

# Students' Rights in Indiana: Wrongful Distribution of Student Records and Potential Remedies

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## INTRODUCTION

The state-supported university at which Jane was a graduate student considered her a non-resident of the state for tuition purposes, but she hoped to prove to the Committee on Residence that her status should be changed. After all, she had been in the state for several years and had numerous ties to it. She knew from the information packet on residency which she received from the Registrar that the members of the Committee would be composed of professors, trustees, and even a few students. The head of the Committee introduced himself to Jane, and, after a few brief introductory remarks, said that "everyone has a copy of your record." Jane, who sat next to two student Committee members, saw that each had a copy of her grades. Stunned and not knowing what to say, Jane stuttered, "O.K."

Later, Jane remembered that at her state-supported undergraduate institution grades were never posted and were never released to anyone but the student or her parents because of a certain law. Jane called the head Committee member the next day and asked about the need for her grades. The Committee member told her that her record was needed to show that Jane was registered and progressing well in her studies at the University. He added that the students had Jane's grades for "only a week." When Jane inquired about the access the students' roommates or friends had to her records, the Committee member said that the students on the Committee were bound by an oath not to discuss other students' records.

The Family Educational Rights and Privacy Act ("FERPA" or the "Buckley Amendment")<sup>1</sup> is the little discussed law to which Jane referred. Unfortunately for Jane, FERPA is effectively impotent because of its lack of enforcement mechanisms; however, the weakness of FERPA has been buttressed by increased protection provided by most states and by improved remedies offered by many state courts.<sup>2</sup> If in the above hypothetical Jane were attending a school in the State of Indiana, then her situation would be more ominous, for no such bolstering mechanisms are provided by that state. As a result, those Indiana parents and students whose FERPA rights have been violated by Indiana schools have no real recourse, and the schools have an open invitation to abuse their power over student records. This should not be the case.

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1. 20 U.S.C.A. § 1232g (West 1990 & Supp. 1999).

2. See *infra* Part III.B-C.

Courts in several states and two Circuits have held § 1983<sup>3</sup> claims applicable under FERPA.<sup>4</sup> Indeed, the United States Supreme Court has held that § 1983 permits claims that are based not on alleged constitutional violations, but on alleged violations of federal statutes.<sup>5</sup> Violations of FERPA are violations of students' rights to privacy, and those students should be able to redress their grievances. Therefore, a method of relief such as that provided by § 1983 should be applied by Indiana courts as well.

This Note first reviews the background of both the idea of privacy and the Buckley Amendment, analyzing especially the operation of that statute. Next, this Note discusses the status of student privacy rights in Indiana and other states, contrasting the lack of remedies available to an Indiana student whose rights have been violated by an Indiana school with those available to students in other states. Finally, this Note concludes with recommendations for the State of Indiana for increasing student privacy protection.

### I. THE RIGHT OF PRIVACY

Different people interpret the term "privacy" differently. For some, it simply refers to "the right to be left alone," while for others it may have a more complex association, such as "the right" to an abortion.<sup>6</sup> Still for others, it may mean the right to be secure in the solitude of one's own home, free from governmental intrusions. This Note, however, is interested only in the university student's rights to information privacy, meaning "the legal rights of individuals in relation to information about them that is circulating throughout society,"<sup>7</sup> specifically within the school system.

Most people have boundaries around and about themselves which they would like to remain free from outside invasion. These areas differ among individuals, but it is widely recognized that "traditional family relationships such as husband-wife and professional ones such as doctor-patient or lawyer-client deserve maximum levels of confidentiality."<sup>8</sup> However, relationships between students and school systems also deserve some measure of privacy. Indeed, early ideas about a right to privacy arose from a "desire to safeguard individual autonomy and to protect traditional relationships against government intrusion";<sup>9</sup> the right to privacy, in turn, evolved to protect the relationship between students and the data about them kept by their schools.

A distinct body of law about the notion of privacy emerged following the publication of an article written by Samuel Warren and Louis Brandeis. In their article, *The Right to Privacy*, published in 1890 in the *Harvard Law Review*,

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3. 42 U.S.C. § 1983 (Supp. II 1996).

4. See *infra* Part III.B; *infra* note 182.

5. See *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

6. EVAN HENDRICKS ET AL., *YOUR RIGHT TO PRIVACY: A BASIC GUIDE TO LEGAL RIGHTS IN AN INFORMATION SOCIETY* xi (2d ed. 1990). The introduction of this book influenced the organization of this Part.

7. *Id.*

8. *Id.* at xii.

9. *Id.*

Warren and Brandeis advocated that an individual maintained an interest in preventing the publication of private matters by the press.<sup>10</sup> After delineating proposed limits on privacy rights,<sup>11</sup> Warren and Brandeis suggested that an action for tort be available to victims in all cases involving an invasion of privacy and an injunction be available in a limited number of cases.<sup>12</sup> Following the famed authors' advice, courts and legislatures slowly accepted, defined, and enforced numerous principles which were generally described as a "right to privacy."<sup>13</sup>

#### A. Early Court Decisions

As noted above, courts originally recognized violations of privacy as a tort. That is, courts typically saw the right to privacy as protecting only against tangible intrusions which resulted in a measurable injury. Because courts thought of privacy in terms of torts, they took longer to recognize and discuss the more difficult constitutional issues of personal autonomy and information control.<sup>14</sup>

The United States Supreme Court first explored constitutional principles relating to privacy during the first part of this century.<sup>15</sup> In 1923, the Court found unconstitutional a Nebraska law which required all school subjects to be taught in English, and prohibited the teaching of any language other than English to a student who had not passed the eighth grade.<sup>16</sup> Using the "letter and spirit of the Constitution"<sup>17</sup> as a guide, the Court declared that "individual[s] ha[ve] certain fundamental rights which must be respected."<sup>18</sup> Two years later, the Court again recognized the "fundamental theory of liberty"<sup>19</sup> when it struck down an Oregon law requiring, with few exceptions, all children to attend public schools until completion of the eighth grade.<sup>20</sup>

Other such decisions followed slowly. The Court combined its recognition of personal autonomy with the value of information control and First Amendment associational privacy when, in 1958, it refused to allow a state to compel the

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10. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195-97 (1890).

11. *See id.* at 214-19. Warren and Brandeis proposed six limitations. They suggested that the right to privacy should not protect the publication of general knowledge or information disclosed at a public hearing, nor should it disallow oral publication (as during a speech). *See id.* at 214-17. Also, they thought that the right ceased when a person consented to publication or published the information himself or herself. *See id.* at 218. Truth and the absence of malice were not considered defenses to an invasion of privacy. *See id.*

12. *Id.* at 219.

13. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 850-51 (5th ed. 1984). New York was the first state to accept the principle, followed by Massachusetts. *See id.* at 850 & n.10.

14. *See* HENDRICKS ET AL., *supra* note 6, at xiii.

15. *See id.*

16. *See* *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923).

17. *Id.* at 402.

18. *Id.* at 401.

19. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

20. *See id.* at 531-32, 536.

disclosure of organizational membership lists.<sup>21</sup> The Court held that "immunity from state scrutiny of membership lists . . . is . . . so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment,"<sup>22</sup> confirming the notion that any state action that effectively thwarts the freedom to associate should be subjected to close scrutiny.<sup>23</sup> In *Mapp v. Ohio*, the Court declared that the Fourth Amendment grants a right to privacy that is as important as any other constitutional right.<sup>24</sup> Furthering this idea, the Court in 1965 decided in *Griswold v. Connecticut*<sup>25</sup> that the Constitution protects a right of sexual privacy, noting that the specific guarantees of the Bill of Rights creates "zones of privacy" within a "penumbra."<sup>26</sup> Justice Douglas, writing for the Court, said that the First Amendment grants people the right of associational privacy and a certain degree of protection from governmental intrusion.<sup>27</sup> Justice Douglas also noted that the Fourth and Fifth Amendments affirm the people's "right" to be free from governmental invasions of themselves and their homes.<sup>28</sup>

Subsequent cases have followed and expanded upon the reasoning of the *Griswold* Court. In 1967, in *Katz v. United States*,<sup>29</sup> the Court ruled that wiretapping without a warrant was unconstitutional and, in the process, created the reasonable expectation of privacy standard.<sup>30</sup> The *Katz* Court emphasized that "the Fourth Amendment protects people, not places,"<sup>31</sup> suggesting that constitutional protection is provided by the Bill of Rights for more than just tangible property, but for a person's "communications, personality, politics, and thoughts."<sup>32</sup> Indeed, the Ninth and Fourteenth Amendments were invoked to create the "right to choose" an abortion in the still controversial 1973 decision of *Roe v. Wade*.<sup>33</sup>

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21. See *NAACP v. Alabama*, 357 U.S. 449, 460, 466 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.").

22. *Id.* at 466.

23. See *id.* at 460-61.

24. 367 U.S. 643, 656-57 (1961).

25. 381 U.S. 479 (1965).

26. *Id.* at 483-84.

27. See *id.*

28. See *id.* at 484 (citing *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

29. 389 U.S. 347 (1967).

30. See *id.* at 353 ("The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment.").

31. *Id.* at 351.

