

1975

## The Buckley Amendment: Opening School Files for Student and Parental Review

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### Recommended Citation

Carole M. Mattessich, *The Buckley Amendment: Opening School Files for Student and Parental Review*, 24 *Cath. U. L. Rev.* 588 (1975).

Available at: <https://scholarship.law.edu/lawreview/vol24/iss3/7>

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## RECENT DEVELOPMENTS

### THE BUCKLEY AMENDMENT: OPENING SCHOOL FILES FOR STUDENT AND PARENTAL REVIEW

With the rapid development in the 1960's of electronic means of gathering and storing information, one of mankind's oldest activities, that of record-keeping, came under increasing scrutiny from legislative tribunals, individuals, and, all too infrequently, the courts. A desire to strike a workable balance between personal privacy and institutional recordkeeping prompted numerous foundation studies<sup>1</sup> and, last year, extensive congressional hearings which resulted in enactment of legislation pertaining to "freedom of information"<sup>2</sup> and the broad concept of individual privacy.<sup>3</sup>

In contrast, the most recent addition to this area was a controversial and hastily contrived piece of legislation known as the "Buckley Amendment"<sup>4</sup> for its sponsor, Senator James L. Buckley of New York. Intended primarily to open up individual school files for student and parental review,<sup>5</sup> the mea-

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1. See NATIONAL ACADEMY OF THE SCIENCES, DATA BANKS IN A FREE SOCIETY (1972); RUSSELL SAGE FOUNDATION, GUIDELINES FOR THE COLLECTION, MAINTENANCE AND DISSEMINATION OF PUPIL RECORDS (1970). The National Academy project, a scholarly and well detailed analysis of the effects of computerization on recordkeeping and the right to privacy, concludes that increased computer usage (1) has not resulted in overly expansive powers of surveillance; (2) can indeed prove beneficial in systems efficiency; but (3) has not resulted in a correlative expansion of organizational policies affecting the individual rights involved. *Id.* at 341.

2. Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (U.S. CODE CONG. & AD. NEWS, 93d Cong., 2d Sess. 5758 (Dec. 15, 1974)).

3. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (U.S. CODE CONG. & AD. NEWS, 93d Cong., 2d Sess. 6881 (Jan. 30, 1975)). See STAFF OF SENATE COMM. ON GOVERNMENT OPERATIONS, 93RD CONG., 2D SESS., MATERIALS PERTAINING TO S.3418 AND PROTECTING INDIVIDUAL PRIVACY IN FEDERAL GATHERING, USE AND DISCLOSURE OF INFORMATION (Comm. Print 1974). See also *Joint Hearings on S.3418, S.3633, S.3116, S.2810, S.2542 Before the Ad Hoc Subcomm. on Privacy and Information Systems of the Senate Comm. on Government Operations and the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974).

4. Family Educational Rights and Privacy Act of 1974, 20 U.S.C.A. § 1232g (Supp. 1975).

5. Because legislative hearings were not held on the measure, an understanding of the intent is best derived from floor discussion in the Senate. See, e.g., 120 CONG. REC.

sure was adopted in May 1974 by voice vote in the Senate as an amendment to an omnibus education bill.<sup>6</sup> The legislation subsequently caused an uproar among educators sufficient to bring about the proposal and passage of new, corrective legislation only one month after its effective date of November 19, 1974.<sup>7</sup> This corrective legislation is now in effect.

As a whole, the current measure is largely duplicative of the original. Parents and students may review information maintained in a student's educational file; they may challenge such information if they believe it to be false or misleading; and there exist strict controls on the accessibility of a student's records to third parties. Particularly significant, however, is the new provision that students may waive their future rights of access to certain confidential information; this provision can effectively close up many of the files which the original Buckley Amendment intended to open. The evolution and possible ramifications of this waiver provision are discussed below.

Despite the new measure's partial frustration of original congressional intent, it is nevertheless clear that the merger of an increased national concern for individual privacy with a growing conception of the student as a citizen entitled to ordinary constitutional guarantees has produced a certain ensured dynamism in the area of educational recordkeeping.

### I. THE STUDENT/SCHOOL RELATIONSHIP: AN AREA OF CHANGE

Transferral of legislative guarantees of privacy into the context of educational recordkeeping necessarily involves an examination of the judicially fashioned in loco parentis relationship of students and schools. Developed during the 19th and early 20th centuries, largely in response to frequent litigation brought against teachers who punished their students,<sup>8</sup> the doctrine defined the position of teachers and school administrators as standing in loco parentis to their pupils.<sup>9</sup>

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21,484 (daily ed. Dec. 13, 1974) (remarks of Senator McIntyre); 120 CONG. REC. 21, 487-489 (daily ed. Dec. 13, 1974) (remarks of Senator Buckley).

6. Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (U.S. CODE CONG. & AD. NEWS, 93rd Cong., 2d Sess. 3071 (Oct. 15, 1974) (codified in scattered sections of 20 U.S.C.A. (Supp. 1975))).

