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## Balancing Law Student Privacy Interests and Progressive Pedagogy: Dispelling the Myth that FERPA Prohibits Cutting-Edge Academic Support Methodologies

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**BALANCING LAW STUDENT PRIVACY INTERESTS AND  
PROGRESSIVE PEDAGOGY: DISPELLING THE MYTH  
THAT FERPA PROHIBITS CUTTING-EDGE ACADEMIC  
SUPPORT METHODOLOGIES**

Louis N. Schulze, Jr.\*

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\* Assistant Professor of Law and Director of the Academic Excellence Program, New England Law, Boston. I gratefully thank the administration of New England Law, Boston for its generous financial support of this project. I also sincerely thank Professors Elizabeth Bloom and Lawrence Friedman, both of New England Law, Boston, for their immeasurably helpful comments on earlier drafts. My thanks also to Professors Kris Franklin (New York Law School), James Janda (Suffolk University Law School), and Paula Lustbader and Brendon Taga (both of Seattle University School of Law) for their thoughts and contributions. Finally, my research assistant, Matthew Bruss of the New England Law Review, did excellent work on this article, for which I thank him.

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## I. INTRODUCTION

LAW SCHOOL DEAN: Next on the agenda is the report of the Curriculum Committee, which recommends establishing an extensive academic support program here at the law school that will focus on underperforming students and upon incoming students with lower indicators. The purpose of the program will be to support these students' learning and, hopefully, to increase their likelihood of success. I open the floor to discussion. Yes, Professor Kingsfield?<sup>1</sup>

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<sup>1</sup> For rhetorical purposes, I use character names from the classic law school parables: *The Paper Chase* and *One L*. Professor Kingsfield is the bowtie-clad embodiment of the curmudgeonly, old-school professor in *The Paper Chase*

PROFESSOR KINGSFIELD: Yes, well, I oppose this program. It is my belief that an important part of law school is learning to fend for oneself. We should not be providing this sort of hand-holding. On that basis, I oppose this motion.

PROFESSOR MORRIS: This isn't a matter of hand-holding, it's a matter of filling in the gaps between doctrine and skills—explicitly teaching students what's expected of them on exams instead of making expectations some secret enigma to be figured out by students listening to the law school rumor mill.

PROFESSOR KINGSFIELD: Look, we can have this philosophical debate forever, but the biggest problem here is that this program violates students' privacy rights.

PROFESSOR MORRIS: Upon what do you base this claim?

PROFESSOR KINGSFIELD: Well, since you asked, FERPA.<sup>2</sup> That federal statute makes it unlawful for schools to disclose any information about any student. This support program we're considering will get the law school sued, plain and simple.

LAW SCHOOL DEAN: Did the Committee look into the implications of FERPA?

PROFESSOR MORRIS: No, Dean, but I can't imagine that a federal law would make it unlawful to help students succeed in law school.

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who viciously brandishes the Socratic method to the emotional detriment of his students. *THE PAPER CHASE* (Twentieth Century Fox 1973). Meanwhile, Professor Morris is Scott Turow's jeans-wearing, touchy-feely civil procedure professor in *One L* who seeks to modernize and humanize the law school environment. *SCOTT TUROW, ONE L: THE TURBULENT TRUE STORY OF A FIRST YEAR AT HARVARD LAW SCHOOL* 46-48 (1977).

<sup>2</sup> Family Educational Rights and Privacy Act (FERPA) of 1974, 20 U.S.C. § 1232(g) (2006).

PROFESSOR KINGSFIELD: No, but forcing all students below a 2.50 grade point average to take a class together implicitly discloses to all those in the room that everyone else has a grade point average below 2.50. That is an unlawful disclosure under FERPA. Also, this whole business of having students doing 'peer reviews' of each others' papers discloses that record to the other student. That, too, violates FERPA. Finally, even disclosing students' grades to a 'Director of Academic Support' violates FERPA because, according to the Committee's report, that person will not be a member of the faculty. So, even though I usually am not a fan of federal legislation creating privacy rights in the context of higher education, it turns out that this time this law supports my argument that this law school should not adopt this program.

LAW SCHOOL DEAN: Professor Morris, does the Committee have any information to refute the claim that FERPA bars academic support programs?

PROFESSOR MORRIS: No, Dean, but I can hardly believe that a statute intended to benefit students would actually act to hurt them. If we could just have more time to . . .

LAW SCHOOL DEAN: Well, this issue has been in committee all year. Unless there is further discussion, I think the faculty should vote. All those in favor say 'aye.' All opposed? . . . Well, the nays have it by a slim margin. So the Committee's motion fails. The next issue on the agenda is . . .

Here, Professor Kingsfield has grossly inflated the constraints placed on academic support methodologies by the Family Educational Rights and Privacy Act (FERPA).<sup>3</sup> Each of the conclusions he reaches about the school's proposed Academic Support Program (ASP) is incorrect. His prediction that violating FERPA "will get the law school sued" is wrong because the Supreme Court of the United States has held, explicitly, that FERPA neither provides a cause of action nor supports a derivative

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<sup>3</sup> § 1232(g).

claim through 42 U.S.C. § 1983.<sup>4</sup> His allegation regarding the creation of academic support courses that focus on students within a certain grade range is also inaccurate according to specific guidance from the Department of Education (DOE), the entity charged with enforcing FERPA.<sup>5</sup> The assertion that classroom 'peer review' activities (a common method in both academic support and legal writing courses) are unlawful is patently untrue; the Supreme Court of the United States addressed a nearly identical issue and determined that the practice is lawful.<sup>6</sup> Finally, refusal to disclose students' education records to a nonfaculty 'Director of Academic Support' not only lacks support in FERPA, but also severely curtails the effectiveness of any ASP.<sup>7</sup>

The problem is that each inaccurate objection represents arguments articulated in the real world. Each of the issues addressed in this article stems from protestations that I have personally encountered<sup>8</sup> or that have been relayed to me by other academic support professionals. In other words, there are law schools questioning, preventing, or even terminating certain academic support methods on the basis of inaccurate conclusions about FERPA. A general misunderstanding of FERPA pervades academia, and often this misunderstanding prevents the expansion of otherwise laudable methods.

The purpose of this article is to clarify FERPA's impact on law school ASPs and to explain explicitly that the vast majority of mainstream and cutting-edge academic support methods are perfectly lawful. In part II of this article, I discuss FERPA, including an explanation of the statute, the federal regulations, and the scant case law that governs the Act. In part III of this article, I

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<sup>4</sup> *Gonzaga Univ. v. Doe*, 536 U.S. 273, 276, 290 (2002) (discussing the applicability of 42 U.S.C. § 1983 (2006)); *see also infra* pt. II.C (discussing the available remedies under FERPA).

<sup>5</sup> *See infra* note 183 and accompanying text.

<sup>6</sup> *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 428-36 (2002); *see infra* pt. IV.C.

<sup>7</sup> *See infra* pt. IV.A.2-.4, .B.1-3.

<sup>8</sup> I should note, at the outset, that the ASP I direct is not the source of any objection on the basis of FERPA. To the contrary, our Academic Excellence Program enjoys the broad support of both the faculty and the administration. The objections I have heard personally stem from conference discussions and other similar forums.

detail some of the typical methods used in academic support pedagogy and introduce objections to these methods under FERPA. Part IV analyzes the legality of academic support methods under FERPA and concludes that most contemporary methods of law school academic support are permissible. In circumstances where FERPA might legitimately pose an obstacle, I explain simple workarounds to conform academic support efforts to FERPA in ways that do not water-down the pedagogical strengths of the methods.

## II. THE FAMILY EDUCATION RIGHTS PRIVACY ACT

Congress enacted FERPA in 1974, based primarily upon the efforts of New York Senator James Buckley.<sup>9</sup> Often called the Buckley Amendment, FERPA was a floor amendment to other educational initiatives and, as such, lacks the extensive and traditional legislative history by which one might determine the intent of Congress.<sup>10</sup> On the other hand, Congress has amended FERPA's language several times, and the DOE has codified regulations governing the interpretation of FERPA in the *Code of Federal Regulations*.<sup>11</sup> Additionally, the DOE's Family Policy Compliance Office (FPCO), which interprets and enforces FERPA, publishes helpful advice letters to clarify the Act.<sup>12</sup>

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<sup>9</sup> Lynn M. Daggett, *Bucking Up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617, 620 (1997).

<sup>10</sup> *Id.* at 617.

<sup>11</sup> Family Educational Rights and Privacy, 34 C.F.R. pt. 99 (2009).

<sup>12</sup> See, e.g., About the Family Policy Compliance Office (FPCO), <http://www.ed.gov/policy/gen/guid/fpc/index.html> (last visited Dec. 14, 2009) (containing links to letters). FPCO's website states:

The mission of the Family Policy Compliance Office (FPCO) is to meet the needs of the Department's primary customers—learners of all ages—by effectively implementing two laws that seek to ensure student and parental rights in education: the Family Educational Rights and Privacy Act (FERPA) and the Protection of Pupil Rights Amendment (PPRA).

Parents and eligible students who need assistance or who wish to file a complaint under FERPA or PPRA should do so in writing to the Family Policy Compliance Office, sending pertinent information through the mail, concerning any allegations . . . .

*Id.*



FERPA employs Congress's Spending Clause power<sup>13</sup> and has two principal focuses. The first, which is generally inapplicable to this article, prohibits the expenditure of any federal funds "to any educational agency or institution which has a policy of denying [or preventing]" access to education records by parents of a student<sup>14</sup> or, if the student has reached the age of eighteen, to the student.<sup>15</sup> The second provision focuses not on access, but on disclosure, stating:

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 . . . ) of students without the written consent of their parents to any individual, agency, or organization . . . .<sup>16</sup>

The Act then lists several exceptions that are not relevant to this article<sup>17</sup> and one quite relevant exception that permits release to "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, including the educational interests of the [student] for whom consent would otherwise be required."<sup>18</sup> The Act also explicitly permits the release of education records where "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

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<sup>13</sup> *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278-79 (2002).

<sup>14</sup> 20 U.S.C. § 1232g(a)(1)(A) (2006).

<sup>15</sup> *Id.* § 1232g(d).

<sup>16</sup> *Id.* § 1232g(b)(1).

<sup>17</sup> *Id.* § 1232g(b)(1)(B)-(J). The exceptions permit the release of education records: (1) to officials at a school to which the students seek to transfer; (2) to certain governmental and law enforcement officials; (3) in connection with requests for financial aid; (4) as a result of certain state statutes; (5) to organizations conducting studies for educational institutions to measure or develop tests, student aid programs, or to improve instruction; (6) to accrediting agencies for purposes of their accrediting process; (7) to parents of dependent children; (8) in emergencies or for public safety; or (9) pursuant to court order. *Id.*

<sup>18</sup> *Id.* § 1232g(b)(1)(A).

copy of the records to be released to the student's parents and the student if desired by the parents."<sup>19</sup>

A few parts of FERPA's prohibitions warrant more extensive discussion. I will discuss each in turn.

#### *A. Policy or Practice*

First, a single act does not violate FERPA; instead, the school must have a "policy or practice" of permitting unauthorized release.<sup>20</sup> For instance, in *Daniel S. v. Board of Education*,<sup>21</sup> the court addressed FERPA's impact upon a single incident of unauthorized disclosure.<sup>22</sup> The plaintiff, a seventeen-year-old high school student, and a friend received severe discipline from their gym teacher.<sup>23</sup> The discipline, occasioned by the boys ripping their swimsuits, included forcing the students to stand naked in the boys' locker room for an extended period of time while the gym teacher berated them with expletives.<sup>24</sup> Among other claims, the plaintiff asserted that the gym teacher later violated FERPA by telling the school's cross-country team that he had kicked two students out of his third-period gym class.<sup>25</sup> Although he did not name the students, the identity of the two students was clear to all.<sup>26</sup> The district court dismissed the FERPA claim, holding that the single incident of disclosing the discipline to the team did not amount to a prohibited policy or practice.<sup>27</sup> The court stated that "FERPA was adopted to address systematic, not individual, violations of

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<sup>19</sup> § 1232g(b)(2)(A). The Act is consistently worded in a way that presumes the student is a child. *See id.* § 1232g. The Act, however, states that "whenever a student has attained eighteen years of age, or is attending an institution of postsecondary 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." *Id.* § 1232g(d). This clarifies that FERPA's provisions consider the student as the 'rights-holder' after the age of eighteen or if the student is in postsecondary education. *See id.*

<sup>20</sup> *Id.* § 1232g(b)(1).

<sup>21</sup> *Daniel S. v. Bd. of Educ.*, 152 F. Supp. 2d 949 (N.D. Ill. 2001).

<sup>22</sup> *Id.* at 954.

<sup>23</sup> *Id.* at 951-52.

<sup>24</sup> *Id.* at 951.

<sup>25</sup> *Id.* at 954 (citing § 1232g).

<sup>26</sup> *Id.*

<sup>27</sup> *Daniel S.*, 152 F. Supp. 2d at 954.

students' privacy by unauthorized releases of sensitive information in their educational records.' "<sup>28</sup>

The court then addressed a related issue: whether the statement to the cross-country team amounted to a " 'release' " under FERPA.<sup>29</sup> In holding that it did not, the court stated that "FERPA does not protect information which might appear in school records but would also be 'known by members of the school community through conversation and personal contact.' "<sup>30</sup> Because two gym classes witnessed the incident, the cross-country team likely was aware of the situation prior to the statements by the gym teacher.<sup>31</sup> These sorts of 'implicit disclosures,' which do not amount to a release under FERPA, are relevant to the discussion of academic support policies.<sup>32</sup>

Thus FERPA does not govern every single transaction that might arguably constitute an unauthorized release of education records. Instead, FERPA forbids only a policy or practice that condones such a release.<sup>33</sup>

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<sup>28</sup> *Daniel S.*, 152 F. Supp. 2d at 954 (quoting *Jensen ex rel. C.J. v. Reeves*, 45 F. Supp. 2d 1265, 1276 (D. Utah 1999)); *see also* *Weixel v. Bd. of Educ.*, 287 F.3d 138, 151 (2d Cir. 2002) (holding that the school's single act of contacting a student's doctor, home instructor, and lawyer to provide information about the student did not constitute a policy or practice); *Gundlach v. Reinstein*, 924 F. Supp. 684, 692 (E.D. Pa. 1996) (finding that the law school's answer to a complaint in a civil law suit, which attached two confidential letters from the student to the school, did not violate FERPA because this act did not constitute a policy or practice).

<sup>29</sup> *Daniel S.*, 152 F. Supp. 2d at 954 (quoting § 1232g(b)(1)).

<sup>30</sup> *Id.* (quoting *Frasca v. Andrews*, 463 F. Supp. 1043, 1050 (E.D.N.Y. 1979)). The court in *Frasca* held that discussion of a student's suspension printed in a school newspaper did not violate FERPA, stating "Congress could not have constitutionally prohibited comment on, or discussion of, facts about a student which were learned independently of his school records." *Frasca*, 463 F. Supp. at 1045-46, 1050.

<sup>31</sup> *Daniel S.*, 152 F. Supp. 2d at 954.