32. See HENDRICKS ET AL., *supra* note 6, at xv.

33. 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

However, a year later, in 1974, the Court evinced a marked shift in its position. In *California Banker's Ass'n v. Shultz*,<sup>34</sup> the Court held that a law targeting money launderers which required banks to keep copies of customer records and allowed government authorities unlimited access to them did not deprive the banks of due process by imposing heavy burdens on them, and, by implication, did not violate their customers' privacy rights.<sup>35</sup> The 1976 decision in *United States v. Miller*<sup>36</sup> solidified the restrictive trend. The Court refused to find that the Constitution provided a right to privacy in bank records; rather, when opening an account, people assumed the risk that the bank would convey their bank records to the government.<sup>37</sup> *Miller's* importance became apparent when the Court applied its reasoning to other cases involving personal records held by third parties.<sup>38</sup> For example, in 1977, the Court upheld a New York law requiring that the name and address of anyone obtaining narcotics by a doctor's prescription be forwarded to the state for storage in a centralized computer system.<sup>39</sup> In 1979, a target in a criminal probe objected to the police's receipt of his telephone records;<sup>40</sup> however, the Court maintained that the phone company could provide such information to the police without notice to or consent from the customer.<sup>41</sup>

### *B. Early Legislative Action*

The Court, after 1974, had announced that Congress, not the courts, would have to create legal protection for personal information stored in institutional computers. Perhaps sensing the Court's position, Congress passed the Privacy Act in 1974.<sup>42</sup> The Privacy Act applies to federal agencies and grants individuals access to and the ability to correct their records.<sup>43</sup> The Act also allows disclosures to other federal or non-federal entities only with the concerned person's written consent.<sup>44</sup>

Congressional privacy advocates desired a law that covered both governmental files and privately held records; however, President Gerald Ford maintained that he would veto such a bill.<sup>45</sup> Congress compromised by limiting the scope of the Privacy Act to federal files and creating the Privacy Protection Study Commission to study the recordkeeping practices of employers, banks, and other private

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34. 416 U.S. 21 (1974).

35. *See id.* at 46, 50. To support its decision, the Court cited the provisions of the Internal Revenue Code which require a third party to report to the government any income paid to an individual. *See id.* at 47.

36. 425 U.S. 435 (1976).

37. *See id.* at 442-43.

38. *See* HENDRICKS ET AL., *supra* note 6, at xvi-xvii.

39. *See* Whalen v. Roe, 429 U.S. 589, 597 (1977).

40. *See* Smith v. Maryland, 442 U.S. 735, 737 (1979).

41. *See id.* at 742-44.

42. Pub. L. No. 93-579, 88 Stat. 1896, 1897 (codified as amended at 5 U.S.C. § 552a (1994 & Supp. III 1997)).

43. *See* 5 U.S.C. § 552a(d) (1994).

44. *See id.* § 552a(b) (1994 & Supp. III 1997). Exceptions are made for certain agencies, such as the Census Bureau, Congress, and a consumer reporting agency. *See id.*

45. *See* HENDRICKS ET AL., *supra* note 6, at xvii.

recordkeepers.<sup>46</sup> The Commission, made up of congressional and presidential appointees,<sup>47</sup> recommended the enactment of several new laws and the amendment of existing laws, including those covering employment,<sup>48</sup> banking,<sup>49</sup> and education.<sup>50</sup> Congress, however, passed only one new privacy law following the Committee's report; that law protected bank records from informal government access.<sup>51</sup>

The realm of education fared differently. In 1974, Senator James Buckley introduced the Family Educational Rights and Privacy Act as a Senate floor amendment to a bill extending the Elementary and Secondary Education Amendments of 1965.<sup>52</sup> The legislature adopted FERPA in 1974 after some discussion but without public hearings or committee study and reports.<sup>53</sup> Although the Buckley Amendment contains no preface or statement of purpose, Senator Buckley stated that "[t]he immediate reason for the legislation was . . . the growing evidence of the abuse of student records across the nation,"<sup>54</sup> but it was also meant to assure parent and student access to education records, and to protect the privacy of those records.<sup>55</sup> Another purpose recently identified is to enhance students' educational achievement through their parents' involvement.<sup>56</sup>

There was, however, some question about whether FERPA's purpose is to address individual records violations or only to prevent systematic violations. The law on its face does not answer this question, but every court which has addressed the issue has said that FERPA protects against systematic violations only.<sup>57</sup> While no court has ruled that FERPA allows a private cause of action, many courts have said that the Buckley Amendment creates a privacy interest under § 1983.<sup>58</sup>

FERPA conditions the receipt of federal education funds on the agencies keeping student records confidential, with parental consent for access by third parties

46. *See id.*

47. *See id.*

48. *See* PRIVACY PROTECTION STUDY COMM'N, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 231-75 (1977).

49. *See id.* at 107-24.

50. *See id.* at 428-44. The Commission recommended 15 amendments to FERPA. *See id.*

51. *See* HENDRICKS ET AL., *supra* note 6, at xviii. Congress's failure to enact any other new laws has been blamed on opposition from interest groups in the other areas that the Commission studied; the banking industry welcomed the effort to clarify privacy rights in that area. *See id.*

52. *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).

53. *See* S. CONF. REP. NO. 93-1026.

54. 121 CONG. REC. 13,990 (1975) (statement of Sen. Buckley).

55. *See* 120 CONG. REC. 39,863 (1974); *see also* *Belanger v. Nashua*, 856 F. Supp. 40, 47 (D.N.H. 1994) (noting these purposes).

56. *See* 140 CONG. REC. S10290 (daily ed. Aug. 2, 1994) (statement of Sen. Grassley).

57. *See* *Klein Indep. Sch. Dist. v. Mattox*, 830 F.2d 576, 579 (5th Cir. 1987); *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986); *Girardier v. Webster College*, 563 F.2d 1267, 1276-77 (8th Cir. 1977); *Achman v. Chicago Lakes Indep. Sch. Dist.*, No. CIV. 2426, 1999 WL 194193, at \*8-9 (D. Minn. Apr. 2, 1999); *Tombrello v. USX Corp.*, 763 F. Supp. 541, 541 (N.D. Ala. 1991); *Moore v. Hyche*, 761 F. Supp. 112, 112 (N.D. Ala. 1991); *Smith v. Duquesne Univ.*, 612 F. Supp. 72, 80 (W.D. Pa. 1985), *aff'd*, 787 F.2d 583 (3d Cir. 1986); *Price v. Young*, 580 F. Supp. 1, 1 (E.D. Ark. 1983); *Zaal v. State*, 602 A.2d 1247, 1255 (Md. 1992).

58. 42 U.S.C. § 1983 (Supp. II 1996); *infra* Part III.B.

normally required.<sup>59</sup> These records may be accessed by the qualified student or the student's parents and may be challenged by the qualified student or the student's parents if they find the records to be misleading, inaccurate, or in violation of the student's privacy rights.<sup>60</sup> The statute also requires schools to notify parents and qualified students of their rights under FERPA.<sup>61</sup>

As a part of the General Education Provisions Act,<sup>62</sup> the Buckley Amendment conditions the receipt of federal education funding on compliance, rather than directly requiring deference to it.<sup>63</sup> Congress does not provide federal funds to schools to defray the cost of their compliance with FERPA.<sup>64</sup>

## II. THE CURRENT ROLE OF FERPA<sup>65</sup>

The computer age has elevated the need for information privacy.<sup>66</sup> Modern life has transformed schools from an age when they kept a few paper records in filing cabinets into the fast-moving present in which their students' activities, including more than the students' academic records, are recorded and stored in the schools' computer systems. The advent of the computer age eases the transferring of student records within and between schools via electronic mail or fax, potentially creating undue intrusions into the lives of students.

Because student records may be easily accessed and transferred by schools, stricter privacy protections for students are required. FERPA has been, for twenty-five years, the source of regulation for the access and accuracy of student records.<sup>67</sup> FERPA regulates the student records kept by most public and private schools at all educational levels in the United States.<sup>68</sup> Although the level of regulation under the Buckley Amendment is comprehensive, critics suggest that it was a congressional afterthought, pointing to FERPA's passage as a floor amendment to other educational legislation with no public hearings, committee reports, and little floor debate.<sup>69</sup> Since it passed Congress in 1974, FERPA has been substantively amended

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59. See 20 U.S.C.A. § 1232g(a), (b) (West 1990 & Supp. 1999).

60. See *id.*

61. See 20 U.S.C. § 1232g(e) (1994).

62. 20 U.S.C.A. §§ 1221-1235 (West 1990 & Supp. 1999).

63. See *id.* § 1232g(a), (b). Any school receiving federal funds or distributing federal financial aid is therefore required to comply with FERPA.

64. See Lynn M. Daggett, *Bucking Up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617, 620 (1997). Over 20 years ago, the Privacy Protection Study Commission found that FERPA compliance was not unreasonably costly to schools. See PRIVACY PROTECTION STUDY COMM'N, *supra* note 48, at 418. There is nothing to indicate that compliance is costly today.

65. Although independent research was performed, Daggett's article, *supra* note 64, provided the general organization for a large portion of this Part.

66. See HENDRICKS ET AL., *supra* note 6, at xi.

67. See 20 U.S.C.A. § 1232g (West 1990 & Supp. 1999); see also Family Educational Rights and Privacy, 34 C.F.R. §§ 99.1-67 (1998).

