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THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT TWO YEARS LATER

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The Family Educational Rights and Privacy Act of 1974,[1] the so-called Buckley Amendment, grants parents the right to inspect all records that schools maintain on their children and to challenge any contents they believe are inaccurate or misleading. The Act also requires that parents consent before information from school records is released to those outside specified educational categories. Once a student reaches eighteen years of age or enters a postsecondary educational institution, he assumes these rights in his parents' stead. The penalty for failure of an educational system or institution to comply with the law is loss of all federal assistance administered by the U.S. Office of Education.

The Act, which had a somewhat unusual legislative history in that it never received consideration by a congressional committee,[2] grew out of the concerns of Senator James J. Buckley of New York that educators were usurping parents' authority. Supporters of the Amendment saw it as advancing the right of individuals, both parents and students, against institutional encroachments. Detractors feared it would enmesh schools in more federal red tape and upset delicate relationships among educators and educational institutions.[3]

Rights granted by the Amendment are consistent with standards suggested by studies on records and recordkeeping.[4] Subjects of records have the right to know of the existence of the files, to inspect the records for accuracy, to challenge allegedly erroneous informa-

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1. 20 U.S.C.A. § 1232g (Cum. Supp. 1976) [hereinafter cited as Privacy Act of 1974].

2. *See* Note, *The Buckley Amendment: Opening School Files for Student and Parental Review*, 24 CATH. U.L. REV. 588 (1975).

3. *See, e.g.*, Fitt, *The Buckley Amendment: Understanding It, Living with It*, THE COLLEGE BOARD REVIEW, Summer, 1975, at 2. *See also* Davis, *The Buckley Regulations: Rights and Restraints*, EDUCATIONAL RESEARCHER, Feb., 1975, at 11.

4. *See, e.g.*, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, REPORT OF THE SECRETARY'S ADVISORY COMMITTEE OF AUTOMATED DATA SYSTEMS, COMPUTERS AND THE RIGHTS OF CITIZENS, at xx (1973).

tion, and to limit the information to those with a legitimate and immediate interest in the information. Other federal legislation has extended similar protection to individuals in different contexts.[5]

This article will examine in brief the state of the law regarding school records prior to passage of the Act, progress thus far in implementing the Act and the likelihood that courts will find in the Act new grounds for relief in cases dealing with student records.

The State of the Law Prior to Passage of the Buckley Amendment

Before passage of the Buckley Amendment, laws regarding school records varied widely among states. Twenty-four states provided for some form of parental or student access to school records.[6] Of these twenty-four, fifteen conferred the right by statute, three by administrative regulation and six through administrative guideline. Only five states explicitly granted the right to contest, correct or expunge information in school files. Ten states expressly permitted release of students' files without parental consent to other than educational agencies while nine prohibited such release.

Decisions by courts have also affected the rights of parents and students vis-a-vis educational institutions. It will be useful to examine separately the effects of these decisions on (1) parent or student access to records, (2) modification or challenge of the contents of records and (3) dissemination of records to third parties. Before beginning that discussion, the reader should note that practices in individual school districts may not be in accord with rulings by state courts. For example, although most analysts agree that under common law principles parents have a right to inspect school records of their children, one study showed that in only twenty of fifty-four districts were parents given access to complete school records of their children.[7] Of the same fifty-four districts, however, twenty-nine gave complete access to CIA and FBI officials, twenty-three to juvenile authorities and twenty-one to health department officials.

5. *See, e.g.*, Privacy Act of 1974, 5 U.S.C.A. § 552a (Cum. Supp. 1976); Fair Credit Reporting Act, 15 U.S.C. § 1601 (1970).

6. NATIONAL COMMITTEE FOR CITIZENS IN EDUCATION, CHILDREN, PARENTS AND SCHOOL RECORDS (1974). This book contains the results of a recent survey of all state laws and regulations.

7. Goslin & Bordier, *Record-Keeping in Elementary and Secondary Schools*, in ON RECORD: FILES AND DOSSIERS IN AMERICAN SOCIETY (S. Wheeler ed. 1969).

The common law creates a strong presumption in favor of access to records of a public nature by persons having sufficient interest in the subject matter, where access is not detrimental to the public interest.[8] In 1961, a New York court found that "absent constitutional, legislative, or administrative permission or prohibition," a parent has the right "to inspect the records of his child maintained by school authorities as required by law."[9] The court reasoned that although school records are not, strictly speaking, public records, the fact that they are required by law to be kept by a public officer subjects them to the common law rule that a person with an interest in the subject matter is entitled to inspection.

