Bucking Up Buckley II: Using Civil Rights Claims to Enforce the Federal Student Records Statute

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INTRODUCTION

A 1974 federal statute, the Buckley Amendment (Buckley), also known as the Family Educational Rights and Privacy Act or FERPA,[1] comprehensively regulates student records kept by most United States schools, both public and private, whether serving students at the elementary, secondary, or higher education levels.[2] As a condition of receiving federal education funds, Buckley requires schools to provide parents of minor pre-college students, and adult and college students, access to their school records, confidentiality in those records, and an opportunity to challenge their accuracy.

Enforcing Buckley has been problematic, and, consequently, litigants have treated Buckley largely as an afterthought.[3] Buckley

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1. 20 U.S.C. § 1232g (1994). Buckley is part of the General Education Provisions Act (GEPA), 20 U.S.C. §§ 1221-1234 (1994). Buckley regulations are at 34 C.F.R. § 99.1 to 99.67 (1996).

2. For a discussion of the educational agencies covered by Buckley, *see infra* notes 18-19, and accompanying text.

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

itself provides for enforcement solely through filing complaints with a federal office for voluntary resolution.[4] The only sanction available against schools, withdrawal of all federal education funds,[5] has never been imposed. After an early, and singularly unsuccessful, attempt to get courts to recognize a private cause of action,[6] case law dealing with Buckley consisted largely of secondary claims tacked on to, for example, special education statutory claims.[7] Recently, however, a growing number of courts have either held or suggested that a civil rights claim under 42 U.S.C. § 1983 (Section 1983) may be used to redress alleged Buckley violations.[8]

This Article explores enforcement of Buckley and, in particular, the possibilities of using Section 1983 claims for this purpose. It concludes that Section 1983 claims have only limited potential, under narrowly defined circumstances, as a remedy for Buckley violations. Part I of this Article summarizes Buckley's substantive provisions; a comprehensive review is available in a companion article.[9]

Part II reviews enforcement of Buckley, other than through Section 1983 claims. Specifically, Part II examines the statute's two enforcement mechanisms as well as the potential of state law tort claims to enforce Buckley and the indirect enforcement mechanism of workplace discipline of employees who violate Buckley.

Part III of this Article first reviews Section 1983 doctrine generally as well as its potential to redress Buckley violations. Part III concludes that, while Section 1983 claims are an available remedy to redress Buckley violations, established Section 1983 doctrine significantly limits potential defendants, success, and remedies for such claims.

Part IV of the Article explores five problems inherent in the (weak) array of enforcement mechanisms currently available for Buckley. The Article concludes by urging Congress to reexamine Buckley's enforcement mechanisms and suggests an administrative

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Disclose or Not To Disclose: The Dilemma of the School Counselor, 13 MISS. C. L. REV. 323 (1993).

4. *See* Maynard v. Greater Hoyt Sch. Dist. No. 61-4, 876 F. Supp. 1104 (D.S.D. 1995). For a discussion of the complaint process provided by Buckley, *see infra* notes 96-108 and accompanying text.

5. *See* 20 U.S.C. § 1232g(b)(2) and (f) (1994); 34 C.F.R. §§ 99.62-.67 (1996).

6. For a partial list of the court decisions rejecting a private cause of action under Buckley, *see infra* note 116 and accompanying text.

7. *See, e.g.*, Odom v. Columbia Univ., 906 F. Supp. 188, 195 (S.D.N.Y. 1995) (Buckley claim added to suit primarily alleging a violation of the Civil Rights Act, 42 U.S.C. § 1983).

8. For a discussion of the cases in which Buckley-based Section 1983 claims have been brought, *see infra* Part III.B.

9. *See* Lynn M. Daggett, *Bucking Up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. L. REV. 617 (1997).

remedy which would address the identified problems with existing enforcement mechanisms.

I. OVERVIEW OF BUCKLEY/FERPA[10]

Buckley was enacted in 1974.[11] According to its sponsor, Buckley was enacted to cure "the growing evidence of the abuse of student records across the nation"[12] by (1) assuring parent access to records and (2) protecting the privacy of those records.[13] Buckley also provides parents an opportunity to challenge records. There is some dispute about whether Buckley's purpose is to address individual records violations or merely to prevent systemic violations.[14]

Buckley also requires schools to notify parents annually of their Buckley rights.[15] Further, Buckley is part of the General Education Provisions Act[16] and as such operates as a condition on the receipt of most federal education funds, rather than as a direct mandate.[17] No federal funds are available to schools specifically to help them comply with Buckley.

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 that receives federal education funds under most programs[18] (including, for example, federally guaranteed student loans) is subject to Buckley.[19] For the sake of simplicity, this Article refers to the various educational agencies covered by Buckley as "schools."

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10. This overview is adapted from the more comprehensive review in a companion article by the author. *See* Daggett, *supra* note 9.

11. *See* 20 U.S.C.S. §§ 1221-1234 (Law. Co-op. Supp. 1997).

12. 121 Cong. Rec. S7974 (May 13, 1975).

13. *See* 121 Cong. Rec. 39,863 (December 13, 1974). *See also* Belanger v. Nashua, N.H., Sch. Dist., 856 F. Supp. 40, 46 (D.N.H. 1994) (noting these dual purposes); Zaal v. State, 602 A.2d 1247, 1255 (Md. App. 1992) (same); Student Press Law Center v. Alexander, 778 F. Supp. 1227, 1229 (D.D.C. 1991) (same).

14. *See* Smith v. Duquesne Univ., 612 F. Supp. 72, 80 (W.D. Pa. 1985), *aff'd*, 787 F.2d 583 (3rd Cir. 1986) (taking the latter view); *Zaal*, 602 A.2d at 1255 (same).

15. *See* 20 U.S.C. § 1232g(e) (1994).

16. 20 U.S.C. §§ 1221-1234.

17. *See id.*

18. *See* 34 C.F.R. § 99.1(b) (1996) for a list of Department of Education funded programs which do not trigger Buckley obligations.

19. *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. 20 U.S.C. §§ 1232g(a)(1)(B). Receipt of federal funds other than through the Department of Education does not subject a school to Buckley. For example, receipt of school lunch funds, which flow from the Department of Agriculture, does not trigger Buckley.

B. "Student" "Records" Under Buckley

"Records" covered by Buckley must be those of "students" in (or formerly in)[20] attendance at the school.[21] 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.[22] "Records" are defined quite broadly by the statute. Any recorded information created or maintained[23] by a school, or a school employee, or a person "acting for"[24] a school (such as an independent contractor or privately retained attorney)[25] that directly relates to a

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20. Readers still curious about what their third grade teacher thought of them, or eager to know their IQs, could exercise their rights under Buckley and ask their former elementary schools for access to their records. However, as Buckley does not require schools to maintain records for any specified period of time, the records may have been destroyed.

21. *See* 20 U.S.C. § 1232g(b)(6); 34 C.F.R. § 99.3 (attendance may include enrollment in a correspondence class or work-study program).

22. *See* United States v. Brown Univ., 1992 WL 2513 at *2 (E.D. Pa. 1992) (finding federal government subpoena of financial aid records of students accepted at, but choosing not to attend, school not subject to Buckley because not records of "students"); Norwood v. Slammons, 788 F. Supp. 1020, 1026 (W.D. Ark 1991) (holding plaintiff, who was accepted to defendant law school but did not enroll, 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) (holding records about athlete recruited by school were not Buckley records absent proof recruit had become a student at a school; thus, records were subject to disclosure under state open records law).

23. Records need not be created by the school; it is sufficient if the school maintains them. However, when a school 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. App. 1991) (letter written by university faculty member evaluating student's performance as student teacher was not 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. Of course, if a Buckley request for records is pending, they cannot be destroyed. *See* 34 C.F.R. § 99.10(e) (1996).

24. 20 U.S.C. § 1232g(a)(4)(A)(ii) (1994). One court has held that student information held by the NCAA and an athletic conference are not records maintained by them "on behalf of" member schools. *See* Kneeland v. Nat'l Collegiate Athletic Ass'n, 650 F. Supp. 1076, 1089 (W.D. Tex. 1986), *rev'd on other grounds*, 850 F.2d 224 (5th Cir. 1986). While 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 redisclosure, strengthened by statutory amendment in 1994. *See* 20 U.S.C. § 1232g(b)(4)(B), *amended by* Act of Oct. 20, 1994, 20 U.S.C.S. § 1232g(b)(4)(B) (Law. Co-op. Supp. 1997). Due to the amendment in 1994, Buckley now requires that organizations which receive student records from schools lose access to such records for at least five years if the receiving organization provides access to them without parent consent. *Id.*

25. 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 Buckley records.

particular student is a "record" for Buckley purposes.[26] The record must contain "personally identifiable" information about a student, usually (but not always) her name.[27] The information need not be recorded in words nor contained in written documents. Any permanent recording such as a tape or film, a picture, or a computer file[28] can be a "record."[29] Unrecorded information, such as something heard by a teacher, is not a Buckley record, nor (according to one court) is information about a student obtained from an external source such as a newspaper article.[30] Moreover, to be a Buckley record, student information does not have to be in the official "student file"; it may, for example, be in a teacher's desk, nurse's office, or principal's file.

Four kinds of school documents are explicitly excluded from the definition of "records" under Buckley. First, records under Buckley do not include "sole possession notes."[31] These are notes (such as a school counselor's notes of a treatment session) prepared by a single school employee which are neither accessible to, nor actually accessed by,[32] anyone except the employee or the employee's substitute, including other school employees. Second, for students aged 18 and over or in higher education only, records under Buckley do not include

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26. *See* 20 U.S.C. §§ 1232g(a)(4); 34 C.F.R. § 99.3. An invoice from a school's attorney naming the student who was the subject of a special education hearing is a record under Buckley. *See Letter of March 15, 1991*, 17 INDIVIDUALS WITH DISABILITIES EDUC. LAW REP. (IDELR) 701 (FPRO 1991). *But see* Red and Black Publ. Co., Inc. v. Board of Regents, 427 S.E.2d 257, 261 (Ga. 1993) (suggesting that university student records kept at its Office of Judicial Programs and which are about nonacademic discipline rather than "individual student academic performance, financial aid, or scholastic probation" are not Buckley records). In direct contrast to the *Red and 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* 60 Fed. Reg. 3464, 3464-65 (1995) (statement included in comments on new Buckley regulations).

27. *See* 34 C.F.R. § 99.3 (1996) (lists the categories of personally identifiable information).

28. For a discussion of Buckley and other privacy-related concerns involved in computerized school (and other) records, *see* Tremper and Small, *supra* note 3, at 841.

29. *See* 34 C.F.R. § 99.3; MR by RR v. Lincolnwood Bd. of Educ., 843 F. Supp 1236 (N.D. Ill. 1994) (videotape of special education student made by school without parent's consent was considered a record, and its admission in special education hearing did not violate Buckley).

30. *See* Frasca v. Andrews, 463 F. Supp. 1043, 1050 (E.D.N.Y. 1979) (finding that while principal's seizure of student newspaper with article critical of another student was not unconstitutional, possible Buckley violation did not provide additional authority for seizure since information in article had source independent of student's school records).