7. White House Conference—Library and Information Services, Pub. L. No. 93-568, § 2, 88 Stat. 1855 (U.S. CODE CONG. & AD. NEWS, 93d Cong., 2d Sess. 6836-42 (Jan. 30, 1975)).

8. See Note, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362 (1963). Another good analysis of the in loco parentis doctrine, as well as a study of the application of due process and equal protection to the relations of students and institutions of higher learning, is provided in Beaney, *Students, Higher Education, and the Law*, 45 DENVER L.J. 511 (1968). See also *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045 (1968).

9. *Gott v. Berea College*, 156 Ky. 376, 161 S.W. 204 (1913), is often cited as a

Although in many instances courts during this period found that educational authority derived from the general enabling act of an educational institution or school district,<sup>10</sup> the examples of courts relying broadly on the *in loco parentis* doctrine, and thus neglecting the larger constitutional issues, are legion.<sup>11</sup> The latter, traditional, approach is rooted in Blackstone:

[The parent] may also delegate part of his parental authority, during his life, to the tutor or school master of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.<sup>12</sup>

It may be questioned whether the voluntary nature of Blackstone's envisaged delegation of authority is of any relevance in contemporary public education, which is compulsory in nature. With few exceptions,<sup>13</sup> however, the courts ignored this distinction and utilized the *in loco parentis* doctrine to vest broad discretionary authority in educational officials.<sup>14</sup>

The doctrine was strengthened in 1934, when the Supreme Court postulated that attendance at public universities is a privilege and not a right.<sup>15</sup> As a result, judicial parameters for the activities of school authorities were infrequently drawn. Moreover, school teachers and administrators were afforded the somewhat lenient yardstick of "reasonableness" on those few occasions when their in-school activities were challenged in the courts. Thus, in a representative case in 1955, the Kentucky Court of Appeals stated that the "only concern of the courts is to determine whether the school rules and regulations are reasonable or . . . arbitrary."<sup>16</sup>

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touchstone for the doctrine. Further discussion of the doctrine is found in Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 547, 559-62 (1971).

10. See, e.g., *Pugsley v. Sellmeyer*, 158 Ark. 247, 250 S.W. 538 (1923); *Board of Directors v. Green*, 259 Iowa 1260, 147 N.W.2d 854 (1967); *Jones v. Cody*, 132 Mich. 13, 92 N.W. 495 (1902); *State ex rel. Thompson v. Marion County Bd. of Educ.*, 202 Tenn. 29, 302 S.W.2d 57 (1957).

11. See, e.g., *Kenny v. Gurley*, 208 Ala. 623, 95 So. 34 (1923); *Holmes v. State*, 39 So. 569 (Ala. 1905); *Isgrig v. Srygley*, 210 Ark. 580, 197 S.W.2d 39 (1946); *Douglas v. Campbell*, 89 Ark. 254, 116 S.W. 211 (1909); *John B. Stetson Univ. v. Hunt*, 88 Fla. 510, 102 So. 637 (1924); *Tanton v. McKenney*, 226 Mich. 245, 197 N.W. 510 (1924); *Vermillion v. State ex rel. Englehardt*, 78 Neb. 107, 110 N.W. 736 (1907); *State v. Lutz*, 113 N.E.2d 757 (Ohio C.P. 1953).

12. 1 W. BLACKSTONE, COMMENTARIES \*453.

13. See, e.g., *Drake v. Thomas*, 310 Ill. App. 57, 33 N.E.2d 889 (1941); *Anthony v. Syracuse Univ.*, 224 App. Div. 487, 231 N.Y.S. 435 (1928).

14. See cases cited note 11 *supra*.

15. See *Hamilton v. Regents of Univ. of California*, 293 U.S. 245 (1934).

16. *Casey County Bd. of Educ. v. Luster*, 282 S.W.2d 333, 334 (Ky. 1955). The

### A. *In Loco Parentis Doctrine Comes Under Attack*

In a landmark decision in 1967, the Supreme Court provided impetus for new analyses of traditional legal attitudes toward young people when, in *In Re Gault*,<sup>17</sup> it extended hitherto withheld procedural guarantees to juvenile court proceedings. Significantly, in rejecting the theory that a state acting as *parens patriae* could disregard due process guarantees for juveniles, the Court stated that "[t]he Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historical credentials are of dubious relevance."<sup>18</sup> Although one must exercise caution in drawing an analogy between *Gault* and other areas in which rights are extended to minors,<sup>19</sup> the Court's obvious disenchantment with reliance on an overly expansive legal doctrine which sanctioned broad, and potentially harmful authority over juveniles is of relevance in the *in loco parentis* context.

A sporadic, though cumulatively persuasive attack on the *in loco parentis* doctrine was evinced by other cases. For example, in 1961, the Fifth Circuit completely circumvented application of the doctrine in an expulsion case by treating a public college as a governmental body analogous to an administrative agency.<sup>20</sup> Similarly, in a decision that provided another striking contrast to the Supreme Court's earlier characterization of attendance at a public university as a privilege, a California court likened attendance at institutions of higher learning to public employment.<sup>21</sup> On the secondary level, in *Tinker v. Des Moines School District*,<sup>22</sup> the Supreme Court expanded *Gault*'s extension of constitutional guarantees to juveniles by holding that state operated schools cannot be "enclaves of totalitarianism"<sup>23</sup> in the observance of the first amendment freedoms of students. The *Tinker* decision, though not to be viewed as sounding the death knell for the *in loco parentis* doctrine,<sup>24</sup> none-

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court held that a principal's rule prohibiting schoolchildren from entering or patronizing a nearby cafe was not unreasonable or arbitrary, but rather for the good of the children.