<sup>32</sup> *See infra* pt. IV.A.2-.4, .B.1-.3.

<sup>33</sup> *But see* Cara Runsick Mitchell, Note, *Defanging the Paper Tiger: Why Gonzaga Did Not Adequately Address Judicial Construction of FERPA*, 37 GA. L. REV. 755, 755-56, 761-62 (2003) ("Because the DOE downplays the policy or practice language of the statute, courts following its lead have likewise ignored this restriction.").

*B. Education Records*

Second, FERPA's prohibitions only apply to "education records."<sup>34</sup> The Act defines education records as "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."<sup>35</sup> The regulations governing FERPA,<sup>36</sup> expanding upon language from the Act itself, exempt a number of records from this definition, including (1) records kept only by their maker, used for a memory aid, and not accessible or revealed to any other person; (2) certain law enforcement records; (3) certain records relating to an individual employed by the educational institution; (4) records of adult students "[m]ade or maintained by a physician, psychiatrist, [or] psychologist" for the purpose of treating the student; (5) records collected after the student no longer attends the school, regarding information unrelated to his or her attendance as a student; and (6) "[g]rades on peer-graded papers before they are collected and recorded by a teacher."<sup>37</sup>

The definition of education records has proven to be the subject of significant litigation. In *United States v. Miami University*,<sup>38</sup> the District Court for the Southern District of Ohio grappled with the issue of whether student disciplinary records constituted education records under FERPA.<sup>39</sup> A central facet of this inquiry was the argument that disciplinary records are not "'academic'" in nature and thus fall outside FERPA's reach.<sup>40</sup> The court disagreed, focusing on the plain meaning of the statute, the sparse legislative history, and the administrative treatment of

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<sup>34</sup> See § 1232g(a).

<sup>35</sup> *Id.* § 1232g(a)(4)(A).

<sup>36</sup> Family Educational Rights and Privacy, 34 C.F.R. pt. 99 (2009).

<sup>37</sup> *Id.* § 99.3. This last exemption, related to peer-graded work, is essentially a codification of case law. See generally *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002).

<sup>38</sup> *United States v. Miami Univ.*, 91 F. Supp. 2d 1132 (S.D. Ohio 2000).

<sup>39</sup> *Id.* at 1134 (citing 20 U.S.C. § 1232g).

<sup>40</sup> *Id.* at 1135 (quoting *State ex rel. Miami Student v. Miami Univ.*, 680 N.E.2d 956, 958-59 (Ohio 1997)).

FERPA by the DOE.<sup>41</sup> Regarding plain meaning, the court pointed to the fact that the first prong of the two-pronged analysis of education records requires only that the record include " 'information,' " not academic information.<sup>42</sup> Further, Congress intended a broad definition of the term, as shown by the fact that it included detailed exceptions to the definition.<sup>43</sup>

Regarding the legislative history, the court quoted the *Congressional Record* as noting that "[t]he purpose of the Act is 'to assure parents of students . . . access to their education records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent.' "<sup>44</sup> Furthermore, under "the principle of *expressio unius*," Congress's expression of specific exceptions to the statute (that is, personally kept records, law enforcement records, and the like) connotes that anything not so excluded should be deemed included.<sup>45</sup> In addition, the fact that Congress subsequently amended the exceptions to permit disclosure of certain disciplinary records (that is, those related to sexual assaults and like crimes) shows that Congress recognized a privacy interest in all other disciplinary records.<sup>46</sup> Finally, the court detailed the fact that the DOE explicitly recognized that disciplinary records are within FERPA's ambit, which proves solidly that such records ought not to be released absent consent.<sup>47</sup>

On the other end of the spectrum, the Supreme Court of the United States addressed the definition of education records in *Owasso Independent School District No. I-011 v. Falvo*.<sup>48</sup> There, the plaintiff asserted that the elementary school's practice of permitting "peer grading" violated FERPA.<sup>49</sup> The teachers at issue assigned students quizzes in class and, upon completion, required

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<sup>41</sup> See *Miami Univ.*, 91 F. Supp. 2d at 1148-52 (citations omitted).

<sup>42</sup> *Id.* at 1448-49 & n.17 (quoting 20 U.S.C. § 1232g(a)(4)).

<sup>43</sup> See *id.* at 1149 n.17.

<sup>44</sup> *Id.* at 1150 (quoting 120 CONG. REC. 39,862 (1974) (emphasis omitted)).

<sup>45</sup> *Id.* at 1150-51 (citing 20 U.S.C. §1232g(4)(B)).

<sup>46</sup> *Id.* at 1151 (citing 20 U.S.C. §§ 1092(f)(8)(B)(iii), 1232g(b)(6)(A)-(B)).

<sup>47</sup> *Miami Univ.*, 91 F. Supp. 2d at 1151 & n.19.

<sup>48</sup> *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002).

<sup>49</sup> *Id.* at 429-30.

students to exchange papers with another student.<sup>50</sup> The teacher then verbally provided the quiz answers to the class, and each student graded their peer's quiz.<sup>51</sup> Of particular concern was the fact that teachers then asked students to call out the grade received on the quiz, after which the teacher finally recorded the grade in his or her grade book.<sup>52</sup>

The Court addressed the FERPA claim, examining whether peer grading practices released education records under the Act.<sup>53</sup> Writing for the majority, Justice Kennedy noted that, to be considered an education record under FERPA, the papers had to (1) include " 'records, files, documents, [or] other materials' containing information directly related to a student" and (2) " '[be] maintained by an educational agency' " or someone acting upon its behest.<sup>54</sup> The somewhat existential question the Court faced was whether, in the moments before recording the score in a grade book, the grades called aloud were " 'maintained' " by the school so as to make them education records.<sup>55</sup> Justice Kennedy began the Court's analysis by noting that prohibiting this sort of practice would drastically alter the balance of responsibilities between states and the federal government; typically, pedagogical choices are left to the discretion of local or state education policy decisionmakers.<sup>56</sup>

Justice Kennedy first resolved that, because the grade was not yet recorded in the teacher's grade book, it was not yet maintained by the school.<sup>57</sup> Instead, by using the term " 'maintain,' " FERPA seemed to contemplate some notion of permanence and central recordkeeping, for instance, in one's "permanent file" at the registrar's office.<sup>58</sup> Also, the grading student is not " 'acting for' " the school, as noted in the definition of education records, because

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<sup>50</sup> *Owasso*, 534 U.S. at 429.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 431-32 (citing 20 U.S.C. § 1232g(a)(4)(A), (a)(4)(B)(i), (b)(1) (2006)).

<sup>54</sup> *Id.* at 429 (quoting 20 U.S.C. § 1232g(a)(4)(A)).

<sup>55</sup> *See id.* at 431 (20 U.S.C. § 1232g(a)(4)(A)).

<sup>56</sup> *See Owasso*, 534 U.S. at 431.

<sup>57</sup> *Id.* at 433 (quoting 20 U.S.C. § 1232g(b)(1)).

<sup>58</sup> *Id.* (quoting 20 U.S.C. § 1232g(a)(4)(A)).

he or she is not akin to a teacher or some administrative personnel.<sup>59</sup> The tactic of having classmates grade each other's papers is a pedagogical method intended to present the learned material in a new context.<sup>60</sup> The Court would not countenance the prohibition of this pedagogical choice without clear expression from Congress that such was its intent.<sup>61</sup>

The Court's decision then took a somewhat unexpected turn. While maintaining that it was not deciding whether a teacher's grade book constituted an education record, the Court nonetheless seemed to hold that education records are only those which are kept by some central custodian.<sup>62</sup> "The word 'maintain' suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database . . . ."<sup>63</sup> The Act "implies that education records are institutional records kept by a single central custodian, such as a registrar, not individual assignments."<sup>64</sup> These passages drew criticism from Justice Scalia, who wrote specially to "concur only in the judgment of the Court."<sup>65</sup> He noted that there was no reason to go beyond the Court's determination that the grades were not records because the students were not employees of the school or acting on behalf of the school.<sup>66</sup> Discussion of the necessity of a central records holder, Justice Scalia claimed, was procedurally unnecessary and substantively illogical.<sup>67</sup> Commentators generally have agreed with Justice Scalia that the Court's extracurricular pontification has created confusion regarding the breadth of FERPA's definition of education records.<sup>68</sup>

Thus *Miami University* and *Owasso* seem to establish two ends of the spectrum with regard to the definition of education

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<sup>59</sup> *Owasso*, 534 U.S. at 433 (quoting 20 U.S.C. § 1232g(a)(4)(A)).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 435-36.

<sup>62</sup> *Id.* at 433, 435.

<sup>63</sup> *Id.* at 433 (quoting 20 U.S.C. § 1232g(a)(4)(A)).

<sup>64</sup> *Id.* at 435.

<sup>65</sup> *Owasso*, 534 U.S. at 436-37 (Scalia, J., concurring).

<sup>66</sup> *See id.*

<sup>67</sup> *Id.* (citing 20 U.S.C. § 1232g(a)(4)(B)(i)).

<sup>68</sup> *See, e.g.,* Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 CATH. U. L. REV. 59, 72-75 (2008).

records. While lower courts have occasionally adopted expansive definitions of the term, the Supreme Court of the United States has given some indication that FERPA's text should not be broadened in such a way as to step on the toes of teachers' pedagogical methods.

### *C. FERPA's Remedies*

Importantly, FERPA's remedies are limited to one method: the DOE may discontinue federal funding to a school that maintains a practice or policy of unauthorized disclosures.<sup>69</sup> FERPA provides no explicit cause of action in federal court, and courts have refused to imply a cause of action from it.<sup>70</sup> Thus, in *Gonzaga University v. Doe*,<sup>71</sup> the Supreme Court of the United States took up the issue it reserved in *Owasso*: whether a policy or practice of unauthorized disclosures of education records provides the basis for a claim under § 1983.<sup>72</sup>

The plaintiff in *Gonzaga* attended Gonzaga University as an undergraduate and was studying to become a teacher.<sup>73</sup> To teach in the Washington public schools, a candidate must obtain a certification from a specified state agency attesting to the candidate's good character.<sup>74</sup> By contacting that state agency, the plaintiff learned that a university official had called the agency and disclosed information about the plaintiff that the University had obtained in an investigation surrounding alleged acts of sexual misconduct.<sup>75</sup> The plaintiff was unaware of this investigation until he attempted to procure the certification, at which point the state agency and university officials informed him that he could not do so.<sup>76</sup> Based on the University's disclosure of the information to the agency, the plaintiff sued under § 1983 claiming that the disclosure

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<sup>69</sup> 20 U.S.C. § 1232g(b)(2).

<sup>70</sup> See Daggett, *supra* note 68, at 64-65.

<sup>71</sup> *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

<sup>72</sup> See *id.* at 290 (citing 42 U.S.C. § 1983 (2006)); see also Daggett, *supra* note 68, at 64-65 (citing 42 U.S.C. § 1983).

<sup>73</sup> *Gonzaga*, 536 U.S. at 277.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*



violated FERPA.<sup>77</sup> At issue was whether FERPA created rights cognizable via suit under § 1983.<sup>78</sup>

Chief Justice Rehnquist began the Court's analysis by noting that "Congress enacted FERPA under its spending power."<sup>79</sup> As such, the remedy provided by the text of the statute for failure to comply with FERPA's antidisclosure measures is the termination of federal funds.<sup>80</sup> Spending Clause<sup>81</sup> legislation typically does not confer a federal right enforceable by means of a claim under § 1983.<sup>82</sup> Only when Congress " 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights" does a funding provision create rights capable of redress under § 1983.<sup>83</sup> In *Wright v. City of Roanoke Redevelopment and Housing Authority*,<sup>84</sup> for instance, the Court permitted a § 1983 claim under Spending Clause legislation where that enactment clearly conferred an individual right and where the federal agency, charged with enforcing its provisions, had never provided tenants with a procedure by which to complain about violations of the statute.<sup>85</sup>

In contrast, the text of FERPA is silent with respect to creating individual rights and explicitly states that the Act shall be enforced by the DOE, which provides for a complaint mechanism via its FPCO.<sup>86</sup> More on point with FERPA, therefore, was the Adoption Assistance and Child Welfare Act of 1980,<sup>87</sup> discussed in *Suter v. Artist M.*<sup>88</sup> That Act required state officials to have a plan to make

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<sup>77</sup> *Gonzaga*, 536 U.S. at 277.

<sup>78</sup> *Id.* at 278 (citing 42 U.S.C. § 1983 (2006)).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 278-79 (quoting 20 U.S.C. § 1232g(b)(1) (2006)).

<sup>81</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>82</sup> See *Gonzaga*, 536 U.S. at 279-80 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981)) (citing 42 U.S.C. § 1983).

<sup>83</sup> *Id.* at 280 (quoting *Pennhurst*, 451 U.S. at 17, 28 & n.21) (citing 42 U.S.C. § 1983).

<sup>84</sup> *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418 (1987).

<sup>85</sup> See *id.* at 426.

<sup>86</sup> See 34 C.F.R. §§ 99.60-.67 (2009).

<sup>87</sup> 42 U.S.C. §§ 620-628, 670-679a.

<sup>88</sup> *Suter v. Artist M.*, 503 U.S. 347, 350 (1992) (citing 42 U.S.C. §§ 620-628, 670-679a).

" 'reasonable efforts' " to keep children out of foster homes.<sup>89</sup> When a class of state residents sued to force state officials to take action under that statute, the Court rejected the § 1983 claim because the statute provided "only a rather generalized duty on the State, to be enforced . . . by the Secretary in the manner [of reducing or eliminating payments]."<sup>90</sup>

Thus, in *Gonzaga*, although Congress intended FERPA to benefit individuals, which the plaintiff claimed was sufficient to establish a claim under § 1983, it did not intend the Act to create any individual *rights*.<sup>91</sup> The Court clarified that it is the creation of rights, and not merely the intent to create broad benefits, that gives rise to enforceability under § 1983.<sup>92</sup> Therefore, FERPA has no remedy, either as a cause of action in and of itself or derivatively, through § 1983.

An issue the Court did not decide, however, was whether the DOE may sue to enforce FERPA. That issue arose in *Miami University*, albeit prior to the guidance from *Gonzaga*. In *Miami University*, the court held that the Secretary could bring an action for declaratory and injunctive relief<sup>93</sup> based on the following passages in the Act:

[T]he Secretary [of Education] shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that actions to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

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<sup>89</sup> *Suter*, 503 U.S. at 351 (quoting 42 U.S.C. § 671(a)(3), (15)).

<sup>90</sup> *Id.* at 360, 363 (quoting 42 U.S.C. § 671(a)(3), (15)).

<sup>91</sup> *Cf. id.* at 358, 363.

<sup>92</sup> *See id.* at 363 (citing 42 U.S.C. §§ 671(a)(15), 1983).

<sup>93</sup> *See United States v. Miami Univ.*, 91 F. Supp. 2d 1132, 1134 (S.D. Ohio 2000).

