

UIC John Marshall Journal of Information Technology & Privacy Law

Volume 3
Issue 1 *Computer/Law Journal* - 1981

Article 18

1981

The Family Educational Rights and Privacy Act of 1974 and College Record Systems of the Future, 3 Computer L.J. 563 (1981)

Ursula Hyman

Follow this and additional works at: <https://repository.law.uic.edu/jitpl>



Part of the [Computer Law Commons](#), [Internet Law Commons](#), [Privacy Law Commons](#), and the [Science and Technology Law Commons](#)

Recommended Citation

Ursula Hyman, The Family Educational Rights and Privacy Act of 1974 and College Record Systems of the Future, 3 Computer L.J. 563 (1981)

<https://repository.law.uic.edu/jitpl/vol3/iss1/18>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC John Marshall Journal of Information Technology & Privacy Law by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

Note

THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974 AND COLLEGE RECORD SYSTEMS OF THE FUTURE

TABLE OF CONTENTS

INTRODUCTION	564
ELECTRONIC RECORD KEEPING	565
I. THE BUCKLEY AMENDMENT.....	567
A. THE PASSAGE OF FERPA.....	567
B. WHY FERPA?	568
C. VALUES UNDERLYING OR CONFLICTING WITH FERPA ...	571
D. CONTENT OF THE ACT.....	576
E. REMEDIES	578
II. THE STUDENT FILE OF THE FUTURE	582
A. INTEGRATION	582
B. CUMULATIVE	583
C. PERPETUAL.....	583
D. FLEXIBLE	583
E. SECURITY	584
1. <i>Natural Disasters</i>	585
2. <i>Accidental Occurrences</i>	585
3. <i>Deliberate Tampering</i>	586
F. OPTIMAL FILE DATA ELEMENTS.....	587
III. DESIGNING FERPA COMPLIANCE	587
A. WAIVERS	588
B. THE SIGNATURE REQUIREMENTS IN AN ELECTRONIC AGE	589
C. ACCESS TO FILES	591
D. RECORD RETENTION.....	594
E. STUDENTS' RIGHT TO AMENDMENT OF RECORDS.....	595
F. RELEASE OF INFORMATION	597
IV. CONCLUSION.....	604
APPENDICES	605
A. DATA ELEMENTS IN AN INTEGRATED FILE	605
B. FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974 (20 U.S.C. § 1232g (1980))	612

INTRODUCTION

Paper files will be almost totally eliminated at most educational institutions within the next ten years. This radical departure from traditional record keeping potentially could conflict with certain aspects of the Family Educational Rights and Privacy Act of 1974,¹ better known to educators as the Buckley Amendment.² The purpose of this Note is to explore specific software considerations in light of the requirements of the Buckley Amendment. The suggestions are offered as a guide to higher education planners grappling with the complexities of designing a system that protects the privacy of students while providing the data needed for management and long range planning.

In Part I, the history, values, remedies, and broad provisions of the Buckley Amendment will be briefly explored. Part II will describe the basic components of a complete student record base, including security. Part III will apply specific FERPA requirements in an integrated EDP system. Suggestions will be made for specific system designs to ensure compliance with FERPA. In addition, suggestions will be offered for statutory and regulatory reform to ensure that the intent of FERPA can be realized in the electronic age.

This Note will confine its review to record retention in higher education, defined as education beyond the compulsory secondary education mandated by the state.³ Higher education (or post-secondary education as it is referred to in the Act) is sometimes referred to in this Note as college or university education.⁴

FERPA requires only minor changes to make it applicable to the electronic age. Serious questions which are not within the scope of an educational privacy act must be addressed, however, if the courts are to respond adequately to the records and privacy issues of the future. Some of these questions are briefly touched upon in this Note: record retention, the need for written waivers and consents, and signature alternatives. But, educational institutions

1. General Education Provisions Act of 1974, Pub. L. 93-380, Title V, § 513(a), 88 Stat. 571 (1974), *as amended by* Pub. L. 93-568, § 2(a) 88 Stat. 1858 (1974). The Federal Educational Rights and Privacy Act is codified in 20 U.S.C. § 1232g (1980) [hereinafter cited as FERPA].

2. The Act is named after its author, former United States Senator James L. Buckley (R-N.Y.).

3. Traditionally five distinct categories of post-secondary education have been recognized. These include universities, colleges, community colleges, vocational and trade schools (non-profit), and proprietary institutions. Higher education is normally confined to community colleges, colleges, and universities.

4. The unique problems of the other post-secondary institutions named above are beyond the scope of this Note.

must, first and foremost, ensure that their EDP system is safe from both internal and external tampering. Then, the institutions, computer software design firms, governmental agencies, and students must cooperate during this sometimes painful transition to electronic record keeping.

ELECTRONIC RECORD KEEPING

The end of the paper record keeping era is approaching and a new era of electronic record keeping is beginning. Files once maintained in a drawer will be stored on a disk or a tape or in a magnetic bubble. Correspondence, transactions, ledgers, and journals will all be recorded electronically.

Evidence of our reliance on electronic record and data processing systems can already be observed in our daily activities. Groceries are checked electronically. Bills, statements, and invoices are issued by computer. Nevertheless, we still have the comfort of paper: "hard copy" of almost every record that is meaningful to our lives is maintained in the cluttered storage basement of some organization, so that the proof that an event or transaction occurred can be clutched, and when appropriate, waved around.

The increased capabilities of information technology will soon eliminate our reliance on "hard copy" documents. Experts predict that we are on the threshold of an information revolution.

Every indicator predicts the 1980s to be a decade of overwhelming technological change, probably exceeding in impact all the years preceding them. In all likelihood, the changes we will experience in information technology and in the concepts for its use during the decade will dwarf the changes experienced since the advent of the computer.⁵

Major strides have already been made toward the elimination of paper records (or hard copy) in the course of daily transactions. Institutions of all types receive information via magnetic tape. Mail, blueprints, graphs, charts, diagrams, pictures, even fingerprints, are transmitted thousands of miles via electronic transfer or mail systems.⁶ Individuals can "sign on" to electronic systems that provide them with access to major daily papers, weather information, and

5. Robinson, *Computers and Information Systems for Higher Education in the 1980s: Options and Opportunities*, 4 CAUSE/EFFECT, Sept. 1980, at 4. This article is a report of the four day retreat on computer technology held for top educational personnel in September 1980, by the College and University Systems Exchange (CAUSE).

6. See *Multiport Terminals Link Message Network*, 95 THE OFFICE, Feb. 1982, at 52; *Local Area Networking Provides Needed Link for Today's Office*, 95 THE OFFICE, Feb. 1982, at 113; Jones, *Word Processing Study Makes a Contribution to Profits*, 95

stock forecasts on a video screen.⁷ Even newspapers are composed and photo typeset on video screens.

New forms of data input have already reduced the paper cluttering many educational institution offices. For example, the Educational Testing Service provides magnetic tapes with the SAT scores of admissions applicants to campuses that wish them. This saves the institution from manually sorting and filing hundreds of scores. Similarly, the College Scholarship Service transmits financial aid data on magnetic tape to educational institutions and to the government processor for Pell Grants. In addition, academic records in some multi-campus community college systems are centrally stored electronically. This means that a student's academic records can be accessed by the new campus when a student physically transfers to another campus in the system.

Educational leaders are developing systems which will not only reduce paper, but reduce the number of times information must be collected from a single individual. The College Board might soon field test an innovative system that could eventually eliminate the need for hand created financial aid documents to be sent by students to their colleges, lenders, or the government.⁸ This proposed interactive system will allow students and their parents to answer a series of financial questions via terminals linked to the major processing computer. Program edits will be performed instantaneously permitting all necessary data to be collected at one time. When the sequence is completed, students will receive information regarding their financial aid eligibility at all the colleges to which the data was transmitted. Similarly, student lenders, including banks, credit unions, and savings and loan associations, will have the information necessary to evaluate a student's eligibility for loan funds. Theoretically, the federal and state governments can also access the same data for determining the student's eligibility for government programs. When fully operative this system alone might save over five million pieces of paper which are currently sent to post-secondary educational institutions.

THE OFFICE, Feb. 1982, at 79; Rothfeder, *Electronic Mail Delivers the Executive Message*, 6 PERSONAL COMPUTING, June 1982, at 32.

7. See Holman, *The Global Link: Data Banks*, 5 BUS. COMPUTING, Oct. 1981, at 35; *CompuServe*, 3 TRS-80 MICROCOMPUTER NEWS, Nov. 1981, at 6; Torode, *Getting Down to Business with Local Area Networks*, 6 MICROCOMPUTING, June 1982, at 32.

8. This system is known as Project Transaction. James E. Nelson is the Project Manager. CEEB intends to field test this system in 1983 in the states of Washington and Florida.

I. THE BUCKLEY AMENDMENT

A. THE PASSAGE OF FERPA

FERPA was a significant legislative breakthrough in the area of student rights. Yet, this important amendment was enacted with little of the study normally attached to a major bill. In May of 1974 an amendment for the "Protection of the Rights and Privacy of Parents and Students" was introduced on the floor of the Senate by Senator James Buckley (R-N.Y.)⁹ as an amendment to an omnibus education bill.¹⁰ No public or committee hearings were held, and there was substantive debate on only a few of the Amendment's provisions.¹¹ A fellow New Yorker, Representative Jack F. Kemp, had introduced a short amendment to the House version of the education bill in March of that same year.¹² Mr. Kemp's bill was designed to protect parental rights regarding their children's classroom experiences. The Buckley and the Kemp amendments were adopted by their respective bodies.¹³ In Conference, the Senate proposal was incorporated with only one substantive addition made from the House bill: a provision allowing parental review of instructional material.¹⁴ The Educational Amendments of 1974, of which FERPA was a part, were signed into law by President Ford.¹⁵

The passage of the Family Educational Rights and Privacy Act caused great concern within the educational community. Numerous letters to Congress and the Department of Health, Education and Welfare, primarily from higher education administrators, urged changes in the legislation.¹⁶ These concerns resulted in a FERPA amendment¹⁷ barely a month after the original legislation took effect, which corrected many of the provisions that had caused concern in the educational community.¹⁸ Despite this amendment,

9. 120 CONG. REC. 14,579 (1974).

10. Education Amendments of 1974, Pub. L. No. 93-380, Title V, § 513(a), 88 Stat. 571 (1974).

11. When the Amendment was first introduced it contained a provision requiring written parental consent before a child could participate in any research project conducted by a school. 120 CONG. REC. 14,579 (1974). This provision was eliminated from the bill after heated debate. *Id.* at 14,584.

12. *Id.* at 8,505.

13. *Id.* at 8,506, 14,595.

14. CONF. REP. NO. 1023, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 4206.

15. Pub. L. 93-380, Title V, § 513(a), 88 Stat. 571 (1974).

16. For a discussion of the major opponents to the Act, see Note, *The Buckley Amendment: Opening School Files for Student and Parental Review*, 24 CATH. U.L. REV. 588, 596-98 (1975).

17. Pub. L. No. 93-568, § 2(a), 88 Stat. 1858 (1974).

18. Student access to letters of recommendation for college admission were a par-

many questions about the Buckley Amendment continue to arise.¹⁹

Because the Act was written when paper records were the traditional mode of record retention, it is inevitable that more questions will arise as institutions explore alternative record keeping options.²⁰

B. WHY FERPA?

The values of privacy and confidentiality are not unique to education. In the late 1960s and the early 1970s there was substantial legislative activity on both the federal and state levels regarding the three themes of access to records regarding oneself, restriction of others' access to those same records, and public access to governmental records. These themes were reflected in the Privacy Act of 1974,²¹ the Freedom of Information Act,²² the Consumer Credit Protection Act,²³ and the Education of the Handicapped Act.²⁴

The law's concern with privacy is often traced to the famous 1890 *Harvard Law Review* article by Charles Warren and Louis Brandeis.²⁵ Since then the judiciary has continued to explore concepts of personal privacy in such areas as family relationships, child rearing, and education.²⁶ Therefore, it is not surprising that privacy issues in educational record keeping procedures were reviewed by Congress.

ticular concern. The new legislation prohibited students from viewing letters of recommendation written prior to January 1, 1975. 20 U.S.C. § 1232g(a)(1)(B)(ii) (1976).