17. 387 U.S. 1 (1967).

18. *Id.* at 16.

19. See Buss, *supra* note 9, at 557-58, for a discussion of the limiting considerations.

20. See *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

21. See *Goldberg v. Regents of the Univ. of California*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

22. 393 U.S. 503 (1969).

23. *Id.* at 511. The Court continued, "School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution." *Id.*

24. See, e.g., *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir. 1970), in which the court ruled that a school board could, consistent with due process, enforce regulations regarding the hair length of male students. See also *Davis v. Firment*, 269 F. Supp. 524 (E.D.

theless illustrated an important shift in the judicial conception of the relationship between student and school.

In retrospect, the most significant (and paradoxical) aspect of the growth of the doctrine is that this judicially created relationship fostered ultimate judicial deference to the administrative decisions of educational institutions. This tacit desire to uphold autonomous institutional authority was responsible, in turn, for the relative dearth of litigation in the area of educational record-keeping. Only when it was recognized that the mere condition of being a student is not sufficient to deny constitutional guarantees could the stalemate be broken. With additional fuel flowing from the intense national interest in personal privacy, the stage was set for litigation and, in the form of the Buckley Amendment, legislation.

### B. *Judicial Reticence and Variegated State Law*

Despite the growing extrajudicial interest, however, an indication that the Supreme Court might maintain a somewhat passive attitude toward educational recordkeeping was offered in 1971 when, in *State of Washington ex rel. Tarver v. Smith*,<sup>25</sup> the Court denied certiorari to a Washington woman who wished to challenge material placed in a file maintained on her as a welfare recipient under the Federal Aid to Families and Dependent Children program. A caseworker had placed allegedly derogatory material in the woman's file, accusing her of child neglect and recommending that she be deprived of custody of her children. Although it would be improvident to interpret the Court's refusal to grant certiorari in *Tarver* as an absolute unwillingness to explore the constitutional ramifications of institutional record-keeping, it is safe to assume that the volume of litigation in this area will not show a dramatic or sudden increase.

Similarly, the sporadic lower court rulings on access to recordkeeping systems, particularly those of educational institutions, do not provide forceful guidance in attempting to discern a definitive trend. A New York case, *Van Allen v. McLeary*,<sup>26</sup> is nevertheless worthy of mention for its recognition of what the court perceived to be a common law right of a parent to inspect his child's records. Regarding the parent/school relationship as essentially a compulsory one in which a parent must delegate educational authority over his child to the school, the court relied on "the obvious 'interest' which a

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La. 1967), *aff'd per curiam*, 408 F.2d 1085 (5th Cir. 1969); *Leonard v. School Comm.*, 349 Mass. 704, 212 N.E.2d 468 (1965). *But see Griffin v. Tatum*, 300 F. Supp. 60 (M.D. Ala. 1969).

25. 78 Wash. 2d 152, 470 P.2d 172 (1970), *cert. denied*, 402 U.S. 1000 (1971).

26. 27 Misc. 2d 81, 211 N.Y.S.2d 501 (Sup. Ct. 1961).

parent has in the school records"<sup>27</sup> as determinative of his rights. (It is interesting to note that the court offered a contemporary interpretation of Blackstone's view of the *in loco parentis* doctrine by reverting to common law tenets.)

In a slightly different context, an effort to enjoin public inspection of particular school records of a university student proved unsuccessful. In *Eisen v. Regents of the University of California*,<sup>28</sup> a California court held that the public's right to obtain disclosure of the names of officers and the stated purposes of registered student organizations outweighed what the court characterized as a "minimal" infringement of the first amendment freedoms of the officers of the organization. The "public records doctrine"<sup>29</sup> came into play in this and similar cases. Briefly, the doctrine is based upon the supposition that in a democratic society, public records should be open to anyone who shows a legitimate interest in viewing them.<sup>30</sup> However, since some states specifically exempt certain documents,<sup>31</sup> access even to those documents which appear to fall well within the ambit of the doctrine may nevertheless be limited.

Some guidelines for educational recordkeeping have existed since the early 1970's. Over twenty-five states have laws or regulations regarding student records,<sup>32</sup> though they vary widely in force and content. Although most of these states permit parental or student access to files under certain conditions,

27. *Id.* at 92, 211 N.Y.S.2d at 513.

28. 269 Cal. App. 2d 696, 75 Cal. Rptr. 45 (1969).