[T]he Secretary may . . . (4) take any other action authorized by law with respect to the recipient.<sup>94</sup>

The broad language used in the fourth enumerated permitted action, the court reasoned, empowered the United States to maintain an action in federal court to enjoin a practice or policy of releasing records without consent.<sup>95</sup> Whether this holding remains sound in the aftermath of *Gonzaga* is an open question.

Prior to *Gonzaga*, both lower federal courts and state courts split on the issue of whether FERPA conferred a cause of action under § 1983.<sup>96</sup> The issue of whether the United States may sue might also seem murky. Chief Justice Rehnquist's opinion suggested that this murkiness was due to a lack of clarity in the Supreme Court's line of § 1983 cases.<sup>97</sup> It may also suggest, however, the difficulty in interpreting FERPA.

Justice Breyer's concurrence in *Gonzaga* is crucial to understanding this problem and reinforces the importance of comprehending why failing to permit lawsuits by individual plaintiffs is a critical safeguard of good teaching. Justice Breyer agreed, generally, with Chief Justice Rehnquist's analysis of FERPA.<sup>98</sup> He offered an additional justification for the conclusion that FERPA did not provide the basis for a § 1983 claim, saying that Congress wrote FERPA in broad, vague language.<sup>99</sup> As an example, Justice Breyer quoted the text of the definition of education records, noting just how nonspecific the definition is.<sup>100</sup> This, Justice Breyer claimed, "leaves schools uncertain as to just

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<sup>94</sup> *Miami Univ.*, 91 F. Supp. 2d at 1138 (quoting 20 U.S.C. §§ 1232g(f), 1234c(a)(4) (2006)) (emphasis omitted).

<sup>95</sup> *Id.* at 1140 (citing 20 U.S.C. § 1234c(a)(4)). The court supported this textual analysis with several other grounds, including (1) courts' interpretation of similar language in other federal statutes, (2) the purpose of FERPA, and (3) the inherent power of the United States to sue a recipient of federal funds for failure to comply with federal law. *See id.* at 1140-41.

<sup>96</sup> *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278 (2002) (citing 42 U.S.C. § 1983).

<sup>97</sup> *Id.* at 278.

<sup>98</sup> *See id.* at 291 (Breyer, J., concurring). Justice Breyer disagreed with the claim that there should be a presumption against creating rights. *Id.*

<sup>99</sup> *Id.* at 292.

<sup>100</sup> *Id.* (quoting 20 U.S.C. § 1232g(a)(4)(A)).

when they can, or cannot, reveal various kinds of information."<sup>101</sup> But Justice Breyer did not mean this as a complaint about FERPA's drafting; instead, he meant that this lack of specificity indicates Congress's intent that an expert, such as the Secretary of Education and *not* the courts, interpret these vague definitions in a manner that balances privacy with pedagogy.<sup>102</sup> To this end, it is critical to understand that Justice Breyer's concurrence highlights three propositions: (1) FERPA is indeed vague and not easily understood; (2) educational experts, not courts, should be the primary arbiters of FERPA's language; and (3) Congress intended FERPA to leave plenty of room for common sense and effective teaching methods, not to curtail smart teaching choices that happen to disclose innocuous information implicitly and indirectly.<sup>103</sup>

Several commentators have decried the *Gonzaga* ruling as failing to protect students' rights.<sup>104</sup> For instance, Professor Lynn M. Daggett, in discussing *Gonzaga*, states that "with no apparent private vehicle to get a court to address FERPA violations, a lessening of judicial guidance on FERPA is inevitable. This is unfortunate because FERPA's text is in many respects unclear, a reality the Court has recognized."<sup>105</sup> Although this stance disregards the fact that the DOE's FPCO remains a valid forum for guidance on FERPA and disregards the fact that the Court's analysis of the availability of a derivative claim under FERPA was fairly inevitable,<sup>106</sup> Professor Daggett is correct that, after

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<sup>101</sup> *Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring).

<sup>102</sup> *Id.*

<sup>103</sup> *See id.* at 291-92.

<sup>104</sup> *See, e.g.*, Daggett, *supra* note 68, at 66.

<sup>105</sup> *Id.*

<sup>106</sup> *See Gonzaga*, 536 U.S. at 288. Justice Breyer got it right: permitting law suits to define the breadth of FERPA's provisions would create the "risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action for damages." *See id.* at 292 (Breyer, J., concurring). FERPA's vagueness evidences a congressional intent to leave education to experts and not to judges who, without training in education theory, might be more likely to prioritize theoretical and sometimes miniscule notions of student privacy over important educational methods. *See id.* For instance, a technical reading of FERPA would invalidate such important and mainstream concepts as special education programs, graduation honors, and announcing the names of those selected for law review. Each of these practices

*Gonzaga*, there will be less *judicial* guidance on the subject. Thus, although the courts may not serve as the petri dish for FERPA theories, it is clear that schools need not fear a private lawsuit post-*Gonzaga*.

#### *D. Release of Education Records Under FERPA*

Finally, FERPA prohibits only the unauthorized "release" or "disclosure" of records.<sup>107</sup> "Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means . . . ."<sup>108</sup> The problem with this issue is that it is unclear whether passive actions constitute a release. For instance, if a law school hands a student's education records in an envelope to a third person, that action clearly constitutes a release. A school official reading a student's grades to a third party by phone would also constitute a release as would letting that third person thumb through a filing cabinet full of educational records.

But what about more subtle circumstances, such as when a school releases anonymous education records from which one can, through diligent work, determine the identity of an individual student? This question was answered by the DOE's FPCO in an advice letter, dated September 25, 2003.<sup>109</sup> The letter was a response to an inquiry from the University of Georgia, which had

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implicitly discloses some educational information about students; yet these programs and policies are accepted, mainstream, and often critical to learning. Congress intended for the experts in the DOE and its FPCO to balance privacy and pedagogy. Judges without training in pedagogical theory would likely misapply FERPA—a statute meant to help students, not hinder them. *See id.* Unfortunately, these misinterpretations create the exact situation we currently face in the academic support community in fearing that FERPA tightly constricts and abolishes otherwise perfectly legitimate, effective, and useful methods. *See infra* pt. IV. I will take up this soapbox at a later time. *See id.* For now, additional discussion of a few of FERPA's wrinkles is warranted.

<sup>107</sup> 20 U.S.C. § 1232g(b)(1)-(2) (2006); 34 C.F.R. § 99.3 (2009).

<sup>108</sup> 34 C.F.R. § 99.3.

<sup>109</sup> *See* Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, to Corlis P. Cummings, Senior Vice Chancellor for Support Servs., Bd. of Regents of the Univ. Sys. of Ga. (Sept. 25, 2003), *available at* <http://www.ed.gov/policy/gen/guid/fpc/ferpa/library/georgialtr.html>.

received an Open Records Act request from an Atlanta newspaper seeking certain information about university students in general, but which was categorized in such a way that one might discern the identity of the students by the use of additional records.<sup>110</sup> The FPCO informed the University that:

FERPA-protected information may not be released in any form that would make the student's identity easily traceable. . . . Conversely, student-level information from education records may be disclosed, without consent, if "personally identifiable information," as defined above, has been removed. This has been referred to as de identified or anonymous data.

. . . .

Occasionally a student's identity may be "easily traceable" even after removal of nominally identifying data. This may be the case, for example, with a highly publicized disciplinary action, or one that involved a well-known student, where the student would be identified in the community even after the record has been "scrubbed" of identifying data. In these circumstances, FERPA does not allow disclosure of the record in any form without consent because the irreducible presence of "personal characteristics" or "other information" makes the student's identity "easily traceable."<sup>111</sup>

Thus, the release would violate FERPA by revealing a student's identity if the newspaper sought classification by means of a student's hometown and only one student from that town attended the University.<sup>112</sup>

So even if a school redacts records, their release may still violate FERPA. But this circumstance still contemplates an affirmative act on the part of the school. The situation of academic support classes targeted at students with certain indicators, however, seems to be a more passive nonaction. This issue will be addressed in part IV.

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<sup>110</sup> See generally Letter from LeRoy S. Rooker to Corlis P. Cummings, *supra* note 109.

<sup>111</sup> *Id.*

<sup>112</sup> See *id.* (citation omitted).

### III. ACADEMIC SUPPORT METHODOLOGIES ALLEGEDLY AFFECTED BY FERPA

Academic support methods take many forms.<sup>113</sup> Generally, "an academic support program is a comprehensive program designed to help law students succeed academically through a combination of substantive legal instruction, study skills, legal analysis, legal writing, and attention to learning styles."<sup>114</sup> The methodologies of law school academic support can be sorted into four temporal categories: (1) pre-law school academic support, (2) first-year academic support, (3) upper-class academic support, and (4) post-law school academic support.<sup>115</sup> This part discusses each category in turn and highlights the methods that some criticize as violating FERPA, which bars law schools from maintaining "a policy or practice of permitting the release of education records" of students without their written consent.<sup>116</sup>

#### *A. Pre-Law School Academic Support Methods*

Pre-law school academic support methods usually include preorientation programs, which introduce soon-to-be law students to legal analysis, the Socratic method, legal reasoning, etc.<sup>117</sup> Studies of these programs have shown mixed results. Preorientation programs of limited duration usually show little to

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<sup>113</sup> See generally Richard Cabrera & Stephanie Zeman, *Law School Academic Support Programs—A Survey of Available Academic Support Programs for the New Century*, 26 WM. MITCHELL L. REV. 205 (2000) (discussing several ASPs).

<sup>114</sup> Sheilah Vance, *Should the Academic Support Professional Look to Counseling Theory and Practice to Help Students Achieve?*, 69 UMKC L. REV. 499, 503 n.24 (2001).

<sup>115</sup> See generally Ricardo Villarosa & Ruth Ann McKinney, *The Five W's of Strong Academic Support Programs* (2008) (on file with author).

<sup>116</sup> 20 U.S.C. § 1232g(b)(1) (2006).

<sup>117</sup> See Cabrera & Zeman, *supra* note 113, at 210; see also Jean Boylan, *Crossing the Divide: Why Law Schools Should Offer Summer Programs for Non-Traditional Students*, 5 SCHOLAR 21, 27-30 (2002) (describing the types of in-house summer programs as (1) those focusing on legal skills, (2) those including substantive classes, and (3) those providing mini-introductions to the law school environment).

no improvement in students' projected law school grades.<sup>118</sup> Broader programs, however, like the Council on Legal Education Opportunity (CLEO) Summer Institute,<sup>119</sup> show more significant results.<sup>120</sup> Regardless of the programs' impact on student grade point average (GPA), these summer programs often help students in important, intangible ways, such as community-building, easing the apprehension of starting law school, providing a substantive head-start, and supporting nontraditional law students.<sup>121</sup>

Some schools' preorientation programs are competitive, offering a limited number of spots in the matriculating class to those who succeed in the preorientation program.<sup>122</sup> Other schools

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<sup>118</sup> See Kristine S. Knaplund & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. LEGAL EDUC. 157, 172-73 (1995) (finding that "the summer program [at one law school] clearly ha[d] no important effect on the academic performance of students after their first semester of law school").

<sup>119</sup> See CLEO, About CLEO, <http://www.cleoscholars.com/index.cfm?fuseaction=Page.viewPage&pageId=482> (last visited Dec. 14, 2009) ("In 1968, the Council on Legal Education Opportunity (CLEO) was founded as a non-profit project of the ABA Fund for Justice and Education to expand opportunities for minority and low-income students to attend law school."). The summer institute, a six-week, pre-law school program, is "[d]esigned to evaluate the student's capacity for learning the law while simultaneously acclimating them to the law school process, the curriculum is taught by full-time law professors and simulates the rigors of the first year of law school." CLEO, Six Week Summer Institute, <http://www.cleoscholars.com/index.cfm?nodeid=2> (click "6-Week Summer Institute" hyperlink) (last visited Dec. 14, 2009).

<sup>120</sup> Eulius Simien, *The Law School Admission Test as a Barrier to Almost Twenty Years of Affirmative Action*, 12 T. MARSHALL L. REV. 359, 383-84 (1987) (discussing the law school graduation rate of CLEO alumnae as indicative of its success). *But see* Knaplund & Sander, *supra* note 118, at 183 n.65 (suggesting, based on data admittedly lacking statistical significance, that the CLEO summer institute did not provide measurable academic improvement to participants).

<sup>121</sup> See Boylan, *supra* note 117, at 26 (calling for all law schools to adopt pre-law school programs to offset the disadvantage suffered by students lacking cultural exposure to the Socratic method).

<sup>122</sup> See generally Sonia Bychkov Green, Maureen Straub Kordesh & Julie M. Spanbauer, *Sailing Against the Wind: How a Pre-Admission Program Can Prepare At-Risk Students for Success in the Journey Through Law School and Beyond*, 39 U. MEM. L. REV. 307, 310-11 (2009) (detailing the SCALES program, which replaced a purely competitive preorientation program).

[I]n the fall of 2003, several faculty members at The John Marshall Law School-Chicago worked together with various members of the administration



offer noncompetitive preorientation programs, aimed at preparing students for legal study. Law schools offering such programs often struggle with the difficulty of having limited resources available. This translates into picking and choosing which members of the incoming class should receive the benefits of preorientation academic support. Some schools choose only students with low Law School Admission Test (LSAT) scores, low GPAs, or other indicators of potential future academic struggles.<sup>123</sup>

An outstanding example of a noncompetitive<sup>124</sup> preorientation program is Seattle University School of Law's Access Admission Program.<sup>125</sup> "Individuals considered for the Alternative Admission Program [include] . . . students whose capabilities may not be accurately reflected in GPAs and LSAT scores. . . . Participants begin [their] legal studies in June, enrolling in [one] substantive

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to create a seemingly distinct program, a summer special admissions program designed to provide an opportunity for prospective J.D. students whose law school indicators fall below the minimum requirements for admission to law school. This new program, SCALES, was intended to replace a longstanding sink-or-swim special admissions program at the law school in which students were provided no academic support and were simply assessed as to their suitability for law school on the basis of their performance on two final examinations administered in two core J.D. courses at the end of the SCALES program. The SCALES program contributes less than ten percent to the overall enrollment in the J.D. program in a given academic year, but SCALES and its predecessor, the Conditional Program, have been at the core of the mission of the law school in providing access and opportunity to students who otherwise may not be admitted to law school.

*Id.* (footnotes omitted).

<sup>123</sup> See Cabrera & Zeman, *supra* note 113, at 208-09. Additional criteria for inclusion, reported by law schools, include "age, undergraduate school, undergraduate major . . . ethnic status, disability status, years out of undergraduate education, [and] disadvantaged status." *Id.* Seattle University School of Law is a notable example of a school with a targeted, preadmission ASP. See *infra* notes 125-28 and accompanying text.

<sup>124</sup> By 'noncompetitive,' I mean that the program is not 'sink-or-swim.' In other words, students' matriculation into the regular law school class is not contingent upon ranking higher than other students in the Access Admission Program.