68. See 20 U.S.C. § 1232g(a)(1) (1994).

69. See Daggett, *supra* note 64, at 620; T. Page Johnson, *Managing Student Records: The Courts and the Family Educational Rights and Privacy Act of 1974*, 79 WEST'S EDUC. L. REP. 1, 1-2 (1993).

four times with one critic noting that each of the amendments, like the original legislation, was a small provision inserted into a piece of larger legislation which did not involve the regulation of student records.<sup>70</sup> Indeed, because it lacks a remedial provision, the Buckley Amendment has been called a "toothless" statute by one of the few writers in recent years who has taken up the subject.<sup>71</sup>

In its first fifteen years, FERPA was amended only slightly in 1979 to allow the disclosure of records without parental consent to educational authorities conducting audits and program evaluations,<sup>72</sup> and in 1986 to update its reference to the Internal Revenue Code.<sup>73</sup> In the 1990s, however, Congress substantively amended FERPA three times.<sup>74</sup> In 1990, Congress passed the Student Right-to-Know, Crime Awareness, and Campus Security Act, which requires colleges and universities to publish statistics on campus crime for distribution to applicants and current students.<sup>75</sup> One provision of this act modified FERPA to allow colleges and universities to inform the victims of violent crimes of the outcome of school disciplinary proceedings.<sup>76</sup> In 1992, Congress again extended the Higher Education Act of 1965,<sup>77</sup> with a section of this legislation altering the Buckley Amendment's language regarding law enforcement records.<sup>78</sup>

The most significant changes to the Buckley Amendment occurred in 1994, when Congress passed the Improving America's Schools Act of 1994, which extended the Elementary and Secondary Education Amendments for another five years.<sup>79</sup> Two

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70. See Daggett, *supra* note 64, at 617, 620-21.

71. *Id.* at 659; see also Krebs v. Rutgers, 797 F. Supp. 1246, 1257 (D.N.J. 1992) (noting the "complete inadequacy" of the Buckley Amendment's enforcement mechanism and the "failure" of the statute to provide a remedy).

72. See Act of Aug. 6, 1976, Pub. L. No. 96-46, § 4(c), 93 Stat. 338, 342 (1979) (codified as amended at 20 U.S.C. § 1232g(b)(5) (1994)).

73. See Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, 2095 (1986) (replacing "Internal Revenue Code of 1954" with "Internal Revenue Code of 1986" in 20 U.S.C. § 1232g(b)(1)(H)).

74. The Department of Health, Education, and Welfare first issued FERPA regulations in June, 1976, 18 months after the Act passed. See PRIVACY PROTECTION STUDY COMM'N, *supra* note 48, at 416; Family Education Rights and Privacy, 41 Fed. Reg. 24,662 (1976) (codified at 45 C.F.R. pt. 98). The first major revisions were adopted in 1988. See Family Education Rights and Privacy, 53 Fed. Reg. 11,942 (1988) (codified at 34 C.F.R. pt. 99). The Secretary of Education recently finalized regulations to implement the 1994 statutory changes. See Family Educational Rights and Privacy, 61 Fed. Reg. 59,292 (1996) (codified at 34 C.F.R. pt. 99). On June 1, 1999, the Secretary proposed amendments to implement the Higher Education Amendments of 1998. 64 Fed. Reg. 29,532 (to be codified at 34 C.F.R. pt. 99) (proposed June 1, 1999). Comments must be received by the Department before August 2, 1999. *Id.*

75. Pub. L. No. 101-542, § 204, 104 Stat. 2381, 2385-87 (1990) (codified as amended at 20 U.S.C. § 1092 (1994)).

76. This amendment has been codified at 20 U.S.C.A. § 1232g(b)(6) (West 1990 & Supp. 1999).

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

78. See *id.* § 1555(a), 106 Stat. at 840 (codified as amended at 20 U.S.C. § 1232g(a)(4)(B)(ii) (1994)).

79. Pub. L. No. 103-382, 108 Stat. 3518 (codified as amended in scattered sections of 20 U.S.C.).



sections of this Act amended FERPA in several ways<sup>80</sup> and attempted to provide greater parental access to records, while reducing the schools' burden of compliance and making enforcement easier on the Department of Education.<sup>81</sup> The 1994 amendments added mandatory penalties for FERPA violations by third persons to whom schools disclose records;<sup>82</sup> created different requirements for schools to allow them to comply with subpoenas of school records;<sup>83</sup> replaced the general exception for disclosures without consent with an exception for reporting records to juvenile justice authorities without consent;<sup>84</sup> and made an allowance for schools to advise staff members of disciplinary actions taken against a student where safety risks are involved.<sup>85</sup>

In 1998, Congress once again amended FERPA, passing the Higher Education Amendments of 1998.<sup>86</sup> Aside from extending the authorization of programs under the Higher Education Act of 1965, the Act imposed limitations on the type of information that can be disclosed about the perpetration of a violent crime or "nonforcible sex offense."<sup>87</sup> The amendment states that only the name of the perpetrator, the offense, the punishment imposed by the school, and, by written consent, the name of a victim or witness may be provided; however, the added language indicates that such information may be disclosed to anyone, as long as the crime committed violates "the institution's rules or policies with respect to such crime or offense."<sup>88</sup> Additionally, a post-secondary institution may disclose to the parent or guardian of a student under twenty-one years old any violations of the school's drug or alcohol policy by the student, unless state law prohibits such disclosure.<sup>89</sup>

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80. *See id.* §§ 249, 261(h), 108 Stat. at 3924-26, 3928 (codified as amended at 20 U.S.C.A. § 1232g(b) (West 1990 & Supp. 1999)).

81. *See* 140 Cong. Rec. S10290 (daily ed. Aug. 2, 1994) (statement of Sen. Grassley).

82. *See* 20 U.S.C. § 1232g(b)(4)(B) (1994) (banning the school from allowing "access to information from education records to that third party for a period of not less than five years"). Senator Grassley, who proposed the amendments, cited the lack of an effective enforcement mechanism as the reason for this penalty. *See* 140 Cong. Rec. S10290 (daily ed. Aug. 2, 1994) (statement of Sen. Grassley).

83. *See* 20 U.S.C. § 1232g(b)(1)(J). Senator Grassley noted that, because of increased crime among young people, schools have been presented with court-issued subpoenas for students' records. As a result, schools have been put in the difficult position of choosing whether to be charged with contempt of court for failing to honor the subpoena or to be charged with violating FERPA, an offense which could cause the school to lose its federal funding. *See* 140 Cong. Rec. S10291 (daily ed. Aug. 2, 1994) (statement of Sen. Grassley).

84. *See* 20 U.S.C. § 1232g(b)(1)(E).

85. *See id.* § 1232g(h).

86. Pub. L. No. 105-244, 112 Stat. 1618 (codified as amended in scattered sections of 20 U.S.C.). The Secretary of Education has announced proposals to amend 34 C.F.R. 99 to effectuate these amendments. *See* 64 Fed. Reg. 29,532 (to be codified at 34 C.F.R. pt. 99) (proposed June 1, 1999).

87. *Id.* § 951, 112 Stat. at 1835 (codified as amended at 20 U.S.C.A. § 1232g(b)(6)(B), (C) (West Supp. 1999)).

88. *Id.*

89. *See id.* § 952, 112 Stat. at 1836 (codified as amended at 20 U.S.C.A. § 1232g(i) (West Supp. 1999)).

The above amendments changed the coverage of FERPA, but did not affect the Act's functioning. The following discussion explains the requirements and basic procedures of the Buckley Amendment.

### A. Definitions

#### 1. Scope

FERPA applies to all educational agencies that receive federal education funds<sup>90</sup> under most programs,<sup>91</sup> regardless of whether the educational agency is public or private, state or local, or an elementary school, secondary school, trade school, college, or university.<sup>92</sup> FERPA only covers governmental agencies that provide educational services, but if one part of an educational agency receives funds, then FERPA applies to the entire agency.<sup>93</sup> This Note refers to all educational agencies as "schools."

#### 2. "Students"

FERPA covers records of a school's current and former "students."<sup>94</sup> Applicants who have never attended a school, including those students who are admitted but not enrolled and those students denied admission, are not "students."<sup>95</sup> Records of school employees are also not protected under the Buckley Amendment.<sup>96</sup>

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90. Funds may be provided directly to the educational agency or institution in the form of a grant, or indirectly through its students, in the form of loans. *See* 34 C.F.R. § 99.1(c) (1998).

91. An educational agency that does not receive funds under a program, but has students who receive non-monetary benefits under the program, is not subject to FERPA. *See id.* § 99.1(b).

92. *See* 20 U.S.C. § 1232g(a)(3) (1994); 34 C.F.R. § 99.1(a). A 1994 modification clearly states that FERPA also applies to state educational agencies. *See* 20 U.S.C. § 1232g(a)(1)(B). FERPA does not apply to schools receiving federal funds through a source other than the Department of Education. *See* 34 C.F.R. § 99.1(a).

93. *See* 34 C.F.R. § 99.1(d); *see also* *Kneeland v. NCAA*, 650 F. Supp. 1076, 1089-90 (W.D. Tex. 1986) (holding that the NCAA and athletic conferences are not subject to FERPA), *rev'd on other grounds*, 850 F.2d 224 (5th Cir. 1988).

94. 20 U.S.C. § 1232g(a)(6); 34 C.F.R. § 99.3 (1998) (defining a student).