More recent common law cases dealing with rights to inspect public records suggest that agencies bear a heavy burden in showing that inspection is inappropriate or unduly onerous.[10] With respect to school records in particular, the state of the law by the mid-1960's appeared to be that where such records were required to be kept by statute or regulation, parents possessed the requisite interest to be given inspection rights.[11]

Court decisions affecting the parental and student right to question entries in records have arisen in a number of contexts. Where certain information is the basis for decisions affecting a student's legal rights, such as prejudicial or exclusionary decisions, parents (or students) have been granted the right to challenge the information on procedural due process grounds. Where students were threatened with expulsion from college[12] or high school,[13] it was held that they had the right to a presentation of the facts in the record, a hearing and an opportunity to present witnesses and their own version of the facts.

Similarly, where students are threatened with exclusion from the school system or placement in special programs, parents have been

8. 76 C.J.S. *Records* § 35 (1952).

9. Van Allen v. McCleary, 27 Misc. 2d 81, 211 N.Y.S.2d 501 (Sup. Ct. 1961).

10. Carey, *Students, Parents and the School Record Prison: A Legal Strategy for Preventing Abuse*, in CHILDREN, PARENTS AND SCHOOL RECORDS 32 (National Committee for Citizens in Education ed. 1974).

11. Burt, *Inspection and Release of Records to Parents*, in LAW OF GUIDANCE AND COUNSELING 48 (Ware ed. 1964).

12. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

13. Vought v. Van Buren Pub. Schools, 305 F. Supp. 1388 (E.D. Mich. 1969).

given the right to receive notification of the reasons for such proposed action and a hearing at which they may question the basis for the school's decision. In one instance, the court explicitly provided that the parents had the right to "examine the child's records before the hearing, including any texts or reports upon which the proposed action may be based."[14]

One court agreed not only that certain information should not be included in a student's file, but found that the program generating the information was an invasion of the student's constitutional right of privacy and ordered the program terminated.[15] In addition to the privacy ground for its decision, the court found that the school system had not met minimum due process requirements in obtaining parental permission and undertaking a program of marginal reliability which could have resulted in imposing the life-long label of "potential drug abuser" on the child.

Suits have been brought to challenge inclusion of certain factual information in a student's file, even where the accuracy of such information was not contested. The trend of decisions in such cases is not clear. In one case,[16] high school students and their parents sought a preliminary injunction against school officials to prevent the latter from communicating with colleges or prospective employers about the students' orderly demonstration at graduation exercises. The school proposed to send a short letter accurately describing the fact that plaintiffs had worn armbands at graduation even though requested not to. The court denied the injunction, finding no proof of irreparable harm saying:

> School officials have the right and, we think, a duty to record and to communicate true factual information about their students to institutions of higher learning, for the purpose of giving to the latter an accurate and complete picture of applicants for admission.[17]

In another case,[18] however, high school students challenged disciplinary action taken against their passing out leaflets opposing the

14. Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972).
15. Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973).
16. Einhorn v. Maus, 300 F. Supp. 1169 (E.D. Pa. 1969).
17. *Id.* at 1171.
18. Hatter v. Los Angeles City High School Dist., 452 F.2d 673 (9th Cir. 1971).

school's dress code and requested an order requiring school officials to expunge from school records any mention of the action. The trial court dismissed the complaint, but on appeal the case was remanded for consideration on the merits.

With respect to dissemination of records to third persons, it is probably safe to say that prior to passage of the Buckley Amendment, courts did not sanction release of school records to anyone not having an interest in them.[19] The requisite interest may have been established by statute or regulation. In the absence of either, standards established under the common law of the jurisdiction controlled access, and these standards varied widely.