31. 20 U.S.C. § 1232g(a)(4)(B)(i) (1994); 34 C.F.R. § 99.3 (1996). Apparently, this is also the case under Section 504. *See Millis, Mass. Public Schools*, 21 IDELR 1064, 1066 (OCR 1994) (holding that teacher's notes of meeting between student and another student are not accessible under Section 504 or the ADA).

32. *See* 34 C.F.R. § 99.3.

health treatment records accessible only to treatment staff, even if not sole possession notes.[33] Access is available, however, to a treatment professional of the student's choosing.[34] 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[35] within a school.[36] Finally, information about former students after they have left a school (for example, accomplishments of an alumnae) are not Buckley records.[37]

C. "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 themselves.[38] Under Buckley, "parent" includes any parent (including noncustodial parents unless there is a court order or law specifically to the contrary)[39] or persons "acting as a parent in the absence of a [natural] parent" (guardian, stepparent, grandparent, etc.).[40] Buckley "parent" rights are transferred to students at the age of 18 or when they enroll in a higher education institution.[41] Thus, college and adult students (and former students) have the right to access their own records. In discussions that follow, the term "parent" refers to persons with Buckley rights, including adult and college students.

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

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

35. 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). However, records created only for these nonlaw enforcement purposes would be Buckley records. *See id.* § 99.8(b)(2)(ii). Hence, school security staff without any specific law enforcement authority can be subject to this exception. However, only records made at least in part for law enforcement purposes are not Buckley records. *See id.*

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

37. *See* 34 C.F.R. § 99.3.

38. *See* 34 C.F.R. §§ 99.3-99.5.

39. *See* 34 C.F.R. § 99.4.

40. 34 C.F.R. § 99.3.

41. *See* 20 U.S.C. § 1232g(d); 34 C.F.R. §§ 99.3, 99.5). Thus, presumably 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 OF ITS DEVELOPMENT 160-178 (Camilla Benbow & Julian Stanley eds., 1983) (examining mental health of twenty-one students in college at aged fifteen or younger).

D. Right to Access Records Under Buckley

Buckley gives parents, upon request, the right to access their child's records within a "reasonable" time—no later than forty-five days after request.[42] Access does not generally include the right to a copy of record. 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."[43] In most cases, schools may charge parents a modest copy fee.[44] Access does include the right to "reasonable" explanations and interpretation of records, for example, a conference with a teacher about a report card grade.[45] Access rights may not be waived, except by older students who may waive access to letters of recommendation.[46]

E. Confidentiality of Records as to Third Parties

In general, third parties cannot access student records without written parent consent.[47] It is equally as prohibited under Buckley to disclose information contained in student records orally as it is to disclose the records themselves.[48] Under most circumstances, written, dated consent of a parent is required to release student records.[49] The consent must specify the records, the person to whom they are to be released, and the reason for the release.[50] When records are released pursuant to written consent, the parents and student are entitled to a copy (for a fee) of the released records upon request.[51] The many exceptions to the consent requirement are described in detail at 34 C.F.R. § 99.31. Schools may, but are not required to,[52] disclose student records without consent in the following circumstances:

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42. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.10(b).

43. 34 C.F.R. § 99.10(d). *See also Huntsville, Ala. Sch. Dist.*, 24 IDELR 82, 83 (FPCO 1996). Presumably, this would occur primarily when a parent lives too far away to come to school to view records.

44. *See* 34 C.F.R. § 99.11(b) (A fee may not be charged where doing so "would effectively prevent a parent from exercising Buckley rights.").

45. *See* 34 C.F.R. § 99.10(c).

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

47. *See* 20 U.S.C. § 1232g(b)(2) (1994); 34 C.F.R. § 99.3(b) (1996).

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

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

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

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

52. *See* 34 C.F.R. § 99.31(b).

a. To other officials or employees of the school officials who have a legitimate educational interest in the records;[53]
b. To a school in which the student seeks to enroll, after advance notice to the parent;[54]
c. When the records are certain "less-private" ones designated as "Directory information";[55]
d. To juvenile justice authorities to help serve students prior to adjudication;[56]
e. In response to a federal grand jury or other subpoena issued for a law enforcement purpose;[57]
f. In response to any other subpoena or court order, with notice to the parent;[58]
g. To federal and state education authorities (and the U.S. Comptroller General) for audit and evaluation purposes (*e.g.*, special education compliance audits);[59]
h. In connection with the student's financial aid, as needed for financial aid purposes;[60]
i. To educational organizations (such as ETS) conducting studies for test development purposes, student aid, or improving instruction;[61]
j. To accrediting organizations for accreditation purposes;[62]
k. To parents of adult or higher education students who are declared by that parent as a dependent on federal income tax returns;[63]
l. To students themselves;[64]

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53. 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31.
54. 34 C.F.R. § 99.34(a).
55. 34 C.F.R. § 99.34.
56. 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).
57. 20 U.S.C. § 1232g(b)(1)(J); 34 C.F.R. § 99.31 (a)(9).
58. 20 U.S.C. § 1232g(b)(2)(B). *See* Francois v. Univ. of the District of Columbia, 788 F. Supp. 31 (D.D.C. 1992) (Buckley and Section 1983 claims filed by student because school registrar complied with U.S. Attorney subpoena and brought educational records to student's trial on drug charges without providing advance notice to student.). *See also* 34 C.F.R. § 99.31(a)(9)(i).
59. 20 U.S.C. §§ 1232g(b)(1)(C); (b)(3); (b)(5); 34 C.F.R. §§ 99.31(a)(3), 99.35.
60. 20 U.S.C. § 1232g(b)(1)(D) (1994); 34 C.F.R. § 99.31(4)(i) (1996).
61. 20 U.S.C. § 1232g(b)(1)(F); 34 C.F.R. § 99.31(6)(i).
62. 20 U.S.C. § 1232g(b)(1)(G); 34 C.F.R. § 99.31(7).
63. 20 U.S.C. § 1232g(b)(1)(H); 34 C.F.R. § 99.31(8). Note that parents in these circumstances do not have a right to such information; it is up to schools to decide whether to disclose to them without student consent.
64. 34 C.F.R. §§ 99.5(b); 99.31(a)(11).

m. In a health or safety emergency, to "appropriate parties"[65] as necessary to protect the health or safety of the student or others. This exception is to be narrowly interpreted;[66]

n. For records of higher education agencies only, results of school discipline proceedings to alleged victims of crimes of violence.[67]

When schools are asked to release or when they actually release nondirectory information to persons other than the parent or student or other employees in the school system without written parent consent,[68] the school must maintain a written log.[69] When records are released to such an outsider, the person receiving the records must be notified of his obligation not to disclose the records to anyone else without written parent consent, except as permitted by Buckley.[70] The receiver of the records must maintain his own written access log.[71] If the receiver violates Buckley with regard to the released records, the releasing school must deny records access to the receiver for at least five years.[72]

F. Challenges to Records

Parents may ask the school to amend records that they believe are inaccurate, misleading, or that invade the privacy rights of students.[73] Hearings are available to challenge the accuracy of recorded grades,[74] but not their fairness.[75] The school must respond to such requests

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65. 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. § 99.36(a).

66. 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. §§ 99.31(a)(10), 99.36(b). *See, e.g., Irvine, Cal. Unified Sch. Dist.*, 23 IDELR 1077, 1077-78 (FPCO 1996) (finding student's nonurgent medical condition and associated safety concerns is not emergency justifying sharing records with student's doctor without parent consent).

67. 20 U.S.C. § 1232g(b)(6); 34 C.F.R. § 99.31(a)(13). Crimes of violence are defined at 18 U.S.C. § 16.

68. 20 U.S.C. § 1232g(b)(4) (1994); 34 C.F.R. § 99.32(d) (1996).

69. 20 U.S.C. § 1232g(b)(4).

70. 20 U.S.C. § 1232g(b)(4)(B); 34 C.F.R. § 99.33.

71. *Id.*

72. 20 U.S.C. § 1232g(b)(4)(B).

73. 20 U.S.C. § 1232g(a)(2); 34 C.F.R. § 99.20(a). Former language allowing challenges because records invaded rights other than privacy was deleted in 1994. *See* 20 U.S.C.S. § 1232g(a)(2) (Law. Co-op. Supp. 1997).

74. *See* Lewin v. Medical College of Hampton Roads, 910 F. Supp. 1161, 1165 (E.D. Va. 1996).

75. Tarka v. Cunningham, 917 F.2d 890, 891-92 (5th Cir. 1990). *See also* 120 CONG. REC. at 39,862 (May 12, 1974) (joint statement in support of Buckley) (Buckley hearing may be used to challenge improperly recorded grade, but not to contest fairness of grade assigned to student's performance); 140 CONG. REC. at S10291 (July 28, 1994) (Buckley hearings also may not be used to challenge appropriateness of IEP's).

within a "reasonable time."[76] If the school does not agree to amend the records, the school must tell the parent of her right to seek an internal hearing (that is, one where the hearing officer is a school employee who is not directly interested in the outcome)[77] to challenge records.[78] The hearing must be held within a reasonable time of the request,[79] include written notice "reasonably in advance"[80] to the parent of the particulars of the hearing,[81] and provide the parent with a "full and fair opportunity to present evidence" and to representation by an attorney or other person at their own expense if they wish.[82] The hearing must result in a written decision, issued within a reasonable time after the hearing.[83] The decision "must be based solely on the evidence at the hearing, and must include a summary of the evidence and the reasons for the decision."[84]

If the parent wins the hearing, the school must accordingly amend the records and so inform the parent in writing.[85] If the parent loses the hearing, the decision is final and there is no provision for an appeal. However, the parent may place a statement in her child's records explaining what she finds to be inaccurate, misleading, or violative of the privacy rights of students.[86] The statement becomes part of the child's records, to be released whenever the challenged records are released.[87]

G. Notice to Parents

Buckley also requires schools to notify parents of current students (as well as adult and higher education students) annually and "effectively" of their Buckley rights.[88] Notice to former students is not required. Parents who have a first language other than English must

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76. 34 C.F.R. § 99.20(b) (1996).
77. *See* 34 C.F.R. § 99.22(c).
78. *See id.*
79. *See* 34 C.F.R. § 99.22(a).
80. 34 C.F.R. § 99.22(b).
81. *See id.* (notice must include "date, time and place of hearing").
82. 34 C.F.R. § 99.22(d).
83. *See* 34 C.F.R. § 99.22(e).
84. 34 C.F.R. § 99.22(f).
85. *See* 34 C.F.R. § 99.20(b).
86. 20 U.S.C. §§ 1232g(a)(2); 34 C.F.R. §§ 99.21-22. This process is somewhat similar to that when entries in credit records are contested.
87. *See id.*
88. *See* 20 U.S.C. § 1232g(e) (1994) (language added in 1994 to require "effective" notification); 34 C.F.R. §§ 99.7; 99.7(c) (1996) (notice must be by means "reasonably likely" to inform).

be "effectively notified."[89] Notice to parents must include notice of 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 statute; and (4) file a complaint with the Family Policy Compliance Office (FPC).[90]

Although not specifically required as part of the parent notice, if a school intends to designate certain information as directory, the annual notification should note this decision, list the types of directory information, and explain to parents the deadline and process for objecting.[91]

H. Conflicts Between Buckley and State Laws

If a school cannot comply with Buckley because of a conflict with state or local law, it must notify the FPC Office within forty-five days.[92] The statute is silent as to any required follow up by the Office or action by the school, when such a conflict arises. One court has suggested, and the FPC Office has stated, that Buckley does not preempt state laws which conflict with it.[93]

II. ENFORCEMENT OF BUCKLEY

As an overview, Buckley itself contains two administrative enforcement provisions. First, a complaint may be made to the FPC Office, which may investigate the complaint and, if a violation is found, attempt to informally and voluntarily resolve it.[94] Second, the Office is empowered in limited egregious circumstances to initiate proceedings to withhold federal education funds from a school district.[95] As the discussion that follows will show, attempts to create a private cause of action for Buckley violations have been singularly unsuccessful. In addition, common law tort claims appear equally lacking in potential. One indirect means of enforcement, however, is the potential for disciplining (and in some cases even discharging) school employees who violate Buckley.