19. Testimony of Thomas S. McFee, Deputy Assistant Secretary for Management Planning and Technology, Dep't of Health, Education & Welfare (HEW), before the Privacy Protection Study Commission on November 12, 1976, as reported by Schatken, *Student Records at Institutions of Post Secondary Education: Selected Issues under the Family Educational Rights and Privacy Act of 1974*, 4 J.C. & U.L. 147, 149, n.23. Schatken reports that McFee stated that by 1976, HEW (now the Department of Education) had received 14,000 inquiries.

20. For example, FERPA requires that the institution receive a signed release from a student before allowing certain student data to be transferred or reviewed by other than institutional personnel. See 34 C.F.R. § 99.30 (1982). The signature requirement does not currently leave open alternative methods of a student indicating acquiescence or for initiating a request. Such alternatives will be discussed briefly in Part III.

21. 5 U.S.C. § 552a (1976).

22. *Id.* § 552.

23. 15 U.S.C. §§ 1601-1691g (Supp. III 1979).

24. 20 U.S.C. §§ 1412(2)(D), 1417(c) (1980).

25. Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

26. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942) (procreation); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (family relationships); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (child rearing); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (education).

FERPA provides two fundamental rights to students. Students are permitted access to their own files, and they may limit access to their files except to a specified list of officials. Senator Buckley addressed the reason for providing these rights in a Senate speech citing *Merriken v. Cressman*,²⁷ a 1973 district court case which he saw as a "microcosm of the problems addressed by my amendment."²⁸ *Merriken* involved a junior high school student's participation in a "Critical Period of Intervention" program designed to identify potential drug abusers. Parental consent was not required for participation until after the plaintiffs had initiated their lawsuit. Even then, the defendants responded by providing a limited propaganda piece in a question-answer format through which parents were to indicate their permission for participation.²⁹ The court found that a questionnaire used in the program had invaded the right of privacy of the students and their families.³⁰ Senator Buckley saw a growing "violation of confidentiality and abuse of personal data" depicted by this case and urged the adoption of his amendment.³¹ He believed that parents and students should have the right to review school records, to question inaccuracies, and to have confidential material protected.

In the House, Representative Kemp similarly argued that school systems should be subject to information requirements similar to those imposed upon the federal government under the Freedom of Information Act.³² Overall, both Senator Buckley and Representative Kemp appeared to be concerned with the loss of control experienced by parents whose children were enrolled in school.

Perhaps Senator Buckley or Representative Kemp believed their legislation was necessary because the judicial response to educational privacy issues was insufficient. In *Merriken*, while the court found that the student had the same constitutional right of privacy as an adult,³³ it did not deal with this issue directly. It preferred instead to invalidate the Critical Period of Intervention Program because the defendant attempted to "exercise the exclusive privileges of parents."³⁴ This holding is consistent with the court's statement that only the marriage relationship is more private than the relation-

27. *Merriken v. Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973).

28. 120 CONG. REC. 14,581 (1974).

29. 364 F. Supp. at 915.

30. *Id.* at 922.

31. 120 CONG. REC. 14,581 (1974).

32. *Id.* at 8,505.

33. 364 F. Supp. at 922.

34. *Id.* at 919.

ship between parents and child.³⁵

Other courts have been even less disposed to safeguard privacy values than the *Merriken* court. A year before *Merriken*, another federal court avoided the privacy issues in *Doe v. McMillan*.³⁶ These parents and students alleged a violation of their "statutory, constitutional, and common law rights to privacy"³⁷ when a Subcommittee of the House Committee on the District of Columbia printed a report that identified students by name.³⁸ The material in the report had been collected by the Subcommittee from the D.C. public school system and contained numerous personally identifiable references.³⁹ The suit against the United States was dismissed by the District Court for failure to exhaust administrative remedies and against the named defendants on the ground of absolute privilege.⁴⁰ The plaintiffs appealed the District Court's ruling regarding the named defendants, but the decision was affirmed by the Court of Appeals.⁴¹ The Court of Appeals found that the Speech and Debate Clause granted immunity to the Congressmen, their aides, and the government printing office. The court also held that district school officials who had voluntarily given the information to the committee were also entitled to official immunity because they had acted within the scope of their authority.⁴² The Supreme Court upheld the Court of Appeals regarding the immunity provided by the Speech and Debate Clause,⁴³ but it divided sharply over whether the Public Printer was immune.⁴⁴

Other courts have not addressed student privacy issues for other reasons. For example, in *Blair v. Union Free School District No. 6*,⁴⁵ the court upheld the student's action for mental distress but dismissed the student's privacy action because New York does not recognize a common law right to privacy.⁴⁶ Although *Elder v. Anderson* held that a school official was not protected by sovereign immunity for releasing records, the cause of action was premised on a

35. *Id.* at 918.

36. 412 U.S. 306 (1973).

37. *Id.* at 309.

38. H.R. REP. NO. 1681, 91st Cong., 2d Sess. 253 (1970).

39. The report included letters accusing children by name of theft, disrespect, sexual advances, profanity, and assault. *Id.* at 253-58.

40. 412 U.S. at 310.

41. *Id.*

42. *Id.*

43. *Id.* at 312.

44. On a 5 to 4 split the Court held that the Public Printer and the Superintendent of Documents could not be given absolute immunity.

45. 67 Misc. 2d 248, 324 N.Y.S.2d 222 (1971).

46. *Id.* at 249, 324 N.Y.S.2d at 223.

violation of the California Education Code, not on a general right to privacy theory.⁴⁷

The disparity in results confirms the concerns of Senator Buckley and Congressman Kemp about the availability of adequate privacy protection for students and their parents. In a discussion following Representative Goldwater's introduction of a "special order" on privacy, Congressman Kemp acknowledged that the maintenance of school records was primarily a matter of local and state jurisdiction, but he stated that federal legislation was needed to establish general guidelines.⁴⁸ Senator Buckley agreed that most reforms in this area must come from the states, but felt that the federal government could act by withholding public funds if general federal guidelines weren't followed.⁴⁹

C. VALUES UNDERLYING OR CONFLICTING WITH FERPA

The concept of a right of privacy was not advanced in legal theory until the 1890 Warren-Brandeis article.⁵⁰ It is unclear whether the right of privacy is fundamental or whether it has evolved in response to an increasingly complex society. But it is clear that there are certain zones of privacy that the courts are now protecting.⁵¹ There is now a general societal expectation of privacy and confidentiality in certain areas of our lives, most noticeably in those regarding family and interpersonal relationships.

The inefficiency of manual record keeping systems previously afforded individuals a certain amount of privacy. The time and expense necessary for manual data collection and retrieval served as a natural barrier to invasions of privacy. In the new technological age, however, organizations can maintain, access, and disseminate files containing both subjective and objective educational, demographic, financial, statistical, and health data. The use of this information affects all segments of society.

The federal and state governments, students, educational administrators, faculty, potential employers, lenders, parents, individuals providing recommendations, and society as a whole are all touched by the activities controlled by FERPA. Their rights and needs differ, and successful legislation must create a delicate balance between these needs.

The federal government often serves as the defender of society's

47. 205 Cal. App. 2d 326, 23 Cal. Rptr. 48 (1962).

48. 120 CONG. REC. 9,370 (1974).

49. *Id.* at 17,719.

50. See text accompanying *supra* note 25.

51. See text accompanying *supra* note 26.

rights and expectations. It also takes the position of the protector of the weaker party from oppressive state and, when possible, institutional action. The student is normally the weaker party in the educational relationship. Before FERPA, the student was often powerless when faced with an intransigent administration that refused to correct incorrect files or refused to protect the student's right to privacy. The passage of FERPA demonstrated that the federal government was concerned with protecting the rights of the student, and his/her ability to deal with an often powerful adversary.

In addition, the federal government has the right to expect that the data provided by educational institutions is accurate and complete. Funding decisions for social and educational programs are based on data provided by educational institutions. This data ranges from research conducted by the institutions to purely statistical or demographic representations about the student body. The student access provided under FERPA will help guarantee that the data collected by institutions in the future will accurately reflect the student population. New computerized data retrieval will also assist the government in receiving a more complete profile of the student population. This information can be crucial when designing and implementing national policy, especially in the area of federal assistance to the institution and the student.

Historically, however, education has been the responsibility of the states. A state has a right to educate its citizenry and to provide the type of programs it perceives as necessary to the welfare of its citizens. Regulations which intrude upon the relationship between the educational institution and its students infringes upon the ability of the state to establish its educational goals. Regardless of whether that infringement is positive or negative from the student's and institution's viewpoint, the state's freedom has been superseded by federal involvement in an area traditionally controlled by the state.

On the other hand, the states share many of the federal government's expectations. States expect accurate and complete information on which to base their decisions since they are one of the primary funders of higher education. The state also acts as a defender of the citizenry from oppressive private action. The state, through the implementation of its own policies might, therefore, be in a better position to create statutes dealing with the relationships between educational institutions and their students which may be unique to that state.

Society would use different standards in evaluating the impact of FERPA upon its rights and values. Society has a right not to be overregulated by the government. This is particularly true if the po-

sition is held that the government has only the power delegated by the people through the Constitution and its elected representatives. The government then exists at the forbearance of the society, and the needs protected by FERPA must be weighed against the intrusion of FERPA. As a result of this delegation, society has the right to expect that mechanisms will be in place to protect the individual from governmental or institutional coercion and to protect the privacy of its members. But the underlying value of confidentiality is tempered by a societal concern with a need for information for decision making. As part of the decision making process through voting, society must be able to depend on the accuracy of the information it receives. Also, schools require information regarding intelligence, mental stability, and socialization skills to make educational decisions. Employers often insist on similar information for certain types of jobs. For example, an air traffic controller must be able to withstand a great deal of pressure if (s)he is to be effective and if passengers are to be safe. Society has a right to expect that such data will also be available to protect it from potentially unbalanced individuals.

Society also has an expectation of minimal competence of individuals who are educated through its institutions. It expects that there will be an educated citizenry who can make informed choices. It expects that individuals certified as competent will perform their professional duties at certain levels of competence. It expects the educational institutions to transmit the society's basic values to its members.

FERPA has generally met societal expectations. The intrusiveness of the regulation is minimal. The government has designed neither a complex nor an unnecessary set of rules. The weaker party, the student, is guaranteed access to information and an opportunity to correct incorrect data. Confidentiality is assured by offering the student the right to control the dissemination of file material. Accuracy is most likely enhanced because students can ensure that the information is correct.

Perhaps the only societal concern not assisted by FERPA is society's interest in complete information. Since students now control dissemination, society is potentially blocked from information that some of its members might think crucial to informed decision making. However, the information available to society regarding the competence of its citizens is not reduced merely because less individual information is available without the student's consent. The institution itself can still be held to a duty to certify only those individuals that meet established criteria. On balance, the gains offered society by FERPA outweigh the liabilities.

Students share many of the expectations held by society. They are concerned with confidentiality of records for many of the same reasons that society as a whole is concerned. There are expectations that our private lives will not be flaunted in front of the public. Educational endeavors, especially voluntary ones, are a private matter except in those areas that concern professional competence. This concern with confidentiality is in concert with society's general concern with the confidentiality of personal information.

The student also has expectations that society will adhere to what the student sees as an implied covenant. If the student goes to school and performs well, society will permit that student to prosper as long as (s)he works hard. Society on the other hand, expects that its students will work hard in exchange for the opportunity to be educated. If a student is unable to correct erroneous information which prevents him from performing his share of the covenant, both he and society will be damaged.