Activity Since Passage of the Buckley Amendment

The Buckley Amendment has created a national standard for treatment of student records. It eliminates most questions as to what records are to be made available to parents and students[20] and sets a time limit for compliance with a parent's request to inspect records.[21] The provision prohibits disclosure of all so-called "directory" information[22] in a record to anyone other than enumerated officials or organizations without written, informed consent from the parents or responsible student.[23] It provides the opportunity for parents or a student to challenge the contents of the educational records, at a hearing, if necessary.[24] While not requiring that any material in the records be expunged, the law does require that parents be given the opportunity to add to the record written explanations of the contents.[25]

The Secretary of the Department of Health, Education and Welfare (HEW) is directed to establish regulations with respect to the conduct of such hearings.[26] The law also requires HEW to establish an office and review board to administer the Act and adjudicate

19. H. BUTLER, K. MORAN & F. VANDERPOOL, LEGAL ASPECTS OF STUDENT RECORDS 26 (1972).
20. 20 U.S.C.A. § 1232g(a)(4) (Cum. Supp. 1976).
21. *Id.* § 1232g(a)(1)(A).
22. *Id.*
23. *Id.* § 1232g(b)(1).
24. *Id.* § 1232g(a)(2).
25. *Id.*
26. *Id.*

violations.[27] In order to achieve a high degree of uniformity in implementing the law, the Amendment requires that all functions other than the conduct of hearings be carried out in the Washington, D.C. headquarters.[28]

HEW issued final regulations on June 17, 1976.[29] The regulations designate the Family Educational Rights and Privacy Act Office (FERPA) as the office to investigate, process and review violations and complaints.[30] With respect to enforcement, the final regulations codify what has been the practice of HEW since the effective date of the law. Upon receipt of a written complaint, FERPA notifies the agency or institution against which the complaint is made, summarizes the allegations and asks for a written response. The office provides complainant and institution with notification of its findings, and, where there has been a failure to comply with the law, describes specific steps necessary to bring the institution into compliance.

Although at least one organization has suggested that HEW require affected institutions to submit plans for implementing the Amendment,[31] the Department has not adopted this approach.[32] Instead, the office relies on those outside HEW who are aware of the law to bring problems of interpretation to its attention. To increase the number of those familiar with the law, HEW's regulations require that schools notify parents (or students) annually of their rights.[33] The regulations do not mandate any set procedure to achieve this notice.

Since passage of the Act, those administering the law have re-

27. *Id.* § 1232g(g).

28. *Id.*

29. 41 Fed. Reg. 24662 (1976). The introduction to the final regulations makes it clear that current HEW policymakers intend to monitor the effects of the Buckley Amendment closely. HEW has made an unusual commitment to formally invite comments on the regulations for a ninety-day period beginning July 1, 1977, in order to determine whether there is a need to modify the regulations or to recommend changes in the law.

30. The office charged with enforcing the Buckley Amendment employs two professional staff members and two clerical employees.

31. The Children's Defense Fund, in commenting upon HEW's proposed regulations, made such a proposal, according to an officer of the fund. Interview with Linda Lipton, Children's Defense Fund, in Washington, D.C., Mar. 16, 1976.

32. 41 Fed. Reg. 24669 (1976).

33. *Id.* at 24671.

ceived nearly 12,000 requests for information.[34] Approximately one-tenth of these were in the form of complaints, but when analyzed, only slightly over 100 stated actual violations of the Act. The others were based on misunderstandings of what the law requires.

Nothing approaching a comprehensive survey is possible to determine how great an effect the law has had on the practices of school systems and colleges. To a great extent its effect depends on whether individuals are aware of their rights under the Amendment and this, in turn, depends on the effectiveness of the notice schools are required to give annually to parents and students and on efforts by HEW and private organizations to publicize the Amendment.[35]

Reports in the press and comments by National Education Association representatives and HEW officials provide some evidence that changes have been made. Some have referred to a "purging" of student files, cleaning out material which is irrelevant, and perhaps damaging, to a student's education.[36] Others note changes in procedures for transmitting recommendations to colleges or potential employers.[37] Apparently the law has given some educators a much sought-after basis for refusing to turn over files to probation officers, police, the armed services and the FBI.[38]

There is continuing disagreement over whether the Buckley Amendment does more harm than good. Especially in the postsecondary context, it is argued that giving students or parents access to recommendations sent to colleges or potential employers imperils

34. Interview (telephone) with Pat Ballinger, Federal Education Rights and Privacy Act Office, in Washington, D.C., July 30, 1976.