29. Although the doctrine relied on judicial precedent during its gestation and earliest development, nearly every state now has a statute concerning access to public records. See, e.g., CONN. GEN. STAT. ANN. § 1-19 (1969), which states in part:

Except as otherwise provided by any federal or state statute or regulation, all records made, maintained or kept on file by any executive, administrative, legislative or judicial body, agency, commission or official of the state, or any political subdivision thereof . . . shall be public records and every resident of the state shall have the right to inspect or copy such records at such reasonable time as may be determined by the custodian thereof. . . .

30. "Legitimate interest" involves more than a peripheral concern with the subject matter. Thus, in *State v. Harrison*, 130 W. Va. 246, 250, 43 S.E.2d 214, 218 (1947), a West Virginia court stated, "There is no right of inspection of a public record when the inspection is sought to satisfy a person's mere whim or fancy . . . or to further any improper end or purpose."

31. See, e.g., CONN. GEN. STAT. ANN. § 10-209 (1969), exempting certain student health records from the doctrine.

32. These states do not fall into a geographical, or other, pattern. A recent compilation of all relevant state laws is provided in NATIONAL COMMITTEE FOR CITIZENS IN EDUCATION, CHILDREN, PARENTS AND SCHOOL RECORDS (1974). An organization founded to research and publicize the problems of confidentiality of student records, the National Committee for Citizens in Education (NCCE) was a prime instigator of the Buckley Amendment. See note 38 *infra*.

until enactment of the Buckley Amendment only four permitted parents to correct, expunge, or challenge the contents of records they felt to be inaccurate.<sup>33</sup> One commentator felt that such heterogeneity may not be "as such undesirable, if it reflects genuine differences in outlooks and values among states or school districts."<sup>34</sup> But he went on to state that it is "plain that in many districts and for many purposes the issues presented by pupils' school records have been resolved *ad hoc* and even *ad hominum*, without pretence of any systematic examination of the pertinent interests."<sup>35</sup>

The extreme variance in the content of state statutes produced, as might be expected, a curious mixture of procedural results. One extensive study, conducted in fifty-four representative school districts, showed that in only fifteen districts did pupils have access to their entire files, and that parents had complete access to their children's files in only twenty districts. At the same time, however, twenty-nine districts offered complete access to CIA and FBI officials, twenty-three to juvenile authorities, and twenty-one to health department officials.<sup>36</sup>

## II. A LEGISLATIVE FOCUS ON THE STUDENT/SCHOOL RELATIONSHIP

Passage of the Buckley Amendment and subsequent corrective legislation offers a classic case study of infrequently publicized steps in the familiar process of "how a bill becomes a law."<sup>37</sup> No legislative hearings were held to explore potential problems of, or reactions to, the subject matter; nor does it appear that there was extensive preparation on the part of the Senators who cosponsored the bill.<sup>38</sup>

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33. See Indiana's *Recommended Guidelines for Pupil Records* (1973), Minnesota's *Guidelines for the Collection, Maintenance, and Release of Pupil Records* (1973), New York's *Manual on Pupil Records* (1965), and Pennsylvania's *School Law Information Exchange* (April 1973), as reported in NATIONAL COMMITTEE FOR CITIZENS IN EDUCATION, CHILDREN, PARENTS AND SCHOOL RECORDS (1974).

34. C. Lister, *Privacy, Recordkeeping and the Public Schools*, June, 1974, at 5 (unpublished article in author's possession). Mr. Lister served on the National Academy of the Sciences project, *supra* note 1.

35. *Id.*

36. See Goslin & Bordier, *Recordkeeping in Elementary and Secondary Schools*, in S. WHEELER, *ON RECORD: FILES AND DOSSIERS IN AMERICAN SOCIETY* 29 (1969).

37. See 120 CONG. REC. 7533 (daily ed. May 9, 1974).

38. Senator Buckley, although long actively involved in the educational field, asked an aide to draft legislation little more than one month before its introduction. The chief protagonist for the "instant legislation" was Diane Divocky, who had detailed numerous abuses in school recordkeeping systems in an article entitled "How Secret School Records Can Hurt Your Child" in *Parade Magazine*, March 31, 1974. See Wentworth, *Changes Sought to Law on Student File Inspection*, *Washington Post*, Dec. 9, 1974, § A, at 2, col. 1. Ms. Divocky serves on the Advisory Panel of the NCCE.

Nonetheless, court decisions in the area of educational recordkeeping, although infrequent and inconsistent, taken together with the foundation studies,<sup>39</sup> had already raised many of the pertinent questions. These included the basic consideration of a right to access, the additional problem of the kind of information which should be maintained in a student file, and the ancillary, but procedurally crucial, question of challenging allegedly false information.

As originally enacted, the Buckley Amendment provided for the withdrawal of federal funds from any educational institution which denied parental or, under certain circumstances, student access<sup>40</sup> to all official records, files and data related to the student.<sup>41</sup> Along with the right to review and inspect such information, the parties were to have the opportunity to challenge at a hearing any information they believed inaccurate or misleading.<sup>42</sup> Finally, educational institutions were required, with certain exceptions, to withhold personally identifiable records from third parties unless the information was released by written consent of the parent or student,<sup>43</sup> or issued in compliance with a judicial order or subpoena.<sup>44</sup> The Secretary of the Department of Health, Education and Welfare was given the appropriate enforcement power, and was instructed to establish an office and review board within the Department to investigate alleged violations of the law.<sup>45</sup>

Utilizing the withdrawal of federal funding as a sanction in the enforcement of legislation such as the Buckley Amendment raises some interesting considerations. Agencies often enjoy large discretionary power in administering their programs.<sup>46</sup> Affording an agency leeway in setting standards of

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39. See note 1 *supra*.