<sup>125</sup> See Seattle Univ. Sch. of Law, Access Admission Program, [http://www.law.seattleu.edu/Academics/Academic\\_Resource\\_Center/Program\\_Overview/Access\\_Admission\\_Program.xml](http://www.law.seattleu.edu/Academics/Academic_Resource_Center/Program_Overview/Access_Admission_Program.xml) (last visited Dec. 14, 2009).

first-year course . . . ."126 These students benefit from study-skills sessions, intensive writing seminars, and sessions on exam-taking skills.<sup>127</sup> Students then continue to work with the academic support faculty, as needed, throughout their law school careers.<sup>128</sup>

Both competitive and noncompetitive forms of preorientation programs are criticized for violating FERPA because, by seating students with low indicators in the same classroom, arguably the program implicitly discloses to each other person in the classroom that all students in the room have low academic indicators. This, some may allege, is a prohibited "release of education records."<sup>129</sup> I will analyze the merits of these claims in part IV.

### *B. First Year Academic Support Methods*

Once students begin classes, many schools provide academic support to all students or to a limited number of qualifying students. Some schools provide occasional workshops or weekly classes, open to all students, focusing on fundamental law school skills, such as briefing cases, outlining, and legal analysis.<sup>130</sup> Other schools restrict these classes only to those who enter with lower indicators,<sup>131</sup> sometimes making such classes mandatory for students below a certain undergraduate GPA (UGPA) or LSAT score. Still other schools fall somewhere in between.

One school employing such a program is Arizona State University's Sandra Day O'Connor College of Law. The academic support class for first-year students is "open to students who meet

<sup>126</sup> Seattle Univ. Sch. of Law, *supra* note 125. Importantly, in terms of FERPA, the program is also open to students who "are members of historically disadvantaged, underrepresented, or physically challenged groups." *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See 20 U.S.C. § 1232g(b)(1) (2006).

<sup>130</sup> See Dionne L. Koller, *Legal Writing and Academic Support: Timing is Everything*, 53 CLEV. ST. L. REV. 51, 55 (2005-2006).

<sup>131</sup> See Leslie Yalof Garfield, *The Academic Support Student in the Year 2010*, 69 UMKC L. REV. 491, 494-96 (2001); see also Chris K. Iijima, *Separating Support from Betrayal: Examining the Intersections of Racialized Legal Pedagogy, Academic Support, and Subordination*, 33 IND. L. REV. 737, 773 (2000) (noting the stigma associated with participating in ASPs as a critical issue).

certain pre-selection criteria."<sup>132</sup> Importantly, as shall be detailed later, the course webpage does not describe the details of the "pre-selection criteria."<sup>133</sup> "The curricular focus of the first-year class includes learning style theory, approaches to legal thinking, methods of Socratic dialogue, approaches to casebook reading and briefing, organization of essay exams, strategies for multiple choice exams, modes of time management, and structure for outlining."<sup>134</sup> The academic support class continues in the second semester for those "students whose GPAs fall into the lower range of the bell curve, *or who seek out participation based on interest.*"<sup>135</sup> Similar to the preorientation programs described above, this sort of method might (erroneously) be criticized as violating FERPA by implicitly disclosing the fact that the student has low indicators or a low GPA by sitting them all in the same classroom. As shall be seen, the fact that the course includes students that are not at the bottom range of the curve is a crucial factor to the analysis as to whether this method violates FERPA.

Another method used to provide academic support to first-year students is academic counseling.<sup>136</sup> This usually entails students regularly meeting with academic support faculty, privately and individually, for several purposes. These purposes usually include, among other things, (1) guidance on study methods, class preparation, time management, and outlining; (2) oversight and enforcement of a study plan; (3) feedback on essays and other kinesthetic study methods; (4) discussion of issues of learning disabilities and other potential personal obstacles; and (5) discourse regarding issues such as picking classes, choosing internships, preparing for the bar exam, and future employment. Academic counseling is the means by which academic support professionals provide personal feedback to students by a member of the institution.

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<sup>132</sup> Sandra Day O'Connor Coll. of Law, Academic Support Program, <http://www.law.asu.edu/?id=408> (last visited Dec. 14, 2009).

<sup>133</sup> *See id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* (emphasis added).

<sup>136</sup> Jean Boylan, *The Admission Numbers Are Up: Is Academic Support Really Necessary?*, 26 J. JUV. L. 1, 2 (2006) [hereinafter *Admission Numbers*].

An additional method used to provide academic support to first-year students is peer tutoring.<sup>137</sup> In this method, successful upper-class students work with first-year students, providing tutoring, academic counseling, or merely mentoring. Depending upon the methods used in these tutoring sessions, tutors might have significant access to data regarding those they tutor. In a program where tutors hold regular guided study group sessions for a handful of first-year students, the law school need not pass along much information about the first-year students to the tutors. In more intensive programs, where the tutors become almost an extension of the academic support faculty,<sup>138</sup> the tutors may have knowledge of the fact that all their students are having academic difficulty or even of the specific grades of their individual students from classes in which they underperformed.

An exemplary program is Washburn University School of Law's "Ex-L Program."<sup>139</sup> Beginning with an intensive series of classroom and small group sessions during the first week of law school, first-year students receive guidance from successful upper-division students.<sup>140</sup> After that first week, students meet twice weekly with the upper-division students in structured study group settings.<sup>141</sup> In one of these sessions, students focus on learning skills such as outlining, taking notes, briefing cases, spotting issues, and the like.<sup>142</sup> In the other session, upper-division students guide first-year students through practice hypotheticals.<sup>143</sup> All

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<sup>137</sup> *Admission Numbers*, *supra* note 136, at 4-5.

<sup>138</sup> Examples of peer tutoring support programs include Washburn University School of Law's "Ex-L Program," see Washburn Univ. Sch. of Law, Ex-L Program, <http://washburnlaw.edu/facultystaff/curriculum/ex-lprogram.php> (last visited Dec. 14, 2009); City University of New York School of Law's Professional Skills Center, see CUNY Sch. of Law, Professional Skills Center, <http://www.law.cuny.edu/academics/Support/ProfessionalSkillsCenter.html> (last visited Dec. 14, 2009); and Seattle University School of Law's Academic Resource Center, see Seattle Univ. Sch. of Law, Academic Year Program, [http://www.law.seattleu.edu/Academics/Academic\\_Resource\\_Center/Program\\_Overview/Academic\\_Year\\_Program.xml](http://www.law.seattleu.edu/Academics/Academic_Resource_Center/Program_Overview/Academic_Year_Program.xml) (last visited Dec. 14, 2009).

<sup>139</sup> See Washburn Univ. Sch. of Law, *supra* note 138.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

sessions are in the context of students' current doctrinal classes.<sup>144</sup> Notably, the Ex-L Program is open to all first-year students.<sup>145</sup>

By contrast, other schools provide peer tutoring to a more focused group. For instance, at New York Law School, participants in the Academic Success Program (who have access to peer tutorial sessions by means of upper-class "Teaching Fellows") are often students who have met certain "criteria established at the time of admission."<sup>146</sup> The peer tutorial sessions are a subset of the broader Academic Success Program, which also includes mandatory classes in the spring semester for specific students.<sup>147</sup> "Beyond providing training in learning skills, Teaching Fellows help students address problems directly related to law school, such as dealing with stress and adjusting to participation in law school classes, preparing assignments, and studying for examinations."<sup>148</sup> In addition, "[t]utoring services are . . . available to upper-level students who experience academic difficulty."<sup>149</sup>

Critics argue that some peer-tutoring methods violate FERPA by implicitly disclosing to the tutor (a fellow student) that the first-year student either has low incoming indicators or has experienced academic difficulty.<sup>150</sup> They further contend that peer tutoring could violate FERPA if the law school provides the tutor with specific information about the students he or she is tutoring.<sup>151</sup> Finally, critics allege that if the peer tutor releases information about his or her students (either to faculty, other students, or

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<sup>144</sup> See Washburn Univ. Sch. of Law, *supra* note 138.

<sup>145</sup> *Id.*

<sup>146</sup> New York Law Sch., Academic Advising, [http://www.nyls.edu/academics/academic\\_advising](http://www.nyls.edu/academics/academic_advising) (last visited Dec. 14, 2009). Like Arizona State's language, this phrasing may be a crucial factor for determining legality under FERPA.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See Debra Moss Curtis, *Everything I Wanted to Know About Teaching Law School I Learned from Being a Kindergarten Teacher: Ethics in the Law School Classroom*, 2006 BYU EDUC. & L.J. 455, 486-87.

<sup>151</sup> See Lynn M. Daggett & Dixie Snow Huefner, *Recognizing Schools' Legitimate Educational Interests: Rethinking FERPA's Approach to the Confidentiality of Student Discipline and Classroom Records*, 51 AM. U. L. REV. 1, 37-38 (2001-2002).

outsiders) disclosure could run afoul of FERPA if the tutor can be seen as acting on behalf of, or as an agent of, the law school.<sup>152</sup> Each of these arguments is addressed in part IV.

### *C. Upper-Class Academic Support Methods*

A growing number of law schools now offer academic support to upper-class students whose academic performance renders them in the bottom of their class. Many schools now provide credit and grades for these sorts of classes, which are situated in either the second or third semester of law school. Placing these courses in the second semester of law school implies an intent to bolster retention rates. Placing these courses in the third semester (or later) connotes an intent to enforce skills important for practice or the bar. Although methods vary in these courses, the common thread (and possible confrontation with FERPA) is that they are sometimes open only to students on academic probation or below a certain GPA.

For instance, at Widener Law (in Delaware) second-year students with a GPA below 2.5 are required to enroll in "Intensive Legal Analysis."<sup>153</sup> This course is taught in small sections of twenty students or fewer and focuses on presenting students with exam questions.<sup>154</sup> The class provides significant feedback to students by means of three conferences with faculty throughout the semester.<sup>155</sup> Meanwhile, students who finish their first year with a GPA between 2.5 and 2.7 are required to enroll in "Advanced Analytical Applications."<sup>156</sup> Students complete "several different writing assignments and multiple tests throughout the semester."<sup>157</sup>

For an example of a program slightly different from Widener's, New England Law, Boston provides a course entitled

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<sup>152</sup> Daggett & Huefner, *supra* note 151, at 37-38.

<sup>153</sup> See Widener Law, Second Year Students, <http://law.widener.edu/CampusLife/AdvisingandCounseling/OfficeofStudentAffairsDelaware/AcademicSupportProgram/SecondYearStudents.aspx> (last visited Dec. 14, 2009).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

"Legal Analysis."<sup>158</sup> That class focuses upon second-year students on "Academic Concern," a category comprised of all students in the bottom one-third of the class.<sup>159</sup> Importantly, students are not told whether the course is open only to those within the Academic Concern category. The course is not required, but a letter from the Associate Dean "strongly encourage[s]" the graded, two-credit course to Academic Concern students.<sup>160</sup> At New England Law, Boston, Legal Analysis is 'linked' with Evidence,<sup>161</sup> a mandatory course for all second-year students in the fall. Legal Analysis students are contemporaneously enrolled in Evidence, and they complete three substantial papers focusing on the major doctrinal issues at the heart of evidence law.<sup>162</sup>

The law school's statistical analysis of the course shows that students who complete it fare better in Evidence and in their overall GPA compared to similarly situated students who do not enroll. The fact that a substantial percentage of the Legal Analysis class is on Academic Concern, however, might raise questions regarding FERPA; each student in the classroom might look around and suspect that every other person in the class is on Academic Concern. Is this a release violative of FERPA? As shall be seen in the analysis of this question, the fact that GPAs are not disclosed and that the course is not required is critical to the analysis under FERPA.

Another method common to academic support, one often used in upper-class courses, is working in small groups. Small-group work attempts to provide a more optimal pedagogy, for students for whom large classroom environments are less effective, to vary students' learning from the usual, large-classroom, Socratic method

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<sup>158</sup> See NEW ENGLAND LAW, BOSTON, STUDENT HANDBOOK ("THE BLUE BOOK"): RULES AND REGULATIONS § A.3(b), at 3 (2008-2009), available at <http://www.nesl.edu/UserFiles/File/Students/2008-2009%20STUDENT%20HANDBOOK.pdf>.

<sup>159</sup> See *id.* § A.3(a)(1), at 3.

<sup>160</sup> *Id.* § A.3(b), at 3.

<sup>161</sup> Louis N. Schulze, Jr., Legal Analysis Syllabus, <http://www.nesl.edu/userfiles/academics/schulze/2009LegalAnalysisSyll.pdf> (last visited Dec. 14, 2009).

<sup>162</sup> See *id.*

model. This method provides the additional benefit of instilling a sense of the collaborative work found in the practice of law.

One technique frequently employed in small-group academic support methods is peer review. For instance, in New England's Legal Analysis class, peer feedback is a critical facet of the course.<sup>163</sup> Each of the first two graded papers receives extensive, multimodal feedback from the professor between drafts.<sup>164</sup> Giving feedback between drafts and requiring students to rewrite their papers contributes to students' learning by making them see their errors and actually correct them. By contrast, the third (and final, most weighty) paper receives no feedback from the professor until after it is finally handed in.<sup>165</sup> As opposed to the other papers, where professors are an active part of guiding students in the right analytical direction, the lack of feedback for the final paper forces students to 'fly on their own' and thus demonstrate their ability to produce strong analytical work independent of any guidance from faculty. To ameliorate the lack of guidance, one class is dedicated to peer review sessions.<sup>166</sup> In these sessions, students read one another's papers and give detailed feedback on how to improve the analysis.<sup>167</sup> In this way, the reviewed student obtains feedback prior to the graded final draft, and the reviewer has the opportunity to glean ideas for his or her own paper. Commentators assert that this active-learning, collaborative effort is an effective and efficient pedagogical choice.<sup>168</sup>

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<sup>163</sup> See Schulze, *supra* note 161.

<sup>164</sup> See *id.*

<sup>165</sup> See *id.*

<sup>166</sup> See *id.*

<sup>167</sup> See *id.*

<sup>168</sup> See Kirsten K. Davis, *Designing and Using Peer Review in a First-Year Legal Research and Writing Course*, 9 LEGAL WRITING: J. LEGAL WRITING INST. 1, 12-15 (2003) (advocating for the expansion of peer review methods in first-year legal writing classes); see also Jo Anne Durako, *Peer Editing: It's Worth the Effort*, 7 PERSP.: TEACHING LEGAL RES. & WRITING 73, 73-75 (1999) (discussing the pros and cons of peer-editing methods). Peer editing is

a structured exercise in which law students critique the written work of fellow classmates by offering both positive and negative comments. Students use a set of objective criteria to evaluate various aspects of the work as well as offer an overall evaluation. Peer editing includes both giving comments to and receiving comments from peers. Professor review and credit for completing the assignment are also helpful aspects of the exercise.



On the other hand, some contend that this technique violates FERPA. Because the first draft is handed in to the professor (who neither grades it nor gives any feedback), students reviewing the paper necessarily receive the author's education record, thus violating FERPA. This contention, along with the notion that graded, for-credit, upper-class academic support courses violate FERPA, are addressed in part IV.

#### *D. Postgraduate Academic Support Methods*

Most postgraduate academic support is provided by means of bar preparation programs. With the changing nature of the ABA's regulations of bar preparation courses,<sup>169</sup> many schools have created for-credit and/or graded bar courses, scheduled in their students' final semester. Some schools also provide formal or informal programs in the summer after graduation, prior to the students' first bar exam.<sup>170</sup> These supplemental programs serve as a complement to commercial bar preparation classes taken by most law graduates.