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89. 34 C.F.R. § 99.7(d).
90. 34 C.F.R. § 99.7(a).
91. *See id.* Parents must receive this notice in some format.
92. *See* 34 C.F.R. § 99.61.
93. *See Maynard*, 876 F. Supp. at 1108; *South Dakota*, 20 IDELR 105, 106 (FPCO 1993).
94. *See* 20 U.S.C. § 1232g(g); 34 C.F.R. § 99.64(a).
95. *See* 20 U.S.C. § 1232g(b)(2) and (f); 34 C.F.R. §§ 99.62-.67.

A. *Enforcement by the Family Policy Compliance Office*

1. FPC Office Complaints

Persons who believe their Buckley rights have been violated may file a complaint with the FPC Office.[96] Complaints must be filed within 180 days of the alleged violation or of the time the complainant knew or reasonably should have known of the violation, unless an extension of time is granted by the Office.[97] The FPC Office notifies the complainant if the complaint is untimely or otherwise defective.[98]

When a complaint is received, the Office will notify the school of the complaint[99] (although providing an actual copy of the complaint is apparently not required)[100] and will request a written response.[101] The parties may elect to provide additional information to the FPC Office.[102] The Office will then investigate the complaint,[103] make a finding, and notify the complainant and the school in writing of its findings and reasons.[104] There is no hearing.[105] Buckley also provides no deadline for the Office to process complaints, and resolutions can take many months.[106]

If the FPC Office finds that the school has violated Buckley, the Office is empowered only to seek the school's voluntary compliance. The FPC Office may ask the school to meet certain conditions such as removing records, or may just tell the school to follow the law, in order

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

97. *See* 34 C.F.R. § 99.64.

98. *See* 34 C.F.R. § 99.65(b).

99. *See* 34 C.F.R. § 99.65(a). Apparently, there is no requirement that schools be promptly informed of complaints against them. *See, e.g., Huntsville, Ala. Sch. Dist.*, 24 IDELR 82, 82 (FPCO 1996) (four month interval between complaint and notice of complaint to school).

100. *See* 34 C.F.R. § 99.65(a) (requiring only notice to the schools of "the substance of the alleged violation").

101. *See* 34 C.F.R. § 99.62 (1996) (giving the Office authority to require schools to provide information to resolve complaints). Buckley provides no deadline for responding, and in fact, there may be no response for some months. *See, e.g., Irvine, Cal. Sch. Dist.*, 23 IDELR 1077 (FPCO 1996) (seven months between notice of complaint to school and the school's response).

102. *See* 34 C.F.R. § 99.66(a).

103. *See* 34 C.F.R. § 99.64(b).

104. *See* 34 C.F.R. § 99.66(b).

105. Note, however, that Buckley requires schools to conduct hearings where records are challenged. *See supra* Part I.F. Also note that the statute refers to "adjudication" of complaints, and limits the locations for "hearings" involving school sanctions by the Department of Education. 20 U.S.C. § 1232g(g).

106. *See, e.g., Huntsville, Ala. Sch. Dist.*, 24 IDELR at 82 (February 1996 letter finding Buckley violation as alleged in parent's June 1994 letter claiming school denied access to daughter's records).

to resolve the complaint.[107] If the complaint is thus resolved, the parties are so notified.[108]

2. Termination of Federal Education Funding

In extreme cases, where there is a pattern of violations,[109] and voluntary compliance has not been achieved, the FPC Office may initiate proceedings to withdraw federal funds from the school.[110] Asserting that Buckley bars disclosure of requested records is not sufficient grounds to withhold federal funds.[111] In any event, a school is entitled to a hearing before funds are withheld.[112] Apparently, the Office has never attempted to withdraw federal funds because of Buckley violations.[113] The statute and regulations designate a Review Board but do not assign them any specific Buckley-related responsibilities.

Several courts have noted the lack of remedy Buckley provides to aggrieved persons. One court noted that "neither the statute nor its regulations give a specific remedy that would be beneficial to the plaintiff."[114] 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 Section 1983 claim "would have the effect of 'exhausting' the complainant without any possibility of meaningful enforcement."[115] Accordingly, complainants have attempted to enforce Buckley through private causes of action.

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107. *See* 34 C.F.R. § 99.66(c); *see id.* at 83 (requesting assurances from school of compliance, and notice to staff of obligations in order to resolve complaint); *Irvine*, 23 IDELR at 1078 (same).

108. 34 C.F.R. § 99.67(b).

109. *See* 20 U.S.C. § 1232g(a)(1)(A).

110. *See* 20 U.S.C. § 1232g(b)(2) and (f) (1994); 34 C.F.R. §§ 99.62-.67 (1996).

111. *See* 20 U.S.C. § 1232i. There is an exception to this rule for refusal to provide records to financial aid authorities. *Id.*

112. *See* 20 U.S.C. § 1232g(g); 34 C.F.R. § 99.60(c). *See also* 34 C.F.R. section 78 regarding the GEPA Review Board which conducts hearings when federal funding may be withdrawn.

113. There are no reported decisions so indicating.

114. Belanger v. Nashua Sch. Dist., 856 F. Supp. 40, 47 (D.N.H. 1994) (partly for this reason, finding a Section 1983 claim available and not requiring exhaustion of Buckley administrative remedies).

115. Krebs v. Rutgers, 797 F. Supp. 1246, 1257 (D.N.J. 1992). *See also Maynard*, 876 F. Supp. at 1107 (Buckley enforcement mechanisms "do[] not provide a remedy to the plaintiff, and in fact . . . exacerbate the community's financial burden.").

B. Private Cause of Action Denied

Early in Buckley's history, a series of attempts were made to create a private cause of action under it. However, courts are unanimous in holding that, primarily because of an absence of legislative intent to do so, Buckley itself does not provide the right to file a private lawsuit to challenge alleged violations.[116]

C. State Law Tort Claims

Another possible enforcement mechanism for redressing Buckley violations is state law tort claims, such as those sounding in negligence. While there are few reported decisions examining negligence claims for violation of Buckley, one can predict the likely outcome based on existing tort doctrine and the nature of Buckley violations. The first part of the negligence prima facie case, a breach of the duty of reasonable care on the part of those who violate Buckley, seems easily provable.[117] However, nominal damages are not available in negligence, and the requisite showing of particular types of harm seems unlikely. The harm most likely resulting from a Buckley violation is mental upset. Most jurisdictions do not permit recovery for negligently inflicted mental harm. Instead, under the majority approach mental harm negligently inflicted can be recovered only if incident to physical contact (which seems unlikely in the case of Buckley violations), or if the mental upset results in physical symptoms such as an ulcer.[118]

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116. *See, e.g.*, Tarka v. Franklin, 891 F.2d 102, 102 (5th Cir. 1988); Fay v. South Colonie Central Sch. Dist., 802 F.2d 21, 33 (2nd Cir. 1986); Girardier v. Webster College, 563 F.2d 1267, 1276-77 (8th Cir. 1977); Odom v. Columbia Univ., 906 F. Supp. 188, 195 (S.D.N.Y. 1995); *Krebs*, 797 F. Supp. at 1256; Francois v. Univ. of the Dist. of Columbia, 788 F. Supp. 31, 33 (D.D.C. 1992). For the general standard for inferring a private right of action under a statute, see Cort v. Ash, 422 U.S. 66 (1975).

117. Evidence of custom among educators with regard to student records, as well as expert testimony by educators with regard to best educational practices in the area, could both be used to prove breach of duty. *See* RESTATEMENT (SECOND) OF TORTS § 295A (1965 & Supp. 1996) (custom); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 33 (4th ed. 1984 & Supp. 1996) (custom). Breach of Buckley itself would not, however, establish a breach of the duty of reasonable care. Breach of statute can in some cases conclusively establish a breach of duty under a doctrine sometimes referred to as "negligence per se," but this doctrine requires violation of a(n) (often criminal) state statute establishing a safety standard. *See* Mucklow v. John Marshall Law School, 531 N.E.2d 941, 947 (Ill. App. 1988) (a Buckley violation does not establish negligence per se because Buckley is not a statute "designed to protect human life or property"); *see generally* RESTATEMENT (SECOND) OF TORTS §§ 285, 286; KEETON ET AL., *supra*, § 36.

118. *See* RESTATEMENT (SECOND) OF TORTS § 436A; KEETON ET AL., *supra* note 117, § 54. Of course, other obstacles to negligence claims exist as well. For example, in the case of alleged violations by public schools, state law may provide governmental immunity to such

Other state law tort claims seem equally unlikely to succeed. For example, tort claims sounding in intentional infliction of emotional distress (IIED) require not only outrageous behavior, performed intentionally or recklessly by the defendant, but also that the plaintiff have suffered "severe emotional distress," as usually demonstrated through physical symptoms or the seeking of medical or psychological treatment.[119] Buckley violations are unlikely to be deemed outrageous, or, for the reasons described above with respect to negligence claims, to result in severe emotional distress.

Private school plaintiffs might try a breach of contract claim. Private school students and their schools do have a contractual relationship, in which tuition moneys are exchanged for educational services. The terms of this contractual relationship are inferred from school publications such as the catalog, admissions materials and the student handbook. To the extent a private school has an annual parent notice regarding student records, as Buckley requires, a court may find that notice to be part of the student-school contract. As in tort, however, the likely harm is the wrong sort to be compensated on a contract theory.[120]

One reported case involving a defamation claim based on alleged Buckley violations was thrown out for failure to plead specific facts.[121] More generally, defamation claims based on improper disclosure of student records are likely not viable. Defamation law requires the plaintiff to prove the statements about her are false.[122] Disclosed student records would normally involve true, though allegedly private, information.

Finally, tort claims asserting invasion of privacy may fail because the disclosure of student records would not be "highly offensive to a reasonable person," as is required by such claims. Further, the records may be "of legitimate concern to the public," which defeats the tort of invasion of privacy.[123]

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defendants.