40. Student access is limited to students who are over eighteen years of age or in attendance at a postsecondary institution. See 20 U.S.C.A. § 1232g(d) (Supp. 1975).

41. See *id.* § 1232g(a)(1).

42. See *id.* § 1232g(a)(2).

43. See *id.* § 1232g(b)(1). Third parties falling within the exceptions to this prescription include other school officials within the student's educational institution or local educational agency who have "legitimate educational interests"; school officials in another school or school system in which the student seeks to enroll; and persons connected with a student's application for financial aid.

44. Before compliance with a judicial order or subpoena, school authorities are required to notify the parents and student of the orders. See *id.* § 1232g(b)(2)(B). Presumably, false information could be discovered before causing extensive damage.

45. See *id.* § 1232g(g). An additional congressional concern over the merger of privacy rights with educational data keeping was indicated in § 1232g(c) which calls for regulations safeguarding the use, dissemination and protection of school data by a governmental agency.

46. See generally Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1970); Skoler, Lynch & Axilbund, *Legal and Quasi-Legal Considerations in New Federal Aid Programs*, 56 GEO. L.J. 1144 (1968).

eligibility for federal funds compounds those delays in administrative machinery which prompted Justice Friendly to observe: "To borrow Mr. Churchill's phrase, the regulatory agencies often tolerate delays up with which the judiciary would not put."<sup>47</sup> Of note, then, is the possibility that the Buckley Amendment might not be strictly construed or promptly enforced by HEW.<sup>48</sup>

The original amendment was signed into law by President Ford in August 1974, with an effective date of November 19, 1974. However, as administrators and teachers in institutions of higher education became aware of certain provisions in the law, they set into operation a well-coordinated, intense lobbying effort to delay its implementation.<sup>49</sup> Their concern was presumably fostered by the Act's provision that at age eighteen, or upon entering a post-secondary institution, a student assumes the sole right of access to his file.<sup>50</sup> This provision raised numerous considerations, among them the very difficult problem of what to do with letters of recommendation written for students prior to their entrance to a college or university, under the assurance of confidentiality for the writer.

#### A. *A Brief Study in the Influence of Interest Groups on the Legislative Process*

In a memorandum to its member institutions in early October 1974, a national postsecondary educational association urged that each institution lobby its congressional representatives for a delay in implementation of the Act.<sup>51</sup> Positing that the law "could undermine many areas of vital confidentiality,"<sup>52</sup> the association raised the possibility of holding hearings to deal with anticipated problems, for the purpose of heading off what it foresaw as a "massive

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47. H. FRIENDLY, BENCHMARKS 68 (1967).

48. *But cf.* Fisher, *The Carrot and the Stick: Conditions for Federal Assistance*, 6 HARV. J. LEGIS. 401 (1969), in which the author suggested that strict "assistance proportionate to performance" from administrative agencies might be a mistake. Instead, the author contended that "a great deal of time must be spent on explaining to the recipients the general principle which the specific deficiency in performance brings into play." *Id.* at 405.

49. In contrast, student groups seemed pleased with the provisions of the new law. Kathy Kelly, President of the United States Student Association, noted that the amendment "provides a long overdue mechanism for correcting misinformation and errors in students' records which may be vital to their careers," and expressed the belief that the measure would "curb the arbitrary power that has so often been misused by school administrators and agencies allowed easy access to students' records." United States National Student Association Press Release (Nov. 14, 1974).

50. See 20 U.S.C.A. § 1232g(d) (Supp. 1975).

51. The author of the memorandum, dated October 28, 1974, has requested that confidentiality be maintained.

52. *Id.* at 1.

number of lawsuits”<sup>53</sup> if the law were to be enforced as enacted. These themes were reiterated in letters sent to members of Congress, as requested, by the recipients of the memo.<sup>54</sup> Interestingly, neither the original memo nor the resultant letters explained the basis for their forecast that lawsuits would be generated as a result of enforcement.

All members of the House Committee on Education and Labor and the Senate Committee on Labor and Public Welfare received communications from *ad hoc* groups of administrators throughout October and November 1974. The American Council on Education, along with five other national groups,<sup>55</sup> urged delay of implementation, citing problems with confidentiality of letters of recommendation, certain “ambiguities”<sup>56</sup> in the Act, and “consequences that the Congress may not have intended.”<sup>57</sup> On November 15, the deans of six law schools urged members of the appropriate committees to support a delay of the effective date and called for hearings to consider corrective legislation.<sup>58</sup> The Association of American Medical Colleges also urged postponement of implementation.<sup>59</sup>

While lobbying efforts intensified, colleges were, for the most part, preparing to comply with the Act.<sup>60</sup> In a widely distributed memorandum,<sup>61</sup> the

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53. *Id.* at 2.