95. *See* 20 U.S.C. § 1232g(a)(6); *United States v. Brown Univ.*, No. Civ. A. 91-3274, 1992 WL 2513, at \*2 (E.D. Pa. Jan. 3, 1992) (maintaining that FERPA did not protect the financial aid records of students who were accepted to a school but choose not to attend); *Norwood v. Slammons*, 788 F. Supp. 1020, 1026 (W.D. Ark. 1991) (indicating that an unenrolled student did not have standing under FERPA); *Vandiver v. Star-Telegram, Inc.*, 756 S.W.2d 103, 107 (Tex. App. 1988) (finding that recruitment records of an unenrolled student were not protected by FERPA).

96. *See* 20 U.S.C. § 1232g(a)(4)(B)(iii). The employee records of students who are employed by a school, for example, in a work-study program, are protected by FERPA. *See* Daggett, *supra* note 64, at 623 n.45.

### 3. "Parents"

FERPA broadly gives rights to "parents," including caretakers who are not biological parents as well as adult students.<sup>97</sup> A "parent" under FERPA means either parent, unless there is a court order or state law revoking parental rights.<sup>98</sup> A "parent" may also be a guardian, stepparent, or grandparent who is "acting as a parent in the absence of a [biological] parent."<sup>99</sup>

When the student turns eighteen or enrolls in a post-secondary school, the Buckley Amendment transfers privacy rights from the parent to the "eligible student."<sup>100</sup> As a result, college and adult students, but not their parents, have the right to access their own records. However, if a parent declares a college or adult student as a dependent on the parent's income tax returns, the school may disclose records to the parent without the student's consent.<sup>101</sup> Schools also have the option of providing students with the same rights as their parents, as well as additional rights.<sup>102</sup> Thus, schools may disclose records to students without their parents' consent.

### 4. "Records"

FERPA also defines "records" broadly to include any recorded information that is directly related to a particular student and is created or maintained<sup>103</sup> by a school, school employee, or a person "acting for"<sup>104</sup> a school.<sup>105</sup> The record must contain "personally identifiable information" about the student, including the student's name, parent or other family member's name, address or family's address, personal identifiers such as social security number, a list of personal characteristics that

97. This Note sometimes refers to "parents" as those people with FERPA rights.

98. See Family Educational Rights and Privacy, 34 C.F.R. §§ 99.3, 99.4 (1998).

99. *Id.* § 99.3.

100. See 20 U.S.C. § 1232g(d); 34 C.F.R. §§ 99.3, 99.5(a) (1998). When accelerated students enter college at a young age, their parents' FERPA rights transfer to them. See Daggett, *supra* note 64, at 628 n.85.

101. See 20 U.S.C. § 1232g(b)(1)(H).

102. See 34 C.F.R. § 99.5(b).

103. When a school has destroyed or not kept a copy of a record, there is no longer a FERPA 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 a university faculty member but not copied and kept by the school was not a FERPA record). In *Olsson*, the request for records was made after the school had decided not to keep a copy of the letter. *Id.* at 587. However, if a request for FERPA records is pending, the records are not to be destroyed. See Family Educational Rights and Privacy, 34 C.F.R. § 99.10(e) (1998).

104. 20 U.S.C. § 1232g(a)(4)(A)(ii).

105. See *id.* § 1232g(a)(4); 34 C.F.R. § 99.3.

would result in easy traceability, or other similar information.<sup>106</sup> School records that contain information about no single identifiable student are not FERPA records.<sup>107</sup>

The information kept in a record does not need to be in written form; any permanent recording such as a tape, picture, or computer file can be a record.<sup>108</sup> In addition, student information does not have to be in the official student file to be a record for Buckley Amendment purposes.<sup>109</sup> Records also do not need to be created by the school, as long as the school maintains them.<sup>110</sup> Finally, schools must be careful to edit education records that contain information about more than one student, such as a teacher's grade book, so they do not reveal information about other identifiable students.<sup>111</sup>

Four types of information are not considered school records under FERPA.<sup>112</sup> Documents prepared by a school employee or ancillary personnel to that employee, which are not accessible to or accessed by anyone else, including other school employees<sup>113</sup> (often referred to as "sole possession notes"), are not protected as records under FERPA.<sup>114</sup> This exception may keep the treatment notes of school counselors or the notes of teachers confidential,<sup>115</sup> that is, parents' requests to see these notes need not be honored because they are the private notes of the maker. Once a third party (such as a school administrator or the student) accesses the notes, however, they become records for Buckley Amendment purposes.<sup>116</sup> Notes that are accessible to a third party when created are not sole possession notes, even if a third party never sees them.<sup>117</sup>

FERPA does not protect unrecorded information, such as something overheard by a teacher, nor student information obtained from an external source, such as a

106. 34 C.F.R. § 99.3 (listing some of the categories of personally identifiable information).

107. *See Obersteller v. Flour Bluff Indep. Sch. Dist.*, 874 F. Supp. 146, 149 (S.D. Tex. 1994) (holding that a letter written to an editor by a school secretary regarding an unnamed and unidentified student does not violate FERPA); *see also Red & Black Publ'g Co. v. Board of Regents*, 427 S.E.2d 257, 261 (Ga. 1993) (finding that the records of university disciplinary charges for hazing violations against fraternities and sororities are not FERPA records).

108. *See* 34 C.F.R. § 99.3; *see also MR ex rel. RR v. Lincolnwood Bd. of Educ.*, 843 F. Supp. 1236, 1239 (N.D. Ill. 1994) (holding that a videotape made by a school without parental consent was a record), *aff'd sub nom. Rheinstrom v. Lincolnwood Bd. of Educ.*, 56 F.3d 67 (7th Cir. 1995). *See generally* Charles R. Tremper & Mark A. Small, *Privacy Regulation of Computer-Assisted Testing and Instruction*, 63 WASH. L. REV. 841, 843 (1988) (discussing privacy concerns involved in computerized school records).

109. *See, e.g., Belanger v. Nashua*, 856 F. Supp. 40, 50 (D.N.H. 1994) (concluding that juvenile court records in a school attorney's file are protected under FERPA).

110. *See id.*

111. *See* 20 U.S.C. § 1232g(a)(1)(A) (1994); Family Educational Rights and Privacy, 34 C.F.R. § 99.12(a) (1998).

112. *See* Daggett, *supra* note 64, at 626.

113. *See* 20 U.S.C. § 1232g(a)(4)(B)(i); 34 C.F.R. § 99.3.

114. 34 C.F.R. § 99.3.

115. *See* Daggett, *supra* note 64, at 626.

116. *See id.*

117. *See Parents Against Abuse in Schs. v. Williamsport Area Sch. Dist.*, 594 A.2d 796, 802-03 (Pa. Commw. Ct. 1991) (concluding that the notes of a school psychologist's interviews with students are not "sole possession notes" and may be accessed under FERPA in this case, where the parents permitted the interviews on the condition that they would receive a copy of the notes).

newspaper article.<sup>118</sup> Also, for college students or students eighteen and older, FERPA records do not include health treatment records accessible only to healthcare staff, even if they are not sole possession notes,<sup>119</sup> however, access is available to a treatment professional of the student's choice.<sup>120</sup> In addition, school records created regarding former students, such as records of alumni achievement, are not FERPA records.<sup>121</sup>

Furthermore, as a result of the 1994 amendments, FERPA records do not include those created and maintained for law enforcement purposes by a law enforcement unit within an educational agency.<sup>122</sup> Although Congress created this exception for campus police records at colleges and universities,<sup>123</sup> the language would allow the records of a separate security unit created in an elementary or secondary school district to be exempt from FERPA.<sup>124</sup> Records relating to security which are maintained by other school employees, such as building administrators, who are not part of a law enforcement unit, however, are records covered by FERPA.<sup>125</sup>

### B. Consent

As a general rule, third parties may not access student records without written and dated consent from the parent or qualified student; indeed, under most circumstances, consent is needed for the release of student records even to administrators.<sup>126</sup> The consent must specify the records to be accessed, the person who may access them, and the reason for the disclosure.<sup>127</sup> When an educational agency releases records pursuant to written consent, the parents and student may also receive a copy of the records upon request.<sup>128</sup> Oral disclosure of information contained in student records is prohibited under FERPA.<sup>129</sup>

There are, however, several exceptions to the consent requirement. These exceptions are described at 34 C.F.R. § 99.31. Although schools may disclose student records without consent in these circumstances, FERPA does not require them to do so.<sup>130</sup>

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118. See *Frasca v. Andrews*, 463 F. Supp. 1043, 1050 (E.D.N.Y. 1979) (holding that information contained in a student newspaper is independent of school records and, therefore, not protected by FERPA).

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

120. See 20 U.S.C. § 1232g(a)(4)(B)(iv); 34 C.F.R. §§ 99.3, 99.10(f) (1998).

121. See 34 C.F.R. § 99.3.

122. See 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8(b)(2) (1998).

123. See H.R. REP. No. 102-447, at 128 (1992).

124. See 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8(b)(2). This exception may be increasingly important in the wake of recent high school and elementary school tragedies.

