. See *supra* notes 109-14 and accompanying text.

318. See *supra* Part I.C,D.

319. See *supra* notes 147-50 and accompanying text.

320. See *supra* notes 105-07 and accompanying text.

321. See *supra* notes 248-51 and accompanying text.

ted by Buckley, but not required, the state "open records" law may be interpreted as requiring access.<sup>322</sup>

School determinations of which documents are Buckley records are difficult for additional reasons. Mistaken disclosure of sole possession notes causes the notes to lose their status.<sup>323</sup> In addition, the Buckley status of some documents, such as test protocols and raw data, is not clear<sup>324</sup> and disclosure may compromise school employees' professional ethical standards.

Responding appropriately to subpoenas of student records can be particularly difficult. Schools may be obligated to notify parents before complying with the subpoena, or may be forbidden from notifying parents.<sup>325</sup> Moreover, in cases where a student or former student is a witness in a trial, and one party's attorney subpoenas records, schools may be uncomfortable providing the subpoenaed records without court review, and thus seek a protective order to avoid complying with a subpoena. Cases like these make it clear that responding to requests for school records involves not only substantial staff time and consideration, but also legal costs.

Hearings also require school staff time when parents challenge records as being inaccurate, misleading, or invasive of privacy.<sup>326</sup> In the author's experience representing school districts, requests for such hearings are not common. When a parent requests a hearing, however, the time required to conduct it and issue a written decision is significant. Similarly, schools that are the subject of FPC Office complaints expend staff time to respond and provide documents and information requested by the FPC Office.<sup>327</sup>

Although Buckley conveys an undisputedly important and laudable right on parents, complying with its conditions in order to receive federal education funds is not a small burden for schools. Compliance involves significant resources and carries with it no specific federal funds to support its requirements. Unreasonable burdens on schools also indirectly weaken parental rights. To the extent Buckley imposes excessive burdens on schools which cannot be effectively enforced by parents, schools may fail to comply, compromising parental rights.

**RECOMMENDATION:** The notice, access, confidentiality, and challenge rights that Buckley provides to parents are important and necessar-

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322. This was the situation in *Bauer v. Kincaid*, 759 F. Supp. 575 (W.D. Mo. 1991).

323. See *supra* notes 62-68 and accompanying text.

324. See *supra* notes 78-80 and accompanying text.

325. See *supra* notes 126-32 and accompanying text.

326. See *supra* notes 156-70 and accompanying text.

327. See *supra* notes 179-99 and accompanying text.

ily involve significant burdens to schools. Several of Buckley's provisions could be modified, however, to reduce the statute's burden on schools without significantly impairing parental rights.

First, Buckley's penalty for redisclosure violations<sup>328</sup> unduly burdens school students. As a result of a 1994 amendment, Buckley now requires that schools that provide records to a third party who violates redisclosure provisions may not provide records to that third party for at least five years.<sup>329</sup> The scope of this provision needs clarification. It is not clear whether the provision applies to other school employees. The language of the penalty provision refers to access logs, which do not require entries for requests and access by other school employees. Congress, therefore, likely meant that the penalty should apply only to outsiders, including transfer school districts, issuers of subpoenas, and federal and state educational authorities. Certainly, if a teacher reviews records without a legitimate educational interest, it does not serve her students to deny her access to all of the school's student records for five years. Regarding redisclosure violations by outsiders, the five-year ban on access seems overly harsh and not in students' interests. Suppose, for example, that a school forwards a student's records to her new school district and the new district discloses them without consent. It does not serve students well if schools were unable to release records of future students who may transfer to the violating district. Similarly, if a federal or state educational agency conducting an audit receives records and violates Buckley, it seems unwise to prohibit the state educational agency from receiving records for five years.

Second, Buckley's current provisions regarding notice of rights to parents not fluent in English is not workable from either the parent's or school's perspectives. Buckley imposes an absolute obligation on schools to "effectively" notify non-English speaking parents of their Buckley rights.<sup>330</sup> Although notice to non-English speaking parents is important, in cases where a parent speaks a language unfamiliar to anyone in the district, native language notice may not be feasible.

From the parent's perspective, the current provision deals with neither disabled parents (such as those with visual impairments for whom a written notice is ineffective), nor with parents who do not have written language.<sup>331</sup> Parental notice language in the IDEA addresses both school and parental concerns. The IDEA requires parental notice in other lan-

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328. See *supra* Part I.G.4.