54. Letters were sent to, among others, Senators Kennedy and Metcalf, Representatives Mosher and Teague, and the entire Illinois, Virginia, Wisconsin and Alabama congressional delegations. The source of this information has requested that the authors not be named.

55. The American Association of Community and Junior Colleges, the National Association of State Universities and Land Grant Colleges, the Association of American Colleges, the American Association of State Colleges and Universities, and the Association of American Universities.

56. American Council on Education, Memorandum to Members of the Senate Committee on Labor and Public Welfare, and the House Committee on Education and Labor, at 1, Oct. 8, 1974. Among the “important ambiguities” which the signers noted was a reference in the Act to subsections numbered incorrectly. The signers asked for clarification of the term “any and all official records, files and data” and raised questions concerning the hearing mechanism. *Id.* at 2.

57. The authors perceived these consequences to be the viewing by the student of confidential financial statements submitted by his parents, and the possibility of student access to psychiatric records. Another concern was that parents of students over age eighteen or in attendance at postsecondary institutions could not see their children’s files without the latter’s consent. *Id.* at 1.

58. Letter from the deans of the law schools at Columbia, Harvard, Stanford, Yale, the University of Chicago, and the University of Pennsylvania to members of the Senate Committee on Labor and Public Welfare, and the House Committee on Education and Labor, November 15, 1974.

59. Letter from John Cooper, President of the Association of American Medical Colleges, to members of the Senate Committee on Labor and Public Welfare, and the House Committee on Education and Labor, November 22, 1974.

60. Some schools (*e.g.*, Harvard) sent original letters of recommendation back to

Chancellor of the Massachusetts Institute of Technology issued a policy statement which maintained that materials received under an assurance of confidentiality prior to November 19, 1974 (the effective date of the Act) would not be reviewable by a student without the author's written consent.<sup>62</sup>

Although educational authorities raised a plethora of considerations in their lobbying efforts, it was evident that the focal issue was that of the confidentiality of letters of recommendation. In a memorandum answering the objections raised by the educators, the Buckley aide who drafted the original legislation distinguished this area as the "one largely reasonable concern."<sup>63</sup> However, to the suggestion that confidential recommendations are "unlikely to be candid and frank"<sup>64</sup> and might result in bland and useless letters if accessible to the subject, he raised some important questions:

[S]urely the average admissions officer can distinguish between a bland letter which says essentially nothing and an enthusiastic or detailed letter which has something of value to say. Even in terms of negative comments, are we wrong assuming that most teachers would have the moral courage of their convictions to say what they believe, even in the face of disclosure to the individual in question? Or is it that they have often been too loose with their comments, too generous with their personal prejudices and too sparing with their objectivity [*sic*]?<sup>65</sup>

Philosophical considerations notwithstanding, the educational lobbyists won a partial victory when, on November 14, 1974, one of the cosponsors

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their authors, some (*e.g.*, the University of Pennsylvania) put the letters in storage, and some (*e.g.*, Georgetown) took advantage of the "grace period" which permits schools to take up to forty-five days to produce requested files. See Wentworth, *Unlocking School Files: The Buckley Amendment*, Washington Post, November 17, 1974, § C, at 5, col. 4. Harvard's legal counsel commented:

I think this is the most disturbing piece of legislation affecting higher education that has come out of Congress in recent years. There were no opportunities for students, faculty, administrators, or other university officials to be heard on problems that directly affect them. . . . At Harvard, we have been trying to figure out how we will come in compliance, and I don't think we are going to make it by November 19. No one should be put in this position in our society, where he can't comply with laws.

Address by Daniel Steiner, 1974 College Board National Forum, Oct. 27, 1974.

61. Paul E. Gray, Initial Statement of Institute Policy Concerning Access to Student Records and the Family Educational Rights and Privacy Act of 1974, Nov. 15, 1974.

62. M.I.T. was one of the first postsecondary institutions in the country to computerize its recordkeeping system. See National Academy of the Sciences project, *supra* note 1, at 169-82.

63. Memorandum from John Kwapisz, aide to Senator James Buckley, Questions About and Objections to the Buckley Amendment—and Responses, at 1, Fall 1974.

64. *Id.* at 3.