119. *See* RESTATEMENT (SECOND) OF TORTS § 46; KEETON ET AL., *supra* note 117, § 12.

120. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981 & Supp. 1996) (recovery for emotional disturbance in contract is barred under most circumstances).

121. *See* Norris v. Bd. of Educ., 797 F. Supp. 1452, 1462-63 (S.D. Ind. 1992) (granting summary judgment to defendant).

122. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) (holding that truth is not a defense; plaintiff has burden of proving statement is false).

123. *See* RESTATEMENT (SECOND) OF TORTS § 652D; *see also* Culver by Culver v. Port Allegany Reporter Argus, 598 A.2d 54, 55 (Penn. Super. Ct. 1991) (holding that invasion of privacy claim against newspaper properly dismissed because special education student's evaluation costs were a matter of public concern).

D. Grounds for Employee Discipline

Violation of student records laws by a school employee may be cause for discipline of that employee, up to and including dismissal.[124] Buckley is no defense to reporting concerns about students to other school officials when appropriate.[125]

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124. *See, e.g.*, Henderson v. Huecker, 744 F.2d 640, 644 (8th Cir. 1984) (upholding dismissal of counselor at state rehabilitation center in part for attaching confidential student information to the complaint in her lawsuit where student names could have been edited out with no harm to counselor's claim); Downie v. Indep. Sch. Dist. No. 141, 367 N.W.2d 913, 917 (Minn. App. 1985) (upholding dismissal of tenured school guidance counselor for, among other things, breaching confidentiality of students whom he counseled, which the court found to be "the most serious of the charges and certainly the conduct which has the most potential for causing long-lasting harm to students"). Discipline of employees for Buckley violations must be consistent to be upheld. *See* Jager v. Ramond Bd. of Educ., 444 N.W.2d 21, 26 (S.D. 1989) (reversing a decision to not renew a teacher for Buckley violations where another employee was not disciplined for any of three Buckley violations).

125. *See* Pesce v. J. Sterling Morton High Sch. Dist. 201, 651 F. Supp. 152 (N.D. Ill. 1986), *aff'd*, 830 F.2d 789 (7th Cir. 1987) (upholding five day suspension of school psychologist for failing to promptly notify school authorities that student was contemplating suicide after a sexual encounter with a teacher); Gottlob v. Connecticut State Univ., 1996 WL 57087 (Conn. Super. Ct. 1996) (no discussion of Buckley, but upholding discharge of university employee who refused to disclose information regarding student gambling to employer, as against free speech claim).

Of course, Buckley is no bar to reporting of the sort urged in *Pesce*, since it would have been to other school officials with a legitimate educational interest in the student's mental health. *See* 20 U.S.C. § 1232g(b)(1)(A). More troubling is the argument that Buckley prohibits the reporting of suspected child abuse. Reporting is mandated by state statute for certain school employees in all fifty states as a condition of federal child abuse prevention funds under 42 U.S.C. § 510(a) (1994). Buckley is also alleged to prohibit the reporting of suspected criminal activity to law enforcement authorities.

With regard to reporting suspected child abuse, and under earlier versions of Buckley, pre-1974 child abuse reporting mandates were a means of authorized disclosure without consent. Before 1994, Buckley permitted unconsented-to disclosures pursuant to pre-1974 state laws. As of 1994, however, this exception was eliminated. *See* 20 U.S.C. § 1232g(b)(1)(E), *amended by* Act of Oct. 20, 1994, 20 U.S.C.S. § 1232g(b)(1)(E) (Law. Co-op. Supp. 1997).

If no student records are involved (perhaps instead, a teacher has observed bruises and asked the student about them, but recorded nothing, or a teacher has observed an apparent drug sale by a student but recorded nothing) Buckley would not prohibit the reporting. Moreover, where the records of suspected criminal activity are created by a schools' law enforcement unit, they would not be Buckley records and reporting to the police would be permissible. *See* 34 C.F.R. § 99.8. Where, however, as is often the case, Buckley records are involved, Buckley contains no explicit permission to make a report. While it is the author's experience that school employees can and do make such reports on the presumption that Buckley would not be interpreted to prohibit them, Buckley should be amended to permit such reports, as is urged in the companion article. *See* Daggett, *supra* note 9.

III. SECTION 1983 CLAIMS TO REDRESS BUCKLEY VIOLATIONS

Where a public school violates Buckley, a civil rights lawsuit may be possible.[126] Several courts have held that a Section 1983 action may be brought to vindicate Buckley violations, and the specter of such claims has been touted as the best way to enforce Buckley.[127] In fact, numerous Section 1983 claims alleging Buckley violations have been brought in the last ten years.[128] Of these cases, one court awarded nominal damages of one dollar.[129] Another issued a preliminary injunction against a university practice which likely violated Buckley.[130] No reported decisions awarded actual damages or attorneys' fees.

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126. This Article discusses Section 1983 claims, which form by far the bulk of Buckley-based civil rights claims. *See* 42 U.S.C. § 1983 (1994). It should be noted, however, that under narrowly defined circumstances, a Section 1985 civil rights claim may be available. 42 U.S.C. § 1985 (1994) (prohibiting conspiracies to deprive persons of their civil rights). Where a school and its agents are the only alleged violators, a Section 1985 claim will be unavailable, as a school cannot conspire with itself. *See* Rothman v. Emory Univ., 828 F. Supp. 537, 539 (N.D. Ill. 1993) (dismissing Buckley-based Section 1985 claim against university because "university cannot conspire with itself"). Moreover, Section 1985 requires class-based animus not generally present in Buckley violations. *See, e.g., Maynard*, 876 F. Supp. at 1009 (dismissing Buckley-based Section 1985 claim for this reason).

In the event that student records were singled out for adverse treatment motivated by race, a Buckley-based Section 1981 claim may be available. Brown v. City of Oneonta, 858 F. Supp. 340, 344-345 (N.D.N.Y. 1994), *rev'd on other grounds*, 160 F.R.D. 18 (1995).

127. *See, e.g., Maynard*, 876 F. Supp. at 1107; Cullens v. Bemis, 979 F.2d 850 (6th Cir. 1992) (unpublished decision); *Tarka*, 891 F.2d at 102 (but affirming summary judgment for school on 1983 claim where plaintiff was not a student); *Fay*, 802 F.2d at 33-34 (affirming judgment under Section 1983 and state law for joint custodial parent for Buckley violation where school refused to permit access to child's records and send copies of school notices, and remanding for determination of amount, if any, of compensatory damages); Gundlach v. Reinstein, 924 F. Supp. 684, 690 (E.D. Pa. 1996); Doe v. Alfred, 906 F. Supp. 1092 (S.D.W.V. 1995), *appeal dismissed*, 79 F.3d 1141 (7th Cir. 1996) (refusing, without discussion, to dismiss Buckley-based Section 1983 claim); Doe v. Knox County Bd. of Educ., 918 F. Supp. 181 (D. Tenn. 1994); Oberstellar for Oberstallar v. Flour Bluff Indep. Sch. Dist., 874 F. Supp. 146, 149 (S.D. Tex. 1994); Belanger v. Nashua, Noltog Sch. Dist., 856 F. Supp. 40 (D.N.H. 1994); *Krebs*, 797 F. Supp. at 1256; Norwood v. Slammons, 788 F. Supp. 1020 (W.D. Ark 1991). *Cf.* Maine v. Thiboutot, 448 U.S. 1 (1980) (Section 1983 permits claims which are based not on alleged constitutional violations, but on alleged violations of federal statutes.).

One court has rejected Buckley-based Section 1983 claims. Norris v. Bd. of Educ. of Greenwood Community Sch. Corp., 797 F. Supp. 1452, 1464-65 (S.D. Ind. 1992) (holding that Buckley's administrative enforcement mechanism, the FPC Office complaint, is exclusive and bars a claim under Section 1983; also rejecting a Section 1983 claim based on constitutional privacy deprivation).

128. *See supra* list of cases at note 127.

129. *See* Bauer v. Kincaid, 759 F. Supp. 575, 595 (W.D. Mo. 1991); *see also Fay*, 802 F.2d at 33 (remanding trial court's award of nominal damages to allow plaintiff to prove actual damages).

130. *See Krebs*, 797 F. Supp. at 1262.

A. Section 1983 Claims in General

1. Persons Who May Be Sued

A variety of persons and entities may be sued under Section 1983, including state governments and agencies, local governments and agencies, public school districts and boards of education, and public colleges and universities, as well as agents, officials and employees of all of these entities.[131] Federal entities and employees may not be sued under Section 1983 but may instead be liable under a similar "Bivens" action created under federal common law.[132] Remedies against some types of defendants are, however, limited under Section 1983. The Eleventh Amendment bars federal courts from awarding damages against state governments and agencies and state employees in their official capacity.[133] Punitive damages are not available against municipal defendants.[134] Section 1983 also limits theories of liability against certain types of defendants. Government entities, for example a board of education or a school district, will be liable only if the violation is pursuant to an official policy or custom of that government entity.[135] Generally, the actions of an individual school district employee, even a high-ranking one, do not amount to a school district policy or custom.[136] Finally, supervisory employees such as

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131. *See* 42 U.S.C. § 1983 (1994).

132. *See* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). A *Bivens* claim is markedly similar to a Section 1983 claim, but is brought under common law instead of statute.

133. *See* Edelman v. Jordan, 415 U.S. 651 (1974); Lassiter v. Alabama A & M Univ., 3 F.3d 1482 (11th Cir. 1993), *vacated*, 19 F.3d 1370 (11th Cir. 1994) (finding that a state university president has Eleventh Amendment immunity). The Eleventh Amendment may also limit the authority of state courts to award damages against these defendants. *See* Livingood v. Meece, 477 N.W.2d 183 (N.D. 1991). Eleventh Amendment immunity, however, may be waived. *See, e.g.*, Dellmuth v. Muth, 491 U.S. 223 (1989) (no waiver under IDEA). In any event, Section 1983 defendants sued in state court are likely to seek removal to federal court in order to raise the Eleventh Amendment.

134. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981); Monell v. Dep't of Soc. Serv. of City of New York, 436 U.S. 658 (1978).

135. *See Monell*, 436 U.S. at 690. *See also* City of Canton, Ohio v. Harris, 489 U.S. 378, 382 (1989) ("[T]he first inquiry in any case alleging liability [of a government entity] under § 1983 is . . . whether there is a direct causal link between a policy or custom, and the alleged deprivation."). "Deliberate indifference" by a municipality to the violation of federal rights must also be proved. Board of County Comm'ns of Bryan County, Ok. v. Brown, 65 USLW 4286, 4288-89 (U.S. Apr. 28, 1997).