329. See *supra* notes 151-53 and accompanying text.

330. See *supra* notes 174-75 and accompanying text.

331. Perhaps Buckley's "effective" notification requirement could be interpreted to resolve these concerns. Moreover, section 504 of the Rehabilitation Act arguably obligates



guages "unless it is clearly not feasible to do so,"<sup>332</sup> and requires oral, or other notice, to parents who do not read.<sup>333</sup> Buckley should adopt language similar to the IDEA.

The access log requirement<sup>334</sup> should be eliminated or modified. Compliance with the current access log requirement is not feasible for schools.<sup>335</sup> First, the schools must keep the log confidential except with regard to audit authorities and the parent. Thus, keeping an access log in each student's folder impermissibly would provide access to other school employees who review the file for legitimate educational reasons. Maintaining a central access log, however, prevents parents from viewing the file without extensive redaction to protect the confidentiality rights of other students.<sup>336</sup> Second, because schools maintain several types of records in several different places, schools must keep several access logs. For example, a college may have an access log for transcripts and the student's official file in the registrar's office, another in the financial aid office, one in the health center, one in the dean of students' office, and one in the placement office, not to mention individual faculty members' records. Litigation under Buckley has not involved access logs, suggesting that the log provisions are not the source of disputes, and perhaps that parents do not find them necessary to exercise their rights. Congress should eliminate the requirement or modify it to permit schools to maintain logs on the outside of student folders.

## 2. *Buckley-Created Burdens on Other School Activities*

Buckley places substantial burdens on the manner in which a school conducts its daily business. For example, if a school has an honor roll or Dean's list, the school commonly releases the list of honored students to the newspaper. Buckley requires this information not be disclosed without consent.<sup>337</sup> The school can contact each parent and seek their written consent to release the information. More likely, the school's parental no-

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schools to accommodate disabled parents by modifying the standard parent Buckley rights notice. Buckley should be amended to unequivocally resolve these issues.

332. See 34 C.F.R. § 300.505(b)(2) (1996).

333. See *id.* § 300.505(c).

334. See *supra* notes 147-50 and accompanying text.

335. Several commentators identified this problem when the 1988 regulatory revisions were proposed. See Family Educational Rights and Privacy, 53 Fed. Reg. 11,956 (1988). For example, in the opinion of the FPC Office, a school placement office must maintain a list of all parties (presumably prospective employers) to whom a student's credentials are sent. See *id.* In the author's experience, access logs are simply not kept by schools.

336. For a discussion of related problems with school nurse treatment logs, see Gelfman & Schwab, *supra* note 6, at 325.

337. See *supra* notes 105-07 and accompanying text.

tice will include "honors and awards" as directory information, which can be released without parental consent.<sup>338</sup> Still, because some parents may object to the release of any and all directory information about their child,<sup>339</sup> the school must check for any parent objections to the release of directory information, and remove the names of those students whose parents have objected. If the school makes a mistake and removes a student's name from the list in error, the parent is likely to be upset that the school did not recognize publicly the child for making the honor roll.

Another problem arises when a student releases information about herself that the school believes is inaccurate. For example, a student may list her Grade Point Average (GPA) or class rank on her resume, or falsely claim she was cleared of a plagiarism charge. Regarding the first scenario, the school's honor code may permit the school to take internal disciplinary action against the student for falsely representing her qualifications. Without student consent, however, a school has no authority to tell a prospective employer about the falsification. In extreme cases, a school may wish to be subpoenaed to be able to disclose accurate information about the student, but Buckley prevents the school from disclosing the facts needed to support the issuance of a subpoena.<sup>340</sup>

**RECOMMENDATION:** Congress should consider modifying the directory information provisions. Congress could make certain information, such as names, honors and awards, dates of enrollment, and degrees awarded, directory information as a matter of law. If this were the case, the school in the hypothetical case above could release the honor roll information without significant burdens. Other information, such as phone numbers and home addresses, is more private and either parental objections rights should be maintained or the information should not be treated as directory at all. State public records laws may treat public employee addresses and home phone numbers as confidential and not accessible to the public.<sup>341</sup>

With regard to correcting inaccurate information supplied by students, the author is unable to identify a solution. It is tempting to suggest a rule used to limit privilege; if a litigant opens the door to his physical or mental health, the opposing party has the right to obtain relevant

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338. See *supra* notes 121-24 and accompanying text.

339. See *supra* notes 121-24 and accompanying text.

340. The same situation may arise when a school suspects a student of criminal activity based on information contained in school records. The school must be subpoenaed to disclose the records, but Buckley prevents it from supplying the police with the details necessary to get the subpoena.