65. *Id.* at 5.

of the original measure issued a statement that if an "agreement" could not be worked out, he would "in all probability sponsor an amendment to defer the effective date of the Buckley Amendment."<sup>66</sup>

### B. Waiver of Absolute Access

New legislation was introduced shortly before the end of the 93d Congress, and like its progenitor, the corrective measure was attached to a bill on the floor of the Senate.<sup>67</sup> This time the vehicle was a House-passed resolution authorizing a 1977 White House conference on libraries and information services. Cosponsored by Senators Buckley and Pell, and signed by the President on December 31, 1974, the new law includes much of the original statutory language, with several significant additions:

- (1) Students are barred from viewing letters of recommendation written prior to January 1, 1975;<sup>68</sup>
- (2) Students may not view confidential financial information submitted by their parents;<sup>69</sup> and
- (3) Students cannot gain access to their medical reports, although they may engage an outside physician to examine the relevant data with their consent.<sup>70</sup>

These stipulations largely satisfied the demands of educational authorities.<sup>71</sup> However, the provision that a student applying for admission, job placement, or an award, can waive his right of access to confidential statements<sup>72</sup> might prove to be the Achilles heel of the new legislation. Although

66. Office of Senator Claiborne Pell, Press Release (Nov. 14, 1974).

67. S.J. Res. 40, 93d Cong., 2d Sess. (1974). For the conference committee's report setting out the amendments to the original Buckley Amendment, see U.S. CODE CONG. & AD. NEWS, 93d Cong., 2d Sess. 6794-97 (1975).

68. See White House Conference—Library and Information Services, Pub. L. No. 93-568, § 2(a)(3), 88 Stat. 1855 (U.S. CODE CONG. & AD. NEWS, 93d Cong., 2d Sess. 2130 (1975)).

69. See *id.*

70. See *id.* § 2(a)(2)(F). This exception was accomplished by excluding such information from the legislative definition of the term "education records."

71. Signers of the memorandum, *supra* note 55, along with a representative of the National Catholic Education Association, sent a telegram to President Ford on December 19, 1974, strongly urging his approval of the new measure. They stressed their view that if the legislation were not enacted it would "cause untold confusion on every college campus in the nation."

72. Section 2(a)(3) of the corrective legislation provides for inclusion of the following paragraph:

A student or a person applying for admissions may waive his right of access to confidential statements . . . except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommenda-

the conference changes included a provision that students cannot be required to sign such a waiver, there exists a great possibility that a student will, in a practical sense, be compelled to do so.<sup>73</sup>

"Waiver" is usually defined as the voluntary relinquishment of a known right.<sup>74</sup> The voluntariness of the act of waiver is often heralded as its most essential characteristic.<sup>75</sup> Two themes in the area of waiver are of special significance in a consideration of its application to the newly defined rights of access to student files. First, in 1968 the Supreme Court stated that "where there is coercion there cannot be consent."<sup>76</sup> Consent is, of course, the essence of voluntary relinquishment. Second, judicial analysis of the waiver of a right extended by statute will necessarily involve reference to the legislative intent. Thus, "[w]here a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate."<sup>77</sup>

It is unclear how or whether safeguards will evolve<sup>78</sup> to prevent abuse of

tions are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution. (Emphasis added).

White House Conference—Library and Information Services, Pub. L. No. 93-568, § 2(a) (3), 88 Stat. 1855 (U.S. CODE CONG. & AD. NEWS, 93d Cong., 2d Sess. 2136 (1975)).

73. The United States Student Association opposed the waiver, feeling that students would be "subtly coerced" into waiving their right of access. Interview with Kathy Kelly, President of the United States Student Association, in Washington, D.C., December 15, 1974.

74. See, e.g., *Cornell, Howland, Hayes & Merryfield, Inc. v. Continental Cas. Co.*, 465 F.2d 22 (9th Cir. 1972); *United States v. Slaughter*, 366 F.2d 833 (4th Cir. 1966); *Women's Catholic Order of Foresters v. City of Ennis*, 116 F.2d 270 (5th Cir.), cert. denied, 313 U.S. 589 (1941); *B-M-G Inv. Co. v. Continental/Moss-Gordin, Inc.*, 320 F. Supp. 968 (D. Tex. 1969); *Hove v. Atchison*, 138 F. Supp. 486 (D.N.D.), aff'd, 238 F.2d 819 (8th Cir. 1956).

75. See, e.g., *United States v. Morton Provision Co.*, 294 F. Supp. 385 (D. Del. 1968); *Nichols v. Cities Serv. Oil Co.*, 157 F. Supp. 554 (D. Md. 1957), rev'd, 256 F.2d 521 (4th Cir. 1958). See also 56 AM. JUR. *Waiver* §§ 2, 12 (1947).

76. *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968). See also *United States v. Mapp*, 476 F.2d 67, 77 (2d Cir. 1973).

77. *Brooklyn Bank v. O'Neil*, 324 U.S. 697, 704 (1945).

78. Waiver of fourth, fifth, and sixth amendment rights in the criminal context has undergone, in recent years, the imposition of important procedural safeguards. *Miranda v. Arizona*, 384 U.S. 436 (1966), is the leading case in this area. It involved the fifth amendment privilege against self-incrimination, and the Court held that when there has been custodial interrogation of a defendant, the prosecution must demonstrate "the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444. See also *Johnson v. Zerbst*, 304 U.S. 458 (1938); *United States v. Gaines*, 441 F.2d 1122 (2d Cir. 1971); *United States v. Nikrasch*, 367 F.2d 740 (7th Cir. 1966); Comment, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L.

the waiver provision. Turning to the current realities of educational record-keeping, one notes that many large colleges and universities have in recent years instituted reference services to cope with the exponential growth in student requests for letters of recommendation from individual professors. After receiving a professor's original recommendation, the service sends out copies according to the student's request.