Some schools with these sorts of programs focus directly on students most at risk for failing the bar exam: those with lower law school GPAs (LSGPAs) or with low LSAT scores.<sup>171</sup> As a result,

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Durako, *supra*, at 73 n.1.

<sup>169</sup> See generally SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, No. 44118-1 (2008), [http://www.abanet.org/legaled/standards/noticeandcomment/%2044118\\_%201.DOC](http://www.abanet.org/legaled/standards/noticeandcomment/%2044118_%201.DOC). The American Bar Association, which governs law school accreditation, resolved to delete interpretation 302-7 of the *Standards for the Approval of Law Schools* concerning bar examination preparation courses. *Id.* That interpretation had provided that "If a law school grants academic credit for a bar examination preparation course, such credit may not be counted toward the minimum requirements for graduation established in Standard 304. A law school may not require successful completion of a bar examination preparation course as a condition of graduation." *Id.* With its deletion, schools are now free to provide credit for such courses and require them for graduation. See Leigh Jones, *More Schools Offer Bar Prep Courses*, NAT'L L.J., Sept. 8, 2008, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202424313304&slreturn=1>.

<sup>170</sup> See E-mail from James A. Janda, Dir., Peer Mentoring and Bar Preparation Programs, Suffolk Univ. Law Sch., to Louis N. Schulze, Jr., Assistant Professor of Law, Dir. of the Academic Excellence Program, New England Law, Boston. (Aug. 2, 2009) (on file with author).

<sup>171</sup> *Id.*

in-house bar preparation professionals need to learn which students have low GPAs or LSATs. This requires a disclosure from the registrar's office or the academic support department to the bar preparation professional, which some might contend violates FERPA. The concern raised by these objectors is that releasing this sensitive student information seems dangerous if the bar preparation professional is not a member of the 'faculty' per se. This concern is amplified if the law school outsources its bar preparation instruction to an organization outside the law school.<sup>172</sup> These questions are addressed in part IV.

#### IV. ANALYSIS: FERPA AND ACADEMIC SUPPORT METHODOLOGIES

The following section analyzes whether mainstream and cutting-edge academic support methods violate FERPA. Although I conclude that most methods are permissible under the Act, a few techniques approach the line of legality. Where that is the case, I suggest simple workarounds which both eliminate any potential violation of FERPA and retain the pedagogical strength of the teaching method in question.

##### *A. Whether Pre-Law School Academic Support Methods Violate FERPA*

As previously noted, many law schools provide pre-law school orientation programs to students with lower incoming indicators. Thus the first, and seemingly foremost, issue is whether FERPA permits law schools to establish ASPs targeted directly at students with low entering scores. For the sake of discussion, let us call this practice 'targeted grouping.'

I should note that the analysis of the issue of targeted grouping under FERPA does not only apply to pre-law school orientation programs. Instead, the issue of the legality of this practice under

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<sup>172</sup> For an example of an outsourced bar preparation course, see Tania N. Shah & Melissa A. Gill, Bar Exam Preparation Course Resource Sheet, <http://www.abanet.org/legaled/baradmissions/Bar%20Exam%20Passage%20Conference/southern%20ne%20bar%20prep.pdf> (last visited Dec. 14, 2009). For this novel program, Southern New England School of Law hires an organization called "LawTutors" to provide bar preparation instruction. *See id.*

FERPA pertains to first-year courses that engage in targeted grouping and also to upper-class courses that engage in targeted grouping. As previously noted, law schools engage in this practice in different places. Some law schools provide an expanded orientation program, like Seattle University's excellent Access Admission Program, for students whose entrance criteria may not be indicative of their potential for success.<sup>173</sup> Other law schools provide an academic support class, like New York Law School's Academic Success Program, for students who underperform in their first year of law school.<sup>174</sup> Still other law schools provide group or one-to-one peer tutoring to students with low scores. Finally, other law schools provide academic support classes, such as the Legal Analysis course at New England Law, Boston, for second-year students whose grades result in categorization as 'at-risk' for struggles with the bar exam.<sup>175</sup>

At the end of the day, each of these programs has at least one thing in common: each collects a group of students in one classroom and, by nature of the criteria for selection, may be implicitly disclosing that each student meets those criteria. In other words, depending on what students are told, every student in the classroom knows that every other student in the classroom has a low LSAT score or low UGPA (for preorientation programs) or low law school grades (for first-year and second-year targeted grouping programs). As such, each of these differing programs (orientation programs, first-year programs, and upper-class programs) can be grouped together for analysis under FERPA. For

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<sup>173</sup> See *supra* notes 125-28 and accompanying text.

<sup>174</sup> See *supra* notes 146-49 and accompanying text.

<sup>175</sup> See *supra* notes 158-60 and accompanying text. Of course, law schools effectuate this grouping in a multitude of ways, and these nuances might just prove dispositive with respect to legality under FERPA. For instance, some schools make these programs mandatory, while others merely strongly encourage them to students meeting certain criteria, such as low LSAT or LSGPA. Second, some schools reserve these classes strictly for students who meet the qualifying criteria (LSGPA, and the like), while others reserve most or many seats for such students but then permit other students, who do not meet the entrance criteria, to enroll in the class. Finally, some law schools group students by a specifically stated LSGPA, say for instance a 2.50 or below, while other schools create a status, such as Academic Concern, which determines whether students are eligible for the academic support classes. See *supra* pt. III.C.

organizational purposes, therefore, I will address all issues of targeted grouping, regardless of timing before, during, or after law school, together under the heading of 'pre-law school programs,' though this may be artificial.

### 1. The Argument that Targeted Grouping Violates FERPA

As an initial step, our analysis should begin with the text of the statute and its regulations. First, the statute prohibits "a policy or practice of permitting the release of education records . . . of students without [their] written consent."<sup>176</sup> Second, the regulations define an education record as any record "(1) [d]irectly related to a student; and (2) [m]aintained by an educational agency or institution or by a party acting for the agency or institution."<sup>177</sup> Third, "[d]isclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records by any means, including oral, written, or electronic means, to any party."<sup>178</sup>

Critics may argue, therefore, that placing students in the same classroom with knowledge that each other student has low incoming indicators (in preorientation targeted grouping), has low law school grades (in law school targeted grouping programs), or is a member of some academic grouping violates FERPA. An education record exists, they might argue, because the student's GPA range (from 2.0-2.50) or academic status (academic probation or Academic Concern) is a record directly related to the student and maintained by the law school. This constitutes a disclosure, they might conclude, because the placement of the students in the same classroom permits access to, or releases, transfers, or otherwise communicates, personally identifiable information (that is, the student's identity) contained in the education records by *any* means. But, are these arguments well-founded? The answer is no, for a multitude of reasons. I will discuss these arguments in turn.

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<sup>176</sup> 20 U.S.C. § 1232g(b)(1) (2006).

<sup>177</sup> 34 C.F.R. § 99.3 (2009).

<sup>178</sup> *Id.* (emphasis omitted).

## 2. Targeted Grouping Does Not Constitute a Release or Disclosure Under FERPA

First, placing a student in a classroom is not the sort of affirmative act contemplated by FERPA as constituting a release or disclosure. To violate FERPA, the law school must "permit access[,] . . . release, transfer, or . . . communicat[e]" an educational record.<sup>179</sup> These are affirmative acts, requiring the law school to do some physical act to disclose the record. By contrast, here the purported disclosure of placing a student in a classroom requires other students to infer indirectly that a student is in a certain category or within some grade range. This passive, inferential disclosure does not meet FERPA's language that requires some affirmative action that places the knowledge of the education record directly in the hands of a third party.<sup>180</sup>

Crucial to this analysis is the manner in which students acquire knowledge of the entrance requirements of the program. For instance, if a law school tells each student admitted to the class or program that it is open only to those with a GPA under 2.50, each student in the class will thus know that every other student in the class has scored below that point. Although not constituting a release, this approach is nonetheless closer to the line than the alternative course of action of merely informing students that they are required to enroll in the class or program and not saying why. In other words, if a law school merely tells the student that he or she has been selected for inclusion in a class or program, and the law school does not say, "because your GPA is below 2.50," then the students in the classroom have no idea that the other students in the classroom have a GPA below a certain range. In this way, New York Law School's description of their program as open to students with "certain criteria" eliminates even the trace of a FERPA problem because, even if all the students are grouped in

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<sup>179</sup> 34 C.F.R. § 99.3.

<sup>180</sup> See *Daniel S. v. Bd. of Educ.*, 152 F. Supp. 2d 949, 954 (N.D. Ill. 2001) (holding that a gym teacher informing the cross country team that he kicked students out of his class did not violate FERPA because students learned of the discipline by other means).

the class together, they have no knowledge what each other's educational records actually say.<sup>181</sup>

This conclusion finds support in previous DOE statements. In *Connecticut Office of Protection and Advocacy for Persons with Disabilities v. Hartford Board of Education*,<sup>182</sup> the Second Circuit invited the DOE to submit an amicus brief detailing, among other things, whether permitting investigatory agents to observe classroom activities of special needs students in a school violated FERPA.<sup>183</sup> In its brief, the DOE stated that "FERPA applies only to the disclosure of tangible records and of information derived from tangible records. It does not apply to . . . discovery of information about a student as a result of physical access to that student or the student's school."<sup>184</sup> In permitting access to the school, the court cited to the DOE brief approvingly.<sup>185</sup> One can glean from this statement that observation does not constitute a release under FERPA's prohibitions.<sup>186</sup>

This interpretation comports with the canon of construction asserting that interpretation of a statute should not lead to absurd results.<sup>187</sup> Specifically, interpreting the placement of students in a

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<sup>181</sup> New York Law Sch., *supra* note 146.

<sup>182</sup> Conn. Office of Prot. & Advocacy for Perss. with Disabilities v. Hartford Bd. of Educ., 464 F.3d 229 (2d Cir. 2006).

<sup>183</sup> *Id.* at 231-32, 236 (citing 20 U.S.C. § 1232g (2006)).

<sup>184</sup> Brief for Amici Curiae the Department of Education and the Department of Health and Human Services at 12-13, Conn. Office of Prot. & Advocacy for Perss. with Disabilities v. Hartford Bd. of Educ., 464 F.3d 229 (2d Cir. 2006) (No. 05-1240-CV) [hereinafter Brief for Amici Curiae].

<sup>185</sup> *Conn. Office of Prot.*, 464 F.3d at 236, 244-45 (citing Brief for Amici Curiae, *supra* note 184, at 12-13).

<sup>186</sup> *See* 20 U.S.C. § 1232g(b)(1). One might argue, though, that this case is distinguishable from ours because there the investigators did not know the names of the students they were observing. By contrast, in our case, each student likely knows the other students, thus disclosing the fact that the students are within a certain category. This argument fails, though, because all the classroom seating is doing is disclosing a student's name. Student identities, and even photographs, constitute " 'directory information,' " which FERPA does not guard. *See id.* § 1232g(a)(5)(A), (b)(1). Thus as long as a school does not explicitly inform students of the exact criteria upon which they were placed in the class, no protected education record is disclosed. *See id.*

<sup>187</sup> *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 200 (1993) (noting "the common mandate of statutory construction to avoid absurd results").

classroom together as constituting a release or disclosure under FERPA would mean that no student, regardless of GPA, academic status, and so on, could ever be placed in the same classroom as any other student—for doing so would disclose to the other students that the student is enrolled in that class. For instance, placing Adam Smith in Professor Jones's Contracts class discloses to Jennifer Brown that Adam Smith is enrolled in Professor Jones' Contracts class—a fact clearly constituting an education record under FERPA.<sup>188</sup>

In fact, a whole host of common techniques would violate FERPA under the 'implicit disclosure' logic. Sending an attendance sign-up sheet around a classroom for students' signatures would violate FERPA because the last student to sign could see who attended the class and who did not.<sup>189</sup> Designating student honors by means of asterisks in a graduation program would violate FERPA because readers could infer that those without asterisks did not receive honors.<sup>190</sup> Permitting attorneys and judges in the local legal community to act as judges in a graded, end-of-year oral argument in a legal writing class would violate FERPA because these third parties would be permitted to view the quality of student performances in the oral arguments.<sup>191</sup> The list of

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<sup>188</sup> See 20 U.S.C. § 1232g(a)(4)(A)-(B).

<sup>189</sup> Although FERPA's exception for the release of directory information permits the release of a student's "[d]ates of attendance," that exception pertains not to dates of attending specific classes, but to attendance at the school. 34 C.F.R. § 99.3 (2009) (emphasis omitted). The regulations define dates of attendance as "the period of time during which a student attends or attended *an educational agency or institution*. Examples of dates of attendance include an academic year, a spring semester, or a first quarter." *Id.* (emphasis added). The regulations explicitly state that "[t]he term does not include specific daily records of a student's attendance at an educational agency or institution." *Id.* Thus, if implicit observational disclosures constitute a release, an attendance sign-up sheet would violate FERPA. 20 U.S.C. § 1232g(b)(1).

<sup>190</sup> See 20 U.S.C. § 1232g(a)(5)(A). While FERPA's directory information exception permits disclosure of degrees, honors, and awards received, it does not permit law schools to disclose that a student did not receive an award. See *id.* The asterisk system in the graduation program discloses the lack of honors for any students without an asterisk by their names.

<sup>191</sup> See Transcript of Oral Argument at 10-11, *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002) (No. 00-1073), available at [http://www.supremecourt.us/oral\\_arguments/argument\\_transcripts/00-](http://www.supremecourt.us/oral_arguments/argument_transcripts/00-)

commonplace methods that would violate FERPA under an 'implied, observational disclosure' theory would be endless, and law schools literally would have to overhaul their programs and curricula in ways not seen since the days of Dean Langdell.<sup>192</sup> Such a result would be absurd, and thus it is hardly imaginable that Congress sought these radical changes to perfectly innocuous methods.

Finally, and most importantly, the DOE seems to agree that the implicit disclosure theory is without merit.<sup>193</sup> In researching this article, I contacted the DOE's FPCO about the issue of whether academic support classes targeted at specific students within certain portions of the class violates FERPA. I explained the arguments I have detailed above. In response, the FPCO stated:

We do not interpret FERPA in a manner to interfere with classroom pedagogical practices. Within a student's classroom, FERPA may not be used to demand student anonymity and prevent students from knowing the name of other students within the classroom. Other normal classroom activities, including students commenting on one another's work in the classroom, are also permitted. However, if a school official publicly posted a list of or announced the students that attend

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1073.pdf. Petitioner argued that the definition of "maintained" was too broad, as defined by the Tenth Circuit, because then even chalkboard work would violate FERPA. *Id.* If a student was asked to do a math problem on the board, that would be "personally identifiable" because everyone in the class would see the writing. *Id.* This was an *ad absurdum* argument, showing that this sort of conclusion would be ridiculous. Similarly, in our case, because the student is in the classroom, everyone *sees* the student. This would be equally as absurd. *See id.*

<sup>192</sup> See Larry O. Natt Gantt, II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413, 419 (2006). The case method and Socratic method were introduced in 1870 by Dean Langdell at Harvard Law School. *Id.*

<sup>193</sup> See E-mail from Jim Bradshaw, U.S. Dep't of Educ. Press Office, to Louis N. Schulze, Jr., Assistant Professor of Law, Dir. of the Academic Excellence Program, New England Law, Boston. (Aug. 5, 2009) (on file with author).



or are being requested to attend such a remedial class, that would generally be a violation of FERPA.<sup>194</sup>

Thus the FPCO seems to condone the types of practices currently utilized at New England Law, Boston; Widener Law; Seattle University School of Law; Washburn University School of Law; New York Law School; and Arizona State University's Sandra Day O'Connor College of Law.<sup>195</sup> The single caveat is that law school administrators must take care not to announce students' names publicly. For instance, many schools post lists of students on waitlists as the semester begins. At New England Law, our registrar smartly does not publicly post the waitlists for the Legal Analysis class under the theory (now approved by the FPCO) that such a posting might run afoul of FERPA.