341. See *supra* notes 248-51 and accompanying text. This modification also would avoid commercial requests to schools for mailing list of student names and addresses.

records.<sup>342</sup> Similarly, Congress could amend Buckley to provide that when a student discusses her records, that student is deemed to have consented to the school's disclosure of records to the extent needed to correct inaccuracies. The scope of the school's right to disclose seems, however, impossible to clearly limit and invites abuse by schools.

### 3. *Keeping Buckley Up-to-Date with Today's Schools*

#### a. *Student Records Kept by Schools*

Congress enacted Buckley in an era when student records consisted largely of academic and disciplinary documents, such as transcripts and test scores. Soon after Buckley's 1974 enactment, Congress adopted the IDEA,<sup>343</sup> requiring special education for eligible students. To comply with IDEA, schools created and maintained new records, such as psychiatric and psychological studies, medical and other neurological evaluations, and occupational and physical therapy reports.

Schools today also maintain records beyond academic and disciplinary ones on students who do not participate in special education. School-based health clinics create and maintain records incidental to the medical treatment they provide to students.<sup>344</sup> Juvenile court records are found in schools, and schools also may have mental health and/or social services records.<sup>345</sup>

While Buckley provides parents with the right to access *all* of their child's records,<sup>346</sup> parents may not be qualified to understand and interpret these records. Professional ethical standards may also prohibit release.

Buckley addresses the possible lack of adult and college student expertise to interpret health records by labeling them as excluded "treatment records" and limiting access to a qualified professional of the student's choosing.<sup>347</sup> There is no corresponding provision for health records of pre-college students. As described in the section immediately below, Buckley does not address the conflicts between its provisions and those of other laws.

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342. See generally 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2388-2390 (John T. McNaughton rev., 1961 & Supp. 1991) (discussing waiver of physician-patient privilege under these circumstances).

343. See 20 U.S.C. §§ 1401-1461 (1994).

344. See Gelfman & Schwab, *supra* note 6, at 320-21 (discussing the expanding roles and responsibilities of school nurses).

345. See *supra* note 68 and accompanying text.

346. See *supra* notes 50-61 and accompanying text.

347. See *supra* notes 67-68 and accompanying text.

**RECOMMENDATION:** To avoid the misinterpretation of at least one court,<sup>348</sup> Congress should clarify that student records include all student information maintained by a school, whether academic or disciplinary in nature, and wherever stored. Congress also needs to clarify the status of test protocols and raw data, which can be accomplished by amending the “treatment records” exception discussed below.

Congress should expand the treatment records exception to include health and psychological records of adult, college and pre-college students, created or maintained by a school. Schools still could disclose such records to parents, but a right of access to records would be limited to a person of the parents’ choosing. Access by a professional would ensure that parents still have access, while accommodating a school’s professionalism concerns.

#### *b. Buckley and Today’s Educational Practices*

Buckley is dated not only in its premises about the kinds of records schools keep, but also in regard to certain education practices. For example, Buckley permits schools to deny to students access to their parents’ financial records.<sup>349</sup> This language leaves open the possibility that students aged eighteen and over in secondary schools could view their parents’ financial records. While public high schools are unlikely to maintain such records (except in connection with college scholarship applications), private schools that offer financial aid may indeed maintain such records.

**RECOMMENDATION:** Congress should modify Buckley to deny all eligible students access to parent financial records.

#### *4. Buckley Conflicts*

The greatest burden Buckley places on schools is dealing with its conflicts with other laws. Consider the situation where a school employee suspects a student has been abused and the school keeps information about the possible abuse in the student’s records. As a condition of receiving federal abuse prevention grants,<sup>350</sup> state statutes require certified school employees to report suspected abuse to law enforcement or social services authorities.<sup>351</sup> Criminal penalties may result if abuse goes unre-

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348. See *supra* note 51 (discussing *Red and Black* and the Department of Education’s response).

349. See 34 C.F.R. § 99.12(b)(1) (1996); see also *supra* note 102 and accompanying text.

350. See 42 U.S.C. § 5106a (1994).

351. See, e.g., WASH. REV. CODE ANN. §§ 26.44.030(1)(a) (West Supp. 1997) (“When any . . . professional school personnel . . . has reasonable cause to believe that a child . . . has suffered abuse or neglect, he or she shall report such incident . . . to the proper law enforcement agency . . .”).