136. *See, e.g.*, Ware v. Unified Sch. No. 492, 902 F.2d 815, 820 (10th Cir. 1990) (finding that superintendent of schools does not make Board of Education employment policy or custom and Board of Education cannot delegate its employment authority); Landstrom v. Barrington Sch. Dist. 220, 739 F. Supp. 441, 449 (N.D. Ill. 1990) (finding that although school principals make

school administrators cannot be liable under Section 1983 on a respondeat superior theory.[137] Supervisors can only be liable for subordinates' conduct that they encouraged, condoned, or to which they acquiesced.[138]

2. Prima Facie Case

Plaintiffs must prove the following elements to make out a prima facie case under Section 1983:

-the defendant acted under color of state law;[139]
-the defendant acted with the requisite state of mind, if any (generally more than ordinary negligence);[140]
-causing[141]
-a deprivation of a right under federal law or the constitution.[142]

Violations of federal statutes (at least those enacted under Congress' spending authority) are actionable under Section 1983 only if the statute "unambiguously confer[s] an enforceable right upon [its] beneficiaries."[143]

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policy for their school buildings, principal does not establish school district policy). *Cf.* Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737-38 (1989) (noting that school district policy maker determination is an issue of state law and may vary from issue to issue); moreover, even if a school district employee is a policymaker for the district, that employee's acts do not render the district liable unless the district was the "moving force" behind the injury. Board of County Comm'ns of Bryan County, Ok. v. Brown, 65 USLW 4286, 4288-89 (U.S. Apr. 28, 1997).

137. *See Monell*, 436 U.S. at 692. *See generally* Russell G. Donaldson, Annotation, *Vicarious Liability of Superior under 42 U.S.C. § 1983 for Subordinate's Acts in Deprivation of Civil Rights*, 51 A.L.R. FED. 285 (1981).

138. *See, e.g.*, Lipsett v. Univ. of Puerto Rico, 864 F.2d 881 (1st Cir. 1988). Deliberate indifference on the part of superiors to, for example, obligations to train subordinates, may be required. *See Harris*, 489 U.S. at 388.

139. For a discussion of the under color of state law requirement, see Lugar v. Edmondson Oil, Inc., 457 U.S. 922, 937 (1982).

140. Section 1983 does not contain an independent state of mind requirement; the state of mind required for the underlying violation is to be considered. For example, in Section 1983 claims alleging procedural due process violations, more than ordinary negligence must be proven. *See* Daniels v. Williams, 474 U.S. 327, 329 (1986). Municipalities will not be liable unless deliberate indifference to the underlying violation is proved. *See Brown*, 491 U.S. at 737-38.

141. *See* Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979); Mount Healthy City Bd. Of Educ. v. Doyle, 429 U.S. 274 (1977) (setting out standard when there are multiple causes); Scheuer v. Rhodes, 416 U.S. 232 (1974).

142. Although most Section 1983 claims allege constitutional violations, it is clear that claims alleging federal statutory violations may also be brought. *See* Maine v. Thiboutot, 448 U.S. 1 (1980) (finding that Section 1983 permits claims which are based, not on alleged constitutional violations, but on alleged violations of federal statutes).

143. Suter v. Artist M., 503 U.S. 347, 357 (1992) (holding that a Section 1983 claim is unavailable under the Adoption Assistance and Child Welfare Act, which merely requires "reasonable efforts" by states).

3. Defenses

There are several affirmative defenses. State defendants in federal court cases may plead Eleventh Amendment immunity.[144] Individual defendants may raise the defense of good faith (also sometimes referred to as "qualified" or "official") immunity.[145] A defendant has good faith immunity if her actions do not violate a clearly established right about which a reasonable person would have known.[146] In due process-based claims, an adequate state remedy defeats the Section 1983 claim.[147] On the other hand, administrative exhaustion is generally not required.[148]

4. Remedies

If a plaintiff prevails before a judge or jury on a Section 1983 claim, a wide variety of remedies are available. Nominal[149] and compensatory[150] damages are available, including "inferred" damages, where the jury is asked to estimate the size of the plaintiff's injury (for example, because of a due process violation) without specific proof.[151] Punitive damages are also available to remedy intentional and reckless violations.[152] However, punitive damages are not available against a municipality or municipal employees sued in their official capacity.[153] Plaintiffs who "prevail"[154] may also have their reasonable attorneys' fees reimbursed by the defendant.[155]

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144. *See supra* note 133 and accompanying text.

145. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982); Wood v. Strickland, 420 U.S. 308 (1974) (school board members have good faith immunity).

146. *See Harlow*, 457 U.S. at 818-819.

147. *See* Parratt v. Taylor, 451 U.S. 527 (1981).

148. *See* Patsy v. Board of Regents of State of Fla., 457 U.S. 496 (1982).

149. *See* Carey v. Piphus, 435 U.S. 247 (1978).

150. *See id.*

151. *See id.* at 264 n.22. The amount of the presumed damages award must, however, depend on the magnitude of the plaintiff's injury rather than the importance of the right that was violated. *See* Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 302 (1986).

152. *See* Smith v. Wade, 461 U.S. 30 (1983); *Carey*, 435 U.S. at 257 n.11.

153. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

154. "Prevail" means to "succeed on any significant issue in litigation which achieves some of the benefit the party sought in bringing the suit." Hensley v. Eckerhart, 461 U.S. 424, 429 (1983).

155. *See* 42 U.S.C. § 1988 (1996). Attorneys' fees are available even if only nominal damages are awarded. *See, e.g.*, Dahlem v. Bd. Educ., 901 F.2d 1508 (10th Cir. 1990). Attorneys fees may also be awarded against a state or other party with Eleventh Amendment immunity where prospective injunctive relief is granted. *See* Hutto v. Finney, 437 U.S. 678 (1978).

B. Section 1983 Claims Asserting Buckley Violations

To understand the applicability of Section 1983 claims to Buckley grievances, and specifically why such claims have not been more successful, it is instructive to work through each aspect of a hypothetical Section 1983 claim alleging a Buckley violation. Assume, for example, that a teacher returns a student's exam marked with a grade of "D" and blurts out, in front of the class, "I can't believe someone with an IQ of 130 [cannot] do better than a D." The student is pleased to learn her IQ is high,[156] but upset that it, and her exam grade, are now matters of public knowledge.

1. Persons Who May Be Sued

The plaintiff parent[157] might file a Section 1983 claim against the teacher, the teacher's supervisors such as the principal and superintendent of schools, the board of education and its members, and the school district itself. If the attorney is creative, state defendants such as the state department of education may also be joined. Initially, several defendants are likely to move to dismiss the claims against them. As discussed above in Part III.A, the state and institutional defendants, the school district and board of education, will likely make one or more of three following arguments: (1) the alleged violation was not pursuant to official policy; (2) they are immune under the Eleventh Amendment; or (3) they cannot be found responsible on a vicarious liability or respondeat superior basis. Assuming the school district has annual parent notice regarding student records as Buckley requires,[158] that this notice prohibits disclosures such as the teacher's, and that there is no pattern of Buckley violations in the school district which might amount to an official policy or practice, the institutional defendants are likely to be dismissed under *Monell*.[159]

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156. On a Wechsler IQ test, for example, a score of 130 is two standard deviations above the mean, putting this student at about the 98th percentile rank.

157. Of course, if the student is aged eighteen or over, she herself would be the proper plaintiff.

158. *See supra* Part I.G.

159. *See, e.g.*, *Krebs*, 797 F. Supp. at 1258 (numerous instances of faculty distribution of rosters with student social security numbers for attendance purposes, without corrective action from university administration, constitutes a practice; however, isolated instance of posting grades by names does not); *Francois*, 788 F. Supp. 31, 33 (D.D.C. 1992) (alleged Buckley violation where school, under subpoena, released records of indicted student to U.S. Attorney without notice to student does not state Section 1983 claim where there is no allegation the violation was pursuant to school custom or policy).

Immunity under the Eleventh Amendment does not extend to municipal defendants which, according to most states, includes local school districts.[160] However, institutional state defendants, and state employees sued in their official capacity, will have Eleventh Amendment immunity from suits for damages in federal courts.[161] Of course, because suits for prospective injunctive relief would not implicate the Eleventh Amendment,[162] claims for injunctive relief could be maintained against these defendants.

Finally, supervisory defendants (such as the principal and superintendent of schools) and employer defendants (such as the teacher's employing school district) cannot be held liable on a respondeat superior basis.[163] Only supervisors who participate in or condone the violation will be liable under Section 1983.[164] Similarly, board of education members cannot be liable under Section 1983 unless they approved the conduct.[165]

In short, claims are likely to be dismissed against almost all of the defendants, except for the teacher.[166]

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160. *See* Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 277 (1977) (applying Ohio law, school district acts as political subdivision of the state and thus has no Eleventh Amendment immunity); Gundlach v. Reinstein, 924 F. Supp. 684, 691 (E.D. Pa. 1996); Doe v. Knox Co. Bd. of Educ., 918 F. Supp. 182, 183 (E.D. Ky. 1996). *But see* Belanger v. Madera Unified Sch. Dist., 963 F.2d 248, 255 (9th Cir. 1992) (stating that because of level of state control of education in California, local board of education does have Eleventh Amendment immunity).

On the other hand, a state university likely has Eleventh Amendment immunity. *See, e.g.*, Hall v. Hawaii, 791 F.2d 759 (9th Cir. 1986) (University of Hawaii immune).

161. *See, e.g.*, Cullens v. Bemis, 979 F.2d 850, 857 (6th Cir. 1992) (unpublished decision) (dismissing 1983 claims claiming Buckley violation against state defendants under Eleventh Amendment); *Fay*, 802 F.2d at 33-34 (dismissing claims against state Commissioner of Education because of Eleventh Amendment immunity).

162. *See* Quern v. Jordan, 440 U.S. 332, 337 (1979); *Ex parte* Young, 209 U.S 123 (1908).

163. *See* Oberstellar v. Flour Bluff Indep. Sch. Dist., 874 F. Supp. 146, 149 (S.D. Tex. 1994) (holding that defendant's coach and athletic director cannot be liable under Section 1983 on respondeat superior theory for alleged Buckley violation by secretary who wrote letter about student to newspaper).

164. *See Cullens*, 979 F.2d at 850 (holding that no respondeat superior liability is possible in Section 1983 claim based on alleged Buckley violation; supervisor liable only if she "condoned, encouraged, or participated in the alleged misconduct"); *Krebs*, 797 F. Supp. at 1261 (refusing to permit amendment of complaint to add university president as defendant, where no allegations he knew of or "acquiesced in" alleged Buckley violations).

165. *See* Maynard v. Greater Hoyt Sch. Dist. No. 61-4, 876 F. Supp. 1104, 1108 (1995) (dismissing claims against school district, and Board of Education members in official capacity, because alleged actions not pursuant to official policy or custom).

166. As discussed *supra* in Part III.A.3, the teacher may move to dismiss the case on the basis of the affirmative defense of good faith immunity. As good faith immunity is an issue of law, it may be resolved without going to trial.