125. See 34 C.F.R. § 99.8(b)(2).

126. See 20 U.S.C.A. § 1232g(b)(1), (2) (West 1990 & Supp. 1999).

127. See *id.* § 1232g(b)(2); 34 C.F.R. § 99.30(b) (1998).

128. See 34 C.F.R. § 99.30(c). A school may charge a fee for this copy. See *id.* § 99.11 (1998).

129. See *id.* § 99.3 (1998) (including the oral, written, or electronic release of information contained in records).

130. See *id.* § 99.31(b).

### 1. The Exceptions

FERPA allows schools to make internal disclosures of records to other officials or employees who the school determines to have a "legitimate educational interest[]" for inspecting student records.<sup>131</sup> However, the school must ensure that the records are not accessible to others during the transmission of the documents to persons with legitimate educational interests.<sup>132</sup> Non-school employees or officials may not receive records under this exception, even though they may have some other legitimate interest in the student.<sup>133</sup>

School records may also be sent to another school in which the student is trying to enroll, in which the student is enrolled concurrently, or from which the student receives services.<sup>134</sup> The school sending the information must make a "reasonable attempt" to provide advance notice to the parents unless they have already consented, or if the school's annual notice to parents regarding student records includes a statement that student records are forwarded for these reasons.<sup>135</sup>

Some private information is considered "directory information"<sup>136</sup> and may be released to the general public without parental consent, including but not limited to the student's name, address, phone number, date and place of birth, major or field of study, participation in school activities and sports, height and weight if the student is on an athletic team, dates of attendance, degrees and awards, and the last school attended.<sup>137</sup> The school must designate directory information,<sup>138</sup> and parents, within a specified timeline, must have an opportunity to object to the release of some or all directory information about their children.<sup>139</sup> The same notice is not required for directory information concerning former students.<sup>140</sup>

131. *Id.* § 99.31(a)(1).

132. *See* Daggett, *supra* note 64, at 632.

133. *See* Irvine (CA) Unified Sch. Dist., 23 INDIVS. DISABILITIES EDUC. L. REP. (LRP) 1077, 1078 (FPCO Feb. 20, 1996) (finding a FERPA violation where a local school released a student's records to his doctor in order to obtain advice about handling the child's medical condition). The 1994 amendments added language to the Buckley Amendment providing that teachers and school officials with a legitimate educational interest in the behavior of a student who has been disciplined for dangerous conduct affecting others may be informed about disciplinary actions and other related "appropriate information" about the student. 20 U.S.C. § 1232g(h) (1994); *see also id.* § 1232g(b)(6)(B) (allowing information to be disclosed regarding the final results of a disciplinary hearing of the perpetrator of a violent or sex-related crime). The 1998 amendments will allow limited information to be accessed by anyone, if the student's offense violates school policy. *See* Pub. L. No. 105-244 § 951, 112 Stat. 1618, 1835 (codified as amended at 20 U.S.C.A. § 1232g(b)(6)(B), (C) (West Supp. 1999)); *see also* 64 Fed. Reg. 29,532, 29,533 (1999) (to be codified at 34 C.F.R. § 99.31(a)(13)) (proposed June 1, 1999).

134. *See* 20 U.S.C. § 1232g(b)(1)(B) (1994); 34 C.F.R. § 99.34(b) (1998).

135. 34 C.F.R. § 99.34(a).

136. *Id.* § 99.3.

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

138. *See* 34 C.F.R. § 99.37(a) (1998).

139. *See* 20 U.S.C. § 1232g(a)(5)(B); 34 C.F.R. §§ 99.3, 99.37(a)(2), (3).

140. *See* 34 C.F.R. § 99.37(b).

## 2. The Access Log

Schools must maintain a written log detailing the release of nondirectory information without consent to people other than the parents, student, or other employees in the school system; the log must also include requests for disclosure that were declined,<sup>141</sup> and it must be kept with the records as long as they exist.<sup>142</sup> Every time the records are accessed or there is a request for access, the log must specify the name of the party to whom the records were released, that person's legitimate interest in the records, and any permitted redisclosures.<sup>143</sup> Only parents, custodians of records and their assistants, and other educational authorities may use the log, and use is limited to auditing and evaluating purposes.<sup>144</sup>

When someone other than the parent or eligible student receives student records, that person must be notified of his or her obligation not to disclose the records to anyone without the written consent of the parent or qualified student, except as permitted by the statute,<sup>145</sup> and must also keep his or her own written access log.<sup>146</sup> Should the receiver violate FERPA with regard to the disclosed records, the school that released the records must not allow that receiver access to student records for at least five years.<sup>147</sup>

### C. Notice

Under FERPA, schools annually and "effectively"<sup>148</sup> must notify eligible current students or parents of current students of their rights under the Buckley Amendment.<sup>149</sup> The notice must include the qualified student's or parent's right to inspect and review the student's records, challenge the accuracy of the student's records, provide consent before the records are released to third parties except as provided by FERPA, and file a complaint with the United States Department of Education.<sup>150</sup> If a school intends to release a student directory, the annual notification should note this disclosure, list the types of personally identifiable information to be included, and explain the deadline and process for objecting to the release of the information.<sup>151</sup> Schools are not required to provide notice to former students.<sup>152</sup>

141. See 20 U.S.C. § 1232g(b)(4)(A); 34 C.F.R. § 99.32(a)(1) (1998).

142. See 20 U.S.C. § 1232g(b)(4)(A); 34 C.F.R. § 99.37(a)(2).

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

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

145. See 20 U.S.C. § 1232g(b)(4)(B); 34 C.F.R. § 99.33 (1998).

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

147. See 20 U.S.C. § 1232g(b)(4)(B).

148. 34 C.F.R. § 99.7(b)(2) (1998).

149. See 20 U.S.C. § 1232g(c) (requiring effective notification); 34 C.F.R. § 99.7(b) (stating that notice must be "reasonably likely to inform" the parents or eligible students of their rights).

150. See 34 C.F.R. § 99.7(a)(2) (listing parent notice requirements).

151. See *id.* §§ 99.37, 99.7.

152. See *id.* § 99.7(a)(1) (requiring notice only to current students).

*D. Enforcement*

People whose rights under FERPA have been violated should file a complaint with the Family Policy Compliance Office ("FPCO").<sup>153</sup> Complaints must be filed within six months (180 days) of the alleged violation, or from the time the complainant knew or should have known of the violation, unless an extension of time is granted by FPCO.<sup>154</sup> The FPCO will notify the complainant if the complaint does not specify the allegations or is not timely filed.<sup>155</sup>

When the FPCO receives a complaint, it notifies the school,<sup>156</sup> but it does not need to provide the school with a copy of the complaint.<sup>157</sup> The FPCO will request a written response from the school,<sup>158</sup> and it may allow the parties to provide it with additional information.<sup>159</sup> The FPCO then investigates the complaint,<sup>160</sup> makes a finding, and notifies the complainant and the school in writing of its finding and its reasoning,<sup>161</sup> it does not hold a hearing.<sup>162</sup> The Buckley Amendment does not provide a deadline for processing complaints, and resolution may take months or years.<sup>163</sup>

If the FPCO finds a FERPA violation, it is only authorized to ask the offending school to voluntarily comply.<sup>164</sup> The FPCO will provide the school with specific guidelines to follow in order to comply with FERPA, including a deadline within which the school must come into compliance.<sup>165</sup> If the school fails to comply, the Secretary of Education may withhold funds the school currently receives, force

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153. *See* 20 U.S.C. § 1232g(g); 34 C.F.R. § 99.63 (1998). The FPC Office's address is: Family Policy Compliance Office, U.S. Department of Education, Washington D.C., 20202-4605. *See id.*

154. *See* 34 C.F.R. § 99.64 (c)-(d) (1998).

155. *See id.* § 99.65(b).

156. *See id.* § 99.65(a).

157. *See id.* § 99.65(a)(1) (requiring notice to the schools of only the substance of the alleged violation).

158. *See id.* § 99.65(a)(2).

159. *See id.* § 99.66(a).

160. *See id.* § 99.64(b).

161. *See id.* § 99.66(b).

162. Of course, if the FPCO determines that the school has a pattern of violating the Buckley Amendment and decides to withdraw federal funds, a hearing is required. *See* 20 U.S.C. 1232g(g) (1994).

163. *See, e.g.,* Irvine (CA) Unified Sch. Dist., 23 INDIVS. DISABLED EDUC. L. REP. (LRP) 1077, 1077 (FPCO Feb. 20, 1996) (finding a FERPA violation almost two years after a parent's letter claiming the school disclosed information from a student's education records to the student's doctor without her consent); Iowa (Case Name Not Provided), 20 INDIVS. DISABILITIES EDUC. L. REP. (LRP) 105 (FPCO May 14, 1993) (finding a FERPA violation one year after the parents filed their complaint). One eligible student mailed a letter to the FPCO in March 1998, and received a response from the FPCO in October 1998, to the effect that it was investigating the complaint. *See* Letter from Student to Family Policy Compliance Office, Dep't of Educ. (Mar. 23, 1998) (on file with author); Letter from Family Policy Compliance Office, Dep't of Educ., to Student (Sept. 10, 1998) (on file with author). As of June 17, 1999, the student has not yet received the results of the FPC Office's investigation.

164. *See* 20 U.S.C. § 1232g(f) (1994); 34 C.F.R. § 99.66(c)(2) (1998).