35. The original HEW official responsible for implementing the Buckley Amendment spent significant time traveling and speaking to groups of educators and parents to explain provisions of the law. Two private organizations—the National Committee for Citizens in Education with headquarters in Columbia, Maryland, and the Children's Defense Fund with headquarters in Washington, D.C.—have also made extensive efforts through mailings and personal contacts to alert parents of their newly-mandated rights. Articles have appeared in several mass circulation periodicals, including the September, 1975 issue of *Ladies' Home Journal* and the December, 1975 issue of *Family Circle*, which describe the Amendment and provide names and addresses to write for further information. *Consumer News*, published by HEW's Office of Consumer Affairs, printed a summary of the Buckley Amendment rights in the July 15, 1976 issue.

36. Washington Post, Nov. 17, 1974, § C, at 5, col. 4.

37. N.Y. Times, Feb. 1, 1976, at 33, col. 2; Note, *The Buckley Amendment: Opening School Files for Student and Parental Review*, 24 CATH. U.L. REV. 588, 601 (1975).

38. TIME, Feb. 2, 1976, at 44.

the candor of the recommendations and leads to increased emphasis on objective measures of ability, possibly to students' detriment.[39]

Another criticism charges that the cost to schools of complying with the law, that is, figuring out what the law requires and instituting procedures which conform, is overwhelming at a time when these institutions are under extreme financial pressures.[40]

Compliance may not be as costly as some at first feared. As noted above, HEW does not require schools to develop and submit detailed procedures for implementing the law. Nor does HEW in its final regulations require that assurance of compliance be submitted with an application for any type of federal funding. As one association official put it: "The Amendment, in fact, requires little more than what many schools were already doing."[41]

Private Rights of Action Under the Amendment

Whether or not passage of the Act is bringing about salutary changes in school recordkeeping practices, there may be potential benefits to parents and students if it appears that courts will imply new civil causes of action as a result of the Act. One commentary[42] reported that the original amendment proposed by Senator Buckley[43] contained a section which, by reference to another part of the Senate bill,[44] permitted private rights of action. Analysis of the Senate bill, however, reveals that private parties were expressly given only the right to appeal to the Commissioner of Education and not to the courts.

One of two theories is usually offered as a basis for finding that a statute implies a private right of action.[45] The first—the standard-setting theory—is that the statute provides standards by which to judge conduct already required or proscribed by existing law. The

39. *Id.*; N.Y. Times, Feb. 1, 1976, at 33, col. 2.

40. Ehrlich, *Legal Pollution*, N.Y. Times Magazine, Feb. 8, 1976, at 17.

41. Interview (telephone) with Edward Keller, National Association of Elementary School Principals, in Washington, D.C., Mar. 17, 1976.

42. 120 CONG. REC. S 19613 (daily ed. Nov. 19, 1974).

43. Amend. No. 1289, 93d Cong., 2d Sess. (1974), *reprinted in* 120 CONG. REC. S 7535 (daily ed. May 9, 1974).

44. S. 1539, 93d Cong., 2d Sess. (1974).

45. Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 286 (1963).

second view is that the statute declares wrongful certain behavior and implicitly authorizes the courts to create a new cause of action in order to give full effect to the legislative determination. (A third basis has been suggested specifically with reference to private rights under the Buckley Amendment,[46] but this will not be dealt with in the analysis which follows.)

Plaintiffs bringing suits in state courts, where statutory or common law causes of action already exist, may successfully be able to argue that the Buckley Amendment provides evidence of the standard to which school officials should be held in dealing with school records. For example, a court in a state where the common law permits release of records to health or welfare authorities might be persuaded to prohibit such releases, given the standards established by the Buckley Amendment.

Where state statutes conflict with the Amendment, the question of which law will prevail is more difficult. Because the Buckley Amendment does not require or proscribe conduct, state courts might well conclude that it is the function of the legislature to alter state laws so as not to lose federal funds and might refuse to invoke the Buckley Amendment to overrule existing state statutes.

In a recent California case, however, the court did not follow this reasoning.[47] In order to be eligible for certain state aid, California law required school districts to submit lists of students who were non-citizens without immigration status to the U.S. Immigration and Naturalization Service. A suit was brought on behalf of one such student to enjoin the State Superintendent of Schools from requiring the release of, and the local school district from releasing, the lists, except as provided by the Buckley Amendment. The court granted a preliminary injunction holding the state law was in conflict with the Buckley Amendment and was void under the suprem-

46. In a paper prepared by Barry George as a Washington Semester Thesis at The American University and reprinted in THE LAW AND CONSTRUCTIVE CHANGE, (University of Georgia, Institute of Higher Education ed. 1974), the possibility is raised that a court might consider the Buckley privacy rights as an essential part of an institution's general policy. They would thereby become an element in a contract between the individual parent or student and the institution. If this view prevailed, rather than the view which regards the Act's requirements as only conditions in the contract between HEW and the institution, individuals could sue for breach of contract.