ported.<sup>352</sup> Buckley, however, does not provide explicitly for reporting suspected child abuse without parental consent. Extreme cases may permit disclosure under the emergency provision, but that exception is narrowly construed and courts have interpreted the exception not to include non-urgent medical conditions.<sup>353</sup> Proving the abuse information under the subpoena provision for disclosure acts as a double-edged sword—in order to issue a subpoena, a court needs information contained in the records. Prior to 1994, school employees who suspected abuse could report their concerns consistent with Buckley pursuant to pre-1974 child abuse reporting statutes. That exception, however, essentially was eliminated in 1994 when the legislature limited it to reporting to juvenile justice authorities.<sup>354</sup> The author recommends that school employees resolve the conflict in the child's best interests by reporting suspected child abuse. As the foregoing discussion demonstrates, however, this leaves the school employee open to a claimed Buckley violation. In a worst-case scenario where a teacher or other school employee reports suspected abuse by a parent in a non-emergency situation, a § 1983 claim by the parent is possible.<sup>355</sup>

Similarly, school employees who suspect a student has engaged in criminal behavior may be required to report<sup>356</sup> their suspicions to the police. Where the police have formed a suspicion of criminal activity based on non-school information, the police can use Buckley's subpoena provisions to obtain school records.<sup>357</sup> Where a school employee suspects a student, and the police have no other basis for the suspicion, Buckley is an obstacle to reporting. Again, if the basis for the suspicion involves student records, and there is no emergency, Buckley provides no explicit exception permitting such reporting without parental consent.

Certain school employees and agents who provide counseling about student substance abuse problems face troubling issues as well. If the student is old enough under state law to receive substance abuse help

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352. See WASH. REV. CODE ANN. § 26.44.080 (West 1986) (providing that knowing failure to report incidents of abuse or neglect pursuant to § 26.44.030 will constitute a gross misdemeanor).

353. See *supra* notes 144-45 and accompanying text.

354. See *supra* note 125 and accompanying text.

355. See *supra* notes 201-02 and accompanying text.

356. See, e.g., CAL. EDUC. CODE § 44014 (West 1993) (stating that if a school employee is attacked, assaulted, or menaced by a student, a police report must be made); CONN. GEN. STAT. §§ 10-233g, 10-233h (1995) (regarding assaults on teachers that must be reported to police); TEX. EDUC. CODE ANN. § 37.015(a) (West 1996) (obligating principals of public and private schools to notify police when reasonable grounds exist to believe that criminal activity is occurring on school grounds, on school property, or other related event).

357. See *supra* notes 126-32 and accompanying text.

without parental consent, federal health laws require that the records of that treatment remain confidential, unless the student consents to disclosure.<sup>358</sup> Buckley, however, requires schools to provide parental access to records. Suppose that an older student confides a drug or alcohol problem to a school-based drug counselor as permitted under state law, and the parent calls the counselor and asks for information about the student. To the extent the school kept the information in Buckley records, that statute entitles parents to access the records. Federal health laws regarding substance abuse records, however, prohibit disclosure of such information to parents and to most other school employees unless the student agrees.

**RECOMMENDATION:** Buckley should include provisions explicitly permitting disclosure, without consent, to report suspected substance abuse and criminal activity. As discussed above, under some circumstances Buckley presents, or may present, obstacles to reporting suspected substance abuse of, or criminal activity by, a student. Congress should amend Buckley to explicitly permit such reporting without parental consent.

Buckley also should include a provision excluding records information about student substance abuse communications that are confidential under federal law. As discussed above,<sup>359</sup> under some circumstances Buckley conflicts with other federal law requiring confidentiality with regard to substance abuse communications. In order to reduce substance abuse by students, Congress should allow students to confide in specially trained school-based persons without parental consent. Congress should amend Buckley to reflect this change.

Buckley's pre-1974 state law disclosure provision should be reinstated. The 1994 amendment essentially eliminated this disclosure provision by limiting it to state laws pertaining to the release of records to juvenile justice authorities. Pre-1974 state laws may require release of school records for child abuse reporting, reporting criminal activity, or for other valid purposes. State laws that have been in force for more than twenty years should not be rendered ineffective suddenly without surveying the states. Consequently, Congress should restore the provision or the FPC Office should survey states to obtain their views on the continued need for the provision.

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358. *See supra* notes 233-38 and accompanying text.

359. *See supra* Part II.B.

## IV. CONCLUSION

Congress enacted and amended Buckley for laudable goals: to protect the accuracy and confidentiality of student records and to enhance parental involvement in education. Congress's failure, however, to review systematically its student records law and related statutes has led to a patchwork quilt of provisions whose piecemeal nature limits coherence and effectiveness. Congress should "buck up" Buckley by amending it to increase clarity and reduce inconsistency, thereby achieving its statutory purpose.