165. *See* 34 C.F.R. § 99.66(c).



compliance through a court order, or terminate the school's eligibility for future funding.<sup>166</sup> If the complaint is resolved, the parties are notified to that effect.<sup>167</sup> Of course, schools are entitled to a hearing before funds are withheld.<sup>168</sup> To date, the FPCO has never attempted to withdraw federal funds based on FERPA violations.<sup>169</sup>

### III. ALTERNATIVE REMEDIES IN INDIANA AND ELSEWHERE<sup>170</sup>

FERPA has been labeled ineffective and toothless in recent years because of the lack of remedies provided by it upon its violation. Indeed, several courts have also noted the inadequacy of the remedies that the Buckley Amendment provides to people whose privacy rights have been violated. A New Hampshire district court noted that "neither the statute nor the regulations gives an explicit remedy that would be beneficial to the plaintiff."<sup>171</sup> A New Jersey court used stronger language, calling the regulations "complete[ly] inadequa[te]," and failing to require "complete relief for aggrieved individuals."<sup>172</sup> While the federal statute is criticized for its lack of effectiveness, courts in many states have found ways to allow redress for those who have suffered FERPA violations. However, of all the courts to have heard cases brought under FERPA, Indiana courts alone offer no additional remedies to plaintiffs in actions involving the Buckley Amendment.

Title 20 of the Indiana Code governs education, and has no sections regarding student records or student or parental rights therein.<sup>173</sup> Even Article 12, which governs state universities and occupational schools, does not provide for student privacy rights.<sup>174</sup> As a result, students in the State of Indiana are given no additional rights and are protected only by federal law, the Family Educational Rights and Privacy Act.

#### *A. Private Cause of Action*

Although they term the remedies under the Buckley Amendment inadequate, courts reviewing the issue are unanimous in holding that FERPA does not provide parents or qualified students the right to file a private lawsuit against a school to

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166. *See id.* § 99.67(a).

167. *See id.* § 99.67(b).

168. *See* 20 U.S.C. § 1232g(g); 34 C.F.R. § 99.60(c) (1998); *see also* 34 C.F.R. § 81 (1998) (regarding the use of the General Education Provision Act Review Board for hearings involving the withdrawal of federal education funds).

169. A search of Westlaw, FED-ADMIN database, on June 17, 1999, shows no reported decisions, indicating that the FPCO has never attempted to withdraw funds.

170. The author would like to acknowledge her use of Lynn M. Daggett, *Bucking Up Buckley II: Using Civil Rights Claims to Enforce the Federal Student Records Statute*, 21 SEATTLE U. L. REV. 29 (1997), and Ralph D. Mawdsley, *Litigation Involving FERPA*, 110 EDUC. L. REP. 897 (1996), for portions of the organization in this Part.

171. *Belanger v. Nashua Sch. Dist.*, 856 F. Supp. 40, 47 (D.N.H. 1994) (finding a § 1983 claim available and not requiring exhaustion of FERPA's administrative remedies).

172. *Krebs v. Rutgers*, 797 F. Supp. 1246, 1257 (D.N.J. 1992).

173. *See* IND. CODE § 20 (1998).

174. *See id.* § 20-12.

challenge alleged violations.<sup>175</sup> This includes decisions rendered in the Second, Third, Fifth, and Eighth Circuits, as well as by trial courts in the Fifth and Eleventh Circuits.<sup>176</sup> Primarily, the courts cite the absence of such a provision within FERPA itself, as well as a similar absence of legislative intent providing for a private right of action.<sup>177</sup>

Like the courts of other states, Indiana also does not recognize a private cause of action under FERPA. In *Olsson v. Indiana University Board of Trustees*, the Indiana Court of Appeals explicitly followed the trend of the federal circuit courts, declaring that “[n]o private right of action exists under [the] Family Educational Rights and Privacy Act.”<sup>178</sup>

### B. Section 1983 Claims

A more successful claim to redress violations of FERPA by public schools may be a claim filed under § 1983 of the Civil Rights Act.<sup>179</sup> Under the Civil Rights Act, school officials acting under color of state law may be held liable for actions which deprive students of their rights under federal law.<sup>180</sup> Because § 1983 applies only to public officials, officials of private schools who violate the Buckley Amendment may not be sued under it.<sup>181</sup> Several courts have allowed a § 1983 action to remedy violations of FERPA,<sup>182</sup> and legal scholars consider these claims the best available

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175. See, e.g., *Tarka v. Franklin*, 891 F.2d 102, 104 (5th Cir. 1989) (holding that only the Secretary of Health, Education, and Welfare can file an action under FERPA); *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986) (finding that FERPA does not provide a private right of action); *Girardier v. Webster College*, 563 F.2d 1267, 1276-77 (8th Cir. 1977) (explaining that a private cause of action does not arise under FERPA); *Odom v. Columbia Univ.*, 906 F. Supp. 188, 195 (S.D.N.Y. 1995) (dismissing an individual's private claim that Columbia University violated FERPA); *Francois v. University of D.C.*, 788 F. Supp. 31, 32 (D.D.C. 1992) (noting that FERPA does not provide for a private cause of action).

176. See *Klein Indep. Sch. Dist. v. Mattox*, 830 F.2d 576 (5th Cir. 1987); *Fay*, 802 F.2d 21; *Girardier*, 563 F.2d 1267; *Tombrello v. USX Corp.*, 763 F. Supp. 541 (N.D. Ala. 1991); *Moore v. Hyche*, 761 F. Supp. 112 (N.D. Ala. 1991); *Smith v. Duquesne Univ.*, 612 F. Supp. 72 (W.D. Pa. 1985), *aff'd*, 787 F.2d 583 (3d Cir. 1986); *Price v. Young*, 580 F. Supp. 1 (E.D. Ark. 1983).

177. See, e.g., *Tarka*, 891 F.2d at 104; *Fay*, 802 F.2d at 33; *Girardier*, 563 F.2d at 1276-77; *Odom*, 906 F. Supp. at 195.

178. 571 N.E.2d 585, 589 n.4 (Ind. Ct. App. 1991).

179. For a comprehensive discussion of § 1983 claims as a remedy for FERPA violations, see *Daggett*, *supra* note 170, and *Mawdsley*, *supra* note 170.

180. See 42 U.S.C. § 1983 (Supp. II 1996).

181. See *id.*

182. See *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (holding that § 1983 permits claims that are based on alleged constitutional violations, as well as on alleged violations of federal statutes); *Cullens v. Bemis*, No. 92-1582, 1992 WL 337688 (6th Cir. Nov. 18, 1992) (unpublished decision) (stating that FERPA “does create an interest that may be vindicated in a § 1983 action”); *Achman v. Chicago Lakes Indep. Sch. Dist.*, No. 97 CIV. 2426, 1999 WL 194193, at \*7-9 (D. Minn. Apr. 2, 1999) (concluding that “FERPA section 1232g(b)(1) creates a federal right that is enforceable through section 1983 actions”); *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. Va. 1995) (refusing, without discussion, to dismiss FERPA-based § 1983 claim), *appeal dismissed*, 79 F.3d 1141 (4th Cir. 1996); *Krebs v. Rutgers*, 797 F. Supp. 1246, 1256

remedy.<sup>183</sup> A claim may be brought for the school's failure to provide access to parents or students, or the inappropriate release of student records.<sup>184</sup>

A § 1983 claim may be brought against public school districts and boards of education, public colleges and universities, as well as against the agents, officials, and employees of these entities.<sup>185</sup> However, § 1983 limits the theories of liability against government bodies, such as a board of education or a school district, to violations that are pursuant to an official policy or custom of that body.<sup>186</sup> In general, one school employee's actions do not amount to the school's policy or custom.<sup>187</sup>

To prove a prima facie case under § 1983, the plaintiff must show that the defendant acted under color of state law with the requisite state of mind (usually more than ordinary negligence), causing a deprivation of rights under federal law or the Constitution.<sup>188</sup> Section 1983 allows an action for violations of federal statutes enacted under Congress's spending authority, such as FERPA, only if the statute "unambiguously confer[s] an enforceable right upon [its] beneficiaries."<sup>189</sup>

A defendant to a § 1983 action may raise several affirmative defenses. For example, state defendants may plead Eleventh Amendment immunity in federal court cases.<sup>190</sup> Defendants may also raise a good faith defense of "qualified" or

(DN.J. 1992) (examining a § 1983 Buckley-based claim); *Norwood v. Slammons*, 788 F. Supp. 1020, 1026 (W.D. Ark. 1991) (noting that FERPA claims may be brought under § 1983); *see also 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 a joint custodial parent for a FERPA violation.); *Obersteller v. Flour Bluff Indep. Sch. Dist.*, 874 F. Supp. 146, 149 (S.D. Tex. 1994) (dismissing FERPA claim on the grounds that the plaintiff failed to satisfy the § 1983 requirements).

The only court to have wholly rejected FERPA-based § 1983 claims is an Indiana district court. *See Norris v. Board of Educ.*, 797 F. Supp. 1452, 1464-65 (S.D. Ind. 1992) (finding the Buckley Amendment's administrative enforcement mechanism, the FPCO complaint, exclusive, therefore barring a claim under § 1983, and also rejecting a § 1983 claim based on constitutional privacy deprivation).

183. *See Daggett*, *supra* note 170, at 46 (stating that § 1983 claims have been most successful in courts); *Mawdsley*, *supra* note 170, at 1 (same).