Students also share the government's and society's concern about accuracy, but for different reasons. A student's future is often dependent upon the educational record. Although government and society may not be as concerned with the individual who is occasionally harmed by ineffective or inaccurate record keeping, it is the individual's prime concern. Hand in hand with the desire for accurate record keeping is the opportunity for the student to confront his/her accusers. A student denied employment because of an inaccurate educational record might never determine why employment opportunities have been closed to him/her if (s)he never has an opportunity to review the record.

Students are concerned with coercion as the weaker party in the institutional-student relationship. Although higher education is a voluntary activity, it is a prerequisite to many careers. Without advanced education, many individuals would be unable to pursue the interests and careers they desire to pursue. Therefore, although students are technically free to choose whether or not to attend an educational institution, this choice is often coerced by interest and ability. Without governmental protection, students would normally not be in a position to protect the confidentiality and accuracy of their records.

While the primary concern of students is the correction of institutional error, there are some FERPA violations that can't be corrected. Once information is disseminated it can be corrected, but seldom retracted.

A student's right to compensation for harm is not effectively handled by FERPA. However, this right is also in direct conflict

with the state's and an institution's wish to reduce liability. Society is less concerned with harm to individuals than with policies which affect entire groups. Also, society might adhere to the concept that common law principles offer the student sufficient remedies. Although causes of action may lie for certain institutional action,⁵² legal remedies are costly and often inefficient for students.

Individuals providing recommendations for school admission play an instrumental role and have rights which must be protected. They assist in the identification of students who will most benefit from particular types of instruction. Yet, if their recommendations are freely available to the students for whom they write, the recommender may be less candid. Fear of a defamation suit may cause the writer to gloss over areas of concern.

FERPA has attempted to strike a balance between the recommender's potential liability problem, the institution's need to have complete information while making admission decisions, society's desire to have its educational resources used by students who can benefit from them, and a student's right to know what is being said about him/her. The waiver provision allows students an opportunity to let the recommender and the school know whether the recommendation will be free from student scrutiny. If the student has chosen to read the evaluation, the recommender can take this into consideration when the letter is written.

Potential employers are entitled to proof that the student has met certain institutional standards in order to attend or graduate from a particular institution. To this end, they can receive verification of attendance and degree received (directory information) without the student's consent. However, the employer can receive little information regarding other aspects of the student's life when making an employment decision. While such barriers initially seem to restrict the employer in its ability to hire qualified employees, potential employers are really not harmed by FERPA. Employers have developed their own standards by which to judge applicants (testing, etc.). In addition, they can legitimately request reference sources that can be contacted before a hiring decision is made.

Student loan lenders also have a need for information regarding past and potential borrowers. Since most student loans are guaranteed by the federal or state government, society and the government are also protected since information regarding a student can be received by the lender to insure reasonable lending decisions. FERPA struck a balance between the lender's need for information regarding loan eligibility and the student's right to privacy. Information

52. See text accompanying *infra* notes 71-88.

which does not directly pertain to a student's eligibility for a loan is barred from the lender. For example, the lender cannot review confidential material in the file regarding class performance. However, the school must provide the lender with material regarding the student's overall academic progress so that the lender can determine if the student should receive a loan.

The concerns and conflicts evident in FERPA between different group interests is evident in any type of comprehensive legislation influencing such a wide spectrum of society. It is possible that attacking the privacy problem on a piecemeal basis, i.e. one act for education, one for credit information, etc., is an inappropriate way to develop a national scheme of privacy legislation. It appears as though a unified nationwide attempt at identifying primary and secondary values and goals could lead to the passage of an umbrella act under which legislation affecting specific interest groups could be formulated. Such legislation could help assure that all societal groups are protected from unwarranted intrusions into their privacy.

D. CONTENT OF THE ACT

FERPA provides that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students. . . the right to inspect and review the education records of their children."⁵³ In higher education, however, college students, rather than their parents, retain the right to inspect higher education files. The Act provides:

{f}or the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of post-secondary education the permission of consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.⁵⁴

This right is modified slightly by subparagraph 99.31(a)(8) of the FERPA regulations which allows parents the right to access the files of dependent students as defined by the Internal Revenue Code.⁵⁵ This modification was obviously an answer to those parents who argued that since they must be responsible for the educational costs of their children they should be allowed access to their children's records.⁵⁶ Nevertheless, the basic access right remains with

53. 20 U.S.C. § 1232g(a)(1)(A) (1976).

54. *Id.* § 1232g(b)(4)(d).

55. 34 C.F.R. § 99.31(a)(8) (1980).

56. *See* 41 Fed. Reg. 24,663 (1976). These comments indicated that several commentators felt that parents had a right to this information. It is also interesting to note that it is possible that a student who is considered dependent for financial aid

the higher education student.

Generally, the Act provides students with access to the information contained in their educational records. Educational records are defined in the regulations as "those records which: (1) are directly related to the student, and (2) are maintained by an educational agency or institution. . . ."⁵⁷ Students must be permitted access to their records within a reasonable time after making a written request to review their files.⁵⁸ Access would be less meaningful, however, if the student did not have a vehicle to effect change when the file contained incorrect or misleading information. The FERPA authors recognized this and provided students with an opportunity to challenge the content of the record. If the university determines that it is unwilling to change or delete the disputed material, a hearing must be held if requested by the student.⁵⁹ The hearing must be conducted by an impartial individual.⁶⁰ If the university's decision not to alter the file is affirmed, the student is permitted the right to add a statement to the file outlining his/her objections.⁶¹ In addition, a student has control over who may have access to his or her file.⁶² A principal exception to this rule, and an administrative necessity, allows educational faculty and administrators who have a legitimate educational interest access to the file.⁶³

Students, however, do not have access to all files which concern them. Records created for the exclusive use of the creator which are in the sole possession of the creator are exempt under the regulations.⁶⁴ Records that are maintained solely for law enforcement purposes and which are physically separate from other student records are also exempt.⁶⁵ In addition, records created or maintained by a

purposes will not be considered dependent for IRS purposes. This inconsistency, caused by the Higher Education Amendments of 1980, could make a student's parents provide personal financial data before the student could be considered for federal financial aid programs, yet deny those same parents access to the student's educational records.

57. 34 C.F.R. § 99.3 (1980).

58. *Id.* § 99.11.

59. *Id.* § 99.21(a).

60. 34 C.F.R. § 99.22(b) (1980) provides that the hearing may be conducted by any party who does not have a direct interest in the outcome of the hearing. Traditionally, institutions ask faculty, administrators, or occasionally student government leaders to conduct such hearings.

61. *Id.* § 99.21(c).

62. *Id.* § 99.30(a)(1).

63. *Id.* § 99.31(a)(1).

64. *Id.* § 99.3.

65. See Schatken, *supra* note 19, at 161, for a discussion of a controversial section of the law enforcement exclusion. The law enforcement exclusion is limited to records "(not) disclosed to individuals other than law enforcement officials of the

psychologist, physician, or psychiatrist which are used solely for the treatment of the student are exempt from examination under the regulations.⁶⁶ These exemptions require that the file be closed to outside individuals. For example, only individuals involved in the student's treatment program may have access to medical/psychiatric records.⁶⁷ The law enforcement record exclusion is similarly restricted to law enforcement personnel,⁶⁸ and records created for the sole possession of the creator can never be divulged to other than a substitute.⁶⁹

The Act appears to have had two immediate impacts. First, it provided students with statutory authority for file access. Second, and perhaps as important, it caused many educational institutions to question the purpose, nature and method of data collection.⁷⁰

E. REMEDIES

Despite the detailed regulations established under FERPA, a student whose rights have been violated has few remedies available. The statute provides that "No funds shall be made available to any educational agency or institution which has a *policy of denying, or which effectively prevents,*" the student from reviewing his record,⁷¹ or "which has a *policy or practice* of permitting the release of education records"⁷² or "which has a *policy or practice* of releasing, or providing access to, any personally identifiable information. . . ."⁷³ (Emphasis added.) The statute provides no remedy for individual incidents that violate either the spirit or the letter of FERPA.

Likewise, the regulations emphasize the control of institutional policies that violate FERPA. Subpart E of the regulations deals with

same jurisdiction." 34 C.F.R. § 99.3 (1980) (definition for education records). Schatken maintains that various interpretations can be given to the term jurisdiction. This section of the regulations also requires that the law enforcement files be kept separate from the education records, if they are to be exempt from disclosure. It is assumed that a file would be considered separate, even if on the same computer, if it couldn't be accessed through the student record system.

66. 34 C.F.R. § 99.3 (1980).

67. *Id.* § 99.3(b)(4)(ii) (definition for education records).

68. *Id.* § 99.3(b)(2)(ii) (definition for education records).

69. *Id.* § 99.3(b)(7)(ii) (definition for education records).

70. For an interesting example of the type of institutional self-examination that resulted from FERPA, see generally Bomzer, *Security and Privacy at a Public University, The Managerial Revolution in Higher Education*, cited in *THE ROLE OF INFORMATION SYSTEMS; PROC. OF 1976 CAUSE NAT'L CONF.* (R. Mann & C. Thomas, eds.). (Coll. & Univ. Systems Exchange, Boulder, Colorado).

71. 20 U.S.C. § 1231g(a)(1)(A) (1976).

72. *Id.* § 1232g(b)(1).

73. *Id.* § 1232g(b)(2).

the enforcement of FERPA. The regulations require that complaints regarding FERPA violations be reported in writing⁷⁴ to the FERPA office. The FERPA office is required to notify the institution and the complainant that the complaint has been received, and the institution is given an opportunity to provide a written response to the allegation.⁷⁵ The FERPA office is then required to investigate all timely complaints⁷⁶ and to issue a written notification of its findings to the parties.⁷⁷ If the FERPA office determines that the institution has failed to comply with FERPA, it must include in its notification "the specific steps which may be taken by the agency or educational institution to bring the agency or institution into compliance."⁷⁸ If the institution does not change its practice or policy in accordance with the notification, a Review Board hearing is held to determine if federal funding to the institution should be discontinued.⁷⁹

Federal funding will be terminated only "[i]f the Secretary, after reasonable notice and opportunity for a hearing by the Review Board, (a) finds that an educational agency or institution has failed to comply with the provisions . . . of the Act, or the regulations . . . , and (b) determines that compliance cannot be secured by voluntary means."⁸⁰ Thus, an institution that has violated FERPA may avoid termination of its funding by future voluntary compliance.

The institution will probably voluntarily comply with the FERPA Office notification. In some cases this will solve the student's problem. For example, if a student wishes access to his/her file, and FERPA notifies the institution that access must be made reasonably available, the student will probably be offered access. But if the student complaint involves the unauthorized release of information, a change in institutional policy will not serve as a remedy. The damage has already been done. A change in policy will protect students in the future but cannot retract the information already released.

No provision is made to impose fines or other penalties upon the institution for past violations of FERPA. Nor do students whose rights have been violated have a remedy under the statute or the regulations. They are not provided a cause of action against the institution for a FERPA violation.

Under common law, however, a student may be able to recover

74. 34 C.F.R. § 99.63(a) (1980).

75. *Id.* § 99.63(b)(1), (2).

76. *Id.* § 99.63(c)(1).

77. *Id.* § 99.63(c)(2).

78. *Id.* § 99.63(c)(3).

79. *Id.* § 99.63(d).

80. *Id.* § 99.64.

for some intentional or negligent violations of FERPA when there is a computerized record keeping system.