2. Prima Facie Case

To make out a prima facie case against the teacher and any remaining defendants, the plaintiff would first have to prove that the defendant acted under color of state law. For claims against public schools and their employees and officials, proving this element would be easy. Claims against private schools and their employees and officials would fail here, however. Even private schools which receive substantial federal funding do not act under color of state law for Section 1983 purposes.[167] The unavailability of Section 1983 claims, and the lack of a private remedy thus leave private school students with no way to challenge Buckley violations in court, nor with an administrative hearing conducted by an independent official.[168]

Next, the plaintiff would have to prove the requisite state of mind. Section 1983 has no independent state of mind requirement; any requisite state of mind arises from the state of mind required for the alleged underlying violation.[169] For example, more than ordinary negligence is required in Section 1983 claims alleging procedural due process violations.[170] In the case of Buckley violations, the statute contains no state of mind requirement, but more than negligence may be required.[171]

To complete the prima facie case, the plaintiff would then have to establish causation and a deprivation of Buckley. Three courts have found that Buckley does "unambiguously impose enforceable obligations" on states, and thus held that a Buckley violation is an actionable statutory deprivation.[172] Because however, some courts have read

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167. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 841 (1982) (finding that a private school for disabled students whose revenue was derived almost exclusively from tuition payments by public schools did not act under color of state law for Section 1983 purposes); Williams v. Discovery Day School, 924 F. Supp. 41 (E.D. Pa. 1996) (dismissing Buckley-based Section 1983 claims against private school and its agents); Odom v. Columbia Univ., 906 F. Supp. 188, 195 (S.D.N.Y. 1995) (dismissing Buckley claim and noting in dicta that Section 1983 claim would be unavailable because private university does not act under color of state law); *Maynard*, 876 F. Supp. at 1107 (finding that newspaper reporter and taxpayer defendants are not state actors who can be liable under Section 1983). *Cf.* National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988) (holding that a national university athletic association which is largely comprised of public schools does not act under color of state law).

168. *See Cullens*, 979 F.2d at 850 (unpublished decision) (no 1983 claim based on alleged Buckley violation against private college).

169. *See supra* note 140.

170. *See* Daniels v. Williams, 474 U.S. 327 (1986).

171. *See Cullens*, 979 F.2d at 850 (holding that a Section 1983 claim not available where the complaint that the school lost student's records alleges no more than negligence).

172. *See* Gundlach v. Reinstein, 924 F. Supp. 684,690 (E.D. Pa. 1996); *Maynard*, 876 F. Supp. at 1107; *Belanger*, 856 F. Supp. at 41-47 (performing a particularly thorough analysis).

Buckley literally to only require schools to adopt policies regarding access to and confidentiality of student records, one court has found that actionable deprivations of Buckley may occur only through school policy.[173] Alternatively, two courts have suggested that student records violations may involve deprivations of constitutional privacy interests.[174]

In the hypothetical scenario, if the teacher works at a public school, it should be easy to prove her actions were under color of state law. The other elements of the prima facie case are less clear. If the court requires a state of mind worse than ordinary negligence, "blurting out" student records information may not be sufficient. Similarly, if the court interprets Buckley as only requiring school policies, then the individual teacher's violation would not constitute a deprivation.

3. Defenses

The teacher, and any other defendants sued in their individual capacities, may raise the affirmative defense of good faith immunity. If the violation of Buckley is a clear one, and there are no other conflicting laws, the good faith immunity defense seems unlikely to succeed. Whatever the teacher's actual state of mind, it appears that a reasonable educator would know about Buckley, which has been the law for more than twenty years.[175] On the other hand, if Buckley was violated in order to comply with a conflicting law, good faith immunity may well exist.

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173. *See Gundlach*, 924 F. Supp. at 690 (performing *Suter* analysis, finding that "the requirement placed [by Buckley] on the participating institution is not that it must prevent the unauthorized release of education records, . . . but that it cannot improperly release such records as a matter of policy or practice").

174. *See* Norris v. Bd. of Educ., 797 F. Supp. 1452, 1465-66 (S.D. Ind. 1992) (finding no actionable claim arising from the facts before the court); *see also* Sean R. v. Bd. of Educ. of Town of Woodbridge, 19 IDELR 173, 174 (D. Conn. 1992).

175. *See* Doe v. Knox County Bd. of Educ., 918 F. Supp. 181, 185 (D. Tenn. 1994) (refusing to dismiss on grounds of qualified immunity Section 1983/Buckley claims against Superintendent of Schools and Board of Education members). *But see Maynard*, 876 F. Supp. at 1108 (finding that school board members have qualified immunity in individual capacity for alleged Buckley violations when they acted pursuant to advice of school attorney and in accordance with conflicting state law). It would seem especially likely that reasonable special education employees would be familiar with Buckley, given the Individuals with Disabilities Education Act's (IDEA) requirement for staff training on student records confidentiality. 34 C.F.R. § 300.572(c) (1996). Moreover, state teacher certification requirements may require knowledge of school legal issues, perhaps specifically including knowledge of student records laws. *See, e.g.*, WASH. ADMIN. CODE § 180-79-131 (1997) (general knowledge requirements for all Washington educator certification candidates includes the knowledge of American education law, including "students . . . privacy rights").

Adequate state remedy is also a defense, but only for Section 1983 claims alleging due process violations. Therefore, it would appear to be inapplicable to Section 1983 claims alleging Buckley violations. Moreover, there is no state hearing or civil claim provided by Buckley for alleged violations of it which might be considered an "adequate state remedy."[176] However, some states may have state remedies which may be raised as Section 1983 defenses.[177]

Finally, and as is the case with most statute-based Section 1983 claims, administrative exhaustion would likely not be required.[178] In short, in the hypothetical scenario, the public school teacher defendant is unlikely to raise a successful affirmative defense.

4. Remedies

As discussed above, persons who surmount these obstacles and prevail under Section 1983 can recover money damages (including in some cases pain and suffering and punitive damages), as well as attorneys' fees from defendants who are found to have violated the law.[179] Students injured by Buckley violations are unlikely to have physical injuries, or in most cases, emotional harm which involves treatment, so normally only nominal damages will be available.[180] As stated previously, no reported cases have awarded other than nominal damages under Section 1983 for Buckley violations. However, prevailing plaintiffs may be able to recover presumed damages[181] in the same manner as persons injured by, for example, search and seizure violations. Moreover, they may in appropriate circumstances recover punitive damages,[182] except against municipal defendants. At the least, nominal damages will be available. Injunctive relief is also a

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176. This is in contrast to other federal education statutes such as the IDEA, which requires a state level administrative hearing for alleged statutory violations. *See* 20 U.S.C. § 1415(b) (1994).

177. *See* Cullens v. Bemis, 979 F.2d at 850 (in case alleging Buckley violation, noting that adequate state remedy would defeat due process-based 1983 claims in federal court).

178. *See Belanger*, 856 F. Supp. at 47; *Krebs*, 797 F. Supp. at 1256-57. Note that attorneys' fees would also be unavailable for "prevailing" at the administrative level. *See* North Carolina Dep't of Trans. v. Crest Street Community Council, 479 U.S. 6 (1986). Of course, given the absence of a hearing opportunity as part of the Buckley administrative process, hiring a lawyer to file an FPC Office complaint is probably not a good investment.

179. *See* 42 U.S.C. § 1988 (1994) (availability of attorneys' fees); *see supra* notes 149-55 and accompanying text.

180. *See* Bauer v. Kincaid, 759 F. Supp. 575, 595 (W.D. Mo. 1991) (awarding $1.00 damages). *See also Fay*, 802 F.2d at 33 (remanding trial court's award of nominal damages to allow plaintiff to prove actual damages).

181. *See supra* note 151 and accompanying text.

182. *See supra* notes 152-53 and accompanying text.

possibility.[183] Whatever damages or other relief are awarded, reimbursement of attorneys' fees may also be claimed. Attorneys' fees need not be proportionate to the actual damages awarded.[184] Again, the teacher cannot look to her employer for payment of the judgment on a respondeat superior theory. However, the teacher may have insurance to cover the judgment, or may look to her school district employer for indemnification.

In the hypothetical scenario, all but one defendant have likely successfully avoided trial.[185] The parent may be able to prevail against the remaining teacher. Nominal, and perhaps presumed and/or punitive damages may be awarded, as well as attorneys' fees, which may be substantial. The parent's actual financial gain, however, may be zero or less. If nominal damages and attorneys' fees are awarded, the parents' will not have to pay their lawyer but will not receive any money. If the teacher's assets[186] are used up to pay her attorney, the prevailing parent will be unable to collect any damages awarded, and may owe their own attorney besides.

The outcome in the hypothetical case is actually more favorable to the plaintiff than that in a recent Buckley-based Section 1983 claim. In *Maynard v. Greater Hoyt Sch. Dist.*,[187] the plaintiff parents claimed that the school (through board of education members) had shared information with the press on four separate occasions about the costs and details of their son's $100,000-annual-tuition residential special education placement.[188] The resulting newspaper articles identified the student by name and ran his photograph. The release of this information in board meeting minutes was undisputed, and would appear to be a clear violation of Buckley. It also had significant consequences for the family. The school had to raise property taxes to pay for the placement. Taxpayers were upset about the tax increase

183. *See, e.g., Krebs*, 797 F. Supp. at 1262 (enjoining certain uses of student social security numbers as violating their Buckley rights).

184. *See* City of Riverside v. Rivera, 477 U.S. 561 (1986) (upholding award of more than $240,000 in attorneys' fees in case with about $33,000 in actual damages).

185. Where the alleged violator is a school board member, there may be no viable defendants. *See Maynard*, 876 F. Supp. at 1108 (dismissing some defendants as private actors, and remaining defendant school board and members because violation was not pursuant to official policy, and because of good faith immunity).

186. And, of course, any insurance assets or school board assets available via indemnification.

187. 876 F. Supp. 1104 (D.S.D. 1995).

188. *See South Dakota*, 20 IDELR 105 (FPCO 1993).

and asked why it was necessary. After the newspaper articles came out, the parents were harassed.[189]

The parents apparently first filed an FPC Office complaint in early 1992.[190] Over one year later, the Office issued a finding that Buckley had been violated, and offered to close the complaint if the school assured the Office it would comply with Buckley in the future, and notified school officials of their Buckley obligations.[191]

The parents then filed Section 1983 claims alleging Buckley violations by the school district, board of education members in their official and individual capacities, the reporter who ran the story, and a citizen who allegedly made derogatory comments about their son after reading the article. The matter never went to trial because defendants were all granted summary judgment. Summary judgment was granted to the reporter and citizen because they did not act under color of state law.[192] The school board members were found to have good faith immunity in their individual capacity because they released the information pursuant to state law requiring public minutes of board of education meetings.[193] The release of the minutes was found not to be pursuant to official board policy or custom, which meant that the school district and board members in their official capacities were not liable.[194]

In short, although the *Maynard* court held that Buckley violations were actionable under Section 1983, all of the plaintiffs' Section 1983 claims were dismissed on pretrial motions despite the following: (1) all possible institutional and individual defendants were sued; (2) the defendants' violations of Buckley were repeated and undisputed; and (3) the violations caused the plaintiffs actual harm. The *Maynard* case compellingly demonstrates that Section 1983 claims are no panacea for enforcing Buckley.

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189. *See Maynard*, 876 F. Supp. at 1106-07.

190. *See South Dakota*, 20 IDELR 105. This FPC Office finding does not name the family. However, the state of origin (South Dakota) is the same as in *Maynard*, and the facts described are virtually identical. The court decision refers to an FPC Office complaint and finding. *Maynard*, 876 F. Supp. at 1107.