184. *See Mawdsley*, *supra* note 170, at 6.

185. *See* 42 U.S.C. § 1983.

186. *See City of Canton v. Harris*, 489 U.S. 378, 382-92 (1989).

187. *See Ware v. Unified Sch. Dist. No. 492*, 902 F.2d 815, 820 (10th Cir. 1990); *Landstrom v. Barrington Sch. Dist. 220*, 739 F. Supp. 441, 449 (N.D. Ill. 1990).

188. *See* 42 U.S.C. § 1983; *Daggett*, *supra* note 170, at 47.

189. *Suter v. Artist M.*, 503 U.S. 347, 357 (1992) (holding that a requirement of "reasonable efforts" by states under the Adoption Assistance and Child Welfare Act does not confer and enforceable right).

190. *See* U.S. CONST. amend. XI; *see also Lassiter v. Alabama A & M Univ.*, 3 F.3d 1482, 1485 (11th Cir. 1993), *vacated*, 19 F.3d 1370 (11th Cir. 1994) (concluding that a state university president acting in his official capacity has Eleventh Amendment immunity). It is likely that § 1983 defendants in state court will try to remove the case to federal court in order to raise the Eleventh Amendment defense.

“official” immunity,<sup>191</sup> if the defendant’s actions do not violate a clearly established right about which a reasonable person would have known, then the defendant has good faith immunity.<sup>192</sup> If the claim is based on a due process violation, an adequate state remedy will defeat the § 1983 claim,<sup>193</sup> but administrative exhaustion is not required.<sup>194</sup>

If a prima facie case is proven, and an affirmative defense is unsuccessful, a wide variety of remedies are available to the plaintiff, including nominal and compensatory damages.<sup>195</sup> If the violations are reckless and intentional, punitive damages may be available.<sup>196</sup> In addition, victorious plaintiffs may have their attorney’s fees reimbursed by the defendant.<sup>197</sup>

Unfortunately, federal courts in Indiana are the only courts that have denied § 1983 claims under FERPA. In *Norris v. Board of Education*, the plaintiffs brought a claim under § 1983 of the Civil Rights Act of 1964 in conjunction with their tort claims.<sup>198</sup> The court said that “FERPA provides expressly that the Secretary of Education is responsible for enforcing the provisions of FERPA; Section 1983 does not create a private right of action for damages where the federal statute provides an exclusive administrative enforcement mechanism.”<sup>199</sup> The court made no reference to the decisions of courts in other circuits.<sup>200</sup>

### C. Section 1985(3) Claims

A more recent trend in litigation involving FERPA violations stems from § 1985(3) of the Civil Rights Act of 1964.<sup>201</sup> Section 1985(3) provides a cause of action in cases in which two or more people have conspired to deprive a person or class of people of a protected right, through actions based on “racial, or perhaps other class-based, invidiously discriminatory animus.”<sup>202</sup> A plaintiff may prove a prima facie case under § 1985(3) by showing that there was a conspiracy for depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws. A plaintiff must also prove that defendants engaged in an act in furtherance of the

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191. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (recognizing the defenses of “absolute” and “qualified” immunity); see *Wood v. Strickland*, 420 U.S. 308, 321 (1974) (stating that school board officials have good faith immunity).

192. See *Harlow*, 457 U.S. at 818-19.

193. See *Parratt v. Taylor*, 451 U.S. 527, 543 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

194. See *Patsy v. Board of Regents*, 457 U.S. 496, 507 (1982).

195. See *Carey v. Phipus*, 435 U.S. 247, 254-55 (1978).

196. See *Smith v. Wade*, 461 U.S. 30, 35-36 (1983).

197. See 42 U.S.C. § 1988 (1994).

198. 797 F. Supp. 1452 (1992).

199. *Id.* at 1464.

200. See *id.*

201. 42 U.S.C. § 1985(3) (1994). For a discussion of § 1985(3) claims, see Mawdsley, *supra* note 170, at 5.

202. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 268 (1993) (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)).

conspiracy which injured the plaintiff or the plaintiff's property or deprived the plaintiff of any right or privilege of citizens of the United States.<sup>203</sup>

Although courts have consistently held that a school board "is a collection of individuals . . . [and] a school board and its employees constitute a single legal entity which is incapable of conspiring with itself for the purposes of Section 1985(3),"<sup>204</sup> one legal commentator has proposed that "if school districts or universities, or their employees, conspire with other outside entities to violate FERPA, a section 1985(3) cause of action is stated."<sup>205</sup> *Brown v. City of Oneonta*, a case in which New York State Police tracked the assailant of an elderly woman to the Campus of State University of New York's Oneonta campus ("SUCO"), supports this contention.<sup>206</sup> The state police, acting on the description of the assailant as a black male, requested the city police to obtain a list of all black males on campus from SUCO's Public Safety Office.<sup>207</sup> SUCO granted the list, and the state police questioned the people whose names appeared on the list.<sup>208</sup> The men who were questioned as a result of the disclosure of the list, alleged, among other claims, that SUCO had violated FERPA under § 1985(3); they contended that school officials, city police, and state police had conspired to deprive them of their rights as citizens of the United States.<sup>209</sup> The federal district court refused to dismiss the conspiracy charges, observing that the "plaintiffs sufficiently elaborate the factual grounds on which they base their conspiracy claims in regard to the creation, approval, and release of the list."<sup>210</sup>

However, on appeal, the Second Circuit found that "no clearly established right of plaintiffs was infringed and appellants are entitled to qualified immunity from claims of conspiracy."<sup>211</sup> The court questioned the scope of the "emergency exception" under 34 C.F.R. § 99.36.<sup>212</sup> By 1992, there had been no adjudications regarding the emergency exception, so the creation and release of the list was not clearly unlawful. Indeed, the educational institution had discretion to determine what constituted an emergency. Based on these factors, the court determined that the plaintiffs had no clearly defined and recognized right under FERPA and that defendants acted reasonably and in good faith with regard to the list.<sup>213</sup>

The Second Circuit ruling does not eliminate the potential use of § 1985(3) as a claim for relief. Its language implies that a valid § 1985(3) claim may still be raised provided that plaintiffs articulate with clarity a specific right, recognized by the Supreme Court, that has been violated.<sup>214</sup> Additionally, a state official must

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203. See 42 U.S.C. § 1985(3).

204. *Hilliard v. Ferguson*, 30 F.3d 649, 653 (5th Cir. 1994).

205. Mawdsley, *supra* note 170, at 5.

206. 911 F. Supp. 580, 583 (N.D.N.Y. 1996).

207. See *id.*

208. See *id.* at 584.

209. See *id.* at 584-85, 593.

210. *Id.* at 593.

211. *Brown v. City of Oneonta*, 106 F.3d 1125, 1128 (2d Cir. 1997).

212. *Id.* at 1132.

213. See *id.*

214. See *id.* at 1131.

understand that his or her acts violate that right.<sup>215</sup> So far, however, no other attempts to claim relief for a FERPA violation under § 1985(3) seem to have been made.<sup>216</sup> Although Indiana courts have not ruled on any § 1985(3) claims under FERPA, it is unlikely that they would allow such a claim after *Norris*, in which they stated that there is absolutely no allowance for a private cause of action under FERPA.<sup>217</sup>

#### D. State Tort Claims

While federal claims under FERPA may be successful, state law tort claims provide no redress. Negligence claims, for example, may be proven with respect to their first prong, the breach of the duty of reasonable care; however, nominal damages are unavailable for negligence claims and proof of a particular harm is most unlikely.<sup>218</sup> Similarly, claims of intentional infliction of emotional distress ("IIED") are unlikely to succeed.<sup>219</sup> IIED requires not only intentionally or recklessly outrageous behavior on the part of the defendant, but also that the plaintiff suffer "severe emotional distress," evidenced by physical symptoms or through medical or psychological treatment.<sup>220</sup> Violations of the Buckley Amendment are not likely to be considered "outrageous" or to result in severe emotional distress.<sup>221</sup>

Moreover, defamation claims based on improper disclosure of student records generally do not succeed because defamation law requires the plaintiff to prove that the statements released are false.<sup>222</sup> School records normally include true, although private, information. Claims of invasion of privacy may also fail, however, because the disclosure of student records would probably not be found to be "highly offensive to a reasonable person," and they may even be found to be "of legitimate concern to the public."<sup>223</sup>

While no Indiana cases exist regarding suits under FERPA specifically claiming negligence, IIED, defamation, or invasion of privacy, one may surmise from the cases which are available that Indiana will not allow such claims. Indeed, in *Norris*, an Indiana district court held that a school corporation may not be held liable under the Indiana Tort Claims Act<sup>224</sup> regardless of whether its employees were acting within the scope of their employment.<sup>225</sup> If they were acting within the scope of their

215. *See id.*

216. A search in Westlaw, ALLFEDS database, on June 17, 1999 revealed no new results.

217. *See Norris v. Board of Educ.*, 797 F. Supp. 1452, 1464-65 (S.D. Ind. 1992).

218. *See Daggett, supra* note 170, at 42.

219. *See id.*

220. RESTATEMENT (SECOND) OF TORTS § 46 (1977).

221. *See Daggett, supra* note 170, at 43.

222. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986) (holding that the plaintiff has the burden of proving the falsity of the statements).