The courts have held that the use of computerized record keeping does not relieve a company from its duty to exercise due care when relying on the records.⁸¹ Courts have rejected defenses based on good faith mistakes made because of erroneous computer information. In *Ford Motor Credit Co. v. Swarens*,⁸² a Kentucky Court of Appeals stated that "[t]rust in the infallibility of a computer is hardly a defense. . . ." and implied that when the company has the opportunity to avoid the error the courts will not be sympathetic. Similarly, a district court held that use of computerized systems did not absolve a company from following federal regulations regarding disclosure, even though a national computerized system in its present configuration did not conform to the regulation changes.⁸³

Although none of these cases involved educational institutions, educational institutions would not seem to be immune from these holdings. They, like other companies and institutions, have a duty to use reasonable care to insure that the information in their systems is correct. Furthermore, educational institutions cannot avoid compliance with laws and regulations merely because their computer systems are not appropriately designed. Yet these holdings do not assist the student who has had correct information released without his consent. The student's best possibility of obtaining a remedy would be through an action in tort.

Traditionally, tort actions for invasion of privacy have been recognized by courts as a way of protecting the individual from unauthorized interference or intrusion into his/her private affairs. There are four general categories of common law invasions of privacy action: intrusion into plaintiff's private life or affairs, public disclosure of private facts, publicity placing plaintiff in a false light, and appropriation of plaintiff's name or likeness.

Public disclosure of private facts, the tort most likely to be committed by an educational institution, has been found applicable only to disclosure through a public medium, such as a newspaper or tele-

81. *Pompeii Estates, Inc. v. Consolidated Edison Co.*, 91 Misc. 2d 233, 397 N.Y.S.2d 577 (1977).

82. 447 S.W.2d 53 (Ky. Ct. App. 1969).

83. *Allen v. Beneficial Fin. Co.*, 531 F.2d 797, 804 (7th Cir. 1976), *cert. denied*, 429 U.S. 885 (1976). The court found that Beneficial Finance had designed its form to comply with a national computer system. The design of the system, however, did not justify its failure to comply with the "meaningful sequence" requirement of Regulation Z.

vision.⁸⁴ In some instances, an action for false light might be possible. A tort action for false light, however, requires that the material be published, false, and highly offensive to a reasonable person.⁸⁵ Under *Bernstein v. National Broadcasting Co.*,⁸⁶ a false light publication means dissemination to a reasonable number of third persons. It is doubtful that all three elements of this tort will ever be committed by an educational institution, but it is possible.

The student might also have an action for intentional infliction of emotional distress, if (s)he can prove extreme or outrageous conduct on the part of the institution and that the institution intended to cause the severe emotional distress.⁸⁷ A successful cause of action under this tort theory is highly unlikely.

A cause of action in defamation might also lie if the institution's disclosure harms the student's reputation. Such an action can be envisioned when an institution incorrectly provides information to a potential employer or transfer institution which harms the student's reputation. However, a student probably could not recover unless the information released was purported to be fact, rather than professional opinion.⁸⁸ Therefore, a student might be able to recover for an incorrect academic transcript, but probably would not be able to recover for a statement by the institution that (s)he was not qualified for a particular position. Such a statement would probably be considered the educator's professional opinion.

The Act could be amended in two ways to encourage institutional compliance and to assist the student who has been harmed by a violation of FERPA. First, the Act could provide the Secretary with the power to fine institutions who have intentionally violated the Act or who have been grossly negligent. The fines could be established by the Hearing Board after a thorough investigation of the event. In this way, students could be protected from serious individual violations of the Act (even if they were contrary to institutional policy). The current regulation allowing the institution an opportunity to voluntarily correct the policy could still be retained with regard to federal funding. A system of fines which are dependent upon the severity of the action should serve as an added incentive for careful system design by the institution.

In addition, the statute could provide a student with a private

84. *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9 (9th Cir. 1962); *Household Fin. Corp. v. Bridge*, 252 Md. 531, 250 A.2d 878 (1969).

85. RESTATEMENT (SECOND) OF TORTS, § 652E (1965).

86. 129 F. Supp. 817, *aff'd*, 232 F.2d 369 (D.C. Cir. 1956).

87. See *Womack v. Eldridge*, 210 S.E.2d 145 (Va. 1974) (highly reckless conduct might also suffice).

88. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

cause of action under FERPA. This would guarantee that students from different jurisdictions would have the same access to the courts if their rights had been violated. Also, students would not be forced to rely on tort theories which are often difficult to plead and prove and which vary according to jurisdiction. While students would hopefully not need to avail themselves of such a costly forum, it should be uniformly available to them across the fifty states.

II. THE STUDENT FILE OF THE FUTURE

This section argues that the optimal student record file of the future will have six basic characteristics.⁸⁹ The system will be (1) integrated, (2) cumulative, (3) perpetual, (4) flexible, (5) secure, and (6) complete.

A. INTEGRATION

To be integrated means that the system will maintain common information which is accessible to all users at one or more common locations. This does not mean, however, that the information contained will be equally available to all users. Data can, and must, be stored in such a way as to limit access.⁹⁰ By classifying data according to confidentiality and privacy requirements, an institution can develop an integrated model that adheres to the privacy requirements of the Buckley Amendment.

The benefits of an integrated system are numerous. Student data need be entered only once by the office responsible for the updated information. It is even possible that the student will be responsible for entering much of the data directly into the system. Such on-line student registration systems would allow a student direct access to certain "directory information"⁹¹ which could be

89. Stephen J. Patrick's proposal that the ideal system be integrated, cumulative, perpetual and flexible has been incorporated into the model proposal here. See Patrick, *Implementation of the Ideal Student Record System*, 4 CAUSE/EFFECT, Nov. 1981, at 4.

90. Security is probably the greatest danger with EDP systems. It is frequently demonstrated that million dollar systems are easily subject to tampering. See Rivlin, *Computer Crime*, 10 STUDENT LAW., Feb. 1982, at 14.

91. Directory information has a specific meaning under FERPA. It is defined in 34 C.F.R. § 99.3 (1980) and includes the following:

The student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, the most recent previous educational agency or institution attended by the student, and other similar information.

Much of this information is collected from registration and other student information collection documents. Systems will soon be designed that will allow a student to reg-

changed or modified as necessary. Regardless of who enters the information, student or institution, single entry saves processing and reconciliation time as well as storage space in the computer. In addition, all the information about a student can be accessed at one time. When systems such as financial aid and registration are maintained separately, multiple files must be accessed. Since file identifiers often differ between systems, time consuming hand match-up of data is often required. The single integrated file eliminates this matching requirement.⁹²

B. CUMULATIVE

The ideal student record system must also be cumulative. That is, both current and past information about a student must be easily accessible. This capability enhances academic counseling because a complete review of the student's educational history would be possible. A cumulative record allows fixed information such as previous high school, date of birth, and social security number to be collected and stored only once. In most prototypes, the academic schedule information is stored by term within the student file and can be accessed either through the student file or through the term identifier.⁹³

C. PERPETUAL

The perpetual characteristic refers to the length of time the records are kept on file and is necessary if a completely effective system is to be designed. When a student leaves an institution, the student's file can be stored on tape and filed in a secure location. If the student returns or a query is made, the original file can be reactivated, rather than recreated.

D. FLEXIBLE

The system must be flexible and adaptable. Federal and state reporting requirements can frequently change. Any useful system must be able to store data in a fashion flexible enough to allow for

ister using some type of access terminal. Much of this data, then, would be directly under the student's control.

92. For example, the California Institute of Technology does not currently maintain an integrated student database system. The financial aid data, including all authorized expenditures, must be hand matched to the actual expenditure ledgers which are not only produced by different software, but on a different piece of hardware as well. Countless hours are spent reconciling the data between the two systems.

93. See, e.g., ISIS, The Systems and Computer Technology Corporation's integrated student information system.

changing uses of the data. In addition, the data must be stored to allow for flexible retrieval. Assuming adequate user clearance for the data, the optimal system would allow a user to request any combination of data in any order. Unlimited flexibility of retrieval will also enhance institutional research capabilities while protecting identities since data can be accessed without use of the student's name or other identifying data.⁹⁴

Further, the flexible system must allow for textual storage of pertinent correspondence in each file. This capability is essential to the elimination of paper files. For example, an institution may wish to retain letters of recommendation written on a student's behalf. Such letters would have to be retained in traditional files unless the system had textual capability. The flexible system also requires that the software be easily transferable to improved hardware so that the system can continue to be improved as the art of EDP storage is improved.

E. SECURITY

Security is perhaps the most important characteristic of the optimal student file. A system that is not secure will not only fail to afford student privacy—it is easily tampered with. Data integrity will be lost, and as such the system is worthless. "Computer security includes the protection from unauthorized (accidental or deliberate) access, use or disclosure, and modification, loss, damage, destruction, error, or disruption."⁹⁵ Computer authorities differentiate between the prevention of accidental errors ("protection") and the prevention of deliberate attacks on the system ("security").⁹⁶ The system must be secure from both destruction or unapproved modification.

There are essentially three broad sources of system interference or destruction: natural disaster, accidental occurrences and deliberate tampering.

94. This statement assumes that any combination of data can be retrieved at any time. Researchers therefore could perform almost unlimited research. For example, a researcher could identify all math majors involved in sports programs and determine whether there is a correlation between sports participation and math grades. Since the researcher would be limited to accessing cumulative data, or list data without student identifiers, the student's privacy will be ensured. Yet quick and accurate research could be performed since there would have to be no hand manipulation of the original data. There are numerous prototypes of flexible retrieval systems already on the market.

95. *COMPUTERS AND SECURITY* (C. Dinardo ed. 1978).

96. B. WALKER & I. BLAKE, *COMPUTER SECURITY AND PROTECTION STRUCTURES* 6 (1977).

1. *Natural Disasters*

Natural disasters include fire, water and structural damage which occurs due to earthquake, tornado, hurricane or other wind storm. These threats must be taken into account when deciding on the physical location of the hardware and any back-up tapes or drives. The building must be structurally sound, and routine inspections of the physical area should be made. A small leak in a roof could cause thousands of dollars of damage to a computer. The machine room should be equipped with automatic heat, smoke and water detectors and fire suppression systems. Furthermore, the temperature and the humidity of the room should be automatically controlled. Hardware, despite its name, is extremely sensitive to temperature and moisture. Primary data file, systems file, and program file backups should be maintained in a separate location so that if the hardware or software is damaged the system can be re-created, or even run on other hardware.

2. *Accidental Occurrences*

Accidental occurrences include those caused by personnel, hardware or software defects, and data transmission errors in telecommunications systems. New systems must be thoroughly debugged and tested before being used. All major production system files should have corresponding test files which contain examples of all transaction types. The live production files should never be used in system testing. Even minor modifications of the system should be tested through the use of a test file. If a manual operation is being computerized for the first time, many institutions suggest maintaining a hand operation for the entire first year of a new system's use. For operations which are already computerized but are being upgraded, the old system should be run in parallel with the new one. The resulting outputs should be compared at the end of each cycle, whether weekly or monthly. For very large files, this comparison can be done on a statistically significant sample basis.

Even if the hardware or software is flawless, human error may occur. Only thoroughly trained personnel should ever have access to the system. System users can create errors if they provide incorrect data or information in the wrong form. Data entry personnel and computer operators can also introduce accidental errors. It is possible to design very sophisticated data entry validity and reasonableness edits for the system to help prevent the entry of incorrect data. In addition, access can be restricted by passwords, systems log-on procedures, and hierarchical security procedures within the computer system itself. Also, transaction logs and exception logs

should be automatically maintained, and reviewed daily for unusual transactions.

The system should be designed so that there is a backup available at all times in case a fatal error occurs. Such backup systems are usually on magnetic media. Restart procedures must be established, and periodic backups should be made of all systems. In addition, source code and object code backups should be maintained. Backup should occur at least daily for an on line system and each backup generation should be rotated through primary and secondary levels. This makes it possible to recover old versions of source programs. The frequency and complexity of the backup procedures is to a large extent dependent upon the complexity of the system itself, the ease of reconstructing the data entered since the last backup, and the value of the information contained in the files.