191. *See South Dakota*, 20 IDELR at 106-07.

192. *See Maynard*, 876 F. Supp. at 1107.

193. *See id.* at 1108.

194. *See id.* The court found that in releasing the board meeting minutes with personally identifiable information to the public, the board was not acting pursuant to its own custom, but rather in accordance with state law. The court also found that any isolated sharing of information by individual board members was not in accordance with official policy or custom and therefore not actionable. *Id.* at 1108 n.1. Finally, the court dismissed Section 1985 claims, as conduct motivated by animus toward handicapped persons did not constitute the required class-based animus. *See id.* at 1109.

IV. ANALYSIS AND RECOMMENDATIONS

As described above in Part II, enforcement mechanisms under Buckley include FPC Office complaints, and the withdrawal of federal education funds. Private lawsuits under Buckley are unavailable. Elements of, or specific showings of harm, required for state law tort and contract claims are generally not present when Buckley is violated; however, workplace discipline of employees who violate Buckley is a possibility. Moreover, and as described above in Part III, Section 1983 claims are available in theory, but in actuality have very limited applicability.

It is easy to complain that this current set of Buckley enforcement mechanisms is unfair, because it provides no remedy to persons aggrieved by violation of their Buckley rights. In fact, problems resulting from the current set of enforcement mechanisms are much broader in scope. First, Buckley itself provides enforcement mechanisms at two extreme ends on a spectrum of strength: at one end is the impotent FPC Office complaint process, and at the other, the possibility of withholding all federal education funds, a prospect so harsh it is never used. There is no workable enforcement mechanism in the middle of this spectrum, frustrating the statute's purpose. Second, the absence of a workable enforcement mechanism is at wide variance with the expectations Buckley itself creates in parents that they have Buckley "rights." Third, the lack of a workable enforcement mechanism, when coupled with the heavy burdens Buckley places on schools and the many conflicts it presents with other laws, provides schools with little incentive to comply with its provisions.

Two final problems with current enforcement mechanisms arise from their inconsistency. To the extent that workable, indirect enforcement remedies exist, such as Section 1983 or special education statutory claims, they are inconsistently available: only to selected aggrieved persons, and under limited circumstances. Further, the enforcement mechanisms which do exist are not consistent with those available under other laws regulating student records.

A. Buckley Currently Lacks A Workable Enforcement Mechanism

As described above in Part II.A, Buckley currently provides only for FPC Office complaints to enforce its provisions. If a school is determined to have a pattern or practice of Buckley violations, the Office may initiate proceedings to revoke federal funds, but apparently has never done so. Congress's two enforcement mechanisms, FPC Office complaints and withdrawal of federal education funds, are

respectively too weak and too harsh to encourage school compliance. FPC Office complaints are infrequent, and involve no penalties. Withdrawal of all federal funding is too harsh a penalty for the government to actually use, and also appears to be out of proportion to most student records violations. Moreover, the withdrawal of federal funds is a penalty against the school, rather than the individuals responsible for Buckley violations.

One court has recognized that these two enforcement mechanisms leave aggrieved persons and schools between a fake rock and a place so hard no one goes there.[195] This court characterized the FPC Office complaint procedure as part of the "complete inadequacy of the Secretary's regulations, coupled with the statute's failure to require more complete relief for aggrieved individuals, [which have the effect of] exhausting the complainant without any meaningful possibility of enforcement by the Secretary."[196] This court characterized the withholding of federal funds as a "drastic remedy . . . which the Secretary cannot be expected to threaten and/or act upon."[197]

B. Buckley's Current Enforcement Mechanisms are at Odds With Parents' Statutorily-Created Expectations That They Have Buckley "Rights"

Technically speaking, Buckley does not grant parents any rights. In fact, and as several courts have noted,[198] it does not impose any obligations on schools. Instead, Buckley imposes conditions on schools in order to receive federal education funds.[199] One of these conditions is that educational agencies attempt to annually inform parents of their "rights" under Buckley, as discussed in Part I.G.[200] The statute and regulations are explicit: it is not school obligations and responsibilities about which parents must be informed, but rather

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195. *See Krebs*, 797 F. Supp. at 1257.

196. *See id.*

197. *Id.*

198. *See supra* note 14 and accompanying text.

199. Buckley is not the only federal education statute structured in this manner. A more well-known example is the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1401-1461 (1994), which is also spending legislation. The IDEA conditions receipt of federal special education funds on states' preparation of a state 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." Unlike Buckley, however, the IDEA provides federal funds specifically marked for states which choose to comply with its provisions.

200. *See* 20 U.S.C. § 1232g(e); 34 C.F.R. § 99.7.

"their [the parent's] rights under" the Act.[201] Specifically, parents who read the schools' annual required notice will see a "statement that the parent or eligible student has a right to:"[202] inspect and review their child's records, request correction of records, consent under most circumstances before records are released to third parties, and file complaints with the Family Policy Compliance Office.[203]

This notice of parent rights is considered important enough to require schools to "effectively notify parents of students who have a primary or home language other than English."[204] The parent rights notice is also considered important enough that Congress 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"[205] parents of their Buckley rights, because of concerns that some schools were publishing the notice of rights in newspapers or by other means whereby parents were not informed.[206]

From the parent/student's perspective, then, Buckley provides significant rights. Review of current enforcement mechanisms demonstrates that these rights exist largely on paper. Parent Buckley "rights" are enforceable only through FPC complaints.[207] Section 1983 claims are theoretically available, but actually can succeed largely only against individual public school employees who themselves violate Buckley, and who may not have the assets to pay a substantial judgment or attorneys' fees.[208]

C. *Buckley's Current Enforcement Mechanisms Give Schools Little Incentive To Comply With Its Provisions*

From the school's perspective, Buckley imposes numerous and detailed requirements for handling student records set out in Part I, above. As that Part's overview of Buckley makes clear, schools and their employees face significant burdens in order to comply with Buckley.

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201. 20 U.S.C. § 1232g(e); 34 C.F.R. § 99.7(a).
202. 20 U.S.C. § 1232g(e); 34 C.F.R. § 99.7(a).
203. *See* 20 U.S.C. § 1232g(e); 34 C.F.R. § 99.7(a).
204. 34 C.F.R. § 99.7(d).
205. Act of Oct. 20, 1994, Pub. L. No. 103-382, 108 Stat. 3913 (codified at 20 U.S.C. § 1232 (1994)).
206. *See* 140 CONG. REC. S10290-10291 (July 28, 1994) (comments of Senator Grassley).
207. *See supra* Part II.A.1.
208. *See supra* Part III.B.1.

For example,[209] when schools receive requests from parents to inspect their children's records, staff time is required to retrieve the records. Often, a staff member must stay with the parent during her review of the records in order to maintain their integrity. Further, staff time may be needed to provide parents with any requested explanations or interpretations of the records.[210] Buckley provides no limits on the number of times a parent may request review, nor on the duration of any parent review.[211] Some students' school records are voluminous, and it may take many hours or days for a parent to review them.[212] The forty-five day outer limit on responding to requests for review of records[213] gives schools some leeway in deciding when it can spare staff for these purposes. However, Buckley provides no funds to schools for these labor costs. Moreover, schools cannot charge parents for these costs; only when copies of records are involved may parents be charged copying fees, which cannot include the labor costs to retrieve the records.[214] In more limited cases, a parent may be entitled to a free copy of records.[215]

Schools must respond appropriately to a variety of family requests for records, such as those by noncustodial parents, nonbiological parents, relatives, or other persons acting as parents, and requests by students themselves, as well as requests for interpretations and explanations of records.[216] While Buckley does not mandate staff training, the secretaries and office workers who primarily receive these requests cannot be expected to understand Buckley's requirements without such training.[217] Schools must also respond appropriately, and staff must also be trained, in how to respond to requests for records by persons outside of the student's family, such as subpoenas, requests from police, from other schools in which the student is enrolled or will enroll, prospective employers, governmental authorities, the press and public, and from other school employees.[218]

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209. The foregoing discussion of school burdens under Buckley is adapted from the more thorough examination in a companion article by the author. *See* Daggett, *supra* note 9.

210. *See supra* Part I.D.

211. *See Huntsville, Ala. Sch. Dist.*, 24 IDELR 82, 83 (FPCO 1996).

212. 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.

213. *See supra* note 42 and accompanying text.

214. *See supra* note 44 and accompanying text.

215. *See supra* note 43 and accompanying text.

216. For a discussion of persons with Buckley rights, *see supra* Part I.C.

217. Compare the IDEA which explicitly requires staff training on legal requirements for special education records. 34 C.F.R. § 300.572(c) (1996).

218. *See supra* Part I.E.

The disclosure decision is not a simple one. Whether the request is from a member of the student's family, another school employee such as a teacher (whom the school must decide has a legitimate educational interest), or an outsider, schools must first determine whether the records requested are actually Buckley records, and second whether disclosure is permitted. Whatever the decision, in the case of requests by outsiders, schools must maintain an access log of unconsented-to requests for records, as well as of most unconsented-to actual disclosures. Where consent has been provided, the school must determine that the consent form meets Buckley requirements, and maintain a copy.

The determination of what is a Buckley record has significant consequences. Because of state open records and meetings laws, documents about students may be on the one hand Buckley records, which can be disclosed only upon parent consent, or on the other, public agency records which any member of the public can access upon request. Mistaken disclosure of sole possession notes, for example, causes them to lose their status as such.[219] The Buckley status of some documents such as test protocols and raw data is not clear. Responding appropriately to subpoenas of student records can be particularly difficult. Depending on the subpoena, schools may be obligated to notify parents before complying, or may be forbidden from notifying parents.[220] Moreover, in some situations such as those 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 may 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 thought, but also legal advice and costs.

In short, complying with Buckley's conditions on the receipt of federal education funds is not a small burden for schools, and in fact involves significant resources which are not specifically federally funded. Buckley's requirements also burden schools as they carry out routine activities. For example, an honor roll cannot be released to the local paper unless the school has designated the information as directory, given parents an opportunity to object, and removed the name of students with objecting parents.[221] Perhaps the biggest

219. *See supra* notes 31-32 and accompanying text.
220. *See supra* notes 57-58 and accompanying text.
221. *See* 34 C.F.R. § 99.34.

burden Buckley places on schools, however, is dealing with its inconsistencies, both internally and its conflicts with other laws. Consider, for example, the situation where a school employee suspects a student has been abused and information about the possible abuse is contained in student records. State statute requires certified school employees to report suspected abuse to law enforcement or social services authorities.[222] Criminal penalties may result if abuse goes unreported.[223] Buckley, on the other hand, does not provide explicitly for reporting suspected child abuse without parent consent. Extreme cases may permit disclosure under the emergency provision, but that exception is to be narrowly construed and has been judicially interpreted to not include nonurgent medical conditions.[224] Proving the information about abuse under the subpoena provision for disclosure actually acts as a Catch-22; to issue a subpoena, a court needs information contained in 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 was, however, essentially eliminated in 1994 when it was limited to reporting to juvenile justice authorities.[225] 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 nonemergency situation, a Section 1983 claim by the parent is possible.