A brief study<sup>79</sup> shows that recommendations prepared by various school reference services since enactment of the original legislation are often accompanied by stipulations such as, "This material is released with the candidate's consent . . . [IT] SHOULD NOT BE SHOWN TO OR DISCUSSED WITH THE CANDIDATE"<sup>80</sup> or, "This information is strictly confidential. Under no circumstances should it be shown or given to the candidate"<sup>81</sup> or, "References are CONFIDENTIAL and are NOT to be shown to the candidate under any circumstances."<sup>82</sup> Only a few forms, of approximately thirty surveyed, appeared to comply with the intent and letter of the Act.<sup>83</sup> Particularly distressing were packets accompanied by printed form letters, one

REV. 130 (1967). It is unclear, however, if similarly evolved safeguards will operate in regard to a right extended by statute, as in the present case.

79. Schools surveyed included Barnard, Boise State, Boston College, Bucknell, Colgate, College of Human Ecology at Cornell University, Douglass, Duke, Georgetown, Mount Holyoke, New Rochelle, Northeastern, St. Joseph's (Philadelphia, Pa.), Smith, State University of New York at Buffalo, State University College at New Paltz, State University of New York at Stony Brook, Syracuse University, Temple, Tufts, University of California at Berkeley, University of Illinois at Urbana-Champaign, University of Maryland, University of Massachusetts, University of New Hampshire, University of Pennsylvania, University of Rochester, University of Virginia, University of Virginia Law School, Wellesley, and Yale. Survey conducted by the author, Dec. 1974-Jan. 1975.

80. Placement Form, State University of New York at Buffalo.

81. Placement Form, Colgate University. In a recent communication, the Assistant to the Dean of Students admitted to a "lag in changing our forms and procedures," but stated that provisions such as this "are now being modified or deleted as the law requires." Letter from Gary Pavela to the author, Feb. 26, 1975.

82. Placement Form, Mount Holyoke College. The college's Director of Vocational Planning and Placement avers that after November 11, 1974, the school "started operating on the assumption that thereafter recommendations would be open to the individual at her request." The Director admitted to confusion about the current waiver provision: "How waivers will or can be handled is still unclear—especially since they cannot be required—and, quite frankly, we are still debating policy and procedures in regard to these." Letter from Drue E. Matthews to the author, Feb. 27, 1975.

83. The model among these was that of Bucknell:

The accompanying personally identifiable student information has been released with the written consent of the said Bucknell student who has been given the opportunity to review this information and receive a copy before its release. In compliance with the Family Educational Rights and Privacy Act of 1974, this information is released only on condition that the recipient will not permit any other party to have access to such information without the written consent of the student.

stating that "the recommendations contained herein have been acquired with a waiver of right of inspection by the subject,"<sup>84</sup> and another stating that the "student has signed a waiver of his legal rights, a copy of which is enclosed."<sup>85</sup>

As some of the forms were prepared prior to passage of the new legislation, it would be inaccurate to state that there exists substantial noncompliance at present. However, it is clear that avoidance of the original legislation was accomplished by the majority of surveyed schools, before and after the effective date of November 19, 1974. Further, despite the new Act's provision that waiver cannot be a condition of obtaining letters of recommendation, the practice of including form letters with recommendation packets raises the possibility that larger colleges and universities will continue to treat the waiver of the legal right of access in a relatively haphazard, or perhaps coercive, manner.

How students should deal with coercive attempts at securing waivers will depend largely on whether or not HEW takes an active role in investigating alleged abuses. There now exists a special office at HEW which was set up for the purpose of processing complaints and information requests.<sup>86</sup> In addition, HEW issued comments on January 6, 1975, regarding the new legislation.<sup>87</sup> The comment on the waiver provision substantially restates the statutory language,<sup>88</sup> but an introductory letter from the Secretary of HEW suggests that some "new issues" have been raised in response to which new rules may be developed.<sup>89</sup>

### III. CONCLUSION

The actions of HEW in enforcing compliance with the Buckley Amendment will be a crucial indicator of the government's desire and ability to extend the spirit of the recently evolved privacy laws into the classroom. Although conceived, passed, and enacted in a somewhat unconventional man-

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84. Placement Form, University of Virginia. The Director of Career Planning and Placement reports, however, that students may opt for either an "open" or a "closed" file. If they choose the latter, the cited provision is included with their recommendation packet. "Almost all of our registrants," wrote the Director, "elect the 'closed' system and execute a waiver to this effect." Letter from Lawrence A. Simpson to the author, Feb. 12, 1975.

85. Placement Form, College of Liberal Arts and Sciences, University of Illinois at Urbana-Champaign.

86. See HEW News, November 18, 1974, at 1.

87. See 40 Fed. Reg. 1208 (1975).

88. "Since an educational institution is precluded from 'effectively' preventing the exercise of access rights . . . an institution could not require students to waive such rights. However . . . students [are allowed] to waive their rights under certain conditions." *Id.* at 1212.

89. See *id.* at 1209.