### 3. Targeted Grouping Does Not Release Records Directly Related to Students

Let us assume, however, that the FPCO had not weighed in on this issue, and that it is still an open debate whether implicit disclosures violate FERPA. Additional arguments bolster my conclusion that such a theory is flawed.

The most obvious is that FERPA only prohibits the release of records "*directly related* to a student."<sup>196</sup> By seating the student in a classroom, the law school merely implicitly discloses the student's grade *range* (for example, below a 150 LSAT score in a preorientation program or below a 2.50 LSGPA score in a first-year or upper-class program).<sup>197</sup> In so doing, the school does not release *specific* information about a student, like his or her *exact*

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<sup>194</sup> E-mail from Jim Bradshaw to Louis N. Schulze, Jr., *supra* note 193.

<sup>195</sup> See *supra* pt. III.C.

<sup>196</sup> 20 U.S.C. § 1232g(a)(4)(A)(i) (emphasis added).

<sup>197</sup> See *id.* (indicating that the information must be "directly related to a student"). On the other hand, if students are selected by means of being in a grouping, such as academic probation, and the law school directly tells students that a class is open only to those in that category, this would directly relate to a student because it would disclose that the student is on academic probation. Because this is not an amorphous range, but instead, an actual list kept by the registrar, this would be an education record whose release would violate FERPA. See *id.* § 1232g(a)(4)(A)(i), (b)(1).

GPA, *exact* grade received in a given class, or *exact* LSAT score. As a result, the information is general in nature and is not directly related to the student.

The DOE's FPCO guidance letters support this conclusion. By a letter dated November 18, 2004, the FPCO took up the issue of whether the release of students' education records to researchers by means of an encrypted process conformed to FERPA.<sup>198</sup> The Tennessee Department of Education sought to provide student level data to researchers in a lawful manner, and it created a means of providing that data by changing student identifying information such that no student's specific information could be connected to him or her.<sup>199</sup> The FPCO found this method lawful, stating that "data that cannot be linked to a student by those [v]iewing . . . the data are not 'personally identifiable.' As such, the data are not directly related to any students."<sup>200</sup> Thus, because students in the classroom only know each other's general information (that is, that they qualified for the program for some reason), they are not aware of specific education records, and the general information is not directly related to any student. Therefore, this conduct conforms to the Act.

#### 4. Modifications of Targeted Grouping Programs to Avoid Any Trace of Implicit Disclosures

Even if such implicit disclosures could be considered to run afoul of FERPA, there are a number of simple workarounds which do not undermine the pedagogical effectiveness of the courses. First, the easiest solution is to permit the enrollment into these courses or programs of a few students whose grades are not within the criteria. In other words, if the academic support class normally permits only those below 2.50 to enroll, allowing a few students above 2.50 to enroll in the class would alleviate any problem so long as the law school communicates to the students that those

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<sup>198</sup> Letter from LeRoy S. Rooker, Dir. Family Policy Compliance Office, to Matthew J. Pepper, Policy Analyst, Tenn. Dep't of Educ. (Nov. 18, 2008), available at [http://www.ed.gov/policy/gen/guid/fpc/ferpa/library/Nashville\\_tn2004.html](http://www.ed.gov/policy/gen/guid/fpc/ferpa/library/Nashville_tn2004.html) (citing 20 U.S.C. § 1232g; 34 C.F.R. pt. 99 (2009)).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

above the GPA threshold are also admitted. This does not release any protected information because students do not know which students in the classroom are above or below 2.50.

Second, to avoid a FERPA problem, a law school could ensure that no record is ever created. FERPA only applies to education records, which are those records *maintained* by the law school.<sup>201</sup> In *Owasso*, the Court held that when a student grader calls out students' grades, the grades are not maintained by the school until the teacher records them in his or her grade book.<sup>202</sup> Similarly, if a law school simply calculated the bottom third of the class and contacted those students for inclusion within the academic support class, no education record would be disclosed because no such record is maintained. If, on the other hand, the law school typed a list and then kept that list, either in electronic or physical form, it might arguably become a record.<sup>203</sup>

Finally, the ultimate workaround is simply to obtain authorization from students. FERPA states that a law school may not release education records unless the student authorizes the release by means of a dated signature.<sup>204</sup> A simple fix, therefore, would be to present all students taking the course with an authorization explaining the situation and requesting their authorization. This workaround would cure any potential problem.

### *B. Whether First-Year Academic Support Methods Violate FERPA*

As noted, first-year programs that engage in targeted grouping are indistinguishable, in terms of FERPA, from such programs that

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<sup>201</sup> 20 U.S.C. § 1232g(a)(4)(A)(i)-(ii) (emphasis added).

<sup>202</sup> *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 432 (2002).

<sup>203</sup> *But see* 20 U.S.C. § 1232g(a)(4)(B)(i). One should note FERPA's exception for documents created by an education official for that person's own use. *See id.* If the registrar, therefore, made a list of students to contact and that list was only for use by the registrar in contacting those students, the "sole possession" exception would apply and no education record would be created. *See id.*

<sup>204</sup> *See id.* § 1232g(b)(1), (d). There is an exception for funds to be released with written consent of students' parents, and there is an explicit exception for parents to release specific information. *Id.* § 1232g(b)(1), (2)(A). FERPA provides for students over the age of eighteen and postsecondary students to hold rights accorded to their parents under the Act. *Id.* § 1232g(d).

do so in preorientation programs. Thus the remaining first-year academic support method requiring analysis under FERPA is academic counseling. This section discusses whether academic counseling methods violate FERPA.

### 1. Academic Counseling: General Disclosures of Education Records to Academic Support Professionals

The first area of concern is determining the degree to which law schools may share education records with the law schools' academic support professionals. Some objectors may contend that releasing education records to members of the law school community who are not appointed members of the faculty would violate FERPA.<sup>205</sup> Because many academic support professionals are administrative appointees, rather than faculty, this contention becomes a valid issue if, in fact, FERPA permits intraschool disclosures only to faculty members.

If this were the state of the law under FERPA, such a rule would be disastrous to academic support efforts because academic support professionals routinely acquire information about their students, such as their LSGPA, their LSAT score, and their UGPA. The purposes for acquiring this information can include (1) accurately 'diagnosing' students' academic problems,<sup>206</sup> (2) ranking and triaging students in terms of the amount of time necessary to allocate to each student,<sup>207</sup> and (3) managing a student's denial

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<sup>205</sup> Again, each scenario depicted in this article derives from actual situations expressed to me by members of the academic support community. At one school, a faculty member objected to ASP access to students' grades on the notion that such access violated FERPA.

<sup>206</sup> For instance, a high UGPA but a low LSAT score may show that the student is a hard worker, but lacks a high aptitude. Academic support focusing on work ethic would be futile. Meanwhile, the converse may show a student with high aptitude, but the need for academic support in the area of work ethic.

<sup>207</sup> An ASP professional with dozens of students in his or her care must prioritize. Some students require a weekly, hour-long meeting. Others require a quick check-in maybe once every two to three weeks. A student's education records can aid in making this determination. A student with a high UGPA and LSAT score and with a relatively decent LSGPA score would require, perhaps, a series of tweaks to their study habits. A student at the opposite end of the spectrum might require a complete overhaul and consistent reinforcement and

about his or her academic performance and likelihood of success.<sup>208</sup> All of these records, if held by the law school, would constitute education records under FERPA because they "contain information directly related to a student" and they "are maintained by an educational agency."<sup>209</sup> The following sections detail whether disclosures to academic support professionals violate FERPA.

The wholesale prevention of access to education records to academic support professionals would seriously undermine the mission of academic support. This problem would crop up in a number of scenarios. First, academic support professionals aiding students during their first year and upper-class years would be hindered if FERPA prohibited disclosure of these records. Second, many schools assign their academic support professionals to academic standing committees.<sup>210</sup> These committees determine

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monitoring. Thus access to these records is crucial to academic support professionals.

<sup>208</sup> Many academic support professionals must deal with students in denial about their grades. After midterms, students required or recommended to obtain academic support meet with an ASP professional. In this meeting, a discussion is held regarding the student's game plan for success. Often, despite very poor grades, a student will indicate that he or she does not deem it necessary to overhaul his study habits because his midterm grades were flukes. Students will also occasionally undermine the seriousness of their situation by 'remembering' their midterm grades somewhat inaccurately, describing them as higher than they actually were. Academic support professionals often must confront this denial with evidence that a student must immediately rework his or her study plan. Access to a student's midterm exam grades, LSAT score, and UGPA are critical to confronting the student's denial and allowing the student to see the emergent nature of the situation.

<sup>209</sup> 20 U.S.C. § 1232g(a)(4)(A)(i)-(ii). These factors, I should remind the reader, serve as the definition of " 'education records' " under FERPA. *Id.*; *see also supra* pt. II.B.

<sup>210</sup> *See, e.g.,* Suffolk Univ. Law Sch., Rules and Regulations: Readmissions, <http://www.law.suffolk.edu/offices/deanofstu/handbook/regs/rule6.cfm> (last visited Dec. 14, 2009). Academic support professionals should give serious thought to whether it is appropriate to serve on these committees. Students working with academic support frequently develop a bond of trust with the ASP professional. I often view my role in academic support as being one part faculty member and one part coach to students. To serve on a committee that determines whether students may remain in their course of study would seem to confuse these roles. Additionally, if a student shares personal

whether a student whose grades fail to meet the school's 'good standing' criteria should, in fact, be dismissed or readmitted.<sup>211</sup> These committees require members to be provided with the student's grades as well as any information the student submits in support of his or her petition for readmission.<sup>212</sup> Thus if a student discloses a recent diagnosis of a learning disability in support of a petition, the academic support professional on the committee would receive this information, allegedly in violation of FERPA. Finally, if disclosing education records to academic support professionals violates FERPA, such a rule would seriously hinder bar preparation professionals' efforts. Frequently, when in-house bar preparation professionals must prioritize and triage the students to whom they will devote individual attention, they will obtain data reflecting students' LSGPAs, UGPAs, or LSAT scores from the law school as a means to discern the likelihood of success on the bar exam.<sup>213</sup> This is the case at Suffolk University Law School and New England Law, Boston.<sup>214</sup> All of these methods would be invalid if FERPA prohibited disclosure of education records to all but members of the appointed faculty.

Luckily, that is not the state of the law. FERPA does not prohibit disclosure of education records in any of the scenarios outlined above. The Act contains a specific exception permitting access to "other school officials, including teachers within the educational institution or local educational agency, who have been

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information with an ASP professional and later appears before that person in his or her role on an academic review committee, the student may wonder whether the personal information may be disclosed to others or may be used against him or her. If the student is aware that the ASP professional may soon sit in judgment of him or her on such a committee, this concern could have a chilling effect upon students' willingness to be completely open and honest with the ASP professional during academic counseling. For these reasons, I chose to decline my law school's request that I serve on the academic review committee.

<sup>211</sup> See, e.g., Suffolk Univ. Law Sch., *supra* note 210.

<sup>212</sup> See, e.g., *id.*

<sup>213</sup> See *supra* pt. III.D.

<sup>214</sup> See Suffolk Univ. Law Sch., Registrar: Bar Preparation, <http://www.law.suffolk.edu/offices/registrar/barexams/barprep.cfm> (last visited Dec. 14, 2009) (describing the school's bar preparation course); New England Law, Boston, Graduation and Bar Information, [http://www.nesl.edu/students/grad\\_requirements.cfm](http://www.nesl.edu/students/grad_requirements.cfm) (last visited Dec. 14, 2009).

determined by such agency or institution to have legitimate educational interests, including the educational interests of the [student] for whom consent would otherwise be required."<sup>215</sup> Here, Congress stated that "other school officials, including teachers" may have access to the records.<sup>216</sup> Thus even if we define teachers solely as appointed members of the law faculty, a dubious proposition which I will assume *arguendo*, the additional phrase "other school officials" makes it clear that Congress intended access to nonfaculty persons affiliated with the law school who possess some legitimate pedagogical interest in obtaining the records.<sup>217</sup> A conclusion to the contrary would violate the axiom of statutory construction that a court should interpret a statute in such a way that no portion of its text is rendered superfluous.<sup>218</sup> If FERPA permits only appointed faculty members access to records, why does it permit access both to teachers and to other school officials? Also, if FERPA permits access only to appointed faculty members, must not the law school registrar, whose entire job is to maintain education records, be an appointed member of the faculty?<sup>219</sup> I can think of no school that follows that approach. Finally, the fact that Congress used the term "teachers," and not 'appointed faculty' or even 'faculty,' seems to lead to the conclusion that both academic support and bar preparation professionals may access education records.<sup>220</sup> Clearly, FERPA permits academic support and bar preparation professionals access to education records.

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<sup>215</sup> 20 U.S.C. § 1232g(b)(1)(A) (2006).

<sup>216</sup> *Id.*

<sup>217</sup> *See id.*

<sup>218</sup> *See United States v. Santos*, 128 S. Ct. 2020, 2028 n.6 (2008) ("We do not normally interpret a text in a manner that makes one of its provisions superfluous.").

<sup>219</sup> *See* Letter from LeRoy S. Rooker, Dir., Family Policy Compliance Office, to Jeanne-Marie Pochert, Deputy Assistant Gen. Counsel, Clark County Sch. Dist. Legal Dep't (June 28, 2006), *available at* <http://www.ed.gov/print/policy/gen/guid/fpco/ferpa/library/clarkcty062806.html> (containing the DOE's clarification that registrars are permitted access to records under FERPA).

<sup>220</sup> *See* 20 U.S.C. § 1232g(b)(1)(A).