223. RESTATEMENT (SECOND) OF TORTS § 652D (1977); *see also Culver v. Port Allegany Reporter Argus*, 598 A.2d 54, 55 (Penn. Super. Ct. 1991) (affirming the dismissal of an invasion of privacy claim against a newspaper because the public had an interest in a special education student's evaluation costs).

224. IND. CODE ANN. §§ 34-13-3-1 to -25 (1998).

225. *See Norris v. Board of Educ.*, 797 F. Supp. 1452, 1459 (S.D. Ind. 1992).

employment, then the Tort Claims Act provides immunity for the school corporation (which would otherwise be held to the doctrine of respondeat superior), and if they were not, then the bridge of liability required for respondeat superior would be absent and the school corporation could not be held liable for the employee's acts.<sup>226</sup>

Also, in *Doe v. Methodist Hospital*,<sup>227</sup> a plurality of the Indiana Supreme Court declined to recognize that the public disclosure of private facts, part of the tort of invasion of privacy, may form the basis of a civil action.<sup>228</sup> *Doe* involved a man who disclosed to emergency medical workers that he had tested positive for the human immunodeficiency virus ("HIV").<sup>229</sup> This information was noted on his chart, which was subsequently read by Doe's co-worker's wife, an employee at Methodist Hospital where Doe was seeking treatment.<sup>230</sup> The co-worker's wife disclosed the information to her husband, who further disclosed Doe's HIV status to other co-workers.<sup>231</sup> This chain of events is not unlike the unauthorized disclosure of student records, such as what may have happened to Jane in the hypothetical described in the Introduction to this Note; if an unauthorized individual, such as the friend or roommate of the student on the Committee on Residency, views Jane's records without her consent and then discloses the knowledge contained therein to others, that person has violated the Buckley Amendment and invaded Jane's privacy. Similar to the plaintiff in *Methodist Hospital*, Jane will have no remedy in an action for invasion of privacy in the Indiana courts.

#### IV. RECOMMENDATIONS

Indiana courts are not following the trend toward relief for victims of Buckley Amendment violations created by courts in other jurisdictions. In order to prevent a further diminishing of respect for FERPA in Indiana, the courts should re-evaluate the policy implications of the *Norris* ruling. If the courts provide wronged individuals a legal remedy for records violations under FERPA, the ineffectiveness of Congress's remedies would be counteracted.<sup>232</sup> Therefore, Indiana's courts should again analyze the reasoning of courts in other jurisdictions which have allowed recovery under § 1983.

In *Norris*, the court made no reference to the opinions of courts in other jurisdictions when it ruled that FERPA's exclusive enforcement mechanism prohibited a cause of action under § 1983.<sup>233</sup> Other courts have not found the administrative remedy so limiting. The Pennsylvania district court in *Gundlach v.*

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226. *See id.* at 1459 n.3 (discussing the liability of the school corporation). Without specific statutory immunity, the common law doctrine of respondeat superior holds the employer liable for the acts of its employee within the scope of the employee's employment. *See id.*

227. 690 N.E.2d 681 (Ind. 1997).

228. *Id.* at 693.

229. *See id.* at 683.

230. *See id.*

231. *See id.*

232. For one court's view, see *Krebs v. Rutgers*, 797 F. Supp. 1246, 1257 (D.N.J. 1992).

233. *See Norris v. Board of Educ.*, 797 F. Supp. 1452, 1464-65 (S.D. Ind. 1992).

*Reinstein*<sup>234</sup> found that to validly state a claim under § 1983, a plaintiff must allege that he or she was deprived of a right guaranteed by the Constitution or a federal statute.<sup>235</sup> The focus of such a claim should not be whether a constitutional or statutory right was violated, but whether the constitutional or statutory right at issue vests the plaintiff with an enforceable right.<sup>236</sup> When a plaintiff invokes § 1983 to enforce a statute enacted pursuant to Congress's spending power, "the relevant inquiry is whether the Congress unambiguously conferred upon the beneficiaries of the statute a right to enforce its requirements."<sup>237</sup> The *Gundlach* court also found that Congress's intention in enacting FERPA was to impose upon participating institutions a mandatory obligation to avoid a practice of permitting the unauthorized release of education records.<sup>238</sup> Such a mandatory obligation would seem to provide an unambiguous right on the part of the beneficiaries to enforce the statute. Therefore, if an educational institution engaged in a practice of releasing students' education records without parental authorization, then the parents or qualified students would have a cause of action against the institution under § 1983.

Similarly, in *Norwood v. Slammons*,<sup>239</sup> an Arkansas district court said that although "[c]ourts have held that . . . FERPA creates no private cause of action, a plaintiff may assert a FERPA violation as the basis of a claim under § 1983."<sup>240</sup> The court also noted that FERPA regulates the release of student records, so parental consent must be obtained before information from a student's records may be disclosed.<sup>241</sup> Thus, in order to assert a § 1983 claim based on a FERPA violation, a student or parent need only allege that an educational institution has violated that student's or parent's FERPA rights.<sup>242</sup>

Perhaps if the district courts in Indiana were not willing to follow the reasoning of courts in other jurisdictions, the Seventh Circuit Court of Appeals, which has not yet heard a FERPA-based § 1983 claim, would follow the trend in its sister circuits. The Third Circuit affirmed the district court's decision in *Gundlach*, implicitly agreeing with the district court's analysis of the application of § 1983 to FERPA violations.<sup>243</sup> The Second Circuit also would allow a § 1983 action based on a

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234. 924 F. Supp. 684 (E.D. Pa. 1996), *aff'd*, 114 F.3d 1172 (3d Cir. 1997).

235. *See id.* at 691 (citing *Frazier v. Southeastern Penn. Transp. Auth.*, 868 F. Supp. 757, 763 (E.D. Pa. 1994)).

236. *See id.* (citing *Suter v. Artist M.*, 503 U.S. 347, 357 (1992) (citing in turn *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990))).

237. *Id.* (citing *Suter*, 503 U.S. at 357).

238. *Id.* at 692 (citing 20 U.S.C. § 1232g(b) (1994)).

239. 788 F. Supp. 1020 (W.D. Ark. 1991).

240. *Id.* at 1026 (citations omitted).

241. *See id.* (citing *Klein Indep. Sch. Dist. v. Mattox*, 830 F.2d 576 (5th Cir. 1987); *Lawson v. Edwadsburg Public Sch.*, No. 1:90-CV-68, 1990 WL 359811 (W.D. Mich. Nov. 14, 1990)).

242. *See id.*

243. *See Gundlach v. Reinstein*, 114 F.3d 1172 (3d Cir. 1997), *aff'g* 924 F. Supp. 684 (E.D. Pa. 1996).



violation of the Buckley Amendment,<sup>244</sup> as would the Fourth Circuit,<sup>245</sup> Fifth Circuit,<sup>246</sup> and the Sixth Circuit.<sup>247</sup>

The courts, however, are not alone responsible for the strengthening of FERPA in Indiana: The Indiana legislature should reconsider the issue of privacy rights and student records. If the courts are unable or unwilling to provide relief, the legislature should attempt to do so. Illinois has made an effort through the enactment of the Illinois School Student Records Act,<sup>248</sup> which, unlike FERPA, provides specific remedies to parents and students whose rights have been violated under it.<sup>249</sup> The Illinois School Student Records Act allows an action to be instituted in an Illinois circuit court,<sup>250</sup> and, if there is a willful or negligent violation of FERPA, then the Act allows an action for damages, including actual damages, the costs of the action, and reasonable attorney's fees.<sup>251</sup> Additionally, the state's attorney may bring an action for injunctive relief on behalf of the State Board of Education.<sup>252</sup> The Illinois School Student Records Act extends its reach to allow criminal proceedings against an offending individual.<sup>253</sup>

Also, in order to prevent litigation in the first place, Indiana schools need to be more capable of administering records under the Buckley Amendment. That is, the Indiana legislature should provide definitive guidelines directing to whom the school may and may not provide records and which records a person other than a parent or student may be entitled to review. These guidelines should also be made available to parents so that they may more fully understand their rights under FERPA. Without such measures, Indiana is inviting abuse of student records by its schools.

#### CONCLUSION

Most courts outside of Indiana have allowed an action for a violation of FERPA to be brought under § 1983 because of the lack of an effective enforcement mechanism within the Buckley Amendment. Until Congress acts to strengthen FERPA, it will be up to the states to ensure that students are not left without privacy rights. The current status of FERPA leaves parents and students like Jane without recourse in Indiana. Thus, Indiana courts should review their stance on student privacy rights and allow actions based on violations of the Buckley Amendment to be brought under § 1983, and the Indiana legislature should work as well to ensure that students and their parents maintain privacy rights in student education records.

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244. See *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21 (2d Cir. 1986).

245. See *Doe v. Alfred*, 79 F.3d 1141 (4th Cir. 1996), *aff'g* 906 F. Supp. 1092 (S.D. W. Va. 1995).

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

247. See *Cullens v. Bcmis*, No. 92-1582, 1992 WL 337688 (6th Cir. Nov. 18, 1992) (unpublished decision).

248. 105 ILL. COMP. STAT. 10/1-10 (West 1998).

249. See *id.* 10/9(a)-(c).

250. *Id.* 10/9(a).

251. See *id.* 10/9(b)-(c).

252. See *id.* 10/9(d).

253. See *id.* 10/9(e).