3. *Deliberate Tampering*

Deliberate threats to the system's physical security and data integrity are of great concern to college administrators. These threats can be to the hardware or the software. Furthermore, the tamperers may not be attempting to destroy the system, they may merely be changing data items. These minor changes in specific fields are the most difficult to detect.⁹⁷ The physical security of the system must be maintained. All systems software, run documentation, job decks, transaction audit, backup files, production system files and historical files should be kept in a secure vault. One set should be maintained on site, another at an off campus location. Furthermore, access to the mainframe and the tape library must be limited to computer staff. A keyed combination lock or other sophisticated system should be used to control access to the computer room which should also be equipped with some type of burglar alarm system.

Even if physical access to the hardware is controlled the system will not be secure from tampering. The system's data security is crucial. Access to data should be limited by function and need. Access must be password keyed, and the passwords must be controlled by an administrator independent of the system. Automatic software lock-outs should occur when there is a repeated attempt to use a password incorrectly and an exception report should be generated. Passwords should be allocated only to those personnel requiring interaction with the system, and the staff must be impressed with the danger of sharing their passwords.⁹⁸ Passwords must be

97. See Rivlin, *supra* note 90.

98. At the 1978 CUMREC conference, Ron Kays discussed the problem of personnel freely exchanging their passwords. He stated that the University of Idaho suf-

changed frequently. Areas of particularly sensitive data such as grade input should be limited to one or two individuals who have proved themselves not to be security risks.

For the purposes of this Note, it must be assumed that well designed security systems can protect the confidentiality of the student file. In addition, it is assumed that the security design will allow for hierarchical access. This means that data will be classified by level: individual users will be allowed access to data on only certain levels. For example, the financial aid information will be restricted to the financial aid office and to the internal auditors who annually review the use of federal, state and institutional funds.⁹⁹

F. OPTIMAL FILE DATA ELEMENTS

The actual data elements in the optimal student file can be identified.¹⁰⁰ Not all elements will apply to all institutions. Field identifiers will differ slightly depending on the priority assigned to each item by the university. The importance of the elements for the purpose of this Note is only to demonstrate the complexity of designing a system that meets the characteristics outlined above.

III. DESIGNING FERPA COMPLIANCE

The Department of Education is responsible for ensuring that educational institutions comply with FERPA.¹⁰¹ The Department¹⁰² issued proposed regulations only a few days after the 1974 amendments to the Act were made.¹⁰³ In addition, an office was established by the Department to administer FERPA.¹⁰⁴ Interim final regulations were published in March 1975,¹⁰⁵ and after receiving over three hundred written comments on the proposed regulations,¹⁰⁶ final regulations were published.¹⁰⁷ Technical amendments

ferred from this problem. He stated that careful education of the personnel regarding data tampering and its impact changed this practice.

99. For example, 34 C.F.R. § 674.19 (1980) requires a bi-annual audit of the institution's federal financial aid programs.

100. See Appendix A for an example of the types of information which would be contained in an integrated system. Although certain data elements would not be applicable to all institutions, the major data areas would be the same.

101. 34 C.F.R. § 99.60(a) (1980).

102. When FERPA was passed, the Department of Education was part of the Department of Health, Education and Welfare.

103. 40 Fed. Reg. 1207-16 (Jan. 6, 1975).

104. The Family Educational Rights and Privacy Act Office was established pursuant to section 438(g) of the Act.

105. 41 Fed. Reg. 9061-64 (1976).

106. 41 Fed. Reg. 24,661, 24,662 (1976) (preamble to the final regulations). This preamble was not codified.

were made to the regulations in 1977.¹⁰⁸

A. WAIVERS

Subpart A of the regulations discusses student waivers to FERPA requirements and contains the definitions applicable to the remainder of the FERPA regulations. A waiver of FERPA rights made pursuant to section 99.7 must be exercised by the student¹⁰⁹ and can apply to all FERPA rights.¹¹⁰ Waivers must be signed,¹¹¹ and are most commonly given regarding letters of recommendation for admission.¹¹² Institutions may request students to waive their right of access to these letters, but they may not require a waiver as a condition for admission or services.¹¹³

A student waiver to access of letters of recommendation can apply only when three conditions are met. A waiver is valid when:

- (1) the applicant or student is, upon request, notified of the names of all individuals providing the letters or statements;
- (2) the letters or statements are used only for the purpose for which they were originally intended; and
- (3) such waiver is not required.¹¹⁴

A separate field in the computerized student record should be allocated for the author's name. If the text of each piece of correspondence is preceded by this field, the first part of this section can be easily complied with. A student could review the list of individuals providing the statements without accessing the text of the letter. In addition, an integrated student data base can be modified with a flag to identify material to which the student has waived access.¹¹⁵ The

107. 34 C.F.R. § 99 (1977).

108. 42 Fed. Reg. 4460-61 (1977) (codified in 34 C.F.R. § 99 (1977)).

109. 34 C.F.R. § 99.7(d) (1980) provides that waivers regarding letters of recommendation must be made by the individual, even if that student is a minor. Section 99.7(a) states that "a student may waive any of his or her rights under Section 438 of the Act or this part." Section 99.7(d) is superfluous for students attending a post-secondary institution, but provides an interesting distinction for school children. Usually a minor child's parents can waive the child's rights for the child. Section 99.7(d) restricts that right of waiver slightly.

110. *Id.* § 99.7(a).

111. *Id.*

112. Educational institutions often provide preprinted recommendation forms. These forms often contain a section where the student can waive his/her rights to review the recommendation.

113. 34 C.F.R. § 99.7(b) (1980).

114. *Id.* § 99.6(c).

115. A flag causes a modification in the sequence of instructions in a computer program.

flag will not permit the particular element to be displayed or printed when the student requests review.

While the requirements discussed above do not address the informed waiver issue, additional requirements are imposed which help insure that waivers are exercised knowingly. For example, section 99.6 requires an institution to notify all students of their FERPA rights.¹¹⁶ This annual notification process would offer students the information necessary to make an informed choice about waiving their right of access to their file.

It was suggested above that files should be coded by level of access.¹¹⁷ Individuals should be permitted access only to the information required by their job function and classification. Limiting access to letters of recommendation by hierarchical security codes will assist in meeting FERPA requirements. The EDP system will, however, give the letter to an individual entitled to request it. Institutional guidelines and sanctions would need to be developed to deal with possible abuses in the use of the letter by individuals who are entitled to obtain it from the system.¹¹⁸

Waiver of access to the letters of recommendation can be indicated in numerous ways. The regulations merely require that the waiver be signed and voluntary. Statements regarding the voluntary nature of the waiver are now generally attached to any preprinted recommendation form. Then a student may choose to sign the waiver and, it is thought, receive a more candid response from the evaluator. Alternatively, a student could present a signed waiver to the institution before it sent a request for a recommendation through an electronic mail system.

B. THE SIGNATURE REQUIREMENTS IN AN ELECTRONIC AGE

The difficulty arises when a totally electronic system is contemplated. If a signature is required, how and where will it be filed?¹¹⁹

116. 34 C.F.R. § 99.6 (1980).

117. See text accompanying *supra* note 98.

118. 34 C.F.R. § 99.5(a) (1980) requires an institution to adopt a five point policy of (1) informing parents of students or eligible students of their rights under FERPA, (2) permitting parents of students or eligible students to inspect and review the education records of the students, (3) not disclosing personally identifiable information from the education records of a student without the prior written consent of the eligible student, (4) maintaining the record of disclosures of personally identifiable information from the education records of the student, and (5) providing an eligible student with an opportunity to seek the correction of education records of the student. No requirement is made for the institution to adopt a policy for handling misuse of information by faculty and staff. It is assumed that personnel procedures would address this issue.

119. The question of the signature validity is beyond the scope of this paper. It is

There appear to be three alternatives to the signature dilemma. Two require a change in the legislation, one a use of innovative data storage. One legislative change involves both the applicable code section and the parallel regulations.¹²⁰ The law could be amended in two ways in contemplation of the new electronic era. First, it could allow an institutional official to destroy the signed waiver after verification of its authenticity, thus eliminating the need for any paper files. The official could then make a field designation indicating that (s)he saw the waiver. Such an indication could be identified to the individual(s) attesting to the waiver. This alternative is unattractive for there would be no proof that a signed waiver ever existed. The system would rely solely on the integrity of the educational official. Realistically, a copy should have to be retained on microfiche or in the system itself.

Additionally, the law could be amended to instruct the Secretary to allow for alternate means of personal identification. The authority granted should be broad enough to encompass any alternative verification system approved by the Secretary of Education. Such alternatives include systems of fingerprint identification, facial feature identification and security code access. Fingerprint identification systems would allow a student to enter a waiver into the system only after comparing his/her fingerprints with those on file with the system. Any indicator made by the student after the fingerprint identification would be considered valid. Facial scanning systems do not appear as technically developed as the fingerprint systems, but work on similar principles. It is likely that this personal identification system will be improved in the next few years.

Security code access through an approved identifier could include any system which assigns a student-specific designator to each student. Through the use of a personal identification code, a student would be free to enter desired information into specific directory information fields such as address. The most likely format would be similar to the cards used with electronic tellers at banks. This code could be used to facilitate any student-university transac-

assumed that the current regulations require an original signature for exercising a waiver.

120. 20 U.S.C. § 1232g(a)(1)(C) states:

A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (B), 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 recommendations 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.

tion, including registration, financial aid award receipt or even to fund transfers to the University to pay fee bills.¹²¹

The technology currently exists for electronic scanning and storage of documents containing signatures. Questions could be raised regarding the legality of a signature facsimile. For the purposes of FERPA, the Secretary should recognize a signature retained in this fashion because a system such as this would also permit signature transmission to and from other locations.¹²²

C. ACCESS TO FILES

Although an institution must provide students with a copy of their file upon request, it is allowed to charge a fee for the reproduction costs of the files.¹²³ The only requirement is that the fee cannot prevent students from exercising their rights under FERPA.¹²⁴ It is conceivable that students will request a hard copy of their files, even in an almost paperless electronic age. The student record system should, therefore, contain two features. The data must be able to be printed in a reasonable form at a minimal cost to the student. Second, if the institution chooses to charge the student, the fee should be automatically charged against the student's account.¹²⁵

Subpart B of the regulations addresses a student's right to inspect and review education records. Section 99.11(a) mandates that an institution comply with a request to review "within a reasonable period of time, but in no case more than 45 days after the request has been made."¹²⁶ The form of the system and the request may significantly affect the institution's ability to speedily comply. If a student is allowed direct access to the system through terminals located at the institution, or perhaps even his own home computer, a student review request theoretically could be handled instantaneously. All data in the system would be coded to indicate which information the student may review and which information (s)he is barred from reviewing.¹²⁷ The student could review the data or request the system to produce a hard copy of the data on the printer connected to his home terminal. Alternatively, all requests for hard copy could be stored in the computer and printed at regular inter-

121. See generally *The Smart Card*, DUN'S BUS. MONTHLY, May 1982, at 89.

122. For example, a student could electronically mail a release from his/her home computer terminal. Or, a multi-campus system may only maintain one mainframe and transmit data from other campuses to it.

123. 34 C.F.R. § 99.8 (1980).

124. *Id.* § 99.8(a).

125. See the prototype system described in Appendix A.

126. 34 C.F.R. § 99.11(a) (1980).

127. This assumes that every field can be flagged.

vals.¹²⁸ If the system is not designed to allow the student to review the file via a terminal, however, the institution would have to produce a hard copy to satisfy the student's legal right of review. Hard copies would take more time and have additional costs. Moreover, the institution cannot automatically charge for the hard copy since no provision is made in the law for costs associated with file review.