Case law supports this interpretation of the statute. In *MR ex rel. RR v. Lincolnwood Board of Education*,<sup>221</sup> the court addressed the breadth of the exception permitting other school officials access to education records.<sup>222</sup> A disabled public school student sought federal court review of the local school board's decision to place him in classes with other disabled children.<sup>223</sup> His parents wanted him to be 'mainstreamed.'<sup>224</sup> At a school district hearing to determine whether the school board accurately placed the student, school officials played a video of the student which they had filmed.<sup>225</sup> The video showed that the student's behavior supported the school board's placement decision not to mainstream the student.<sup>226</sup> The student's parents objected to the use of this video, arguing, inter alia, that the school board's release of the video to those attending the hearing violated FERPA.<sup>227</sup> The federal district court rejected this proposition, saying that FERPA "permits disclosure of information to other local school officials who have legitimate educational interests."<sup>228</sup>

Although the court's analysis did not focus on the FERPA issue to a great degree, *MR ex rel. RR* supports the notion that FERPA grants academic support professionals access to education records.<sup>229</sup> Like the school officials present at the plaintiff's hearing in *MR ex rel. RR*, academic support professionals have a legitimate educational interest in the records. Just as the disputed

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<sup>221</sup> *MR ex rel. RR v. Lincolnwood Bd. of Educ.*, Dist. 74, 843 F. Supp. 1236 (N.D. Ill. 1994), *aff'd sub nom. Rheinstrom ex rel. Rheinstrom v. Lincolnwood Bd. of Educ.* Dist. 74, 56 F.2d 67 (7th Cir. 1995). Interestingly, the court noted that "[b]ecause judges are not trained educators, judicial review under the [Individuals with Disabilities Education Act] is limited." *Id.* at 1237. For an explanation of the same sentiment, see also *supra* note 106 and accompanying text.

<sup>222</sup> *MR ex rel. RR*, 843 F. Supp. at 1239 (citing 20 U.S.C. § 1232g(b)(1)(A), (C), (b)(3)).

<sup>223</sup> *Id.* at 1237-38.

<sup>224</sup> *Id.* at 1239.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *See id.* (citing 20 U.S.C. § 1232g (b)(1)(A), (C), (b)(3)).

<sup>228</sup> *MR ex rel. RR*, 843 F. Supp. at 1239 (citing 20 U.S.C. § 1232g (b)(1)(A)).

<sup>229</sup> *See id.* (citing 20 U.S.C. § 1232g(b)(1)(A)).



tape enhanced the local school officials' ability to review the plaintiff's placement, access to students' education records enhances academic support professionals' ability to provide academic support. As discussed above, these education records allow academic support professionals to diagnose students' learning challenges, triage students by need, and address students' denial of their academic struggles.

In fact, academic support professionals satisfy the statutory definition even more clearly than the officials in *MR ex rel. RR*.<sup>230</sup> The relevant exception to FERPA permits access to two groups: (1) teachers and (2) school officials who are not teachers.<sup>231</sup> While the school officials in *MR ex rel. RR* only satisfied the latter category, academic support professionals satisfy both categories because they are both teachers and, oftentimes, school officials as well since they usually have administrative duties to perform. As a result, *MR ex rel. RR* proves that academic support professionals are entitled to access education records under FERPA.<sup>232</sup>

## 2. Academic Counseling: Implicit Disclosures to Peer Tutors Do Not Violate FERPA, but Peer Tutors Do Not Meet the Other School Official Exception

A trickier issue is whether providing academic counseling to academically deficient first-year students by means of upper-class peer tutoring violates FERPA. In this method, peer tutors may be aware that only students within a certain category or below a certain GPA are eligible for such tutoring. For this issue, we must examine the portion of the FERPA regulations governing circumstances in which consent to release education records is not required.

As previously stated, the *Code of Federal Regulations* provides that schools may release education records "to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate

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<sup>230</sup> See *MR ex rel. RR*, 843 F. Supp. at 1239 (citing 20 U.S.C. § 1232g(b)(1)(A)).

<sup>231</sup> 20 U.S.C. § 1232g(b)(1)(A).

<sup>232</sup> See *MR ex rel. RR*, 843 F. Supp. at 1239 (citing 20 U.S.C. § 1232g(b)(1)(A)).

educational interests."<sup>233</sup> The regulations then state that "[a] contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official" if the party performs an institutional service the institution otherwise would conduct, "[i]s under the direct control of the . . . institution," and is subject to other requirements not at issue here.<sup>234</sup> On the other hand, the DOE's FPCO has stated that "[a]lthough 'school official' is not defined in the statute or regulations, this Office has interpreted the term broadly to include a teacher; school principal; president; chancellor; board member; trustee; registrar; counselor; admissions officer; attorney; accountant; human resources professional; information systems specialist; and support or clerical personnel."<sup>235</sup>

There is no reason to believe that assigning a peer tutor to students meeting certain criteria violates FERPA vis-à-vis an implicit disclosure theory. The same analysis applies to peer tutors as it applies to other students.<sup>236</sup> That is not to say, however, that the blanket exception of other school officials allows schools to disclose other students' education records to peer tutors. First, a peer tutor does not seem to meet the definition of a school official because peer tutors are not "within the . . . institution."<sup>237</sup> This phrase implies that the other school official is an employee of the school. Even if peer tutors are paid employees, they are not within the institution because their primary role is to be a student. Furthermore, peer tutors do not seem to meet the 'outside contractor' language because institutions do not outsource the services of peer tutoring to them.<sup>238</sup> Finally, peer tutors are not among the listed descriptions enumerated in the FPCO's advice letter because they are not truly counselors or "support or clerical personnel."<sup>239</sup> Thus although peer tutors may have knowledge of the fact that the students they tutor are within a certain category,

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<sup>233</sup> 34 C.F.R. § 99.31(a)(1)(i)(A) (2009).

<sup>234</sup> *Id.* § 99.31(a)(1)(i)(B).

<sup>235</sup> Letter from LeRoy S. Rooker to Jeanne-Marie Pochert, *supra* note 219.

<sup>236</sup> *See supra* pt. IV.A.1.

<sup>237</sup> 34 C.F.R. § 99.31(a)(1)(i)(A).

<sup>238</sup> *See id.* § 99.31(a)(1)(i)(B).

<sup>239</sup> Letter from LeRoy S. Rooker to Jeanne-Marie Pochert, *supra* note 219.

schools should not feel free to treat them as other school officials to whom education records may be released under the regulations.<sup>240</sup>

### 3. Academic Counseling: Academic Support Professionals Disclosing Sensitive Information to Doctrinal Faculty

One of the objections I have heard to providing academic support faculty with education records for purposes of academic counseling is that such faculty could improperly disclose that information to faculty teaching doctrinal courses. So would it violate FERPA for an academic support professional to reveal a student's academic probation status to a student's property or torts professor in a blind grading system? Or would disclosure of a diagnosis of a learning disability violate FERPA? For answers to these questions, we must turn to FERPA's definition of the exception for intraschool communications.<sup>241</sup>

In addition to requiring that the releaser be either a school official or a teacher (a requirement clearly met in either scenario above), the exception also requires that the person to whom the record is released be a person "who [has] been determined . . . to have legitimate educational interests [in the record], including the educational interests of the [student] for whom consent would otherwise be required."<sup>242</sup> Thus either disclosure would be permissible under FERPA so long as there was some legitimate, educational purpose for the disclosure. For instance, if a doctrinal faculty member and an academic support professional were discussing a particular student, and the doctrinal faculty member was conflicted about whether to reach out to the student out of a concern that the student was not 'getting it,' the academic professional could disclose the student's academic probation status to the doctrinal faculty member to reassure the faculty member that reaching out would likely be warranted. Similarly, if a doctrinal faculty member reported to the academic support professional that he or she felt that a student was disrespectfully failing to pay

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<sup>240</sup> 34 C.F.R. § 99.31(a)(1)(i)(A).

<sup>241</sup> 20 U.S.C. § 1232g(b)(1)(A) (2006).

<sup>242</sup> *Id.*

attention in class, the academic support professional would not violate FERPA by revealing the student's diagnosis of ADHD or Asperger's Syndrome,<sup>243</sup> so long as the disclosure was to facilitate an improvement of the student's learning or relations with the professor.<sup>244</sup>

Generally speaking, other than these two important nuances, FERPA broadly permits the release of education records within an education environment.<sup>245</sup> FERPA requires the person receiving the information to be a teacher or other school official.<sup>246</sup> It also requires that the recipient have a legitimate, pedagogical interest in the information.<sup>247</sup> In the case of ASP professionals and bar preparation professionals, this requirement is usually met.

#### 4. Academic Counseling: Helicopter Parenting, Academic Support Program Faculty, and FERPA

The final FERPA issue inherent in academic counseling is the role of parents in their children's law school education. I was surprised, to say the least when, in my first year as an academic support professional, I was besieged by at least a half dozen calls early in the first semester from parents of students. Most of these calls were to put me on notice that the caller's child (and, yes, a few would use that word) required additional academic assistance. Several of these callers went so far as to demand that I personally tutor the 'child' in the subjects about which he or she was confused. When I explained that tutoring, per se, is actually counterproductive and that the purpose of academic support is to

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<sup>243</sup> See Jennifer Jolly-Ryan, *Disabilities to Exceptional Abilities: Law Students with Disabilities, Nontraditional Learners, and the Law Teacher as a Learner*, 6 NEV. L.J. 116, 126-28, 139-40 (2005). Students with these conditions report that faculty misinterpret the symptoms, which can include inattentiveness (ADHD) or lack of eye contact (Asperger's Syndrome), as disrespectful conduct. See *id.*

<sup>244</sup> See 34 C.F.R. § 99.31(a)(1)(i)(A). As a policy matter, however, the ASP professional might be well advised to seek the student's permission prior to such a revelation. While lawful, an unwanted disclosure of this sort could harm the trust between the ASP professional and the student.

<sup>245</sup> See *id.* § 99.31(a)(1)(i).

<sup>246</sup> *Id.* § 99.31(a)(1)(i)(A).

<sup>247</sup> See *id.*

help students teach themselves how to learn law more effectively, several callers were not appreciative of my pedagogical philosophies.

These sorts of calls from " 'helicopter' parents" represent a reality as the current generation of law students enters law school.<sup>248</sup> Parents are more involved in their children's legal education, possibly as a result of the dramatic increase in the costs of that education. One area of FERPA affected by this change is the degree to which law school personnel, specifically academic support professionals, can reveal education records to inquisitive and usually well-meaning parents. May an ASP professional disclose a student's grades or academic status (such as probation, dismissal, or readmission) to a parent? On the other hand, what if a law school does not want to disclose education records to parents? May a law school refuse, under FERPA, to release information to parents? Furthermore, what about parents who are genuinely concerned about their daughter's or son's health or safety? May law schools disclose knowledge, gathered in one-on-one academic support sessions, that a student is suffering from mental illness, an eating disorder, or suicide ideation? This section analyzes these questions.

*a. The General Rules and the Exceptions Pertaining to Disclosure of Education Records to Parents Under FERPA*

FERPA states that "whenever a student has attained eighteen years of age, or is attending an institution of postsecondary 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."<sup>249</sup> Thus if the student is above the age of eighteen or, if below that age, enrolled in postsecondary education, FERPA's protections are in the hands of the student.<sup>250</sup> For law schools, therefore, the general rule is that

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<sup>248</sup> See Laura Rothstein, *Millennials and Disability Law: Revisiting Southeastern Community College v. Davis*, 34 J.C. & U.L. 169, 171 (2007) (defining helicopter parents as those who "hover and land to take care of things that they perceive as needing attention").

<sup>249</sup> 20 U.S.C. § 1232g(d) (2006).

<sup>250</sup> *Id.*

students hold the privacy interests under FERPA because, even if a student is below eighteen (obviously an unlikely scenario), law school is "postsecondary."

The DOE, however, has created a number of exceptions to the general rule that a student's consent is required. Under the *Code of Federal Regulations*, a school can disclose education records to a parent, even if the student is above eighteen and/or attending postsecondary education, in three explicitly enumerated circumstances: (1) if the student is a dependent for federal income tax purposes; (2) if "[t]he disclosure is in connection with a health or safety emergency," as defined in the regulations' definition section; or (3) if the student has violated any law or school rule or policy regarding "the use or possession of alcohol or a controlled substance" and the student is below twenty-one years of age.<sup>251</sup> Obviously, this last exception is unlikely to be fulfilled in the law school setting, as most students are above age twenty-one. The first exception is the one that often eats the general rule. Many students who attend law school are still claimed as dependents on their parents' income tax returns. In those circumstances, the law school, including academic support professionals, may disclose education records to parents. Thus the first bit of information an academic support professional should gather when asked by parents for education records is whether the student is a dependent of the inquiring parent in his or her most recent income tax filing. At that point, disclosure is proper.

This does not mean that the law school *must* disclose education records to parents.<sup>252</sup> The exceptions above relieve the law school of the legal duty to obtain consent from the student prior to disclosure. If one of the above exceptions is met, no such consent must be obtained from the student.<sup>253</sup> In terms of FERPA's requirement to permit access to records, however, only the student retains that right.<sup>254</sup> The above exceptions do not alter

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<sup>251</sup> 34 C.F.R. §§ 99.5, 99.31(a)(8), (10), (15)(i).

<sup>252</sup> See Joey Johnsen, Note, *Premature Emancipation? Disempowering College Parents Under FERPA*, 55 *DRAKE L. REV.* 1057, 1059-60, 1081-85, 1089-90 (2007) (critiquing FERPA's failure to permit colleges to notify parents in cases such as eating disorders or suicide ideation).

<sup>253</sup> 34 C.F.R. § 99.5(a)(2).

<sup>254</sup> 20 U.S.C. § 1232g(d).

the fact that the student alone bears the right of inspection of education records. A law school is still free to have a policy to refuse to disclose education records to anyone except the student; the exceptions above merely *permit* a law school to disclose education records to parents *without the student's consent*.<sup>255</sup>

The Secretary of Education made this clear in the DOE's "Section-by-Section Analysis" of the new regulations.<sup>256</sup> The Secretary noted that, despite exceptions to the consent requirement, schools were still claiming that FERPA barred them from releasing education records to parents, even in cases of dependents, health or safety emergencies, and alcohol or substance abuse cases.<sup>257</sup> This was not accurate. The Secretary also made clear, though, "that while [schools] may choose to follow a policy of not disclosing information to the parents of eligible students, FERPA does not prevent them from doing so in most circumstances."<sup>258</sup>

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<sup>255</sup> See Johnsen, *supra* note 252, at 1062 (citing 20 U.S.C. § 1232g(h)) (commenting on schools' freedom to refuse disclosure when FERPA does not require it). Johnsen's take on this situation is that many schools, fearful of litigation for violating FERPA, choose a policy of nondisclosure to parents, much to the detriment of students suffering from eating disorders or suicidal ideation. See generally *id.* This position dovetails with my thesis that many law schools, ignorant of FERPA's true breadth, choose to prohibit ASP professionals from obtaining education records out of an irrational fear of FERPA.

<sup>256</sup> DEP'T OF EDUC., FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA), FINAL RULE, 34 CFR PART 99: SECTION-BY-SECTION ANALYSIS § 99.5, at 4-5 (2008), <http://www.ed.gov/policy/gen/guid/fpco/pdf/ht12-17-08-att.pdf>.

<sup>257</sup> *Id.*

The Department has been concerned that some colleges and other postsecondary institutions do not fully understand their options with regard to disclosing education records (or personally identifiable information from education records) of eligible students to their parents and continue to believe mistakenly that FERPA prevents them from releasing this information to parents under any circumstances, including a health or safety emergency.