47. Maria P. v. Riles, No. C-121905 (Los Angeles City Super. Ct., Sept. 17, 1975).

acy clause of the United States Constitution. Subsequent to the suit, California has changed the offending state statute.

A more perplexing issue is whether federal courts will entertain private suits based on the Buckley Amendment. Willingness by federal courts to hear these cases would be most meaningful in states where courts or statutes traditionally have favored school and other institutional rights over those of parents and students; where state courts therefore might be unlikely to look to a federal law which sets standards different from those already adhered to.

Federal courts have not hesitated to find private causes of action implied where federal legislation was clearly intended to benefit a particular class. One such case[48] was based on the Agricultural Marketing Agreement Act of 1937, which gave the Secretary of Agriculture authority to set minimum milk prices in defined geographic areas. He did so for the Boston area, but included in his order certain deductions from the price. Plaintiffs claimed the latter action exceeded his authority. The Supreme Court found that the statute and order created in plaintiffs the right to avail themselves of the minimum price. In finding that such a private right had been created, the Court said:

> When . . . definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction.[49]

In another case[50] the federal legislation involved was the Railway Labor Act, which was intended to benefit the class of railway employees. The Act provided that one labor organization be selected to act as exclusive bargaining representative for a craft or class of railway employees. When in the instant case that organization failed to represent all such employees, those discriminated against had no remedy other than a private action. The Court appeared to

48. Stark v. Wickard, 321 U.S. 288 (1944).

49. *Id.* at 309.

50. Steele v. Louisville & Nash. R.R., 323 U.S. 192 (1944).

give great weight to the fact that the federal statute imposed a duty on the defendant union and conferred concomitant rights on the plaintiffs to challenge the union because the federal scheme deprived the plaintiffs of certain rights they otherwise would have possessed. Absence of other remedies was also emphasized:

> In the absence of any available administrative remedy, the right here asserted, to a remedy for breach of the statutory duty . . . is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty. . . .[51]

It appears that in each of the above cases the Court felt impelled to recognize private claims not expressly provided for in the statute because federal statutory duties were violated. The same line of thought is apparent in cases where violation of federal laws regulating securities has been found to confer private rights of action. For example, one court which permitted shareholders to sue on the basis of alleged proxy rule violations noted "the long established general rule that a breach of statutory duty normally gives rise to a right of action on behalf of the injured persons for whose benefit the statute was enacted."[52]

Statutory duty is most easily discerned where criminal penalties are imposed for failure to behave in a prescribed manner. The willingness of federal courts to allow private actions when a criminal statute is involved is described as the "doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal."[53] The apparent basis for this doctrine is that a criminal sanction is the legislature's strongest indication that the conduct proscribed is contrary to public policy. Such conduct is to be deterred by any acceptable means and courts are implicitly empowered to fashion remedies to carry out legislative intent.

Application of this doctrine can be seen in a case where the plaintiff contended he had been discriminated against by an airline com-

51. *Id.* at 207.
52. Dann v. Studebaker-Packard Corp., 288 F.2d 201, 208-09 (6th Cir. 1961).
53. Reitmaster v. Reitmaster, 162 F.2d 691, 694 (2d Cir. 1947).

pany.[54] He was removed from an oversold flight for which he held a valid reservation in favor of a first class passenger. The Federal Aviation Act prohibits "unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The law does not provide a private right of action. Instead, it provides for injunctive or criminal sanctions which may be sought by the federal government. The statute does allow individuals to complain to the Civil Aeronautics Board (CAB) about alleged violations, permits the CAB to ask for satisfaction from the person complained against, and if not satisfied with the response, to investigate the matter. If, after notice and a hearing, the Board finds that the person has failed to comply, it can issue an order to compel compliance. The court found that the strong policy to protect individual passengers against discrimination could not be implemented by sanctions provided in the legislation alone:

> Every pertinent consideration of reason and policy, therefore, points to the compelling desirability of permitting a Federal cause of action to the aggrieved passenger as a needed force to assure full compliance with the requirements of the Act.[55]

The cases so far reviewed suggest that three considerations may weigh heavily in the decision to imply a private federal right under the Buckley Amendment. The first is whether the law was clearly intended to protect the rights of a particular class or group. The second is whether the Act provides remedies sufficient to protect the intended beneficiaries. The third might be characterized as a determination whether the law was intended to create new federal rights in the class of beneficiaries or whether it was meant merely to encourage certain actions by state and local authorities and legislatures.