The regulations establish that a student's right to information includes a right to an explanation of that information.¹²⁹ The regulations mandate that a student has a right to reasonable requests for interpretations and explanations of the records. Some students will always require some personal assistance when interpreting their files, but an innovative system design might reduce the number of interpretation requests. In all cases where information is presented in statistical, chart, graph or code form,¹³⁰ a printed explanation should accompany the record. For example, if a student requested his grade in biology it is possible that a standard letter grade might appear. In this case a standard text would appear to explain that a B equals some particular institutional standard.¹³¹

Subparagraph c of this same regulation section allows an institution to assume that the student has the right to exercise his/her authority under FERPA unless the institution has been "provided with evidence that there is a legally binding instrument or a State law or court order governing such matters as divorce, separation or custody which provides to the contrary."¹³² Although this subparagraph seems to be aimed at the minor child whose parents' rights might be restricted in some manner, it is possible that situations will arise where this section applies to the college age student as well. If such restrictions occur, a restriction flag similar to those used for waivers must be applied to the entire file to ensure that the student's access is limited.

The right of a student to inspect and review his/her own file is not absolute. Section 99.12, which applies to post-secondary educational institutions only,¹³³ imposes three limitations on student ac-

128. It is doubtful that an administrative center could print requests as they were received. However, if student printers were available at each terminal site it is possible that the material could be printed for the students immediately. The student, however, would possibly risk intrusion of his privacy from other students in such a setting.

129. 34 C.F.R. § 99.11(b)(1) (1980).

130. Code form means any data presented by symbolic or numeric representers or in sufficiently abbreviated fashion as to require some method of deciphering the data.

131. This subparagraph also reminds the educator that students have a right to request copies of their educational records.

132. 34 C.F.R. § 99.11(c) (1980).

133. *Id.* § 99.12.

cess. Two deal with letters of recommendation, and one deals with financial aid materials for the dependent student. Students are prohibited from reviewing the financial data their parents submitted as part of the student's application for financial assistance. By applying a flag based on dependency status to the financial aid file, this restricted data could be easily safeguarded from student scrutiny.

It is possible, however, that this restriction is obsolete. The major processor of student aid financial need analysis is the College Scholarship Service (CSS), which is a part of the College Entrance Examination Board (CEEB).¹³⁴ In 1981, CSS added a new feature to its service. Students now receive an acknowledgement of the data submitted to the service on the Financial Aid Form (FAF) and the Student Aid Application for California (SAAC). The acknowledgement recaptures all data submitted on the FAF or SAAC, including financial data for parents of dependent students.¹³⁵ In addition, students utilizing the free federal system of need determination receive a Student Aid Report (SAR) from the government contractor who processes Pell Grant applications; the SAR also contains information regarding parental income and asset strength.¹³⁶ While some institutions may process the basic financial need document in-house,¹³⁷ no student may participate in the Pell (Basic) Grant program without an SAR. Therefore, virtually all dependent students receive information regarding their parents' financial status through the SAR or the acknowledgement. It seems reasonable, therefore, to

134. The College Scholarship Service (CSS) is part of the College Entrance Examination Board. Although CSS is responsible for the form components and design of the system, it contracts with the Educational Testing Service (ETS) to do the actual processing.

135. This service is not new in California. CSS provided it in 1979 and 1980 under an agreement with the California Student Aid Commission which selected CSS as the sole processor of financial aid data forms for public institutions in the United States. The parental data contained on the SAAC and the FAF includes parental income, taxes, medical expenses, home equity, and other asset values. The information is addressed "to the parents of X," but in an informal survey conducted by the author with three community colleges it was determined that students usually open the envelope. The part of the address which states that the information is for the parents is not easily noticed.

136. The SAR (previously known as the SER) is returned to the student after the contractor processes the data submitted on its standard form, or through the data submitted to CSS, ACT, or PHEAA. The SAR contains information regarding family income and asset strength.

137. For example, the California Institute of Technology modeled the CSS system in-house from 1975-1980. This system was driven off the CSS document but performed at no cost for the student. However, the data was submitted to the Pell Grant processor, so many students still had access to the data when their SAR (then SER) was returned.

amend the regulations and allow students access to this data through the colleges. Since a student has independent corroboration of the data, the student might even serve a vital function in the process. If the data has been incorrectly entered into the system, the student can alert the financial aid officer and have a new determination of need performed.¹³⁸

Letters of recommendation "which were placed in the education records of the student prior to January 1, 1975" are also exempt from review if they were used only for the purpose for which they were solicited¹³⁹ and if they were sent or retained with a documented understanding of confidentiality or an express guarantee of confidentiality.¹⁴⁰ A student's access to letters that meet these two qualifications have the same restrictions as when the student exercises a waiver under section 99.7.¹⁴¹

Section 99.12(a)(3) reiterates that students who have waived their rights of review have restricted access to their files. The waiver, however, applies only to the specific items that the student knowingly waived his/her right to review.¹⁴² Three types of confidential letters of recommendation are specifically cited in this subparagraph: letters regarding admission,¹⁴³ employment,¹⁴⁴ and receipt of an honor or honorary recognition.¹⁴⁵ Since the student must affirmatively waive the right to access in these three cases, the same type of access restrictions discussed for waivers would allow the institution to exercise its right of limiting access.¹⁴⁶

D. RECORD RETENTION

Educational institutions are allowed to destroy education records. Three limitations to this right are imposed by the regulations.¹⁴⁷ An institution may not destroy a record "if there is an outstanding request to inspect and review it."¹⁴⁸ Further, an institution may not destroy explanations attached to the record by the stu-

138. Many institutions already receive their information in computer tape form from the College Scholarship Service. However, the student is still sent a printed acknowledgement which recaptures the data.

139. 34 C.F.R. § 99.12(a)(2)(ii) (1980).

140. *Id.* § 99.12(a)(2)(i).

141. See text accompanying *supra* notes 110-14.

142. 34 C.F.R. § 99.12(a)(3)(iii) (1980).

143. *Id.* § 99.12(a)(3)(i).

144. *Id.* § 99.12(a)(3)(ii).

145. *Id.* § 99.12(a)(3)(iii).

146. See *supra* note 115 and accompanying text.

147. 34 C.F.R. § 99.13 (1980).

148. *Id.* § 99.13(a).

dent.¹⁴⁹ Finally, the institution may not destroy the mandatory record of people who have reviewed the file.¹⁵⁰ The ability to destroy records gives the educational institution a great deal of flexibility. For example, institutions may wish to destroy all written letters of recommendation or electronically purge them if they have been added to the data base once they have been used for the purpose for which they were solicited. Or, universities may wish to institute a system of systematic purging of all correspondence that is more than two years old. Such purging is easily accomplished in an EDP system. While all systems must be built with failsafe security measures to protect against unintentional purging, program routines can be established to purge specific data on a regular basis.

Care, nevertheless, should be exercised as not all material can be purged. Institutions are usually bound by state and accrediting requirements to maintain all academic records. Furthermore, institutions participating in the federal financial aid programs may not purge financial aid records until five years after the student leaves the institution or until three years after a successful audit.¹⁵¹ Therefore, routine purging cycles should not be established until all users have been queried regarding their needs for retention.

E. STUDENTS' RIGHT TO AMENDMENT OF RECORDS

Subpart C of the regulations discusses the students' right of amendment of their educational records. A student "who believes that information contained in the education record of the student is inaccurate or misleading or violates the privacy or other rights of the student" may request that the institution amend the record.¹⁵² An institution is not bound to amend the record merely because the student has requested it.¹⁵³ The institution is required, however, to make its decision regarding file revision within a reasonable period of time.¹⁵⁴ If the institution decides not to amend the record, the institution must inform the student and also advise the student of his/her right to a hearing.¹⁵⁵

Electronic data processing systems can be used in two important ways to facilitate the amendment process. If the system permits direct student interaction, a student could flag the

149. *Id.* § 99.13(b).

150. *Id.* § 99.13(c).

151. *Id.* §§ 675.19, 674.19(d)(3).

152. *Id.* § 99.20(a).

153. "The educational agency or institution shall decide whether to amend the education records of the student in accordance with the request." *Id.* § 99.20(b).

154. *Id.* § 99.20(b).

155. *Id.* § 99.20(c).

objectionable part of the record. In addition, specific requests for amendment to a substantive part of the file could be entered for review by the administrative officer in charge of reviewing such requests. The institutional officer's decision must be communicated to the student. The communication could be by traditional letter, via terminal, or electronic mail. A standard explanation of hearing procedures and rights should be printed by the computer whenever a denial communication is sent.¹⁵⁶

Hearing requirements are set out in subparagraphs 99.21 and 99.22 of the regulations. If an institution has denied a student's request to amend, it must provide a hearing when requested.¹⁵⁷ The hearing must be held within a reasonable period of time after the request,¹⁵⁸ and the student must be notified of the time, date and place of the hearing reasonably in advance of the proceeding.¹⁵⁹ A student has the right to counsel at his/her own expense,¹⁶⁰ and (s)he may present all relevant information.¹⁶¹ The institution is bound to make its determination "based solely upon the evidence presented at the hearing."¹⁶²

If the hearing officer affirms the student's request, the record must be immediately changed.¹⁶³ If the institution's prior decision not to amend the record is affirmed, the student must be informed of the right to place "a statement commenting upon the information in the records and/or setting forth any reasons for disagreeing with the decision of the agency or institution" in his/her education record.¹⁶⁴ For our purposes, the critical part of these requirements is the right given to the student to append his/her record.

Such a right creates two problems for the institution that maintains a totally electronic data processing system. First, the system must be able to handle free form textual material.¹⁶⁵ Second, the system must be designed to prevent the student's statement from being purged "as long as the education record to which it pertains is maintained."¹⁶⁶ The first problem can be easily remedied by good system design. Each file should have sufficient free field space to

156. *Id.*

157. *Id.* § 99.21(a).

158. *Id.* § 99.22(a).

159. *Id.*

160. *Id.* § 99.22(c).

161. *Id.*

162. *Id.* § 99.22(e).

163. *Id.* § 99.21(b).

164. *Id.* § 99.21(c).

165. Part 8 of the ideal system assumes textual capability. See Appendix A.

166. 34 C.F.R. § 99.21(c) (1980).

hold textual comments that are of a "reasonable length." To avoid unnecessarily long student attachments, however, the statute should be amended to state that a student has a right to insert a statement of reasonable length into the record.¹⁶⁷ The Secretary of Education could be responsible for regulating what is reasonable length in section 99.21 of the regulations or the determination of what is reasonable length could be left to the individual institution; an institutional determination should be subject to review by the Secretary if a student maintains that his/her right of attachment has been abused. Such a regulation would allow the standard to change as EDP capabilities improve without having to amend the statute.

If the student amends his/her file, the statement should be cross referenced to the information to which it refers so that the student comments will be retrieved when the referenced information is retrieved. Furthermore, a field restriction should be placed on the student statements to prevent them from being purged unless the information to which it refers is also being purged. For example, if a student objects to a letter in the file from a faculty member, the student's comments would be coded against the letter. Then, if the letter is purged at any time, the student's statement could be purged as well.

F. RELEASE OF INFORMATION

There are broad categories of exceptions to the rule that an institution must have a signed consent from the student before it can release information.¹⁶⁸ The first exception is that written consent is not required for release of information to the student.¹⁶⁹ Second, an institution may release directory information unless specifically prohibited by the student.¹⁷⁰ Third, school officials who "have been determined by the institution to have legitimate education interests" are permitted access to the data without written consent.¹⁷¹ Officials in other school systems in which the student hopes to enroll are allowed access to the data,¹⁷² and certain governmental officials

167. 20 U.S.C. § 1232g(a)(2) (1976) provides that no funds shall be made available to the institution unless it provides the student "an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records."

168. 34 C.F.R. § 99.30(a)(1) (1980).

169. *Id.* § 99.30(a)(2)(ii).

170. *Id.* See *supra* note 91 for the definition of directory information.