Somewhat similarly, school employees who suspect a student has engaged in criminal behavior at school may want to, or may be required to[226] report their suspicions to the police. Where the police have formed a suspicion of criminal activity by a student based on nonschool information, the police can use Buckley's subpoena provisions to obtain school records. On the other hand, when 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,

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222. *See, e.g.*, WASH. REV. CODE §§ 26.44.010 *et seq.* (1996).

223. *See id.*

224. *See supra* notes 65-66 and accompanying text.

225. *See supra* note 56 and accompanying text.

226. *See, e.g.*, CAL. EDUC. CODE § 44014 (1993) (if school employee is attacked, assaulted or menaced by student, police report must be made); CONN. GEN. STAT. §§ 10-233f-233g (1988) (assaults on teachers must be reported to police); TEX. EDUC. CODE § 21.303 (1990).

Buckley provides no explicit exception permitting such reporting without parent consent.

Also troubling is the situation faced by certain school employees and agents who provide counseling and other assistance about student substance abuse problems. If the student with the problem is old enough under state law to get substance abuse help without parental consent, federal health laws require that the records of that treatment remain confidential, even as to parents, unless the student consents in writing to their disclosure.[227] On the other hand, Buckley requires schools to provide parent access to records. Suppose, for example, that an older student confides a drug or alcohol problem to a school-based drug counselor, and the parent calls the counselor and asks for information about the student. To the extent information is contained in Buckley records, that statute entitles parents to access to the records and to explanations and interpretations of them. Federal health laws regarding substance abuse records, on the other hand, prohibit disclosure of such information to parents (and in fact, to other school employees) unless the student agrees.

These burdens, in conjunction with the lack of a meaningful enforcement mechanism, give schools little incentive to comply with Buckley. The incentive to comply is especially lacking when Buckley conflicts with another law, such as a child abuse reporting mandate, which does have a powerful enforcement mechanism.

D. To the Extent Workable Buckley Enforcement Mechanisms Exist, They are Inconsistently Available

Whether there are meaningful enforcement mechanisms (primarily Section 1983 claims) varies tremendously. First and most clearly, there is little incentive from enforcement procedures for private schools and private employees to comply with Buckley. At most, the private school may have to respond to an FPC Office complaint and, in order to resolve that complaint, may be asked to agree to some things (such as avoiding future violations). Loss of federal education funding is a theoretical possibility, but it has never actually happened. However, the private school faces no administrative hearing, and Section 1983 claims will fail as there is no action under color of state law.[228]

Moreover, and as the foregoing examination of enforcement options has demonstrated, Buckley is not a law which "carries a big stick" for public school districts, their administrators, supervisors and board

227. *See* 42 U.S.C. § 290 dd (1994); 42 C.F.R. § 2.14 (1996).

228. *See supra* Part III.B.1.

members. A public school district (or administrators or board members in a district) which violates Buckley may also have to respond to an FPC Office complaint and, in order to resolve that complaint, may be asked to agree to some things (such as avoiding future violations). Again, loss of federal education funding is a theoretical possibility, but it has never actually happened. Finally, like the private school, the public school district faces no administrative hearing. Any Section 1983 claim is likely to be dismissed, on *Monell* policy or custom, and/or lack of respondeat superior liability grounds.[229]

On the other hand, and as previously discussed, the public employee committing the Buckley violation faces some of the biggest sticks of all—the possibility of a civil rights judgment involving damages and attorneys' fees, as well as job discipline up to and including discharge.

E. Buckley's Lack of Workable Enforcement Mechanisms is Inconsistent With Other Laws Regulating Student Records

This situation is in marked contrast to other laws regulating student records in more limited ways. For example, violations involving special education student records can be redressed under the federal special education statute through special education hearings and appeals to a court, in which the opposing party is a school district with substantial assets.[230] The IDEA requires states to set up an administrative hearing system with impartial hearing officers to hear special education disputes, including claims that the IDEA's records provisions have been violated.[231] The IDEA was recently amended to require states to offer mediation as an initial step before proceeding to the impartial adversarial hearing.[232] If the matter does go to a hearing, the hearing officer's decision may be appealed to a court, and attorneys' fees reimbursement is available to prevailing plaintiffs.[233]

The IDEA also contains a little-known provision requiring state education agencies to set up a complaint procedure.[234] Under this complaint procedure, any "organization or individual may file a signed written complaint" asserting that a public agency has violated the

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229. *See id.*

230. *See* 20 U.S.C. § 1415(b) (1994).

231. *See id.*

232. *See* Individuals with Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, § 101 (615)(e) 111 Stat. 37, 89 (1997) (to be codified at 20 U.S.C. § 1415(e)).

233. *See* 20 U.S.C. §§ 1415(e)(2) (1994) (appeals); 1415(e)(4) (attorneys' fees).

234. *See* 34 C.F.R. §§ 300.660-662 (1996).

IDEA in some way.[235] Within sixty days of the complaint, the state educational agency must carry out any necessary investigation, review all information, make a determination about whether the IDEA has in fact been violated, and issue a written decision with findings of fact and reasoning.[236] The state educational agency may also provide technical assistance or require corrective actions "to achieve compliance."[237] Parents "and other interested individuals" must be notified of their rights to file such complaints.[238]

Under Section 504, disability discrimination complaints, including claims that parents have been denied access to records, may be filed with the Office of Civil Rights (OCR).[239] OCR's complaint investigation and resolution process is similar to that for Buckley. The important difference is that a private cause of action is also available under Section 504.[240] State student records laws may also provide a private cause of action.[241] Violations of the federal laws involving substance abuse records can result in criminal prosecution.[242] Violations of state public records and meetings laws may, depending on the state, be redressed through an administrative hearing with possible appeal to court[243] or through civil claims possibly involving attorneys' fees reimbursement for prevailing plaintiffs.[244]

Simply put, it makes no sense to provide stiff enforcement measures for laws which regulate student records in a limited way on the one hand, and on the other hand to enact a statute which comprehensively and with no small burden to schools regulates student records, but provides no significant means of enforcement. This lack of a hearing opportunity or other meaningful enforcement mechanism is especially puzzling because Buckley itself requires schools to conduct hearings where the accuracy of records are challenged.[245]

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235. 34 C.F.R. § 300.662.

236. *See* 34 C.F.R. § 300.661(a). An extension to the sixty day time line may occur under "exceptional circumstances." *Id.* at 300.661(b).

237. *Id.* § 300.661(c).

238. *Id.* § 300.661(b).

239. *See* 34 C.F.R. §§ 107.6; 107.7 (1996).

240. *See* 29 U.S.C. § 794a (1994).

241. *See, e.g.*, FLA. STAT. ANN. § 228-093 *et seq.* (1996) (providing persons injured by student records violation may sue for injunctive relief and attorneys' fees).

242. *See* 42 U.S.C. § 290 (1994).

243. *See, e.g.*, CONN. GEN. STAT. §§ 1-18; 1-19 (1988).

244. *See, e.g.*, WASH. REV. CODE § 42.17.400(4), (5) (1996) (providing private cause of action for alleged violations of the Washington public records law, with possible recovery of attorneys' fees, and treble damages).

245. *See supra* Part I.F.

F. *Congress Should Adopt a Workable Enforcement Mechanism For Buckley in the Form of an Impartial Administrative Hearing*

In between the two extremes of FPC Office complaints and removing all federal funds, Congress needs to provide a middle-ground enforcement mechanism which is not overly harsh but does give schools an incentive to comply with Buckley and which provides parents with a meaningful remedy. As described immediately above in Part IV.E, other statutes regulating access to school records not only provide models of possible Buckley enforcement mechanisms, but also provide a marked contrast to Buckley's paucity of enforcement options. The author urges Congress to provide a meaningful enforcement remedy for Buckley. A private cause of action is neither necessary nor suggested. Instead, however, Congress is encouraged to consider making available an administrative hearing such as that which is in place for special education disputes.[246]

Complaints under Buckley may fall into one of five categories. First, parents may claim they have improperly been denied access to their child's school records. Second, parents may claim that their child's school records were improperly disclosed without their consent. Third, parents may claim that their child's records contain information which is inaccurate, misleading, or unduly invades the child's privacy. Fourth, parents may claim that the school's notice of their rights is defective. Fifth and finally, parents may claim that the school has a policy or practice of violating Buckley.

Complaints asserting a policy or practice of Buckley violations by a public school are likely actionable under Section 1983, as discussed in Section VI, *supra*. The other four kinds of complaints are unlikely to be actionable as civil rights violations. An enforcement procedure is needed for these kinds of claims. The enforcement mechanism chosen should not be unnecessarily adversarial, as the school and parent parties need to work together for many years in order to further the child's educational interests. Moreover, the chosen enforcement mechanism should work rather quickly, particularly in the case of denied access to records. Finally, while an enforcement mechanism which provides for damages may encourage school compliance, money damages seem unlikely to compensate injuries caused by Buckley violations, just as is the case for violations of the special education statute. For example, if a student's transcript is sent to a prospective

246. *See* 20 U.S.C. § 1415(b) (1994).

employer, or her grades are mentioned to other students without consent, the harm seems unmeasurable in dollars, nor can damages truly compensate such a loss.

An administrative hearing, perhaps preceded by voluntary mediation, or a more formal and time-circumscribed complaint resolution process seem to offer the most hope for putting teeth in Buckley without unduly burdening schools. Either an administrative hearing or a formal complaint procedure with processing deadlines, as opposed to actual litigation, would provide the quicker resolution necessary for Buckley claims. Additionally, both hearings and complaint procedures are less adversarial than litigation, and may not require attorney involvement, which avoids burdening schools (and parents) with litigation expenses. The hearing option provides the parent with an opportunity to be heard by an impartial person. Currently, the only hearing provided by Buckley is to challenge records,[247] and that hearing need not be by an impartial person, nor by a person not employed by the school.[248]

Money damages and attorneys' fees would not be available under either process. However, hearing officers or the entity conducting the complaint resolution procedure should have authority to order schools to comply with Buckley, such as by ordering the removal of inaccurate records, ordering schools to provide access to parents, ordering schools to attempt to retrieve records improperly disclosed, and ordering schools to modify invalid provisions in the annual parent notification and train staff who violate Buckley. The hearing system and/or formal complaint resolution process could be federally administered through the FPC Office, or state educational agencies could be required to set up such a system as a condition of their receipt of federal education funds.

CONCLUSION

Buckley was enacted and amended for laudable goals: to protect the accuracy and confidentiality of student records, and to enhance parent involvement in education. However, Congress' failure to provide a meaningful enforcement mechanism for Buckley, coupled with its burdens and internal and external conflicts, give schools little incentive to comply. Section 1983 claims may provide an incentive for public schools to avoid official patterns, practices and policies of Buckley violations, but are unlikely to provide relief for other claims,

247. *See supra* Part I.F.
248. *See id.*

particularly of individual instances of Buckley violations. Congress is urged to "buck up" Buckley by adding a meaningful administrative enforcement mechanism.