The answer to the first inquiry is clear—the entire amendment is directed toward enhancing parents' and students' rights vis-a-vis the alleged interests of society's institutions.

With respect to whether the remedies provided in the Act are adequate, reference to *Wills v. Trans World Airlines*[56] may be help-

54. Wills v. Trans World Airlines, 200 F. Supp. 360 (S.D. Cal. 1961).
55. *Id.* at 365.
56. 200 F. Supp. 360 (S.D. Cal. 1961).

ful. There, although the passenger could have complained to the CAB, the court found that such a complaint would have been useless to compensate the particular plaintiff:

> Without judicial intervention to redress past violations of the statute, the rights of passengers, as declared in the Act . . . would be robbed of vitality and the purposes of the Act substantially thwarted.[57]

The court awarded the plaintiff punitive damages in addition to actual damages, which were nominal.[58]

A private litigant asserting a violation of rights under the Buckley Amendment could seek damages for past violations, such as the release of information to non-authorized recipients, or he might request injunctive relief such as a prohibition against such release. Inadequacy of statutory remedies appears more glaring in the former context than in the latter. At least in the latter situation courts would be likely to give some attention to the doctrines of primary jurisdiction and exhaustion of administrative remedies before providing a judicial remedy. The doctrine of primary jurisdiction requires a complainant to seek relief in an administrative proceeding before a remedy will be supplied by the courts, even though the matter might properly be presented to the court as well as to the administrative agency.[59] The doctrine of exhaustion of administrative remedies requires that where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will act.[60]

In an important case[61] the Supreme Court did not require exhaustion of administrative remedies prior to resort to judicial relief. Welfare recipients requested court review of the compatibility of New York's welfare laws with requirements of the Social Security Act. HEW was, at the time of the suit, reviewing New York's statutes, and could have terminated federal funding if the state laws were found not to comply with federal criteria. The Court based its hold-

57. *Id.* at 364.
58. *Id.* at 368.
59. 2 AM. JUR. 2d *Administrative Law* § 595 (1962).
60. *Id.* § 788.
61. Rosado v. Wyman, 397 U.S. 397 (1970).

ing, in part, on the fact that petitioners could not "trigger" or participate in the Department's review of state laws.

Complainants under the Buckley Amendment, in contrast, do have recourse to HEW; in fact, it is individual complaints which trigger HEW's investigation. Past experience indicates that most conflicts can be resolved through the administrative mechanism provided by the Department. It would appear that in most cases plaintiffs seeking injunctive relief from a federal court would first have to pursue available remedies with HEW.

If the relief sought by individuals cannot be obtained from the agency or if the administrative remedy is not "complete and efficient,"[62] courts may not await final agency action. When "great and obvious damage" might be suffered, courts may likewise provide injunctive relief before an agency completes its review.[63] Thus, if a case arose where violation of provisions of the Buckley Amendment raised the specter of great and immediate injury, where HEW's procedures would not provide prompt enough relief, federal courts might excuse the failure to exhaust administrative remedies. However, if potential harm were of such a magnitude, it seems reasonable to expect that a cause of action under state law, common or statutory, would hold promise of success. Then the federal court might decline to imply a remedy under the Buckley Amendment because of available relief elsewhere.

This possibility brings up the third question likely to be asked by a court before it determines whether there exist federal private rights of action: Does the Family Educational Rights and Privacy Act create new federal rights or is it intended merely to encourage states to undertake certain actions?

It should first be observed that the Buckley Amendment does not make any conduct unlawful; it merely conditions receipt of certain government benefits on prescribed behavior. This fact could be used by the courts to find that Congress did not intend to create new federal rights. As noted above,[64] the courts have often relied on the presence of criminal sanctions in a statute to conclude that court-created remedies were appropriate to effect the goals of legislation.