*Id.* § 99.5, at 4. This supports my thesis that many schools fail to understand FERPA and, as a result, create policies out of unreasonable fear of litigation rather than reasoned analysis of the statute.

<sup>258</sup> *Id.* § 99.5, at 5.

*b. Internal Policies Forbidding Disclosure to Parents: What About Health or Safety Emergencies?*

The flipside to the ability of schools to retain an internal policy of nondisclosure is such a policy's effect upon parents seeking to help their students in situations of mental health, suicide ideation, or eating disorders.<sup>259</sup> Academic support professionals frequently become aware of intimate details of students' personal lives that may be hindering their academic success. Occasionally, students report mental health problems or facts that give rise to the suspicion of eating disorders or the potential of suicide. May the law school inform parents of these facts or even affirmatively contact the students' parents? The alcohol and substance abuse provision set forth in the regulations would generally not apply here, but the other exceptions might.

As previously noted, if the student is a dependent of the parents for tax purposes, then the law school may disclose the information.<sup>260</sup> But even if the student is not a dependent for tax purposes, the law school may disclose information to parents if "[t]he disclosure is in connection with a health or safety emergency, under the conditions described in § 99.36 [of the *Code of Federal Regulations*]."<sup>261</sup> Section 99.36(a) and (c) provides that:

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

....

(c) In making a determination under paragraph (a) of this section, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat

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<sup>259</sup> See Johnsen, *supra* note 252, at 1059 (criticizing FERPA, prior to the recent amendment of its regulations, as unresponsive to situations of mental health, eating disorders, and suicide).

<sup>260</sup> 34 C.F.R. § 99.31(a)(8) (2009).

<sup>261</sup> *Id.* § 99.31(a)(10).



to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.<sup>262</sup>

Thus although academic support professionals and law schools may not disclose mental health, eating disorder, or suicide ideation information under FERPA's general rule that students bear the privacy right, the regulations permit such a disclosure if (1) there is an emergency and (2) the emergency pertains to the student's health or safety or to the health or safety of another individual.<sup>263</sup> In defining the term "emergency," it seems that the touchstone is whether the circumstances present "an articulable and significant threat."<sup>264</sup> Given the severity and dangerousness of scenarios related to mental health, suicide, and eating disorders, it appears that many circumstances would permit academic support professionals, through the law school, to communicate this information to parents. Law school personnel obviously should conduct internal analyses of each specific situation as it arises to determine whether the above guidelines are satisfied, thus permitting disclosure.

*C. Whether Upper-Class Academic Support Methods Violate FERPA*

One method used in the smaller, upper-level academic support classes (as well as many legal writing courses) is peer review or peer-grading exercises. As discussed previously, in these methods, students exchange their completed papers in the classroom and provide feedback on the writing, which can be incorporated as a

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<sup>262</sup> 34 C.F.R. § 99.36(a), (c).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

means by which to improve the quality of the papers.<sup>265</sup> Usually, professors implement this method either prior to students handing in the papers or, in the alternative, between drafts of the papers. Peer review is seldom, if ever, conducted after the student hands in the final paper because such an approach would not allow the writer to use the other student's critique in a constructive manner. The benefits of the peer review method are that students can contrast the strengths and weaknesses of their own work; receive extensive feedback without time-consuming effort by faculty; and learn to take personal responsibility for the analytical quality of their own work, instead of passively relying on the fiction of an 'all-knowing' faculty member who will guide them through effortless rewrites.<sup>266</sup>

One might argue, however, that this method violates the Act. Such an argument would contend that the paper may constitute an education record in that it fulfills the two-part statutory definition of that term: (1) the process identifies the student author and (2) the paper is arguably maintained by the law school or someone working at its behest (that is, the student reviewer). Forcing students to exchange papers, the argument would continue, may constitute a release under FERPA because the student who did not author the paper is reading it.

This argument fails for one simple reason: the Supreme Court of the United States has rejected it. As discussed above, *Owasso* explicitly rejected the idea that elementary school peer-grading techniques violated FERPA.<sup>267</sup> The analogy to law school peer review methods is obvious, and as shall be seen, the case of peer review methods actually presents even less likelihood of a FERPA violation than the peer-grading methods at issue in *Owasso*.

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<sup>265</sup> See *supra* pt. III.C. Importantly, this is a controlled exercise, and students are not permitted to leave the classroom with their colleagues' papers. All peer review activities occur in the classroom to draw the line between appropriate collaboration and improper cheating. See Davis, *supra* note 168, at 5-6 (stating that the author did a peer review assignment exercise in class in order to avoid "any perceived unfair competitive advantage of having another student's draft for an extended time").

<sup>266</sup> See Davis, *supra* note 168, at 1-3.

<sup>267</sup> See *supra* pt. II.B.

The Court predicated its rejection of the student's FERPA claim upon simple statutory interpretation.<sup>268</sup> To be an education record, the document must be "maintained by an educational agency" or someone acting upon its behest.<sup>269</sup> Like *Owasso*, because the document is not yet in the possession of the professor, it is not maintained by the educational agency. Furthermore, also like *Owasso*, the law student reviewing the paper is not acting at the behest of the school:

Just as it does not accord with our usual understanding to say students are "acting for" an educational institution when they follow their teacher's direction to take a quiz, it is equally awkward to say students are "acting for" an educational institution when they follow their teacher's direction to score it. . . . We do not think FERPA prohibits these educational techniques.<sup>270</sup>

Because the student is not acting as an agent of the law school when directed to complete a peer review activity, the technique does not violate FERPA. One should note, however, that FERPA and its definition of an education record would be implicated if the professor handed out the document *after* grading it and displayed the grade for the reviewing student to see. In that case, the document would be maintained by the law school because the professor is then the agent of the educational agency and showing the grade would be a release of the record (that is, the grade itself).<sup>271</sup> Assuming that peer review does not include the notion of

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<sup>268</sup> *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 432 (2002).

<sup>269</sup> 20 U.S.C. § 1232g(a)(4)(A)(ii) (2006).

<sup>270</sup> *Owasso*, 534 U.S. at 433-34.

<sup>271</sup> See 20 U.S.C. § 1232g(a)(4)(A)(ii), (b)(1). A contrary view could be maintained, however. Justice Kennedy's majority opinion in *Owasso* noted that education records suggest permanence and that the records would be kept in a central location, such as the registrar's office. *Owasso*, 534 U.S. at 434-35. Because the grade on the initial paper meets neither of these criteria (it is inherently impermanent because, apparently, there is a second draft for which the students are preparing; and it is an interim grade not kept by the registrar), one could claim that this practice would be lawful. On the other hand, this scenario could simply provide ammunition to Justice Scalia's view that the " 'central custodian' " interpretation is absurd because sharing even a student's

the professor disclosing the grade to the reviewer, the peer review method does not violate FERPA because the paper is not yet an education record, and the reviewing student is not an agent of the school.

In fact, the case of the peer *review* method typically used in law school academic support or legal writing classes is actually less likely to violate FERPA than the peer-*grading* technique approved in *Owasso*. There, the Court particularly struggled with the notion that students called other students' grades aloud for the teacher to record.<sup>272</sup> The United States Court of Appeals for the Tenth Circuit, in invalidating peer grading, reasoned that if teachers disclosing the grades after recording them violate FERPA, it would make little sense to permit disclosure of the grades by calling them out in class just before maintaining them.<sup>273</sup> Although the Court rejected this analysis by noting that the students were not agents on behalf of the school and, thus, did not fulfill the statutory definition,<sup>274</sup> this nonetheless seemed to be the stickiest argument the Court had to deal with. In our case, however, there is no such disclosure because peer review techniques do not require students to grade the papers in any way, much less call out those grades for contemporaneous recording by the professor. Thus law school peer review techniques are even less likely to offend FERPA than the methods discussed in *Owasso*.

The propriety of law school peer review methods is buttressed by additional arguments. First, the Court also based its interpretation of education records upon the notion that invalidating peer grading, which is a well-established technique in public schools, would drastically alter the balance between the federal government and the states.<sup>275</sup> Because pedagogical methods are entrusted to local and state authorities, the Court

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interim grade would seem to violate the spirit of FERPA. *Id.* at 437 (Scalia, J., concurring).

<sup>272</sup> See *Owasso*, 534 U.S. at 433.

<sup>273</sup> See *id.* at 432 (citing *Falvo v. Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1203, 1215-16 (10th Cir. 2000)).

<sup>274</sup> *Id.* at 433.

<sup>275</sup> *Id.* at 432.

would not disrupt this balance absent express evidence that Congress intended such a radical intervention.<sup>276</sup>

This logic is equally true for law school peer review methods because many state law schools utilize peer review methods. Thus an interpretation of FERPA that necessitates a federal foray into the minutia of law school teaching methods would similarly offend the notion of a separation of federal and state governments. One might argue, though, that this justification does not exist for private law schools, which lack any connection to state government. While true, this argument nonetheless would not win the day because of the well-established precedent that courts give great deference to pedagogical choices by decision makers in the realm of higher education.<sup>277</sup> Thus it would seem that the Court would refuse to inject the federal government into the nuts and bolts of law school teaching methods absent some clear indication by Congress that it sought such an extreme outcome.

Second, and most convincingly, evidence that law school peer review activities would not violate FERPA comes from the oral argument in the *Owasso* case. Justice Ginsburg raised the question of whether student critiquing techniques would offend FERPA.<sup>278</sup> Importantly, one should note Justice Ginsburg's background—teaching both at Rutgers University School of Law and later at Columbia Law School<sup>279</sup>—as particularly likely to have made her aware of pedagogical techniques used in law schools. Even the attorney representing the respondent, Falvo—the student

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<sup>276</sup> *Owasso*, 534 U.S. at 435-36.

<sup>277</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (citing *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment."); *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96 n.6 (1978) (Powell, J., concurring) ("University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.")) ("Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.").

<sup>278</sup> See Transcript of Oral Argument, *supra* note 191, at 50-51.

<sup>279</sup> About the Supreme Court, The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Dec. 14, 2009).

challenging the peer-grading method—explicitly stated that that method "is not prohibited by FERPA" because "[t]he teacher is not collecting that information. The students are making the evaluation or assessment of each other for their sole purpose, not for the purpose of the teacher recording [it]."<sup>280</sup> This should serve as extremely strong evidence that law school peer review techniques do not encroach upon FERPA because those techniques do not disclose any education records as that term is defined in the Act.

*D. Whether Postgraduate Academic Support Methods Violate FERPA*

As I noted previously, the majority of postgraduate academic support is provided by means of bar exam preparation or support services. Many law schools have created graded, for-credit bar preparation classes for graduating seniors and even provide support for graduates as they draw closer to the bar exam.<sup>281</sup> The analysis of these classes under FERPA follows the same analysis of the issues I have addressed previously. But bar preparation classes may provide one additional nuance to the overall picture: what if a law school outsourced the instruction of its graded bar preparation course to an outside organization?

As I noted in part III, one school hires LawTutors, an outside firm, to teach its graded, credited bar preparation course.<sup>282</sup> If these instructors want to focus individual attention upon students apt to fail the bar exam, may the law school release UGPA, LSAT, or LSGPA information to these outside vendors? Answering this question requires the definition of the statutory exceptions for other school officials and teachers. Does a teacher include an instructor who is, ostensibly, an adjunct professor?

The answer appears to be yes. In 2008, the DOE amended the regulations pertaining to FERPA.<sup>283</sup> Pursuant to these changes, the DOE's FPCO, which oversees the enforcement of FERPA, issued a

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<sup>280</sup> See Transcript of Oral Argument, *supra* note 191, at 51.

<sup>281</sup> See Jones, *supra* note 169.

<sup>282</sup> See Shah & Gill, *supra* note 172.

<sup>283</sup> See Family Educational Rights and Privacy, 73 Fed. Reg. 74806, 74806-55 (Dec. 9, 2008) (codified at 34 C.F.R. pt. 99 (2009)).

"Dear Colleague Letter" explaining the recent changes.<sup>284</sup> That letter articulated that

[t]he final regulations clarify that the school officials' exception in FERPA may include contractors, consultants, and other outside parties to whom an educational agency or institution has outsourced institutional services or functions that it would otherwise use employees to perform, provided that the outside party is under the direct control of the agency or institution with respect to the use and maintenance of education records and subject to the same conditions governing the use and redisclosure of education records that apply to other school officials . . . . The regulations also clarify that educational agencies and institutions are responsible for outside service providers' failures to comply with applicable FERPA requirements.<sup>285</sup>

Thus a law school can provide education records to an outside commercial provider, such as LawTutors, so long as that commercial provider maintains the records in a manner compliant with FERPA.<sup>286</sup> Therefore, law schools taking this approach should be sure to instruct these commercial providers of their student privacy obligations under FERPA. If, on the other hand, the outside provider is not "under the direct control of" the law school with respect to its "maintenance of education records," a law school could not provide the information.<sup>287</sup>

I see one possible situation arising out of this regulation. If a law school outsourced its graded bar preparation class to an outside contractor, releasing education records to that outside contractor would violate FERPA if the bar preparation company used the lists of students given by the law school as a source to recruit students. So, if the bar preparation company solicited the students identified in the lists provided by the law school, that solicitation would

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<sup>284</sup> See generally Letter from Raymond Simon, U.S. Dep't of Educ., to Colleague (Dec. 17, 2008), <http://www.ed.gov/policy/gen/guid/fpco/hottopics/ht12-17-08.html> (explaining various changes instituted by the final regulations).

<sup>285</sup> *Id.*

<sup>286</sup> See generally 34 C.F.R. § 99.31 (2009) (explaining when consent is not needed for disclosure of information).

<sup>287</sup> § 99.31(a)(1)(i)(B)(2).

violate FERPA because the list is now no longer being used for a 'legitimate education purpose' but, instead, for the commercial purpose of obtaining clients. Thus law schools using this approach should be extremely cautious, given the entrepreneurial nature of many bar preparation companies, to insist that the companies not use education records for client recruitment.

## V. CONCLUSION

A common thread runs through many of the scenarios regarding the application of FERPA in higher education: extreme, and sometimes irrational and inappropriate, caution. Many schools might prefer to assume that FERPA prevents the release of anything to anybody rather than to engage even in a cursory analysis that would determine that FERPA is, in fact, a sensible law that provides plenty of room for forward-thinking pedagogy. The veracity of this thesis is supported by comments from the DOE itself, noting that schools frequently, unnecessarily, and unwisely prohibit the disclosure of important information in circumstances where little privacy is involved. The circumvention of the expansion of law school academic support methodologies is an example of this ill-informed folly.

As such, law schools should more thoughtfully and openly analyze the viability of law school academic support methods under FERPA. If they did so, as I have done in this article, they would find that the vast majority of benevolent policies and pedagogies are entirely lawful. As a community, academic support professionals should make themselves aware of the truth of FERPA and not abide by the timid presumption that it prevents us from doing what we do best. FERPA and law school academic support can peaceably coexist, and neither students nor their privacy rights will suffer.<sup>288</sup>

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<sup>288</sup> I dedicate this article to the memory of my mother, Marianne Davis Schulze.