171. 34 C.F.R. § 99.31(a)(1) (1980).

172. *Id.* § 99.31(a)(2).

are allowed access as long as the data is not shared with other persons.¹⁷³ Financial aid data can be reviewed provided that the personal identification of the student is released only if necessary.¹⁷⁴ For example, in order to trace whether federal student aid funds have actually been disbursed, the student's identity may need to be known. Schools are allowed to complete state and federal reports and to provide student-specific data for state programs if the statute mandating the report was adopted prior to November 19, 1974¹⁷⁵ or if a federal statute passed after FERPA requires it. Data may be released to organizations conducting research, but no personal identifiers may be released.¹⁷⁶ Accrediting agencies are free to review the files as necessary.¹⁷⁷ Data may be released to appropriate parties in emergency situations;¹⁷⁸ for example, medical personnel may require information to protect a student's life. Finally, parents of a dependent student, as that term is defined by the Internal Revenue Service, may also review the adult student's file without the student's consent.¹⁷⁹

Educational institutions must be careful that the data they release does not exceed the scope granted by the regulations. While directory information can generally be published,¹⁸⁰ a student has a right to refuse permission to make such disclosure.¹⁸¹ Furthermore, the institution must inform the student of his/her right not to disclose the information.¹⁸² If the initial directory information is collected on printed forms such as admissions applications, an institution can easily add a statement informing the student that (s)he has disclosure control. A student could check a box or otherwise designate that information which (s)he wishes not to have disclosed. Similarly, any directory data entered into the system directly by the student could be restricted. The student would merely enter an indicator next to any field of information (s)he wishes to restrict.

Once a student has indicated a desire to restrict directory information, the institution can restrict the field. When student-specific data is printed or transmitted, the restricted field will indicate the

173. *Id.* §§ 99.31(a)(3), 99.35(b).

174. *Id.* § 99.31(a)(4).

175. *Id.* § 99.31(a)(5). FERPA took effect on November 19, 1974.

176. *Id.* § 99.31(a)(6).

177. *Id.* § 99.31(a)(7).

178. *Id.* § 99.31(a)(10).

179. *Id.* § 99.31(a)(8).

180. *Id.* § 99.30.

181. *Id.* § 99.37(c)(2).

182. *Id.*

student's desire not to release the information. The field restriction can be lifted whenever a student has provided a release for the information.

Little guidance is given in the regulations regarding disclosure to internal institutional personnel.¹⁸³ Inherent in the regulation's wording is the assumption that all institutions will implement a system (be it manual or computerized) that limits the data which can be reviewed by institutional reviewers. "[L]egitimate educational interest"¹⁸⁴ is a vague exclusion which should be interpreted narrowly by the institution if it hopes to abide by the spirit of the Buckley Amendment. Access and restriction levels should be designed with both an office/function need to know and a personnel classification. For example, while it might be reasonable for a member of the professional staff of a financial aid office to review a student's complete academic history when making scholarship choices, it would not be reasonable for the financial aid receptionist to do the same.

Data may be sent to "officials of another school or school system in which the student seeks or intends to enroll."¹⁸⁵ It is rare for this section to apply to students in post-secondary education. Since attendance at a university or college is strictly voluntary and upon the discretion of the university, a student usually must affirmatively seek admittance. To do so, (s)he normally specifically authorizes previous institutions to forward data regarding his/her educational history at that institution. There are, however, cases in which this section is applicable. Financial aid offices are now required to obtain a student's financial aid transcript (FAT) before it can disburse federal funds. It may request the financial aid data directly from the previous institution without the permission of the student.¹⁸⁶ Data can be transmitted to another institution, however, only if the institution makes a reasonable attempt to notify the student of the transfer of the data.¹⁸⁷ This notice requirement does not apply when the transmittal was requested by the student¹⁸⁸ or if the institution provides public notice that it automatically transfers records to a school in which a student seeks enrollment.¹⁸⁹ If the institution automatically transfers records, it must, upon request, provide the student with a copy of the record sent.¹⁹⁰

183. The regulations are silent on what is a legitimate educational interest.

184. 34 C.F.R. § 99.31(a)(1) (1980).

185. *Id.* § 99.31(a)(2).

186. *Id.* §§ 674.2, 675.2, 676.2.

187. *Id.* § 99.34(a)(1).

188. *Id.* § 99.34(a)(1)(i).

189. *Id.* § 99.34(a)(1)(ii).

190. *Id.* § 99.34(a)(1)(ii)(2).

Automatically sending data to transfer institutions seems to be generally inconsistent with higher education attendance. Matriculation in an institution of post-secondary education is a voluntary act of the student. (S)he should be allowed, therefore, to control the data that is transmitted to colleges and universities (s)he hopes to attend. While it is probable that another institution would require that the academic data be received before admitting the student, it should be up to the student to request the transmission of the material. The only records that should be transmitted without the student's permission are those that pertain to the receipt of public financial aid dollars. This exception should be made only because many student aid programs have statutory limits on the amount a student can receive, and those limits are cumulative.¹⁹¹ Even here, it would be uncommon for the institution to transmit the material without either the student or the transfer institution requesting it. The spirit of FERPA would be better served by amending section 99.31(a)(2) to restrict the transmittal of educational records to those that pertain to the receipt of public funds, unless the student requests that the data be sent.

Financial aid plays a role in another of the exceptions. Section 99.31(a)(4) permits an institution to disclose financial aid information.¹⁹² However, personally identifiable information can be released only if needed to determine (1) a student's eligibility for student aid,¹⁹³ (2) the amount of student aid,¹⁹⁴ (3) the conditions of student aid,¹⁹⁵ or (4) to enforce the terms and conditions under which the aid was awarded.¹⁹⁶ Most of these functions are normally performed at the campus level. However, student loan collection agencies must by law be retained by an institution if it has any NDSL borrowers in default.¹⁹⁷ Disclosure of information to this outside agency would be permissible under the fourth exception. Since a student affirmatively seeks financial assistance, these exceptions to the written consent requirement are reasonable.

The Comptroller General of the United States, the Secretary of Education, and state educational authorities may review a student's file without consent in connection with audits, program evaluations, and the enforcement of or compliance with legal requirements that

191. *Id.* § 99.674.31(a) (National Direct Student Loan).

192. *Id.* § 99.31(a)(4).

193. *Id.* § 99.31(a)(4)(i).

194. *Id.* § 99.31(a)(4)(ii).

195. *Id.* § 99.31(a)(4)(iii).

196. *Id.* § 99.31(a)(4)(iv).

197. *Id.* § 99.674.46(a).

pertain to Department of Education programs.¹⁹⁸ These officials are bound to protect the identification of the student unless the collection of personal data is provided for by law, or consent is given by the student.¹⁹⁹ When the review is complete, all personally identifiable data must be destroyed.

Although institutions exert very little control over federal and state officials conducting an audit or a program review, they should request that the officials conduct their studies with a minimum of intrusion of privacy. In addition, if the institution is responsible for establishing the worksheets and records reviewed by the auditors, many can be prepared with student identifiers that can be separated from the material when it leaves the campus.

When the institution is designing its student data base, it should conduct a study to determine those data elements that must be reported by each branch or office of the university to every governmental and private organization. If state statutes exist which require student-specific information, the system design should provide for exact compliance only. In this manner the letter of the state law can be followed, while the spirit of FERPA is protected. In addition, superfluous data collection can be eliminated through this study. Normally, an office must justify the inclusion of every element of an EDP file that it wishes included in the data base. When paper files are maintained there are few incentives to restrict the data collected. Therefore, this study can both assist in identifying data that needs to be collected for statutory reasons and for legitimate educational purposes.

Educational institutions routinely cooperate with organizations conducting research "for the purpose of developing, validating, or administering predictive tests, administering student aid programs and improving instruction,"²⁰⁰ and such cooperation is allowed to continue under FERPA. However, the studies must be conducted so that any personally identifiable data is seen only by representatives of the organization or agency conducting the study. In addition, the data must be destroyed when it is no longer needed for the purpose for which it was obtained.²⁰¹ This cooperation between higher education and testing organizations ultimately will benefit the student. Institutions have an affirmative duty to assure themselves that personally identifiable data is actually necessary when they agree to participate in any kind of study. In addition, they should review the

198. *Id.* § 99.31(a)(3).

199. *Id.* § 99.35(b).

200. *Id.* § 99.31(a)(6).

201. *Id.*

organization's plans for the security of the data and for its eventual destruction.

In the ideal student record system all information that could be required in an emergency should be restricted to two sections of the file: the directory section and the student emergency and medical section.²⁰² The regulations specify that personally identifiable data can be released without the student's consent "if knowledge of the information is necessary to protect the health or safety of the student or other individuals."²⁰³ The regulations specify four factors that must be taken into account when determining whether personally identifiable data can be released. These are:

- (1) The seriousness of the threat to the health or safety of the student or other individuals;
- (2) The need for the information to meet the emergency;
- (3) Whether the parties to whom the information is disclosed are in a position to deal with the emergency; and
- (4) The extent to which time is of the essence in dealing with the emergency.²⁰⁴

The regulations stress that the information must be necessary to protect the health or safety of the student or other individual.²⁰⁵ By limiting data that could be needed in an emergency to two parts of the file, the risk is lessened that inappropriate data will be released in an emergency. Furthermore, institutions are free to request that students provide a waiver so that this information may be easily transmitted in an emergency. Also, a waiver would protect the student in a situation by encouraging release when administrators were not available and lower level clerical personnel are faced with making a determination of the severity of the situation and releasing the information.

The regulations allow the parent of a dependent student access to the student's file even though the student is an adult.²⁰⁶ Section 152 of the Internal Revenue Code allows a parent who provides more than one half of the student's support to claim that student as a dependent.²⁰⁷ If the student is claimed as a dependent, the parents have access to the student's educational records. The parents' ability to review the student's file has caused significant debate

202. See *supra* note 100 for a description of a model student database.

203. 34 C.F.R. § 99.36(a) (1980).

204. *Id.* § 99.36(b)(1)-(4).

205. *Id.* § 99.36(c).

206. *Id.* § 99.31(b)(8).

207. 26 U.S.C. § 152 (1981).

within the higher education community.²⁰⁸ Many institutions deny parents' access as an institutional policy while still adhering to the philosophy of FERPA and allowing the student full access.²⁰⁹ Student groups argued that many students only relied on their parents for financial assistance because the system did not allow them to be considered self supporting and to receive student financial aid assistance.²¹⁰ They asserted that this put them in a "catch-22" situation.

While a few cases arise each year on every college campus regarding this situation, none have been litigated. Higher education officials attempt to reconcile the student to the parents' request and receive a tacit agreement to the review of the file.

It appears that the drafters of the regulations agreed with the parents' position that they be permitted access to their child's file if they are financially responsible for their child's educational costs. But this exception seems contrary to the intent of FERPA. FERPA was intended to provide access to students and to prevent invasions of privacy. College age students are certainly capable of reviewing their files to determine if there is any misleading or inaccurate material contained therein. Similarly, they are capable of exercising choice over to whom data should be released. The students are adults, albeit financially dependent, and they have an interest in protecting their privacy like all other adults. Parents who wish to review material should handle that conflict with the student. As a family matter, the parent can choose numerous sanctions, including nonsupport, if the student will not comply with the parental request. In this way, the institution is not forced to participate in an invasion into the student's privacy by the parent. It is, therefore, recommended that 20 U.S.C. § 1232g(b)(1)(H) and corresponding regulation section 99.31(a)(8)(108) be eliminated.

Finally, an institution may release information without the student's permission in order to comply with a judicial order or subpoena.²¹¹ The institution has an affirmative duty to make a reasonable effort to notify the student in advance of the institution's compliance.²¹² The system could be designed to permit the adminis-

208. The author participated personally in a number of forums at which this topic was discussed during 1975, 1976, and 1977.