62. Goldstein v. Groesbeck, 142 F.2d 422 (2d Cir. 1944).

63. Utah Fuel Co. v. National Bitum. Coal Comm'n, 306 U.S. 56 (1939).

64. See note 53 *supra* and accompanying text.

It should also be noted that the Buckley Amendment, unlike the statutes dealt with in *Stark v. Wickard*[65] or *Steele v. Louisville & Nashville Railroad Co.*,[66] does not create a new federal program or a wholly new set of rights and duties. The Amendment is more akin to federal statutes which define standards by which to judge pre-existing duties.

Neither of the above observations would necessarily be dispositive in determining whether or not to imply private federal rights. Federal courts would be likely to refer to remedies available in state courts before declining to imply new federal rights. Where some form of redress is provided by the states, the interest in limiting new sources of litigation in federal courts militates against implying a federal cause of action. One commentator[67] suggests that this consideration provides the best explanation for the refusal of federal courts to find implied private causes of action under the Safety Appliances Act. In *Jacobson v. New York, New Haven & Hartford Railroad Co.*,[68] for example, the court, without explanation, concluded that although they possessed the authority, federal courts declined to imply private causes of action where railway employees or passengers had been injured by alleged violations of the Act. The court reasoned that potential plaintiffs in these cases clearly could sue under well-established causes of action in state courts.

The fact that states provide some form of relief does not close the inquiry, however. First, a federal court might look to determine whether the apparent relief, because of procedural requirements, such as difficulties of proof, is chimerical.[69] Second, a federal court might examine the interest in availability of uniform relief throughout the nation.[70] There is evidence to support the view that Congress was seeking uniformity under the Buckley Amendment when it directed that enforcement activities be undertaken by HEW in Washington, D.C. and not be delegated to regional offices.

65. 321 U.S. 288 (1944).

66. 323 U.S. 192 (1944).

67. Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 286 (1963).

68. 206 F.2d 153 (1st Cir. 1953).

69. *See* 3 L. LOSS, SECURITIES REGULATION 1683 (2d ed. 1961).

70. *See* Fitzgerald v. Pan American World Airways, 229 F.2d 499, 502 (2d Cir. 1956).

In seeking to answer the question of whether adequate state remedies exist, a federal court should consider the national picture. In any one case it may be that the state provides adequate relief. A decision against implying a federal right by a court in such a state, however, could carry weight in other federal courts where no adequate state remedy exists.

Conclusion

The Family Educational Rights and Privacy Act was passed in response to growing national concern over abuse of student records. Practices with respect to these records varied widely among states and school districts, leaving parents and students with little guidance as to their rights. While no one actually objected to the goals of the legislation, the education establishment questioned whether the Act's requirements were not unduly burdensome.

Approximately twenty-one months have passed since the effective date of the Act. Although institutions have modified certain practices, some of the worst fears about red tape have not been realized. There has been no great surge in requests by parents or students for access to files, but public awareness of the provisions of the Amendment—measured by reports in the press and inquiries to HEW—appears to be substantial.

Some argue that the effect of the Act would be greater and compliance more complete if institutions were required to submit periodic reports on its implementation. Instead, federal enforcement rests solely on complaints initiated by individuals who must learn of their rights from school notices or from the media and private organizations. There is no good way to measure the effectiveness of the Amendment. As with most laws, its full impact will never be known.

It is suggested that the real value of the Amendment may be first, that it has caused educational institutions to consider their policies and practices with respect to student records—many, perhaps, for the first time. The continuing possibility of complaints by individuals to HEW and, ultimately, loss of funds, may make school officials more conscientious in their disposition of information in school files. Furthermore, the Act spells out standards schools must meet, removing a good deal of uncertainty from the patchwork of state and local laws and regulations.

Second, the existence of the Buckley Amendment probably increases the chance that an individual with a complaint about an institution's records policy will be informed of his rights, either by the school itself, or by others with whom he is likely to confer.

It is unlikely that many complaints under the Act will reach a court, but when one does, the detailed requirements of the law will provide definite standards for the court to apply. This fact should assist plaintiffs who are threatened by or have suffered injury from violations of the Act.

A survey of federal decisions suggests that while federal courts would probably prefer to see Buckley Amendment controversies resolved administratively or in state courts, there might be some willingness in unusual circumstances, such as where the state forum has historically applied less demanding standards than those mandated in the Act, to entertain private damage suits for past injuries. Even so, federal courts will be reluctant to find grounds for providing injunctive relief to private litigants.