209. This was standard procedure at the California Institute of Technology from 1975-1980.

210. From the author's notes of a conversation with a United Student Association Representative at the 1977 Western Association of Student Financial Aid Administrator's conference.

211. 34 C.F.R. § 99.31(9) (1980).

212. *Id.*

trator to indicate to the computer that the file was being requested to comply with a legal mandate. The system could automatically send a notice to the student through electronic mail or by printing a notice that could be mailed. The system could then "seal" the student's file for a specific period before complying with the request. Such a design would provide for automatic compliance with the regulation.

When an educational institution releases information without the student's consent, a record of that disclosure must be maintained.²¹³ This requirement does not apply if the information was requested by educational officials at the same institution or was for directory information only.²¹⁴ The institution must also keep a record of who "requested or obtained personally identifiable information"²¹⁵ and the "legitimate interests" these parties had for obtaining the information.²¹⁶ This information could be easily stored in a well designed student data base. The record could indicate the party by name, and routine types of requests could be coded to save field space. For example, an audit by the Department of Education could be indicated by a one-position indicator. In cases where the legitimate interest requires more than one code to describe it, field space could be allowed for textual information. This record of access must be available to the student, school officials, and auditors reviewing the institution's record-keeping procedures.²¹⁷ Institutions may wish to automatically distribute this access record to their students on a regular basis.

IV. CONCLUSION

FERPA is usable in the electronic age. But all participants in the educational partnership should continue to evaluate their privacy needs in relationship to societal and personal goals. Only then can meaningful modifications be made to the Act, regulations, and data processing systems.

Ursula H. Hyman

213. *Id.* § 99.32(a).

214. *Id.* § 99.32(b)(ii), (iv).

215. *Id.* § 99.32(a)(1).

216. *Id.* § 99.32(a)(2).

217. *Id.* § 99.32(c).

APPENDIX A

DATA ELEMENTS IN AN INTEGRATED FILE

1. Student Directory Information
 - A. Name
 - B. Address (permanent)
 - C. Address (local)
 - D. Phone (permanent)
 - E. Phone (local)
 - F. Date of birth
 - G. Place of birth
 - H. Sex
 - I. Race (optional)
 - J. Religion (optional)
 - K. Social Security number
 - L. Other student identifier (optional)
 - M. Year in school
 - N. Major field of study
 - O. Minor field of study (if applicable)
 - P. Previous educational institution
 - Q. Dates of attendance at this institution
 - R. Status
 1. Regularly admitted student
 2. Visiting student
 3. Continuing education
 4. Special
 - S. Degrees and awards
 - T. Recognized activities
 1. Sports
 - a. Type
 - b. Weight and height
 - c. Awards and achievements
 - d. Dates
 2. Student Government
 - a. Type
 - b. Office (if applicable)
 - c. Awards and achievements
 - d. Dates
 3. Other clubs and activities
 - a. Name of organization
 - b. Officer
 - c. Dates
2. Student Academic Information

- A. Previous educational records
 - 1. Test scores (SAT, LSAT, etc.)
 - 2. GPA at prior institutions
 - B. Current registration information
 - 1. Courses
 - 2. Instructors
 - 3. Date/Time
 - 4. Units
 - C. Past registration information
(same components as 2B)
 - D. Grades for past courses (transcript data)
 - E. Academic advisor
 - F. Written academic evaluations (if any)
 - G. Academic progress cycle
 - 1. Progress rate (matched against major requirements in the system)
 - 2. Further required courses
 - H. Graduation requirement verification (automatic sequence to identify students who will be eligible to graduate each term). Data verified would include:
 - 1. Major
 - 2. Units completed (and in progress)
 - 3. Units required
 - 4. Grade point
 - 5. Specific requirements completed
 - a. Courses
 - b. Thesis
 - c. Lab
 - d. Other
3. Student Financial Aid Data (only operative if student applies for financial assistance)
- A. Dependency status
 - 1. Dependent
 - 2. Self-supporting
 - B. Application tracking module
 - 1. Need analysis document
 - 2. Institutional application (if any)
 - 3. IRS verification material
 - 4. Other verification material
 - a. Social Security
 - b. Welfare/AFDC
 - c. Disability
 - d. IRAP (Iranian aid program)
 - e. VA benefits
 - f. Other
 - 5. Follow-up answers

- C. Income
 - 1. Type
 - a. Taxable
 - b. Nontaxable
 - 1. Income from tax exempt bonds
 - 2. Nontaxed portion of capital gains
 - 3. Nontaxable pension
 - 4. Welfare
 - 5. Social Security
 - 6. Unemployment (portion that is nontaxable)
 - 7. Disability
 - 8. Other
 - 2. Allowances against
 - a. Federal income tax
 - b. FICA
 - c. State and other income taxes
 - d. Medical/dental (if applicable)
 - e. Employment offset (if applicable)
 - g. Family living allowance (known in some systems as family offset or standard maintenance allowance)
 - 3. Available income
- D. Assets
 - 1. Type
 - a. Cash and bank accounts
 - b. Home equity
 - c. Investments
 - d. Other real estate
 - e. Adjusted business and farm net worth
 - 2. Home and other asset protection allowance
 - 3. Net worth
 - 4. Asset conversion percentage
 - 5. Discretionary net worth
 - 6. Income supplement
- E. Adjusted available income
- F. Parents' contribution (if applicable)
- G. Student's contribution (if applicable)
- H. Student budget
 - 1. Type
 - 2. Amount
- I. Financial aid award (if any) (name and amount)
 - 1. Pell grant
 - 2. State grant

3. SEOG (or other federal grant if SEOG is eliminated)
4. Institutional grants
 - a. Type
 - (1) Endowed
 - (2) Annual gift
 - (3) Operating expense
 - (4) Other
 - b. Type name
 - c. Amount
5. Outside Award
 - a. Donor's name
 - b. Amount
6. National Direct Student Loan
 - a. Previous NDSL history
 - b. Exit interview schedule
 - c. Disbursement documents
7. Guaranteed Student Loan
 - a. Application
 - b. Certification
 - c. Lender
 - d. Disbursement
8. Institutional loan
 - a. Type
 - b. Amounts
 - c. Disbursement documents
9. United Student Aid Fund loan
10. Other external loan funds
11. College Work-Study
 - a. Employer
 - (1) On campus
 - (2) Off campus
 - (A) Billing cycle
 - (B) Contract cycle
 - b. Performance record
 - c. Classification
 - d. Wage
 - e. Maximum Earnings allowance
 - f. Notification sequence for over-earnings
12. Other institutional employment (Fields *a-f* for CWS apply if financial aid controlled assignment; if independent employment, only fields *a-d* apply.)
- J. Disbursement sequence (assumes all funds will be electronically disbursed against the student account. This

includes external agency funds, such as a state grant system.)

- K. Loan billing and collection sequence
 - 1. Exit interview (to be conducted via a terminal)
 - 2. Grace period notifications
 - 3. Monthly/quarterly billing cycle
 - 4. Payment cycle (including provisions for automatic payments from student's bank account)
 - 5. Skip-tracing
 - 6. Automatic assignment to collection agency
 - L. Report cycle (flexible data retrieval using all elements above)
 - M. Academic progress cycle
 - 1. Automatic flagging of all recipients not maintaining satisfactory academic progress as defined by current law. (Required for NDSL, SEOG, CWS, PELL, GSL)
 - 2. Automatic financial aid probation cycle
 - N. External agency notification of withdrawal or status change
 - O. Model cycle (Allows all data elements to be adjusted using given assumptions. Permits projection of future financial need, etc.)
4. Admissions Data (This system will initially provide much of the data contained in the directory system. In addition, test score data and previous educational records will be obtained from this file. Since this file is not an active component of the student record file when the student matriculates, its data elements have been omitted.)
 5. Student Fiscal Records (This system will also tie into the other fiscal record keeping systems of the university.)
 - A. Student account
 - 1. Tuition and fee charges
 - 2. Bookstore charges
 - 3. Other campus charges
 - a. Graphic arts
 - b. Equipment stockrooms
 - c. Theatre events
 - d. Library fines
 - e. Health center charges
 - f. Other
 - 4. Payments
 - 5. Financial aid credits and transfers
 - 6. Adjustments

- B. Student payroll
(Actual payroll transactions are effectuated through the campus payroll system which is part of the fiscal section. Cumulative data regarding the student's earnings will be stored here and can also be accessed through the financial aid system.)
- 6. Student Emergency and Medical
(Medical records listed here do not refer to any treatment records maintained by a physician or psychologist who the student is seeing or has seen for treatment. The data is not considered directory information; it cannot be released unless an emergency situation arises. It is assumed that the information is voluntarily given by the student for use in emergency situations only.)
 - A. Name of person to contact in case of emergency
 - B. Address of party listed in A
 - C. Phone number of party listed in A
 - D. Blood type
 - E. Medication allergies
 - F. Special medical conditions (i.e. diabetes, epilepsy, etc.)
 - G. Organ donor authorization (optional)
- 7. Placement File
The Placement file is not field specific. Rather, after receiving student authorization, specific items can be electronically gathered for transmission to an employer or other agency. These items could then be stored as completed documents (i.e. a resume) that could be retrieved again. This data could include, for example, letters of recommendation from the Correspondence file (See # 8), grade point, activities, or school employment.
- 8. Correspondence and Memoranda
 - A. Author's name
 - B. Letters of recommendation
 - 1. Current
 - 2. Admission
 - C. Disciplinary action
 - D. Requests for information from outside sources
 - E. Other
 - F. Information disbursement listing
 - 1. Party
 - 2. Address of party
 - 3. Date of transmission
 - 4. Reason for transmission

9. Student Addenda (student's statements of reasonable length pertaining to one or more parts of the file)
10. Purge Cycle (This cycle is only necessary if the institution wishes to automatically purge material on a regular basis. Otherwise, all deletions can be made through the operating system.)

APPENDIX B

The Family Educational Rights and Privacy Act of 1974

20 U.S.C. § 1232g (1974)

(a)(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) If the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (C), confidential recommendations—

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(C) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (B), 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 recommendations 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.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include—

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) if the personnel of a law enforcement unit do not have access to education records under subsection (b)(1) of this section, the records and documents of such law enforcement unit which (I) are kept apart from records described in subparagraph (A), (II) are maintained solely for law enforcement purposes, and (III) are not made available to persons other than law enforcement officials of the same jurisdiction;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such per-

son in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b)(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency, who have been

determined by such agency or institution to have legitimate educational interests;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C) authorized representatives of (i) the Comptroller General of the United States, (ii) the Secretary, (iii) an administrative head of an education agency (as defined in section 1221e-3(c) of this title), or (iv) State educational authorities, under the conditions set forth in paragraph (3) of this subsection;

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974;

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of Title 26; and

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.

Nothing in clause (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection unless—

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, (C) an administrative head of an education agency or (D) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education program, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student.

(5) Nothing in this section shall be construed to prohibit State

and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

SURVEYS OR DATA-GATHERING ACTIVITIES; REGULATIONS

(c) The Secretary shall adopt appropriate regulations to protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

STUDENTS' RATHER THAN PARENTS' PERMISSION OR CONSENT

(d) For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of post-secondary education the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

INFORMING PARENTS OR STUDENTS OF RIGHTS UNDER THIS SECTION

(e) No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

ENFORCEMENT; TERMINATION OF ASSISTANCE

(f) The Secretary, or an administrative head of an education agency, shall take appropriate actions to enforce provisions of this section and to deal with violations of this section, according to the provisions of this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with the provisions of this section, and he has determined that compliance cannot be secured by voluntary means.

OFFICE AND REVIEW BOARD; CREATION; FUNCTIONS

(g) The Secretary shall establish or designate an office and review board within the Department of Health, Education, and Welfare for the purpose of investigating, processing, reviewing, and adjudicating violations of the provisions of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.